The predicate for the 15-year maximum in H.R. 1645 and S. 2611 is a "felony" sentenced to not less than 30 months. *See* H.R. 1645, § 236; S. 2611, § 207. For a 12-level increase, Option 7 would not require the prior offense to be a felony, and would set a lower threshold – of 24 months – for the length of sentence imposed.

Predicates for the 10-year maximum in H.R. 1645 and S. 2611 are (1) three or more misdemeanors, or (2) a "felony." *See* H.R. 1645, § 236; S. 2611, § 207. Current § 2L1.2 requires an 8-level increase for an aggravated felony not covered by previous subsections, and a 4-level increase for any other felony or three or more misdemeanor crimes of violence or drug trafficking offenses. Option 7 would require an 8-level increase for any offense sentenced to as little as 12 months (even if a misdemeanor) or any three offenses sentenced to at least 90 days, and a 4-level increase for a felony not covered by previous subsections or any one offense sentenced to at least 90 days. As explained in our letter of March 16, Option 7 would result in an 8- or 4-level increase in some instances where currently there would be no increase.

Again, we urge the Commission to provide us with the data runs for Options 7 and 8. If we receive the data in sufficient time before the April 18 meeting at which the Commission plans to vote, we will submit further comments, and probably an Option 9 that more closely mirrors congressional intent than any of the options proposed thus far.

III. Criminal History

During the hearing, the Department asserted that the criminal history score is already "a very good indicator of the risk of recidivism," and that "excluding more offenses will not improve the ability of criminal history score to identify those offenders who provide a greater risk of recidivism." *See* Tr. 3/20/07, Testimony of Jonathan Wroblewski at 9, 11.

These assertions are not statistically supportable. For example, according to the Commission's statistics, defendants with two criminal history points have a ***lower*** risk of recidivism of any kind – including being rearrested or violating the terms of supervised release or probation – than defendants with one criminal history point, yet they are lumped into Criminal History Category II irrespective of the reason for those two points. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 23; U.S.S.G., Ch. 5, Pt. A, Sentencing Table. Thus, a defendant with two prior convictions for driving without insurance could receive two criminal history points, be placed into Criminal History Category II, and denied safety valve under the current rules.

There is no data of which we are aware that shows that minor offenses are a good predictor of recidivism. The Fifteen Year Report states 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," and that there are many other such possibilities. *See Fifteen Years of Guideline Sentencing: An Assessment*

of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform at 134 ("*Fifteen Year Report*"). Here, the Fifteen Year Report cites a 2003 paper by Blackwell, which would shed further light on the subject, but we are told it is not available to the public. And though a study on the relationship between recidivism risk and minor offenses is mentioned in one of the recidivism reports, that study either has not been completed or has not been published. *See* U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004).

Assigning only half a point for countable minor offenses would not alleviate the current problems with U.S.S.G. § 4A1.2(c). In our experience, convictions for the minor offenses listed in subsection (c)(1) reflect conduct that does not indicate either a need to protect the public or a likelihood of recidivism. For this reason, counting such offenses in the criminal history score – even by a fraction of a point – results in an unwarranted inflation of the criminal history score of many defendants. The addition of even a half point for such offenses would likely have a disparate impact on minorities, in some cases making them ineligible for safety valve treatment. As we noted in our previous letter and at the hearing, motor vehicle offenses frequently reflect the limited financial circumstances of the defendant. Adding even a half point for such offenses would result in harsher treatment, under the guidelines, for economically strained defendants.

Assigning even a half a point to these offenses will also perpetuate the unwarranted disparity caused by the current version of § 4A1.2(c), which depends upon the various state statutory schemes. Our earlier letter provided some examples of states in which some of the minor offenses are always counted because they carry a maximum sentence of more than one year. Set forth below is a more comprehensive account of misdemeanor offenses that would be excluded under subsection (c)(1) but for the fact that the state authorizes punishment of imprisonment for more than one year. We also note that, in addition to those states mentioned in our previous letter, Colorado permits sentences of more than one year for some of the minor offenses.

Colorado: Each of the following offenses is a misdemeanor under state law punishable by a maximum of eighteen months of imprisonment, *see* Colo. Rev. Stat. § 18-1.3-501:

- Driving after revocation of license, Colo. Rev. Stat. § 42-2-206;
- Professional gambling, Colo. Rev. Stat. § 18-10-103;
- Fish and game violations – e.g., illegal taking of black bears, Colo. Rev. Stat. § 33-4-101.3.

Iowa: Each of the following offenses is a misdemeanor under state law punishable by a maximum of two years imprisonment:

- Gambling, Iowa Code § 725.7 (if the amount involved exceeds $100);
- Prostitution, Iowa Code § 725.1.

Maryland: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Gambling: playing "thimbles," "Little Joker," "Craps," etc. for money, Md. Code Ann., Crim. Law § 12-103(a) (up to 2 years);
- Insufficient funds check ("Misdemeanor Bad Check"), less than $500, Md. Code Ann., Crim. Law §§ 8-103, 8-106(b) (up to 18 months);
- Non-support, Md. Code Ann., Fam. Law § 10-203 (up to 3 years);
- Resisting or interfering with arrest, Md. Code Ann., Crim. Law § 9-408 (up to 3 years).

Massachusetts: Each of the following offenses is a misdemeanor under state law and is punishable by up to two-and-a-half years in the house of correction:

- Reckless driving, Mass. Gen. Laws ch. 90 § 24(2)(a);
- Leaving the scene of an accident (with or without injury or property damage), Mass. Gen. Laws ch. 90 § 24(2)(a), (a1/2)(1);
- Resisting arrest, Mass. Gen. Laws ch. 268 § 32B.

Pennsylvania: The following are misdemeanors under state law and punishable by up to five years:

- Misdemeanor offenses relating to gambling and pool selling, 18 Pa. Cons. Stat. Ann. §§ 5513, 5514.

South Carolina: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Failure to obey a police officer by failing to stop for siren or flashing light, S.C. Code § 56-750(B)(1) (up to three years);
- Fishing or trespassing in private fish or oyster breeding ponds, S.C. Code Ann. § 50-13-350 (up to three years);
- Insufficient funds check over $1000, S.C. Code Ann. § 34-11-90(b) (up to two years);
- Hunting bears out of season or in violation of the law, S.C. Code Ann. 50-11-430 (up to two years);
- Trespass upon state park property, S.C. Code Ann. § 51-3-150 (up to two years).

In contrast to these states where the current version of U.S.S.G. § 4A1.2(c) requires that certain minor offenses are always counted, other jurisdictions have statutory schemes that insure that the offenses listed in § 4A1.2(c)(1) are never counted because the state does not authorize a term of probation or imprisonment for 30 days or more.

Thus, under the current version of the guidelines, a defendant convicted of reckless driving in Massachusetts will always have that conviction counted (because it carries a possible sentence of more than one year imprisonment), while a defendant

convicted of *the exact same conduct* across the state line in New Hampshire will *never* see that conviction counted because the maximum sentence in New Hampshire for reckless driving (unless injury or death result) is a fine and loss of license, N.H. Rev. Stat. Ann. § 265:79.

In Texas, the maximum punishment for gambling offenses and fish and game violations is a fine. *See* Tex. Penal Code §§ 12.23 & 47.02 (gambling offense punishable up to a maximum fine of $500); Tex. Parks & Wild. Code § 66.019 (offense relating to fishing reports punishable by a maximum fine of $500); Tex. Parks & Wild Code § 90.011 (maximum fine of $ 500 for offenses relating to access to protected freshwater areas).

In New Hampshire, the maximum sentence for disorderly conduct (unless committed after a request to desist) is a fine of $1,000, N.H. Rev. Stat. Ann. §651:2III-a. Driving without a license (first offense) carries a fine of $1,000; N.H. Rev. Stat. Ann. § 263:1; and fish and game violations (where no human injury or death result) are punished by a fine and/or loss of hunting or fishing license, N.H. Rev. Stat. Ann. § 207:46.

In Pennsylvania, certain fish and game violations can only be punished by a fine. For example, a violation of 30 Pa. Cons. Stat. § 2703 (fish license violation) carries a fine of up to $50. See 30 Pa. Cons. Stat. § 923(a)(3). A violation of 34 Pa. Cons. Stat. § 2711 (unlawful acts concerning licenses) carries a fine of up to $200. See 34 Pa. Cons. Stat. § 925.

In Alabama, driving without a license is a misdemeanor punishable by a maximum fine of $100. Ala. Code Ann. § 32-6-18.

In South Carolina, a first offense of driving with a license that has been suspended for failure to pay a motor carrier property tax is punishable by a maximum fine of $50, and a second offense carries a maximum punishment of a fine of $250. S.C. Code Ann. § 12-37-2890.

To resolve these and other problems inherent in the current guideline structure, U.S.S.G. § 4A1.2(c) should be amended as we proposed in our March 13th letter.

IV. Mandatory Minimums

Mandatory minimums create unwarranted uniformity and interfere with proportionality by treating different offenses and offenders the same. *See* Brief Amicus Curiae of Senators Kennedy, Hatch and Feinstein, *United States v. Claiborne*, 2007 WL 197103 **13, 28-29 (Jan. 22, 2007). When the Commission reflexively builds mandatory minimums into offense guidelines, the resulting sentences are not based on the purposes of sentencing but on politics. The Commission's choice to build mandatory minimums into the drug guidelines without independent study has resulted in disproportionately severe sentences and unwarranted uniformity, contrary to the goals of the Sentencing Reform Act. *Id.* at ** 21, 29. We fully agree with the Judicial

Conference that the Commission should not repeat this mistake with other offenses, but should develop guidelines irrespective of the mandatory minimum and allow § 5G1.1(b) to operate when necessary.

Exacerbating the lack of a sound policy basis, the guidelines spawned by mandatory minimums do not just meet mandatory minimum levels, but exceed them. As we noted in our testimony, the Commission has acknowledged that "[o]ver 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels." *Fifteen Year Report* at 54. This is true for all drug offenders, not just crack offenders. *Id.* It was suggested that this may no longer be accurate because of the effect of the safety valve and the mitigating role cap since 2001. However, the analysis done for the Fifteen Year Report controlled for safety valve by excluding cases in which it was applied. *Id.* at D-9. Moreover, the safety valve does not successfully apply to all low-level offenders as Congress intended. *See* Jane L. Froyd, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). We expect that the mitigating role cap has had little effect in ameliorating the excess, since the extent of the reduction was sharply cut back only two years after it was promulgated. *See* App. C, amend. 640 (Nov. 1, 2002), amend. 668 (Nov. 1, 2004).

The proposed sex offense amendments would continue on the same misguided course. Examining the facts of all of the reported cases involving a conviction under the four statutes with new mandatory minimums under the Adam Walsh Act (18 U.S.C. §§ 2241(c), 1591, 2422(b), and 2423(a)), we found that the guideline range under the published proposals for offenders in Criminal History Category I would exceed the mandatory minimum in every case, not in an aggravated case or an unusual case, but the standard case, because of specific offense characteristics that are inherent in the basic unadorned offense. *See* 3/6/07 Comments on Proposed Amendments Relating to Adam Walsh Act at 15-16, 18-24.

We urge the Commission to publish a current report on mandatory minimums, including data on the extent to which guideline sentences exceed mandatory minimum levels. The Commission's report is sixteen years old. Congress is seriously questioning the wisdom of both the crack/powder disparity and mandatory minimums generally. A current report would be of particular interest to Congress, the criminal justice community, and the public at this time.

V. Sentence Reduction

We join in the letter of the American Bar Association responding to the Commission's questions at the hearing on the topic of standards and examples for a motion for sentence reduction under § 3582(c)(1).

As always, we hope that our comments and testimony have been helpful.

Very truly yours,

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

AMY BARON-EVANS
ANNE BLANCHARD
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cc: Hon. Ruben Castillo
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Tom Brown, Assistant General Counsel
Judith Sheon, Staff Director
Ken Cohen, General Counsel

March 19, 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: Issue for Comment: Reduction in Sentence Based on BOP Motion

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) offers these comments concerning the new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter sets out FAMM's position on early release, addresses matters raised by the Department of Justice in its submission of July 14, 2006, and answers the Commission's specific questions in the Issue for Comment.

FAMM welcomes the Commission's continued interest in this area. We have long championed a reading of the early release authority consistent with congressional intent that it be used in cases including, but not limited to, impending death or debilitating circumstances. In 2001 we proposed specific language to the Commission that, in our view, would further Congress's intent that there be a way to take account of extraordinary and compelling circumstances that were not or could not be addressed at sentencing.1

Our concern was motivated by, among other things, the many stories we had heard from or about prisoners whose circumstances had changed so dramatically that continued service of their sentences would be unjust or meaningless. We began to assist prisoners in their petitions and were stunned to learn how seldom the Director of the Bureau of Prisons exercised the authority to seek sentence reductions.

Our examination of the practice revealed that the Bureau takes a very narrow view of its mandate. Although 18 U.S.C. § 3582 (c)(1)(A) speaks of "extraordinary and compelling reasons," in practice, the Director has moved for a reduction in a mere handful of cases each year and only on behalf of terminally ill prisoners, or more recently, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."2 In the years since our letter, and despite the significant growth in the

1 *See* Letter to Honorable Diana J. Murphy and Commissioners (June 25, 2001).

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federal prison population, it appears that the Bureau has used the authority even more sparingly.3 This may be due to a more stringent set of criteria enunciated by the Department of Justice in its recent submission to the Commission on this matter.4 The Bureau of Prisons has recently published for public comment a proposed rulemaking that would limit early release motions to those on behalf of prisoners within 12 months of death or who suffer a medical condition so debilitating that the prisoner cannot attend to fundamental bodily functions and personal care.5

FAMM certainly agrees with the Department that prisoners who are terminally ill and those debilitated by physical or mental illness merit consideration for early release under 18 U.S.C. § 3582(c)(1)(A)(i). However, there are other classes of extraordinary and compelling reasons that merit consideration as well, including but not limited to cases where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children, or where the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence. FAMM endorses the approach taken by the American Bar Association in its recommendations to the United States Sentencing Commission, as you consider adopting a policy statement to guide courts considering early release motions. 6

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2 *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. R. 191, Exhibit II (Vera Inst. Just.).

3 *See* Testimony of Stephen A. Saltzburg on Behalf of the American Bar Association (March 20, 2007) at 7 n.4 (The Bureau of Prisons has filed between 15 and 25 early release motions annually since 2000.). While the federal prison population has more than tripled, from 58, 838 in 1990 to 195,623 today, the number of motions has remained fairly constant, never exceeding 30 in any given year. *See* U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2000, August 2001, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.

4 Letter from Michael J. Elson, Senior Counsel to the Attorney General to The Honorable Ricardo H. Hinojosa at 1 (July 14, 2006) (DOJ Letter).

5 *See* 71 Fed. Reg. 76619-01 (Dec. 21, 2006) ("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our authority under these statutes and our current policy." *See* 71 Fed. Reg. at 76619-01.

6 *See* letter from Denise Cardman, Governmental Affairs Office, American Bar Association to Honorable Ricardo H. Hinojosa (March 12, 2007) attachment, Proposed

Congress intended that early release authority be broad.

Congress and, until recently, the Department, have consistently enunciated a generous view of the breadth of the early release authority, contemplating its use for changed circumstances beyond serious or terminal illness. The Bureau's existing authority to seek early release dates from the 1976 Parole Commission and Reorganization Act.7 The BOP issued its § 4205(g) regulations in 1980. Those rules provided that early release motions under 18 U.S.C. § 4205(g) were to be brought "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."8

Significantly, when Congress in the Sentencing Reform Act (SRA), eliminated parole in 1984, it kept intact the courts' existing authority to reduce sentences for a range of reasons. 18 U.S.C. § 3582(c)(1)(A)(i). Congress crafted 18 U.S.C. § 3582(c)(1)(A)(i) in 1984 fully aware of the Bureau's existing regulations, which provided a relatively broad use of sentence reductions in extreme cases

The SRA thus in no way limited the courts' existing authority. This conclusion is supported by the legislative history, demonstrating that Congress embraced a broad view of the potential underlying reasons to bring an early release motion. The Senate Judiciary Committee's Report on the Sentencing Reform Act states:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of

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Policy Statement, § 1B1.13 (Revised March 9, 2007). FAMM's most recent letter on this subject was one of several that collectively endorsed the ABA's approach. *See* Letters from Julie Stewart and Mary Price (July 14, 2006); Mark Flanagan and David Debold (PAG) (July 13, 2006); and Jon Sands (Federal Public and Community Defenders) (July 14, 2006).

7 18 U.S.C. § 4205(g).

8 28 CFR § 572.40 (1980).

imprisonment.9

By not limiting the courts' existing sentence reduction authority, Congress signaled its intention that the authority be used broadly, if sparingly, to reduce a determinate sentence in appropriate circumstances. Had Congress wanted to limit the new law prisoners' access to sentence reductions, it would have stated conditions in the SRA, or indicated something in the legislative history. It did not.

Further support for broad authority is found in another part of the SRA. Congress charged the newly created United States Sentencing Commission (not the Bureau of Prisons) with the task of issuing policy statements to guide courts considering early release motions brought to them by the Bureau.10 The only limitation the SRA made to existing authority was to instruct that rehabilitation alone could not constitute a sufficiently extraordinary or compelling circumstance. Congress did not eliminate rehabilitation as a reason, but required that it be combined with others. It is clear that Congress considered rehabilitation a reason for early release if found in combination with at least one other reason.

Unwarranted restrictions on the early release mechanism would subvert congressional intent that courts be able to entertain early release motions for a variety of circumstances, provided they are extraordinary and compelling and reflect more than rehabilitation alone.

The Department of Justice has long endorsed a broad view of the sentence reduction authority.

The Bureau of Prisons, a DOJ agency, recognized that Congress intended that it take a robust approach to the discretion given it in the Sentencing Reform Act when considering early release for prisoners serving determinate sentences. In the ten years following the passage of the SRA, the BOP operated under the 1980 rule to bring early release motions under 18 U.S.C. § 3582(c)(1)(A)(i). Those regulations covered sentence reduction motions under both § 4205(g) and § 3582(c)(1)(A)(i), making early release available "in particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. This section may be used, for example, *if there is an extraordinary change in an inmate's personal or family situation*

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9 S. Rep. No. 98-225, at 55, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3132, 3238-39 (emphasis added.).

10 *See* 28 U.S.C. § 994(t).

or if an inmate becomes severely ill."11

Following the SRA, the Bureau published new regulations in 1994 "to include provisions applicable to inmates who were sentenced under the new law sentencing guidelines that eliminated parole." 59 Fed. Reg. 1238. The new rules thus were inclusive, crafted to bring new law prisoners into the program and treat them much as the old law prisoners were treated. The Bureau affirmed existing policy in important respects and even added specific provisions to underscore that the authority could be used in medical and in non-medical cases.12

Significantly, the Bureau did not publish the 1994 rule for notice and comment before adopting it. "Because the revised rule *imposes no additional burdens or restrictions* on inmates, the Bureau finds good cause for exempting the provisions of the Administrative Procedures Act (5 U.S.C. [§] 553) [APA] requiring notice of proposed rulemaking . . . . "13 Further underscoring the continuity of authority to exercise discretion, the Bureau stated in the final rule that "the standards to evaluate the early release *remain the same.*" 14

That the Bureau eschewed notice and comment because no additional restrictions were placed on prisoners and because the evaluation standards remained the same means that according to the Bureau, the new rule did not change the ability of a prisoner to seek and the Bureau to move for a sentence reduction in the event there is an "extraordinary [and compelling] change in an inmate's personal or family situation *or* if an inmate

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11 48 FR 48972-01, 48973, 1983 WL 105766 (emphasis added).

12 *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment."); *id.* at § 571.62(a) – (c) (describing different processes to follow in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

13 59 Fed. Reg. 1238, 1994 WL 3184 (emphasis added). The Bureau did eliminate "prison overcrowding" as one of the acceptable bases for a sentence reduction motion, added the "extraordinary and compelling" language and required a release plan for prisoners. 59 Fed. Reg. 1238.

14 59 Fed. Reg. 1238 (emphasis added).

becomes severely ill." Eliminating consideration of extraordinary changes in a personal or family situation would have imposed an additional restriction on inmates, who previously would have been able to seek a sentence reduction for other than imminently terminal or debilitating conditions. Such a restriction would have in turn required notice and comment under the Administrative Procedures Act. The Bureau did not intend to eliminate those conditions and thus saw notice and comment as unnecessary. Put another way, if the Bureau intended to eliminate extraordinary changes to a personal or family situation, this would represent a new restriction and thus trigger the notice and comment requirement.

The Department's New Position is Unwarranted, Insupportable, and Unduly Restrictive

We address several of the Department's points set forth in its letter of July 14, 2006: (1) its concern that a proposal broader than that urged by the Department would contravene congressional intent to abolish parole and establish a system of determinate sentencing; (2) its warning that it would be futile for the Commission to adopt a policy statement broader than that urged by the Department; and (3) its recommendation that the resulting sentence reduction be determined by the Department.

(1) The Department of Justice warns the Commission that to take a broad view of the early release authority would be akin to subverting congressional intent to establish determinate sentencing through the elimination of parole and truth in sentencing reforms ushered in by the SRA.15 It urges the Commission to take a very narrow view of the authority, limited to cases where the prisoner is expected to die within twelve months or is suffering a medical condition that is "irreversible and irremediable and prevents the prisoner from attending to basic bodily functions and personal care without substantial assistance from others."

Crafting a policy statement consistent with congressional intent will hardly subvert the goals of the SRA. Congress specifically provided for a sentence reduction authority for extraordinary and compelling circumstances in the SRA. It included only one specific limitation: rehabilitation alone would not be sufficient. Had Congress been concerned that sentence reductions for extraordinary and compelling circumstances would undermine the goal of determinate sentencing, it would not have specifically provided for such a broad view of the potential reasons for sentence reductions.

(2) The Department warns in its submission that a Commission policy statement that is broader than the Department's practice will be ignored as a "dead letter." The Department cites no authority for its extreme position. The Commission should not consider itself limited by this warning. The SRA does not commit the definition of what constitutes extraordinary and compelling circumstances to the Department or to the

15 DOJ Letter at 3.

Bureau. It commits the job of defining the contours of sentence reductions motions to the U.S. Sentencing Commission. We submit that the Bureau has no authority to categorically eliminate from judicial consideration all cases except those presenting terminal illness and debilitating conditions. The Bureau is charged with at most considering whether individual prisoner circumstances meet the criteria and if so, submitting the motion to the sentencing court. It cannot categorically limit the conditions and criteria without implicating separations of powers concerns.16

Further, and as evidenced by the discussion of how the Department has treated the authority in BOP regulations thus far, future Departments of Justice, just like previous ones, may not take so restrictive a view of when to bring sentence reduction motions. The Commission should not indulge the current Department's view of the matter.

(3) FAMM opposes limiting the extent of the reduction upon resentencing to that recommended by the Bureau. There is no indication in the statute, the legislative history, or elsewhere, that courts can be limited in the extent of reduction. Courts are competent to consider the BOP's submission on the matter of extent, but should not be considered bound by the recommendation.

Finally, we note that the circumstances proposed by the Bureau of Prisons (impending death or near complete incapacitation), while certainly appropriate early release precursors, do not express the breadth of medical and mental health conditions that would warrant early release. We find the personal hygiene limitation to be particularly curious. There are certainly changed medical conditions that render a prisoner physically or psychologically damaged that do not limit the prisoner's ability to bathe or use the bathroom. The limitations suggest that contours of extraordinary and compelling circumstances should be defined by the amount of staff trouble and time taken up by the personal hygiene needs of incontinent prisoners.

Issue for Comment Questions

FAMM believes that changed circumstances can include those that were known to the court at the time of sentencing but have changed significantly, such as an auto-immune disease in remission at the time of sentencing that subsequently is diagnosed; or a significant change in an existing medical condition, such as total blindness brought on

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16 *See* Testimony of Steven A. Saltzburg at 14-15 & n.10 ("Because the Commission is an agency of the judicial branch, any effort by the executive . . . to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimensions . . .); *see also* Letter from John Sands (March 13, 2007) at page 5-6 (pointing out that "[u]nilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem.").

by pre-existing diabetes or pre-existing glaucoma; or a subsequent change in the law that the court was forbidden from taking into account at the time of sentencing and by its nature presents a compelling and extraordinary case for reduction.

As discussed above and evidenced in our endorsement of the ABA's model guideline, FAMM does not believe that the authority should only be used to respond to medical conditions. Nor does FAMM believe that only conditions that are considered terminal within twelve months should be accounted for. For example, a failure to diagnose a medical condition may render an otherwise treatable condition terminal but not necessarily terminal within twelve months. Such a situation is extraordinary and compelling and courts should be able to address it.

The Commission should provide for a combination approach. Such an approach was contemplated by Congress in 28 U.S.C. § 994 (rehabilitation alone is insufficient).

The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances.

Thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

Attachment:

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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February 20, 2007

Office of General Counsel
Bureau of Prisons
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Washington, D.C. 20534

Re: Proposed Rule
Reduction in Sentence for Medical Reasons
28 CFR Parts 571 and 572

To Whom It May Concern:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to comment on the proposed rule published on December 21, 2006, entitled "Reduction in Sentence for Medical Reasons." The ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering."

Significantly for present purposes, in 2004 the ABA House urged the Department of Justice to make greater use of the federal sentence reduction authority in motions under §§ 3582(c)(1)(A)(i). It also asked the United States Sentencing Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." It is against this background of strong and consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances that we consider the proposed BOP regulation.

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The proposed regulation would categorically restrict the circumstances in which the Bureau of Prisons will move for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) to two classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." The proposed regulation represents a significant curtailment of the policy reflected in BOP's existing regulations, as we explain in greater detail in the following section, which BOP makes little effort to justify.[1]

Insofar as the proposed regulation would impose strict limits on the kinds of cases that will qualify for sentence reduction under § 3582(c)(1)(A), we believe it is beyond BOP's authority, for three reasons. First, the proposed regulation would place unwarranted substantive limitations on the circumstances in which a prisoner may be considered for sentence reduction. Second, the proposed regulation would render nugatory the United States Sentencing Commission's statutory policy-making authority, raising questions of constitutional dimension. Third, the proposed regulation would effectively prevent sentencing courts from even considering sentence reduction in a variety of situations, frustrating congressional intent and raising similar constitutional concerns. The following discussion elaborates these three points in turn.

I.

For more than 30 years, BOP has been the gatekeeper for courts considering prisoner requests for sentence reduction under § 3582(c)(1)(A)(i) and its old law predecessor 18 U.S.C. § 4205(g). And for more than 25 years, BOP's published regulations have given it broad latitude to ask courts to reduce a prisoner's sentence in a variety of extraordinary situations. In its first regulations under the old law analogue to § 3582(c)(1)(A)(i), BOP asserted that sentence reduction may be sought in "particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. *This section may be used, for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill.*" 28 C.F.R. § 572.40 (1980), 45 Fed. Reg. 23365-66 (Apr. 4, 1980). *See also* 48 Fed. Reg. 48972-01, 48973, 28 CFR § 572.40(c)(1983)(adding "to relieve prison overcrowding" as a basis for seeking sentence reduction).

After enactment of the Sentencing Reform Act ("SRA") in 1984, BOP processed sentence reduction motions for new law sentences under the same set of regulations and policies it used for sentence reduction motions under the analogous old law authority. When in 1994 BOP crafted a new set of regulations, they specifically applied to both old

[1] In the introductory summary of the proposed regulation, BOP explains the proposed revision of its regulations as a "more accurate[] reflect[ion of] our authority under these statutes and our current policy." Without some more extended attempt to reconcile the broad statutory language with the crabbed eligibility criteria in the proposed regulation, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or § 4205(g), much less on the authority Congress intended to give courts under these statutes.

and new law prisoners. 28 C.F.R. § 571.61 et seq., 59 Fed. Reg. 1238 (Jan. 7, 1994) (emphasizing "the standards to evaluate the early release remain the same" while adding provisions for those inmates "sentenced under the new law sentencing guidelines that eliminated parole"). *See also* BOP Program Statement 5050.44, Compassionate Release: Procedures For Implementation of 18 U.S.C. 3582 (c)(1)(A) & 4205(g) (Jan. 7, 1994).[2] The 1994 regulations affirmed existing policy in important respects and even added specific procedural provisions underscoring that sentence reduction could be sought in both medical and non-medical cases.[3] So sure was BOP that its discretion could be exercised much as before, that it did not even publish the new rules for notice and comment.[4] The blanket restrictions BOP now proposes to place on its own ability to seek sentence reduction in a broad range of equitable circumstances thus represent a significant change in BOP's existing regulations, and fly in the face of an unbroken line of regulatory policy dating back to 1980.

Moreover, the new blanket restrictions on BOP's ability to seek sentence reduction are inconsistent with Congress' clear intention to allow sentence reduction in a broad range of extraordinary equitable circumstances. When BOP's authority to seek sentence reduction was first enacted more than 30 years ago, it was designed to expedite BOP requests for relief in behalf of a prisoner that theretofore required a request for clemency to be submitted to the President through the Office of the Pardon Attorney.[5] In the SRA, besides providing that motions for sentence reduction be predicated on "extraordinary and compelling reasons," Congress did not otherwise constrain BOP's existing discretion to bring motions to the sentencing court in cases warranting a gesture of compassion. In

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[2] The revised policy continued the same description of potentially eligible cases, except that "prison overcrowding" was eliminated as an appropriate basis, and the legislative language "extraordinary and compelling" was added. Prisoners or their proxies were also required to provide a release plan. 59 Fed. Reg. 1238. Significantly for present purposes, applicable case-processing procedures underscored the propriety of petitioning courts in both medical and non-medical cases. *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "*if* the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment.") (emphasis added); *id.* § 571.62(a)–(c) (describing different processes to follow in medical versus non-medical-based requests from prisoners).

[3] *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "*if* the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment."); *id.* at § 571.62(a) – (c) (describing different processes to following in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

[4] Announcing the final rule without resort to the notice and comment process ordinarily applicable to regulatory changes, the Bureau stated that "the standards to evaluate the early release remain the same. . . . Because the revised rule imposes no additional burdens or restrictions on inmates, the Bureau finds good cause for exempting the provisions of the [APA] requiring notice of proposed rulemaking . . . . " 59 Fed. Reg. 1238.

[5] *See U.S. v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977)(Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978)(same).

fact, Congress embraced a generous view of the breadth of that discretion, contemplating its use for changed circumstances beyond serious illness. *See, e.g.*, S. Rep.No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (release authority can be used to address "the unusual case in which the defendant's circumstances are so changed . . . that it would be inequitable to continue . . . confinement. . . .") *id.* at 55 (reduction may be justified for "changed circumstances" including "severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction . . . ").

There is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court's authority to reduce a sentence under § 3582(c)(1)(A)(i), or BOP's authority to seek such a reduction, to be limited to medical cases, much less cases in which a person is a year or less from death, or so severely disabled as to be incontinent and unable to care for themselves. And neither the courts nor BOP itself have to date understood it so narrowly. The specific reference to a prisoner's "rehabilitation" in 28 U.S.C. § 994(t) as being insufficient "alone" to warrant sentence reduction is further evidence that Congress did not intend that the courts' authority in § 3582(c)(1)(A)(i) should be limited to the two narrow categories of cases identified in the proposed BOP regulation, where "rehabilitation" is surely irrelevant, "alone" or otherwise.

II.

We also object to the proposed regulation because of its evident intent to preempt the United States Sentencing Commission from making policy for the courts considering motions filed under § 3582(c)(1)(A)(i), as Congress authorized it to do under 28 U.S.C. § 994(t). As previously noted, the ABA has recognized the primacy of the policy-making role entrusted to the Commission by Congress under § 994(t). It has also urged the Sentencing Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." As recently in July of 2006, the ABA urged the Commission to develop "the criteria to be applied and a list of specific examples [of extraordinary and compelling reasons]," as contemplated by 28 U.S.C. § 994(t), rather than defer to case-by-case decision-making by the Bureau of Prisons. It is gratifying that in the past year the Commission has turned to this policy-making task, and it is presently seeking additional comment regarding appropriate criteria for sentence reduction under recently promulgated § 1B1.13 of the Sentencing Guidelines ("Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons"). However, the Department of Justice has warned the Commission that any policy it adopts that is inconsistent with BOP's operating sentence reduction policy (the same policy that BOP now proposes to formalize in a regulation) will be a "dead letter." *See* Letter from Michael Elston, Criminal Division, to Chairman Hinojosa, July 14, 2007 ("DOJ letter").

We do not doubt that, as a practical matter, BOP can choose to frustrate the Commission's policy-making role through case-by-case decision-making. It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if

BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present "extraordinary and compelling reasons," and that have in the past been thought to present them. *See, e.g.*, the 1980 BOP regulations discussed in section I, and the cases cited in note 4, *supra*. The development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under 28 U.S.C. § 994(t), not to the Bureau of Prisons. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the original sentence, so too is BOP bound to comply with such policies in connection with the reduction of that sentence. While BOP is free to interpret and administer Commission policy as it deems most appropriate, it cannot declare it in advance a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position avoids.

III.

Our final objection to the proposed regulation relates to the limitations it places on the authority of courts under § 3582(c)(1)(A)(i). Because a motion by BOP is a jurisdictional predicate for exercise of a court's authority under § 3582(c)(1)(A)(i), any restrictions that BOP places on its own authority in the proposed regulation would at the same time necessarily also impose analogous restrictions on the authority of courts, restrictions that the ABA believes are unwarranted.[6] We do not question here that Congress may have intended to make a court's authority *in a particular case* depend upon a BOP motion. But it plainly did not intend BOP to use its regulatory power to foreclose judicial consideration of sentence reduction on an across-the-board blanket basis in a wide variety of situations that arguably present "extraordinary and compelling reasons." As noted above, there is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court's sentence reduction authority in § 3582(c)(1)(A)(i) to be limited to medical cases only, much less the small universe of medical cases defined in the proposed regulation. There is every indication, starting with the broad statutory language and confirmed by specific references in the legislative history, of the SRA and of the Parole Reorganization Act before it, that Congress intended a much broader eligibility criterion. And, to the extent BOP's decision to limit sentence reduction motions to two narrow classes of medical cases would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of constitutional concerns as were noted in the foregoing section. The ABA's position on the authority of the Sentencing Commission to promulgate general policy for courts considering sentence reduction motions would avoid these concerns.

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[6] It is not clear whether BOP intends in the proposed regulations to suggest an opinion about the legal limits of a court's authority under § 3582(c)(1)(A)(i), *see* note 1, *supra*, much less impose its views in this regard upon the judiciary. But because only a BOP motion can trigger judicial authority under § 3582(c)(1)(A)(i), its administrative decision will as a practical matter have exactly this result.

We appreciate the opportunity to provide these comments and hope that they will be helpful.

Respectfully submitted,

Robert D. Evans

Robert D. Evans

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 20, 2007

Office of the General Counsel - Rules Unit
Bureau of Prisons
320 First Street NW
Washington, D.C. 20534

RE: Proposed Rule re: Reduction in Sentence For Medical Reasons
28 CFR Parts 571 and 572

To Whom It May Concern:

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 13,000 direct members — and 30,000 affiliate members from 92 state, local, and international organizations — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Through this letter, we join in the comments submitted separately today by the American Bar Association, the Federal Defenders and Families Against Mandatory Minimums concerning the Bureau of Prisons' proposed limitations on the exercise of its authority under 18 U.S.C. § 3582(c)(1)(A)(i). The Bureau's Central Office processes applications for relief pursuant to this provision on behalf of less than one-tenth of one percent of federal prisoners each year. Accordingly, in terms of administrative efficiency, nothing is to be gained through diminution of the agency's ability to petition courts on behalf of individual prisoners in appropriate circumstances. However, much may be lost needlessly in terms of serving legitimate penological interests.

Given the importance of this issue, the suggested departure from established practices, and the potential abdication of vested statutory responsibility, we ask that a hearing(s) be held regarding the rule change. We also ask that the Bureau publish for the administrative record those studies and reports that support or otherwise pertain to the purported need for modification, as well as any non-confidential written materials (*i.e.*, letters, memoranda, electronic mail) by agency staff and/or between agency and Department of Justice personnel regarding this issue.

Respectfully submitted,

/s/ Todd Bussert

Todd A. Bussert
Co-Chair, Corrections Committee

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March 13, 2007

Honorable Ricardo H. Hinojosa
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United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Comments on Criminal History Issues

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the two issues for comment relating to criminal history that were published on January 30, 2007.

I. MINOR OFFENSES

In its current formulation, U.S.S.G. § 4A1.2(c) directs a sentencing court to count all felony offenses for purposes of calculating a defendant's criminal history score. A felony offense is defined as "any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed." § 4A1.2(o). Misdemeanor and petty offenses are generally counted except that the fifteen offenses listed in subsection (c)(1) and offenses similar to them, "by whatever name they are known," are counted only if they resulted in a sentence of a term of probation of at least one year or a term of imprisonment of at least thirty days. This list includes the common minor offenses of disorderly conduct, driving without a license or with a revoked or suspended license, insufficient funds check, local ordinance violations, and resisting arrest. *See* § 4A1.2(c)(1). A number of other offenses, such as truancy and minor traffic infractions, are never counted. *See* § 4A1.2(c)(2).

It appears that the Commission intended that the most common petty offenses that tend to be summarily disposed of by the sentencing authority should not increase a defendant's criminal history score unless the circumstances surrounding the violation resulted in a sufficiently severe deprivation of liberty by the jurisdiction whose interests were at stake. In operation, however, § 4A1.2(c) routinely operates to sweep in misdemeanor and petty offenses for which little or no real punishment or active

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supervision was imposed, in a manner that both creates unwarranted disparity and defies common sense.

A study on the recidivism rates for defendants whose previous convictions were for minor offenses is mentioned in one of the recidivism reports, but that study either has not been completed or the data has not been published. *See* U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004). Meanwhile, our experience tells us that § 4A1.2 consistently over-captures minor and petty offenses that likely do not accurately reflect a defendant's risk of recidivism but affect thousands of defendants across the country by significantly increasing their sentences through elevated criminal history categories and loss of eligibility for the safety valve. In addition, the application of the guideline has become a labor- and time-intensive exercise, difficult for judges, probation officers, and defense attorneys alike. The complexity created by this guideline promotes less accurate decision-making at the time of both plea and sentencing, generates confusion about the sentence a given defendant faces, and gives rise to more appeals.

We believe that misdemeanor and petty offenses should never be counted, even if they are considered felonies under subsection (o) because they are punishable by more than one year of imprisonment. The Commission also should adopt an expansive test for "offenses similar to them," one that encourages common sense judgments and discourages exclusive reliance on a strict elemental analysis. We offer the following proposed amendment to § 4A1.2(c):

Proposal 1:

(c) Sentences Excluded

Sentences for the following prior offenses and for offenses similar to them are not counted:

Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fare evasion
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Hitchhiking
Insufficient funds check
Juvenile status offenses and truancy
Leaving the scene of an accident
Local ordinance violations
Loitering
Minor traffic infractions (*e.g.*, speeding)
Motor vehicle offenses, other than drunk driving or driving while intoxicated

Non-support
Panhandling
Possession of marijuana
Prostitution
Public intoxication or open container
Resisting arrest
Shoplifting
Trespassing
Vagrancy.

Application Note: *Because of the differences among state statutory schemes, some minor offenses may carry labels or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.*

By eliminating reliance on the sentence imposed as the dividing line between minor offenses that are counted and minor offenses that are not counted, this approach would draw a bright line that is easily applied. It would eliminate the disparity caused when an offense defined by a state as a misdemeanor is counted as a felony under the guideline and the disparity reflected in the sentences imposed for the same offense in different courts. It would eliminate the time-consuming efforts devoted to determining the impact of myriad minor state offenses, which do not often correlate in any meaningful way to the defendant's culpability for the federal offense or risk of recidivism. It would eliminate the need for defendants to depend on a judge's willingness to grant a downward departure for overrepresentation of criminal history in § 4A1.3, the denial of which is insulated from review. It would set forth an appropriately expansive test for similarity. It would streamline federal sentencing and allow sentencing courts to dedicate their time to other, more relevant issues in determining the appropriate sentence.

In the alternative, we offer the following proposal:

Proposal 2:

(c) Sentences Counted and Excluded

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the prior conviction was for an adult offense committed after the defendant had attained the age of 18; (B) the sentence actually served was a term of imprisonment for more than 60 days;

and (C) the offense was committed within three years prior to the commencement of the instant offense:

False information to a police officer
Hindering or failure to obey a police officer
Resisting arrest.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
Fare evasion
Fish and game violations
Gambling
Hitchhiking
Insufficient funds check
Juvenile status offenses and truancy
Leaving the scene of an accident
Local ordinance violations
Loitering
Minor traffic infractions (*e.g.*, speeding)
Motor vehicle offenses, other than drunk driving or driving while intoxicated
Non-support
Panhandling
Possession of marijuana
Prostitution
Public intoxication or open container
Shoplifting
Simple possession of marijuana
Trespassing
Vagrancy.

Application Note: *Because of the differences among state statutory schemes, some minor offenses may carry a label or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.*

Although this proposal does not set forth the bright-line approach of Proposal 1, it addresses the unwarranted disparities and unnecessary complexities that § 4A1.2(c) currently produces. We discuss below the current state of § 4A1.2 and explain why the Commission should make the changes we propose.

A. State misdemeanor offenses punishable by more than one year in prison

Some states have misdemeanor offenses that are counted under subsection (c)(1) only because they are punishable by more than one year. As the guidelines currently read, these convictions are always counted as felonies, regardless of the sentence imposed. For example, in Pennsylvania, resisting arrest is a misdemeanor punishable by up to two years in prison. *See* 18 Pa. C.S. §§ 1104, 5104. In Iowa, resisting arrest can be charged as a misdemeanor aggravated assault even when there is no intent to injure and no injury, and is punishable by up to two years in prison. *See* Iowa Code §§ 708.3A(3)-(4), 903.1(2); *State v. Dawdy*, 533 N.W. 2d 551, 556 (Iowa 1995). In South Carolina, "failure to stop for a blue light" is a misdemeanor punishable by 90 days to three years. *See* S.C. Code Ann. § 56-5-750. In Maryland, passing a bad check to obtain goods or services is a misdemeanor punishable by up to eighteen months in prison. *See* Md. Code Ann. § 8-106. And in Massachusetts, leaving the scene of an accident with property damage, Mass. Gen. L. c. 90, § 24(2)(a), operating to endanger (analogous to careless or reckless driving), Mass. Gen. L. c. 90 § 24(2)(a), and resisting arrest, Mass. Gen. L. c 268 § 32B, are misdemeanors punishable by up to two-and-a-half years in the house of correction. Because a previous conviction for any of these offenses in states that do not punish the offense with imprisonment for more than one year are not counted unless the sentence was a term of probation of at least a year or a term of imprisonment of at least thirty days, while a conviction for the same offenses under the law of the states described above always count, the guidelines institutionalize the unwarranted disparity that the Commission aims to avoid in implementing its statutory directives.

The same problem has even more dire consequences with respect to predicates for the career offender guideline, U.S.S.G. §§ 4B1.1 and 4B1.2, and for enhancements based on prior felony convictions under § 2K2.1(a)(1)-(4). In these states, a misdemeanor conviction for resisting arrest is usually considered a felony conviction for a crime of violence, and convictions for assault and battery routinely count as career offender predicates. We look forward to an opportunity to address this distressing anomaly when the Commission addresses the career offender guidelines next amendment cycle.

In the meantime, the Commission should prevent convictions for minor offenses from being counted solely because they arose in a state where misdemeanors are punishable by more than one year.

In a case currently pending in the District of Massachusetts, the defendant pled guilty in state court to trespassing, disorderly conduct, and resisting arrest. He was fined $100. The conviction for resisting arrest will drastically increase the defendant's guideline range from 57-71 months to 262-327 months, solely because it is punishable by

two and a half years. In another Massachusetts case, a defendant was convicted of possessing with intent to distribute 6.4 grams of cocaine base. He had been previously convicted in Massachusetts of drug trafficking and, on two separate occasions, resisting arrest. The latter convictions resulted from a diagnosed mental condition. In one of the resisting arrest cases, the defendant was fined $100; in the other, he was given six months probation. In the federal case, the defendant's guideline range without the career offender enhancement would have been 70 to 87 months. But because his Massachusetts convictions for resisting arrest counted as convictions for felony crimes of violence, he was classified as a career offender and his guideline range jumped to 262 to 237 months.

In Pennsylvania, a defendant was convicted of possession with intent to distribute 10 grams of heroin. He had two prior second-degree misdemeanor convictions, punishable by a maximum of two years. One was a "walkaway" escape and the other resisting arrest.1 Both are considered crimes of violence for career offender purposes. Together, these prior misdemeanor offenses increased the defendant's sentencing range from 30-37 months to 151-188. He was sentenced to 151 months.

These examples are far from unusual in states that authorize imprisonment of more than one year for misdemeanors.

B. Driving without a license or with a suspended or revoked license

There are several problems with including motor vehicle offenses, particularly if they can be excluded only if the sentence was probation of less than a year or imprisonment of less than thirty days. One is that some states impose virtually automatic sentences of more than thirty days' imprisonment or probation of at least one year. For example, for a number of years, Tennessee punished any second offense of driving on a suspended license with a mandatory minimum sentence of forty-five days' imprisonment. *See, e.g.*, Tenn. Code Ann. § 55-7-116 (1986). The statute was later amended so that a mandatory term of imprisonment now applies only when the previous suspension resulted from certain enumerated vehicular offenses, *see* Tenn. Code Ann. § 55-50-504(a)(2) (2006), but many defendants whose only countable criminal history was a second conviction for driving on a suspended license under the prior state law received at least one criminal history point, and if they were on probation when they committed the instant offense, they were ineligible for safety valve relief.

Another problem is the very common scenario for many of our clients where they fail to pay a minor traffic ticket or fine, which results in a suspended license. Driving on a suspended license then becomes an occupational hazard: they must work to earn the money to get their license reinstated, but they must drive to get to work. As a result, it is typical for clients to have one or more convictions for driving with a suspended license, for which a typical sentence is probation for one year. If the defendant was under that term of probation – even if it was unsupervised – at the time he committed a federal drug

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1 The "walkaway escape" arose during a police encounter at a friend's house. The defendant was handcuffed and told to stay put while the police officers looked for a stolen stereo. When the officers went outside, he walked away.

offense, he would be ineligible for safety valve, even though his only conviction was for driving with a suspended license. This is especially common in smaller cities and rural areas, where a car is essential to employment and basic daily living needs. In jurisdictions that levy substantial fines, such as California, the cost of getting a suspended or revoked license reinstated is beyond the financial reach for many of our clients, even those who are regularly employed, resulting in a vicious cycle of minor, regulatory convictions.

Further, as the Commission has recognized, the inclusion of non-moving violations in the criminal history score may have an unwarranted adverse impact on minorities without clearly advancing sentencing purposes. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 134 (Nov. 2004). Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, a phenomenon often called "driving while black." *See* Letter from Jon Sands to the Honorable Ricardo Hinojosa, United States Sentencing Commission, July 19, 2006, Memorandum Regarding Priorities at 19 (collecting authorities).

Driving without a license or with a revoked or suspended license should never be counted. These offenses do not reflect the type of conduct that bears on a defendant's likelihood of recidivism or danger to the community. The Commission should exclude all motor vehicle offenses other than drunk driving and driving while intoxicated.

C. Diversionary dispositions for minor offenses

Some states use diversionary dispositions that do not involve findings of guilt and that involve no actual supervision during the diversionary period. For example, in Massachusetts, a disposition of "continuance without a finding" is routinely imposed for minor offenses. This disposition results in an ultimate dismissal without a finding of guilt. The First Circuit has held that when this disposition includes an admission of facts sufficient to warrant a finding of guilt, it is a "criminal justice sentence" for purposes of § 4A1.1(d). *See, e.g., United States v. Fraser*, 388 F.3d 371, 374-75 (1st Cir. 2004) (citing *United States v. Nicholas*, 133 F.3d 133, 135 (1st Cir. 1998)). District courts, in turn, treat continuances without a finding as sentences of probation that are countable under subsection (c)(1). As a result, a defendant whose entire criminal record consists of a minor offense such as operating with a suspended license, for which he or she received a one year continuance without a finding, and who committed a federal offense while that continuance was in effect (even if unsupervised) would receive three criminal history points and be ineligible for safety valve treatment.

New York uses a similar diversionary disposition, referred to as a "one-year conditional discharge." N.Y. Penal Law § 65.05. A conditional discharge does not require supervision by a probation officer or other supervisory authority and is one of the most lenient dispositions permissible under New York law. These diversionary sentences are given for the overwhelming majority of misdemeanor offenses prosecuted in New York. *See* 2000-2001 Crime and Justice Annual Report, http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec3.pdf (80,000 such

dispositions in the year 2000 and nearly 70,000 in the year 2001). The Second Circuit has held that a one-year conditional discharge is equivalent to a one-year sentence of probation. *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005). This interpretation, which produces illogical results, can have a devastating impact on federal defendants in New York.

In *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), the maximum allowable prison sentence for the offenses at issue (disorderly conduct and driving without a license) was fifteen days. *Id.* at 165. Had the defendant been sentenced to the maximum prison term, the offenses would not have counted for federal sentencing purposes. But because the defendant was sentenced to the more lenient one- year conditional discharge -- which has no condition except to stay out of trouble -- the offenses pushed him into a higher criminal history category.

The Second Circuit's interpretation means that a prior trespassing conviction in New York will receive no points if the defendant is sentenced to fifteen days' jail time. But if the defendant was given a one-year conditional discharge for the offense, which is not probation and does not require active supervision, he would receive at least one criminal history point and possibly more. This outcome not only defies common sense, but also the Commission's apparent intent to count only those offenses listed in subsection (c)(1) that result in a significant deprivation of liberty.

Other circuits have held that similar dispositions are the equivalent of "probation," regardless of the absence of supervision. *See United States v. Miller*, 56 F.3d 719, 722 (6th Cir. 1995) (holding that conditional discharge under Kentucky law is the "functional equivalent" of an unsupervised term of probation under U.S.S.G. § 4A1.1(d)); *Harris v. United States*, 204 F.3d 681, 682-83 (6th Cir. 2000) (Ohio's equivalent of a "conditional discharge" sentence qualifies as a term of probation of at least one year under § 4A1.2(c)(1)); *United States v. Lloyd*, 43 F.3d 1183, 1188 (8th Cir. 1994) (same for unsupervised conditional discharge under Illinois law for driving with suspended license); *United States v. Caputo*, 978 F.2d 972, 977 (7th Cir. 1992) (holding that although Illinois conditional discharge is "probation without the probation officer," this is a "distinction without a difference so far as the guideline exception is concerned"); *United States v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990) ("The guidelines make no provision for treating 'unsupervised' probation as less than probation.").

In *United States v. Rollins*, 378 F.3d 535 (6th Cir. 2004), the defendant was convicted of driving without insurance in violation of Kentucky law. The only sentence available under state law for that offense was a fine. The court suspended most of the fine, and sentenced the defendant to a two-year conditional discharge. Had the defendant violated the terms of the conditional discharge, all the Kentucky courts could do would be to impose the balance of the fine, plus court costs. Under those circumstances, the conviction would not have counted under subsection (c)(2). But because most of the fine was suspended and the defendant received a conditional discharge instead, a majority of a Sixth Circuit panel held that the conditional discharge was the "functional equivalent of unsupervised release" and therefore countable. *Id.* at 538.

Significantly, the *Rollins* majority recognized that its interpretation has a "seemingly odd consequence," in that, had the defendant paid the fine, his sentence would not have been counted. *Id.* at 539. The court went on to state that "[i]t is not clear whether the Sentencing Commission anticipated this specific development when it imposed this bright-line rule about sentences of probation of a year or more." *Id.* at 539-40. The court suggested that any overrepresentation might have been rectified through a downward departure under § 4A1.3, but noted the unlikelihood that the district court would have granted such a request.

The absurd results in these cases is aggravated by the fact that defendants who receive diversionary dispositions typically are told by their state court lawyers that this disposition will not result in a conviction, and so readily agree to this resolution even when there is a viable claim of innocence. The possibility of a discretionary downward departure under § 4A1.3 is insufficient, as this "insulates the district court's decision from review and further limits the ability of wrongfully sentenced defendants to appeal to this court for legal correction." *Id.* at 583 (Moore, J., dissenting). Further, a downward departure, even if granted, cannot render a defendant eligible for safety valve relief.

The Guidelines should not count minor offenses based on the fact that a term of probation was imposed. At the very least, the Commission should amend § 4A1.2(c) so that diversionary dispositions, in whatever form, are never counted for minor offenses. This could be accomplished by adding the following language at the end of the section:

> Diversion from the judicial process for offenses listed in (c)(1) or those similar to them are never counted.

In the alternative, the Commission should replace the language in § 4A1.2(c)(1)(A) so that it reads, "the sentence was a term of supervised probation of more than one year," and clarify that "supervision" means active supervision by a probation office or other supervisory authority.

D. Offenses "similar" to those listed in subsection (c)(1)

In several cases, courts have found an offense to be dissimilar to the offenses listed in subsection (c)(1) (and therefore countable), by engaging in legal acrobatics that defy the Commission's apparent intent to allow for relatively broad *categories* of similarity. For example, in *United States v. Laureano*, No. 05-2078, 162 Fed. Appx. 188 (3d Cir. Jan. 17, 2006), the defendant had been previously convicted under Pennsylvania law for operating a motor vehicle while possessing an open 22-ounce bottle of "Silver Thunder" malt liquor. The open container violation was punishable under state law by a fine, but not imprisonment, *id.* at 190, n.1, and the defendant's sentence was a fine and costs totaling $217. The district court counted the conviction, finding that it was not similar to any of the offenses listed in § 4A1.2. This conclusion increased the defendant's guideline range from 18 to 24 months to 24 to 30 months. Using an approach borrowed from the First Circuit, the Third Circuit held that operating a motor vehicle while possessing an open container is not similar as a matter of elemental comparison to "public intoxication" as defined under Pennsylvania law. *Id.* at 4

(applying *United States v. Elmore*, 108 F.3d 23, 27 (3d Cir. 1997)). "Public place," the court held, is not similar to "presence in a 'motor vehicle' . . . located on a highway in this Commonwealth." *Id.* at 6. Further, being "under the influence of alcohol or a controlled substance" is not sufficiently similar to "possession of an open alcoholic beverage container or consum[ption] of a controlled substance." *Id.*

Defendants in the Middle District of Pennsylvania are routinely assessed points for truancy violations where the *parent* is convicted and fined in a local magistrate court. According to the Third Circuit, because the truancy offense arose out of the defendant's "status as an adult responsible for a child, [it] was not 'similar' to a juvenile status offense or truancy in any meaningful way." *See United States v. Jackson*, 169 Fed. Appx. 120, 123 (3d Cir. 2006).

Some courts have thus transformed the meaning of "similar" in § 4A1.2(c)(1) from the common-sense reading of shared characteristics into a tortured exercise requiring elemental identity and approaching the close statutory parsing that one might expect from a court applying the test for determining whether offenses are the same for purposes of double jeopardy. *See Blockburger v. United States*, 284 U.S. 299 (1932). As a result, what should be a common-sense exercise in judgment to determine whether an offense is "similar" has become a restrictive examination leaving little room for exclusion of offenses that are not listed.

In *United States v. Martinez (Clyde)*, 905 F.2d 251 (9th Cir. 1990), the majority used a different approach, one that examines the comparative levels of culpability and the degree to which the unlisted offense indicates a likelihood of recurring criminal conduct. The Ninth Circuit later adopted a second test, defining the phrase "similar to" as "whether the activity underlying the prior offense is similar to the activities underlying the listed offenses." *United States v. Martinez (Carlos)*, 69 F.3d 999 (9th Cir. 1995). Recently, the Ninth Circuit suggested that the two tests applied in the alternative. *See United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005).

The Fifth Circuit in *United States v. Hardeman*, 933 F.2d 278 (5th Cir. 1991), adopted "a common sense approach," holding that the courts should inquire into "all possible factors of similarity," in determining whether an unlisted offense is "similar" to a listed offense. These factors include:

> a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

Id. at 281. Under this test, none of these factors is dispositive, and each comparison is fact-specific. *Id.*

Under these varying approaches, an offense may be counted in some jurisdictions because it fails a strict categorical or culpability analysis but excluded in another because

it passes a more expansive test examining all possible factors of similarity. The resulting disparity is unwarranted and defeats a primary purpose of federal sentencing policy.

The Commission should clarify that "similar" does not mean "elementally the same." It should reject the restrictive approach used by some courts, and adopt a common sense approach similar to the one adopted by the Fifth Circuit. We have adapted the Fifth Circuit's approach in our proposed Application Note.

E. Other minor offenses that should never be counted

In addition to the offenses now listed, there are other minor offenses that do not advance any sentencing purpose. Offenses such as fare evasion, open container violations, panhandling, shoplifting, simple possession of marijuana, and vagrancy should be placed in subsection (c)(2). At the very least, these latter offenses should be added to the list in subsection (c)(1) so that only those sufficiently serious sentences are counted.

Local ordinance violations should never be counted, even when the offense is also a state criminal offense. First, a defendant convicted of a local ordinance violation was not convicted of a state criminal offense. The fact that the offense is similar to a state criminal offense does not necessarily make it more serious, and is otherwise irrelevant.

Second, some courts do not hesitate to expand the category as written in order to count the most minor of local offenses. For example, in the Middle District of Pennsylvania, federal defendants regularly receive criminal history points for local occupancy tax violations arising from failure to pay a $10 yearly occupancy tax. Although failure to pay a local occupancy tax is not a state criminal offense, district courts have held that, because a state statute enables localities to impose the tax, failing to pay the tax is akin to violating a state criminal law. In this way, courts have expanded the language "that are also criminal offenses under state law" to mean "that are authorized by state law."

Third, the varying interpretations of the local ordinance category injects uncertainty into the process, undermining counsel's ability to advise a client regarding criminal history. In a case prosecuted in the District of Iowa, the defendant worked in a bar where he sold alcohol after the bar was closed, a prohibited alcohol sale in violation of a city ordinance. He was charged with violating two separate ordinances, only one of which is similar to a state criminal statute. He pled guilty to that charge, and the other was dismissed. He was sentenced to pay a $120 fine. As a result of this $120 fine and the unintended consequence of pleading to the charge that was similar to a state statute, the defendant's guideline range was increased by fourteen months.

F. "Sentence served" of more than 60 days as proper measure of "real sentence"

If the Commission decides not to eliminate a distinction among minor offenses based on the sentence imposed, it should apply a "sentence served" test for minor

offenses and increase the minimum term of imprisonment that triggers inclusion to more than sixty days. First, "sentence served" more accurately reflects the seriousness of the offense by reflecting the real punishment imposed. In many jurisdictions, defendants routinely receive a sentence pronounced of 30 days' or more imprisonment for a minor offense, but they actually serve only three or four days. Second, given the potentially grave federal consequences of prior minor offenses, a "sentence served" of more than sixty days is a truer indication of the relative seriousness of the prior offense. Many of these minor offenses are disposed of as part of a package deal, when a defendant in state court is motivated to plead guilty to a number of minor offenses by the promise of a "time served" disposition. This may occur when a defendant is facing a revocation of probation or is unable to post bail for financial reasons. For example, a defendant may face more serious charges in a separate or related case, in which the prosecution encounters difficulties and therefore offers a favorable "time served" disposition alone or in combination with dismissal of a more serious charge.

Setting a higher bar for the type of sentence that will translate a minor offense into criminal history points will ensure that these types of summary dispositions will not inflate a criminal history category. Just as the Commission uses the concept of "real offense conduct" to measure culpability with respect to the appropriate offense level, it should use the concept of "real sentence" for purposes of calculating criminal history.

E. Minor offenses over three years old or committed prior to age 18

The Commission should amend § 4A1.2(d) so that minor offenses are not counted if they were committed more than three years before the instant offense. Given their nature, minor offenses over three years old are not likely to contribute in any manner to a defendant's future risk of recidivism. At the very least, the Commission should publish its data on this subject so that meaningful dialogue on the subject is possible.

The Commission should also amend subsection (e) so that minor offenses committed before the defendant reached the age of eighteen are never counted. There is no conceivable policy reason why such convictions should increase a defendant's federal criminal history score, and common sense about a juvenile's immature ability to form sound judgments counsels against it. The average adolescent operates with an "underdeveloped sense of responsibility," resulting in "'impetuous and ill-considered actions and decisions.'" *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation omitted). "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* Juveniles are more vulnerable than adults to negative influences and peer pressure, due in part to the "prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Given that the actions of a juvenile often result from an unfixed character and "transitory personality traits," *see id.*, prior juvenile convictions for minor offenses should not be counted without the clearest empirical evidence of their predictive value.

II. RELATED CASES

The Commission expected that there would be instances in which the definition of "related cases" in Application Note 3 of § 4A1.2 would be "overly broad." In practice, the opposite is true: the provision has been interpreted so narrowly by the courts that it is now virtually impossible to convince a sentencing judge that two prior sentences were "related." In addition, the various formulations for determining whether two cases are related adds unnecessary complexity to the Guidelines. The current definition is both far too restrictive and far too complex. Principles of fairness and simplicity suggest that the definition of "related cases" should be aligned with the more expansive definition of "relevant conduct" in § 1B1.3, and the meaning of "consolidated for trial or sentencing" should be clarified.

The Commission should amend Application Note 3 by replacing "no intervening arrest" with "no intervening conviction" and replacing (A) and (B) with a cross-reference to the definition of "relevant conduct" under the provisions of § 1B1.3(a)(2) and Application Note 9 to that guideline, so that prior sentences are "related" if they would constitute relevant conduct *with respect to each other* under those provisions. The Commission should retain (C), but add the term "functionally consolidated for trial or sentencing" and define it as proposed below. In addition, because § 4A1.1(f) does not predict increased risk of recidivism, the Commission should eliminate subsection (f) and the reference to it in Application Note 3.

We propose the following language:

Related Cases. Prior sentences are not considered related if they were for offenses that were separated by an intervening conviction (i.e., the defendant was convicted of the first offense prior to committing the second offense). Otherwise, prior sentences are considered related (A) if they resulted from conduct that would be considered relevant conduct with respect to each other under the provisions of §1B1.3(a)(2) and comment (n. 9) (Relevant Conduct), or (B) if they were consolidated for trial or sentencing or functionally consolidated for trial or sentencing. "Functionally consolidated for trial or sentencing" includes prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding.

Our proposed amendment sets forth a streamlined approach, allowing courts to bypass the potentially more complicated "relevant conduct" inquiry whenever consolidation can be readily ascertained, while leaving open the opportunity for a fair assessment of whether the conduct reflected in two convictions is related when necessary.

In addition, this approach is a more accurate measure of assessing past patterns of criminal behavior. By providing that prior offenses are not related if they were separated by an intervening conviction, our proposal ensures that convictions will not be considered related if they demonstrate that conviction and punishment failed to deter repeated criminal behavior. At the same time, it would reflect that repeated arrests within a short period of time – which may result from police harassment – do not necessarily show an

increased risk of recidivism. This approach also would further the goal of simplification by reducing the number of different tests for similar concepts.

By tying the definition of related cases to the relevant conduct rules, our proposal would alleviate the disconnect between the use of uncharged or acquitted conduct to increase punishment under § 1B1.3 and the treatment of the same kind of conduct as "unrelated" for purposes of criminal history.

Unlike the use of relevant conduct rules in setting offense levels, which we continue to oppose, the rules we propose would not increase offense levels based on conduct that did not result in a criminal charge or conviction, but instead would result in a more realistic calculation of criminal history based on actual convictions. Unlike relevant conduct, this will not implicate due process concerns. Indeed, if the expansive meaning of relevant conduct can be used to increase offense levels, then it should be available to limit the impact of prior sentences in determining criminal history.

Finally, our proposal addresses the complexities, disparities, and restrictive interpretations created by current Application Note 3, which we discuss more fully below.

A. "Occurred on the same occasion"

Some of the cases interpreting subsection (A) have emphasized a temporal aspect that requires something akin to simultaneity. The passage of a mere ninety minutes between seemingly related offenses often will mean that they did not "occur on the same occasion." *See, e.g., United States v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990), *overruled on other grounds, United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (*en banc*) (robbery attempts at two different locations within one-and-one-half hours of each other did not occur on the same occasion).

In another case, the Fifth Circuit engaged in unduly extensive and complex analysis before concluding that three offenses occurring on the same day – drunk driving, driving with a suspended license, and failure to identify oneself to a police officer – were related. The court examined temporal proximity, spatial proximity, and the timing of the formation of *mens rea* in order to reach the conclusion that the offenses were related. *United States v. Johnson*, 961 F.2d 1188, 1189 (5th Cir. 1992). In a later case, the Fifth Circuit engaged in a similarly extensive analysis because "the extent of the temporal separation between commissions [is] controlling for purposes of the same-occurrence prong, and even then such separation must be viewed in light of other factors such as spatial separation, identity or non-identity of offenses, and the like." *United States v. Moreno-Arredondo*, 255 F.3d 198, 207 (5th Cir. 2001).

These cases demonstrate that the test is so restrictive that it it is either impossible to meet or requires the court to engage in ludicrously complex maneuvers to reach a conclusion that would go without saying if the question were whether the offenses were "relevant conduct." Our proposal avoids these problems by replacing subsection (A) with a reference to Application Note 9 of § 1B1.3.

B. "Single common scheme or plan"

Cases are related under subsection (B) if the prior sentences resulted from offenses that "were part of a single common scheme or plan." Differing interpretations of the meaning of this term have resulted in a circuit split. In *United States v. Irons*, 196 F.3d 634 (6th Cir. 1999), the Sixth Circuit joined the Third, Fifth, and Ninth Circuits in following the Seventh Circuit's interpretation that crimes are part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. *Id.* at 828 (following *United States v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992)). Under this view, offenses committed during a "crime spree" are not related unless (1) they were jointly planned at their inception, or (2) the commission of one offense entailed the commission of another. *See Irons*, 196 F.3d at 637-38.

In *United States v. Carter*, 283 F.3d 755 (6th Cir. 2002), however, the Sixth Circuit recognized that this cramped view of relatedness under subsection (B) for purposes of criminal history conflicts with the liberal and expansive view of relevant conduct under § 1B1.3. *Id.* at 758. According to the court, "the goal of reasonable uniformity sought by the Sentencing Guidelines is undermined with regard to the differing applications of U.S.S.G. § 4A1.2(a)(2). The treatment of the issue by the various Courts of Appeal evidences the lack of consistency and, therefore, the lack of uniformity in the application of this provision of the Sentencing Guidelines. This Court urges the Sentencing Commission to review U.S.S.G. § 4A1.2(a)(2) with regard to the concerns herein expressed." *Id.* at 761.

The Seventh Circuit has also acknowledged the illogic in the differing interpretations of the phrase "common scheme or plan" in §§ 4A1.2 and 1B1.3(a)(2). *See United States v. Walls*, 59 Fed. Appx. 876 (7th Cir. 2003). Because its own precedent foreclosed applying the same interpretation, the court suggested that the Commission should clarify the matter. *Id.* at 879 ("Although the application of the career offender provision can lead to harsh results, and has done so here, it is a matter that the Sentencing Commission might want to address.").

Some courts have opposed interpreting "common scheme or plan" the same way in §§ 4A1.2 and 1B1.3 based on the view that "different considerations" animate the two provisions, and noting that the word "single" appears in § 4A1.2, but not in § 1B1.3. *See, e.g., United States v. Berry*, 212 F.3d 391, 394-95 (8th Cir. 2000) (elaborating the "different considerations"). The *Berry* court explained: "Addition of the word 'single' suggests an intent to narrow the concept of 'common scheme or plan.' It points strongly in the direction of the Seventh Circuit's view that two prior offenses must have been *jointly* planned to be 'related sentences' under § 4A1.2(a)(2)." *Id.* at 395.

Other circuits have held that subsection (B) should be given the same meaning as relevant conduct under § 1B1.3. *See United States v. LaBarbara*, 129 F.3d 81, 86 (2d Cir. 1997); *United States v. Breckenridge*, 93 F.3d 132, 139 (4th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995)). In *Breckenridge*, the Fourth Circuit

summarized the factors considered by courts: "In deciding whether offenses are part of a common scheme or plan, courts have looked to whether the crimes were committed within a short period of time, in close geographic proximity, involved the same substantive offense, were directed at a common victim, were solved during the course of a single criminal investigation, shared a similar modus operandi, were animated by the same motive, and were tried and sentenced separately only because of an accident of geography." *See Breckenridge*, 93 F.3d at 139; *see also United States v. Brothers*, 316 F.3d 120, 123-24 (2d Cir. 2003) (summarizing factors).

These differing interpretations produce unwarranted inconsistency in sentences, and engender confusion. Our proposal adopts the fairer and more sensible approach of those courts that have interpreted the phrase "common scheme or plan" to mean the same thing in subsection § 4A1.2, comment. (n.3(B)) as it does under § 1B1.3(a)(2).

C. "Consolidated for trial or sentencing"

Subsection (C) provides that prior sentences are "related" if they were "consolidated for trial or sentencing." Some courts have held that this includes cases that were "functionally consolidated," but that term has been narrowly construed over the years. Courts now very rarely (if ever) find cases consolidated for sentencing absent a formal order of consolidation. Such an order is uncommon or nonexistent in many states, making such a finding impossible. In *Buford v. United States*, 532 U.S. 59 (2001), the Supreme Court suggested that the Commission might bring some consistency into the determination of "functional consolidation." In rejecting the petitioner's argument that consistency would result from *de novo* review of the district court's finding that her prior sentences were not functionally consolidated, the Court stated:

> [T]he Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts. Insofar as greater uniformity is necessary, the Commission can provide it.

Id. at 66. In the absence of overarching guidance from the Commission, defendants face what has become an impossible hurdle.

Some circuits require formal consolidation in the form of an order or some other "indicium of formal consolidation" and do not recognize functional consolidation for arguably related cases. *See, e.g., United States v. Martins*, 413 F.3d 139 (1st Cir. 2005); *United States v. Mills*, 375 F.3d 689, 691 n.4 (8th Cir. 2004); *United States v. Piggie*, 789, 796 (8th Cir. 2003). Unfortunately, several jurisdictions, including Massachusetts and New Hampshire, do not employ any form of formal consolidation. For defendants whose prior convictions arise in these jurisdictions, relatedness can never be proven under this prong. As a result, the guidelines institutionalize a categorical disparity.

In other circuits, "functional consolidation" exists in theory, but can hardly be proven. For example, in the Fifth Circuit, cases will be considered consolidated if there is "some factual connexity between them, or else a finding that the cases were merged for trial or sentencing." *United States v. Huskey*, 137 F.3d 283, 288 (5th Cir. 1998). Courts there have consistently required either a formal order of consolidation or the listing of two offenses in the same indictment under the same docket number. *See, e.g., United States v. Hayes*, 341 F.3d 385 (5th Cir. 2003); *United States v. Metcalf*, 898 F.2d 43, 46 (5th Cir. 1990); *United States v. Kates*, 174 F.3d 590, 584 (5th Cir. 1999). However, Texas courts rarely enter formal orders of consolidation, likely due to the fact-that under Texas law, such orders are unnecessary. If multiple counts arising out of a single "criminal episode" are presented in a single trial or plea proceeding, then they are considered under Texas law to be consolidated. *See LaPorte v. State*, 840 S.W.2d 412 415 (Tex. Crim. App, 1992).

For reasons apparently connected to the tumultuous history of Texas state law on joinder and defects in charging instruments, it is not unusual in multi-count cases in Texas state court to see a separate charging instrument with a separate docket number for each individual count, even in cases in which the offenses could have been joined in a single charging instrument. These cases are commonly disposed of in a single plea proceeding before the same judge, thus resulting in consolidation under state law and concurrent sentences. *See* Aff. of El Paso Public Defender, July 14, 2006, attached as Exhibit 1. Despite this, the Fifth Circuit does not consider the cases consolidated for purposes of determining whether they are related.

Although other circuits do not require a formal order of consolidation, they have nevertheless developed a stringent test for finding "functional consolidation" that approaches a requirement of a formal indication of consolidation. These courts hold that "there is no functional consolidation when offenses proceed to sentencing under separate docket numbers, cases are not factually related, and there was no order of consolidation[.] There must be some explicit indication that the trial court intended to consolidate the prior convictions." *United States v. Carson*, 469 F.3d 528, 531 (6th Cir. 2006) (internal citations and quotations omitted). Even after *Buford*, the Seventh Circuit has held that simultaneous disposition merely for the sake of administrative convenience is not consolidation, and that "in the absence of a formal order of consolidation, we will deem sentences functionally consolidated only where there is a showing on the record of the sentencing hearing that the sentencing judge considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions." *United States v. Best*, 250 F.3d 1084, 1095 (7th Cir. 2001).

In the absence of uniform state policies and practices, the Commission should set forth a simpler and more flexible test for consolidation in Application Note 3 so that, at the very least, prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding will be considered "related" under § 4A1.2. Where such circumstances do not exist, courts should be permitted to take a number of factors into account, such as consecutive indictment or complaint numbers, or same day scheduling of a plea hearing, trial or sentencing hearing, to determine whether cases are related.

D. Uncounted crimes of violence

As set forth in Part I, some state misdemeanor offenses are counted as felony crimes of violence because they are punishable by a term of imprisonment greater than one year. The harsh and disparate effects of this are felt throughout the guidelines, including the determination of whether cases are related. The Commission adds one point for each prior conviction of a crime of violence that is otherwise uncounted because it is "related" under Application Note 3 of § 4A1.2. U.S.S.G. § 4A1.1(f). 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. *See* U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* at 7. Not only does § 4A1.1(f) unfairly inflate some defendants' criminal history scores, but its predictive power is statistically insignificant. *See id.* at 7, 11 n. 40, 15. Therefore, it should be deleted.

Very truly yours,

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March 30, 2007

The United States Sentencing Commission
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The Honorable Ricardo H. Hinojosa, Chair
The Honorable Ruben Castillo, Vice Chair
The Honorable William K. Sessions III, Vice Chair
The Honorable John R. Steer, Vice Chair
The Honorable Dabney Friedrich, Commissioner
The Honorable Beryl A. Howell, Commissioner
The Honorable Michael E. Horowitz, Commissioner

RE: Proposal for Consideration -
Recommendations for Simplifying the Scoring of Criminal History

Dear Distinguished Members of the Commission:

While I am currently employed as a probation officer for the U.S. District Court for the Middle District of Tennessee, the opinions and recommendations I forward for your consideration do not necessarily represent the Courts I serve, the U.S. Probation Office, or the Administrative Office for the U.S. Courts.

With that disclaimer, I personally urge the Commission to place high priority in addressing the need to simplify the scoring of criminal history at Chapter 4 of the guidelines.

Though the current scoring schemata is based on reasonable theory concerning severity of criminal behavior based on actual sentences imposed, I believe the current procedures are unduly cumbersome and have the potential to introduce unwarranted sentencing disparity from inadvertent errors caused in attempting to track cases from opening to close.

Some of the difficulties in tracking cases include:

Non-standardized case management procedures across state and local jurisdictions. A major concern toward properly scoring criminal history is related to the incompleteness of case records subsequent to initial case settlement. I have personally scored convictions that exceed the 13 months' imprisonment threshold and later find that the sentence was ultimately suspended and a probationary term imposed. Some jurisdictions may simply note on the case

file that the sentence was suspended upon granting of a motion to suspend without entering a subsequent order which modifies the original judgment. In these situations, if not caught by astute counsel, a detriment to the defendant.

Difficulty in tracking violations and subsequent rulings related to probation/parole.
A similar problem encountered is accurately capturing subsequent violation outcomes due to a lack of systematic record keeping. In order to address potential changes in scoring due to subsequent sanctions and violations, contact may be required of several different agencies to calculate "in/out" time served related to violation petitions, sanctions, and ultimately, revocations. This is increasingly a very complicated process for offenders caught in the "revolving doors" of our state and local criminal justice systems. This is particularly exacerbated in cases with lengthy criminal histories as we are experiencing with the Department of Justice's Project Safe Neighborhood (PSN) initiative.

The Proposal for Simplification.
With limited resources for gathering, analyzing, and scoring criminal history within the presentence investigation process, I believe there is an urgent need to modify the current scoring schemata to ease the time demands in assessing criminal convictions. First, I suggest any new procedure considered enable scoring decisions to be completed from review of a single source document rather than searching for multiple documents or records maintained by law enforcement and correctional agencies. In fact, I recommend a scoring schemata that would enable scoring be satisfied by review of the original judgment alone.

By focusing on the original conviction rather than the cumulative time served for any sentence, less error will be introduced into the scoring process. I believe this could be easily accomplished by making slight changes to subsections (a) through (c) to § 4A1.1, by focusing on the type of conviction rather than the actual sentence received plus any additional time imposed due to subsequent sanctions and revocations. Attached to this letter is a sample of what I propose the Commission consider.

Thank you in advance for your consideration. The work you do on behalf of the federal justice system, and more importantly, the citizenry of our nation, is greatly appreciated.

Sincerely,

James T. Searcy
672 Magnolia Lane
Nashville, TN 37211

Proposal for Modifying Criminal History Scoring Procedures at Chapter 4 -

§ 4A1.1. **Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior (felony conviction) ~~sentence of imprisonment exceeding one year and one month~~ (for any crime of violence or a controlled substance offense.)

(b) Add 2 points for each prior (felony conviction) ~~sentence of imprisonment of a least 60 days~~ not counted in (a).

(c) Add 1 point for each prior (misdemeanor conviction) ~~sentence~~ not counted in (a) or (b), up to a total of 4 points for this item.

NOTE 1: As to § 4A1.1(a), the terms of "crime of violence" and "controlled substance offense" are defined at U.S.S.G. § 4B1.2(a) and (b), respectively.

NOTE 2: As to § 4A1.1(c), exclusions to counting are covered at U.S.S.G. § 4B1.2(c)(1) and (2), respectively.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

We appreciate the important work of the U.S. Sentencing Commission in preparing its 2007 report to Congress on Crack Cocaine and Federal Sentencing Policy and we look forward to your report next month.

Last year marked the twentieth anniversary of the passage of the law mandating disparate treatment for crack and powder cocaine offenders. In 1986, Congress enacted the Anti-Drug Abuse Act, which established much tougher sentences for crack cocaine offenses than for powder cocaine. As a result, it takes 100 times more powder cocaine than crack cocaine to trigger the 5- and 10-year mandatory minimum sentences.

Two decades ago, our nation knew little about crack other than the fear that it was more dangerous than the powder form and would greatly increase drug-related violence. Since that time, the matter has been studied extensively by the Commission.

The Commission now has another opportunity to work with Congress to eliminate or reduce this disparity, as well as the disparate impact on minorities that can result. We welcome the Commission's guidance and recommendations that could improve the fairness of federal sentencing. We hope that the 2007 report will assist Congress by continuing to update the scientific literature on the issue. Please help us by including recommendations that cover statutory and non-statutory remedies, such as the promulgation of a Guideline Amendment in the current amendment cycle, that can assist us in eliminating or reducing the crack-powder disparity without further delay.

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Sincerely,

PATRICK LEAHY
Chairman

EDWARD M. KENNEDY
Senator

JOSEPH R. BIDEN, Jr.
Senator

DIANNE FEINSTEIN
Senator

RICHARD J. DURBIN
Senator

JEFF SESSIONS
ALABAMA

COMMITTEES:
ARMED SERVICES
JUDICIARY
ENERGY AND NATURAL RESOURCES
BUDGET

United States Senate

WASHINGTON, DC 20510-0104

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

I appreciate the hard work both you and the U.S. Sentencing Commission have devoted to the issue of Federal sentencing policy regarding crack and cocaine. I look forward to the Commission's report to Congress on Crack Cocaine and Federal Sentencing Policy next month.

As you know, I was the lead sponsor of the Drug Sentencing Reform Act of 2006 in the 109th Congress and identical legislation in 2001, both of which would have reduced the disparity for crack and powder cocaine from 100-to-1 to 20-to-1 by reducing the mandatory penalty for crack cocaine and increasing the mandatory penalty for powder cocaine. The underlying goal of the bill was fairness – treating similar drugs more equally when it comes to sentencing. Senators Cornyn, Pryor and Salazar co-sponsored this legislation in a bi-partisan effort to address this inequity in federal law.

In 1986, Congress passed statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking 500 grams of powder cocaine or 5 grams of crack and a 10-year mandatory minimum for trafficking 5,000 grams of powder or 50 grams of crack. The 100-to-1 ratio of crack to powder cocaine was enacted largely to prevent the spread of crack cocaine across America, especially into minority neighborhoods. Despite that goal, crack cocaine has spread across the country and into minority neighborhoods. A recent U.S. Sentencing Commission report said that 83% percent of offenders sentenced for crack violations were African Americans. And a Bureau of Prisons study revealed that weapons use and violence are more accurate indicators of recidivism than drug use.

In three separate reports to Congress, in 1995, 1997, and 2002, the Sentencing Commission has urged Congress to reconsider the statutory penalties for crack cocaine. Once again, the Commission has an opportunity to work with Congress and help improve these statutory mandatory minimums by reducing the harsh disparity that currently exists. By reducing the disparity, we can strengthen the criminal justice system, reduce judicial manipulation, and restore confidence in the system's fairness.

It is my hope that the Commission's 2007 report will include an update to its 2002 Report on Federal Cocaine Sentencing Policy, specifically its data, literature review, and medical chapters. Furthermore, I would also like to see a specific recommendation to Congress about how it should amend the 100:1 statutory ratio that governs cocaine sentencing. Legislation I introduced would reduce this ratio to 20:1, and I believe that to be a sound and justified ratio based on the nature and disparate impact of crack and cocaine. This legislation is directly in line with the Commission's 2002 recommendation that the statutory ratio be no more than 20:1.

I believe these recommendations would provide a measured and balanced approach to improving the statutory and guidelines system that governs the sentencing of federal drug offenders. A more dramatic change that results in a substantial reduction in drug sentences is not consistent with sound public policy and could jeopardize the bi-partisan effort that is now underway. I believe the time has come for Congress to exercise a legislative change in this area, and I look forward to working with the Commission to get this accomplished.

Very Truly Yours,

Jeff Sessions
United States Senator