STATEMENT OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

HEARING ON
PROPOSED AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES

WASHINGTON, DC

March 17, 2010

Mr. Chairman and Members of the Commission:

Thank you for the opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines on the so-called "recency" provision of Chapter Four of the guidelines. We appreciate the Commission's leadership since the passage of the Sentencing Reform Act, and would like to commend especially the Commission's collection, analysis, and careful consideration of empirical data in shepherding the evolution of the guidelines over the last two-and-a-half decades. We are here today to urge that same evidence-based decision-making process in connection with the Commission's review of the recency provision of the criminal history score.

Due to the concern regarding the number of times a single conviction potentially can be factored into the computation of an offender's criminal history category, the Commission is proposing two options for amendment of section 4A1.1 of the guidelines. Option 1 would eliminate recency points entirely, for all offenders regardless of the offense committed. Option 2 would retain recency points, but would preclude the addition of recency points where the so-called "status" provision of subsection 4A1.1(d) also applies. As a result, under Option 2, only a total of two points could be added to the score of an offender who qualifies both for status and recency enhancements to the calculation of his criminal history category.

We cannot endorse either version of the proposed amendment. Committing an offense while under any type of criminal justice supervision – be it probation, supervised release, or imprisonment – is an aggravating circumstance that correlates with a greater risk of recidivism. The guidelines appropriately account for this factor in the calculation of the criminal history category (with two criminal history points). Furthermore, commission of an offense after recently having served a significant term of imprisonment is a distinct aggravating circumstance that also correlates with increased risk of recidivism and that the guidelines also appropriately take into account with two criminal history points. Because the two

factors often coincide, the guidelines as currently drafted *already* limit the impact of the cumulative application of status and recency points, allowing for a total of three points rather than four. The Commission is now proposing to change that to two points.

The Commission's research has shown that status and recency each make an "independent and statistically significant contribution" to predicting recidivism and that each has "high predictive strength." [1] Notably, the Commission's Criminal History Category model (which is the basis for Chapter Four of the guidelines) and the U.S. Parole Commission's Salient Factor Score – both respected and validated recidivism risk assessment tools – rely on both status and recency to predict recidivism. Thus, there simply is no justification in the empirical data for changing the way that criminal history scores are assessed with respect to the recency provision in Chapter Four.

Moreover, deterrence is a critical factor in assuring public safety. The certainty that a harsher penalty will result where an offender has both committed an offense while under criminal justice supervision *and* done so within two years

[1] *See* U.S. Sentencing Commission, Research Series on the Recidivism of Federal Guideline Offenders, Release 3*: A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) at 11 (internal footnote omitted) & n.40.

of imprisonment, escape status, or release from significant imprisonment promotes respect for the law and serves to deter persons from crime in the first instance. Because a sentence calculated based on an offender's eligibility for cumulative status and recency enhancements to his criminal history category is grounded in recidivism research and data, such a sentence is just (even if harsher) and further serves the goal of deterrence.

That said, we do believe that it is wise for the Commission to study and consider the impact of guidelines – like section 2L1.2, for example – that provide for an increase in an offender's offense level in circumstances where any subsection of 4A1.1 of the guidelines *also* applies. Specifically, the Commission should collect and analyze empirical data in an effort to determine whether cumulative application of section 4A1.1 and any Chapter Two section that increases an offense level based on criminal history is (1) redundant and unduly harsh or (2) as demonstrated by the data, constitutes just punishment that ensures public safety and promotes deterrence.

In closing, I would like to thank the Commission for this opportunity to share our views and for its continued commitment to constant review and

evaluation of the guidelines to ensure fair sentences and public confidence in our federal sentencing system.