NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING 2017 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

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This memorandum is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). The NYCDL is a professional association comprised of approximately 275 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York. The NYCDL's members thus have gained familiarity with the Federal Sentencing Guidelines (the "Guidelines") both as prosecutors and as defense lawyers.

We appreciate this opportunity to submit comments to the United States Sentencing Commission (the "Commission") regarding the proposed amendments to the Guidelines. In the pages that follow, we address a few of these proposed amendments. The contributors to these comments include members of the NYCDL's Sentencing Guidelines Committee, Catherine M. Foti (Chair), Richard F. Albert, Michael F. Bachner, Laura Grossfield Birger, Christopher P. Conniff, James M. Keneally, Brian Maas, Sharon L. McCarthy, and Marjorie J. Peerce. Audrey Feldman assisted the Committee in their review and consideration of the proposed amendments.

I. PROPOSED AMENDMENT: FIRST OFFENDERS

The Commission has invited comments on proposed amendments that would prescribe lower guideline ranges for offenders with no criminal history ("First Offenders") and increase the availability of alternatives to incarceration for those offenders. First, the Commission proposes establishing a new Chapter 4 guideline (§ 4C1.1) that provides an offense-level reduction for First Offenders. The Commission also proposes amending § 5C1.1 to establish a rebuttable presumption of non-incarceration for non-violent First Offenders with low guideline ranges. The NYCDL strongly supports both of these proposed amendments, which will promote fairer sentencing and help the Commission comply with its ongoing statutory mandate to address prison overcrowding.

A. Issue for Comment: Definition of "First Offender"

The Commission has requested comment on the appropriate definition of "First Offender." In particular, the proposed new § 4C1.1 includes two alternatives: (1) limiting "First Offender" to defendants with no prior convictions at all; or (2) defining "First Offender" as a defendant who did not receive any criminal history points. The NYCDL believes that the Commission should define First Offenders to include all defendants without criminal history points. In making the determination that certain convictions do not warrant criminal history points, the Commission has recognized that convictions that are stale, or for minor misdemeanors or infractions, should not place defendants in Criminal History Categories that lead to higher Guidelines ranges. For the same reasons, these convictions should not exclude defendants from "First Offender" status.

The NYCDL's position is supported by the Commission's multi-year study of recidivism (the "2016 Study"), which found recidivism rates to be most closely correlated with total criminal history points.[1] Limiting the category of First Offenders to those defendants without *any* prior convictions would be problematic. As an initial matter, no statistical basis for such a distinction appears in the 2016 Study, and the NYCDL is not aware of any other supporting basis.

Moreover, penalizing those with old or low-level convictions would reinforce the pervasive racial disparities in our criminal justice system. Statistics show that people of color are disproportionately arrested for minor offenses. Marijuana arrests provide a stark example. Nationwide, between 2003 and 2010, blacks were 3.73 times as likely to be arrested for simple marijuana possession as whites, even though blacks and whites use marijuana in similar proportion.[2] In New York City, where most of the members of our organization practice, in 2014, before the City adopted a policy of issuing a non-criminal summons for possession of less than 25 grams of marijuana, approximately 88% of those arrested were black or Hispanic, even

[1] *See* U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016), at 18, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (stating that 30.2% of offenders with zero total criminal history points were rearrested within eight years, compared to 81.5% of offenders with more than 10 total criminal history points).

[2] American Civil Liberties Union, *The War on Marijuana in Black and White,* June 2013, at 47, *available at* https://www.aclu.org/sites/default/files/field_document/11144`13-mj-report-rfs-rel1.pdf.

though marijuana use is statistically similar among whites and non-whites.[3] In Virginia, in 2013, blacks were 3.3 times as likely to be arrested for marijuana possession as whites.[4]

Statistics on other minor offenses tell a similar story. For example, in 2015, 92% of those arrested for turnstile jumping in New York City were people of color.[5] Traffic stops are another indicator of racially disparate treatment. Numerous studies indicate that local police departments disproportionately stop nonwhites for traffic infractions, and those stops often result in a misdemeanor charge.[6]

Further, it is beyond dispute that nonwhites under the age of eighteen have disproportionate contact with the criminal justice system. Nationwide, in 2013, black juveniles were 4.6 times as likely to be incarcerated as whites, Native Americans 3.3 times as likely, and Latino youths 1.7 times as likely.[7]

As these facts suggest, it is far more likely that a nonwhite individual is going to have contact with the criminal justice system than a white individual. Restricting the definition of

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[3] Victoria Bekiempis, "Whites Only 8 Percent of NYC's Misdemeanor Pot Arrests," Newsweek, November 4, 2015, *available at* http://www.newsweek.com/new-york-police-department-marijuana-arrests-racial-disparity-390240.

[4] Jon Gettman, *Racial Disparities in Marijuana Arrests in Virginia (2003-2013),* at 2, *available at* http://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf.

[5] Rocco Parascandola and Graham Rayman, "NYPD Arrests Mostly People of Color for Fare Beating, Stats Show," N.Y. Daily News, February 12, 2016, *available at* http://www.nydailynews.com/new-york/nypd-arrests-people-color-fare-beating-stats-article-1.2528320.

[6] *See* Lynne Langton and Matthew Durose, *Police Behavior during Traffic and Street Stops, 2011,* United States Department of Justice Bureau of Justice Statistics, September 2013, Revised October 27, 2106, *available at* https://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

[7] *See* Heywood Burns Institute, *Unbalanced Juvenile Justice*, *available at* http://data.burnsinstitute.org/about.

"First Offender" to those without convictions of any kind would unfairly punish individuals whose prior involvement with the criminal justice system resulted from the biased application of the law.[8]

B. Issue for Comment: Reduction in Offense Level

The Commission proposes two options for the new § 4C1.1 guideline – an across-the-board reduction in offense level for all First Offenders ("Option 1") or a tiered reduction, with a greater reduction for defendants with lower offense levels ("Option 2"). In terms of the amount of the reduction, for Option 1, the Commission proposes, in brackets, a potential reduction of 1-level. For Option 2, again in brackets, the Commission proposes a 2-level reduction for defendants with an offense level less than 16, and a 1-level reduction for defendants with an offense level of 16 or greater.

The NYCDL supports a two-level reduction for all First Offenders. As noted above, offenders with no criminal history points have the lowest recidivism rate of any group. And the 2016 Study found *no* correlation between a higher offense level and a higher likelihood of recidivism.[9] Accordingly, there is no basis for limiting a two-level reduction to those offenders with comparatively lower offense levels. In addition, many first-time offenders receive high offense levels, and therefore longer sentences, based on guidelines with no apparent tie to

[8] We further note that in according "First Offender" status only to those who have no criminal history points, the proposed Guidelines amendment would exclude individuals who have a criminal history because of a law's disproportionate application to nonwhites. Thus, although commendable, the proposed amendment only goes so far to address the problems brought about from the disproportionate application of misdemeanor laws. The NYCDL would encourage the Commission to continue to consider the impact of racial disparity in further amendments to the Guidelines.

[9] *See Recidivism Among Federal Offenders* at 20 (stating that "there is not a strong correspondence between final offense level and recidivism").

recidivism rates (e.g. loss amount). But recent studies have found that longer sentences do not reduce recidivism more than do shorter sentences; in fact, longer prison sentences might produce higher recidivism rates.[10] For these reasons, a substantial two-level reduction (such as the one given for acceptance of responsibility or safety-valve eligibility) is appropriate for all First Offenders, without regard to their total offense level. This approach would help achieve more proportionate sentencing and reduce overcrowding without a corresponding increase in crime.[11]

C. Issue for Comment: Rebuttable Presumption of Non-Incarceration

The proposed amendment to § 5C1.1 would add a new subsection establishing a rebuttable presumption of non-incarceration for non-violent First Offenders with low guideline ranges. This provision would comport with 28 U.S.C. § 994(j), which states that alternatives to incarceration generally are appropriate for first offenders not convicted of a violent or otherwise serious offense, and would further the Commission's goals of reducing the costs of incarceration and the overcapacity of prisons.[12]

The NYCDL strongly supports this amendment. Not only would a presumption of non-incarceration for low-level first offenders help reduce the prison population, but it also would

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[10] Dr. James Austin and Lauren-Brooke Eisen, Brennan Center for Justice, *How Many Americans Are Unnecessarily Incarcerated?*, 35-37 (Dec. 2016) (concluding that "social science evidence indicates that in the worst case scenario, longer lengths of stay produce higher recidivism rates, while the best case scenario points to diminishing returns of incarceration on public safety. It also provides compelling evidence of the possibility that there is no relationship at all between long lengths of stay and recidivism rates").

[11] If the Commission elects to adopt the specific reduction amounts currently reflected in the proposed amendment, we would support Option 2 over Option 1 so that a two-level reduction is available to defendants with lower offense levels.

[12] *See* U.S. Sent'g Comm'n, *Notice of Final Priorities*, 81 FR 58004 (Aug. 24, 2016).

likely reduce the crime rate. Current research indicates that low-level offenders who go to prison are more likely to re-offend than those who do not.[13] A rebuttable presumption designed to encourage alternatives to incarceration would therefore further decrease the recidivism rate.

The Commission has requested comment on whether defendants convicted of certain offenses should be excluded from this presumption. The NYCDL believes that this presumption should not be so limited. Guidelines ranges for crimes like public corruption, tax, and other white-collar offenses (the examples identified by the Commission as potentially subject to exclusion) are frequently high due to factors unrelated to the likelihood of recidivism.[14] As a result, even when judges give below-Guidelines sentences, many of these offenses result in substantial sentences of incarceration. Yet none of these crimes have been found to have especially high rates of recidivism.[15] Moreover, studies have demonstrated that requiring short periods of imprisonment for these offenses does not serve as a significant deterrent.[16] There is no reason to exclude any type of offense from the presumption, in light of the already-proposed limitation to defendants with guideline ranges in Zone A or B (the least culpable offenders) and

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[13] *See Unnecessarily Incarcerated* at 35-37 (citing a range of studies supporting this conclusion).

[14] For example, the loss table at § 2B1.1(b)(1) frequently causes extremely high offense levels, even for first-time offenders.

[15] Even fraud, the white-collar offense with the highest recidivism rate, has a rate of just 34% – lower than that of offenses involving firearms, robbery, immigration, drug trafficking, and larceny. *See Recidivism Among Federal Offenders* at 20.

[16] As one commentator notes, the Commission established Guidelines in 1987 that classified many economic offenses as "serious" and provided for "at least a short period of imprisonment," based on the idea that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent." U.S.S.G. Ch. 1 pt. 4(d) (1987). However, more recent research has found that "certainty of punishment – as opposed to severity – more effectively reduces future criminal activity." *Unnecessarily Incarcerated*, at 37 (stating that "'swift and certain' punishment using non-prison alternatives to respond to violations of probation conditions are more effective than waiting for multiple violations and then revoking the probationer to prison").

the rebuttable nature of the presumption, which leaves judges with ample discretion to impose prison sentences where appropriate.

Finally, the Commission offers two options for defining "non-violent" in connection with the criteria for application of the rebuttable presumption. Under the first option, the presumption would apply only if "the defendant's instant offense of conviction is not a crime of violence." Under the second option, the presumption would apply only if "the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense."

The NYCDL supports the first option. This approach will make determination of the applicability of the presumption more straightforward, and avoid the need for extensive fact-finding in connection with sentencing. However, we recognize that there may be cases where the offense of conviction qualifies as a "crime of violence," but the other criteria for the presumption are satisfied, and a sentence other than imprisonment is appropriate. For this reason, we encourage the Commission to propound an Advisory Note clarifying that in such cases, even though the rebuttable presumption does not apply, judges may consider whether the defendant *him or herself* used violence, credible threats of violence, a firearm, or another dangerous weapon in committing the crime in determining whether alternatives to imprisonment are appropriate.

II. PROPOSED AMENDMENT: ALTERNATIVES TO INCARCERATION

The Commission has requested comment on its proposed amendment to Chapter Five, Part A of the Guidelines, which would strike "Zone C" from the sentencing table and re-designate Zone B to contain all guideline ranges having a minimum of at least one month but not

more than twelve months. In particular, the Commission has asked whether the zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or whether the Commission should provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes. The Commission also has sought comment on whether it should provide additional guidance with respect to the new Zone B defendants (who previously would have been sentenced under Zone C).

The NYCDL applauds the Commission's decision to eliminate Zone C, and to extend the possibility of non-prison sentences corresponding to Offense Levels 12 and 13 for defendants with little or no criminal history. Defense lawyers have spent too many years trying to negotiate pleas that would place a defendant in Offense Level 11 rather than 12 when the underlying conduct and a defendant's criminal history warranted a non-jail sentence.

A. Issue for Comment: Applicability to White-Collar Defendants

As to the Commission's first Issue for Comment, the NYCDL does not believe that any crimes or defendants should be exempted from the Commission's collapsing of Zones B and C. The NYCDL believes there is no basis for the suggestion that white collar offenders are less deserving of having a non-prison sentence available, and the fact remains that judges still will be free to impose jail sentences on any white collar defendant who fall into Zone B if the judge deems it appropriate.

The suggestion that the Guidelines should make a distinction between white collar defendants and other defendants whose Guidelines calculation places them within the same Sentencing Zone is inconsistent with the underlying philosophy and structure of the Guidelines. As stated in the Introduction to the Guidelines, the 1984 Crime Control Act directed the

Commission to rationalize the sentencing process by, among other things, creating categories of offense behavior and offender characteristics. The elaborate structure of the Guidelines was based on an analysis of the characteristics of many different types of offenses that were then fit into a one size fits all grid. The factors that underlie the Guidelines calculation for the many different types of crimes covered by the Guidelines take into account the seriousness of a particular offense so that defendants falling into the same Zone have been determined to be of comparable seriousness. The Commission has never suggested that one type of defendant at a particular Zone should be sentenced differently than another defendant based on the nature of the crime and there is no reason that a white collar defendant who now would be sentenced under Zone C should automatically be deemed less eligible for a non-prison sentence than another defendant within the same zone.

Moreover, the benefits of a non-prison sentence should be equally available to "white collar" defendants whose Guidelines calculation places them in Zone B as to any other defendant whose criminal history and offense characteristics results in the same Sentencing Zone. By merging Zone C into Zone B, the Commission is acknowledging that non-prison sentences should be made available to a broader category of defendants. Such a policy would reduce overcrowding, mitigate budget concerns, and be unlikely to lead to any increase in crime.[17]

The NYCDL believes that extending the availability of non-prison sentences to white-collar defendants will benefit not only these defendants but also their victims and society. The reasons for this conclusion are that "white collar offenders . . . are typically individuals who have

[17] *See* James Austin et al., Brennan Center for Justice, *How New York City Reduced Mass Incarceration: A Model for Change?*, (Jan. 2013) (observing that a 40% decrease in New York City's prison population coincided with a significant drop in crime rates).

never been convicted of criminal conduct and are now facing incredibly long sentences as first offenders."[18] They also are by definition "non-violent, non-dangerous offenders who do not need to be removed from society to protect public safety."[19] Finally, white-collar defendants already are uniquely vulnerable to certain collateral consequences of conviction, such as loss of "[l]icensing, debarment, and government exclusion from benefits," which "may preclude these individuals from resuming the livelihood after serving imprisonment."[20] As such, incarceration is often purely a punishment for these offenders, as the short period of incarceration otherwise imposed on offenders in what is currently Zone C does not meaningfully contribute either to the sentencing goals of deterrence or rehabilitation. Rather, these defendants as well as their victims will potentially benefit from their participation in a period of supervised probation during which the defendant can rebuild his or her life and earn money necessary to satisfy restitution obligations.

B. Issue for Comment: Guidance With Respect to Former Zone C Defendants

As to the Second Issue for Comment, the NYCDL does not believe that any additional guidance is needed with respect to the sentencing of defendants who would previously have fallen under Zone C. Sentencing Courts have 30 years of experience implementing the conditions of probation set forth in § 5B1.3 for Zone B defendants, and there is no reason to

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[18] Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. Crim. L. & Criminology 731, 732-33 (2007)

[19] Mirela V. Hristova, *The Case for Insider-Trading Criminalization and Sentencing Reform*, 13 Tenn. J. Bus. L. 267, 302 (2012).

[20] *Id.* at 303. *See also* United States v. Nesbeth, 188 F. Supp. 3d 179, 190-97 (E.D.N.Y. 2016) (reviewing potential collateral consequences in connection with sentencing and finding that the government, defense attorney and Probation Department are all obligated "to assess and apprise the court, prior to sentencing, of the likely collateral consequences facing a convicted defendant").

believe that this experience will not sufficiently inform the imposition of probation with respect to the "new" Zone B defendants.

III. PROPOSED AMENDMENTS TO THE CRIMINAL HISTORY SECTION[21]

A. Proposed Amendment: Treatment of Revocation Sentences

The Commission has requested comment on its proposed amendment to § 4A1.2(k) of the Guidelines, which would provide that revocations of probation, parole, supervised release, special parole, or mandatory release ("revocation sentences") should not be counted for purposes of determining criminal history points pursuant to Chapter 4, Part A (Criminal History). The Commission has also requested comment on whether it should revise the definition of "sentence imposed" within the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States) to change how that guideline accounts for terms of imprisonment imposed by revocation sentences. Finally, the Commission has sought comment on whether revocation sentences, if not counted for purposes of calculating criminal history points, should be considered for an upward departure under the Policy Statement on Departures Based on Inadequacy of Criminal History Category set forth in § 4A1.3 (the "Policy Statement").

[21] The NYCDL applauds the Commission's recognition of the fact that convictions for conduct under the age of 18 should be considered differently than adult convictions for purposes of calculating criminal history. The NYCDL is not specifically commenting on the proposed amendments to the guidelines for juvenile convictions in this amendment cycle, because it believes that organizations such as the Campaign for the Fair Sentencing of Youth ("Campaign") are in a unique position to comment on the research supporting the current proposals. The NYCDL supports and respectfully refers the Commission to the Campaign's comments and to the comments set forth on this issue in the submission of the Federal Defenders.

1. Issue for Comment: Accounting for Revocation Sentences

The NYCDL supports the Commission's proposal to eliminate revocation sentences from the calculation of criminal history points under § 4A1.2(k). The NYCDL believes that revocation sentences are a poor indicator of past criminality and future recidivism because they are too often based on innocuous violations of "ambigu[ous] and overbr[oad] . . . conditions" that may be imposed in connection with probation, parole, and supervised release.[22]

In particular, the NYCDL notes that revocation sentences are often imposed on the basis of so-called "technical violations" of parole or supervised release conditions – which by definition do not amount to criminal recidivism.[23] Technical violations may include failure to comply with common release conditions such as "reporting requirements, requirements to seek and maintain employment, prohibition on drug and/or alcohol use, requirements to avoid police contact, [] travel and residency restrictions," as well as "requirements to attend programs such as drug treatment or anger management programs, prohibitions on associating with particular individuals, and curfews."[24] Research suggests that revocation sentences imposed upon a

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[22] U.S. v. Kappes, 782 F.3d 828 (7th Cir. 2015); *see also* U.S. v. Ramos, 763 F.3d 45 (1st Cir. 2014) (considering a challenge to supervised release conditions forbidding the defendant from accessing a computer or the internet without permission from his probation officer or the court for a period of ten years).

[23] *See* Christopher Michael Campbell, *Dooming Failure: Understanding the Impact, Utility and Practice of Returns on Technical Violations* (May 2015), available at https://research.libraries.wsu.edu/xmlui/bitstream/handle/2376/5512/Campbell_wsu_0251E_1112.pdf?sequence=1&isAllowed=y (noting that one in six parolees was incarcerated for technical violations in 2006, with many states incarcerating 20% or more of their parole population for technical violations); National Conference of State Legislatures, *Probation and Parole Violations: State Responses* (Nov. 2008), available at http://www.ncsl.org/print/cj/violationsreport.pdf ("Many state statutes afford courts the authority and discretion to dispose of a technical violator as they believe appropriate.").

[24] Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. Rev. 421, 435 (2011).

defendant's failure to comply with such technical requirements are weak barometers of criminality and recidivism risk.[25] The NYCDL accordingly does not view the imposition of a revocation sentence, standing alone, as a meaningful proxy for a defendant's "prior record of criminal behavior" or "likelihood of recidivism and future criminal behavior" as articulated in the Introductory Commentary to Chapter 4(A) of the Guidelines.

Furthermore, the NYCDL believes that a number of procedural limitations exacerbate the potential for revocation sentences to be imposed upon questionable findings of parole or supervised release violations, such that it is inappropriate to treat revocation sentences as an extension of the original sentence imposed upon a criminal conviction (as § 4A1.2(k) presently does). Many courts have observed that revocation hearings are "summary proceeding[s]" lacking "the quality and extensiveness of the procedures followed in a criminal trial."[26] Unlike sentences based on criminal convictions (which are premised upon proof beyond a reasonable doubt), a court may impose a revocation sentence "if it finds by a preponderance of the evidence that a person has violated a condition of supervision" or parole.[27] Also unlike in criminal proceedings, the state is not necessarily obliged to provide counsel to indigent defendants at revocation hearings.[28] Finally, revocation sentences – and the conditions on which they are

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[25] *See* Human Impact Partners, *Excessive Revocations: The Health Impacts of Locking People Up Without a New Conviction in Wisconsin*, (Dec. 2016), available at http://www.rocwisconsin.org/wpcontent/uploads/2015/10/Excessive-Revocations-in-Wisconsin.-Health-Impact-Report.-WISDOM.pdf (noting, based on a review of the available research, that people incarcerated for technical violations are less likely to engage in prison misconduct and are at a lower risk of recidivism compared to the general prison population).

[26] People v. Johnson, 191 Mich. App. 222 (Mich. 1991).

[27] U.S. v. Lee, 795 F.3d 682, 685 (7th Cir. 2015).

[28] *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

based – are subject to limited appellate review, providing defendants with little leeway to challenge conditions that are vague or unreasonable, or judicial findings that such conditions were violated.[29] The NYCDL believes that these procedural limitations weigh strongly against the consideration of revocation sentences in calculating a defendant's criminal history points.

2. Issue for Comment: Parallel Revision to Illegal Reentry Guideline

For the same reasons as discussed above, the NYCDL supports the Commission's proposed parallel amendment to the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide that revocation sentences should not be considered in determining the length of the "sentence imposed" for purposes of applying sentencing enhancements under § 2L1.2.

3. Issue for Comment: Upward Departures Based on Revocation Sentences

The NYCDL does not support the Commission's proposal that § 4A1.2(k) be amended to suggest that revocation sentences could serve as the basis for an upward departure under the Policy Statement. Because revocation sentences are often the result of technical violations (as discussed above), this aspect of the Commission's proposal would run afoul of the principle that upward departures should be considered only in "extremely limited circumstances," especially where the aggravating conduct did not result in a separate criminal charge.[30] Although

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[29] *See* Lee, 795 F.3d at 685 ("Normally, we look only to ensure that the revocation decision was not an abuse of discretion."); U.S. v. Munoz, 812 F.3d 809 (10th Cir. 2016) (reviewing vagueness of supervised release conditions under an abuse of discretion standard).

[30] U.S. v. Carillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (defendant's record of four misdemeanors and three felonies did not warrant an upward departure); U.S. v. Martinez-Perez, 916 F.2d 1020, 1024 (defendant's long-past petty shoplifting conviction was an insufficient basis for upward departure).

revocation sentences are surely sometimes imposed on the basis of serious misconduct, § 4A1.3(a) of the Policy Statement *already* provides for the possibility of an upward departure where "reliable information indicates" that the defendant engaged in "[p]rior similar adult criminal conduct not resulting in a criminal conviction" or "[p]rior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order," or where "the defendant was pending trial or sentencing on another charge at the time of the instant offense." Accordingly, the Policy Statement already permits any grave malfeasance underlying a revocation sentence to serve as the basis for an upward departure; the NYCDL believes that amending § 4A1.2(k) to suggest upward departures on the basis of revocation sentences alone would be unhelpful and improper.

B. Proposed Amendment: Departure Based on Substantial Difference between Time Served and Sentence Imposed

The Commission has sought comment on its proposed amendment to the Commentary to the Policy Statement, which would provide for the possibility of a downward departure from the defendant's criminal history based on a substantial difference between the sentence imposed and the time ultimately served by the defendant. In particular, the Commission has asked whether the Policy Statement should exclude the consideration of such a downward departure in cases in which the substantial difference was due to reasons unrelated to the facts and circumstances of the defendant's case.

The NYCDL supports the proposed amendment to the Commentary to the Policy Statement, which would dovetail with the Policy Statement's general recommendation that downward departures be considered where "reliable information indicates that the defendant's

criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."

However, the NYCDL does not support an exclusion to the amendment for cases in which the substantial difference between the sentencing and the time served was due to early release in order to minimize overcrowding or state budget concerns. Determining the actual reasons a particular defendant received a reduced sentence is often complex and difficult; and the suggested exclusion would effectively "require the sentencing court to participate in the equivalent of an ad hoc mini-trial" in order to determine whether (and to what extent) overcrowding or budget concerns motivated an early release.[31]

Moreover, the NYCDL believes that even where grants of early release are premised on state budget constraints or overcrowding, they most often reflect a judgment that the inmates being released are at a lower risk for recidivism than the general prison population. For instance, the State of California responded to a 2011 Supreme Court mandate to reduce overcrowding in its prisons by "re-aligning" prisoners serving sentences for non-violent, non-sex-related and non-serious crimes from state prisons to county supervision; this transfer of authority afforded local judges "wide discretion to impose a jail term (for the same sentence length that the offender would have received pre-realignment), a community-based alternative, or some combination" of the two.[32] The assessment that these so-called "non-non-non" offenders presented a low

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[31] U.S. v. Lipsey, 40 F.3d 1200 (11th Cir. 1994) (holding that courts should look to the elements of a convicted offense, not the conduct underlying the conviction, to determine whether a prior conviction is a controlled substance offense under the Guidelines).

[32] Joan Petersilia and Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, Calif. J. Politics Policy 5(2), 266-306 (Apr. 2013), available at http://ssrn.com/abstract=2254110.

recidivism risk proved prescient, as the Realignment program ultimately "had no effect on violent or property crime rates in 2012, 2013, or 2014."[33] As such, the NYCDL believes that even when early release is justified principally on state budget or overcrowding concerns, it may nonetheless "indicate[] that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history" such that a downward departure still would be appropriate under Section (b) of the Policy Statement. Thus, as noted, the NYCDL does not support a categorical exclusion to the proposed amendment. Rather, if the Commission believes some limitation to the proposed amendment is necessary, the NYCDL would suggest including language in the commentary that, in cases where the reason for early release appears to be unrelated to the characteristics of the offense or the offender, a Court is at liberty to consider those reasons in deciding whether to grant a downward departure.

IV. PROPOSED AMENDMENTS: BIPARTISAN BUDGET ACT

The Commission has requested comment on proposed changes to § 2B1.1 (Theft, Property Destruction, and Fraud) and Appendix A (Statutory Index) to reflect Congress' amendment of three criminal statutes through the Bipartisan Budget Act of 2015, Pub. L. 114-74 (Nov. 2, 2015) (the "Act").[34]

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[33] Jody Sundt et al., "Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety," *Criminology & Public Policy* 15(2): 1-27 (2016), available at https://scholarworks.iupui.edu/bitstream/handle/1805/7805/Sundt-2016-Is-downsizing.pdf; see also Michael E. Horowitz, Inspector General, U.S. Department of Justice, Testimony before the United States Sentencing Commission (Feb. 17, 2016), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf (describing the federal Compassionate Release Program as one tool to "address the burden of overcrowding" in the federal prison system, and noting that inmates released through the Compassionate Release Program had a comparatively low recidivism rate of just 3.5%).

[34] The statutes are located in §§ 208 (Penalties for fraud [involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II

The amendment of these statutes added new subdivisions prohibiting conspiracy to commit fraud for the substantive offenses already contained in the three statutes, providing that whoever "conspires to commit any offense described in any of [the] paragraphs" enumerated shall be imprisoned for not more than five years (the same statutory maximum penalty applicable to the substantive offense).

The amendment of these statutes also added increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. Specifically, persons who receive fees or income for services performed in connection with any determination with respect to benefits under title 42, or who are physicians or other health care providers who submit, or cause the submission of, medical or other evidence in connection with any such determination, and are convicted of a fraud offense under one of the three amended statutes, may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders.

C. Proposed Amendment: Conspiracy to Commit Social Security Fraud

The Commission proposes an amendment to Appendix A (Statutory Index) by inserting references to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)) in the lines referenced to 42 U.S.C. §§ 408, 1011, and 1383a(a).

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veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively).

The Commission has requested comment as to whether the guidelines covered by the proposed amendment adequately account for the offenses, and if not, what revisions to the Guidelines would be appropriate to account for the offenses.

The NYCDL does not object to this proposed amendment. The guidelines covered by the proposed amendment adequately account for the offenses as defined by Congress in 42 U.S.C. §§ 408(a), 1011(a), and 1383a(a), as § 2X1.1 is the standard guideline referred to for conspiracy offenses.

D. Proposed Amendment: Increased Penalties for Certain Individuals Violating Positions of Trust

The Commission also proposes an amendment to § 2B1.1(b) by re-designating paragraphs (13) through (19) as paragraphs (14) through (20), respectively, and inserting a new paragraph (13) which would specify that if a defendant is convicted under 42 U.S.C. §§ 408(a), 1011(a), or 1383a(a) and the statutory maximum term of ten years' imprisonment applies, then the guidelines offense level should be increased by [4][2] levels, and if the resulting offense level is less than [14][12], then the sentence should be increased to level [14][12]. Further, the Commission proposes an amendment to the Commentary to § 2B1.1 captioned "Application Notes" by re-designating Notes 11 through 20 as Notes 12 through 21, respectively, and inserting a new Note 11 which would specify *either* that the application of subsection (b)(13) precludes the application of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) or that the application of subsection (b)(13) *does not* preclude a defendant from consideration for an adjustment under § 3B1.3.

The Commission has requested comment as to whether cases involving defendants now subject to the statutory maximum term of ten years' imprisonment are adequately addressed by existing provisions in the Guidelines, such as the adjustment in § 3B1.3, and if so, whether in lieu of the proposed amendment, the Commission should instead amend § 2B1.1 only to provide an application note that provides that, for such defendants, an adjustment under § 3B1.3 ordinarily would apply.

The NYCDL recommends against any change to the existing Guidelines because the current Guidelines take into account the possible increase in offense level for an abuse of trust. While Congress has increased the statutory maximum term of imprisonment to ten years for individuals with special skills and in positions of trust (e.g., doctors, lawyers, etc.) who commit fraud in connection with certain federal benefits programs, there is no need to automatically increase the offense level calculated by § 2B1.1. Rather, the discretion to apply such an enhancement should remain with the sentencing court as it does in any other case involving an abuse of a position of trust. In other words, the sentencing judge should continue to simply consider the application of § 3B1.3. Following this approach insures that § 3B1.1 is applied uniformly in all appropriate cases.

As written, § 3B1.3 provides for a two-level increase of the offense level "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." Sentencing courts have routinely considered the application of this guideline in cases involving health care professionals and, in appropriate circumstances, applied it to the court's Guidelines calculation.[35] Removing

[35] *See, e.g.*, United States v. Vigil, 998 F. Supp. 2d 1121, 1154 (D.N.M. 2014) (upholding application of a two-level enhancement based upon a position of trust for a nurse practitioner convicted of using her

this discretion from the sentencing court is unnecessary and likely will result in increased departures in situations where a court does not find the enhancement warranted.

Thus, in lieu of the proposed amendment, the NYCDL supports the proposed alternative amendment of § 2B1.1 to add an application note concerning the suitability of an adjustment under § 3B1.3 for a defendant subject to the ten years' statutory maximum in cases involving the three statutes. However, the NYCDL does not support the use of the phrase "ordinarily will apply" but, rather, suggests the use of the words "may apply" or "may be considered." Although certain conduct under the new amendments to the Budget Act likely will support a finding of abuse of trust, not all such conduct will. For example, it is easy to conceive of a situation in which a low level defendant charged with conspiracy, a provision added by the Act, did not violate a position of trust while his co-conspirators did. The use of the phrase "ordinarily will apply" suggests a presumption that may not be supported by the facts and will present confusion over the ability or standard necessary for defendants to overcome that presumption. Moreover, such a presumption appears to go beyond the requirements of section § 3B1.3 itself.

If the Commission is inclined to adopt the proposed amendment, however, it should limit the increase to two levels to avoid disparities in sentencing whereby a defendant with special skills (e.g., an accountant) who is convicted of fraud receives a two-level increase while a doctor who violates one of the named federal benefits program statutes receives a four-level increase,

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prescription writing authority to distribute oxycodone, a controlled substance, outside of the legitimate practice of medicine); United States v. Sutherland, Case No. 1:00CR00052, 2001 U.S. Dist. LEXIS 19310, *15 (W.D. Va. Nov. 27, 2001) (holding that defendant's "training as a doctor constitutes a special skill used in the commission of this offense and he should thus be subject to the two-level enhancement").

and it should specify in the new application note that when this paragraph applies, § 3B1.3 is not to be applied.

The Commission also seeks comment as to whether, for cases in which a defendant who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment is convicted under a general fraud statute (e.g., 18 U.S.C. § 1341) for an offense involving conduct described in the three statutes amended by the Act, the Commission should instead amend § 2B1.1 to provide a general specific offense characteristic for such cases. The NYCDL recommends against amending § 2B1.1 to provide a general specific offense characteristic for cases involving defendants who are convicted under a general fraud statute for offenses involving conduct described in 42 U.S.C. §§ 408(a), 1011(a), or 1383a(a), for the same reasons provided above. The current Guidelines provide the sentencing court with a vehicle for increasing the applicable offense level under circumstances involving an abuse of a position of trust by way of § 3B1.3, and that formula should be maintained.

V. PROPOSED AMENDMENT REGARDING ACCEPTANCE OF RESPONSIBILITY

The Commission proposes amending the Commentary to § 3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant's challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of § 3E1.1. The proposed amendment would remove the statement in § 3E.1(a) that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility," and would replace it with a statement that "a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under [§ 3E1.1(a)]." The Commission has

requested comment on what additional guidance, if any, should be provided on what constitutes "a non-frivolous challenge to relevant conduct," and in particular whether such non-frivolous challenges should include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative of the applicable Guideline range. The Commission also has asked whether to broaden the proposed provision to include other sentencing considerations, such as departures or variances. Finally, the Commission has asked whether it should alternatively remove from § 3E1.1 all references to relevant conduct for which the defendant is accountable under § 1B1.3, and reference only the elements of the offense of conviction.

The NYCDL understands that the Federal Defenders will be submitting comments in support of the Commission's alternative proposal of removing of all references to relevant conduct under § 3E1.1, and that the Federal Defenders will further propose: (i) that the Commentary to §3E1.1 be amended to clarify that challenges to relevant conduct are categorically not inconsistent with a defendant's acceptance of responsibility; and (ii) that the Commission's proposed reference to "non-frivolous challenges," absent further guidance, could invite courts to conclude that challenges to relevant conduct are "frivolous" simply by virtue of being unsuccessful. The NYCDL supports the Federal Defenders' proposal, which would most effectively ameliorate the current Commentary's chilling effect on legitimate challenges to relevant conduct asserted in presentence reports.

In the alternative, should the Commission choose not to remove all references to relevant conduct, the NYCDL believes that the Commission should provide additional guidance on what constitutes "a non-frivolous challenge to relevant conduct." If such a proposal is adopted, the NYCDL would encourage the Commission to include all challenges to relevant conduct, whether

or not the issues challenged are determinative of the applicable Guideline range. Finally, the NYCDL believes that the Commission's proposal, if adopted, should be broadened to include other sentencing considerations raised by defendants, including departures and variances.

In determining whether a challenge to relevant conduct is frivolous, courts have generally distinguished between legal challenges and factual challenges. Courts have held that "[n]on-frivolous challenges to a legal conclusion drawn from facts the defendant admits—for example, arguments about whether certain conduct fits within the meaning of a Guidelines provision—are protected and cannot serve as the basis for denying credit for acceptance of responsibility."[36] On the other hand, courts have held that a defendant who contests relevant conduct can be denied credit for acceptance of responsibility if the court finds those arguments "frivolous", even if the arguments are made by the defendant's lawyer rather than the defendant himself.[37] This tension in the courts' analysis of challenges to relevant conduct has placed a chill on defendants' ability to contest important sentencing issues, such as the amount of loss to the victim in a fraud case or the weight of narcotics attributable to the defendant in a drug case. Clarification from the Commission, therefore, is necessary.

The NYCDL suggests that the Commission include a definition of "frivolous" in the Application Notes in the event that it adopts a reference to "non-frivolous conduct" in the Commentary to § 3E1.1. Courts seeking to define the term "frivolous" have relied upon its plain

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[36] United States v. Edwards, 635 Fed.Appx. 186, 192 (6th Cir. 2015) (citing United States v. Cook, 607 Fed.Appx. 497, 500–01 (6th Cir. 2015); United States v. Morrison, 10 Fed.Appx. 275, 285 (6th Cir. 2001).

[37] United States v. Purchess, 107 F.3d 1261, 1266–67 (7th Cir.1997); *see also* United States v.Gonzalez–Coca, 262 Fed.Appx. 939, 942 (11th Cir. 2008) (per curiam) ("It is not clear error to conclude that Appellant failed to clearly demonstrate an acceptance of responsibility for his offense when he stood silent while his counsel frivolously contested facts constituting relevant conduct. . . .").

meaning as set forth in the dictionary: *Black's Law Dictionary* defines "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful."[38] *Webster's* defines "frivolous" as "of little weight or importance," and "having no basis in law or in fact."[39] The inclusion of such a definition would serve to deter sentencing courts from denying acceptance of responsibility points based solely on the fact that the court *disagrees* with the defendant's factual challenge to relevant conduct.[40] As one court has held in reversing a sentencing court's denial of acceptance of responsibility, "merely pointing out that the evidence does not support a particular upward adjustment or other sentencing calculation, does not strike us as a legitimate ground for ruling that a defendant has not accepted responsibility."[41] Likewise, courts have held that it is "not frivolous" for a defendant to "raise an objection designed to ensure that the Government properly met its burden of proof concerning a factual determination with which she had not been indicted."[42]

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[38] United States v. Santos, 537 Fed.Appx. 369 (5th Cir. 2013) (quoting Black's Law Dictionary 739 (9th ed. 2009), citing Neitzke v. Williams, 490 U.S. 319, 327 (1989) (holding that a complaint is legally frivolous if it is based on an "indisputably meritless legal theory"); Biliski v. Harborth, 55 F.3d 160, 162 (5th Cir. 1995) (citations omitted) ("A complaint is frivolous if it lacks an arguable basis in law or fact.").

[39] United States v. Schneider, 395 F.3d 78, 86 (2d Cir.), cert. denied, Schneider v. United States, 544 U.S. 1062 (2005) (quoting *Webster's Third New International Dictionary* 913 (3d ed.1993)).

[40] *See, e.g.*, United States v. Lister, 432 F.3d 754 (7th Cir. 2005) (lawyer's factual challenges to pre-sentence report found to be frivolous; acceptance of responsibility denied); United States v. Gonzalez-Coca, 262 Fed.Appx.939 (11th Cir. 2008) (affirming denial of acceptance of responsibility when defendant "stood silent while his counsel frivolously contested facts constituting relevant conduct"); *see also* United States v. Frias, 641 Fed.Appx. 574 (7th Cir. 2016) (factual challenges to amount of drugs at issue made both by lawyer and defendant support finding of no acceptance of responsibility).

[41] United States v. Nguyen, 190 F.3d 656, 659 (5th Cir. 1999), recognized as abrogated on other grounds by United States v. Dunigan, 555 F.3d 501 (5th Cir.2009).

[42] United States v. Santos, 537 Fed. Appx. 369, 375 (5th Cir. 2013).

The NYCDL believes that the clarification and guidance proposed by the Commission would assist sentencing courts in determining whether or not a defendant has accepted responsibility despite challenging relevant conduct or seeking a departure or variance from the applicable guidelines, even if the court disagrees and denies those challenges and applications. It is crucial that defendants be able to make legitimate arguments on these issues without risking the loss of credit for acceptance of responsibility. By including the guidance on what constitutes a "frivolous" challenge, the Commission will assist sentencing courts in reaching reasonable conclusions that will not unfairly penalize defendants for making good faith challenges to the government's proof of relevant conduct.

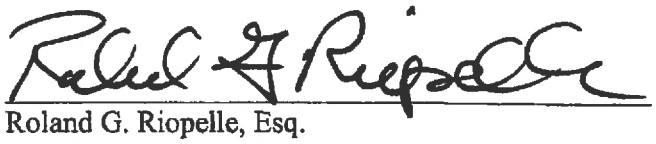
CONCLUSION

The NYCDL once again wants to thank the Commission for offering us the opportunity to comment on the proposed amendments. We look forward to continuing dialogue with the Commission as it continues in its efforts to modify the Guidelines as more experience dictates change.

New York, New York
February 16, 2017

Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

By: 

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