BAC 2210-40

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information portion of this notice.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than **February 20, 2017**. Written reply comments, which may only respond to issues raised in the original comment period, should be received by the Commission on **March 10, 2017.** Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment period, may not be considered.

(2) Public Hearing.—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@ussc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and

invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The proposed amendments and issues for comment in this notice are as follows:

(1) a multi-part proposed amendment to Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence), including (A) setting forth options for a new Chapter Four guideline, at §4C1.1 (First Offenders), and amending §5C1.1 (Imposition of a Term of Imprisonment) to provide lower guideline ranges for "first offenders" generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table, and related issues for comment; and (B) revisions to Chapter Five to (i) amend the Sentencing Table in Chapter Five, Part A to expand Zone B by consolidating Zones B and C, (ii) amend the Commentary to §5F1.2 (Home Detention) to revise language requiring electronic monitoring, and (iii) related issues for comment.

(2) a multi-part proposed amendment relating to the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, including (A) amending the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider in determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, and related issues for comment; and (B) amending the Commentary to §1B1.1 (Application Instructions) to provide a definition of "court protection order," and related

issues for comment;

(3) a proposed amendment to §4A1.2 (Definitions and Instructions for Computing Criminal History) to revise how juvenile sentences are considered for purposes of calculating criminal history points, and to the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for cases in which a defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as "adults;" and related issues for comment;

(4) a multi-part proposed amendment to Chapter Four, Part A (Criminal History), including (A) amending §4A1.2 (Definitions and Instructions for Computing Criminal History) to revise how revocations of probation, parole, supervised release, special parole, or mandatory release are considered for purposes of calculating criminal history points, and related issues for comment; and (B) amending the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for cases in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score, and a related issue for comment;

(5) a multi-part proposed amendment to respond to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), including (A) revisions to Appendix A (Statutory Index), and a related issue for comment; and (B) amending §2B1.1 (Theft, Property Destruction, and Fraud) to address new increased penalties for certain persons who commit fraud offenses under certain

Social Security programs, and related issues for comment;

(6) a proposed amendment to the Commentary to §3E1.1 (Acceptance of Responsibility) to revise how the defendant's challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline, and a related issue for comment;

(7) a multi-part proposed amendment to the Guidelines Manual to respond to recently enacted legislation and miscellaneous guideline issues, including (A) amending §2B5.3 (Criminal Infringement of Copyright or Trademark) to respond to changes made by the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016); (B) amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index) to respond to changes made by the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016); (C) revisions to Appendix A (Statutory Index) to respond to a new offense established by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016); and (D) a technical amendment to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor);

(8) a proposed amendment to make technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term "marihuana equivalency" used in the

Drug Equivalency Tables when determining penalties for controlled substances;

(9) a proposed amendment to make various technical changes to the Guidelines Manual, including (A) an explanatory note in Chapter One, Part A, Subpart 1(4)(b)(Departures) and clarifying changes to the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud); (B) technical changes to §4A1.2 (Definitions and Instructions for Computing Criminal History) and to the Commentary of other guidelines to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); and (C) clerical changes to §2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5D1.3 (Conditions of Supervised Release), Appendix A (Statutory Index), and to the Commentary of other guidelines;

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. § 994(p).

Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.3, 4.4.

Patti B. Saris,

Chair

INDEX TO PUBLIC COMMENT ON PROPOSED AMENDMENTS

February 20, 2017

PROPOSED AMENDMENT NO. 1—FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

PROPOSED AMENDMENT NO. 2—TRIBAL ISSUES

PROPOSED AMENDMENT NO. 3—YOUTHFUL OFFENDERS

PROPOSED AMENDMENT NO. 4—CRIMINAL HISTORY ISSUES

PROPOSED AMENDMENT NO. 5—BIPARTISAN BUDGET ACT

PROPOSED AMENDMENT NO. 6—ACCEPTANCE OF RESPONSIBILITY

PROPOSED AMENDMENT NO. 7—MISCELLANEOUS

PROPOSED AMENDMENT NO. 8—MARIHUANA EQUIVALENCY

PROPOSED AMENDMENT NO. 9—TECHNICAL

OIG Office of the Inspector General
SOCIAL SECURITY ADMINISTRATION

February 21, 2017

The Honorable William H. Pryor, Jr., Acting Chair
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: SSA OIG Comments on the Proposed Amendments to the Federal Sentencing Guidelines Related to Social Security Fraud

Dear Judge Pryor:

On behalf of the Social Security Administration (SSA) Office of the Inspector General (OIG), we submit the following views, comments, and suggestions regarding the Bipartisan Budget Act of 2015 (BBA)[1] proposed amendments to the Federal sentencing guidelines and issues for comment, as it relates to Social Security fraud, published in the Federal Register on December 19, 2016.[2]

We thank the Commission for considering our prior comments, dated March 11, 2016, to the initial proposal to amend the guidelines, published in the Federal Register on January 15, 2016.[3] We stand by our prior comments, which we are attaching, and respectfully request incorporation by reference.[4]

We appreciate the opportunity to provide the following additional comments for your consideration. In brief, SSA OIG:

- Continues to support amending Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to both § 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) and §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)), particularly if the guidelines are amended to address those individuals in a position of trust that defraud SSA (discussed below).

- Supports the Commission's alternate proposal to create a general specific offense characteristic[5] within § 2B1.1 with an enhancement of 4 levels and a minimum offense level of 14[6] for cases in

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[1] Bipartisan Budget Act of 2015, Pub. L. No. 114–74, § 813(a)-(b), 129 Stat. 584, 602-603 (Nov. 2, 2015).

[2] U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 92003 (Dec. 19, 2016).

[3] U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 2295 (Jan. 15, 2016).

[4] We note the Chairmen of the House Ways and Means and Judiciary Committees, and the Senate Committee on Finance, and the Department of Justice, also submitted comments in support of amending the guidelines to reflect the new and stronger penalties for Social Security fraud included in the BBA.

which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person "who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination" In addition, if the enhancement under § 2B1.1 applies, we suggest that an adjustment under § 3B1.3 need not apply.

The existing guidelines at § 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) are inadequate to address cases of Social Security fraud facilitated by persons in a position of trust. Following are our views to support this opinion.

Program Integrity Harmed. SSA OIG is charged with detecting and preventing fraud, waste and abuse in Social Security programs and operations. As stewards of the Social Security disability programs, maintaining integrity of these programs is a priority. When individuals in a position of trust undermine the Social Security disability programs, faith in the SSA and the government erodes. As detailed in our March 11, 2016 letter, SSA OIG has been involved in several large-scale Social Security fraud cases facilitated by persons in a position of trust, as defined in the BBA.[7] When Congress asked how we could better address and combat this type of fraud, SSA OIG submitted a legislative proposal to amend the three fraud statutes - 42 U.S.C. §§ 408, 1011, and 1383a - to double the maximum prison term for persons in a position of trust who defraud SSA from five years to 10 years. SSA agrees that these fraud cases are a priority and supports increased penalties for persons in a position of trust that defraud SSA. With bipartisan support, Congress subsequently included our proposal in the BBA aiming to restore and maintain confidence in the future of this system for hard-working and honest Americans who play by the rules. With our increased focus on identifying fraud by persons in positions of trust, SSA OIG's

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[5] We agree that there may be 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). It is respectfully submitted that even in these situations, the reality is that in Appendix A those general fraud statutes are also referenced to § 2B1.1 and as such, we confront the same problems set forth below.

[6] While some may argue that the wide range of potential offenders covered by the new statute, including translators, could make an offense level floor over-inclusive, the BBA does not make distinctions between the types of persons in a position of trust that defraud SSA. In addition, regardless of the type of person in a position of trust involved in the fraud scheme, whether a translator or physician, the level of harm that can be inflicted upon SSA is no different. In support, we reference our investigation in Seattle, Washington of translators for former refugees, which led to 40 prosecutions, more than $4 million in overpayments assessed, and an estimated $11 million in projected savings to SSA.

[7] Section 813(b) of the BBA defines a person in a position of trust as: "a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination...."

investigations inventory includes approximately 55 cases that would likely meet the BBA's increased penalties.[8]

Loss Greater Than One Individual Criminal Case. The enhancements under § 2B1.1 are inadequate because the magnitude of the loss suffered in these cases goes far beyond the individual criminal case. This is mainly because the victims in these cases are SSA and deserving beneficiaries, which is very different from other basic forms of individual fraud, and the fraud schemes can go undetected for years, with the result that hundreds of individuals may fraudulently receive Social Security benefits. This causes a strain on Social Security's trust funds and the Treasury's general funds. The loss calculations under § 2B1.1(b)(1) simply do not reflect the actual loss suffered by SSA. When investigating these cases, SSA OIG frequently relies on a confidential source with a recording device to prove that the person in a position of trust is defrauding SSA beyond a reasonable doubt. Thus, the loss in that criminal case only pertains to the loss incurred by SSA due to the person in a position of trust submitting false evidence on behalf of that one individual confidential source claimant. However, as explained in our March 11, 2016 letter, persons in positions of trust often work with hundreds, if not thousands, of claimants throughout the course of their fraud scheme; the loss in that individual confidential source's case does not account for all the loss associated with other claimants involved in the fraud scheme. The loss calculations also do not account for the costs associated with SSA's responsibility to conduct continuing disability reviews and administrative redeterminations to identify and assess benefit overpayments for each case associated with that person in a position of trust.[9] These reviews are complex and time-consuming and can be followed by appeals.

BBA Definition of Person in "Position of Public Trust" Broader than § 3B1.3. SSA fraud involving persons in positions of trust go well beyond the offense and offenders covered under § 3B1.3 in both severity of penalty and scope of activity. The § 3B1.3 adjustment is not broad enough to capture all categories of individuals in a position of trust included in the BBA. For instance, § 3B1.3 refers to the use of a "special skill" and provides the following examples: pilots, lawyers, doctors, accountants, chemists and demolition experts. However, the BBA is broader and defines an individual in a position of trust as someone who: "receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination...." Additionally, the simple fact of receiving a fee is not noted anywhere in § 3B1.3, nor is the fact of submitting medical or other evidence in connection with a determination under the relevant program.

Enhanced Penalties in Sentencing Guidelines Necessary to Implement BBA. Although the Federal sentencing guidelines are advisory, the reality is that judges typically give deference to them without following the maximum penalties established by Congress. Therefore, if the guidelines are not amended to increase penalties against persons in a position of trust that defraud SSA, judges will not impose

[8] These cases are time-consuming and complex – often involving reviews of voluminous SSA records, surveillances, and undercover operations. However, there is a great need to prioritize these fraud investigations given the serious impact they have on SSA, Social Security trust funds, Treasury's general funds, and deserving beneficiaries.

[9] For example, in connection with to the fraud scheme uncovered in Puerto Rico, discussed in our attached March 11, 2016 letter, SSA conducted about 7,000 disability reviews of cases containing tainted evidence from persons in a position of trust.

greater criminal penalties, and there will be no practical effect to the BBA. While we recognize that the sentencing guidelines are often complex, Congress has evaluated the great impact of these SSA fraud cases, given our recent criminal investigations in Puerto Rico and New York,[10] and enacted legislation to increase penalties against these criminals.

We thank the Commission for publishing the proposed amendments to the guidelines and issues for comment. We appreciate the opportunity to provide our views, comments, and suggestions, and we look forward to working with you on the proposed amendments to the guidelines. Should you have further questions or requests for information, please contact me, or have your staff contact Ranju R. Shrestha, Attorney, at (410) 966-4440.

Sincerely,

Gale Stallworth Stone

Gale Stallworth Stone
Acting Inspector General

Attachment: March 11, 2016 views letter
cc: Commissioners
Kenneth P. Cohen, Staff Director
Kathleen Grilli, General Counsel

[10] The details of these case examples are included in our attached March 11, 2016 letter.

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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Chair: Marjorie Meyers Phone: 713.718.4600

February 20, 2017

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

Re: Public Comment on Proposed Amendments for 2017

Dear Judge Pryor:

Defenders are grateful for the opportunities we have had to work with the Commission this year. We are also pleased to see a set of proposed amendments that hold the potential to make many improvements to the guidelines by reducing unnecessary and expensive reliance on imprisonment, reducing unwarranted disparity, and simplifying their application. Our specific comments follow.

I. Proposed Amendment #1: First Offenders/Alternatives to Incarceration

Defenders applaud the Commission for exploring ways to amend the guidelines to encourage alternatives for "first offenders" and expand the Sentencing Table to provide more sentencing options. The Commission has proposed a definition of "first offender" that only includes individuals with no prior convictions. Individuals who qualify as "first offenders" would receive either a 1- or maybe 2- level decrease in offense level and some would be eligible for a rebuttable presumption of a non-incarceration sentence. The Commission also has proposed a consolidation of Zones B and C of the Sentencing Table. In both areas—the "first offender" provisions and the Zone expansion—the Commission seeks comment on a number of topics, including whether the definition of "first offender" should be expanded, and whether certain offense types or offense levels should be excluded.

We discuss these issues in detail below and offer additional suggestions on how the Commission can do more to encourage alternatives to incarceration that will meet the purposes of sentencing better than imprisonment-only-sentences. Our position is summarized here:

- The Commission should expand the definition of "first offender" to include individuals who have prior convictions that are never counted in computing criminal history points under Chapter Four including misdemeanor and petty offenses listed in §4A1.2(c); foreign convictions, §4A1.2(h); tribal convictions, §4A1.2(i); expunged convictions, §4A1.2(j); certain military convictions, §4A1.2(g). If the Commission adopts the proposal to exclude juvenile adjudications from §4A1.2 and accepts the Defender proposal to exclude any conviction committed before the age of 18, then those offenses also should not preclude "first offender" status. The Commission also should include an invited downward departure for minor offenses that carry a term of imprisonment over one year.

- "First Offenders" with an offense level of 16 or less as determined under Chapters Two and Three should receive a 3-level reduction, and those with offense levels greater than 16 should receive a 2-level reduction. These reductions, which are greater than those proposed by the Commission, will decrease the Zones for more "first offenders." The adjustment should be available to all "first offenders" regardless of their offense level determined under Chapters Two and Three.

- The Commission should include an invited downward departure for nonviolent "first offenders" (e.g., drug trafficking and fraud) who fall within Zones C or D so that the guidelines give the court the option of imposing an alternative sentence.

- The proposed amendment to §5C1.1 (Imposition of a Term of Imprisonment), which creates a rebuttable "presumption" of an alternative sentence should only exclude

individuals whose offense of conviction resulted in serious bodily injury as defined in §1B1.1, comment. (n.1(L)).

- The proposed application note to §5C1.1 (Application of Subsection (g)) need not state that a sentence of imprisonment is necessary for individuals excluded from the rebuttable presumption of probation. The note also should not state that "[t]he court may not impose a sentence of probation pursuant to this provision . . . where a term of imprisonment is required under the guideline."[1] In addition to amending §5C1.1, the Commission should amend §5B1.1 (Imposition of a Term of Probation) to be consistent with §5C1.1's presumption of an alternative sentence language.

- Rather than simply consolidate Zones B and C of the Sentencing Table, Defenders encourage the Commission to also expand Zone B by 2 levels to an 18-24 month range. Such an expansion would increase the number of individuals likely to benefit from Zone B Sentencing Options, while also protecting public safety. In addition, the Commission should not provide a mechanism to exempt certain offenses from the zone changes.

- We request that the Commission continue to include in the commentary to §5C1.1 an invited departure for individuals who suffer from a substance abuse disorder or mental illness.

- The Commission also should delete §5C1.1, comment. (n.7) (proposed note 5), which discourages the use of substitutes for imprisonment for those in criminal history category III or above even if the individual falls within Zone B.

- Defenders have no objection to the amendment to §5F1.2 regarding Home Detention.

A. Alternatives to Incarceration Are an Important Mechanism to Promote Public Safety and Meet the Purposes of Sentencing

The Commission's effort to increase the use of alternatives to incarceration promotes public safety, serves more purposes of sentencing than imprisonment, and is consistent with many of the Commission's statutory obligations to formulate guidelines, including the need for the guidelines to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[2] Eight years ago, the Commission issued a report that states:

[1] The prohibition on a sentence of probation when "a term of imprisonment is required under §5C1.1" also should be removed from the background commentary to §5B1.

[2] 28 U.S.C. § 994(b)(1)(C).

> Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.[3]

Recently, former Acting Attorney General Sally Yates acknowledged that "current incarceration levels are simply not fiscally sustainable" and that "diverting so much of our public resources to incarceration is undermining, not enhancing, public safety."[4] The most effective way to promote public safety is to ensure that convicted persons "return to society more prepared—not less—to lead law-abiding lives."[5] The best way to accomplish that goal for many individuals is through a non-incarceration sentence, particularly since "[r]esearch suggest that incarceration does little to change a person's behavior" and persons sentenced to prison have higher recidivism rates than those sentenced to community corrections.[6] Alternatives to incarceration are far more likely than prison to meet a person's rehabilitative needs and strengthen the communities in which they reside. A recent report from the Harvard Kennedy School and the National Institute of Justice notes how a conviction, combined with a prison sentence, has devastating collateral consequences.[7] Such consequences include the loss of employment prospects, an increased likelihood of health problems, increased poverty rates and behavioral problems for children of incarcerated parents, and increased racial disparities.[8]

Guidelines that encourage the use of alternatives to incarceration help the Commission fulfill its statutory obligation to formulate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prison." 28 U.S.C. § 994(g). BOP continues to

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[3] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 2-3 (2009).

[4] U.S. Dep't of Justice, *Deputy Attorney General Sally Q. Yates Delivers Remarks at Harvard Law School on Sentencing and Prison Reform, Cambridge, MA, United States* (Jan. 9, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-harvard-law-school-sentencing-and.

[5] *Id*.

[6] Nat'l Inst. of Corrs., *Myths & Facts - Why Incarceration Is Not the Best way to Keep Communities Safe* 1, 4 (2016), https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf.

[7] Wendy Still et al., *Building Trust and Legitimacy Within Community Corrections*, Harvard Kennedy School and Nat'l Inst. of Just. 13-18 (2016), https://www.hks.harvard.edu/content/download/82224/1844712/version/2/file/building_trust_and_legitimacy_within_community_corrections_rev_final_20161208.pdf.

[8] *Id*.

face challenges with inmate crowding[9] and the yearly cost of imprisonment ($31,976) is 7.8 times higher than the cost of post-conviction supervision ($4.097).[10] These high costs of imprisonment continue to consume resources that could be used for more effective programs aimed at promoting public safety. Because "crowding has a negative impact on the ability of the BOP to promptly provide inmate treatment and training programs that promote effective reentry and reduce recidivism,"[11] the better option is to maximize the use of alternatives to incarceration for "first offenders" and others convicted of crimes for which Congress has authorized probationary or split sentences.

Guidelines that encourage greater use of alternatives to incarceration also are consistent with the Commission's statutory mandate to construct guidelines aimed at meeting all the purposes of sentencing,[12] including meeting the rehabilitative needs of the defendant through means other than a sentence of imprisonment[13] and that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[14]

For several years, U.S. Probation has "expanded its training programs pertaining to evidence-based supervision practices."[15] In addition to using actuarial risk assessment instruments to help determine appropriate levels of supervision and assess a person's rehabilitative needs, many probation offices are now using STARR (Staff Training Aimed at Reducing Re-Arrest) skills. "STARR skills include specific strategies for active listening; role clarification; effective use of authority, disapproval, reinforcement, and punishment; problem solving; and teaching, applying, and reviewing the cognitive model."[16] A study published in December 2015 shows that

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[9] U.S. Dep't of Justice, *FY 2017 Performance Budget: Congressional Submission Federal Prison System Buildings and Facilities* 1 (2016), https://www.justice.gov/jmd/file/821371/download. In FY 2016, BOP did not meet its goal of reducing the percentage of system-wide overcrowding. U.S. Dep't of Justice, *FY 2016 Agency Financial Report* I-14, III-12 (2016) ("As of September 30, 2016, BOP's institutions remained 16 percent over rated capacity, and high security institutions were 31 percent over rated capacity").

[10] This information is from the Administrative Office of the U.S. Courts, as of June 24, 2016.

[11] *FY 2017 Performance Budget*, *supra* note 9.

[12] 28 U.S.C. § 994(a)(2).

[13] 28 U.S.C. § 994(k).

[14] 28 U.S.C. § 991(b)(C).

[15] Matthew Rowland, Chief, Prob. and Pretrial Services Office, Admin. Office of the U.S. Courts, *Introduction* to Laura Baber, *Inroads to Reducing Federal Recidivism*, 79 Fed. Prob. J. 3, 3 (Dec. 2015).

[16] Probation and Pretrial Services-Annual Report 2015, http://www.uscourts.gov/statistics-reports/probation-and-pretrial-services-annual-report-2015.

"[m]easurable decreases in federal recidivism coincide with concerted efforts to bring to life state-of-the-art evidence-based supervision practices into the federal system, including the development and wide-scale implementation of a dynamic risk assessment instrument, emphasis on targeting person-specific criminogenic needs and barriers to success, and training on core correctional practices."[17] As the report states: "despite the increase in risk of the federal post-conviction supervision population and several years of austere budgets, probation officers are improving their abilities to manage risk and provide rehabilitative interventions."[18]

B. Definition of First Offender

A critical issue in this proposed amendment is the definition of "first offender." The Commission requests comment on whether it should "broaden the scope of the term 'first offender'" beyond "defendants with no prior convictions of any kind." Defenders strongly urge the Commission to broaden the definition to include individuals with prior convictions that are excluded from counting for criminal history purposes under §4A1.2. Specifically, individuals should not be excluded from "first offender" status on the basis of convictions for misdemeanor and petty offenses listed in §4A1.2(c), military sentences imposed by a summary court-martial or Article 15 proceeding (§4A1.2(g)), foreign convictions (§4A1.2(h)), tribal convictions (§4A1.2(j)), or expunged convictions (§4A1.2(i)). And for the same reasons discussed in the comments on "youthful offenders," offenses committed before age 18, or at least juvenile adjudications, should be excluded.

The exclusion of minor offenses under §4A1.2(c), is supported by available data on recidivism rates. Although the Commission's recent data analysis did not compare the recidivism rates for individuals with no prior convictions to those with prior convictions for offenses listed in 4A1.2(c), a 2004 report of the Commission showed that individuals who had convictions under 4A1.2(c) only had a reconviction recidivism rate of 2.9%, which was substantially similar to the 2.5% rate for individuals with no prior convictions.[19] In short, the available evidence shows that public safety is not undermined by including in the definition of "first offender" individuals with these types of prior convictions.

Depriving individuals with minor misdemeanors from the benefits of "first offender" status would exacerbate racial disparity. Professor Alexandra Natapoff at Loyola Law School has identified the numerous "systemic implications" of misdemeanor prosecutions, including how

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[17] Laura Baber, Chief, Nat'l Program Dev. Div., Prob. and Pretrial Services, Admin. Office of the U.S. Courts, *Inroads to Reducing Federal Recidivism*, 79 Fed. Probation J. 3, 3 (Dec. 2015).

[18] *Id*. at 8.

[19] USSC, *Recidivism and the "First Offender": A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* 14, n.27 & 28 (2004).

"misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal justice system, i.e., 'criminalized,' with little or no regard for their actual guilt."[20] The history of misdemeanor prosecutions shows that they have been "social and economic governance tools" used predominantly in urban areas to "manage various disadvantaged populations."[21] Many minor offenses have significant impact on people of color and the poor. "Police use loitering, trespassing, and disorderly conduct arrests to establish their authority over young black men, particularly in high crime areas, and to confer criminal records on low-income populations of color."[22] The over-policing of poor neighborhoods of color caused by the use of "zero-tolerance" policies often results in disproportionate convictions for loitering, trespassing, and disorderly conduct.[23] In addition, driving on a suspended license, which constitutes a sizable portion of local misdemeanor dockets, is an offense that has a disproportionate impact on the poor. Such offenses criminalize poverty because suspensions often occur when a low-income person cannot afford to pay the fine for a simple traffic violation. [24]

Excluding from "first offender" status individuals with minor convictions also raises significant due process concerns. Many individuals charged with misdemeanor offenses have a greater incentive to plead guilty so they can get out of jail and often do so without defense counsel or with counsel that only have minutes to handle a case.[25] Consequently, the frequency of wrongful convictions for such offenses is troubling.[26]

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[20] Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1313 (2012).

[21] Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, Oxford Handbooks Online 3 (2016).

[22] *Id*. at 5.

[23] *See generally* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Leg. Ethics 285, 286 (2014).

[24] Natapoff, *Criminal Misdemeanor Theory and Practice*, *supra* note 21, at 4.

[25] *See generally* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL Fordham Urb. L. J. 101, 147 (2013) (discussing how "a young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind, whether he commits any criminal acts or not"); Natapoff, *Misdemeanors*, *supra* note 20, at 1348 ("bulk urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction"); Robert Boruchowitz, et al., Nat'l Assoc. of Crim. Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009); Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, Slate, Apr. 17, 2012 (discussing major consequences of misdemeanors), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Courts*, 34 Cardozo L. Rev.1751, 1754, 1803-1810 (2013) (discussing incentives for persons charged with misdemeanors to plead guilty so that they can return to their families and jobs rather

In addition to including within the definition of "first offender" individuals with minor convictions listed in §4A1.2(c), Defenders also encourage the Commission to include an invited downward departure for persons who would qualify for "first offender" status but for a conviction in a jurisdiction where minor offenses carry a prison term of over 1 year. As the Commission acknowledged when it promulgated amendment 798 to the career offender guideline, which included an invited downward departure for persons with misdemeanor offenses, "[s]uch statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont."[27] These individuals should not be treated more harshly because of the arbitrariness of state criminal codes.

Defenders also encourage the Commission to include within the definition of "first offender," individuals with foreign, tribal, expunged, and certain military convictions that are not counted in the criminal history score,[28] as well as offenses committed before age 18, or at least juvenile adjudications. As the Commission is aware, the lack of due process associated with tribal and foreign convictions, and sentences resulting from summary court-martial or Article 15 proceedings raise serious questions about the legitimacy of the conviction. And foreign convictions can criminalize conduct that domestic law permits. It also would be anomalous, and more complicated, for the guidelines to not count certain convictions for calculating criminal history, but to consider them in determining whether a person qualifies as a "first offender."

C. Offense Level Decrease for First Offenders

Of the Commission's proposed options on the offense level reduction for "first offenders," Option 2 (a 2-level decrease if the offense level is less than 16 and a 1-level decrease if the offense level is 16 or greater) is plainly more beneficial than Option 1 (a 1-level decrease no matter the offense level).[29] Defenders believe, however, that the Commission can go one step farther by providing for a 3-level reduction in offense level for people with a final offense level of 16 or less and a 2-level reduction for individuals with a final offense level greater than 16. If the purpose of the amendment is for the guidelines to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender

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than remain in jail pending a trial and elevated risk of noncitizens pleading guilty to misdemeanor offenses).

[26] *See* Natapoff, *Misdemeanors*, *supra* note 20, at 135-38, 143; *Cade*, *supra* note 25, at 1793 n.251 (discussing how pretrial detention leads to more wrongful convictions).

[27] USSG App. C, Amend. 798 (2015).

[28] §4A1.2(g)-(j).

[29] Option 1 proposes a 1-level decrease in offense level. Option 2 proposes a 2-level decrease if the offense level determined under Chapters Two and Three is less than level 16 and a 1-level decrease if the offense level is 16 or greater.

who has not been convicted of a crime of violence or an otherwise serious offense,"[30] then that purpose would be better served if more people moved from Zone B into Zone A, and from Zone D into Zone C. For example, a 3-level decrease would permit a person with an offense level of 13 under Chapters 2 and 3, to move from Zone B into Zone A and have the option of a probationary sentence. Similarly, a 3-level decrease would permit a person with an offense level of 16 to move from Zone D into current Zone C or proposed Zone B. Compared to Option 2 of the Commission's proposed amendment, which would only decrease the Zones for 24.3% of "first offenders" in its FY 2014 sample,[31] Defenders' proposal would decrease the Zone for 27.5% percent of "first offenders."

The Commission requests comment on whether it should "limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels" and if it should identify other "limitations or requirements." Defenders encourage the Commission to make the decrease in offense level available to all "first offenders" regardless of their offense level determined under Chapters Two and Three.

Making the adjustment available no matter the offense level would treat "first offenders" more fairly. The Commission's data analysis shows that a vast majority of "first offenders" fell within Zone D and have offense levels of 16 or greater. And a sizable number – 46.3 percent – of "first offenders" with final offense levels of 16 or higher were convicted of drug trafficking.[32] These are precisely the people who should receive lesser sentences. As the Honorable Patti Saris, former Chair of the Commission, wrote:

> [M]ass incarceration of drug offenders has had a particularly severe impact on some communities in the past thirty years. Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing. In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

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[30] 28 U.S.C. § 994(j).

[31] USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 12 (2016).

[32] *Id*. at Slide 15.

The Honorable Patti Saris, *A Generational Shift for Federal Drug Sentences*, 52 American L. Rev. 1, 10-11 (2015).

While the Commission lowered the offense levels for many drug cases, it did not do so for all of them, and it has taken no steps to acknowledge the different levels of culpability and lower risk of recidivism for "first offenders." For the Commission to exclude such persons from the benefit of a reduction in offense level would serve no purpose of sentencing. First, offense level is not correlated with recidivism, so no justification exists for imposing longer sentences on "first offenders" with higher offense levels.[33] Second, the notion that higher offense levels serve as a general deterrent[34] has long been debunked.[35] Third, a lengthier term of imprisonment is not necessary to promote just punishment. The Supreme Court acknowledged in *Gall* that the standard conditions of probation by themselves substantially restrict a person's liberty.[36] Fourth, as previously discussed, longer terms of imprisonment do not promote rehabilitation.

If the Commission wants to make an evidence-based decision, it should lower sentences for "first offenders" so that they do not spend much time in prison learning "more effective crime strategies from each other" and getting desensitized "to the threat of future imprisonment."[37]

D. Presumption of Non-incarceration Sentence for "First Offenders"

The proposed amendment to §5C1.1, which adds a presumption of a non-incarceration sentence for certain "first offenders," is a welcome change to the guidelines that hopefully will encourage courts to impose probationary sentences for "first offenders" falling within Zones A and B of the Sentencing Table. Defenders, however, believe that the proposed exclusions – [instant offense of conviction is a crime of violence] or [defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense] – sweep too broadly. Defenders encourage the Commission to only exempt from the presumption of a non-incarceration sentence a defendant whose instant offense of conviction resulted in serious bodily

[33] USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* ("*Recidivism Report*") 20 (2016).

[34] The Commission's recidivism report notes that the "offense levels in the federal sentence guidelines were intended to reflect multiple purposes of punishment, including just punishment and general deterrence." *Id.* at 20.

[35] Nat'l Inst. of Justice, *Five Things About Deterrence* 1 (2016) ("The certainty of being caught is a vastly more powerful deterrent than the punishment"; "Sending an individual convicted of crime to prison isn't a very effective way to deter crime"; "Increasing the severity of punishment does little to deter crime."), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.

[36] *Gall v. United States*, 552 U.S. 38, 48-49 (2007).

[37] *Five Things About Deterrence*, *supra* note 35, at 1.

injury. While the Sentencing Reform Act directs that a "first offender who has not been convicted of a crime of violence or an otherwise serious offense," should receive a sentence other than imprisonment, it only singled out "a person convicted of a crime of violence that results in serious bodily injury" for a prison sentence.[38] Accordingly, nothing in the statute precludes the Commission from encouraging non-incarceration sentences for "first offenders" not "convicted of a crime of violence that results in serious bodily injury."

We are particularly concerned about the proposal to exclude individuals who "possessed a firearm or other dangerous weapon in connection with the offense." As the Commission is aware, a circuit split exists on whether an enhancement under §2D1.1(b)(1) ("if a dangerous weapon (including a firearm) was possessed, increase by 2 levels") precludes safety valve relief under §5C1.2(a)(2) ("the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense").[39] Courts are also split on whether constructive possession disqualifies a defendant from safety valve relief.[40] If the Commission were to adopt the proposal to exclude individuals who "possess a firearm or other dangerous weapon in connection with the offense," it would exacerbate the already existing circuit split and promote greater disparity. Therefore, if the Commission rejects our proposal to only exclude individuals whose offense of conviction resulted in serious bodily injury, it should only exclude defendants whose instant offense of conviction is a crime of violence as defined in §4B1.2(a).

The Commission requests comment on whether it should exclude other offenses, such as white collar crimes, from the presumption of a non-incarceration sentence. Defenders strongly oppose any such exclusion. First, for the reasons stated previously, sentences of imprisonment often do not serve the purposes of sentencing. Second, sentences of imprisonment severely limit the

[38] 28 U.S.C. § 994(j).

[39] *Compare United States v. Carillo-Ayala*, 713 F.3d 82, 89-91 (11th Cir. 2013) (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief) *with United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

[40] *See, e.g.*, *United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (per curiam); *United States v. Matias*, 465 F.3d 169, 173-74 (5th Cir. 2006); *United States v. Herrera*, 446 F.3d 283, 287 (2d Cir. 2006); *United States v. Gomez*, 431 F.3d 818, 820-22 (D.C. Cir. 2005); *United States v. McLean*, 409 F.3d 492, 501 (1st Cir. 2005); *United States v. Stewart*, 306 F.3d 295, 327 n.19 (6th Cir. 2002); *Sealed Case*, 105 F.3d at 1463-65 (D.C. Cir. 1997). The Tenth Circuit, in contrast, has held that the scope of activity covered by §2D1.1(b)(1) is broader than that covered by §5C1.2, and that constructive possession does not preclude safety valve relief. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1188 (10th Cir. 2004).

defendant's ability to pay restitution, which is often ordered in white collar cases[41] and do not achieve "penal objectives such as deterrence, rehabilitation, or retribution."[42] Third, the notion that all "first offenders" convicted of white-collar offenses should not get the benefit of a presumption of probation is ill-founded.

Our polling of Defenders revealed numerous clients who were "first offenders" who got involved in an economic crime out of desperation and efforts to support themselves or their family. They often stole to survive or were manipulated by others who took advantage of their desperate plight. They are not likely to reoffend, and for many, incarceration is a punishment greater than necessary to meet the purposes of sentencing under 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could cost society more than the original crimes because of the substantial cost of incarceration and the cost associated with removing the defendant from his or her family.

Three examples from the many cases involving "first time offenders" who faced terms of imprisonment under the guidelines, but who received probationary sentences, demonstrate our point. The first case involved a 54-year-old middle-school teacher, twice divorced, who suffered trauma and physical health issues and helped take care of her older sister with a serious chronic medical illness and in need of money to help meet basic needs and pay for medical expenses. She lost her mother and grandmother within a year of each other. The Veteran's Administration's (VA) benefits that her mother received following her father's death continued to be paid into a joint account that the client held with her mother. She suffered from depression, had a period of unemployment, and failed to inform the VA of her mother's death. Approximately $1400 a month was deposited into the account for almost 8 years, resulting in an overpayment of $142,494. She managed to repay $3000 after the VA contacted her about the overpayments and before any criminal charges were brought.

The second case involved a 62-year-old former military member and disabled plumber who wrote bad checks and made fraudulent bank transfers mainly to benefit his girlfriend who suffered from cancer and to be able to pay off his creditors. The total loss amount under the guidelines was $192,299.36, but the actual loss was $20,634.53.

The third case involved a loan processor with minor children who suffered from extensive physical and sexual abuse in her personal life and persistent mental illness that made her vulnerable to exploitation by her boss who led a scheme to inflate real estate appraisals to obtain

[41] The Mandatory Victim Restitution Act applies to an offense against property, including those committed by fraud or deceit. 18 U.S.C. § 3663A. Accordingly, defendants must compensate victims for the loss suffered. In FY 2015, restitution was ordered in 67.3% of fraud cases, with an average payment of $1,615,341 and a median payment of $125,200. USSC, *2015 Sourcebook of Federal Sentencing Statistics*, Tbl. 15.

[42] *United States v. Cloud*, 872 F.2d 846, 854 (9th Cir. 1989).

mortgage loans that were substantially more than the actual cost of the house. She was ordered to pay restitution in the amount of $42,676,269.14.

Defenders are also concerned about the Commission's proposed application note 10 regarding application of the presumption of alternatives to incarceration for certain "first offenders" with a guideline range falling within Zones A or B. Proposed Note 10(A) states, among other things, that "[t]he court may not impose a sentence of probation pursuant to this provision . . . where a term of imprisonment is required under this guideline." Such a statement is inconsistent with 18 U.S.C. § 3553(a)(3), which "directs the judge to consider sentences other than imprisonment,"[43] and ignores the authority of the court to grant a departure or variance. Probation should not be discouraged for those who fall within Zones C or D, but whose offense of conviction is a Class C, D, or E felony or misdemeanor. Unless otherwise specified in the statute of conviction, 18 U.S.C. § 3561 only prohibits probationary sentences for Class A or B felonies. For the Commission to recommend imprisonment for any Class C, D, or E felony that falls within Zones C or D, regardless of whether the specific statute of conviction prohibits probation, would be inconsistent with 18 US.C. § 3561.[44]

To suggest that a court may not impose a sentence of probation when the guideline range falls within Zones C or D also disregards feedback that the Commission has received from the courts over the years. From 2005 to 2015, the "percentage of offenders with sentencing ranges in Zone D sentenced to alternatives has averaged about 12 percent."[45] The majority of those sentences were probation only or probation with community confinement sentences.[46] To avoid a conflict with the law and acknowledge the feedback that it is receiving from the courts about the appropriateness of probationary sentences for certain individuals falling within Zone D, the Commission should change the proposed application note as follows: "The court may not impose a sentence of probation pursuant to this provision if prohibited by statute. *See* §5B1.1 (Imposition of a Term of Probation)."[47]

The proposed application note also need not state that "[a] sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense." First, if the

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[43] *Gall*, 552 U.S. at 59.

[44] 28 U.S.C. 994(b)(1) requires that the Commission "establish a sentencing range that is consistent with all pertinent provisions of tile 18, United State Code."

[45] USSC, *Alternative Sentencing in the Federal Criminal Justice System 17* (2015).

[46] *Id*.

[47] The prohibition on a sentence of probation when "a term of imprisonment is required under §5C1.1" also should be removed from the background commentary to §5B1.1.

Commission, contrary to Defender recommendations, excludes such individuals from a presumption of a non-incarceration sentence in §5C1.1(c), then including it in an application note is redundant. Second, even if the Commission does not exclude such individuals from the presumption, the proposed note undercuts the presumption and potentially creates an interpretive problem about which party bears the burden of proof on whether the court should or should not impose a non-incarceration sentence. The best course of action would be to allow the presumption of an alternative to apply and let the government rebut the presumption by showing that the individual should actually be sentenced to a term of imprisonment.

E. Conforming Changes

The Commission requests comment on what conforming changes, if any, it should make if it were to promulgate Part A of the proposed amendment for "First Offenders." While the complicated nature of the guidelines makes it difficult to anticipate all the conforming changes that should be made, one change is apparent. In addition to amending §5C1.1, the Commission should amend §5B1.1 (Imposition of a Term of Probation) to be consistent with §5C1.1's presumption of an alternative sentence language. Simply adding subsection (c) to §5B1.1, with the exact language included in §5C1.1 would ensure that the presumption of an alternative sentence does not get overlooked for individuals who fall within Zones A and B of the guidelines.

In addition, Defenders suggest that the Commission change the language of §5B1.1 to call for a presumption of probation. The attached Appendix A sets forth our suggestions for how the language should be changed.

F. Zone Expansion

1. Zones B and C Should be Consolidated with Zone B Expanded to the Range of 18-24 Months

Defenders are pleased that the Commission is considering expanding the Zones of the Sentencing Table to encourage greater uses of alternatives to incarceration. In addition to consolidating Zones B and C of the Sentencing Table, Defenders encourage the Commission to expand Zone B by 2 levels to an 18-24 month range.[48] Such an expansion would increase the

[48] It is worth noting that in 1990, the USSC Advisory Committee on Alternatives, which included several federal court judges and experts from various other agencies/organizations, recommended that Zone D start at a much higher range (27-33 months) for individuals in CH I through III than it currently does (15-21 months). *See USSC Alternatives to Imprisonment Project, The Federal Offender: A Program of Intermediate Punishments* 78 (1990).

number of individuals likely to benefit from Zone B Sentencing Options without jeopardizing public safety.[49]

The Commission's 2015 report on Alternative Sentencing in the Federal Criminal Justice System concluded that the low rate of alternatives to incarceration was "primarily [] due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in which the guidelines provide for a term of imprisonment."[50] Notwithstanding that conclusion, individuals falling within Zone D are receiving alternatives to incarceration. For example, drug offenses were almost as common among individuals sentenced to alternatives (29%) as those sentenced to imprisonment (31.6%).[51]

And as the Commission's data analysis on "Zone C Offenders" likely to benefit from Zone B sentencing options shows, only 420 people sentenced in FY 2015 would have benefited from consolidation of the zones. A slight expansion of the new Zone B would increase those numbers without jeopardizing public safety because a large number of individuals falling within Zone D are convicted of non-violent offenses such as drug trafficking, money laundering, and fraud.[52] Moreover, an expansion of proposed Zone B to the 18-24 month range would likely have the most significant impact on individuals in criminal history category I. Data from FY 2013 to 2015 show that 1,318 individuals with a criminal history category I had an offense level of 14 (15-21 months) and 3,999 had an offense level of 15 (18-24 months).[53]

Data from the Commission's study shows that expanding Zone B to the 18-24 month range will not impact public safety. The reconviction rate for persons imprisoned from 12 to 23 months was 33.9%, just slightly above the 31.9% rate for those imprisoned 6 to 11 months.[54] At the same time, individuals with a probation only sentence had a recidivism rate of 21.6%.[55] Those rates,

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[49] The Commission's data shows no strong correlation between offense level and recidivism. *Recidivism Report*, *supra* note 33, at 20,

[50] *Alternative Sentencing*, *supra* note 45, at 5.

[51] *Id*. at 18, Fig. 14.

[52] In FY 2015, 93.5% of persons convicted of drug trafficking, 53% of persons convicted of fraud, and 79% person of persons convicted of money laundering fell within Zone D. USSC, *FY 2015 Monitoring Dataset*.

[53] USSC, *Interactive Sourcebook*, tbl. 21 FY 2013-2015.

[54] *Recidivism Report*, *supra* note 33, at App. A-2.

[55] *Id*.

combined with other data,[56] show that encouraging greater use of alternatives to incarceration will likely decrease recidivism rates.

In conclusion, the Commission's own data, combined with other points discussed earlier in these comments about how alternatives to incarceration are retributive and more likely to meet a person's rehabilitative needs and strengthen the communities in which they reside, show that making alternatives to incarceration available for more people will better serve all the purposes of sentencing.

2. No Offenses Should Be Exempt From the Zone Changes

The Commission requests comment on whether it should exempt certain offenses, particularly white collar offenses, from the zone changes. For the same reason that the Commission should not exempt any offense from the presumption of an alternative sentence in §5C1.1, it should not exempt any offense from the zone changes.

3. No Additional Guidance is Needed for New Zone B Defendants

The Commission requests comment on whether it should provide guidance to address the new Zone B defendants who previously fell within Zone C. Defenders believe that such guidance is not necessary at this point. The Commission would do better to study the impact of the amendments and determine if they are having their intended effect of expanding the use of alternatives to incarceration.

4. The Commission Should Include an Invited Departure for Zone D Defendants Convicted of Non-Violent Offenses Such as Drug Trafficking

Persons convicted of drug trafficking often fall within Zone D and are typically given lengthy terms of imprisonment even though they may statutorily qualify for probation or may be given a split sentence. An invited departure from Zone D to Zone B for individuals convicted of nonviolent offenses would promote sentences of probation when permitted by statute and a split sentence when not permitted by statute. FY 2015 data show that only 4% of persons sentenced for drug trafficking had a base offense level of 12 or lower and only 6.5% fell within Zones A, B, or C.[57] At the same time, 54.2% were not subject to a mandatory minimum sentence. Any of those individuals, even if convicted of an offense with a statutory maximum of more than 25 years are statutorily allowed to be sentenced to prison for as little as one day. Because all of the purposes of sentencing could be served by a split sentence or probation for many of these individuals, an invited departure is appropriate.

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[56] *See* Discussion *supra* Part A (discussing how persons sentenced to community corrections have lower rates of recidivism and U.S. Probation's success in lowering recidivism rate through new methods of supervision).

[57] USSC, *FY2015 Monitoring Dataset*.

5. The Commission Should Maintain the Invited Departure for Treatment in §5C1.1

The Commission's proposed amendment deletes §5C1.1. comment, (n.6) regarding invited departures for individuals with substance abuse disorders and mental illness. This is a critical departure that promotes treatment needs and recognizes that imprisonment can sometimes exacerbate the problems of people with such disorders. It is consistent with "a growing recognition of the importance of treating, rather than punishing, mentally ill defendants and an understanding that prison may not be the appropriate setting for such treatment."[58] Rather than delete the application note, the Commission should amend it to invite a departure from Zone D to Zone B. "Findings show unequivocally that providing comprehensive drug abuse treatment to criminal offenders works, reducing both drug abuse and criminal recidivism."[59] Other studies favor alternatives to incarceration rather than imprisonment.[60]

An invited departure that makes an alternative sentence available would be especially helpful for people who can turn their lives around. Take, for example, a drug courier whose guideline range is high because he carried a large quantity of drugs. He is a drug addict and committed the offense to support his addiction. After being arrested and before sentencing, he participated in a drug treatment program and reunited with his family in a positive way. At the time of sentencing, he is still doing well in the treatment program. A sentence of imprisonment would interrupt treatment and not advance the purposes of sentencing. An invited departure, however, would encourage the court to fashion a sentence that meets treatment needs and promotes public safety.

Alternatives to incarceration for people who suffer from a mental illness, including a co-occurring substance use disorder, also are important. An "estimated 45 percent of federal prisoners . . . have a mental health problem."[61] Incarcerating such individuals often puts a drain on prison resources and the Bureau of Prisons is not equipped to handle the treatment needs for

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[58] *United States v. Ferguson*, 952 F. Supp. 2d 1186, 1191-92 (M.D. Ala. 2013). *See also United States v. Flowers*, 946 F. Supp. 2d 1295, 1299 (M.D. Ala. 2014).

[59] Nat'l Inst. of Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research Based Guide* 9 (2014).

[60] *See generally Myths & Facts: Why Incarceration Is Not the Best Way to Keep Communities Safe*, *supra* note 6, at 9 ("By large majorities, victims specially prefer investments in mental health, drug treatment, and supervised probation over incarceration."); Missouri Sent'g Advisory Comm'n, *Probation Works for Nonviolent Offenders*, 1 Smart Sent'g 1 (June 2009) ("[R]ecidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations . . . .").

[61] Urban Institute, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System* 8 (2015).

these individuals.[62] Indeed, being able to provide medical care is one of the biggest challenges facing BOP.[63]

Diverting individuals with mental illness to "community-based mental health treatment programs," including mental health courts, is one way to "alleviate the strain on resources caused by incarcerating the mentally ill and providing treatment for them in prison."[64]

6. The Commission Should Delete Current Note 7 (Proposed Note 5) in §5C1.1

Note 7 in §5C1.1 (proposed note 5) should be deleted because it discourages substitutes of imprisonment for "most defendants with a criminal history category of III or above." That provision makes 57% of Zones A, B, and C meaningless because 33 of the 58 ranges in those zones fall within CH III or above. It also discourages judges from imposing alternatives to incarceration for individuals who could benefit from them, and has an adverse impact on Black individuals in Zones B and C, who tend to fall within higher criminal history categories than other groups.[65] Discouraging alternatives for defendants in higher criminal history categories serves no penological purpose and is based on unsound assumptions. No data supports the notion that defendants in higher criminal history categories would not benefit from an alternative to incarceration because we do not know the nature of the previous sentence imposed on those individuals. If they were sentenced to prison or placed on probation without services that meet their rehabilitative needs, their recidivism is at least as much a product of systemic failure as it is their capacity to "reform."

7. Home Detention – Electronic monitoring

Defenders have no objection to the Commission's proposed changes to the commentary on home detention and the use of electronic monitoring because it acknowledges that several different

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[62] FY 2016 Agency Financial Report, *supra* note 9, at I-25 ("[C]rowding has a negative impact on the ability of the BOP to promptly provide inmate treatment and training programs that promote effective reentry and reduce recidivism . . . .").

[63] *Id*. at III-12.

[64] *Id*. at 27.

[65] *Alternative Sentencing, supra* note 45, at 16 ("Black offenders [within Zones A through C] had more serious criminal history scores compared to the other groups."). *See also id*. at 20 (attributing different rates of alternative sentences for "Black offenders" on the difference in criminal history among Black, White, Hispanic, and Other offenders).

location monitoring technologies may be used to verify whether a person is abiding by the conditions of supervision.[66]

II. Proposed Amendment #2: Tribal Issues

Defenders commend the Commission for convening the Tribal Issues Advisory Group (TIAG) and for proposing amendments based on some of the recommendations in the TIAG's 2016 Report. In addition to supporting the proposed amendments, Defenders encourage the Commission to consider amendments responsive to the TIAG's recommendation that the guidelines make changes to better address young people who are prosecuted in federal court. Federal jurisdiction over Indian young people presents important issues and is too frequently overlooked.[67] We encourage the Commission to follow the recommendations of TIAG to both amend §5H1.1 (Age), and add a departure to Chapter 5, Part K "concerning juvenile and youthful offenders."[68]

A. Tribal Court Convictions

In response to the TIAG's recommendations, the Commission proposes amending the Commentary to §4A1.3 to add a non-exhaustive list of factors courts may consider when deciding "whether, or to what extent, an upward departure based on a tribal court conviction is appropriate." Defenders support the proposed amendment as a good effort to resolve a complicated situation. While we continue to have concerns about the practices in sentencing Native defendants in federal court, at this point, the TIAG recommendation seems like a workable approach.

In response to the Commission's issues for comment about how the proposed factors should interact with one another, Defenders support the TIAG's recommended approach. Due to the complex issues involved in considering tribal convictions for purposes of federal sentencing, including the wide variety of practices among the hundreds of different tribes across the country, we support the TIAG's recommendations that the factors identified in the departure commentary be non-exhaustive, and that no one factor be weighted more heavily than any other.

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[66] *See generally* Admin. Office of U.S. Courts, Guide to Judiciary Policy, Vol. 8, Federal Location Monitoring Program, Monograph 113 (2016).

[67] *See, e.g.*, Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. Rev. 37 (2011) ("Historically, the federal juvenile population has been predominantly Native American males. A 2000 study found that seventy-nine percent of all juveniles in federal custody are Native American."); Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: A Report to the President and Congress of the United States* 157 (Nov. 2013) ("Between 1999-2008, for example, 43-60 percent of juveniles held in Federal custody were American Indian.").

[68] USSC, *Report of the Tribal Issues Advisory Group* ("*TIAG Report*") 1 & 33-34 (May 16, 2016).

Finally, in response to the request for comment on whether the Commission should amend §4A1.2(i), Defenders emphatically answer, "no." Consistent with the TIAG,[69] Defenders oppose, as we have since the inception of the guidelines, counting tribal convictions in the criminal history calculation.[70]

B. Court Protection Orders

Also in response to the TIAG's recommendations, the Commission proposes amending §1B1.1 to define "court protection order," to mean "'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)." Defenders support this proposed amendment. Consistent with the TIAG's recommendation, Defenders urge the Commission not to make any additional changes to the guidelines regarding protection orders. We agree with the TIAG that "[g]iven the absence of reliable data and the real potential for disparate impact on Indian defendants" the Commission should "collect and study the data before considering any expansion of the use of court protection orders as enhancements under Chapters Two or Three."[71]

III. Proposed Amendment #3: Youthful Offenders

Defenders fully support the Commission's proposal to exclude prior juvenile adjudications from the criminal history calculation. We also urge the Commission to consider broadening the amendment to exclude all prior offenses committed before the age of 18 from the criminal history calculation, career offender guideline, and other guideline recommended enhancements. If the Commission declines to broaden the scope of the proposed exclusion, Defenders support an invited downward departure for any prior offenses committed before the age of 18.

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[69] *Id.* at 12 ("The TIAG recommends that tribal convictions not be counted under U.S.S.G. §4A1.2."); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28-29 (Judge Lange) ("it was unanimous among the five federal judges [on the TIAG] that [tribal convictions] ought not to be automatically counted"); *id*. at 27 (Judge Erickson) ("amongst the majority there was a concern that if we just said all tribal convictions should score … it would exacerbate the disparity that already exists in Indian country sentencing). *See also* USSC, *Report of the Native American Advisory Group* 13 (Nov. 4, 2003) (declining to recommend counting tribal convictions in the criminal history score and reporting that "discussion among the Ad Hoc Advisory Group members revealed that there was some concern that such an amendment would raise significant constitutional and logistical problems").

[70] *See* Summary of Testimony of Tova Indritz, Federal Public Defender for the District of New Mexico Before the U.S. Sentencing Comm'n, Denver, Colo. 9-10 (Nov. 5, 1986) (urging the Commission not to count tribal court convictions). *See also*, Jon M. Sands & Jane L. McClellan, *Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 Fed. Sent'g Rep. 215 (2005) (opposing the counting of tribal sentences in defendants' criminal history); Creel, *supra* note 67, at 39 (opposing counting tribal court convictions in federal sentencing).

[71] *TIAG Report*, *supra* note 68, at 15.

A. Juvenile Adjudications Should Not Count

Defenders support the proposed amendment to exclude prior juvenile adjudications from the criminal history calculation. We see the injustice of the current rule on a regular basis. We have represented a young woman who was charged as a courier in her first drug offense, but was denied safety valve relief from a mandatory minimum sentence because of a domestic dispute as an adolescent, while she was struggling with mental and emotional issues, that led to a juvenile adjudication. We have represented a man who was pushed across the sentencing grid to criminal history category V on the basis of an adjudication for assault when he was 10-years-old, an adjudication for escape when he walked out of juvenile court at age 15, and a cocaine conviction when he was 18-years-old. And another young man who at age 20 fell in criminal history category V based entirely on juvenile adjudications, mostly for car theft. We routinely see our clients earn criminal history points for minor offenses committed when they were quite young, such as a 14-year-old lying to a police officer about his name and birthdate during a traffic stop.

The guidelines' current rule of counting prior juvenile adjudications creates unwarranted disparity by treating prior juvenile adjudications within the applicable time period[72] on par with adult convictions. Juvenile adjudications should be excluded from the criminal history calculation for many reasons including (1) young people are less culpable than adults; (2) juvenile adjudications are less reliable than adult convictions due to fewer procedural protections; (3) the length of a juvenile disposition is a poor proxy for the seriousness of a prior offense, and is not comparable to the length of a sentence imposed in an adult criminal conviction; and (4) excluding these adjudications may have an ameliorative effect on the disproportionate impact of the criminal history rules on racial minorities.

1. Young People Are Less Culpable

Recently, in a series of opinions, the Supreme Court recognized that "children are constitutionally different from adults in their level of culpability."[73] That is, "juveniles have diminished culpability."[74] The Court's decisions in this series increasingly rest "not only on

[72] The current guidelines provide different decay rules for some—but not all—juvenile adjudications. *See* §4A1.2(d) & (e). These different decay periods are important, but do not adequately address the differences between juvenile adjudications and adult convictions.

[73] *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding that the Court announced a substantive rule of constitutional law in *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'")). *See also Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

[74] *Miller*, 132 S. Ct. at 2464.

common sense—on what any parent knows"—but on "science and social science" including an "ever-growing body of research in developmental psychology and neuroscience."[75] The research shows that "[c]ompared with adults, juveniles are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risky behaviors; and less oriented to the future and thus less attentive to the consequences of their often-impulsive actions."[76] It also "demonstrate[s] that 'juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,' while at the same time they lack the freedom and autonomy that adults possess to escape such pressures."[77] And recent "neuroscience research suggests a possible physiological basis for these recognized developmental characteristics of adolescence."[78] As the Court noted: "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[79]

2. Juvenile Adjudications Are Less Reliable than Adult Criminal Convictions

Juvenile courts provide fewer procedural protections than adult criminal courts and, as a result, juvenile adjudications are less reliable. To be clear, Defenders are not weighing in on the issue of whether juvenile adjudications are "sufficiently reliable to allow for [the] therapeutic dispositions," juvenile courts were originally designed to provide.[80] Rather, our point is that they are "not obtained in a sufficiently reliable manner to justify the much harsher consequences of their use as criminal sentence enhancements."[81] It is "fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then use convictions and sentences obtained for treatment purposes to punish them more severely as adults."[82]

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[75] *Id.* at 2464 & n.5.

[76] Brief for the American Psychological Association, American Psychiatric Association and National Association of Social Workers as *Amici Curiae* in Support of Petitioners at 3-4, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647).

[77] *Id.* at 4.

[78] *Id.*

[79] *Miller*, 132 S. Ct. at 2464 n.5.

[80] Barry Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1190 (2003).

[81] *Id*.

[82] *Id.* at 1194. Professor Feld, a leading juvenile justice scholar, and a proponent—in theory—of using juvenile adjudications (at a discounted level) to enhance adult sentences, acknowledges that doing so

Over the years, the Supreme Court has recognized and required certain procedural protections attend juvenile adjudications, but a significant gap still exists between the juvenile and adult courts over the procedural safeguards they offer.[83]

a. Juvenile Court: Origin and Purpose

The unique origin of the juvenile court system helps explain the gap. "The modern juvenile justice system, which traces its origins to the turn-of-the-century Progressive reform movement, is premised on assumptions and goals that are profoundly different from those of the adult criminal system."[84] The "highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context."[85] "Under the guise of parens patriae, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young defendants."[86] In creating this special court, and separating young people from adults, "juvenile courts rejected the jurisprudence and procedure of adult criminal prosecutions."[87] Juvenile court proceedings "focused on the child's background and welfare, rather than the specifics of the crime."[88] From the "inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles."[89]

b. No Right to a Jury

Concerned that the juvenile court had failed to deliver on its promise, the Supreme Court gave juveniles certain procedural protections.[90] Subsequently, however, the Court declined to

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under current conditions "raise[s] troubling issues in light of the quality of procedural justice by which juvenile courts originally obtained those convictions." *Id.* at 1188-90.

[83] *See* Feld, *supra* note 80, at1114.

[84] *United States v. Johnson*, 28 F.3d 151, 158 (D.C. Cir. 1994) (Wald, J., dissenting). *See also* Feld, *supra* note 80, at 1135.

[85] *In re Gault*, 387 U.S. 1, 17 (1967).

[86] Feld, *supra* note 80, at 1138.

[87] *Id.*

[88] *Id*. at 1139.

[89] *Gault*, 387 U.S. at 14.

[90] *Id.* at 33, 36, 55, 56 (recognizing that young people in juvenile courts have a right to counsel, right to notice of charges, privilege against self-incrimination, right to compulsory process, and right to confront and examine adverse witnesses). A few years later, the Supreme Court also recognized that charges against a young person must be proven "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 368 (1970).

recognize a right to a jury trial in juvenile adjudications.[91] Evincing its commitment to the treatment model of the juvenile court, the Court refused to "equate the juvenile proceeding . . . with the criminal trial."[92] While some states provide jury trials for juveniles as a matter of state law, the vast majority do not.[93]

The absence of jury trials for all juveniles "undermines factual accuracy and creates the strong probability that outcomes will differ in delinquency and criminal trials."[94] Research shows that "[a]lthough judges and juries agree in their judgment of defendant's guilt or innocence in about four-fifths of cases, when they differ, juries are far more likely to acquit defendants than are judges given the same types of evidence."[95] "The case law suggests that judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfies the standard of proof beyond a reasonable doubt."[96] And a "comparison of the outcomes of cases in juvenile and adult courts with comparable evidence suggests that it is easier to convict a delinquent in juvenile court than a defendant in criminal court."[97]

The lack of a right to a jury trial is at the heart of one United States Circuit Court of Appeals' decision limiting the use of juvenile adjudications to enhance subsequent adult sentences.[98] Noting the "significant constitutional differences between adult convictions and juvenile adjudications," the Ninth Circuit held that enhancing a sentence beyond the statutory maximum based on "nonjury juvenile adjudications" is inconsistent with the Sixth Amendment as interpreted by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[99] While other

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[91] *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

[92] *Id.* at 550. *See also id.* at 545 ("The Court has refrained . . . from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding.").

[93] *See* Nat'l Juvenile Defender Ctr. (NJDC), Juvenile Right to Jury Trial Chart (last rev. July 17, 2014), http://njdc.info/wp-content/uploads/2014/01/Right-to-Jury-Trial-Chart-7-18-14-Final.pdf.

[94] Feld, *supra* note 80, at 1162.

[95] *Id*. at 1162 & n.164 (citing studies); *see also* Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 Va. J. Soc. Pol'y & L. 231, 241 (2002).

[96] Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L. Rev. 553, 564 (1998).

[97] Feld, *supra* note 80, at 1166-67.

[98] *United States v. Tighe*, 266 F.3d 1187, 1195 (2001) (addressing enhanced sentence pursuant to the Armed Career Criminal Act).

[99] *Id*. at 1192-93, 1195.

federal courts of appeals have not agreed with the Ninth Circuit,[100] some state courts have reached a similar conclusion,[101] and the Supreme Court has not yet addressed the issue.

c. Lack of Counsel

Although *Gault* recognized the right to counsel fifty years ago, it "is an open secret in America's justice system that countless children accused of crimes are prosecuted and convicted every year without ever seeing a lawyer."[102] In many jurisdictions this is because "children routinely waive their right to counsel without first consulting with an attorney."[103] Routine waiver is allowed despite real questions as to "whether juveniles possess the competence to waive counsel 'voluntarily and intelligently,' particularly without consulting counsel."[104]

Without a lawyer, young people miss out on critical assistance "protect[ing] [them] from the consequences of false confessions and uncounseled guilty pleas, seek[ing] diversion or case dismissal for their clients," and "limit[ing] exposure to costly and harmful detention."[105]

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[100] *See, e.g.*, *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002).

[101] *See Ohio v. Hand*, 2016 WL 4486068, at *8 (Ohio Aug. 25, 2016) (following the Ninth Circuit's reasoning in *Tighe* to hold that, under *Apprendi*, the state cannot treat a prior juvenile adjudication as a prior conviction to enhance the penalty for a subsequent conviction); *State v. Brown*, 879 So. 2d 1276, 1288-90 (La. 2004) (following the Ninth Circuit's reasoning in *Tighe* to hold that, under *Apprendi*, "the use of [juvenile] adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right"); *State v. Harris*, 118 P.3d 236, 245-46 (Or. 2005) (rejecting the Eighth Circuit's rationale in *Smalley* and holding that, when a juvenile adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver).

[102] NJDC, *Defend Children: A Blueprint for Effective Juvenile Defender Services* 10 (Nov. 2016). *See also* Karol Mason (DOJ, Assistant Attorney General for the Office of Justice Programs) & Lisa Foster (DOJ, Director, Office for Access to Justice), *Guest Post: Some juvenile defendants still denied justice through lack of counsel*, Wash. Post., Dec. 20, 2016 ("[A] half-century after the nation's highest court guaranteed this most basic of rights, youth still encounter obstacles to quality representation. . . . Many young people in detention facilities never had a lawyer appointed to represent them, and too often children are encouraged to waive their right to counsel even when doing so can hurt their chances of a fair hearing and a fair result."); Feld, *supra* note 80, at 1170, 1173 ("Studies in many states consistently report that juvenile courts adjudicate youths delinquent without the appointment of counsel." In addition, "[m]any juveniles commonly appear without lawyers because juvenile court judges find that they waived their right to counsel.").

[103] NJDC, *supra* note 102, at 10. *See also* Feld, *supra* note 80, at 1174; Redding, *supra* note 95, at 247.

[104] Feld, *supra* note 80, at 1175. *See also* Redding, *supra* note 95, at 248.

[105] NJDC, *supra* note 102, at 15.

Even when lawyers are physically present, problems often exist with the quality of the representation provided young people. "Throughout the United States, juvenile defenders are overworked and underpaid, and may lack the training and resources critical to their success."[106] Quality representation in juvenile court requires specialized knowledge and skills.[107] For example, juvenile defenders "must have knowledge of delinquency laws and procedures; be versed in adolescent development and the evolving juvenile-specific jurisprudence; be competent to effectively counsel youth on making critical legal decisions; [and] be able to convey complex legal principles to their young clients and families."[108] Despite this need for specialized skills, "many states report non-existent or inadequate training for juvenile defenders."[109]

In addition, young people "are less likely than adults to work effectively with their lawyers to aid in their defense."[110] The Supreme Court explained: "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation."[111]

d. Other Procedural Weaknesses Reduce the Reliability of Juvenile Adjudications

In addition to no guarantee of a jury, and the frequent absence of quality counsel, juvenile courts "often follow evidentiary and procedural rules less rigorously."[112] The courts may "enter an adjudication of delinquency hastily without ensuring that juveniles' rights are protected, or without sufficient evidence to prove guilt beyond a reasonable doubt, particularly in cases where a delinquency adjudication is the only way to ensure that the juvenile receives needed mental health or social services."[113]

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[106] Mason & Foster, *supra* note 102.

[107] NJDC, *supra* note 102, at 27.

[108] *Id.*

[109] *Id.*

[110] *Graham*, 560 U.S. at 78.

[111] *Id.* (citations omitted).

[112] Redding, *supra* note 95, at 243.

[113] *Id.* at 244.

The rate of juvenile appeals also is low. One study showed that "only 1 in every 2,707 juvenile cases is appealed every year."[114] By comparison, a comprehensive review of federal appeals showed that 16% of federal convictions were appealed.[115] At the state level, while little data is available, "estimates are higher."[116]

3. The Length of a Juvenile "Sentence" Is a Poor Proxy for the Seriousness of the Offense, and Not Comparable to the Length of Sentence Imposed for an Adult Criminal Conviction

Under the current guidelines, the length of a juvenile "sentence" is used as a proxy for the seriousness of a prior offense, and other than a different decay period for certain juvenile adjudications, is treated the same as an adult prior conviction with the same sentence imposed.[117] But a juvenile disposition is a poor proxy for the seriousness of a prior offense, and is not comparable to the length of a sentence imposed in an adult criminal conviction.

Today's "juvenile justice system still maintains rehabilitation as its primary goal."[118] This means that juvenile court dispositions "typically include a treatment plan aimed at addressing perceived deficiencies in the child's current living environment and behavior."[119] No relationship necessarily exists between the "offense" and the "sentence" or disposition imposed by the juvenile court.[120] The "imposition and duration of juvenile confinement may be set irrespective of proportionality; irrespective of the sentence ranges for adult offenders."[121] A disposition of confinement "may simply mean that the juvenile lacked an adequate home or that the community lacked adequate services."[122] In other words, the duration of a juvenile disposition is a particularly poor proxy for the seriousness of a prior juvenile adjudication. And critically, it is not at all comparable to the length of sentence imposed for an adult criminal conviction.

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[114] NJDC, *Increasing Juvenile Appeals: An Underused Critical Check on the Juvenile Delinquency System* (Sept. 2016), http://njdc.info/wp-content/uploads/2016/10/Increasing-Juvenile-Appeals.pdf.

[115] U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Criminal Appeals, 1999 with Trends 1985-99* (2001).

[116] Megan Annitto, *Juvenile Justice on Appeal*, 66 U. Miami L. Rev. 671, 680 (2012).

[117] *See* §4A1.2(d).

[118] Juvenile Law Center, *Youth in the Justice System: An Overview*, http://jlc.org/news-room/media-resources/youth-justice-system-overview.

[119] NJDC, *Juvenile Court Terminology*, http://njdc.info/juvenile-court-terminology/.

[120] Redding, *supra* note 95, at 245.

[121] *Johnson*, 28 F.3d at 293 (Wald, J., dissenting).

[122] *Id*.

4. Excluding Prior Juvenile Adjudications May Ameliorate the Disparate Impact of the Criminal History Rules on Racial Minorities

The Commission's proposal to exclude juvenile adjudications from the criminal history calculation may have an ameliorative effect on the current disproportionate impact of the criminal history rules on racial minorities.[123] Evidence indicates that "youth of color—and especially black youth—experience disproportionate court involvement and are more likely to receive harsher punishment."[124] An examination of data from 2013 shows that "black youth comprised 16% of the youth population" but "35% of all delinquency cases handled by the juvenile courts and were more than twice as likely to be referred to juvenile court as white youth."[125] The disproportionality becomes "more pronounced and has more serious consequences" as young people proceed through the system.[126] Specifically, in 2013, "the rate at which referred cases were formally processed was 20% greater for black youth than for white. . . . Additionally, the rate at which black youth were ordered into residential placement after adjudication was 20% greater than for white youth, while white youth were more likely to receive a disposition of probation."[127] Data from earlier years show similar trends. In 2010, for example, "cases involving black (59%) or American Indian (60%) youth were more likely to be formally processed (i.e., petitioned) than cases involving Asian (57%) or white (50%) youth."[128] And, "[a]cross most offenses, adjudicated cases involving black youth were more likely to result in a disposition of out-of-home placement than cases involving youth of other races."[129]

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[123] Scholars from the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota urge each sentencing commission to "examine the racial impact of its criminal history score and all score components" and "[i]f a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including that component to ensure that the degree of added enhancement is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact." Richard S. Frase et al., Robina Institute of Criminal Law & Criminal Justice, *Criminal History Enhancements Sourcebook* 116 (2015). The scholars also note that reducing or eliminating "criminal history rules that have a disparate impact on nonwhite offenders" is the "fastest and least expensive" way to reduce "perceived unfairness" and "other, more concrete beneficial effects" such as less crime. *Id.* at 107.

[124] Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 La. L. Rev. 47, 52 (Fall 2016).

[125] *Id.* at 51.

[126] *Id.* at 52.

[127] *Id.*

[128] National Center for Juvenile Justice (NCJJ), *Juvenile Offenders and Victims: 2014 National Report* 172 (Dec. 2014).

[129] *Id.*

Counting juvenile adjudications pushes people into higher criminal history scores and precludes individuals from qualifying for safety valve relief. Black defendants are disproportionately impacted in both of these areas. In 2015, black defendants comprised 20.5 percent of all defendants, but 34 percent of defendants in the top three criminal history categories.[130] In addition, black defendants qualify for the safety valve far less often than any other group, primarily because of criminal history.[131]

B. No Conviction for Conduct Committed Before Age 18 Should Enhance Guideline Recommended Sentences

Even better than excluding juvenile adjudications from the criminal history calculation, would be excluding all offenses committed before the age of 18, regardless of whether they resulted in adjudications in juvenile court or convictions in adult court. Defenders recommend that these prior offenses be excluded from all guideline enhancements.[132] This is consistent with the evidence that young people are less culpable than adults, and, indeed, as the Supreme Court has recognized, "are constitutionally different from adults in their level of culpability."[133] In addition, and critically, it avoids the unwarranted disparity generated by relying on state policies and practices—that vary tremendously, and shift regularly—regarding the adult criminal prosecution of young people for offenses committed before age 18.

Having addressed, above, the reduced culpability of young people, here we focus on the many different state practices and procedures that would generate unwarranted disparity if the Commission draws a line between juvenile and adult priors, rather than simply excluding all prior offenses committed before age 18. We have witnessed the unwarranted disparity that comes from guidelines that ignore the vastly different and ever-changing state-defined jurisdictional boundaries of juvenile court, and its exceptions. For example, in one Defender case, a defendant who committed a note job bank robbery at the age of 19 was sentenced as a career offender based on two prior convictions for struggles with police that occurred when he was 17. The

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[130] *See* USSC, Individual Offender Datafiles 2015.

[131] *See* USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("*Mandatory Minimum Report*"), xxviii, 354 (2011).

[132] Currently, the guidelines recommend offenses committed before age 18 enhance sentences in multiple ways. *See* §4A1.1(d); §4B1.2, comment. (n.1) (defining "prior felony conviction" to include "[a] conviction for an offense committed prior to age eighteen . . . if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted"); §2K1.3, comment. (n.2) (same language in definition of "felony conviction"); §2K2.1, comment. (n.1) (same); §2L1.2, comment. (n.1(B)) (indicating that offenses committed before 18 are to be counted toward enhancements if the conviction was "classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted").

[133] *Montgomery*, 136 S. Ct. at 736. *See also* discussion *supra* pp. 21-22.

priors counted as career offender predicates because at that time, all 17-year-olds were treated as adults in Massachusetts. If the offenses had occurred in neighboring Rhode Island, where the juvenile court has original jurisdiction over all young people under the age of 18, the defendant likely would not have qualified as a career offender. Indeed, if it simply had happened a few years later, after Massachusetts increased the jurisdiction of its juvenile courts to all young people under the age of 18, it is likely he would not have been deemed a career offender.

In addition to reviewing our comments below, we urge the Commission to visit the website, Juvenile Justice: Geography, Policy, Practice & Statistics.[134] This site has a page regarding the jurisdictional boundaries of juvenile courts and adult criminal courts for young people in all 50 states and the District of Columbia.[135] It provides interactive maps of the United States showing which, and how many, states follow the many different policies and practices that interact to determine whether a particular young person who commits an offense is adjudicated in juvenile court, or convicted in adult criminal court.[136] The site also shows how the policies and practices of the various states have changed over the years, and provides detailed information on each state.[137]

1. Different Age Boundaries for Juvenile Court

States differ on the age at which they set the upper boundary of juvenile court. While the vast majority of states currently include all individuals under the age of 18, several states limit the jurisdiction of the juvenile court to those who are 16 or younger, and two states, New York and North Carolina, limit the jurisdiction of juvenile court to those who are 15 and younger.[138] These age-based boundaries have changed over time, and likely will continue to do so.[139] For example, just a few years ago, in 2010, 11 states capped juvenile court jurisdiction at 16 years old.[140] By

[134] Juvenile Justice: Geography, Policy, Practice & Statistics (JJGPS), http://www.jjgps.org/.

[135] JJGPS, jurisdictional boundaries, http://www.jjgps.org/jurisdictional-boundaries.

[136] *Id.*

[137] *Id.*

[138] *Id.* at Delinquency age boundaries; NCJJ, *supra* note 128, at 93.

[139] *See* JJGPS, *supra* note 135.

[140] *See* NCJJ, *supra* note 128, at 93.

2015, four of those states had increased the maximum age to 17.[141] And in 2016, two additional states followed suit.[142]

2. Exceptions to Juvenile Court

"All states have statutes that make exceptions to the age boundaries of delinquency by specifying when the offense of a juvenile may or must be considered the crime of an adult."[143] But who decides which young person should be excepted from juvenile jurisdiction, and how, varies dramatically from state to state.[144] In addition, any given state may have multiple decision-makers, policies and practices. A chart demonstrating the numerous ways each state exempts juveniles from juvenile court for prosecution in adult criminal courts is attached as Appendix B.[145]

a. Judicial Waiver

Many states have provisions that give juvenile court judges the authority to transfer a young person to adult criminal court.[146] Often, this decision is discretionary. But some states also, or instead, provide for presumptive and/or mandatory waiver.[147] Presumptive waiver provisions set forth conditions for transfer to adult court, but allow the young person to argue for retention in juvenile court.[148] Mandatory waiver provisions require a juvenile court judge to transfer a young person to adult court if the judge determines certain conditions have been met.[149]

b. Statutory Exclusion

Legislatures in many states also play a role in deciding whether a young person will be retained in juvenile court or transferred to adult criminal court. This sometimes is referred to as "statutory

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[141] *See* JJGPS, *supra* note 135.

[142] Rich Williams, Nat'l Conf. of St. Legislatures, *South Carolina Raises the Age of Juvenile Court Jurisdiction, Louisiana to Follow* (June 7, 2016), http://www.ncsl.org/blog/2016/06/07/south-carolina-raises-the-age-of-juvenile-court-jurisdiction-louisiana-to-follow.aspx; Louisiana Ctr. for Children's Rights, *Raise the Age LA Becomes Law* (June 14, 2016), http://www.laccr.org/news/raise-the-age-la-becomes-law/.

[143] JJGPS, *supra* note 135, at Transfer discretion; *see also* NCJJ, *supra* note 128, at 99.

[144] *Id.*

[145] Attached as Appendix B is a copy of a table from NCJJ, *supra* note 128, at 100.

[146] NCJJ, *supra* note 128, at 99.

[147] *See* Appendix B; JJGPS, *supra* note 135, at Transfer discretion.

[148] JJGPS, *supra* note 135, at Transfer discretion.

[149] *Id.*

exclusion."[150] These provisions may provide for adult jurisdiction based on factors such as age, history, and the nature of the offense.[151] Statutes may also exclude young people from juvenile court jurisdiction because they are married or otherwise emancipated.[152]

Most states also have legislative transfer provisions commonly referred to as "once an adult, always an adult."[153] Under these policies, once a juvenile has been tried for one offense in adult criminal court, any subsequent offense must also be prosecuted in adult criminal court.[154]

c. Direct File—Prosecutorial Power to File Charges in Adult Court

In some states, the decision of whether a young person's conduct will be addressed in juvenile court or adult criminal court rests with the prosecutor.[155] This is sometimes referred to as "direct file."[156] The direct file practice—that is, leaving the jurisdictional decision in the hands of the prosecutor—has been the subject of some scrutiny and criticism. For example, a recent Human Rights Watch study of Florida's policies and practices concluded that "[w]hether a particular youth accused of a particular crime in Florida ends up in adult court is in an important sense arbitrary."[157] Almost all (98.3 percent in 2012-13) of "juvenile cases transferred to adult court in Florida in recent years ended up there pursuant to the state's direct file statute [that] . . . gives unfettered discretion to charge 16- and 17-year-olds accused of any felony in adult court and to charge 14- and 15-year-olds as adults with respect to certain specific felonies."[158] The report noted that "more than 60 percent of the juveniles Florida transferred to adult court during this period were charged with nonviolent felonies."[159]

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[150] NJCC, *supra* note 128, at 99.

[151] JJGPS, *supra* note 135, at Transfer discretion.

[152] NJCC, *supra* note 128, at 93; s*ee also* Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book* (including chart on Juvenile Emancipation, 2011), https://www.ojjdp.gov/ojstatbb/structure_process/qa04126.asp?qaDate=2011.

[153] NJCC, *supra* note 128, at 99.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Human Rights Watch, *Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute* 1 (2014).

[158] *Id.* at 3.

[159] *Id.* at 1.

d. Reverse Waiver

Transfer is not always a one-way street. Several states provide for an adult criminal court to transfer jurisdiction to the juvenile court.[160] This is sometimes referred to as "reverse waiver."[161] The criteria a court considers "usually mirror what the juvenile court judge must consider for transfer to criminal court."[162] To complicate matters even more, in some states, "transfer cases resulting in conviction in criminal court may be reversed to juvenile court for disposition."[163]

e. Juvenile Court Blended Sentence

In states with juvenile court blended sentences, juvenile courts are authorized to impose "adult criminal sanctions on certain juvenile offenders."[164] Often this means the juvenile court may "combine a juvenile disposition with a criminal sentence that is suspended. If the youth successfully completes the juvenile disposition and does not commit a new offense, the criminal sanction is not imposed."[165] Sometimes states "mandate a 're-determination' hearing at the age of majority or other intervals to determine whether adult sanctions are (still) necessary."[166]

f. Criminal Court Blended Sentence

Not to be confused with the juvenile court blended sentence, in some states, adult criminal courts are authorized to "impose sanctions otherwise available only to offenders handled in juvenile court."[167] This approach "often involves a suspended adult criminal sentence of incarceration pending successful completion of juvenile sanctions."[168]

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[160] NCJJ, *supra* note 128, at 99.

[161] *Id.*

[162] JJGPS, *supra* note 135, at Transfer provision detail, http://www.jjgps.org/about/jurisdictional-boundaries#provisiondetails.

[163] NCJJ, *supra* note 128, at 99.

[164] *Id.*

[165] *Id.*

[166] JJGPS, *supra* note 135, at Transfer provision detail, http://www.jjgps.org/about/jurisdictional-boundaries#provisiondetails.

[167] NCJJ, *supra* note 128, at 99.

[168] JJGPS, *supra* note 135, at Transfer provision detail, http://www.jjgps.org/about/jurisdictional-boundaries#provisiondetails.

3. Excluding All Prior Offenses Committed Before the Age of 18 May Ameliorate the Disproportionate Impact of the Criminal History Rules on Racial Minorities.

As with juvenile adjudications, excluding all prior offenses committed before the age of 18 from Chapter 4 calculations may have an ameliorative effect on the current disproportionate impact of the criminal history rules on racial minorities. Looking first at judicial waiver, the evidence shows that "black and American-Indian youth were . . . more likely to be waived to criminal court for trial than white youth."[169]

As the discussion above reveals, however, judicial waiver is just one of the many methods states use to exclude certain young people from juvenile court jurisdiction. Unfortunately, no "national data set exists regarding the number of juveniles transferred to criminal court to stand trial through other waiver mechanisms."[170] Data available from some states, however, indicates "disproportionality . . . remains a hallmark of non-judicial waiver."[171] For example, "[a]lthough black youth comprise only 18% of the youth population in Michigan, they account for 59% of all youth tried as adults."[172] Similarly, in Florida, "although black children constitute only 27.2% of all arrested youth, they comprise 51.4% of all cases transferred to criminal court, and white youth account for 28% of all arrests but only 24.4% of transfers."[173]

Including prior sentences from offenses committed before age 18 pushes defendants into higher criminal history categories, can trigger career offender status, and preclude safety valve relief. As mentioned above, black defendants are disproportionately represented in the top three criminal history categories and disproportionately excluded from safety valve relief because of criminal history. In addition, black defendants are disproportionately represented in the career offender guideline. In 2015, black defendants comprised 20.5 percent of all defendants, but 56.7 percent of defendants sentenced under the career offender guideline.[174]

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[169] Federle, *supra* note 124, at 52-53 (looking at data from 2013); *see also id.* at 53 ("the rate at which cases involving black youth were transferred was 30% greater than for cases involving white youth"); NCJJ, *supra* note 128, at 174 ("For most of the period from 1985 to 2010, the likelihood of waiver was greater for black youth than for white youth, regardless of offense category.").

[170] Federle, *supra* note 124, at 54.

[171] *Id.* at 57.

[172] *Id.* at 57-58.

[173] *Id.* at 58.

[174] *See* USSC, Individual Offender Datafiles 2015.

C. Invited Downward Departure

The Commission proposes an invited downward departure where:

> The defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as "adults."

If the Commission declines to exclude all prior offenses committed before the age of 18, an invited departure is a step in the right direction. The departure, however, should be for all priors where the offense was committed before the age of 18. The limitation on the departure the Commission proposes is unnecessarily complicated, would invite litigation, generate unwarranted disparity, and lead to unjust results.

The proposed limitation on the departure is unduly complicated. It would require parties and the court to determine whether a convicting jurisdiction "categorically" excluded the defendant from juvenile court. That is no easy task. It would be difficult to determine what "categorically" means in light of the wide variety of policies and practices states use to both set the jurisdictional boundaries and except young people from them. Some of the many questions generated by the Commission's proposed limitation include:

- Does the "categorical" requirement mean that the departure is limited to defendants with priors committed in jurisdictions where the upper age boundary of juvenile court is set at something less than 17?

- Is the departure also available to defendants with prior offenses in states that set the upper age boundary at 17, but exclude certain categories of young people, such as those who are 15 or 16 years old and committed certain person offenses?[175]

- Is the departure available in jurisdictions that exclude some categories of young people under the age of 18, but that also provide for reverse waiver proceedings where the adult criminal court has discretion to transfer the case back to juvenile court?

- What about criminal court blended sentences, where the young person may be excluded by statute from juvenile court jurisdiction, but the adult court imposes juvenile court sanctions?

[175] *See*, e.*g.*, NJCC, *supra* note 128, at 103 (table listing states with statutory exclusion provisions, and identifying minimum age and offense requirements for exclusion).

In addition to determining what "categorical" means in light of the various state practices, because states change their policies and practices,[176] the parties and the court will also face the challenge of determining whether any given policy or practice was in place at the time of the prior offense.

The proposed limitation also would generate unwarranted disparity and lead to unjust results. It is unclear why a defendant who previously committed an offense while under the age of 18 is less worthy of a departure simply because of the laws in place—at that time—in the particular jurisdiction where he happened to be convicted. We find it difficult to understand why, for example, a defendant who committed an offense before the age of 18 in Florida, or one of the other direct file states, should be excluded from departure consideration simply because of a discretionary decision by a single prosecutor.

Our concerns about unwarranted disparity and unjust results are not alleviated in situations where a judge is involved in transferring jurisdiction. First, the presence of a judicial decision-maker does not guarantee the transfer decision involves a true individualized assessment. Several jurisdictions have mandatory waiver policies under which young people must be excluded from juvenile court if the judge finds certain conditions have been met. Second, even when a judge makes an individualized transfer decision, the Supreme Court has cautioned that "the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court."[177] As the Court explained in *Miller*, "the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense."[178] And, "still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing."[179]

Finally, limiting the departure as the Commission proposes would have the odd effect of excluding defendants who at the time of their prior offense were very young. In some jurisdictions, the lower age for statutory exclusion is 15 or 16, but judges may transfer much younger children.[180]

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[176] *See, e.g.*, JJGPS, *supra* note 135, (showing state policies over time); Kim Geiger, *Rauner signs law ending automatic transfer of some juveniles to adult court*, Chi. Trib., Aug. 4, 2015 (reporting on new legislation that "eliminates the automatic transfer to adult court of 15-year-olds accused of any crime").

[177] *Miller*, 132 S. Ct. at 2475.

[178] *Id.* at 2474.

[179] *Id.* at 2475.

[180] *See, e.g.*, NCJJ, *supra* note 128, at 101, 103 (providing tables showing minimum ages for judicial waiver and statutory exclusion in various states).

D. Clarification Regarding Applicable Time Period

If the Commission amends the guidelines as proposed, Defenders ask the Commission to consider clarifying in §4A1.2(d) the applicable decay period for prior offenses committed prior to age eighteen where the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month. The proposed changes to note 7 in the §4A1.2 commentary indicate that subsection (d) of §4A1.2 "sets forth the time period in which such prior adult sentences are counted." Subsection (d), however, does not address the applicable time period in cases where the sentence of imprisonment exceeded one year and one month. Subsection (d) addresses the applicable time period for similar cases involving confinement of at least sixty days, and other adult sentences. If the note indicates, as proposed, that subsection (d) specifies the applicable time period, we recommend it do so for all three types of prior sentences addressed there.

IV. Proposed Amendment #4: Criminal History Issues

Defenders applaud the Commission for proposing important changes to the criminal history rules that, if adopted, will greatly simplify the criminal history calculation and result in the guidelines recommending more just sentences.

A. Revocations Should Not Count

Defenders support the Commission's proposal to simplify the criminal history rules by amending §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not counted for purposes of calculating criminal history points and do not affect the applicable time period for counting prior sentences. The current rule of counting revocations, with special rules regarding how the revocation sentences affect the applicable time period, are unnecessarily complicated and too often lead to unduly severe recommended sentences.

1. The Current Rule is Complicated with Unjust Effects

The current rule, requiring examination not only of criminal convictions, but also of subsequent revocations is unnecessarily complicated.[181] It requires determining whether various actions in different state courts constitute revocations,[182] and linking the revocation to the original

[181] *See, e.g.*, USSC, *Simplification Draft Paper: Criminal History*, 9 Fed. Sent'g Rep. 216, 222 (1997) (noting that the area involving revocations "alone has created a substantial degree of complexity in Chapter Four").

[182] *See, e.g.*, *United States v. Ramirez*, 347 F.3d 792 (2003) (addressing whether a temporary detention ordered by a youth offender parole board was a constructive revocation under §4A1.2(k)); *United States v. Glover*, 154 F.3d 1291, 1293 (11th Cir. 1998) (addressing whether a state court "Order of Modification of Probation" that imposed 90 days in jail as a condition of probation was a revocation under §4A1.2(k)).

conviction and sentence to determine whether the revocation affects the decay period for the original conviction, with different rules depending on the nature of the original sentence.[183]

The current rule also can have a devastating and unjust impact on defendants in a number of different ways, including (a) deeming defendants "career offenders" on the basis of old convictions that would not have otherwise counted; (b) rendering defendants ineligible for safety valve relief; and (c) elevating the criminal history category based on very old convictions. For example, in a 2013 methamphetamine case in the Northern District of Iowa,[184] the defendant was a "career offender" based on prior drug cases, one of which was so old it counted only because of the revocation rules. Specifically, in 1993, the defendant sustained a drug conviction in Arizona and was sentenced to four months in jail and probation. Subsequently, in 1997, the defendant was convicted in Iowa for possession with intent to distribute methamphetamine and marijuana. The defendant was released in 1999, and in 2001 while finishing parole in Iowa, decided to return to Arizona to address his violation there, based on his 1997 conviction while on probation for his 1993 conviction. Because the defendant had served time in Iowa and was doing well on parole, the probation officer in Arizona did not recommend probation be revoked. However, in 2001, the Arizona court revoked probation. The 2001 revocation brought the 1993 conviction into the applicable time period under the revocation rules in §4A1.2(k), and transformed the old 1993 drug conviction into a career offender predicate. Deemed a career offender, the guidelines recommended criminal history category VI, an offense level of 34, and a range of 262-327 months. Without the revocation rule resuscitating the old 1993 drug conviction, the guidelines would have recommended criminal history category III, with an offense level of 31, and a range of 135-168 months. Fortunately for this defendant, the Court varied downward from the career offender range and imposed a sentence of 138 months.

Defendants also have been denied safety valve relief from mandatory minimums because the current rule of counting revocations has resulted in them having more than one criminal history point.[185] In *United States v. Rodriguez*, 171 F. App'x 698 (9th Cir. 2006), for example, the

[183] §4A1.2(k)(2) (specifying decay period to be measured from date of last release from incarceration for adult term of imprisonment totaling more than one year and one month, from date of last release from confinement for any other confinement sentence for an offense committed prior to defendant's eighteenth birthday, but from date of original sentence in any other case).

[184] *United States v. Asche*, CR 13-3040-MWB (N.D. Iowa. 2013).

[185] 18 U.S.C. § 3553(f) (setting forth requirements for safety valve relief, including that defendant have no more than one criminal history point).

defendant was denied safety valve relief because he received two criminal history points for a revocation related to a conviction for driving under the influence.[186]

The current revocation rule also can have an unfair impact in routine guideline cases. For example, in a recent felon in possession of a firearm case in the Northern District of California,[187] revocations resuscitated two old felony convictions from the 1990s—both of which had original custodial terms of less than one year—adding 6 points, and moving the defendant from criminal history category IV to VI. Fortunately for this defendant, based on a finding that the criminal history was overstated, the Court departed to criminal history category IV.

2. Not Counting Revocations Is the Better Rule

Many reasons support excluding revocation sentences from the criminal history calculation. First, because revocations are not necessarily criminal in nature, they should not be included in determining a defendant's appropriate place on the horizontal axis of the sentencing table, which recommends graduated penalties on the basis of "criminal" history.[188] In many jurisdictions, more than half of revocations are for technical violations, rather than new criminal conduct.[189] Revocations for technical violations such as "failed drug tests, failure to report, failure to meet financial obligations"[190] or failing to "observ[e] a curfew"[191] are not part of a person's "criminal" history.[192]

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[186] *See also United States v. Hernandez-Castro*, 473 F.3d 1004, 1008 (9th Cir. 2007) (reaffirming holding that "district courts have no authority to adjust criminal history points for the purpose of determining eligibility for safety valve relief under 18 U.S.C. § 3553(f)(1), even when the sentencing court concludes that the criminal history calculation overstates the severity of the prior crimes").

[187] *United States v. Clifton*, CR 15-479-CRB (N.D. Cal. 2015).

[188] *See* USSG Ch. 4, Pt. A, intro. comment. (explaining that "a defendant with a record of prior **criminal** behavior is more culpable than a first offender" and "[g]eneral deterrence . . . dictates that a clear message be sent to society that repeated **criminal** behavior will aggravate the need for punishment with each occurrence") (emphasis added).

[189] *See* Ronald P. Corbett, Jr., *Probation and Mass Incarceration: The Ironies of Correctional Practice*, 28 Fed. Sent'g Rep. 278, 279-80 (Apr. 2016); Urban Inst., *The Justice Reinvestment Initiative: Experiences from the States* 2 (July 2013) ("A substantial portion of revocations—sometimes greater than half—are technical violations rather than new crimes."); The Pew Center on the States, *When Offenders Break the Rules* 3 (Nov. 2007) ("A significant number of returns, however, are solely for violations of the conditions of probation or parole . . . . In some states, these so-called 'technical' or 'condition' violators account for more than half of all those returned to prison."); The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* 13 & Ex. 2 (Apr. 2011) (across 33 states "19.9 percent of all released offenders were reincarcerated for a new crime" whereas "25.5 percent were returned for a technical violation").

[190] *See* Corbett, *supra* note 189, at 279.

Second, aggregating revocations with the original sentence artificially inflates the severity of a prior conviction. Chapter Four uses the sentence imposed as a proxy for the seriousness of a prior conviction.[193] The revocation rules, however, are inconsistent with that approach. Revocations are based on post-conviction conduct and do not reflect the seriousness of the prior conviction. If the Commission is going to persist in using the sentence imposed as a proxy for the seriousness of a prior conviction, it is inappropriate to include penalties for conduct that post-dates the sentence imposed for that conviction.

Third, relying on revocations in the criminal history score exacerbates unwarranted disparity because revocation practices and rates vary widely between jurisdictions.[194] As one scholar has noted, "methods of sanctioning [violations] vary as much as the conditions themselves and depend heavily on the discretionary decisions of multiple actors within the criminal justice system."[195] Violations may be handled informally at the "street-level" by community corrections officers.[196] Decisions at this level are often made by "officers without the guidance of formal law or policy."[197] Options for more formal sanctions "will vary according to the policies and procedures of the local jurisdiction."[198] Often "agents will have wide authority to take actions

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[191] *Id.* at 280.

[192] These technical violations also affect the counting of juvenile adjudications under the current guidelines. Recent data indicate 22% of juveniles who are detained for a probation violation are there for a technical violation. NJDC, Infographic, *Promoting Positive Development: The Critical Need to Reform Youth Probation Orders* (Sept. 2016), http://njdc.info/wp-content/uploads/2016/10/Promoting-Positive-Development-Infographic.pdf.

[193] *See* USSC, *Simplification Draft Paper supra* note 181, at 221 ("The Commission reasoned that basing the criminal history score on the prior sentence length reflects a judicial assessment of seriousness and scope of the underlying criminal conduct.").

[194] *See, e.g.*, Pew, *When Offenders Break the Rules*, *supra* note 189, at 4 ("different policies and practices result in radically different rates at which violators are returned to prison"). In addition, length of sentence imposed is a poor proxy for the seriousness of revocations. For example, in Massachusetts, "[w]hether it is a desirable rule or not, when probation is revoked, the original suspended sentence must be imposed, if the time has expired within which the sentence may be revised or revoked . . . . [I]f the suspension of a sentence is revoked, 'the sentence shall be in full force and effect.'" *Com. v. Holmgren*, 421 Mass. 224, 228, 656 N.E.2d 577, 579 (1995).

[195] Cecelia Klingele, *Rethinking the Use of Community Supervision,* 103 J. Crim. L. & Criminology 1015, 1038 (2013).

[196] *Id.*

[197] *Id.* at 1039

[198] *Id.*

ranging from recounseling the offender on his obligations to initiating revocation proceedings."[199]

Finally, excluding revocation sentences from the criminal history calculation may ameliorate the disproportionate impact of the criminal history rules on racial minorities.[200] "Studies of state revocation practices have found that individuals of color are in some instances more likely to be revoked from community supervision than are their white counterparts for identical violations."[201] Counting revocations pushes people into higher criminal history categories, triggers career offender status, and precludes individuals from qualifying for safety valve relief. These are all areas where black defendants are disproportionately negatively impacted. As mentioned above, in 2015, black defendants comprised 20.5 percent of all defendants, but 34 percent of defendants in the top three criminal history categories, and 56.7 percent of defendants sentenced under the career offender guideline.[202] In addition, black defendants qualify for the safety valve far less often than any other group, primarily because of criminal history.[203]

3. Invited Departure

If, as proposed, the Commission eliminates the rule of counting revocations and invites an upward departure under §4A1.3 for revocations, Defenders encourage the Commission to provide guidance on when to apply the departure. As discussed above, revocations occur for many different reasons, from the most technical violation to a new serious criminal conviction, as well as a wide range of revocation practices across the country. In light of this variation, guidance is appropriate to help narrow the field to revocations for serious violations that are not otherwise accounted for under the criminal history rules. One ready-made source of guidance on what constitutes a revocation for a serious violation is the grading system in Chapter 7 applicable to violations of federal probation and supervised release. For example, the Commission could

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[199] *Id.*

[200] As mentioned above, *supra* note 123, scholars have urged sentencing commissions to examine the racial impact of criminal history score components and where there is a disparate impact, carefully examine the rationale and ensure it is narrowly tailored.

[201] Klingele, *supra* note 195, at 1046. *See also* Urban Inst., *Examining Racial and Ethnic Disparities in Probation Revocation* 3 (Apr. 2014) ("We consistently found disparity in probation revocation outcomes to the disadvantage of black probationers."); Kevin F. Steinmetz & Jamilya O. Anderson, *A Probation Profanation: Race, Ethnicity, and Probation in a Midwestern Sample*, 6 Race & Just. 325, 339 (2016) ("Consistently, throughout this analysis, racial/ethnic status was found to significantly predict likelihood of probation failure."); Pamela Oliver, *Crimeless Revocations, part 3: Racial Patterns*, (Dec. 26, 2016) (finding Native American Indians and Blacks have highest rates of crimeless revocations in Wisconsin).

[202] *See* USSC, Individual Offender Datafiles 2015.

[203] *See* USSC, *Mandatory Minimum Report*, *supra* note 131, at xxviii, 354.

specify that an upward departure from the defendant's criminal history category may be warranted based on a revocation for a violation that did not independently receive criminal history points and that would qualify as a Grade A or B violation under §7B1.1(a)(1).

4. Interaction with §2L1.2

If the Commission amends §4A1.2 as proposed, it should ensure the same rule applies to §2L1.2, and that revocations are not counted when measuring the length of a prior "sentence imposed." One rule, applicable across the guidelines, is simple. And, as discussed above, many good reasons support excluding revocations from the calculation of the "sentence imposed." Excluding revocations improves the quality of "sentence imposed" as a proxy for the severity of the prior offense,[204] and helps avoid unwarranted disparity.

To make clear that revocations are excluded from the calculation of the "sentence imposed" in §2L1.2, in addition to promulgating the proposed amendment to §4A1.2, Defenders recommend deleting one sentence from the definition of "sentence imposed" in the commentary to §2L1.2[205] as follows:

> **"Sentence imposed"** has the meaning given the term "sentence of imprisonment" in Application Note 2 of subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). ~~The length of sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.~~

B. An Invited Departure for Time-Served Should Be Added

Defenders support the Commission's proposal to amend §4A1.3 by specifying in the commentary that a downward departure from a defendant's criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant—"time-served"—was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. While Defenders would prefer the Commission adopt time-served as the rule for measuring criminal history,[206] until that happens, an invited downward departure for time-served is a welcome addition to the guidelines.

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[204] As discussed below, Defenders believe "time served" is an even better proxy.

[205] §2L1.2, comment. (n.2).

[206] *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 6 (July 25, 2016) ("Due to the inconsistent practices between various jurisdictions, measuring severity of prior offenses by looking at sentence imposed creates unwarranted disparity."); Statement of Molly Roth Before the U.S. Sentencing Comm'n, Washington D.C., at 1 (Nov. 5, 2015); Statement of the Federal Public and Community Defenders submitted by Jon Sands, Chair, Sentencing Guidelines Committee of the Federal Public and Community Defenders, at 40 (Mar. 9, 2001) ("We believe time served is the better measure because time served is the

So long as the criminal history rules rely on the sentence imposed, an invited downward departure for time-served acknowledges that the current rule can result in unwarranted disparity. Even critics of Defenders' preferred time-served approach acknowledge the limitations of the current sentence imposed rule when addressing "multiple jurisdictions that have different laws regarding parole and other forms of early release."[207] In jurisdictions with "robust early release programs, . . . the announced sentence may not closely track the term of traditional prison-like confinement that the offender will serve. In some state systems, parole laws and other credit systems can reduce an offender's actually served sentence of incarceration dramatically."[208] In other words, the current rule of looking to the sentence imposed as a proxy for the seriousness of the offense results in unwarranted disparity. An invited departure recognizes this problem and provides a mechanism to address it.

Adding an invited departure to Chapter Four that tracks the time-served departure added to §2L1.2 last year also makes the guidelines consistent, by making the same time-served exception available whenever the guidelines look to the sentence imposed.

In response to the issue for comment about possible limitations on the time-served departure, Defenders urge the Commission to refrain from specifying particular exclusions. While we understand the interest in excluding cases where the sentence was reduced for reasons unrelated to the facts and circumstances of the defendant's case, we trust judges will understand that as well. Specifying such exclusions to the departure adds unnecessary complexity and invites appeals regarding whether the terms of the exclusion were satisfied.

Finally, if the Commission adds the invited departure, Defenders suggest one change to the proposed language that introduces what will now be a list of examples of situations where a downward departure due to inadequacy of criminal history may be warranted. Specifically, the Commission proposes amending §4A1.3, comment. (n.3) as follows:

> (A) **Examples.**—A downward departure from the defendant's criminal history category may be warranted ~~if, for example,~~ based on any of the following circumstances:

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actual punishment that has been meted out. Sentence imposed sets the maximum time that will be served, but most defendants do not serve the maximum because of good time credits or parole. Thus, a four-year prison term in one state may result in the same time served as a six-year term in another state.").

[207] Patrick A. Woods, *Assessing Time Served*, 15 Cardozo Pub. L. Pol'y & Ethics J. 1, 15 (2016).

[208] *Id.* at 15-16.

Defenders propose this alternative approach:

> (A) **Examples.—**A downward departure from the defendant's criminal history category may be warranted if, for example,

We believe our suggested language will better indicate that the specified examples are just that, examples, and not the exclusive bases for a downward departure.

V. Proposed Amendment #5: Bipartisan Budget Act

The Commission proposes amending the guidelines to address changes made by the Bipartisan Budget Act of 2015 to three existing statutes[209] addressing fraudulent claims under certain Social Security programs. Defenders have no objection to the Commission's proposal in Part A to respond to the addition of new conspiracy prohibitions by amending Appendix A to reference the three statutory provisions not only to §2B1.1, but also to §2X1.1. Defenders, however, oppose the Commission's proposal in Part B to respond to a new 10-year statutory maximum sentence for a subgroup of people convicted of violating these three statutes by adding yet another specific offense characteristic to the already unwieldy §2B1.1 guideline. The current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to guide courts toward sufficiently (and often unduly) severe penalties for a broad range of offenses, including those addressed in the Act.[210]

No evidence shows that the current guidelines are inadequate to guide courts on appropriate punishments for the subgroup of people who are convicted under these three statutes and subject to the new 10-year statutory maximum.[211] First, no one has been convicted of violating § 1011 in

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[209] 42 U.S.C. §§ 408, 1011, & 1383a.

[210] Last year, the Commission proposed responding to this Act simply by amending Appendix A as proposed in Part A of this year's proposed amendments. The Commission did not propose adding a new specific offense characteristic or any other changes to Chapters Two or Three of the guidelines manual. Defenders supported this response to the Act. *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 13-16 (Mar. 21, 2016); *see also* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 11-13 (July 25, 2016). But following comment by members of Congress, the Justice Department and the Inspector General of the Social Security Administration, the Commission deferred action on the Act. *See* Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Washington, D.C., Apr. 15, 2016, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160415/Chairs-Remarks.pdf.

[211] The Bipartisan Budget Act of 2015 increased the maximum penalties under 42 U.S.C. §§ 408, 1011, and 1383a for certain persons: "a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is

the past decade.[212] Second, neither the government nor sentencing courts have indicated that the guidelines are too low in cases prosecuted under the other two provisions. In the last three years, 56.8% of defendants sentenced for a conviction under 42 U.S.C. § 408 received sentences within the guideline recommended range, 41.2% received sentences below the guideline recommended range, and only 2.0% received sentences above the guideline recommended range.[213] Similarly, for defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1, 48.5% received sentences within the guideline recommended range, 51.4% received sentences below the guideline recommended range, and not one defendant received a sentence above the guideline recommended range.[214]

The proposed amendment would add the 20th specific offense characteristic to §2B1.1. It would add unnecessary complexity to a guideline that already covers more than 5 pages, with more than a dozen pages of commentary full of complicated rules for calculating loss and applying the current 19 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and can require lengthy sentencing hearings. The proposed amendment is a paradigm example of "factor creep,"[215] and is not necessary given the range of sentences already provided for in §2B1.1 combined with the adjustments in Chapter Three.

If the Commission is not convinced that the current guidelines provide adequate guidance on sentences for certain people under these three statutes, a better solution is the one the Commission identifies in the issues for comment: "provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply." The Commission took a similar approach in §2D1.1, comment. (n.23), describing situations where §3B1.3 "ordinarily would apply." This invitation to use existing portions of the guidelines manual in certain cases is simpler than a new specific offense characteristic with set enhancement levels and floors. It also better accommodates the wide range of defendants who may fall under the new statutory maximum,

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a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination."

[212] USSC, *FY 2006-2015 Monitoring Dataset*.

[213] USSC, *FY 2013-2015 Monitoring Dataset*.

[214] *Id.*

[215] R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001) ("In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.").

from physicians who were instrumental in the fraud to translators who may have been paid a small fee for limited services.

If, despite these reasons against it, the Commission persists in its proposal to add the 20th specific offense characteristic to §2B1.1, Defenders urge the Commission to: (a) limit the enhancement to two levels without a floor; (b) specify that §3B1.3 does not apply; and (c) require, as proposed, that the defendant be convicted of one of the three statutory provisions identified in the Act and the statutory maximum term of ten years' imprisonment applies.[216]

(a.) Limit the enhancement to two levels without a floor. A two-level enhancement is more than adequate to address the offenses identified in the Act. Last year, the Department of Justice asked why the Commission was not recommending an enhancement "similar" to the two-level enhancement for Federal health care offenses at §2B1.1(7).[217] That 2-level enhancement applies only to Federal health care offenses with large loss amounts, between $1-7 million.[218] The current proposed amendment would apply to all convictions subject to the 10-year statutory maximum, regardless of the scale of the offense.

The proposed floors would result in guideline-recommended sentences that are disproportionately high for these non-violent offenses. Even the lower of the two bracketed floor options—12—is disproportionately high to other guideline-recommended sentences. For example, §2A2.3 provides an offense level of 7 for an assault where physical contact is made, or use of a dangerous weapon is threatened. The offense level is 9 for assault where the victim sustained bodily injury. §2A2.3(b). And 12 is the same offense level that applies to someone who has obstructed an officer where the victim sustained bodily injury. §2A2.4. A floor also fails to acknowledge the wide range of defendants—and degrees of culpability—that fall within the subgroup of people identified in the Act. A better solution is to let the current guidelines do their work. If the sentencing court perceives that the offense level understates the seriousness of the offense, the court is free to depart under §2B1.1, comment. (n.20(A)).

(b.) Specify §3B1.3 does not apply. Where a factor addressed in a Chapter Two enhancement significantly overlaps with a factor addressed in a Chapter Three adjustment, the guidelines

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[216] The Commission's proposed amendments include several bracketed items, including whether the enhancement should be 2 or 4 levels, whether the floor should be 12 or 14, and whether the commentary should advise courts not to apply §3B1.3 or indicate that courts are "not preclude[d]" from applying §3B1.3.

[217] Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 37 (Mar. 14, 2006).

[218] *See* §2B1.1(b)(7).

routinely advise against double counting by specifying not to apply both.[219] Because the new proposed specific offense characteristic would significantly overlap with the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill), if the Commission adopts the proposed 20th specific offense characteristic, it should advise against double counting by specifying that if the enhancement applies, do not apply §3B1.3.

(c.) Require that the defendant was convicted under the statutes identified in the Act, and that the statutory maximum of ten years' imprisonment applies. The Commission's conviction-based approach to the proposed enhancement (enhancement applies when defendant was convicted under § 408(a), § 1011(a) or § 1383(a), and the statutory maximum term of ten years' imprisonment applies) is better than the relevant-conduct-based approach identified in the Issues for Comment (enhancement applies based on conduct described in the statutes). As Defenders have indicated in the past, sentencing based on relevant conduct presents numerous problems.[220] It provides prosecutors with "indecent power,"[221] and contributes to unwarranted disparity, undue severity, and disrespect for the law. Defenders oppose expanding the use of relevant conduct here.

VI. Proposed Amendment #6: Acceptance of Responsibility

We appreciate the Commission responding to significant concerns about the chilling effect the current language in §3E1.1[222] has on the defense's willingness to object to relevant conduct. We do not believe, however, that the proposed amendment adequately addresses the problem.

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[219] *See*, *e.g.*, §2A3.1, comment. (n.3(B)) ("do not apply §3B1.3 (Abuse of Position of Trust of Use of Special Skill)" if related Chapter Two enhancement applies); §2A3.2, comment. (n.2(B)) (same); §2A3.4, comment. (n.4(B)) (same); §2B1.1, comment. (n.7) (same); §2B1.1, comment. (n.15) (same); §2G1.3, comment. (n.2(B)) (same); §2G2.6, comment. (n.2(B)) (same). The guidelines take a similar approach with other Chapter Three adjustments that overlap with Chapter Two enhancements. *See*, *e.g.*, §2G2.1, comment. (n.4) ("If subsection (b)(4)(B) applies, do not apply §3A1.1(b)."); §2G2.2, comment. (n.4) (same); §2K2.6, comment. (n.2) ("If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence)."); §2L1.1. comment. (n.5) ("If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).").

[220] *See*, *e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-31 (May 17, 2013).

[221] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

[222] Specifically, a defendant's right to dispute the scope of relevant conduct under USSG §1B1.3 – a right acknowledged in §6A1.3 and Federal Rule of Criminal Procedure 32(i) – is undermined by the language in §3E1.1, comment. (n.1(A)), which states that credit for acceptance of responsibility is contingent upon "not falsely denying any additional relevant conduct," and 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."

Defenders strongly encourage the Commission to remove from §3E1.1 all references to relevant conduct and instead reference only the offense of conviction. In the alternative, the Commission should make clear that a defendant who does not obstruct or impede the administration of justice pursuant to §3C1.1, but who otherwise challenges the legal or factual basis for relevant conduct, is eligible for a reduction under subsection (a) and should not be penalized for exercising the right to have disputed sentencing factors resolved in accordance with §6A1.2 and §6A1.3.[223]

A. The Commission Should Remove from §3E1.1 All References to Relevant Conduct and Reference Only the Offense of Conviction

The Commission requests comment on whether it should "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." Defenders strongly support such an approach because looking to relevant conduct when assessing acceptance of responsibility undermines a fair and just resolution of disputed sentencing factors without serving legitimate sentencing purposes.

Defenders recommend the following changes to the commentary in §3E1.1, notes 1(A), 3, and 4:

> 1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
>
> (A) truthfully admitting the elements of the ~~conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, 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~~.
>
> 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the elements of ~~conduct comprising~~ the offense of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A))~~, generally will constitute ~~significant evidence~~ of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. Arguing that the government has not carried its burden of

[223] The guidelines make clear that a party has the right to object to a presentence report, USSG §6A1.2, and "[w]hen a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information." USSG §6A1.3, comment.

> proving relevant conduct or other enhancements by a preponderance of the evidence or that the evidence does not meet the legal definition of those provisions is not inconsistent with acceptance of responsibility. ~~A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right~~.
>
> 4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be ~~extraordinary~~ cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

The reference to relevant conduct in § 3E1.1 should be removed because it does not serve the purposes the Commission originally contemplated when it promulgated the guidelines and undermines a fair and accurate sentencing proceeding. When the guidelines were first created, the Commission believed that a defendant's acceptance of responsibility was a "sound indicator of rehabilitative potential" that should be rewarded with a reduced sentence.[224] The Commission's recent recidivism report, however, reveals that the acceptance of responsibility provision has not proven to be a "sound indicator of rehabilitative potential." The report concluded that an adjustment for acceptance of responsibility "was not associated with lower recidivism rates."[225]

The Commission included relevant conduct in the sentencing guidelines as a compromise between real and charged offense sentencing to prevent prosecutors from being able to "influence sentences by increasing or decreasing the number of counts in an indictment." *See* USSG Ch. 1, Pt. A, 4(a). This presumably was to promote one purpose of the guidelines – reducing unwarranted disparity. But the reference to relevant conduct in §3E1.1 undermines a defendant's ability to challenge allegations at sentencing that often have a significant impact on the guideline calculation.

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[224] USSC, *Preliminary Draft of Sentencing Guidelines*, Ch. Three: Offender Characteristics: Post-Offense Conduct, Acceptance of Responsibility §B321, comment. (1986). *See also United States v. Garrasteguy*, 559 F.3d 34, 39 (1st Cir. 2009) (noting that acceptance of responsibility recognizes "increased potential for rehabilitation"); *United States v. Belgard*, 694. F. Supp. 1488, 1497 (D. Ore. 1988) (reduction for acceptance of responsibility recognizes "increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct"), *aff'd sub nom, United States. v. Summers*, 895 F.2d 615 (9th Cir. 1990).

[225] USSC, *Recidivism Report*, *supra* note 33, at 21. *See also id*. at App. A-1, A-2, and A-3 (defendants who received no adjustment for acceptance of responsibility had lower rearrest, reconviction, and incarceration rates than those who received a 2- or 3-level adjustment).

The guidelines already allow an increase in sentence based on relevant conduct under the lowest standard of proof and with a low threshold of reliable evidence.[226] Thus, a prosecutor may choose to charge a defendant with a lesser offense only to seek a significant enhancement at sentencing based upon relevant conduct established through a de minimis form of proof.[227] For example, prosecutors often present uncorroborated hearsay evidence to probation officers that greatly increases the drug quantity for which defendants are held responsible,[228] and probation officers typically include it in the report without further investigation into its accuracy. Even when the information in the presentence report is objectively unreliable, the defense must object[229] to the government's version of the conduct and, in some circuits, the defense bears the burden of "articulat[ing] the reasons why the facts contained therein are untrue or inaccurate."[230] Due process requires an opportunity to be heard on these allegations but inclusion of relevant conduct in §3E1.1 chills that opportunity.

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[226] *See, e.g.*, *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) ("[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.") (citing *United States v. Clark*, 583 F.3d 803, 813 (7th Cir. 2008)).

[227] *See United States v. Miller*, 910 F.2d 1321, 1331 (6th Cir. 1990) (Merritt, J., dissenting) ("The Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.").

[228] *See generally* Claudia Catalan, *Admissibility of Testimony at Sentencing, Within Meaning of USSG § 6A1.3, Which Requires Such Information be Relevant and Have "Sufficient Indicia of Reliability to Support its Probable Accuracy*," 45 A.L.R. Fed. 2d 457 (originally published in 2010).

[229] *See* Fed. R. Crim. P. 32(i)(3)(A) (permitting court to "accept any undisputed portion of the presentence report as a finding of fact"); USSG §6A1.3 (governing opportunity of parties to object to a factor important to the sentencing determination); *United States v. McCully*, 407 F.3d 931, 933 (9th Cir. 2005) (no plain error for imposing upward enhancements for drug quantity, possession of a weapon, and obstruction of justice where presentence report set forth facts supporting enhancements and defendant did not object); *United State v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) ("failure to object to allegations of fact in a PSI admits those facts for sentencing purposes").

[230] *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990). *See also*, *United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) ("where a defendant's objections to a presentence investigation report are wholly conclusory and unsupported by countervailing evidence, the sentencing court is entitled to rely on the facts set forth in the presentence report"); *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997) (even though defendant objected to certain facts in the presentence report, he "did not provide the sentencing court with evidence to rebut the factual assertions" so the "court was justified in relying on the contested facts"); *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988) (approving district court's decision to accept "controverted matters in the report unless the defendant presented [contrary] evidence"). *But see United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Wilken*, 498 F.3d 1160, 1169-70 (10th Cir. 2007).

Including relevant conduct in §3E1.1 gives prosecutors excessive control over the plea bargaining and sentencing process by giving them a tool to discourage the defendant from challenging the government's version of the offense conduct.[231] If the defense fails to carry the burden of proving that the government's allegations are untrue or inaccurate and the court finds defense counsel's argument frivolous solely because the challenge was unsuccessful, the court can deny the reduction for acceptance of responsibility. The Commission should not further ease the government's burden of proof by requiring a defendant to either admit relevant conduct or take the risk of having an objection found "frivolous."

A provision that permits a court to deny a 2-level reduction because it considers a defendant's challenge to be frivolous actually undermines the principles of real offense sentencing. If defense counsel must make a strategic decision on whether a judge will consider a challenge frivolous and chooses not to make the challenge out of fear that the court will deny the client acceptance of responsibility, then the defendant may have to serve a sentence that does not accurately account for real offense conduct.[232]

Including relevant conduct also results in unwarranted disparity because courts take radically different approaches to applying the rule. This is most apparent in the disparity arising from the different interpretations of what is a "frivolous" challenge. A survey of Defenders throughout the country shows vastly different judicial views on whether a defendant's unsuccessful challenge to relevant conduct should result in a denial of the adjustment for acceptance of responsibility.

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[231] The National Association of Criminal Defense Lawyers pointed out fifteen years ago how the relevant conduct provisions give "the government an opportunity to enter into plea agreements without having to carry the burden of reasonable doubt standards for the enhancement of relevant conduct issues." NACDL Sentencing and Post-Conviction Comm., Written Testimony 24-25 (Feb. 25, 1992) (Concerning United States Sentencing Commission's Proposed Amendments to Sentencing Guidelines and Policy Statements).

[232] Take, for example, a defendant in criminal history category I who pleads guilty to possession of marijuana with intent to distribute. He has a base offense level of 10, but faces a 2-level enhancement for possession of a dangerous weapon under §2D1.1(b)(1). If he does not contest the enhancement and is given a 2-level reduction for acceptance of responsibility, his final offense level is 10, with a range of 6-12 months in Zone B and the possibility of a probationary sentence with home confinement. If, however, defense counsel challenges the enhancement but loses, and the defendant is denied acceptance, the final offense level is 12 and in Zone C where the guidelines recommend imprisonment. Under this scenario, a defendant may forego contesting the enhancement to increase the possibility of a probationary sentence. If the facts, however, actually show that the weapon was not connected to the offense, then the sentence would not truly reflect the real offense.

Cf. Alexa Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. Ch. L. Rev. 1467, 1494 (2013) (discussing how government control over the additional 1-level reduction under §3E1.1(b) may result in an increased sentence because it creates a disincentive for the defendant to challenge relevant conduct).

Some judges do not penalize the defense for holding the government to its burden of proof on relevant conduct, whether the challenge is successful or not. Other judges, however, view an unsuccessful challenge as justifying a denial of the reduction. For example, the Seventh Circuit concluded:

> Contesting the veracity of the alleged relevant conduct is no doubt permissible and often perfectly appropriate. However, if a defendant denies the conduct and the court determines it to be true, the defendant cannot then claim that he has accepted responsibility for his actions.

United States v. Cedano-Rojas, 999 F.2d 1175, 1182 (7th Cir. 1993).[233] Even an unsuccessful challenge to the credibility of a witness has been deemed sufficient to deny a defendant credit for acceptance of responsibility.[234] The varying view among courts[235] as to what constitutes a

[233] The defendant in *Cedano-Rojas* challenged the previous requirement that a defendant admit relevant conduct to receive the acceptance reduction, but the Guideline was amended pending his appeal to permit acceptance as long as there was no false or frivolous denial. *Cedano*-Rojas, 999 F.2d at 1181-82. Subsequent cases reaffirm the principle that a defendant who denies relevant conduct has not accepted responsibility. *See, e.g.*, *United States v. Brown*, 47 F.3d 198, (7th Cir. 1995) ("If a defendant denies relevant conduct and the court determines such conduct occurred, the defendant cannot claim to have accepted responsibility for his actions."); *United States v. Sandidge*, 784 F.3d 1055, 1064 (7th Cir. 2015) (affirming denial of acceptance of responsibility adjustment simply because court rejected defendant's factual challenge to applicability of cross-reference). *See also United States v. Ratliff*, 376 F. App'x 830, 843 (10th Cir. 2010) (quoting *Brown* to uphold court's denial of acceptance of responsibility adjustment for defendant who challenged extent of the fraud committed); *United States v. Skorniak*, 59 F.3d 750, 757 (8th Cir. 1995) ("a defendant who denies relevant conduct that the court later determines to have occurred has acted in a manner inconsistent with clearly accepting responsibility"); *Elliott v. United States*, 332 F.3d 753, 766 (4th Cir. 2003) ("a denial of relevant conduct is 'inconsistent with acceptance of responsibility'"); *United States v. Burns*, 781 F.3d 688, 690, 693 (4th Cir.), *cert. denied*, 135 S. Ct. 2872 (2015) (defendant who pled guilty to a firearm offense argued that cross-reference to aggravated assault rather than attempted murder should apply because of insufficient evidence of mens rea; even though the defendant did not testify, the court affirmed denial of acceptance of responsibility merely because he "falsely denied" relevant conduct). *See generally* Kimberly Winbush, Annotation, *Downward Adjustment for Acceptance of Responsibility under USSG § 3E1.1—Drug Offenses*, 17 A.L.R. Fed. 2d 193 (2007 & Supp. 2016) (citing numerous cases where the defendant was denied a reduction for acceptance of responsibility because he or she contested relevant conduct).

[234] *See, e.g.*, *United States v. Berthiaume*, 233 F.3d 1000, 1004 (7th Cir. 2000) (upholding district court's decision that defendant "frivolously" contested drug quantity calculation because court rejected the challenge to the reliability of the government's witnesses); *United States v. Jones*, 539 F.3d 895, 897-98 (8th Cir. 2008) (defendant's unsuccessful challenge to credibility of cooperating witness was sufficient to deny acceptance of responsibility adjustment even though appellate court acknowledged that the witness was "not a strong witness" and his "testimony as to drug transactions amounts and frequency was confusing and often internally inconsistent").

[235] *See* discussion *infra* pp. 55-57 (citing case law that shows differing judicial views on meaning of "frivolously contest").

"frivolous" challenge is directly contrary to the Commission's goal of promoting the uniform application of the Guidelines.

Some courts have upheld the denial based upon the court's disagreement with the lawyer's argument even if the defendant stands silent. For example, in *United States v. Purchess*, 107 F.3d 1261, 1266-69 (7th Cir. 1997), defense counsel contested relevant conduct without proffering any evidence and the defendant exercised his right to remain silent. The Seventh Circuit concluded that the "defendant and his attorney appear to have been attempting to manipulate the Guidelines" and suggested that whether the attorney proffers evidence or not, "the court can alternatively question the otherwise silent defendant to determine if the defendant understands and adopts the attorney's statements challenging facts underlying possibly relevant conduct. . . . If the defendant does understand and agrees with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction." *Id*. at 1267, 1269.[236] The Eleventh Circuit has encouraged denial of an acceptance of responsibility reduction when the defendant's lawyer contested the significance of the facts set forth in the presentence report[237] or raised a constitutional challenge to the constitutionality of his convictions even after pleading guilty.[238]

In sum, denying an acceptance of responsibility reduction merely because a defendant has contested relevant conduct and lost gives prosecutors undue power, undermines the concept of real offense sentencing, and creates unwarranted disparity, without adding to the assessment of a

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[236] *See also United States v. Lister*, 432 F.3d 754, 759-60 (7th Cir. 2005) (following *Purchess* and denying acceptance of responsibility reduction to a defendant whose attorney challenged the chronology of events presented in the PSR; when the court questioned Lister about whether he agreed with the challenges, Lister stated that he relied on his attorney – an answer that the appellate court characterized as "legal hair-splitting, ultimately frustrating the court's determination"); *United States v. Dong Jin Chen*, 497 F.3d 718, 720-21 (7th Cir. 2007) (following *Purchess* and denying acceptance of responsibility reduction based on the defendant contesting facts contained in the PSR that were established at sentencing hearing; rejecting argument that the defendant did not have sufficient command of the English language to be excused from his conduct); *United States v. Booker*, 248 F.3d 683, 690 (7th Cir. 2001) (affirming denial of acceptance reduction because defendant's denial of relevant conduct was "meritless").

[237] *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (even though district court reduced defendant's offense level for acceptance of responsibility, the en banc court opined that the defendant's challenge to whether evidence in the PSR established fraudulent intent was "factual", not "legal" and would have justified denial of the reduction for acceptance of responsibility).

[238] *United States v. Wright*, 133 F.3d 1412, 1413-14 (11th Cir. 1998) ("even if the district court's conclusion rested *exclusively* on Wright's challenges to the constitutionality of his convictions, the district court's refusal to reduce Wright's offense level was permissible").

defendant's potential for rehabilitation. Therefore, the Commission should delete from §3E1.1 any reference to relevant conduct and amend the guideline to focus on the offense of conviction.

B. Whether a Defendant is Entitled to an Adjustment for Acceptance of Responsibility Should Not Depend upon the Court's Assessment of Whether the Challenge Is "Frivolous" or "Non-frivolous," Particularly Given the Chilling Effect Such an Assessment Has on a Lawyer's Ethical Responsibilities

Whether or not the Commission chooses to reference relevant conduct in §3E1.1, a defendant's eligibility for a reduction for acceptance of responsibility should not depend upon a court's subjective assessment of frivolity. The Commission's proposed amendment to §3E1.1 does not resolve the myriad problems associated with the current wording of the guideline. The proposed language merely converts an affirmative statement about how a frivolous denial of relevant conduct is inconsistent with acceptance of responsibility into a negative statement that a non-frivolous denial does not preclude relief. The term "non-frivolous" is as subjective as the term "frivolous."[239] Under either wording, a defendant who makes a challenge that the court deems "frivolous" is likely to be denied acceptance of responsibility. Consequently, the continued risk of losing one of the few available reductions in the length of a term of imprisonment will deter defense lawyers from "making reasonable arguments in defense of their clients."[240]

1. Only Defendants Who Obstruct Justice in Contesting Relevant Conduct Should be Ineligible for a Reduction under §3E1.1

If the Commission chooses not to remove the reference to relevant conduct from §3E1.1, Defenders suggest the following amendment to the guideline:

(A) truthfully admitting the elements of the conduct comprising the offense(s) of conviction, and truthfully admitting ~~or not falsely denying~~ any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, ~~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~~. a defendant who

[239] As Justice Douglas recognized, the "frivolity standard" is "elusive." *See* Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 Hous. L. Rev. 747, 757 (2008) (quoting *Cruz v. Hasck*, 404 U.S. 559, 65 (1971) (Douglas, J., concurring)). The problem results from the "fine line 'between the tenuously arguable and the frivolous.'" Further, there is a distinction between factual and legal frivolity. *Id.* (quoting *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993)) (other citations omitted).

[240] *Edwards*, 635 F. App'x at 197 (Merritt, J., dissenting).

challenges the legal or factual basis for relevant conduct is eligible for a reduction under subsection (a) provided the defendant did not obstruct or impede the administration of justice pursuant to §3C1.1.

This language would sanction the defendant whose claim is patently false without the chill associated with the court's subjective view of a factual or legal dispute about relevant conduct.

2. Tying a §3E1.1 Reduction to the Court's Assessment of Whether a Challenge is "Frivolous" or "Non-Frivolous" Has Serious Due Process Implications and Infringes on a Lawyer's Ethical Responsibilities

The Commission should acknowledge that reasonable lawyers can disagree about the legal and factual scope of relevant conduct, including disputes about whether the government's allegations are based upon sufficiently reliable evidence, and whether the evidence presented to support an enhancement satisfies the preponderance of the evidence standard. Instructing a court to decide whether to penalize a defendant for challenging relevant conduct based upon the court's view of whether the challenge is frivolous raises due process concerns and chills the rights of defendants to put the government to its burden of proof – a right which is recognized in §6A1.2 (allowing objections to presentence reports) and §6A1.3 (resolution of disputed sentencing factors).[241] And, as discussed above, also results in unwarranted disparity.

The lack of a definition of frivolity has resulted in inconsistent application of the acceptance of responsibility reduction. As previously discussed, some courts consider "frivolous" as any unsuccessful challenge to relevant conduct.[242] Other courts, however, have taken a more refined approach to the meaning of frivolous by focusing on whether the challenge "lacks an arguable basis in law or fact" or is "based on an 'indisputably meritless legal theory."[243] The Fifth Circuit distinguishes between a legal and a factual challenge, opining that "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 the defendant has not accepted responsibility."[244]

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[241] The first Commissioners opined that "[t]he guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing." William W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990).

[242] *See supra* note 236.

[243] *See United States v. Santos*, 537 F. App'x 369, 375 (5th Cir. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) and *Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995)).

[244] *See United States v. Santos*, 537 F. App'x 369, 375 (5th Cir. 2013) (*citing United States v. Nguyen*, 190 F.3d 656, 659 (5th Cir. 1999) and finding that court erred in denying acceptance of responsibility

Even judges within the same circuit court do not agree on the meaning of "frivolously contest." The Sixth Circuit's decision in *United States v. Edwards*, 635 F. App'x. 186, 188-89 (6th Cir. 2015), demonstrates the ambiguity of the term "frivolous" and explains the dilemma attorneys face in deciding whether to challenge an adjustment. Edwards pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine and 28 grams or more of cocaine base. The final PSR stated that "Edwards should receive a four-level increase under USSG §3B1.1(a) for being an organizer or leader of criminal activity that involved five or more participants, because Edwards had directed the activities of others and recruited participants for the offense." *Id*. at 189. It also recommended a three-level reduction for acceptance of responsibility. Edwards objected to the §3B1.1 enhancement, arguing that he did not play an aggravating role and the offense did not involve five or more participants. The court disagreed and increased Edwards' offense level by four points, pursuant to §3B1.1(a). The court also concluded that, in contesting the leadership-role enhancement, Edwards had frivolously denied relevant conduct, and therefore refused to grant Edwards a reduction for acceptance of responsibility. A panel majority on the Sixth Circuit affirmed the district court's decision.

Judge Merritt dissented, noting that the application of the role enhancement was "debatable," and that the lengthier sentence imposed "deter[s] defense lawyers from making reasonable arguments in defense of their clients":

> The court upholds a 15-year drug sentence for a first-time offender. It does so by affirming a debatable "organizer or leader" enhancement that added many years to the sentence and then added more years by denying Edwards an "acceptance of responsibility" deduction—all because at sentencing his lawyer contested the applicability of the enhancement. The 15-year sentence is much longer than necessary to deter this first-time offender from further violations but does deter defense lawyers from making reasonable arguments in defense of their clients.
>
> ***
>
> I do not believe that a criminal defendant's choice to object to the "organizer/leader" enhancement—when it was in dispute by various parties throughout the pendency of the case—is "frivolous." A reduction for accepting responsibility is supposed to be accorded to a criminal defendant who enters a guilty plea and "truthfully admits the conduct compromising the offense." U.S.S.G. § 3E1.1, app. n.3. At the sentencing hearing, defense counsel objected to and argued against the 4-level "organizer or leader" enhancement, but Edwards had consistently admitted the offense conduct. He admitted having contacts with

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simply because defendant objected to sufficiency of evidence supporting importation enhancement). *See also United States v. Patino-Cardnas*, 85 F.3d 1133, 1136 (5th Cir. 1996) (court improperly denied reduction for acceptance of responsibility because defendant "objected to the legal characterization of leadership role given his actions").

> the other conspirators. His counsel only disputed that those contacts demonstrated that he was an organizer or leader. Counsel did not deny any conduct. He only argued that Edwards' conduct did not suggest a leadership role.
>
> The evidence regarding the significance and extent of those contacts was somewhat equivocal and should have been open for debate without being deemed a "frivolous objection" to relevant conduct. Simply put, Edwards did not deny any conduct. He only denied that his conduct should be characterized as a "leadership role."

United States v. Edwards, 635 F. App'x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting).

Judge Merritt's acknowledgment of the deterrent effect of the court's ruling on defense counsel's willingness to raise arguments on behalf of a client is noteworthy. Permitting a court to deny acceptance of responsibility to a defendant based upon the court's belief that the defense attorney presented a frivolous challenge to relevant conduct merely because the defense loses gives the court extensive power to control litigation and impinge on the lawyer's ethical responsibilities to zealously represent his or her clients.[245]

In conclusion, the manner in which some courts consider any unsuccessful challenge to relevant conduct as "frivolous," makes defense attorneys face a "Hobson's choice"[246]: if they challenge relevant conduct, they run the risk that their client will be denied a reduction in sentence. But if they do not raise the challenge, they run the risk of being ineffective advocates. To resolve this dilemma and ensure that a defendant's due process rights are protected, the Commission should amend §3E1.1 as suggested by Defenders.

C. The Commission Should Not Include in §3E1.1 Any Reference to Departures/Variances or Informal Challenges to Relevant Conduct

The Commission requests comment on whether it should reference "informal challenges" to relevant conduct or "broaden the proposed provision to include other sentencing considerations, such as departures or variances." For the same reasons stated earlier, Defenders believe that the Commission should refrain from adding more ambiguity to the guideline. Mentioning informal challenges to relevant conduct, departures or variances, and using the ambiguous term "non-

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[245] *See* Margareth Etiene, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2165 (2003) (discussing how the acceptance of responsibility provision in the guidelines "is the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients"). *See also* Hadar Aviram et al., *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 Hastings Const. L.Q. 775, 822-23 (2014) (noting how judges may "extend defendant's sentence in response" to an attorney's "adversarial tactics that judges deem unnecessary").

[246] *Cf.* Newton, *supra* note 239, at 752 (discussing Hobson's choice lawyers must make in raising *Almendarez-Torres* claims).

frivolous" suggest that the court should make the same subjective assessments of the defense position as it does now. If the government seeks an upward departure or variance, the defendant should have an absolute right to contest it without fear that the court may use an unsuccessful challenge to further penalize him or her by denying a reduction for acceptance of responsibility.

VII. Proposed Amendment #7: Miscellaneous Amendments

A. Parts A-C

Defenders have no objection to the miscellaneous amendments in response to the Transnational Drug Trafficking Act of 2015, International Megan's Law, and the Chemical Safety Act.

In the future, the Commission should revisit the 6- and 8-level enhancements under §2A3.5(b)(1), which apply "[i]f, while in failure to register status, the defendant committed" "a sex offense against someone other than a minor," "a felony offense against a minor not otherwise covered by subdivision (C)," or "a sex offense against a minor." Those enhancements apply when the court finds by a preponderance of evidence, and with evidence that need not comply with the Federal Rules of Evidence, that the defendant committed a specified offense.[247] To ensure greater due process protections for enhancements that can result in a 310% increase in sentence, the enhancement should be limited to individuals who were actually convicted of committing a specific offense while in failure to register status.

B. Part D: Computer Enhancement at §2G1.3

The Commission proposes amending the commentary regarding the computer enhancement at §2G1.3(b)(3) to specify that commentary note 4 applies only to subpart (A) of the computer enhancement (using a computer to "persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct"), and not to subpart (B) (using a computer to "entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor"). Defenders propose a different approach to this issue, and encourage the Commission to eliminate the computer enhancement at §2G1.3(b)(3) and related commentary entirely, or at least eliminate the enhancement in subpart (B) regarding solicitation.

We recommend eliminating or shrinking the scope of the computer enhancement because it fails to distinguish among defendants. As the Commission has noted in the context of a different guideline, changes in computer and Internet technologies used by typical defendants can affect whether a sentencing scheme adequately distinguishes among defendants.[248] The computer enhancement at §2G1.3(b)(3), similar to the computer enhancement at §2G2.2(b)(6), because it

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[247] *See United States v. Lott*, 750 F.3d 214, 220-21 (2d Cir. 2014) (guideline does not require a conviction for enhancement to apply); *United States v. Romeo*, 385 F. App'x 45, 49 (2d Cir. 2010) (relying on allegations in presentence report to uphold enhancement by a preponderance of the evidence).

[248] USSC, *Report to Congress: Federal Child Pornography Offenses* ii (Dec. 2012).

applies to so many defendants, fails to "differentiate among offenders in terms of their culpability."[249] Last year, the computer enhancement at §2G1.3(b)(2) (either subpart (A) or (B)) was applied to 81.2% of defendants sentenced under §2G1.3.[250] The rate for subpart (B) alone was 45.4%.[251] At the same time, the rate of within guideline sentences for this guideline fell to 44.5% with more than 50% of defendants sentenced below the guideline recommended range.[252] Computer enhancements, particularly for solicitation, are out-of-date in this digital era, and fail to adequately distinguish among defendants.

VIII. Proposed Amendment #8: Marihuana Equivalency

Defenders do not object to the Commission's proposal to change the term "marihuana equivalency" to "converted drug weight" or the name of the "Drug Equivalency Tables" to "Drug Conversion Tables." We believe, however, that the Commission should amend the guideline commentary to explain the change. The term of art – "marihuana equivalency" – has been used in the guidelines, and case law interpreting the guidelines, since 1991 when the Commission opted to "simplify[y] the application of the Drug Equivalency Table by referencing the conversions to one substance (marihuana) rather to four substances." USSG App. C, Amend. 396, Reason for Amendment (Nov. 1. 1991). To facilitate future legal research, it would be helpful for the Commission to explain the change in the commentary on Use of Drug Conversion Tables in addition to the Reason for Amendment. We recommend explanations in both places based on our experience that many practitioners are not as familiar with Appendix C to the guidelines, and are more likely to read the commentary and notice changes made to the manual itself. While such repetition may not be necessary with every amendment, because of the long reliance on this term of art in a heavily used and litigated guideline, we recommend it in this instance. [253]

Specifically, Defenders suggest that the Commission add an explanation for the change at the beginning of §2D1.1, comment. (n. 8) – Use of Drug ~~Equivalency~~ Conversion Tables:

> Background: The Drug Conversion Table was previously named the Drug Equivalency Table. The base offense levels for drugs that were not listed in the Drug Quantity Tables were originally determined by using the Drug Equivalency Table to convert the quantity of the controlled substance involved to its

[249] *Id.* at iii.

[250] USSC, *Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2015.*

[251] *Id.*

[252] USSC, *2015 Sourcebook of Federal Sentencing Statistics* tbl. 28.

[253] A Westlaw search of the terms "(marijuana marihuana) /1 equivalen! & guideline" turned up 1140 cases and 70 secondary sources.

marihuana, heroin, and cocaine equivalency. In 1991, the Commission amended the guidelines to use a single conversion factor – "marihuana equivalency," which was meant to simplify application of the guidelines. USSG App. C, Amend. 396 (Nov. 1, 1991). In 2017 the Commission replaced the term "marihuana equivalency" with a more generic term: "converted drug weight." USSG App. C, Amend. ___ (Nov. 1, 2017).

IX. Proposed Amendment #9: Technical Amendments

Defenders have no objections to most of the technical amendments proposed by the Commission. We do, however, question the Commission's proposed clerical changes to the commentary to Ch. 2 guidelines captioned "Statutory Provisions." The guideline commentary for each Chapter 2 offense does not consistently refer to all statutes referenced to a particular guideline in the statutory index. And some commentary adds a reference to Appendix A for additional statutory provisions whereas others do not. To simplify the guidelines, and lessen the commentary, the statutory references need only appear in Appendix A. Accordingly, Parts C (4), (5), (6), and (7) of the Technical Amendments are not necessary. The better course of action is to delete the reference to "Statutory Provisions" from all of the Chapter 2 commentary.

X. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission's proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

cc: Rachel E. Barkow, Commissioner
Jonathan J. Wroblewski, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

Appendix A

Presumption of Probation Recommendation:

§ 5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is resumed to be appropriate ~~authorized~~ if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

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Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, ~~the guidelines authorize, but do not require,~~ a sentence of probation is presumed to be appropriate in the following circumstances:

(A) Where the applicable guideline range is in the Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(B) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months). In such cases, ~~the court may impose~~ probation is presumed to be appropriate only if ~~it~~ the court imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, ~~the court may impose~~ a sentence of probation is presumed to be appropriate only if ~~it~~ the court imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. The presumption in subsection (a) and Application Note 1 may be rebutted by a government showing that the factors set forth in 18 U.S.C. § 3553(a) compel a term of imprisonment.

~~2~~3. Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

Appendix B

Most states have multiple ways to impose adult sanctions on offenders of juvenile age

State	Judicial waiver			Prosecutorial discretion	Statutory exclusion	Reverse waiver	Once an adult/ always an adult	Blended sentencing	
	Discretionary	Presumptive	Mandatory					Juvenile	Criminal
Number of states	45	15	15	15	29	24	34	14	17
Alabama	■				■		■		
Alaska	■	■			■			■	
Arizona	■			■	■	■	■		
Arkansas	■			■		■		■	■
California	■	■		■	■	■	■		■
Colorado	■	■		■		■		■	■
Connecticut			■			■		■	
Delaware	■		■		■	■	■		
Dist. of Columbia	■	■		■			■		
Florida	■			■	■		■		■
Georgia	■		■	■	■	■			
Hawaii	■						■		
Idaho	■				■		■		■
Illinois	■	■	■		■		■	■	■
Indiana	■		■		■		■		
Iowa	■				■	■	■		■
Kansas	■	■					■	■	
Kentucky	■		■			■			■
Louisiana	■		■	■	■				
Maine	■	■					■		
Maryland	■				■	■	■		
Massachusetts					■			■	■
Michigan	■			■			■	■	■
Minnesota	■	■			■		■	■	
Mississippi	■				■	■	■		
Missouri	■						■		■
Montana				■	■	■		■	
Nebraska				■		■			■
Nevada	■	■			■	■	■		
New Hampshire	■	■					■		
New Jersey	■	■	■						
New Mexico					■			■	■
New York					■	■			
North Carolina	■		■				■		
North Dakota	■	■	■				■		
Ohio	■		■				■	■	
Oklahoma	■			■	■	■	■		■
Oregon	■				■	■	■		
Pennsylvania	■	■			■	■	■		
Rhode Island	■	■	■				■	■	
South Carolina	■		■		■				
South Dakota	■				■	■	■		
Tennessee	■					■	■		
Texas	■						■	■	
Utah	■	■			■		■		
Vermont	■			■	■	■			
Virginia	■		■	■		■	■		■
Washington	■				■		■		
West Virginia	■		■						■
Wisconsin	■				■	■	■		■
Wyoming	■			■		■			

■ In states with a combination of provisions for transferring juveniles to criminal court, the exclusion, mandatory waiver, or prosecutorial discretion provisions generally target the oldest juveniles and/or those charged with the most serious offenses, whereas younger juveniles and/or those charged with relatively less serious offenses may be eligible for discretionary waiver.

Note: Table information is as of the end of the 2011 legislative session.

Source: Authors' adaptation of OJJDP's *Statistical Briefing Book* [online].

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 20, 2017

Hon. William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Response to Request for Comment on Proposed Amendments to the Sentencing Guidelines Issued on December 19, 2016

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's request for comment on proposed Guideline Amendment Numbers 1 through 8.[1]

A. Proposed Amendment Number 1 - First Offenders/Alternatives to Incarceration

The PAG supports the Commission's efforts to reduce terms of incarceration and encourage alternatives to incarceration for "first offenders" but recommends specific modifications which we believe are consistent with the policy objectives of this amendment.

1. First Offenders

Part A, at § 4C1.1 (First Offenders), sets forth a new Chapter Four Guideline that would provide lower Guideline ranges for "first offenders" and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (as compared with other offenders falling within Criminal History Category I). This amendment is consistent with

[1] The PAG has no comment on proposed Amendment Number 9 – Technical.

both the Commission's empirical analysis of recidivism data and first offenders,[2] and the mandate of 28 U.S.C. § 994(j) which directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

The new Chapter Four Guideline would define first offender to include defendants who (1) do not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2) have no prior convictions of any kind. The proposed amendment then sets forth two offense level adjustment options:

> ***Option 1*** provides a decrease of [1] level from the offense level determined under Chapters Two and Three.
>
> ***Option 2*** provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

The PAG offers the following comments and suggested modifications.

a. Definition of First Offender.

The PAG recommends that the Commission should broaden the scope of the term "first offender" to include defendants who have a criminal history score of zero and who have no prior *felony* convictions. In its most recent recidivism study, the Commission found that an individual's criminal history, as calculated under the federal sentencing Guidelines, "was closely correlated with recidivism rates."[3] Re-arrest rates were also at their lowest for those in the lowest criminal history category. *Id.* Where the Commission's ongoing research continues to support the conclusion that an individual's criminal history score is a reliable predictor of recidivism, only prior felony convictions should preclude first offender status when an individual's criminal history score is zero.

The Commission's earlier research supports this position. In 2004, the Commission evaluated three proposed first offender groups: one with offenders having no prior arrests, the second with offenders previously arrested, but not convicted; and the third with offenders with prior convictions which did not count towards criminal history. The Commission found that individuals in the three proposed first offender groups:

> are readily distinguishable from offenders with one or more criminal history points...They are more likely to have committed a fraud or larceny instant offense.

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[2] *See* U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" ("2016 Study") at 18 (2016), *available at* http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview.

[3] *Id*. at 5.

> They have less violent instant offenses, receive shorter sentences, and are less likely to go to prison. They are less likely to use illicit drugs, more likely to be employed, more likely to have a high school education (or beyond), and more likely to have financial dependents. Finally, offenders in groups A, B, and C, compared to other Guideline offenders, have instant offenses that are less culpable and less dangerous.[4]

The Commission's recent data analysis also provides support for the PAG's position. Individuals with no criminal history at all had only a 14.7% reconviction rate; the reconviction rate for those with prior criminal justice contact without a conviction counting toward criminal history was only slightly higher, at 21.8%. Re-incarceration rates were 4.1% and 7.4%, respectively.[5] Finally, defining "first offender" as a person with no criminal history points and who has never been convicted of a felony finds support in state first offender statutes.[6]

b. Application of the First Offender Adjustment.

The PAG recommends that the first offender adjustment reduction not be limited to defendants under a specified offense level as determined under Chapters Two and Three. The Commission's recidivism studies show that length of incarceration has relatively little effect on recidivism. Except for very short sentences (less than 6 months), the rate of recidivism changes very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, and 55.5% for sentences between 5 to 9 years).[7] This data is consistent with earlier research showing that long prison terms have little impact on public safety outcomes. The National Research Council, for example, concluded in a 2014 report that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."[8]

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[4] U.S. Sentencing Comm'n., "Recidivism and the 'First Offender'" ("2004 Study") at 11 (2004), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

[5] U.S. Sentencing Comm'n., "Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment" ("2017 Data Presentation") at 20 (2017), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20161209/20160109_DB_alternatives.pdf.

[6] *See*, *e.g.*, Georgia First Offender Act 42-8-60 (a "first offender" is defined as, *inter alia*, a person who has never been convicted of a felony or previously sentenced as a First Offender); Wyoming §7-13-301.

[7] *See* 2016 Study at 22.

[8] National Research Council, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" at 156 (2014), *available at* https://www.nap.edu/download/18613.

Other research has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects."[9] Any "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," *i.e.*, there was no basis to connect severity of a sentence with deterrence.[10]

It follows that wholesale elimination of eligibility for first offender status based on overall offense level is unwarranted. First offender offense level reductions should apply to all offense levels to allow the sentencing judge flexibility in selecting an appropriate punishment. While certain cases may merit a more significant term of incarceration based on the analysis of all § 3553(a) factors, the sentencing court is best positioned to make that determination on a case-by-case basis, as allowed by the rebuttable presumption in the Guideline.

c. Amount of First Offender Adjustment.

The PAG supports Option 2 but **the PAG recommends** that a larger deduction be granted to first offenders when the offense level is 16 or higher. Specifically, the PAG suggests a 2-level reduction for offense levels less than 16, and a 3-level reduction for offense levels at and greater than 16. This would expand the pool of defendants eligible for alternatives to incarceration at the court's discretion.

2. Consolidation of Zones B and C in the Sentencing Table

The proposed amended § 5C1.1(g) provides that the court ordinarily should impose a sentence other than a sentence of incarceration if: (1) the defendant is determined to be a first offender under § 4C1.1 (First Offender); (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense]; and (3) the Guideline range applicable to that defendant falls within Zone A or Zone B of the Sentencing Table.

a. Availability of Alternatives to Incarceration.

The PAG supports the expansion of Zone B as proposed, but **the PAG recommends** that § 5C1.1(g) be clarified to avoid the presumably unintended result of fewer offenders being

[9] Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) ("Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence."); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.").

[10] Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, at 1-2 (1999), *summary available* at http://members.multimania.co.uk/lawnet/SENTENCE.PDF.

potentially viewed as eligible for alternatives to incarceration. As noted above, Criminal History Category I includes defendants with convictions that do not result in any Criminal History points. Because the proposed definition of "first offenders" is limited to those with no convictions of any kind, § 5C1.1(g) can be read to exclude from alternatives to incarceration Category I defendants who are not "first offenders" under this proposed definition. Of course, limiting availability to those with no convictions of any kind, whether or not scoreable, would produce a relatively small pool of eligible offenders. It would result in less use of alternatives to incarceration, rather than more. **The PAG recommends** adding an Application Note to § 5C1.1 clarifying that § 5C1.1(g) is not intended to restrict a court's consideration of alternatives to incarceration only to "first offenders."

b. Application of Rebuttable Presumption.

The PAG recommends that the Commission should not limit the application of the rebuttable presumption by excluding certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenses should be excluded from the benefit of a first offender reduction, as violent offenders recidivate at higher rates and sooner than their non-violent counterparts,[11] there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.[12]

The "implementation of a first offender provision will not only impact a large percentage of the federal caseload, [] it will proportionally benefit offenders in certain demographic, social, personal, and offense categories."[13] However, this can only be so if the provision is applied to all categories of non-violent offenses. Wholesale exclusion of certain categories of offenses would only serve to significantly limit the application and concomitantly the benefits of the first offender provision.

The Commission's research shows that almost half of the individuals eligible for first offender status are sentenced under the fraud or theft Guidelines.[14] Additional lines drawn between categories of non-violent crimes neither is indicated nor would it serve the intended

[11] S*ee* 2017 Data Presentation at 20-21.

[12] *See* Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995).

[13] 2004 Study at 11.

[14] 2004 Study at 9.

purpose of the first offender provision, as alternatives to incarceration are already underutilized.[15]

B. Proposed Amendment Number 2 - Tribal Issues

1. Tribal Court Convictions

The PAG supports the Commission's recognition that tribal court convictions should not be assigned criminal history points and that only some, and certainly not all, tribal court convictions may warrant consideration for an upward departure. The PAG supports the amendment of § 4A1.3, as recommended by the TIAG, to provide guidance and a more structured framework for courts to consider when determining whether a departure is appropriate.

The PAG makes the following comments and recommendations regarding the proposed amendment:

a. **The PAG recommends** that proposed Application Note 2(C) be modified to the effect that a threshold finding either of (1) the absence of due process or (2) a conviction based on the same conduct that formed the basis for another conviction which is counted for criminal history points would bar the use of a tribal court conviction for an upward departure.

b. **The PAG recommends** that the last clause of the preamble to proposed Application Note 2(C), which currently reads "….and in addition, may consider relevant factors such as the following:….", be modified to read:

> "…and, in addition, **should** consider **the presence or absence of** relevant factors such as the following:…."

The PAG makes these recommendations to emphasize that because tribal convictions may not be a reliable basis for departure, the sentencing court *should* first consider whether these factors exist.

c. The PAG recognizes the importance of tribal government communication regarding the weight to be given to tribal convictions. How, when and with whom this should be done is unclear. If this provision is to remain within the proposed amendment, **the PAG recommends** that the Commission encourage the development of a protocol by which a tribal government could satisfy this provision with timely notice to all parties and the sentencing court.

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[15] *See* U.S. Sentencing Comm'n., "Alternative Sentencing in the Federal Criminal Justice System" at 3 (Jan. 2009), *available at* http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

2. Court Protection Orders

The PAG supports defining "court protection order" to clarify that the phrase includes tribal court protection orders which meet certain due process requirements. To accomplish this, **the PAG recommends** a slight change in the language of the proposed amended Application Note 1(D),which currently reads "**court protection order**" means any "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)," be modified to read:

> "**court protection order**" means any "protection order" that meets the definition of 18 U.S.C. §2266(5), as long as the protection order also meets the requirements of 18 U.S.C. §2265(b)."

The PAG does not support a general Chapter 3 adjustment for violations of protection orders. Such an adjustment is not needed for the bulk of cases in which a protection order violation may be of concern. The assault and threat-related Guidelines, found for example in §§ 2A1.4, 2A1.5, 2A2.1(b), 2A2.2(b)(3), (b)(4) and (b)(6), 2A2.3(b)(1), 2A6.1(b)(3), 2A6.2(b)(1), already either have extremely high offense levels, an applicable adjustment for degree of injury or injury to a partner, or an adjustment for violation of protection orders.

The PAG recommends further consideration by the Commission of other Guidelines in which a violation of a court protection order as a specific offense characteristic should replace existing specific offense characteristics that are less predictive of recidivism. For example, the Commission might eliminate the specific offense characteristic currently at § 2 G2.2(b)(6) (use of a computer to view child pornography) that applies to almost every defendant and that has no connection to recidivism, with an adjustment for possessing an image of a child who is the subject of a court protection order (which tends to suggest a more likely chance of recidivism). The PAG believes that further study would be warranted, however, to determine which, if any other Guidelines should be considered for such an adjustment.

C. Proposed Amendment Number 3 - Youthful Offenders

The PAG supports Proposed Amendment 3 which eliminates consideration of juvenile adjudications for any purpose. The PAG also supports the downward departure language proposed for the Commentary. The Amendment reflects the scientific consensus, cited by the Supreme Court, that even normal adolescents "have less control, or less experience with control, over their own environment" than adults and that because of that immaturity, their "irresponsible conduct is not as morally reprehensible as that of an adult."[16]

However, **the PAG recommends** that the Amendment should be more expansive per the recommendations set forth in the PAG's *Response to Request for Comment on Proposed*

[16] *Ropers v. Simmons*, 543 U.S. 551, 569-570 (2005) (citations omitted); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *see Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

Priorities for the Guideline Amendment Cycle Ending May 1, 2017 at 25 (July 25, 2016). For the following reasons, **the PAG recommends** that any offense committed prior to age 18 – whether sentenced as a juvenile or as an adult – should not be included in calculating a defendant's Criminal History score:

- First, assigning criminal history points when a juvenile is sentenced as an adult in the underlying jurisdiction ignores the substantial evidence that, regardless of whether the proceeding was "adult" or "juvenile," those under 18 bear lesser culpability for their actions.[17]

- Second, state jurisdictions have different practices with respect to when individuals under the age of 18 are sentenced as "adults."[18] As a result, similarly situated defendants may end up with substantially different criminal history scores, simply by virtue of different state rules concerning the treatment of juvenile offenses. Unwarranted disparities in sentencing are precisely what the Guidelines were designed to avoid.

- Third, juvenile offenders in many state jurisdictions are technically sentenced as adults – triggering points under Chapter 4 – but are nonetheless subject to the protections of the state's juvenile court system.[19]

Further, for the same reasons that the PAG does not support using such convictions for calculating criminal history points, the PAG does not support adding an upward departure for juvenile convictions under § 4A1.3. Without a similar amendment that addresses youthful age as a mitigating factor when sentencing an offender, the PAG believes that permitting such upward departures would disregard the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late 20's.

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[17] *Gall v. United States*, 552 U.S. 38, 58 (2007).

[18] *See, e.g., United States v. Moorer*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 F. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina has no analogous statutory provision").

[19] *See, e.g., United States v. Jones*, 260, 264 (2d Cir. 2005) (noting that "[y]outhful offender status carries with it certain benefits, such as privacy protections," and "New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing," yet federal courts have "still found it appropriate to consider the adjudications for federal sentencing purposes").

Finally, if the Commission accepts the PAG's position seeking the elimination of all criminal history points for offenses committed before the age of 18, and opposing an upward departure based on such offenses, there would be no necessity for a downward departure for cases in which a juvenile has been sentenced as an adult, because those offenses would never be counted. In sum, the PAG supports the elimination of counting juvenile adjudications, but urges the Commission to eliminate the counting of any sentence for an offense committed before the age of eighteen.

D. Proposed Amendment Number 4 – Criminal History Issues

The PAG supports the Commission's proposal to amend § 4A1.2(k) to provide that:

> Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

The PAG believes that the current regime, which increases offenders' criminal history points based on revocation sentences, can result in excessive terms of incarceration. The Commission's proposed amendment is a well-informed change in accord with the findings of its multi-year study on recidivism in the federal justice system[20] and the Commission's study of revocation sentences.

The *Introductory Commentary* to Chapter Four, Part A, emphasizes patterns of *criminal* behavior in discussing criminal history:

> A defendant with a record of **prior criminal behavior** is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that **repeated criminal behavior** will aggravate the need for punishment with each recurrence. . . . **Repeated criminal behavior** is an indicator of a limited likelihood of successful rehabilitation.
>
> The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and **patterns of career criminal behavior. (**emphasis added).

By contrast, many revocations result from violations of conditions of release that do not constitute criminal conduct (*e.g.*, failure to report, failure to fulfill financial obligations, failure to comply with instructions of probation officer, association with prohibited persons, etc.). Indeed, the 2016 Study revealed that most individuals who were re-arrested for revocation of supervision

[20] U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" (2016), *available at* http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview.

were not convicted of any crime. Since many revocation sentences are not imposed upon criminal convictions, accounting for them in computing criminal history points is inconsistent with the Commentary. Therefore, the PAG does not support an approach that would count revocation sentences in determining criminal history points.

With one modification, the PAG also supports the portion of the proposed amendment that would provide that revocation sentences may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). **The PAG recommends** that the Commission limit consideration of revocation sentences under § 4A1.3(a) to those which are based on criminal conduct. Consideration of revocation sentences based on criminal conduct is consistent with the types of information currently listed in § 4A1.3(a)(2) *(e.g.,* prior similar adult criminal conduct not resulting in a criminal conviction, and prior sentences resulting from foreign and tribal convictions).

The PAG also recommends that § 2L1.2 should be amended to conform to the proposed amendment to § 4A1.2(k). Specifically, the last sentence of Application Note 2, defining "*Sentence imposed,"* should be deleted.

For several reasons, the PAG also supports Part B of the Commission's proposed amendment to § 4A1.3, which would amend the Commentary to provide that a downward departure from the defendant's criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. First, this would encourage recognition of the fact that the severity of a defendant's prior conduct may be more accurately measured by the length of time actually served rather than by the length of the sentence imposed, without putting the onus on probation officers to determine actual time served in each case. Second, the time a prisoner serves for a particular sentence varies wildly from state to state. Judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using time actually served in custody, rather than the sentence imposed, may reduce "unwarranted sentencing disparities"[21] when sentencing offenders with identical prior convictions from different states.

The PAG thinks it is impractical to exclude from downward departure consideration cases in which the time served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant's case. The PAG believes that this is an administratively unworkable distinction, because time served is inextricably intertwined with the facts and circumstances of a defendant's case. For example, if an institution granted inmates early release in order to minimize overcrowding or due to state budget concerns, the criteria used to identify the individuals to be released would in all likelihood have some nexus to the facts and circumstances of the inmates' particular cases.

[21] 28 U.S.C. § 991(b)(1)(B).

E. Proposed Amendment Number 5 – Bipartisan Budget Act

The Bipartisan Budget Act of 2015 amended 42 U.S.C. §§ 408, 1101 and 1383a, to add new conspiracy offenses to each statutory provision. *See* 42 USC §§ 408(a)(9), 1011(a)(5), 1383a(a)(5). The Commission proposes to reference these new conspiracy offenses to § 2X1.1. The PAG agrees.

The Act also increased the statutory maximum from five years to ten years in prison for a person "who receives a fee or other income for services performed in connection with" a determination for Social Security benefits, or "is a physician or other health care provider who submits or causes the submission of medical or other evidence in connection with any such determination . . . ." 42 U.S.C. §§ 408(a), 1011(a), 1383a(a).

The Commission proposes to amend § 2B1.1 by adding 2 or 4 levels and/or an offense level floor of 12 or 14 for defendants convicted under §§ 408(a), 1011(a), or 1383a(a) who are subject to the 10-year statutory maximum, *i.e.*, defendants who receive a income for services performed in connection with any determination Social Security benefits, or who are health care providers who submit, or cause the submission of, evidence in connection with Social Security benefits determinations. The Commission seeks comment on whether the applications notes should be amended to address interaction between these proposed specific offense characteristics and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

The PAG recommends that the Commission not adopt either this additional offense characteristic or offense level floor. The Guidelines already adequately address the subset of Social Security fraud cases that are subject to the higher statutory maximum. In addition, there is no need to create additional specific offense characteristics in § 2B1.1, where the § 3B1.3 adjustment for abuse of trust or special skill already exists to further penalize – if applicable – defendants who are paid to provide Social Security benefit-related services or health care providers who submit Social Security benefit-related evidence. As recognized by myriad stakeholders, § 2B1.1 already is overly complicated, unwieldy, and, due to Guidelines "creep", can result in harsh sentencing range calculations.[22] With regard to these Social Security

[22] *See, e.g.*, *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of "substantially overlapping 39 enhancements" at the high end of the fraud sentencing table); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (Guidelines in security fraud cases "are patently absurd on their face" due to the "piling on of points" under § 2B1.1); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (Guidelines in fraud cases have "so run amok that they are patently absurd on their face," and describing enhancement for "250 victims or more," along with others, as "represent[ing], instead, the kind of 'piling-on' of points for which the Guidelines have frequently been criticized"); *accord* Alan Ellis, John R. Steer, Mark Allenbaugh, "At a "Loss" for Justice: Federal Sentencing for Economic Offenses," 25 Crim. Just. 34, 37 (2011) ("the loss table often overstates the actual harm suffered by the victim," and "[m]ultiple, overlapping enhancements also have the effect of 'double counting' in some cases," while "the

offenses, the PAG is unaware of any research or sentencing data suggesting that the Guidelines fail to recommend sufficiently lengthy sentences. To the contrary, analysis of the Commission's data indicates that Guideline recommendations in this area are frequently too high.[23]

Given the absence of data suggesting that sentences are too low for this category of cases, further tinkering with § 2B1.1 is unnecessary. If, however, the Commission feels a need to differentiate these new cases from other forms of Social Security fraud, changes to the Guidelines should be, at most, incremental. In that case, **the PAG recommends** that the Commission only adopt the proposed 2-level enhancement and make clear that: (a) it applies only to those defendants who are convicted of committing the offenses subject to the 10-year statutory maximum; and (b) if applied, 3B1.3 would not be applicable. This would allow the Commission to isolate and analyze cases brought under the new provisions and use that information to tailor any further proposals to actual experience and demonstrated need.

F. Proposed Amendment Number 6 – Acceptance of Responsibility

The PAG supports the Commission's view that § 3E1.1 should be amended to clarify that a defendant who pleads guilty, and accepts responsibility for the offense of conviction, nonetheless may make a good faith challenge to the inclusion of relevant conduct without risking the loss of acceptance of responsibility credit under that Guideline. The proposed amendment would add the following new sentence at the end of Application Note 1(A):

> "In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)."

The PAG believes, however, that the specific wording of the proposed amendment has the potential for ambiguity and recommends a modification below.

1. Justification for the Amendment Generally

Part of the need for the proposed amendment is apparent from a tension within the Guideline itself. On the one hand, the focus of § 3E1.1 and its Commentary appears to be on

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Guidelines fail to take into account important mitigating offense and offender characteristics."); Justice Stephen Breyer, "Federal Sentencing Guidelines Revisited," 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *11 (1999) ("false precision").

[23] In 2016, the Federal Public and Community Defenders analyzed sentencing data collected and maintained by the Commission for sentences imposed under each of the statutes at issue. *See* Comments, Federal Defender Sentencing Guidelines Committee (Mar. 21, 2016) at 13-14, available at http://www.ussc.gov/policymaking/public-comment/public-comment-march-21-2016. Between 2012 and 2014, 54.7% of sentences for defendants convicted under § 408(a) were within the recommended guideline range, 43.7% were below the recommended range, and only 1.6% were above. For defendants convicted under § 1383(a), 53.5% received a within-guideline sentence, 46.5% received a below-guideline sentence, and none received an above-guideline sentence. According to the Commission's data, no one has been convicted of an offense under § 1011(a) over the past ten years.

truthful admission of the offense conduct. *See* Application Note 1(A) ("a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction…."). Yet, the same Note also provides that a defendant can lose acceptance of responsibility credit not only for "falsely denying" relevant conduct, but also for "frivolously contesting" relevant conduct, and the Guideline and the Application Notes do not define the line between "not admitting" and "contesting." This is not a theoretical issue. A challenge involving the lack of an admission may be equated to "frivolously contesting" relevant conduct.[24]

Even greater than the problems caused by the facial conflicts within the Guideline are the real dilemmas posed by the current Guideline in practice. The PAG shares the concern articulated by the Commission in its Synopsis: that the current suggestion in the Commentary that a defendant who "falsely denies" or "frivolously contests" relevant conduct is ineligible for acceptance of responsibility credit creates a significant risk that any unsuccessful challenge to relevant conduct will result in a denial of acceptance of responsibility credit.

Our concern arises as much from the collective experience of the PAG as from reported cases. Unsurprisingly, there are few reported cases dealing with denying acceptance of responsibility credit on relevant conduct grounds, for it is our experience is that many pleas have been thwarted (or reluctantly accepted) because of the risk of losing acceptance credit when the probation office or the prosecutor include relevant conduct that is subject to good faith, legitimate legal and factual attack. Defense counsel frequently must discuss with clients the risk of bringing good faith arguments against conduct that is believed to be irrelevant, unproven, or legally inconsequential, but which, if accepted by the court, would dramatically increase the defendant's sentencing range exposure. We face this dilemma daily, in contexts such as the amount of loss, whether a firearm was actually used in the offense, or whether a defendant's conduct constituted leader and organizer activity. Under the current Commentary, lawyers now frequently feel compelled to advise clients to abandon good, creative, and potentially valid legal arguments, and to not present facts or challenge government witnesses that put the allegations in the proper perspective, for fear of losing acceptance of responsibility credit for the underlying offense, even though the defendant quite clearly has not opposed or contested the facts of the offense of conviction.

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[24] *See, e.g., U.S. v. Smith*, 13 F.3d 860, 866 (5th Cir. 1994) (affirming denial of acceptance credit because "….even though [defendant] admitted the conduct comprising the offense, she steadfastly refused to admit any connection, even vicarious, with the additional cocaine found in the floor of the house."); *United States v. Edwards*, 635 F. App'x 186 (6th Cir. 2015) (affirming district court's decision to deny acceptance credit because drug defendant had "frivolously denied conduct relevant to the leadership-role enhancement"); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) (affirming district court's decision to deny acceptance credit because defendant contested the factual basis for a four-level enhancement based on relevant conduct). In none of these cases did the defendant testify at sentencing. Rather, relying on the language of the application note, courts characterized appropriate sentencing arguments as "frivolously contesting" or a "falsely denying" relevant conduct and denied the acceptance credit.

The PAG believes that the proposed amendment (with the modification recommended below) will strengthen and clarify the right of a defendant to "put the government to its burden of proof" as to relevant conduct.[25]

2. The PAG's Recommended Modification

The PAG is concerned that the proposed amendment may unintentionally create confusion regarding the circumstances under which a defendant might lose a potential reduction under § 3E1.1 when the defendant raises both legal and factual challenges to the inclusion of certain relevant conduct. While the PAG supports the goal of including language that affirmatively acknowledges the right of a defendant to challenge factually a relevant conduct proposal in a presentence report or a government submission, we think it equally important to acknowledge that many challenges to the inclusion or consideration of relevant conduct are legal, not factual, challenges.

The amended Guideline should allow broad deference to defense counsel to assert legal challenges without causing their clients to risk acceptance of responsibility credit. After all, such legal defenses are almost always attributable to the lawyer, not the client, and say nothing about the client's acceptance of responsibility. Equally important, much of what is now considered established law was once considered novel legal argument, which perhaps some judge even would have characterized as "frivolous" in an earlier era (*e.g.*, the right to exclude a statement in the absence of *Miranda* warnings, the advisory nature of the Guidelines, etc.). Thus, the PAG proposes that the Commission modify the Application Note to make clear that a defendant's eligibility for acceptance of responsibility should not be tied to the perceived quality of his lawyer's legal arguments, and instead, to clarify that the reference to potentially "frivolous" challenges that might entitle a judge to deny acceptance of responsibility credit is limited to "frivolous" factual challenges.

Accordingly, **the PAG recommends** the following modification to the wording of the proposed new sentence in Application Note 1(A) to clarify that both legal challenges and non-frivolous factual challenges should not lead to the loss of acceptance of responsibility credit:

> "In addition, a defendant who makes a **legal challenge or** a non-frivolous **factual** challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)."

G. Proposed Amendment Number 7 – Miscellaneous

1. PART A. Transnational Drug Trafficking Act of 2015

The Transnational Drug Trafficking Act of 2015 targets extraterritorial drug trafficking. Included in the Act is an amendment of 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services) which replaces the term "counterfeit drug" with the phrase "drug that uses a counterfeit

[25] *U.S. v. Jimenez-Oliva*, 82 Fed. Appx. 30, 34 (10th Cir. 2003) (affirming grant of acceptance of responsibility credit after defendant's unsuccessful challenge to the adequacy of the government's evidence that the defendant was an organizer or leader).

mark on or in connection with the drug;" the Act also revised § 2320(f)(6) to define only the term "drug" instead of "counterfeit drug." The term "counterfeit mark" then is defined in § 2320(f)(1). Pursuant to the statutory index, the applicable sentencing Guideline for § 2230 is § 2B5.3 (Criminal Infringement of Copyright or Trademark).

The proposed amendments include two changes to §2B5.3 in light of the Act:

i. Section 2B5.3. Currently, §2B5.3(b)(5) includes a two-level enhancement if the offense involved a "counterfeit drug." The proposed amendment modifies this enhancement in line with the Act, by replacing the term "counterfeit drug" with "drug that uses a counterfeit mark on or in connection with the drug." The PAG has no objection to this amendment.

ii. Commentary to Section 2B5.3. In line with the Act, the proposed amendment adds to the Definitions section of § 2B5.3 (*i.e.*, note 1 of the Commentary), the following definition: "'Drug' and 'counterfeit mark' have the meaning given those terms in 18 U.S.C. § 2320." The PAG agrees that this amendment is necessary in light of the provisions of the Act.

2. PART B. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

The Sex Offenders Registration and Notification Act (SORNA, 42 U.S.C. § 16914) requires sex offenders to provide a wide range of information to authorities, including name, Social Security number, residence and employment addresses, etc. The International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act ("International Megan's Law") added a new notification requirement, requiring sex offenders to provide detailed information related to intended international travel – dates and places of departure and return, carrier and flight numbers, destination country, and "any other itinerary or other travel-related information required by the Attorney General."

A violation of SORNA's registration requirements remains punishable at 18 U.S.C. § 2250(a). The International Megan's Law added a new crime at 18 U.S.C. § 2250(b) for failure to provide the now-required travel-related information. The law punishes the knowing failure to provide the information by a SORNA-restricted individual who travels or attempts to travel in foreign commerce. Section 2250(a) offenses are currently covered by § 2A3.5 (Failure to Register as a Sex Offender). Included in § 2A3.5 are enhancements for a defendant who, while in a "failure to register status," commits a sex offense against an adult (6 levels), a sex offense against a minor (8 levels), or a non-sexual felony against a minor (6 levels). § 2A3.5(b)(1)(A)-(C).

In light of the new criminal provision, the Commission proposes amendments:

i. Statutory Provision and Appendix A Amendments. Currently, § 2250(a) offenses are covered by § 2A3.5. The proposed amendment clarifies that § 2250(b) offenses will also be covered by § 2A3.5. The PAG has no objection to applying § 2A3.5 to § 2250(b) offenses.

ii. Application Note 2 to § 2A3.5. The proposed amendment adds an application note to § 2A3.5 to the effect that a defendant shall be deemed to be in a "failure to register status" during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b). The PAG does not object to this proposed amendment.

iii. Clerical Changes to § 2A3.6. The proposed amendment makes clerical changes to § 2A3.6 to reflect the re-designation of 18 U.S.C. § 2260(c) by the International Megan's Law. The PAG does not object to this proposed amendment.

The PAG recommends one modification in this regard. Under the proposed amendment, § 2A3.5 addresses conduct of two distinct reporting statutes (SORNA and International Megan's Law). However, § 2A3.5 also deals by way of specific offense characteristics with conduct violative of additional criminal statutes, providing enhancements for the commission of sex offenses against minors and adults. *See* § 2A3.5(b)(1). The commission of such sex offenses, however, is addressed by other Guideline sections in Part A(3) (§ 2A3.1 *et. seq*.) and Part G (§ 2G1.1 *et. seq*.) of the Sentencing Guidelines. This could raise confusion about the application of the grouping provisions of §§ 3D1.2 and 3D1.3. Because § 3D1.2(d) does not list all of the different sex offense conduct provisions that are covered in the enhancement provisions of § 2A3.5(b)(1), inconsistent application of grouping provisions could result.

For this reason, **the PAG recommends** that the Commentary to § 2A3.5 be amended to clarify that a count of conviction for a violation of § 2250(a) and/or (b) *(i.e*., a conviction for a SORNA registration violation and/or an International Megan's Law reporting violation), including any enhancement that is applicable under § 2A3.5(b)(1), be grouped together with any other count that addresses the same underlying sexual offense conduct, pursuant to § 3D1.2(c) (Groups of Closely Related Counts). Such an amendment would be consistent with the many "grouping" paragraphs contained in the commentaries of different Guideline sections. *See, e.g*., § 2A6.2 (Application Note 4); § 2K2.6 (Application Note 3); and § 2P1.2 (Application Note 3).

3. PART C. Frank R. Lautenberg Chemical Safety for the 21st Century Act

The Frank R. Lautenberg Chemical Safety for the 21st Century Act added a new criminal provision to 15 U.S.C. § 2615 (the Toxic Substances Control Act), punishing any person who knowingly and willfully violates certain provisions of § 2615 and who knows at the time of the violation that the violation places an individual in imminent danger of death of bodily injury.

The proposed amendment references this new offense (§ 2615(b)(2)) to § 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining § 2615(b)(1)'s reference to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering and Falsification; Unlawfully Transporting Hazardous Materials in Commerce).

The difference between the § 2615(b)(1) misdemeanor offense and the § 2615(b)(2) felony offense is that the felony requires proof of "knowing endangerment" (*i.e.*, knowledge that the violation places an individual in imminent danger of death or bodily injury). Since § 2Q1.1 applies to "knowing endangerment" related to hazardous or toxic substances, the application of § 2Q1.1 for § 2615(b)(2) felony offenses, along with its higher base offense level appears appropriate, and the PAG has no objection.

4. PART D. Use of a Computer Enhancement in § 2G1.3

The proposed amendment relates to a conflict within the language of § 2G1.3 and its commentary. Section 2G1.3 applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) contains an enhancement if-

> the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

The proposal notes a tension between the Guideline and the Commentary, because the Application Note fails to distinguish between the two prongs of subsection (b)(3). Application Note 4 to § 2G1.3 provides that the § 2G1.3(b)(3) enhancement is intended to apply only to the use of a computer or an interactive computer service to communicate *directly* with a minor or with a person who exercises custody, care, or supervisory control of the minor.[26] Thus, on its face, the Application Note precludes application of the enhancement where a computer is used to solicit a third party to engage in prohibited sexual conduct with a minor.

The proposed amendment would amend the Commentary to § 2G1.3 to clarify that the guidance contained in Application Note 4 refers only to § 2G1.3(b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in § 2G1.3 (b)(3)(B)). The PAG does not object to the proposed amendment.

H. Proposed Amendment Number 8 – Marihuana Equivalency

In setting offense levels for narcotics offenders, the Guidelines place heavy emphasis on the type and quantity of controlled substances involved in the offense. *See* § 2D1.1(c)(1)-(16) (Drug Quantity Tables). For the most common substances such cocaine, heroin, methamphetamine, and marijuana, the Drug Quantity Tables specifies the corresponding offense level based on the quantity involved in the offense.

Where the Drug Quantity Tables do not specifically include a particular controlled substance, § 2D1.1 includes Drug Equivalency Tables. *See* § 2D1.1, Commentary, Application

[26] For example, it would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

Note 8. The Drug Equivalency Tables use marihuana as the common currency, and have an equivalency ratio for each controlled substance. One gram of methadone, for example, is the equivalent of 500 grams of marihuana.. *See id.*, Note 8(d). Additionally, the tables "also provide a means for combining different controlled substances to obtain a single offense level." *Id.*, Note 8(B) and (C) (examples).

The Commission has received comments to the effect that using marihuana as the common denominator unit is misleading and results in confusion for individuals not fully versed in the Guidelines. Based on these concerns, the proposal would amend § 2D1.1 to replace "marihuana equivalency" in the Drug Equivalency Tables with a uniform "converted drug weight." Correspondingly, the amendment would change the term "Drug Equivalency Tables" to "Drug Conversion Tables." The Commission points out that the proposed amendment is not intended as a substantive policy change.

The PAG agrees with the proposal. PAG attorneys have found clients confused by the conversion of controlled substances into marihuana for Guidelines calculations purposes. The use of a neutral converted drug weight as a "nominal reference designation" will maintain the Commission's choice of drug type and quantity as the benchmark in determining an offense level, its use of a standardized unit of measurement for poly-substance offenses or those involving uncommon substances, and its previous determinations of the inherent danger in any particular substance as reflected in the conversion ratio.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG's input for the 2017 amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

February 21, 2017

United States Sentencing Commission
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Dear Commissioners,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 8 and 9, 2017, to discuss and formulate recommendations to the United States Sentencing Commission (USSC). We are submitting comments relating to issues published for comment dated December 9, 2016.

1. FIRST OFFENDERS/ALTERNATIVES TO INCARCERATION

First Offenders

The First Offender Amendment garnered much discussion amongst the members of POAG. While the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, the practicality of defining who falls into this "first offender" definition proved rather difficult.

The majority of the members favored Option 1, which suggested a decrease of one level from the offense level determined under Chapters Two and Three. This approach was favored because it was similar to the upward departure from category VI directive under USSG §4A1.3(a)(4)(B) where the departure is structured by moving incrementally down the sentencing table. It was believed that this option provided a way around the prohibition of a departure from Criminal History Category I by resulting in a reduced offense level as if there were a Criminal History Category 0. While the idea of creating, in essence, a Criminal History Category 0 was pleasing, POAG had concerns about how to appropriately define a "first offender."

POAG was unable to reach a consensus as to the criminal history characteristics of a first offender. While some agreed that a defendant who does not receive any criminal history points under Chapter Four, Part A, and has no convictions of any kind is a "first offender," others favored a stricter adherence to the definition of the term wherein a defendant with any criminal history, including an adjudication, arrest, or infraction, is disqualified from the adjustment. Given the variety of reasons for the dismissal of criminal charges, it was believed by some that a defendant with several law enforcement contacts, despite having no convictions, is not the quintessential first offender. Additionally, it was believed that there may exist unintended consequences and disparate application of the adjustment. First, the consequences for certain minor offenses, including driving with a suspended license, vary greatly by state and can involve either criminal or civil punishments. As such, a defendant's civil punishment for these minor offenses, despite not being attributed criminal history points, could be considered a "conviction" resulting in the defendant being precluded from the adjustment. Second, POAG recognized that defendants of lower socioeconomic status and/or minority populations are often subject to more police presence in their neighborhoods which increases the likelihood of sustaining convictions for minor offenses resulting in them being precluded from the adjustment more often than the typical white collar or even child pornography defendant.

POAG discussed whether the nature and the duration of the instant offense should be a factor in the determination of a first offender. For example, should a defendant who commits a firearms-related offense or who commits a tax fraud over a prolonged period of time involving the submission of several fraudulent tax returns be considered a first offender? Given the complexity of establishing an elements-based analysis for a first offender and the need to simplify guideline applications, it was agreed that criminal history should be the determinative factor in deciding who is a first offender and that the nature and duration of the offense should be considered in determining the application of the rebuttable presumption for a non-custodial sentence at USSG §5C1.1. POAG believes the severity and/or the extended duration of the offense should not bind the court to the presumption of an alternative sentence and that it could impose imprisonment in those cases.

Alternatives to Incarceration

POAG appreciates the Commission's continuing work to expand the use of alternatives to incarceration within the structure of the guidelines. POAG has encouraged the Commission to adopt a bifurcated Sentencing Table that expands the availability of probation-only sentences. POAG stands by this proposal and believes this cost-effective alternative is under-utilized within the present framework. The Federal Probation system provides national leadership in its approach to risk-based supervision – tailoring higher intensity interventions for high risk cases. However, POAG has concerns that the well-intentioned Zone B/C consolidation will lead to longer terms of location monitoring (LM) for low risk cases that may result in a higher rate of negative supervision outcomes.

As POAG discussed in its two previous papers, there is a legitimate concern that longer terms of home detention with LM in low risk cases will ultimately run afoul of the "risk principle" and actually reduce successful outcomes. POAG argues that LM should be imposed mindfully, to address specific risks and needs, rather than being imposed in a blanket fashion to everyone within a particular guideline imprisonment range. Anecdotal feedback from officers in the field is strongly critical of home detention terms that exceed six months. It is a very restrictive intervention that can impact the mental health of those under supervision, and the longer someone is subject to LM, the more likely they are to test the limits of the equipment.

Officers responsible for LM supervision have a number of policy requirements to meet in all cases. Monthly home contacts are required to examine the equipment and officers must respond to certain key alerts during the day and night – expanding the range of non-traditional working hours. LM officers are responsible for verifying the activities of offenders outside their homes and must review geo-locational data for all offenders enrolled in GPS systems. In short, individuals sentenced to home detention with LM receive resource intensive supervision consistent with that of a sex offender or violent recidivist.

Location Monitoring Specialists are known to experience high stress levels/burnout due to the nature of their work and the national system has dedicated resources to provide education on officer wellness. POAG is concerned the proposed amendment will embolden courts to impose long terms of LM in a blanket fashion more often – significantly adding to the overall workload of LM officers and taking resources away from the true high-risk cases that deserve the most intensive supervision.

POAG encourages the Commission to exercise caution in its approach to this proposal and instead seek to expand probation-only dispositions rather than authorizing lengthy terms of home detention with LM. At the district court level, probation officers work hard to educate judges and attorneys about the most effective use of LM, and POAG hopes that the Commission can strike a balance that expands the use of probation without overly relying on home detention as the vehicle to achieve that end.

2. TRIBAL ISSUES

The proposed amendment incorporates recommendations from the Tribal Issues Advisory Group (TIAG) regarding the use of tribal convictions to compute criminal history scores under Chapter Four and how to account for protection orders issued by tribal courts.

POAG concurs with TIAG's recommendations and the Commission's proposed changes to the guidelines for consideration of tribal convictions. The convictions should not be assessed criminal history points under USSG §4A1.1, and should remain under USSG §4A1.2(i). POAG recognizes procedures may vary among the many tribal courts. Due process issues and lack of documentation of tribal convictions are a concern and impact the correct assessment of criminal history points.

The policy statement under USSG §4A1.3 (Adequacy of Criminal History) will continue to provide a means for the court to grant departures based on information available regarding tribal convictions. Additionally, important changes have expanded the jurisdiction of tribes in criminal prosecution (i.e. Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013). POAG concurs with the proposed commentary under USSG §4A1.3, comment. (n.2(C)(i) –(iv)) and agrees this provision will provide clear guidance. However, POAG recommends that (iv) be expanded to include language to also allow for a departure if the defendant was under tribal court post-conviction supervision at the time of the federal offense, similar to the application of USSG §4A1.1(d). POAG believes there will be difficulties with practical application of USSG §4A1.3, comment. (n.2(C)(v)) in determining if the tribal government has "formally expressed" a desire for the convictions from the tribal court to be used for computation of criminal history points. It is unclear who determines this formal expression, how it is determined, and how it will be documented. The definition of "formally expressed" may lead to additional disparity because the procedures vary among tribal courts. POAG believes (v) could be eliminated from the list because (i)-(iv) provide sufficient guidance.

POAG concurs with the recommendations of TIAG and the Commission's proposed language to define "court protection order" under USSG §1B1.1, as it will provide consistency with statutory definitions.

3. YOUTHFUL OFFENDERS

POAG discussed the amendment on whether the Commission should consider changing how the guidelines account for juvenile sentences for purposes of determining the defendant's criminal history pursuant to Chapter Four, Part A. Specifically, to amend the guidelines to provide that sentences resulting from juvenile adjudications not be counted in the criminal history score.

After a lengthy discussion, POAG was unable to reach a consensus on this issue. Those in favor of the amendment cited disparity, both curable and incurable, as the primary reason for change. This includes the wide range of varying access to juvenile records, from state to state, as well as jurisdiction to jurisdiction. While some locations have relatively easy access, in others access is non-existent. This is based on records being sealed or destroyed, while in other locations the length of time to obtain records was problematic. It was also discussed how the search for juvenile records is inefficient and costly as it relates to our daily work formula, specifically in relation to time and resources. POAG also noted the frequent inability to obtain records from other states via our system's "collateral" process, which POAG agreed is not reliable or consistent within our own system. POAG also cited the many differences in how juvenile offenses of a similar nature are treated from state to state. POAG generally observed that the issues above, along with inconsistent scoring of juvenile adjudications, lead to certain disparity between offenders from court to court.

Those who were in favor of no longer scoring juvenile offenses were in agreement of then having these adjudications considered for purposes of an upward departure under USSG §4A1.3. The group also did not agree to count juvenile sentences only if the offense involved violence or was otherwise serious, citing recent debate with the definitions of these offenses.

Chapter Four, Part A – Criminal History was designed to quantify prior criminal behavior by a defendant from those defendants without any criminal behavior history and as noted in the Introductory Commentary, "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." Currently all juvenile status offenses and truancy are not scored pursuant to USSG §4A1.2(c)(2). All other juvenile sentences are counted only if the sentence imposed was done so within five years of the defendant's commencement of the instant offense. Those opposed to the proposed amendment indicated this five-year recency provision captures and accounts for only those juveniles who have a higher likelihood of recidivism and future criminal behavior based upon their criminal past. Accounting for past criminal behavior is especially important given that our system is seeing more violent and repeat young offenders than in the past. Any minor behaviors (those captured in USSG §4A1.2(c)(2) and those stale (beyond the five-year point)) have already been excluded based upon these other provisions.

POAG members in opposition to the proposed amendment also commented that historically juvenile offenders receive graduated sanctions where they are often offered initial leniency from the juvenile courts and more serious sanctions were only imposed upon new, repeated or more serious behaviors. Given this pattern, the scoring of juvenile adjudications within five years would continue to identify those juveniles who have committed recent and more serious, or escalating behaviors. To not score or account for the adjudications would be essentially "turning a blind eye" or treating juvenile offenders equal to those individuals with no juvenile criminal past, thus promoting disparity. The scoring of juvenile adjudications distinguishes those who became involved in the juvenile system from those who were law abiding. If juvenile adjudications were ignored in the scoring system, the young offenders' risk of recidivism and potential harm to society would be underrepresented because their pattern of juvenile criminal conduct would be unaccounted for in the sentencing guideline scheme.

Obtaining juvenile records in some jurisdictions and not in others, thus creating unintended disparity, is also concerning to those in opposition to the amendment. This concern, however, is not outweighed by the need to punish those who demonstrate repeated criminal behavior.

4. CRIMINAL HISTORY ISSUES

POAG discussed the proposed change to USSG §§4A1.2(k) and 4A1.3 (Revocations and Downward Departure). POAG members were unanimous that revocations of supervision should be counted toward a defendant's criminal history, and therefore, not considered as a departure under USSG §4A1.3. Several areas of concern were discussed. Although there may be multiple terms of supervision, the application of additional points for the violation is limited to one case, which prevents double counting. This application has been included in the guideline since its inception and the need for change is not apparent. Under the amendment, a potential exists for not capturing the more serious (higher risk) defendants who have failed to comply and thereby affording them the same benefit as offenders who have successfully completed prior terms of

supervision. Additionally, for those individuals who initially received a supervisory sentence, with the four-point cap under USSG §4A1.1(c), there is a likelihood that their noncompliance, which may not include recidivist criminal conduct, but instead serious technical violations, would not be considered. Currently under USSG §4A1.1(d), points are assessed for committing the instant offense while on supervision. This same logic should be applied to assessing points for violations.

Regarding the proposed amendment for a downward departure in a case where the actual time served is substantially less than the length of the sentence imposed, POAG expressed a concern with the inconsistencies which may occur based on jurisdictional computations. As previously discussed by POAG members, there are a number of issues with determining why the "time served" and the "time imposed" varies. Some of the controlling factors are unrelated to the defendant and the offense of conviction, and therefore, should not be a consideration for a departure.

5. BIPARTISAN BUDGET ACT

POAG members noted that they have very little experience with this statute given it is a fairly new law. However, POAG members did favor the reference to 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) at USSG §2B1.1(b)(13) as such a citation makes it clear which cases the enhancement was intended to apply, which has the effect of decreasing litigation at sentencing. Further, POAG members preferred the two-level increase under USSG §2B1.1(b)(13), with a notation that a two-level increase under USSG §3B1.3 would ordinary apply, thereby limiting increase for these types of offenses to a total of four levels.

6. ACCEPTANCE OF RESPONSIBILITY

A defendant who enters a plea of guilty must admit to the elements of the offense; however, at the time of sentencing, the focus is on the concept of relevant conduct when determining if a defendant is eligible for an Acceptance of Responsibility reduction. The Commission is seeking comment on whether the references to relevant conduct should be removed from USSG §3E1.1 and, instead, focus only on the elements of the offense of conviction. POAG notes that relevant conduct is a broad concept that seeks to capture actual offense conduct versus the charged conduct, and that it can include conduct underlying charges that have been, or will be dismissed. As such, the current structure of USSG §3E1.1 requires defendants to "not falsely deny" any additional alleged conduct that is considered to be relevant conduct. POAG recommends that relevant conduct continue to serve as a basis for determining if a defendant is eligible for an Acceptance of Responsibility reduction out of concern that focusing on the elements of the offense would likely have the effect of increasing the amount of litigation at sentencing. Further, relying on relevant conduct in determining if a defendant is eligible for an Acceptance of Responsibility reduction is consistent with the rest of the guideline applications that are based upon relevant conduct. POAG believes that this approach has generally worked well and does not have any concerns regarding this part of the process.

The Commission is also seeking comment on whether USSG §3E1.1, comment. (n.1), should be amended by striking "However, 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 replacing it with "In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)." POAG supports this amendment, but recommends that references to "not falsely deny" or "non-frivolous" in USSG §3E1.1, comments. (n.1(A)) and (n.3), be replaced with "frivolously deny" so as to avoid the use of double negatives in the application instructions. Further, POAG supports this amendment as it seeks to distinguish defendants who have objections based upon reason and fact from defendants who have objections that have no good faith basis. POAG also recommends that the Commission consider defining what constitutes "frivolous," as the layperson's understanding of that term may differ from the common legal definition.

The Commission identified the above noted issue as a priority out of concern that the Commentary to USSG §3E1.1 encourages courts to deny an Acceptance of Responsibility reduction when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessment of relevant conduct or the application of a Specific Offense Characteristic. As it is currently written, the Commentary in USSG §3E1.1 requires a defendant to "not falsely deny any additional relevant conduct," which has been interpreted by some to mean that a reduction is not appropriate if the defendant falsely denies conduct that is determined to be relevant conduct. If that was not the Commission's intent, then POAG would support an amendment to the Commentary to USSG §3E1.1 to clarify that unsuccessful challenges to relevant conduct do not preclude a defendant from being eligible for an Acceptance of Responsibility reduction and that such amendment be significant enough that it creates a new standard under this guideline. POAG believes the aforementioned amendments to USSG §3E1.1 could increase due process for defendants who have legitimate challenges to relevant conduct and lessens their risk for automatic acceptance of responsibility denials in these cases.

Further, POAG recommends that USSG §3E1.1, comment. (n.5), which directs that "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review," be stricken from the Guidelines Manual. POAG believes that the Guidelines Manual should focus on application instructions while leaving the issue of standard of review to the discretion of the appellate courts.

7. MISCELLANEOUS

In August 2016, the Commission indicated that one of its priorities would be the "[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study." See United States Sentencing Commission, "Notice of Final Priorities," 81 FR

58004 (Aug. 24, 2016). The Commission intends that this study will be conducted over a two-year period and will solicit input, several times during this period, from experts and other members of the public. The Commission further intends that in the amendment cycle ending May 1, 2018, it may, if appropriate, publish a proposed amendment as a result of the study.

POAG supports the continuation of this study. Officers noted this is a growing problem with an increase in synthetic cathinones and synthetic cannabinoids appearing in various districts. Currently there are approximately 256 synthetic cannabinoids listed as controlled substances and controlled substance analogues. POAG also discussed the ongoing problems with Methylone, Molly, Fentanyl, and bath salts.

When a drug trafficking offense involves a controlled substance not specifically referenced in the guidelines, the Commentary to USSG §2D1.1 instructs the court to "determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§2D1.1]." USSG §2D1.1, comment. (n.6). The guidelines then provide a three-step process for making this determination. USSG §2D1.1, comment. (n.6, 8). In following this three-step process, POAG members indicated probation officers are doing extensive research and evaluation for the Presentence Report, and then the courts are holding similarly extensive hearings before ruling on the analysis. Further discussion revealed that, even after the analysis is made, there is inconsistency in the marijuana equivalencies that are used around the country. Some courts determine the synthetic smokeable cannabinoid substances are most closely related to Synthetic Tetrahydrocannabinol (THC), and others, marijuana. This is creating an inconsistency in guideline calculations utilizing various marijuana equivalency ratios; however, the majority of the POAG members indicated their officers were utilizing a 1:167 ratio with synthetic smokeable cannabinoids being most closely related to THC. There have been instances when courts have used a 1:167 ratio, that they found the result to be extremely excessive, and sentenced the defendant outside of the advisory guidelines.

Courts have also struggled with issues of notice, wherein the defendants were manufacturing, producing, and/or selling synthetic smokeable cannabinoids that were analogues of JWH-018 without public information or legal guidance available that could put the defendants on notice that AM-2201 and XLR-11 are analogues of JWH-018.

Courts have also struggled in determining the correct ratio for Methylene, and some have compared it to MDMA, while others have held hearings with expert witnesses in order to fashion what they believe to be a reasonable drug conversion rate. In some instances, courts have used a 1:500 ratio, while others have found that a 1:250 ratio or a 1:200 ratio is more appropriate.

In addition, POAG discussed the means by which the synthetic smokeable cannabinoids are made. Defendants frequently obtain a pure form of the chemical from companies that obtain the chemical from outside of the United States. The defendants use warehouses, garages, or storage units as locations for producing the final product of synthetic smokeable cannabinoids. The defendants utilize cement mixers to effectively coat inert plant material by putting the plant material and the

liquid based synthetic cannabinoids into the cement mixer. Defendants have also utilized sprayers to spray the synthetic cannabinoid suspended in a delivery liquid onto the inert plant material. After the plant material is coated, the defendants allow it to dry. The defendants collect the dried, coated plant material and grind it up. It is then packaged for sale. POAG discussed the inconsistency in guideline applications when determining the quantity of synthetic smokeable cannabinoids used to calculate the guidelines. For example, some courts are using the entire weight of the substance (the inert plant material as well as the synthetic substance applied to the inert plant material), while others are attempting to extract the actual or estimated weight of the inert organic material and only using the weight of the synthetic, controlled substance.

Another issue POAG members discussed was the varying charging options prosecutors are using with synthetic cases. For example, defendants with synthetic smokeable cannabinoid cases have been charged with offenses involving drug distribution with guidelines found in USSG §2D1.1; fraud with guidelines found in USSG §2B1.1; misbranding with guidelines found in USSG §2N2.1; and money laundering with guidelines found in USSG §2S1.1.

The Commission asked for additional comments regarding the defendants involved in such cases. POAG noted that, like most offenses, defendants vary tremendously. The defendants involved in these cases range from young people who work as cashiers at establishments that sell these items and other legal items, all the way to business owners who own one or multiple such stores. The cases involve people who accept the pure form of the synthetic substance and engage in the activities necessary to coat the inert plant material with the illicit compounds. Defendants include chemists who test and submit fraudulent laboratory reports on the contents of the products. Some are corporations that finance the operations.

Finally, the Commission asked for comments regarding the harms posed by these activities. POAG members noted the dangers of these synthetic substances. In many cases, defendants are obtaining a chemical substance from China or other foreign location. The substance may be accurately labeled, but many times, it is not. The substance is then sprayed on an organic plant-type material, packaged, and sold in stores. It is made easily accessible and highly attractive to individuals, who are frequently younger, looking to get high. Courts have accepted information from the American Association of Poison Control Centers that describes the effects of synthetic smokeable cannabinoid usage that can be life threatening and can include severe agitation and anxiety; fast racing heartbeat; nausea and vomiting; muscle spasms, seizures, and tremors; psychotic episodes; and suicidal or other harmful thoughts and/or actions. In court cases, the argument has been made that the synthetic smokeable cannabinoids are more serious because they involve a single, highly pure chemical that causes a variety of outcomes depending on the user. The substance is not tempered by other chemicals naturally present in marihuana.

POAG supported the idea of additional study of all synthetics and would like a methodology to deal with these designer drugs. Determining these equivalencies is difficult and time consuming. These cases sometimes require chemical analysis reports and in some instances, chemists and other

experts to resolve contested drug quantity issues at sentencing. This causes disparity between districts/judges, and therefore, sentences. Additionally, POAG supports the Commission's efforts to further investigate Fentanyl, Methylone, Ethylone and other illicit synthetic compounds. POAG members observed that the producers of illicit synthetic compounds are continuously changing the formulas of the compounds to achieve the same effects through different, not-yet-illegal, means, and POAG respectfully recommends the Commission consider the continuous evolution of these substances when fashioning a solution.

The POAG members will continue to forward cases of interest to the Commission as the members observe them.

8. MARIHUANA EQUIVALENCY

The proposed amendment makes technical changes to USSG §2D1.1 to replace the term "marihuana equivalency" with "converted drug weight." The term "marihuana equivalency" is used in cases that involve a controlled substance that is not specifically referenced in the Drug Quantity Table as well as cases with more than one controlled substance where it is necessary to convert each of the drugs to its marihuana equivalency. Although the Commission received comment expressing concern that the term "marihuana equivalency" is misleading and results in confusion for individuals not fully versed in the guidelines, the POAG unanimously agreed that they have never experienced similar confusion by counsel, the defendant, or the court. POAG suggests that the confusion may be a result of the presentation of the information in the Presentence Report and noted that the report should be clear as to the actual drug(s) and drug quantity(ies) for which the defendant is accountable with a notation thereafter of the marihuana equivalency. POAG also suggests that the Commission should include clarification of the term in its training sessions both nationally and district wide. Additionally, there is considerable case law in every circuit that references "marihuana equivalency" and changing this term could potentially lead to further litigation with regard to determining drug equivalencies. The change will make it much harder to compare sentencing recommendations between newer cases, using the new conversion process, and older cases. Moreover, POAG noted the potential confusion that could result from the use of the term "converted drug weight." The proposed guideline defines this term as a "nominal reference designation that is to be used as a conversion factor…" Nevertheless, upon inspection of the Drug Quantity Table and the Drug Conversion Table, it is clear this term is the same as marihuana. Therefore, to avoid further confusion, it is POAG's recommendation to make no changes to the term "marihuana equivalency."

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments.

Respectfully,

Probation Officers Advisory Group

February 2017

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
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Suite 2-500, South Lobby
Washington, D.C. 20002

February 21, 2017

Honorable William H. Pryor, Jr., Acting Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

Dear Judge Pryor:

On behalf of the Tribal Issues Advisory Group (TIAG), we submit the following comments in response to the Commission's proposed amendments published on December 19, 2016. The Tribal Issues Advisory Group (TIAG), chaired by the Honorable Ralph Erickson, met on January 17, 2017, in Washington D.C. at the United States Sentencing Commission. During the course of the January 17 meeting, the TIAG concluded that there was not sufficient time for the TIAG to conduct a meaningful tribal consultation on the proposed amendments. In lieu of formal consultation, TIAG decided that its members would send direct, targeted emails to individual contacts in certain stakeholder groups with an interest in these issues, inviting those groups to submit public comment to the Commission about the Proposed Amendments.

In this letter, the TIAG addresses three amendments (1) First Offenders/Alternatives to Incarceration; (2) Tribal Issues; and (3) Youthful Offenders. The TIAG takes no position on the remainder of the proposed amendments published for comment.

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

Part A of this amendment addresses first offenders and sets forth a new Chapter Four guideline at §4C.1.1. The TIAG offers the following comment on §4C.1.1, subparts (a) and (g)(3).

At page 4: the TIAG recommends that the Commission revise §4C1.1(a) as follows:

(a) A defendant is a first offender if (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2) the defendant has no prior convictions of any kind, except convictions from tribal or foreign jurisdictions which are not for violent crimes.

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Voting Members
Wendy Bremner
Honorable Michael Cotter
Neil Fulton
Winter Martinez
Honorable Mekko Miller
Tim Purdon
Tricia Tingle
Sam Winder

The Commission's published first offender definition includes a bracketed paragraph (2) requiring that the defendant have no convictions of any kind in order to qualify as a first offender. The TIAG understand the term "no conviction of any kind" to include tribal convictions and believes that this exclusion would operate too broadly. Many tribal courts have misdemeanor jurisdiction and routinely handle a wide variety of criminal matters ranging from petty offenses to crimes of violence. The TIAG felt great emphasis should be placed on distinguishing between petty offenses and crimes of violence in determining whether a person with tribal court convictions qualifies as a "first offender." The term "first offender" should not be interpreted to exclude a person who has prior convictions for petty offenses from tribal or foreign courts. However, the TIAG feels strongly that if a person has been convicted of a crime of violence in tribal court or a foreign court, he / she should not qualify as a "first offender." Thus, the TIAG felt that application of the proposed first offender guideline should not apply to a defendant that has prior crimes of violence in his / her criminal history from a tribal court or foreign court.

At page 6:

> (g) ....and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.

Even with the requested delineation between defendants with tribal court status convictions and defendants with tribal court violent crime convictions, there are cases in which a term of imprisonment remains the most appropriate choice. By way of example, it might be appropriate to impose a period of incarceration if an examination of the entire sentencing record reveals the defendant has a history of significant unscored violations in foreign or tribal courts or a history of unscored violent behavior.

The TIAG feels that the additional language will remind the sentencing court should be reminded that a non-incarceration sentence is an appropriate alternative in some circumstances under the guidelines. The TIAG recognizes that there may be defendants in Indian Country who are in Zone A or B who are not appropriate for non-incarceration sentences because of extensive tribal court criminal history.

2. TRIBAL ISSUES

The Commission published commentary intended to provide the courts with guidance on whether an upward departure based on a tribal conviction is appropriate. The commentary

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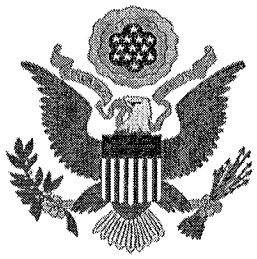

includes five relevant factors that the court may consider in arriving at this determination, (subsections (i) – (v) at pages 25-26) and the Commission asked how these factors should interact with one another. The TIAG believes that subsection (iii) and (iv) should continue to be listed, and offers no other comments to those factors. The TIAG makes the following observations about the first, second and fifth factors (subsections (i), (ii) and (v)).

As published, subsection (i) provides as follows:

(C) **Upward Departures Based on Tribal Court Convictions**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court may consider the factors set forth in §4A1.3(a) above and, in addition, may consider the following:

* * *

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protection consistent with those provided to criminal defendants under the United States Constitution.

The USSC asked whether due process should be a threshold factor before other factors are considered. The TIAG Feels that it should not. Further, the TIAG strongly opposes the idea that the due process requirements set forth in subpart (i) as a mandatory threshold necessary for the court to consider an upward departure based on tribal court convictions. Such reading of subpart (i) ignores the diversity and historical culture of tribal courts, is not consistent with federal statute (Indian Civil Rights Acts of 1968) or the United States Supreme Court precedent. Finally, it undercuts the sovereignty of each tribe.

In the United States, there are approximately 351 tribal courts of varying capacity.[1] Subpart (i) could be read as mandating a western court model on all tribal courts which may not be the intent of this section. In Indian Country, tribal courts vary in capacity and models and imposing the forgoing requirement as a mandate may be deemed paternalistic and a rejection of tribal sovereignty. Tribal nations are not political subdivisions of the United States. Each federally recognized tribe is a separate sovereign.

The use of the term "due process protections" in this section with the affirmative statement of certain rights which are protected by the United States Constitution are not consistent with protections afforded to Native Americans under the Indian Civil Rights Acts of

[1] Report of the Tribal Issues Advisory Group May 16, 2016, p.12.

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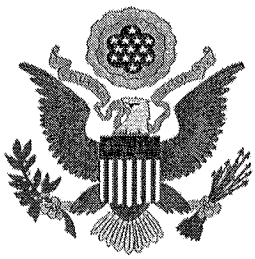

1968 (ICRA). The rights afforded citizens under the United States Constitution and the ICRA are not identical. Due process, as it is known in federal and state court, should not serve as a litmus test under this proposed amendment. ICRA governs tribal court proceedings and provides safeguards to tribal court defendants that are "...similar to, but not identical to those contained in the Bill of Rights and the Fourteenth Amendments." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 57.

The United States Supreme Court, in *United States v. Bryant* 136 S. Ct. 1954 (2016) addressed whether an uncounseled tribal court misdemeanor conviction could be used as a predicate offense for the felony offense of domestic assault in Indian Country by a habitual offender. 18 U.S.C. §117(a). The Ninth Circuit disallowed the use of uncounseled tribal court convictions as a predicate offense which was contrary to decisions in the Eighth and Tenth Circuits. The Eighth and Tenth circuits held tribal-court "convictions, valid at their inception and not alleged to be otherwise, unreliable, may be used to prove the elements of §117." *United States v. Cavanaugh*, 643 F. 592, 594 (8th Cir. 2011); see *United States v. Shavanaux,* 647 F. 3d 993, 1000 (10th Cir. 2011). Under ICRA, neither Bryant nor any other Native American, is afforded Sixth Amendment protection and therefore, does not have a right to counsel in tribal court proceedings. The Supreme Court reconciled the spilt in the circuits and said that a defendant convicted in a tribal court proceeding without counsel "...suffers no Sixth Amendment violation in the first instance and, "use of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment]." 'anew." citing *Shavanaux,* 647 F. 3d 993, 998 (10th Cir. 2011). The court also stated that the tribal court convictions are reliable. *Bryant* at 1966.

In light of the foregoing, the TIAG believes that subpart (i) should be included, but weighed equally with the other factors.

The TIAG opines that the Commission should continue to include, as separate subparts, subpart (i) and subpart (ii). The two sections are different. Subpart (ii) states:

> (ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act (TLOA) of 2010, Pub. L. 111-211 (July 29, 2010) and the Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. 113-4 (March 7, 2013).

TLOA amended the Indian Civil Rights Act of 1968 to permit a tribe to opt into enhanced sentencing of up to 3 years or a fine of $15,000 for any one offense, or up to 9 years, subject to specified requirements. If imprisonment for more than 1 year the bill requires an indigent defendant be afforded a licensed defense attorney at the tribe's expense, the tribal judges must be licensed and law trained, the tribes criminal laws must be published and if sentenced, the facility must meet minimum federal requirements.

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VAWA 2013 provisions were enacted to address tribal jurisdiction over perpetrators of domestic violence allowing tribes to exercise their sovereign power to investigate, prosecute, convict and sentence both Indian and non-Indians who assault Indian spouses or dating partners or violate protection orders against Indians and non-Indians. Tribes can prosecute non-Indians effective March 7, 2015, if certain rights are afforded defendants. Those rights include those that are described in TLOA (2010) by providing effective assistance of counsel for defendants, free, appointed licensed attorneys for indigent defendants, law-trained tribal judges who are licensed to practice law, publically available tribal criminal laws and rules and recorded criminal proceedings. Tribes should ensure that jury pools include a fair cross-section of the community and not systematically exclude non-Indians and inform defendants detained by a tribal court of their right to file federal habeas corpus petitions. With these rights available to perpetrators of domestic violence, tribes can assert jurisdiction over Indians and non-Indians.

* * *

The TIAG feels that the application of subpart (v) is premature for several reasons. As stated above, there is insufficient time for formal consultation with all tribes that is meaningful, how tribes would express a preference is not defined and most tribes do not understand how tribal court criminal history would impact a defendant if tribal court convictions counted as criminal history.

(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.

The TIAG previously reported that there are 567 federally recognized Indian tribes. BIA reports that 351 have tribal courts while the remaining tribes presumably are Public Law 280 tribes or otherwise rely on state courts as their criminal courts.[2] Each of these tribes is a separate sovereign. The TIAG believes that both tribal governments and tribal courts have a varying working knowledge of the Sentencing Guidelines. Many tribes have a limited knowledge of the Sentencing Guidelines and their impact on Native American defendants in federal court and that increased knowledge of the Sentencing Guidelines by tribes and tribal courts would be beneficial.

Accordingly, the TIAG recommends with respect to subpart (v), that during the comment period tribal governments and other interested groups be consulted on the issue of how tribal governments would "formally express a desire" for their tribal convictions to count toward

[2] Report of the Tribal Issues Advisory Group May 16, 2016, p.12.

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criminal history. The TIAG also recommends that in the months and years ahead, trainers from the United States Sentencing Commission engage in training for tribal governments, courts and staff on the Sentencing Guidelines to enhance knowledge and understanding of the Sentencing Guidelines, their impact Native American defendants in federal court, and on the impact of the adoption of section (C) (Upward Departures Based on Tribal Court Convictions).

3. YOUTHFUL OFFENDERS –

The TIAG made recommendations regarding youthful offenders to USSC in its 2016 report and found that there is a disparity in the severity of sentences imposed on Native American offenders as compared to Hispanic, Black and White offenders.[3] The TIAG strongly agrees with the USSC published amendments and recommends that the USSC adopt the proposed amendment to the Commentary, paragraph 3 Downward Departures, at pages 42-43.

On behalf of our members, we appreciate the opportunity to offer TIAG's input for the 2016-2017 amendment cycle.

Sincerely,

Ralph R. Erickson
Chair, Tribal Issues Advisory Group
Chief U.S. District Judge, District of North Dakota

cc: Rachel Barkow
Jonathan Wroblewski
Patricia Wilson Smoot
Kathleen Gilli
Ken Cohen

[3] Report of the Tribal Issues Advisory Group May 16, 2016, p. 30.

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 21, 2017

United States Sentencing Commission
One Columbus Circle, N.E.
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RE: VAG's Response to the 2017 Proposed Amendments to the Sentencing Guidelines.

Dear Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written response to the Commission on the proposed amendments regarding tribal issues, youthful offenders, criminal history, acceptance of responsibly, and miscellaneous (Use of a Computer Enhancement in §2G1.3). The VAG urges the Commission to consider the specific concerns addressed below especially with regard to the impact on victims.

I. Tribal Issues

The VAG recommends the Commission adopt the recommendations that lists the relevant factors that courts may consider when considering a §4A1.2(i) upward or downward departure with regard to Criminal History Category VI. The VAG supports that each relevant factor be given equal weight. However with regard to whether the defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with the those provided to criminal defendants under the Constitution, the VAG urges the Commission to follow the holding in *United States v. Bryant,* 136 S.Ct. 1954 (2016), which held that since Bryant's tribal-court convictions occurred in proceedings that complied with the Indian Civil Rights Act and were valid when entered, and used as predicate offenses it did not violate the Constitution. As the Commission recalls, the ICRA does not require the accused to be represented by counsel. As a result, the VAG recommends that the Commission treat tribal court convictions the same as state and local offenses when computing criminal history points. With regard to the tribal sovereignty question on whether Tribes should opt in and provide the criminal history for tribal defendants, the VAG's position is

that in cases where a victim is involved and the defendant has prior convictions in tribal court, those tribal convictions should be counted as any other conviction and be part of any criminal history calculation.

With regard to court protection orders, the VAG supports the commentary of § 1B1.1 (Application Instructions) and the definition of court protection order derived from 18 USC § 2266(5) which is consistent with 18 USC § 2265(b). The most important factor for court protection orders, especially tribal court protection orders, is that they should be given the same full faith and credit as state or federal courts.

II. Youthful Offenders

The VAG recommends that the Commission not adopt any changes on how the guidelines account for juvenile adjudications for the purpose of determining the defendant's criminal history. Specifically, the VAG is concerned that eliminating juvenile adjudications prior to age 18 will not give the court complete information for determining whether that defendant engaged in prior criminal conduct, especially where those adjudications involve victims. The VAG is concerned that this amendment will limit consideration toonly those juvenile convictions which occur prior to age 18 and are treated like adult convictions. While the VAG recognizes a sentencing court may consider certain adjudications or convictions differently than others, such a limitation as that proposed would be too severe and would fail to adequately inform the sentencing court of the defendant's full background. Alternatively, if the Commission implements this change, the VAG strongly encourages all juvenile adjudications that involve victims to be disclosed to the sentencing court. Failure to do so discounts the impact the defendants' crime had on the previous victim as well as the impact the defendant's apparent continuing criminal history has had on the community.

III. Criminal History

The VAG recommends that the Commission not change the counting of the revocation sentences for the purpose of calculating criminal history points. The VAG is concerned that by changing the calculation, the resulting criminal history category would not accurately reflect the seriousness of the defendant's criminal history. Therefore, the VAG believes that all sentences upon revocation of probation, parole, supervised release, special parole or mandatory release should include the original term of imprisonment in addition to any term of imprisonment imposed upon the revocation, especially crimes involving victims. This allows a sentencing court to more accurately assess any patterns in the defendant's criminal history, as well as his amenability to alternatives to incarceration.

IV. Acceptance of Responsibly

The VAG recommends that the Commission not amend the Commentary with regard to acceptance of responsibility under §3E.1 to include a non- frivolous challenge for relevant conduct. The VAG is concerned that the term "non- frivolous" is not defined and thus would not provide the clarity the Commission is seeking. This change would not be victim friendly. It could result in forcing the victim to testify in a type of mini- trial with regard to the defendant's challenge of an Acceptance of Responsibility adjustment. Moreover, this change would undermine finality for the victim. Furthermore, the VAG is concerned that there is not enough data or evidence to support this proposed change.

V. First Offenders

The VAG recommends that the Commission adopt the proposed first offenders definition under §4C11(a). The VAG wants to maintain the status for a pattern of offenses. The VAG would like to exclude the following crimes from the operation of the proposed amendment.

Exclusion: Any offense which meets the definition of a crime of violence, as set out in §§4B1.2(a)(1) and (a)(2); §2B1.1 in which a specific victim or group of victims has been identified; §2B1.6; §2B2.1 (burglary of a residence); §2D2.3; §2G1.1; §2G1.3; §2G2.1; §2G2.2; §2G2.3; §2G2.6; §2G3.1 as it pertains to the transfer of obscene matter to a minor; §2H4.1; §2L1.1; and, §2X6.1. Any defendant who has prior criminal convictions for offenses which meet the definition of a crime of violence or which are the same or similar to an offense included in this listing but whose convictions are not used in the calculation of the criminal history category are excluded from consideration as a first time offender.

In light of all the proposed amendments, especially the amendment to the guideline sentencing table, it is the VAG's assessment that the noted exceptions to the first time offender amendment should be applied. First time offenders who engage in crime(s) of violence, as defined under §4B1.2(a) have engaged in offenses which are clearly different from first time offenders whose offense of conviction has no element of violence and no victim(s) associated with their criminal conduct. The additional listing of specific sections of Chapter 2 of the Sentencing Guidelines has been provided because not all offenses involving victims fall into the definition of a crime of violence. In addition, as is presently proposed, a first time offender can be an individual who has engaged in serious criminal conduct but has not been criminally charged or convicted as a result of that behavior (i.e., college students who engage in repeated sexual assaults on campus and who are disciplined by the school but whose conduct has not been

reported to law enforcement would technically be a first time offender under the proposed amendment. Likewise, individuals who purchase, view, and/or distribute child pornography may not have been previously convicted and would, again, technically qualify as a first time offender.)

Defendants who have a pattern of criminal behavior which includes crimes of violence or which are similar to the conduct listed in the recommended exclusion provision have demonstrated that they are not first time offenders and therefore should not be given another bite as a first time offender.

More importantly, the use of the exclusion provision provides the sentencing court with a mechanism that insures the victim's right to have all harms caused by the defendant's offense conduct taken into full consideration. The placement of the defendant in CHC I recognizes the defendant's status as a first time offender. The exclusion provision helps insure that a true distinction is drawn between first time offenders whose offense conduct does not seek to harm any individual and those offenders who specifically seek to harm others.

Finally, if the Commission does not support the new VAG proposed commentary the VAG supports option 1 to decrease the offense level by 1.

Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of offenses. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
February 2017

The Honorable William Pryor, Acting Chair
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Submitted via e-mail

RE: Request for Public Comment on Proposed 2017 Amendments to Sentencing Guidelines

Dear Judge Pryor:

On behalf of The Leadership Conference on Civil and Human Rights (Leadership Conference) and the American Civil Liberties Union (ACLU), we are pleased to submit the following comments and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 19, 2016.[1]

The Leadership Conference provides a powerful unified voice for the various constituencies of the coalition: persons of color, women, children, individuals with disabilities, LGBTQ individuals, older Americans, labor unions, major religious groups, civil libertarians, and human rights organizations. For almost 100 years, the ACLU has worked to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States. We are deeply invested in promoting fair and lawful policies that further the goal of equality under law. The Sentencing Commission's proposed 2017 Amendments are an important step toward meeting this goal, and we urge the Sentencing Commission (the Commission) to consider the following recommendations:

Proposed Amendment 1
Part A: First Offenders

- Establish a new guideline at §4C1.1 for first offenders, but broaden the definition of "first offenders" to include any offender in Category I (one or fewer criminal history points).
- Adopt Option 2 in the proposed §4C1.1. Under this option, first offenders with an offense level under 16 (as determined under Chapters two and three) would receive a two-level reduction, and all other first offenders would receive a one-level reduction.
- Create a presumption in §5C1.1 that non-violent first offenders who have a guidelines range in Zones A or B should ordinarily receive a sentence other than imprisonment.

[1] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003 (proposed Dec. 19, 2016).

- Adopt by cross-reference the existing definition of "crime of violence" at §4B1.2 for the purposes of this presumption (Option 1).

Part B: Zones B and C Consolidation

- Consolidate Zones B and C to allow greater sentencing flexibility for offenders whose guidelines ranges are currently in Zone C.
- Do not exempt white-collar or public corruption offenders from Zone B and C consolidation.
- Refrain from providing additional guidelines for former Zone C offenders.
- Eliminate the presumption in the Application Notes to §5F1.2 that electronic monitoring should ordinarily be used when a home detention sentence is imposed.

Apply Amendment 1 retroactively.

Proposed Amendment 3: Youthful Offenders

- Amend §4A1.2(d) to prohibit sentences committed prior to the age of 18 from being counted in the criminal history score regardless of severity of the crime or whether the sentence was classified as "adult" or "juvenile."
- Modify the Application Notes to §4A1.3 to eliminate the consideration of state law when determining whether a downward departure should be granted.
- If the Commission continues to allow consideration of offenses committed before an offender turns 18, establish a downward departure for any such convictions that overstate the seriousness of an offender's criminal history.
- Refrain from establishing an upward departure for youth sentences in any circumstance.

Apply Amendment 3 retroactively.

Proposed Amendment 4: Criminal History Issues

Part A:

- Eliminate the use of revocation sentences in determining the length of a term of imprisonment under §4A1.2.
- Make a conforming amendment to the definition of "sentence imposed" in §2L1.2.

Part B:

- Establish that a downward departure is warranted when a defendant's period of imprisonment is significantly less than the length of the sentence imposed.
- Refrain from creating an exception to this downward departure in cases where a defendant's period of imprisonment is reduced for reasons other than the defendant's good behavior.

Apply Amendment 4 retroactively.

Proposed Amendment 6: Acceptance of Responsibility

- Remove all references to relevant conduct in the standards for acceptance of responsibility in the Application Notes to §3E1.1.

Our detailed comments on these matters are set forth below. We take no position on the other amendments that the Commission has proposed (Amendments 2, 5, 7, 8, and 9).[2]

Proposed Amendment 1: First Offenders and Zone Consolidation

We support both parts of Amendment 1, which the Commission has divided into two parts: Part A would create a new guideline, §4C1.1, which would provide "first offenders" with a small reduction in offense level. Part A would also modify §5C1.1 by establishing a presumption that non-violent first offenders in Zones A and B of the Sentencing Table receive sentences other than imprisonment. Part B provides more flexibility by consolidating Zones B and C in the Sentencing Table and by eliminating a presumption that individuals sentenced to home detention be subject to electronic monitoring. Together, the amendments provide significantly more judicial discretion in sentencing decisions for offenders who the Commission's own studies show are least likely to commit another offense.

Part A: First Offenders

We support the Commission's efforts to advance its goals of reducing costs, reducing overcrowding, and promoting the effectiveness of reentry programs by proposing amendments that account for the substantially lower threat of recidivism that first offenders pose.[3] Expanding the availability of alternatives to incarceration for low-level, non-violent first offenders appropriately balances the Commission's responsibility to guide courts to sentences that are "sufficient, but not greater than necessary" and that "afford adequate deterrence to criminal conduct."[4]

The Commission has proposed that the definition of first offenders include all individuals who either have no prior offenses or no criminal history points assessed for their convictions.[5] We support this change, but contend that this definition is under-inclusive of the people least likely to offend again. We recognize that offenders with zero criminal history points have the lowest recidivism rates, but individuals with one criminal history point are similarly low.[6] The Commission's study, *Recidivism Among Offenders: A Comprehensive Overview* (Recidivism Study), showed people with zero or one criminal history points were far less likely to offend again; 33.8% of people with zero or one criminal history points were rearrested within eight years of release – compared to 56% of people with two criminal history points.[7] And these are *rearrests*, which reflect the possibility that an individual has reoffended, not a determination of guilt—a far more relevant measure of recidivism. The reconviction rate for offenders with one or fewer criminal history points is even lower; only 19.9% of those offenders are reconvicted in eight years. By contrast, offenders with two or three criminal history points are reconvicted at a

[2] *Id.*
[3] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[4] *See* 28 U.S.C § 991 (2008) (referencing the purposes of sentencing established in 18 U.S.C. § 3553(a)).
[5] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003 at 92015 (proposed Dec. 19, 2016).
[6] KIM STEVEN HUNT, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, 19 (2016) [hereinafter *Recidivism Study*].
[7] *Id.* The study also reveals a clear distinction between offenders with one criminal history point, 46.9 percent of whom are rearrested within eight years of release, as compared with 56.0 percent of those with two criminal history points.

rate of 33.0%.[8] The drastically lower recidivism and conviction rates of offenders with one or fewer criminal history points shows that they are deserving of the "first offender" relief that the Commission is proposing.

Furthermore, the Commission already groups offenders with one and zero criminal history points together in "Category I" in the Sentencing Table for a reason: Chapter 4 makes clear that the differences between those with one or zero criminal history points is minimal. Under §4A1.1, an offender will receive more than one criminal history point if he has failed to satisfy past commitments to the state, has been convicted of a violent crime, has more than one unexcluded conviction within the past ten years, or has a prior conviction that resulted in a 60 day (or more) term of imprisonment.[9] Nor should the label "first offender" stand in the way of making these offenders eligible for relief under proposed §4C1.1, because the same could be said of an offender who has zero criminal history points because of convictions that do not yield points under Chapter 4. For these reasons, making offenders with one criminal history point eligible for the same "first offender" relief as those with zero criminal history points is consistent with the Commission's practice of treating these two cohorts as part of one criminal history category.

The Commission also requests comment on two options it proposes for the size of the downward adjustment for first offenders.[10] The Leadership Conference supports Option 2, which provides, "a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater."[11]

A two-level reduction in offense level is better than a one-level reduction because it better serves the Commission's stated goals of reducing costs and overcrowding and will not risk a decrease in the deterring effect of the law.[12] Option 2 is supported by the Recidivism Study, which conclusively determined that the length of a sentence has no effect on the likelihood of recidivism.[13] Providing sentencing length flexibility will reduce the overcrowded federal prison population. The U.S. imprisons more people than any other industrialized nation in the world,[14] and federal prisons are currently operating at 16% over-capacity.[15]

We also support the Commission's proposal to establish a presumption in §5C1.1 that first offenders who are low-level (*i.e.*, those in Zones A or B) and who have not committed a crime of violence receive a sentence other than imprisonment.[16] This presumption would substantially advance the Commission's goals to "provide the defendant…correctional treatment in the most

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[8] *Id. at* A-2 (2016). Note that there is also a substantial difference between the reconviction rates of offenders with one criminal history point (28.8%) and those with two criminal history points (34.5%). *Id.*
[9] *See* U.S. SENTENCING GUIDELINES MANUAL §4A1.1 (U.S. SENTENCING COMM'N 2016).
[10] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92012.
[11] *Id.*
[12] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[13] *Recidivism Study*, *supra* note 5, at 22.
[14] *The World Prison Brief*. Accessed Feb. 21, 2017. http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.
[15] "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Sept. 30, 2016. https://www.bop.gov/resources/news/20161004_pop_decline.jsp.
[16] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92012.

effective manner"[17] and to reduce costs, reduce overcrowding, and promote effectiveness of reentry programs. [18] As the Commission determined in the Recidivism Study, Category I offenders are only rearrested at a rate of 33.8% in the eight years after their release (although this statistic covers individuals that are in Zone D not just current Zones A, B and C (or Zones A and B, post consolidation)).[19] Keeping these first offenders out of prison will allow them to keep their employment and maintain their relationships with their family and community, both of which have been shown to decrease the likelihood of recidivism.[20]

The Commission requested comment on how to define "crime of violence" for the purpose of determining whether a first offender is eligible for this presumption. We recommend that the Commission adopt proposed Option 1, which would employ by cross-reference the definition in §4B1.2: any offense "punishable by imprisonment for a term exceeding one year" that either "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is a murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials defined in 18 U.S.C. § 841(c)."[21] The Commission's alternative definition would exclude offenders who "did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense."[22]

Defining "crime of violence" by cross reference to §4B1.2 is preferable to the alternative, because it is easier to apply and would ensure that the term "crime of violence" has consistent application throughout this section of the Guidelines.[23] Having two separate definitions of crime of violence could lead to confusion among defendants who are trying to understand the basis for criminal history calculations and eligibility for the proposed first offender adjustment. Furthermore, the alternative definition's references to "credible threats of violence" and possession of a "dangerous weapon" are subjective and vague and could result in the disqualification of more offenders than the Commission intends.[24] Therefore, we support the definition of crime of violence as described in Option 1 of the proposed amendment.

Part B: Zones B and C Consolidation

We also support Part B of proposed Amendment 1, which would consolidate Zones B and C of the Sentencing Table to create a new, expanded Zone B and would change the Commentary to §5F1.2 of the Guidelines to eliminate the presumption that electronic monitoring is appropriate

[17] *See* 18 U.S.C. 3553(a)(2)(D).
[18] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[19] *Recidivism Study*, *supra* note 5, at 19.
[20] M. T. Berg & B. M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUSTICE QUARTERLY 383 (2011).
[21] U.S. SENTENCING GUIDELINES MANUAL §4B1.2 (U.S. SENTENCING COMM'N 2016).
[22] Sentencing Guidelines for United States Courts, 81 Fed. Reg at 92019.
[23] *Compare*, U.S. SENTENCING GUIDELINES MANUAL §4B1.2 (U.S. SENTENCING COMM'N 2016), *with*, Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92019.
[24] *See*, *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963) (stating many objects that have been considered dangerous, including shoes, a rake, a plastic chair, and more).

for all home detention sentences.[25] Consolidating the two zones would create more flexibility in judicial discretion by increasing the number of offenders eligible for non-incarceration sentences. This flexibility would help reduce the federal prison population, curtail sentencing disparities, and rehabilitate lower-level offenders. Additionally, expanding judicial discretion in electronic monitoring would empower judges to fashion sentences that are more practical and feasible to administer.[26]

We believe that the consolidation of Zones B and C is appropriate because it would achieve several objectives. First, sentencing flexibility would reduce the overcrowded federal prison population.[27] Second, providing Zone C offenders with alternative sentencing options would help reduce racial and economic disparities in sentencing. Currently, a disproportionate number of inmates are African American, Hispanic, low-income, and non-violent.[28] Finally, Zone C offenders would have rehabilitative opportunities, which could reduce the likelihood of recidivism.

Providing alternatives to imprisonment enables offenders to remain productive in society while serving out their sentences. For example, probation and supervised release may enable a defendant to continue working and to receive better medical or psychiatric monitoring, if needed.[29] In the Recidivism Study, the Commission notes that longer prison sentences neither reduce crime nor increase public safety.[30] Creating flexibility within the new Zone B would ensure that prison capacity is reduced, that sentencing disparities are curtailed, and that offenders are rehabilitated to become productive members of society.

The Commission requested comment on whether it should exempt from consolidation current Zone C offenders convicted of white-collar and other public corruption offenses. We oppose the creation of such an exemption. The Commission notes that the exemption could reflect "a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence."[31] However, racial and ethnic disparities exist even within white-collar sentencing. One study found that African American and Hispanic white-collar defendants receive longer prison sentences than whites because white offenders are more often able to pay the fine to reduce their time in prison,

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[25] Additionally, Zone B would encompass all guideline ranges that have a minimum of at least one month imprisonment but not more than twelve months. Zone C would disappear, and Zone D would remain labeled as such. Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92006.

[26] *See* Emma Anderson, *The Evolution of Electronic Monitoring Devices*, NPR (May 24, 2014) available at http://www.npr.org/2014/05/22/314874232/the-history-of-electronic-monitoring-devices (stating that some EM technology can send false alerts).

[27] As mentioned under Part A, the U.S. imprisons more people than any industrialized nation, and federal prisons are currently operating at 23% over capacity.

[28] *Civil and Human Rights Coalition Commends Bipartisan Action on Sentencing Reform*, THE LEADERSHIP CONFERENCE (Jan. 30, 2014), http://www.civilrights.org/press/2014/smarter-sentencing-act-committee.html.

[29] United States Courts, *Chapter 3: Intermittent Confinement (Probation and Supervised Release Conditions)*, http://www.uscourts.gov/services-forms/intermitten-confinement-probation-supervised-release-conditions (also noting that offenders are able to continue serving as provider and caretaker for family members).

[30] *Recidivism Study*, *supra* note 5.

[31] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92006.

whereas Hispanic and African American defendants are usually incapable of doing so.[32] Moreover, individuals who did not graduate high school or who are not U.S. citizens receive longer prison sentences,[33] an outcome that reinforces the racial disparity. Overall, the study found that black and Hispanic defendants, on average, receive 10% longer sentences than white defendants.[34] Through consolidation, racial and ethnic minorities who commit white-collar and public corruption crimes would have sentencing alternatives otherwise not available to them in Zone C.

We also oppose any additional guidance to courts about new Zone B offenders (*i.e.*, those who are currently in Zone C) for a simple reason: establishing such guidance would run counter to the Commission's proposal to consolidate Zones B and C. Accordingly, the same reasons that counsel in favor of zone consolidation counsel against the creation of such guidance.

The Commission Should Give Amendment 1 Retroactive Effect

The Commission requested comment on retroactivity, and we believe that Amendment 1 is a strong candidate for such treatment. The Policy Statement on retroactivity in §1B1.10 explains that the Commission assesses three criteria in determining whether an amendment should be retroactive: (1) the purpose of the amendment, (2) the magnitude of the amendment's impact on the guidelines range (the Commission does not apply retroactivity when the maximum guidelines range reduction is less than six months), and (3) the ease of application.[35] We believe that retroactive application of Amendment 1 satisfies these criteria, particularly when the changes proposed in Parts A and B are considered in aggregate.

Retroactive application would advance the purposes of the amendment—to alleviate prison over-capacity and recidivism by reducing sentences for first offenders and Zone C offenders. Low-level offenders should benefit from the change even if they were sentenced in the year or two prior to adoption of this amendment. Their recidivism risks are just as low as similar offenders who would be sentenced one year after this amendment takes effect.

Taken together, the magnitude of the changes in Parts A and B would have a large impact on the guidelines range for certain offenders. For example, a non-violent first offender whose offense level is 15 (in Zone D) and would be subject to a maximum guideline sentence of 24 months could see his offense level reduced by two, thereby placing him in offense level 13, which carries an 18-months maximum guidelines sentence. In addition, the sentence would now be in Zone B (if the commission proceeds with Zone C and B consolidation) rather than Zone D, which would make the offender eligible for alternative sentences such as several months of imprisonment with supervised release subject to conditions of confinement. For this reason, our hypothetical offender's term of imprisonment could be reduced even further. This example makes clear that retroactive application of Amendment 1 could result in changes of a significant magnitude.

[32] Schanzenbach & Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 764 (2006).
[33] *Id.* at 781.
[34] *Id.*
[35] *See* U.S. SENTENCING GUIDELINES MANUAL §1B1.10 cmt. background (U.S. SENTENCING COMM'N 2016).

Finally, Amendment 1 would be easy for courts to apply retroactively. Determining whether an individual is a first offender and whether he was given a sentence in an expanded Zone B would in most cases be a simple matter of consulting the sentencing record.[36] In a smaller subset of cases, the court would have to consider whether the underlying offense was a crime of violence; however, courts are well practiced at making such determinations under §4B1.2. Accordingly, we recommend applying this amendment retroactively.

Proposed Amendment 3: Youthful Offenders

The Leadership Conference and the ACLU support the objectives behind Amendment 3, which would modify §4A1.2(d) to exclude juvenile sentences from being considered in the calculation of a defendant's criminal history score; however, we believe that whether the conduct was committed before the offender turned 18 (*i.e.,* whether or not it was a "youth" offense) [37] should be the dispositive question rather than whether or not the offender received a juvenile or adult sentence. Nevertheless, should the Commission decide to move forward with its proposal, we support creating a downward departure for cases in which the defendant had an adult conviction for an offense committed prior to age 18 counted in the criminal history score that would have been classified as a juvenile adjudication if the laws of the jurisdiction did not consider offenders below the age of 18 as "adults." Finally, we also oppose creating an upward departure in §4A1.3 for criminal conduct committed before the age of 18 under any circumstances.

The Commission asked for comment on whether it should provide that sentences for offenses committed prior to age 18 not be counted in the criminal history score, regardless of whether the sentence was classified as a "juvenile" or an "adult" sentence as an alternative to the proposed amendment. The Leadership Conference and the ACLU support these changes and believe that all youth sentences should be excluded from the calculation of the criminal history score for two reasons: (1) youth offenses are not indicative of future criminal activity due to youth brain development and (2) the inclusion of youth sentences in the criminal history score has a disparate impact on people of color since youth of color are more likely to be sentenced as adults.

First, youth offenses should not be considered in the calculation of a defendant's criminal history score because youth convictions are not indicative of an offender's culpability or propensity to recidivate. According to the Sentencing Guidelines, one goal of considering the past criminal conduct of the defendant is "to protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior…."[38] While this strategy may be effective when using prior adult sentences, the predictive value of youth convictions is much lower.

[36] In 2014, only about 10% of the federal prison population was Zone C offenders. *See* COURTNEY R. SEMISCH, U.S. SENTENCING COMM'N, ALTERNATIVES TO SENTENCING IN THE CRIMINAL JUSTICE SYSTEm 7 (2015).
[37] We use the term "youth sentences" to refer to sentences for offenses committed prior to the age of 18 regardless of whether the sentence was classified as "juvenile" or "adult." We use the term "youth offenses" to refer all offenses committed prior to the age of 18.
[38] U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENTENCING COMM'N 2016).

Research has shown that the prevalence of offending increases from late childhood, peaks in the teenage years (from 15 to 19), and then declines in the early 20s.[39] Between 40% and 60% of youth stop offending by early adulthood, which demonstrates that a youth sentence is not predictive of future criminal behavior.[40] The decline is linked to a decrease in impulsive behavior. Adolescents struggle to control their impulses and are prone to participate in risky behavior because their brains do not develop into an adult brain until the individual reaches their early 20s.[41] Emotionally charged situations make it difficult for youth to make correct decisions and many become involved in the criminal justice system due to mitigating circumstances stemming from systemic racism or entrenched poverty.

The Supreme Court's recent Eighth Amendment jurisprudence counsels in favor of considering this research in deciding how we should adjudicate youth offenders. In *Miller v. Alabama*, the Supreme Court highlighted three significant gaps between youth and adults to explain why youth have diminished culpability and deserve less severe punishments.[42] First, children have a lack of maturity and an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and risk-taking. Second, children are more vulnerable to outside influences and pressure from family and peers, and are often unable to extricate themselves from a negative environment. Lastly, a child is still growing and his or her actions are less likely to be "evidence of irretrievable depravity."[43] All youth should have diminished culpability for offenses committed prior to the age of 18 regardless of whether the sentence was classified as "juvenile" or "adult" according to the logic put forth by the Supreme Court. We encourage the Commission to adopt this rationale.

Second, youth sentences should not be used in calculating a defendant's criminal history points because doing so perpetuates racial disparities in the treatment of young offenders. People of color face disparate treatment at all stages in the criminal justice process, from enforcement decisions to intake to adjudication.[44] State laws and judicial discretion also negatively impact youth of color. Some states have laws that automatically transfer youth over a certain age to adult courts, while other states allow the juvenile court judge or prosecutor to make a decision to waive or transfer a case to the adult court. Thirty-four states have provisions known as "once an adult always an adult" that require youth who were previously tried and/or convicted in adult court to automatically face adult charges for any future conduct, regardless of whether it is related to the prior offense.[45]

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[39] Rolf Loeber, David P. Farrington, David Petechuk, *Series: Study Group on the Transitions between Juvenile Delinquency and Adult Crime*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE (2013).

[40] *From Juvenile Delinquency to Young Adult Offending*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE (Mar. 11, 2014), https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx#reports.

[41] *The Teen Brain: Still Under Construction*, NATIONAL INSTITUTE OF MENTAL HEALTH (2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml.

[42] *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012).

[43] *Id*. at 2464–65.

[44] Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 252–53 (2002).

[45] *Key Facts*: Youth in the Justice System, THE CAMPAIGN FOR YOUTH JUSTICE (Jun. 2016), https://campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.

These laws and procedural flaws in the juvenile justice system have startling consequences. In the United States, an estimated 200,000 youth are tried, sentenced, or incarcerated as adults even though most of the youth prosecuted are charged with non-violent offenses.[46] African American youth overwhelmingly receive harsher treatment than white youth and make up 32% of those arrested even though they represent only 16% of the overall youth population.[47] African American youth are more than eight times as likely as white youth to receive an adult prison sentence.[48] Latino youth are 43% more likely than white youth to be waived judicially to the adult system and 40% more likely to be admitted to adult prison.[49] Since youth of color are more likely than white youth to be sentenced as adults, continuing to allow the use of adult sentences would have a disparate impact on people of color and perpetuate racial inequalities already present in the criminal justice system.

Nevertheless, if the Commission does proceed with Amendment 3 as proposed, The Leadership Conference and the ACLU support that option over the status quo because of systemic flaws in the juvenile justice system. The procedural requirements in the juvenile court are frequently relaxed to account for the unique circumstances of individual cases and to achieve the best rehabilitation for the juvenile. For instance, evidentiary rules and procedural rules are followed less rigorously, there are frequent procedural errors, the proceedings are less adversarial than in the criminal court, youth are unrepresented by counsel or the quality of representation is poor, and juvenile offenders are not offered a jury trial.[50] Juvenile offenders do not have the right to a trial by jury, which may lead many offenders to plead guilty rather than proceeding to trial.[51] Youth offenders rarely receive notice that their juvenile adjudication could be used for sentence enhancement, and they are generally unaware that juvenile adjudications factor into their criminal history score. Youth and their parents often fail to understand their legal rights due to inadequate legal representation and falsely believe that juvenile adjudications are confidential and will be expunged.[52] In addition, youth offenders are psychosocially and emotionally immature in ways that significantly affect their decision-making process in a legal context.[53] Given the systemic flaws in the juvenile justice system that impede due process and the developmental differences in youth that can impact their substantive and procedural rights, it would be unjust to use juvenile sentences in the calculation of a criminal history score.

The Commission requested comment on whether a downward departure may be warranted in cases in which the defendant had an adult conviction for an offense committed prior to age 18 counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted

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[46] Liz Ryan, *Youth in the Adult Criminal Justice System*, 35 CORDOZO L.REV. 1167, 1169 (2016); Carmen Daugherty, *State Trends: Legislative Victories from 2011-2013: Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUSTICE 12 (2013), http://www.campaignforyouthjustice.org/documents/ST2013.pdf.

[47] *Key Facts*, *supra* note 42.

[48] *Id.*

[49] *Id.*

[50] Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 110–11 (2015).

[51] The Supreme Court has held that trial by jury in the court's adjudicative stage is not a constitutional requirement. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

[52] *See* Redding, *supra* note 41 at 242–43.

[53] *Id.* at 247–48.

did not categorically consider offenders below the age of 18 years as "adults." The Leadership Conference supports a downward departure for all defendants with an adult conviction for an offense committed prior to the age of 18 regardless of whether the jurisdiction categorically considers offenders below the age of 18 as "adults." The text of the proposed change to the commentary of §4A1.3 captioned "Application Notes: Downward Departures A(ii)" should be modified to state, "The defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score." This change would prevent the Commission's approach to juvenile sentences from being contingent on state law and would address the overarching concerns we have raised about using youth offenses to calculate criminal history points.

The Commission also requested comment on whether juvenile sentences may be considered for the purposes of an upward departure under §4A1.3. The Leadership Conference and the ACLU oppose an upward departure for offenses committed prior to the age of 18. If the exclusion of juvenile sentences from the calculation of criminal history points results in a criminal history category that inadequately captures the seriousness of an individual's record, a court can impose a non-guidelines sentence. Nonetheless, if the Commission does decide to consider youth sentences for an upward departure, guidance should be provided that youth sentences should only be considered where the offense was a crime of violence as defined by §4B1.2 of the Guidelines.

The Commission Should Give Amendment 3 Retroactive Effect

We also propose that the Commission give Amendment 3 retroactive effect. As we discussed in conjunction with Amendment 1, the Commission must take into consideration the purpose of the amendment, the magnitude of the change, and difficulty of applying the amendment when determining whether to use retroactivity.

Making Amendment 3 retroactive advances the purpose of the proposed amendment. We presume that many individuals are serving sentences that were based on criminal history calculations that included youth offenses. Those sentences are flawed for the reasons we outlined above.

The magnitude of the proposed amendment would be large for many offenders. The changes proposed could easily cause a defendant to move down a Criminal History category or two. For instance, an offender with an offense level of 15 and who was assessed ten criminal history points (Criminal History Category V) would have a maximum guidelines sentence of 46 months; however, if two juvenile convictions made up four of his criminal history, the proposed amendment would shift him down to Criminal History Category III and a resulting maximum of 30 months imprisonment.[54]

Finally, Amendment 3 would not be difficult for the courts to apply retroactively because recalculation of an individual's criminal history points would only require the court to determine what juvenile offenses were included in an offender's criminal history calculations ***(or, if The***

[54] In our example, both juvenile sentences resulted in confinement of at least 60 days and occurred within five years of his commencement of the instant offense.

Leadership Conference and ACLU's preferred alternative were adopted) when the offender turned 18 and what conduct occurred before that date. Neither inquiry would be particularly complex.

Proposed Amendment 4: Criminal History Issues

The Leadership Conference and the ACLU support the adoption of Amendment 4. Part A of Amendment 4 amends §4A1.2 to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are no longer counted for purposes of calculating criminal history points in Chapter 4. Part B amends the Commentary to §4A1.3 to provide a downward departure from the defendant's criminal history when the period of imprisonment actually served by the defendant is significantly less than the length of the sentence imposed.

Part A

The Leadership Conference and the ACLU support Part A of Amendment 4 for the following reasons: revocation sentences are not related to the severity of the underlying offense, revocation offenses are in many cases not serious violations, and considering revocation offenses that are also prosecuted as separate offenses could lead to systematic overstatement of offender criminal history.

Revocation sentences are not related to the severity of the underlying offense, which is what criminal history calculations are meant to reflect.[55] An offender's criminal history points are supposed to represent the seriousness of the defendant's prior convictions; however, adding points because of conduct that occurred *after* the underlying offense does not accomplish that end, particularly when the points are based on an aggregate term of imprisonment. There is a possibility that even if the revocation sentence were counted separately, a defendant could end up in a higher criminal history category than would be warranted for the cumulative number of days the defendant spent in jail.

In many instances, revocation offenses are far less serious than the underlying offense. More than two-thirds of all federal offenders who receive a revocation sentence commit a technical violation.[56] Examples of technical violations include a violation of general conditions, use of drugs, absconding, and the willful nonpayment of a court imposed obligation.[57] Under the Guidelines, a technical violation would likely be a Grade C violation of parole, which includes "(A) federal, state or local offense punishable by a term of imprisonment of one year or less; and (B) a violation of any other condition of supervision."[58] Section 7B1.4 of the Guidelines provides

[55] U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (U.S. SENTENCING COMM'N 2016).
[56] *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Business in the United States 2015, Table E-7A, http://www.uscourts.gov/statistics-reports/judicial-business-2015-tables); *Number of Offenders on Federal Supervised Release Hits All Time High: Average inmate faces nearly four years of community monitoring after incarceration*, PEW RESEARCH (Jan. 24, 2017), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high.
[57] U.S. District Courts – Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2015, http://www.uscourts.gov/sites/default/files/data_tables/E7ASep15.pdf.
[58] U.S. SENTENCING GUIDELINES MANUAL §7B1.1 (U.S. SENTENCING COMM'N 2016).

that if your Grade C violation goes before a judge, a defendant's sentencing range is anywhere between three and 14 months.[59]

Parole conditions also vary widely depending on what state a particular defendant is in. In Kansas, Kentucky, and Hawaii, parolees are prevented from drinking alcohol and going into bars.[60] California has 20 basic conditions of parole including that a defendant cannot be around guns or a "thing that looks like a real gun."[61] Many of the state statutes are vague and broad and therefore open to interpretation; whether or not a defendant is judged to have violated the terms of his parole (or supervised release) can be highly subjective.

Where revocation offenses are serious, the conduct leading to the revocation may be the foundation for a new, separate charge and conviction as well as the imposition of a revocation sentence. This raises the possibility that application of Chapter 4 will systematically *overstate* the seriousness of offenders who receive *both* revocation offenses *and* new convictions. Indeed, it is extremely likely that the sentence imposed for the new violation will be enhanced because the offense was committed while a defendant was on probation or supervised release.[62] For instance, § 4A1.1(d) proscribes adding two additional points to an offense if an offender commits an offense under "probation, parole, supervised release, imprisonment, work release or escape status."[63]

The Commission requested comment on how the revocation sentence should be counted for the purpose of criminal history points. For the reasons stated above, we believe a revocation sentence should not be counted. If the revocation conduct is serious, charged, and proven (or admitted), the conduct will result in criminal history points as would any other conviction.

The Commission also requested comment on whether it should amend §4A1.3 to allow for upward departures for revocation sentences. The Leadership Conference and the ACLU do not believe criminal history points should be considered for a departure. Criminal history points already take into account if a new crime is committed while a defendant is on probation, and for the reasons stated above, considering revocation offenses could lead the court to overstate the seriousness of an offender's criminal history.[64]

Nonetheless, if the Commission does decide to consider revocation sentences for an upward departure, guidance should be provided that revocation sentences should only be considered when a defendant has committed a crime of violence as defined by §4B1.2 of the Guidelines or when the parole violation is substantially related to the previous crime.

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[59] *See id.*
[60] *Parole Decision Making in Hawaii: Setting Minimum Terms, Approving Release, Deciding on Revocation and Predicting Success and Failure on Parole*, *RESEARCH AND STATISTICS BRANCH CRIME PREVENTION AND JUSTICE ASSISTANCE DIVISION DEPARTMENT OF THE ATTORNEY GENERAL* (Aug. 2001), http://ag.hawaii.gov/cpja/files/2013/01/Parole-Decision-Making.pdf.
[61] State of California Department of Corrections and Rehabilitation, *Parolee Information Handbook*, http://www.cdcr.ca.gov/Parole/docs/PAROLEE_INFORMATION_HANDBOOK_2016.pdf.
[62] *See, e.g.* U.S. SENTENCING GUIDELINES MANUAL §4A1.1(d) (U.S. SENTENCING COMM'N 2016).
[63] *See id.*
[64] *See id.*

Finally, the Commission requested comment on whether a conforming amendment should be made to the definition of "sentence imposed" in §2L1.2. The Leadership Conference and the ACLU support conforming changes to §2L1.2 for substantially the same reasons that we articulated above; the assessment of criminal history in this guideline operates in a similar manner to Chapter 4.

Part B

The Leadership Conference and the ACLU also support the adoption of Part B of Amendment 4, which amends the Commentary to §4A1.3 to provide that a downward departure may be warranted when the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. A defendant's criminal history points should reflect early release in making that assessment.

The Commission requested comment on whether an exception should be made if the reason a defendant was released early was not based on the defendant's own conduct. We do not believe there should be an exception. It is not always clear why a defendant is released from prison. If a state was forced to release prisoners because of overcrowding, it would presumably start with the low-risk defendants who have been on their best behavior. This appears to be what California did when it recently released more than 30,000 prisoners as part of an effort to reduce overcrowding.[65] A study found that of 1,600 prisoners released early only 1.3% of them ended up back in prison, compared with more than 30% of other prisoners.[66]

In addition, determining why an individual was released may not be as straightforward as it seems and could be extremely burdensome on state authorities. State authorities facing budget pressures or court orders to reduce overcrowding might choose to release certain individuals early precisely because they have been on good behavior. In such cases, it is unclear how federal courts would determine the exact reason a defendant was released. Moreover, litigating this issue at sentencing would create an issue of fact that would require defense counsel and assistant U.S. attorneys to obtain documents or testimony from state parole or prison authorities.

The Commission Should Give Amendment 4 Retroactive Effect

Section 1B.10 of the Sentencing Guidelines discusses the relevant factors to determine if an amendment should be enacted retroactively. As discussed in connection with Amendment 1, the Commission must take into consideration the purpose of the amendment, the magnitude of the change, and difficulty of applying the amendment.

We believe that Amendment 4 satisfies these criteria, particularly when the changes proposed in Parts A and B are considered in the aggregate. Retroactively applying Amendment 4 advances its

[65] *Brown v. Plata*, 563 U.S. 493 (2011).
[66] *Proposition 36 Progress Report: Over 1,500 Prisoners Released Historically Low Recidivism Rate,* STANFORD LAW SCHOOL THREE STRIKES PROJECT (Apr. 2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf.

purpose because many defendants who are currently incarcerated were assessed criminal history points that overstated the seriousness of their prior offenses.

Amendment 4 would also have a large impact on the guidelines range of some offenders. Through the aggregation of revocation and original sentences and not allowing a downward departure for a substantially early release, there are many defendants whose criminal history point total is higher than it should be. Now a revocation sentence would not be counted and a downward departure would be warranted if a defendant was released substantially early. For example, consider a defendant in Criminal History Category II and offense level 15 who was sentenced to 25 months in prison and then released. While on supervised release, he committed a technical violation and had his probation revoked. Since a violation was committed while he was on supervised release, two offense levels would be added to his offense level score. If the revocation and original sentence were no longer aggregated, the defendant would be subject to a maximum guidelines sentence of 6 months instead of 33 months.

Finally, it would not be difficult to apply this amendment retroactively. These calculations would be simple because it is easy to look at the sentencing record to determine the number of criminal history points assessed and see whether a revocation sentence was aggregated with the original sentence. In addition, it would be relatively simple to determine which defendants spent substantially less time in prison than the terms to which they were sentenced and depart from the guidelines where warranted.

Proposed Amendment 6: Acceptance of Responsibility

The Leadership Conference and the ACLU are encouraged by the Commission's proposed amendment to limit references to relevant conduct in §3E1.1 of the Guidelines; however, as we explain below, we think the Commission should go one step further than the changes it has proposed by removing mention of relevant conduct from §3E1.1 altogether.

The Commission should remove all references to relevant conduct from §3E1.1 because its inclusion requires judges to make decisions as to guilt in the sentencing phase, which uses a lower burden of proof and standard of evidence. Relevant conduct is "uncharged, dismissed, and sometimes even acquitted conduct undertaken as part of the same transaction or common scheme or plan as the offense of conviction."[67] Although this proposed amendment is a step towards limiting the impact of non-convicted, relevant conduct in the sentencing phase, the amendment should eliminate the impact of this conduct from the accepting responsibility reduction entirely.

The Application Notes to §3E1.1 recognize that incentivizing the acceptance of responsibility serves "legitimate societal interests."[68] Although the Notes do not explicitly explain what these interests are, they acknowledge that the acceptance of responsibility offense level reduction encourages defendants to plead guilty, thereby reducing the amount of resources the Government must spend on preparing for and conducting a trial.[69] Avoiding trial costs and time is one of the

[67] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1325 (2005).
[68] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. background (U.S. SENTENCING COMM'N 2016).
[69] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 n.6 (U.S. SENTENCING COMM'N 2016).

principal purposes of this guideline, and accordingly, §3E1.1 should only require consideration of factors germane to this purpose.

The Leadership Conference and the ACLU believe that the reduction for acceptance of responsibility should focus on whether the defendant has admitted charged conduct rather than relevant conduct. Issues at sentencing involve many different determinations under a lower burden of proof where rules of evidence do not apply.[70] The court may also consider all relevant information, even if it would not be admissible under the rules of evidence, as long as the information "has sufficient indicia of reliability to support its probable accuracy."[71] For example, uncorroborated hearsay is inadmissible at trial, but hearsay that meets the standards of §6A1.3 is admissible during the sentencing phase.[72] In this context, determining what challenges to relevant conduct constitute "false denials" or "frivolous" arguments is hardly a simple task.

With these concerns in mind, we believe that even if Amendment 6 were adopted as proposed, §3E1.1 would still contain two problematic references to relevant conduct: one sentence that encourages a defendant to "truthfully admit" to relevant conduct; and another sentence that discourages arguments that may be considered frivolous.

First, the Guidelines should not encourage judges to consider as a factor whether defendants "truthfully admit" to relevant conduct because it is coercive and a violation of the defendant's Fifth Amendment rights. Application Note 1(A) to §3E1.1 first requires that a defendant truthfully admit to the conduct of the offense of conviction, and truthfully admit or not falsely deny relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct).[73] Although a defendant is not obligated to truthfully admit to relevant conduct, the fact that this is still a factor for consideration is concerning. Suggesting a defendant admit to conduct for which he was not charged in order to receive a possible sentence reduction is unduly coercive and interferes with a defendant's Fifth Amendment right against self-incrimination – regardless of whether it is mandatory or just a factor for consideration. Moreover, this does nothing to further the primary aim of §3E1.1, which is to limit resource expenditure at trial.

Second, the proposed amendment to Application Note 1(A) to §3E1.1, which adds that "a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction," [74] imprudently encourages the consideration of frivolity in determining whether to grant the acceptance of responsibility reduction and may have the undesirable impact of chilling valid, factual legal arguments. The Commission's proposed amendment would replace the current last provision, which says if a defendant falsely denies or frivolously contests relevant conduct, he cannot receive the acceptance of responsibility reduction.[75] Although Amendment 6 alters the way in which a judge considers frivolous arguments, the proposed amendment's reference to frivolity still suppresses a defendant's ability to defend himself. The Guidelines should not dissuade defendants from raising valid, factual, and

[70] U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (U.S. SENTENCING COMM'N 2016).
[71] *Id.*
[72] *See* Ricardo J. Bascuas, *The American Inquisition: Sentencing after the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 33 n.207 (2010).
[73] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016).
[74] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92015.
[75] *Id.*

legal arguments to be eligible for acceptance of responsibility because the proper application of the Guidelines depends on both sides being able to litigate their interpretation and application. Language in the Guidelines intended merely to dissuade frivolous challenges at sentencing may in fact prevent defendants from raising valid challenges to the application of the Guidelines.[76]

For these reasons, although the Commission proposes a welcome softening of the language in §3E1.1, it does not go far enough. The Sentencing Guidelines should be designed to allow judges the discretion to appropriately sentence defendants who have pled guilty and reduce the Government's burden of preparing for trial. The Leadership Conference and the ACLU recommend that the Commission remove all references to relevant conduct from factors for consideration under §3E1.1.

Conclusion

We remain committed to working with the Commission to create more comprehensive and effective sentencing guidelines that operate to shift the Commission's treatment of defendants and promote rehabilitation. We believe that the proposed Amendments discussed above represent a step toward establishing fair and effective policies, which are vital to ensuring the effective administration of our country's justice system. We stand ready to work with you to ensure that the voices of the civil and human rights community are heard in this important, ongoing national conversation. If you have any questions about these comments, please contact Sakira Cook, Counsel, at cook@civilrights.org or 202-263-2894 or Jesselyn McCurdy, Deputy Director, at jmccurdy@aclu.org or (202)675-2307.

Sincerely,

The Leadership Conference on Civil and Human Rights

The American Civil Liberties Union (ACLU)

[76] In the Seventh Circuit, for instance, a defendant's challenge to relevant conduct may be deemed frivolous if the defendant fails to present evidence on his behalf. *United States v. Lister*, 432 F.3d 754, 760 (7th Cir. 2005).

the Campaign for the Fair Sentencing of Youth

Campaign for Youth Justice

Because the Consequences Aren't Minor

February 20, 2017

Judge William H. Pryor, Jr.
Acting Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Attention: Public Affairs—Comments on Proposed Amendments

CC: Ms. Rachel Barkow, Mr. Jonathan J. Wroblewski, Ms. J. Patricia Wilson Smoot

RE: Proposed Amendment: Youthful Offenders

Dear Chair Pryor and Commissioners,

The Campaign for the Fair Sentencing of Youth and the Campaign for Youth Justice ("the Campaigns") are grateful that the United States Sentencing Commission has offered a proposed amendment addressing youthful offenders. The current Sentencing Guidelines have not yet been revised to account for ongoing advancements in our understanding of adolescent brain and behavioral development, as well as recent U.S. Supreme Court cases. **We encourage the U.S. Sentencing Commission to adopt the proposed amendments and to also consider additional revisions related to the treatment of youthful offenders under the Sentencing Guidelines.**

The U.S. Supreme Court has repeatedly concluded children are constitutionally different than adults in criminal sentencing

Throughout the last decade, the United States Supreme Court has repeatedly concluded that children are constitutionally different than adults for the purpose of criminal sentencing. In *Roper v. Simmons* (2005), the Court struck down the death penalty for children, finding that it violated the 8th Amendment's prohibition against cruel and unusual punishment.[1] The Court emphasized empirical research demonstrating that children are developmentally different than adults and have a unique capacity to grow and change as they mature.[2] In *Graham v. Florida* (2010), the Court struck down life-without-parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release."[3] In *Miller v. Alabama* (2012), the Court struck down mandatory life-without-parole sentences for youth convicted of

[1] *Roper v. Simmons*, 543 U.S. 551 (2005).
[2] *Id.*
[3] *Graham v. Florida,* 130 S. Ct. 2011 (2010).

homicide offenses and ruled that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" any time a child faces a potential life-without-parole sentence.[4] *Miller* also requires that if a child is facing a sentence of life in prison, sentencing judges must consider certain factors related to the child's age and his or her prospects for reform.[5] In January 2016, the U.S. Supreme Court ruled in *Montgomery v. Louisiana* that the *Miller* decision applies retroactively to individuals serving mandatory life-without-parole sentences for crimes they committed while under age 18 and found life-without-parole sentences to be unconstitutional for the vast majority of youthful offenders who commit homicide offenses.[6] Further information as to these U.S. Supreme Court cases can be found in the Campaign for the Fair Sentencing of Youth's Comments addressing the Commission's Proposed Priorities.[7]

Advances in adolescent developmental research demonstrate an empirical basis for treating youth differently than adults

The Sentencing Guidelines have not yet been revised to account for consistent scientific advancements in adolescent brain and behavioral development. As many parents and educators could verify from personal experience, the adolescent brain is not fully mature even at age 18.[8] Empirical studies have repeatedly shown that the brains of youth are not fully developed, making it difficult for them to consider the long-term impact of their actions, control their emotions and impulses, and evaluate risks and rewards in the same way as adults.[9] Youth as a whole are more vulnerable, more susceptible to peer pressure, and more heavily influenced by their surrounding environments, which they rarely can control.[10] Due to the plasticity of their developing brains, however, children also possess a unique capacity for change and rehabilitation.[11]

The Campaigns support the proposed amendments as to youthful offenders

The current Sentencing Guidelines permit offenses committed prior to age 18 to be considered when computing a defendant's criminal history score. These offenses can include both juvenile adjudications and convictions in adult court for offenses that occurred prior to age 18. Considering either of these is antithetical to the U.S. Supreme Court jurisprudence regarding youthful offenders and decades of adolescent brain development research. Given that youth should not be held accountable for their actions in the same way as adults, a defendant's prior

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[4] *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
[5] *Id.* at 2468.
[6] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
[7] Campaign for the Fair Sentencing of Youth's Comments addressing Federal Register Number 216-13681; Support for Potential Priority (7) to Study the Treatment of Youthful Offenders (July 2016). Available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160725/priorities-comment.pdf#page=135.
[8] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).
[9] *Id*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).
[10] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); Dustin Albert & Laurence Steinberg, Peer Influences on Adolescent Risk Behavior, in INHIBITORY CONTROL AND DRUG ABUSE PREVENTION: FROM RESEARCH TO TRANSLATION (Michael Bardo et al. eds., 2011).
[11] Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).

youthful offenses should not be weighted in the same way as prior offenses that occurred after age 18.

- Consideration of Juvenile Adjudications for Criminal History Calculation

The Sentencing Commission seeks comments as to how the Guidelines should account for juvenile adjudications. The current proposed amendment omits juvenile adjudications from consideration for calculation of a defendant's criminal history and the Commission also proposes the alternatives of 1) excluding juvenile adjudications unless they are violent or serious and 2) excluding consideration of all offenses committed prior to age 18.

The Campaigns fully support the proposed amendment to exclude all juvenile adjudications from a defendant's calculated criminal history. The intended purpose of the juvenile justice system is to rehabilitate rather than punish youthful offenders and includes a focus on the "best interests of the child."[12] Accordingly, juvenile adjudications serve a distinct function from convictions within the criminal justice system. Individuals should not be further penalized for their youthful transgressions, particularly when these incidents are resolved in a rehabilitative setting. Therefore, any and all juvenile adjudications should be excluded from consideration when calculating a defendant's criminal history.

The Campaigns oppose creating an exception for juvenile adjudications if they are violent and/or serious. First, the majority of youthful offenders cease criminal behavior by their mid-20s, including those who commit violence offenses,[13] so empirical data does not support treating these youthful offenders differently than the broader youthful offender population. Second, attempting to standardize what offenses would be considered serious or violent creates the risk of disparate outcomes for children with similar offenses. Because each state establishes statutory criminal offenses, children in different states with comparable crimes may be adjudicated differently for similar offenses. The result is that the Sentencing Guidelines may produce harsher sentencing outcomes for individuals in some states as compared to others. Lastly, all states have some sort of statutory transfer mechanism to adjudicate youth in the adult criminal justice system if they commit certain enumerated violent and/or serious offenses.[14] Youth adjudicated delinquent for those offenses in the juvenile system have already been deemed amenable to rehabilitation or better served by the juvenile system. These youth therefore should be treated like all other youth adjudicated in the juvenile delinquency system.

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[12] American Bar Association Division for Public Education, The History of Juvenile Justice at 5, available at http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

[13] Laurence Steinberg, Elizabeth Cauffman, & Katheryn C. Monahan. *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders.* Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Mar. 2015).

[14] Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestine. *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting.* Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Sept. 2011).

The current state of adolescent brain development research that indicates the brain continues to mature up to the mid-20s.[15] This research supports policies establishing unique treatment for youthful offenders. The Campaigns would strongly endorse an amendment that excludes from consideration *all* offenses that occurred prior to age 18 when evaluating a defendant's criminal history, regardless of whether the individual was convicted in adult or juvenile court.

- Upward Departure for Juvenile Adjudications

The Campaigns would oppose a proposed amendment stating that all or a subset of juvenile offenses should be considered for the purpose of an upward departure under §4A1.3. As stated previously, the juvenile justice system is intended to be a system of rehabilitation rather than punishment for youthful offenders. Penalizing individuals for their youthful errors is contradictory to the established goals of this court system. Additionally, in many states, juvenile records are at least partially protected from public view to permit individuals to move forward in a positive manner without the collateral consequences of a criminal conviction.[16] To consider these adjudications in a discretionary manner to enhance subsequent adult penalties contradicts the goals of the juvenile justice system.

- Downward Departure for Adult Convictions that Occurred While Under 18

The Campaigns support the proposed amendment recommending a downward departure for defendants who have adult convictions that occurred while under age 18 that would have been classified as juvenile adjudications if the laws in the jurisdiction did not categorically consider offenders below the age of 18 as adults. In interpreting this amendment, there are at least three ways in which youthful offenders under 18 can be categorically considered adults under the laws of a jurisdiction. The first way includes those states that consider the age of majority to be under 18 for purposes of the criminal justice system. Seven states treat all 17-year-olds as adults regardless of their offense, with two of those states also treating all 16-year-olds as adults regardless of their offense.[17] The second way includes those states that permit prosecutors to directly file adult charges against children under 18 with no judicial hearing. In fifteen states, children under 18 who commit certain enumerated offenses are categorically considered to be charged as adults.[18] The third way includes fourteen states that have mandatory waiver provisions, in which children are

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[15] Laurence Steinberg, Elizabeth Cauffman, & Katheryn C. Monahan. *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders.* Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Mar. 2015).

[16] Riya Saha Shah, Lauren Fine, and Jamie Gullen. *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement.* (2014.) Available at http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf

[17] Georgia, Michigan, Missouri, New York, North Carolina, Texas, and Wisconsin automatically prosecute 17-year-olds as adults; New York and North Carolina also automatically prosecute 16-year-olds as adults. Campaign for Youth Justice. *Let's Raise the Age of Juvenile Jurisdiction*. Available at http://www.campaignforyouthjustice.org/images/factsheets/RTAOnePagerJune72016final.pdf

[18] Alaska, Arizona, California, Colorado, the District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Pennsylvania, Vermont, Virginia, and Wyoming allow prosecutors to directly file charges against children in adult court. Campaign for Youth Justice. *The Detriments of Direct File.* Available at http://www.campaignforyouthjustice.org/news/blog/item/the-detriments-of-direct-file

mandatorily transferred into the adult criminal justice system if the judge finds probable cause the offense occurred and the child is a certain age.[19] Finally, twenty-nine states statutorily exclude children charged with certain offenses from juvenile court, meaning they are statutorily required to be tried as adults.[20]

The Campaigns oppose the automatic charging of children in adult court and therefore supports the proposed amendment as an effort to ameliorate the harms caused by automatically charging children as adults. However, the Campaigns strongly encourage the Sentencing Commission to clarify which of these mechanisms it intended to address through the proposed amendment as it is currently ambiguous. Additionally, the Campaigns strongly support clear examples or guidance as to when a downward departure is warranted, because federal judges may lack a familiarity with states' nuanced procedural mechanisms for convicting youth as adults.

Finally, the Campaigns strongly recommend that a downward departure should be recommended for *all* defendants who have adult convictions for offenses that occurred while under 18, primarily due to the developmental differences previously described of those under age 18 and recent U.S. Supreme Court jurisprudence. Additionally, this amendment has the potential to create unequal recommendations for downward departures (e.g., recommending a downward departure for a 17-year-old convicted as an adult for murder because all 17-year-olds in a given state are statutorily defined as adults while not recommending a downward departure for a 14-year-old who was discretionarily transferred to adult court who possess but did not use certain weapons). Accordingly, in order to reduce confusion among judges, increase fairness and ease of application, treat all youth in a developmentally-appropriate manner, and prevent unintended counter-intuitive outcomes, the Campaigns recommend the Sentencing Commission adopt an amendment which recommends a downward departure for all individuals convicted of adult offenses while under age 18.

The Campaigns recommend further revisions to the Sentencing Guidelines

- Life Sentences

As a result of recent U.S. Supreme Court cases, the use of life sentences on child offenders under 18 years of age has largely been deemed unconstitutional. Additional litigation around the country has also called into question the legality of life-equivalent sentences.

The Commission should amend the Guidelines to create a clear presumption against the imposition of a life or life-equivalent sentence on individuals under the age of 18 at the time of the offense. For example, the Commission could include language within the Guidelines Manual that states: "There is a very strong presumption against the use of a life or

[19] Campaign for Youth Justice. *The Impact of Mandatory Transfer Statutes.* Available at http://www.campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet.pdf
[20] Jurisdictional Boundaries, Juvenile Justice Geography, Policy, Practice, & Statistics. Available at http://www.jjgps.org/jurisdictional-boundaries

a life-equivalent sentence, which should very rarely, if ever, be imposed on a person who was less than 18 years of age at the time of the offense or offenses."

- §5H1.1. Age (Policy Statement)

The Guidelines treat youth as an optional consideration relevant only in unique circumstances: "[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[21] By making consideration of youth an exception rather than the rule, the Guidelines ignore the Eighth Amendment mandate that "children are constitutionally different from adults for purposes of sentencing."[22]

In the wake of the U.S. Supreme Court decisions, states around the country have passed legislation requiring judges to consider youth-related mitigating factors at the time of sentencing for children whose offenses occurred while under age 18.[23] West Virginia's House Bill 4210 presents the most comprehensive approach. For all children sentenced in the adult criminal justice system, regardless of the offense level, the judge must consider a series of factors that make children unique from adults.[24] These factors include the child's age, family and community environment, ability to appreciate the risks and consequences of their conduct, the role of peer pressure in the incident, and the child's history of trauma.[25] Additionally, the judge must consider a comprehensive mental health evaluation, school records, any history in the child welfare system, and the child's capacity for rehabilitation.[26] This robust list of factors the judge must consider enable judges to fully understand the life circumstances of every child sitting before them and tailor an age-appropriate sentence. The Commission should require the consideration of these or similar mitigating factors any time a child is being sentenced. At a minimum, the Commission should include language like that found in Assembly Bill 267 in Nevada, which requires judges sentencing children in adult court to "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth."[27]

- §5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Under the current Guidelines, "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing *are not relevant grounds* in determining whether a departure is warranted."[28] This policy statement is in direct contradiction with the

[21] United States Sentencing Commission, Guidelines Manual, §5H1.1 (Nov. 2016).
[22] *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012).
[23] *See* HB 4210, 81st Legislature, 1st Sess. (W. Virg. 2014); H.B. 7035, 2014 Reg. Sess. (Fl. 2014); S.B. 796, 2015 Reg. Sess. (Conn. 2015); S.B. 228, 86th Gen. Assemb., 1st Sess. (Iowa 2015); H.B. 2471, Am. 1 and SB 1830, Am. 2 (Ill. 2015).
[24] H.B. 4210, 81 Leg., 2d Sess. (W.Va. 2014).
[25] *Id.*
[26] *Id.*
[27] A.B. 267, 78th Reg. Sess. (Nev. 2015).
[28] USSG §5H1.12 (emphasis added)

U.S. Supreme Court's ruling in *Miller v. Alabama*, in which the Court emphasized that children were "constitutionally different from adults for sentencing purposes" in part because children "'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their environment' and lack the ability to extricate themselves from horrific, crime-producing settings."[29] At least 75% of youth involved in the justice system have been victims of trauma, such as experiences of abuse, neglect, substance abuse, violence in the home, and violence in the community.[30] Reactions to this childhood trauma may manifest in different ways, including by engaging in risky behavior, being unable to manage emotions and control impulses, experiencing depression and anxiety, and exhibiting learning disabilities.[31]

The Commission should amend the Guidelines to state that lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing or the presence of adverse childhood circumstances warrants a downward departure for offenses that were committed when the defendant was less than 18 years of age.

- §4B1.1. Career Offender and §4B1.2. Definitions of Terms Used in Section 4B1.1

Similar to the computation for a defendant's criminal history category, felonies committed prior to age 18 are part of the prior felony conviction analysis in sentencing for "career offenders." The Guidelines commentary states that "[a] conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[32] Due to the heightened neuroplasticity of the adolescent brain, young people have a heightened capacity for positive change.[33] The majority of individuals who commit crimes as youth demonstrate the ability to mature and change, with age 18 being the peak age for criminal behavior and 90 percent of all youthful offenders ending criminal activity by their mid-20s.[34]

It is groundless policy, therefore, to identify individuals as career offenders when some or all of their criminal behavior occurs during a time period when criminal behavior is a transient developmental activity rather than a permanent character trait. The Guidelines should be amended to exclude consideration of offenses occurring before age 18 when analyzing a defendant's eligibility for career offender sentencing.

- §5K2.0. Grounds for Departure (Policy Statement)

Judges are currently permitted to take an upward depart from the applicable guideline range if an aggravating circumstance exists "of a kind, or to a degree, not adequately taken

[29] *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).
[30] The National Child Traumatic Stress Network, Service Systems Brief V. 2 N.2 (Aug. 2008). Available at http://www.nctsn.org/sites/default/files/assets/pdfs/judicialbrief.pdf
[31] National Child Traumatic Stress Network, Effects of Complex Trauma, http://www.nctsn.org/trauma-types/complex-trauma/effects-of-complex-trauma
[32] USSG §4B1.2, comment. (n.1)
[33] Arain et al. 2013, Scott et al. 2015.
[34] Scott, Elizabeth, Thomas Grisso, Marsha Levick, and Laurence Steinberg. The Supreme Court and the Transformation of Juvenile Sentencing. Issue brief. N.p.: Models For Change, 2015.

into consideration by the Sentencing Commission if formulating the guidelines, that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described."[35] Given that youth are constitutionally and developmentally different than adults, they should not be eligible for harsher sentences than adults who commit identical crimes.

The Commission should amend the Guidelines to recommend a downward departure for individuals who commit their offenses while under the age of 18. Judges should be encouraged to treat these individuals as part of a unique population and to reduce their sentences accordingly. Additionally, the Commission should amend the Guidelines to prohibit upward departures for individuals who commit offenses while under age 18.

- Retroactivity

The Commission should make the above recommendations retroactive. Youth who were sentenced a generation ago demonstrated similar age-related risk-taking, peer pressure, and developmentally-appropriate maturation out of criminal behavior as today's youth, yet it has taken decades for adolescent brain development research to catch up. Particularly in light of the U.S. Supreme Court's *Montgomery v. Louisiana* decision that retroactively applied *Miller v. Alabama* to youth who received mandatory life-without-parole sentences,[36] the Commission should ensure that individuals who were sentenced prior to any youth-related amendments receive relief based on those amendments.

The U.S. Sentencing Commission should adopt the proposed amendments addressing youthful offenders and further recommendations

The Campaign for the Fair Sentencing of Youth and the Campaign for Youth Justice are grateful that the U.S. Sentencing Commission is considering proposed amendments to the Guidelines as they relate to youthful offenders. It is critical for the Commission to update the Guidelines in light of evolving science and legal precedent finding that youth are developmentally and constitutionally different from adults. Amendments in this area would have a profound positive impact on individuals charged with federal offenses that occurred while they were youth and for those individuals who had youthful offenses considered as part of their criminal history analysis. Thank you so much for your serious consideration.

Sincerely,

Jody Kent Lavy
Director, The Campaign for the Fair Sentencing of Youth

Marcy Mistrett
CEO, Campaign for Youth Justice

[35] USSC §5K2.0. (a)(1).
[36] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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National Campaign for Reform

February 9, 2017

Honorable Judge William H, Pryor, Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002
Attn: Public Affairs

RE: Proposed Amendments to Section §4C1.1 (First Offenders) of the Sentencing Guidelines

To whom it may concern,

This letter serves as a public comment to the United States Sentencing Commission's proposed amendment regarding the addition of §4C1.1 (First Offenders). We, Caution Click National Campaign for Reform (CCNCR), support the Commission's efforts to provide relief to "first offenders" as defined and proposed in the December 19, 2016 edition of the Federal Register. (81 FR 92003 and 81 FR 92021). We also support the Commission's efforts to enforce the proposed relief as retroactive to those who qualify as a "first offender". We agree with the Commission's empirically based approach in determining that "first offenders" generally pose the lowest risk of recidivism. Additionally, CCNCR respectfully offers the following comments to the Commission regarding relevant changes in other provisions of the Guidelines Manual if §4C1.1 were to be promulgated.

In 2012, the Commission provided an exhaustive report to Congress entitled Federal Child Pornography Offenses. The Commission noted that its policy[1] for recommending the maximum term of supervised release for those convicted of sex offenses was made prior to the enactment of the 2003 PROTECT Act[2]. The Commission recognized a need to amend this policy "in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is tailored to an individual offender's risk and corresponding need for supervision[3]". CCNCR encourages the Commission to revisit this initiative consistent with "first offenders" convicted of a non-production child pornography offense that have no history of sexual contact with children. In such cases, a policy statement recommending the imposition of the minimum mandatory term of 5 years of supervised release is appropriate. CCNCR suggests that this proposed policy change be made retroactive to those defendants who qualify.

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[1]U.S.S.G. §5D1.2(b).

[2]The PROTECT Act increased the supervised release term for those convicted of sex offenses to a statutory range of 5 years to life.

[3]http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212- federal-child-pornography-offenses/Full_Report_to_Congress.pdf at page xix.

CCNCR also requests that the Commission exclude 18 U.S.C.§ 2252(a) from the "crime of violence" definition under U.S.S.G. §4B1.2. The United States Supreme Court defines "crime of violence" within the United States Code as violent force capable of causing physical pain or injury to another person. See, *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (interpreting "crime of violence" definition in 18 U.S.C. § 16); *Johnson v. United States*, 130 S.Ct. 1265, **1271** (2010) (interpreting "crime of violence" definition in 18 U.S.C. § 924(c)(3)). Contrary to these decisions, 18 U.S.C. § 3156(a)(4)(C) includes any felony under chapter 110 as a "crime of violence" even though the required elements of violent physical force are not present within the plain statutory language of 18 U.S.C. § 2252(a).

To further complicate matters, the Commission's definition of "crime of violence" provides enumerated offenses which includes "forcible sex offenses". In 2016, the Commission amended the definition of "forcible sex offense" as an offense with an element where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The Commission commented that this definition is consistent with U.S.S.G. § 2L1.2, and that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute "crimes of violence" under §4B1.2.[4] However, for the purposes of U.S.S.G. §2L1.2(b)(1), the terms "child pornography offense" and "crime of violence" are separately and exclusively defined. *See*, Commentary Application Note 1(B)(ii),(iii). This suggests that a violation under 18 U.S.C. § 2252(a) is neither a "forcible sex offense" nor a "crime of violence". To avoid the inconsistencies within the United States Code and the United States Sentencing Guidelines, we request that the Sentencing Commission consider amending its §4B1.2 Commentary to specifically exclude 18 U.S.C. 2252(a) from the "crime of violence" definition. CCNCR respectfully asserts that this change is appropriate and consistent with the Supreme Court's decisions.

To conclude, CCNCR expresses gratitude to the United States Sentencing Commission for the opportunity to provide public comment to its proposed amendments, and for the Commission's dedication to create and change its policies in a manner that reflects a careful analysis of law, empirical data, and public commentary.

Kind regards,

Gail Colletta

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cc: Rachel E. Barkow, Commissioner
Ms. J. Patricia Wilson Smoot, Ex-officio representing the US Parole Commission
Mr. Jonathan J. Wroblewski, Designated ex-officio representing the Attorney General

[4]http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf at page 4.

February 20, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Proposed Amendments

Dear Judge Pryor:

We are pleased to bring you the views of the board, staff and members of FAMM on proposed amendments to the federal Sentencing Guidelines.[1] The amendments you adopt can have a lasting impact on the 39,000 federal prisoners and their many loved ones who hear from and communicate with FAMM on a regular basis. We work to keep them informed and you apprised of their issues, concerns, and opinions. We are keenly interested in providing you context drawn from their unique perspectives. We welcome this opportunity to address several of the proposals and issues for comment on their behalf.

1. First Offenders/Alternatives to Incarceration

a. <u>First Offenders Adjustment</u>

FAMM generally supports the Commission's proposal to acknowledge first offenders and provide them some measure of sentencing relief by way of a reduced guideline range. We support the most generous reduction (two levels) notwithstanding the final offense level. We would also encourage the Commission to include, as first offenders, those Criminal History Category I defendants with no criminal history points because their prior convictions are not countable, for example under § 4A1.2(c)(1) and (2), as offered in the Issue for Comment.

Considering defendants with no criminal history points as currently defined by the guidelines as first offenders would be consistent with the Commission's judgment that these defendants have history so remote or insignificant, or convictions that could have been secured in ways that did not afford them due process protections, that it should not affect their sentence in any way. We can think of no principled reason to treat them differently for first offender purposes.

[1] *Notice of Proposed 2017 Amendments*, 81 Fed. Reg. 92003 (Dec. 16, 2016).

We are pleased the Commission has proposed to provide an adjustment for first offenders. Among its benefits, adding a first offender adjustment would help the Commission comply with two congressional directives that have not received sufficient attention. In one, Congress directed the Commission to ensure that the guidelines provide for punishment other than prison for first offenders.[2] The statute defined first offenders as defendants who had not been convicted of a crime of violence or otherwise serious offense.[3] The Commission has not followed this directive; instead fashioning Criminal History Category I more broadly by including defendants with no countable criminal history with those who receive one criminal history point.

A similarly neglected directive is found at 28 U.S.C. § 994(g). Congress requires the Commission to craft guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons as determined by the Commission."

The sheer size of the federal prison population remains a significant concern, despite reductions due in part to actions the Commission has taken to lower sentences and make those changes retroactive. At the end of FY 2016, BOP facilities remained overcrowded. Overall, institutions were 16 percent over rated capacity and high security institutions stood at 31 percent over rated capacity.[4] The BOP still consumes more than 25 percent of the DOJ's discretionary budget and has requested $7.3 billion in the FY 2017 budget.[5]

The former administration's Smart on Crime initiative aimed, among other things, to dampen reliance on incarceration for less dangerous offenders. The Department encouraged prosecutors to consider alternatives to incarceration for non-violent offenders in appropriate cases. Unfortunately, it appears the program was marked by wide disparity; some districts used diversion programs robustly while others used them not at all.[6]

While disappointing, this news is not especially surprising and underscores the continued relevance of Commission moves to comply with directives that can result in lessening population pressure on the BOP. The proposals as drafted can do that as they make a modest start on scaling back sentencing for first offenders. We think they can be expanded on in several ways.

The Commission has struggled with recognizing first offenders for some years. A very early staff working group proposed a two-level reduction for defendants with no criminal history points who had not used violence or weapons during the offense.[7] According to the

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[2] 28 U.S.C. § 994(j).
[3] *Id.*
[4] Dep't of Justice, Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice* III-13 (Nov. 10, 2016), *available at* https://www.justice.gov/doj/page/file/910486/download#page149.
[5] *Id.* at III-12.
[6] *Id*. at III-14.
[7] U. S. Sentencing Comm'n, *Recidivism and the "First Offender*" 3 (May 2004) ("*Recidivism and the First Offender*") (*citing* U.S. Sentencing Comm'n, *Criminal History Working Group Report: Category 0, Category VII, Career Offender* (1991)).

Commission, "[t]he significance of this proposal was that it both responded to the intent of 28 U.S.C. § 994(j) and finessed the need to create a new 'first offender' CHC."[8]

The proposal was not advanced. The Commission said in 2005 that the fact that the early commissions lacked recidivism data had a role in preventing any first offender guideline. [9]

Today, of course, we have ample evidence, thanks to the Commission's robust collection and analysis of sentencing data. For example, now we know that offenders with zero criminal history points have the lowest recidivism rates of any sentenced in the federal system.[10] They enjoy the lowest re-arrest rates (30.2 percent) beating out offenders with one criminal history point who had re-arrest rates of 46.9 percent.[11] Moreover, they comprise over 40 percent of all defendants in Criminal History Category I.[12]

In defining first offenders, the Commission should include those without countable criminal history points, regardless of their prior contact with the criminal justice system. While the Commission did not include a breakdown in its most recent recidivism report, an earlier report found that 29.8 percent of citizen offenders with zero criminal history points had no arrests, 8.4 percent had no convictions and only 1.5 percent had § 4A1.2(c)(2) non-countable convictions.[13] The Commission considered such "never count" minor offenses as not altering one's first offender status as their presence did not alter predictions.[14]

One incarcerated FAMM member with non-countable priors was convicted of wire fraud and identity theft for filing tax returns using the names of others. He had two prior non-countable convictions; one for driving with a suspended license and the other for driving under the influence of alcohol. One was a non-countable offense under § 4A1.2(c) and the other was not counted because it was time barred, being nearly 25 years old at the time of sentencing. His instant offenses, while serious, were unconnected to these insignificant priors. It is difficult to distinguish him as less deserving of relief than other first offenders. He was the loving father of 8 children who had worked 18 years in the trades. When he found himself out of work options after relocating his family, he filed for bankruptcy. After falling into further debt, he and a friend hit upon a scheme to falsify tax returns using others' social security numbers. When caught, he admitted to his conduct and pled promptly. He was subject to a variety of cumulative enhancements under the fraud guideline that ensured he received a significant prison term, even taking into account adjustments and reductions. His conduct was serious but we can see nothing to distinguish him from other first offenders with no prior conduct whatsoever and we can see no reason why his extremely old and relatively minor priors should bar him from first offender status.

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[8] *Recidivism and the First Offender* at 3.
[9] *Id*. at 4.
[10] U.S. Sentencing Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 5 (March 2016) ("*Recidivism Among Federal Offenders*").
[11] *Id*. at 18 and Fig. 6.
[12] *Id*. at 10 and Fig. 2.
[13] *Recidivism and the First Offender* at 5.
[14] Id. at 5, n. 14.

Another concern we have with a proposal that would provide relief only to first offenders with no convictions whatsoever is that it might give rise to demographic disparities in awarding the adjustment.

Take, for example, the issue of non-countable petty and misdemeanor offenses. A number of studies have focused on the disparate impact on racial minorities of policing and prosecution choices. In one 2014 report by the Vera Institute of Justice, race was found to play a significant role at every stage of the criminal prosecutions.[15] The study examined 222,542 prosecutions in New York City, including all misdemeanor prosecutions.[16] The study examined the demographic picture with respect to charging for a number of felony and misdemeanor offenses. Relevant to non-countable convictions for guideline purposes, blacks and Latinos made up fully 84.3 percent of persons charged with gambling misdemeanors; 53.2 percent of those charged with prostitution; and 77.9 percent of those charged with offenses against public order.[17]

The study found that blacks and Latinos were more likely than whites to be incarcerated post-arraignment for misdemeanors or unable to make bail.[18] Defendants with prior misdemeanors that are not counted under § 4A1.2(c)(1) might very well have been affected by pre-trial detention. Jail detention statistics reveal racial disparity. "Nationally, African Americans are jailed at almost four times the rate of white Americans."[19] Once jailed, those charged with crimes, plead guilty in 97 percent of cases. "[M]uch of the decision making powers in disposition remains with prosecutor, who can leverage the initial charge decision and the amount of money bail requested to bring a case more quickly to a close with a plea deal. Particularly for defendants on low-level charges – who have been detained pretrial due to an inability to pay bail, a lack of pretrial diversion options, or an inability to qualify for those options that are available – a guilty plea may, paradoxically, be the fastest way to get out of jail."[20]

One researcher found, also in New York, that while blacks and Hispanics comprised 51 percent of the population, they made up fully 82.4 percent of all misdemeanor arrestees.[21] The high percentages of "quality of life" misdemeanor arrests . . . that occur in heavily minority or poor neighborhoods are . . . cause for great concern. . . ."[22]

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[15] Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County* , Vera Institute of Justice (Jan. 31, 2014) (*Prosecution and Racial Justice*), available at https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf.
[16] *Id*. at v.
[17] *Prosecution and Racial Justice* at 50. (Those listed offenses were the only ones tracked that resembled non-countable offenses in § 4A1.2(c)).
[18] *Prosecution and Racial Justice* at 94-96.
[19] Ram Subramanian, Ruth Delaney et al., *Incarceration's Front Door: the Misuse of Jails in America* 11, Vera Institute of Justice (Feb. 2015) *available* at http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.
[20] *Id*. at 38.
[21] Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* 48, HUMAN RIGHTS WATCH (Dec. 2010).
[22] *Id*. at 47-48.

We suspect, in light of these and other studies, that racial differences and disparity might be evident with respect to non-countable prior convictions under § 4A1.2(c). The Commission should be able to determine from its own first offender research whether defendants of color would be adversely affected by the proposed exclusion. Before adopting the proposed exclusion, the Commission should examine the matter.

We also urge that defendants with convictions from foreign, military and tribal courts should not be excluded from first offender consideration. There are inherent concerns about these convictions that led the Commission to exclude them from criminal history consideration entirely. For example, the Indian Civil Rights Act, 25 U.S.C. § 1301(2), which provides for certain procedures in tribal courts, nonetheless does not require that defendants in those courts be afforded certain constitutional protections.[23] Above all, it does not provide tribal court defendants the right to appointed counsel. Uncounseled convictions are suspect, not just from a due process perspective, but substantively as well. According to the Commission's Tribal Issues Advisory Group, many tribal courts have court officers who lack a law degree or formal training and/or are politically appointed, raising concerns about impartiality.[24] These features led the TIAG to recommend the Commission continue its ban on counting tribal court convictions under USSG § 4A1.2.[25]

The same concerns that led the Commission to exclude such convictions from counting toward criminal history should inform the first offender decision – inherently suspect convictions should not be counted against the defendant. In any event, if a conviction from one of the currently uncounted courts does trigger a first offender reduction, an upward variance or departure could be used if the court found the criminal history was underrepresented.

The Commission also asked if the proposed reduction should be limited by offense level. We urge the adjustment not be limited by offense level. First offenders populate the entire sentencing table from top to bottom. There are roughly twice as many first offenders at offense level 16 and above than at level 15 and below. Of the 2014 first offenders analyzed by the Commission, only 4,550 triggered final offense levels of 15 or lower; more than twice as many were found at offense level 16 and above and the 4,710 drug offenders in the second category accounted for the majority of the difference in numbers.[26] Drug offenders, who face some of the longest sentences in the guidelines, are especially well represented. Drug offenders make up the largest concentration of first offenders and they are concentrated at offense level 16 and higher. They are followed, at a distance, by offenders sentenced under § 2B1.1.[27] Almost half of all drug traffickers are in Criminal History Category I.[28]

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[23] U.S. Sentencing Comm'n, Tribal Issues Advisory Group, *Report of the Tribal Issues Advisory Group* 10 (May 16, 2016).
[24] *Id*. at 11.
[25] *Id*. at 12.
[26] U.S. Sentencing Comm'n, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment* (Public Data Presentation) (December 2016), Slide 15.
[27] *Id*.
[28] U.S. Sentencing Comm'n, *Quick Facts: Drug Trafficking Offenses* (May 2016).

We know that drug offenders are assigned guideline levels based on drug quantity, a measure of blameworthiness that has come under a great deal of scrutiny and criticism, including from the Commission itself, which recognized in 2011 that drug quantity is only one of many important factors in establishing an appropriate sentence for drug offender.[29] The Commission knows very well that drug quantity overwhelms other important considerations, overstating culpability in many cases. Its work to reduce that reliance has been laudable, most recently with respect to drugs minus two. Nonetheless, it is the quantity of drugs rather than the first offender status that continues to drive these sentences.

If the Commission wishes to recognize and adjust for first offenders, it should not categorically limit the adjustment based on offense level, given how large a part simplistic metrics such as drug quantity or, in the economic crime arena, loss, have in determining final offense levels. Moreover, in its most recent study on recidivism, the Commission concluded that "[t]here is not a strong correspondence between final offense level and recidivism."[30]

It is not uncommon to see first offenders with extremely high base offense levels drawn from relevant conduct quantity or loss assessments. Ms. L. L. had no prior offenses when she became dependent on methamphetamine. She was in a tragically typical downward spiral when she fell in love with her meth supplier. She was arrested with him when she drove him to what turned out to be a drug sale. The purchaser was a confidential informant. Her car was searched and drugs and a gun were found. More drugs were found in her home and despite her boyfriend's assertion that she was not involved, Lisa was charged with all the drugs attributed to him and his supplier. She was sentenced to a whopping 151 months, more time than the dealer who supplied the drugs to her boyfriend, later reduced to 121 months.

Ms. C.R. was in the grips of a severe and untreated gambling addiction when she began embezzling money from the credit union that employed her. She would deduct funds from credit union member accounts and then reimburse, as it were, those members, from the credit union's corporate account. While individual depositors were not harmed by her conduct, the credit union sustained a significant shortfall. When confronted, she admitted her conduct and cooperated in the investigation of her conduct. She was ordered to pay restitution to cover the funds she withdrew and sentenced to a 78 month term of incarceration. She is a mother, grandmother and great grandmother and at 69 years old, suffers from significant health problems, including macular degeneration and is receiving no mental health treatment for her addiction. She reports that she did all she could to help in her own prosecution and writes "I am a sick person that got caught up in the stress and lies and nightmares." She is a true first offender with a final offense level of 27 driven primarily by loss of between $1 million and $2.5 million and enhanced for sophisticated means, and jeopardizing the soundness of a financial institution.

It is precisely because sentences driven higher by relevant conduct and multiple enhancements can be very long that the adjustment to reflect first offender status should be at its

[29] U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 350-351 (2011).
[30] *Recidivism Among Federal Offenders* at 20.

most generous in the higher offense levels. At a minimum, the Commission should provide for a two-level reduction for *all* first offenders.

b. First Offender and Non-Incarceration Presumption

Once having defined first offender, the Commission will consider whether to include a presumption of non-incarceration for certain first offenders who fall within Zones A and B – and expand Zone B to include existing Zone C.

FAMM supports the proposal to the extent that it furthers congressional intent as expressed in 28 U.S.C. § 994(j). That statute directed the Commission to "insure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in *which the offender has not been convicted of a crime of violence* or other serious offense." (Emphasis added). The proposal asks whether the Commission should, in addition to limiting the relief to defendants with non-violent crimes as directed by the statute, also exclude prisoners who were found to have credibly threatened or used violence or possessed a firearm in connection with the offense.

The proposed exclusions should not be adopted. They go beyond anything contemplated by Congress and would bar objectively non-violent prisoners, such as those whose personal conduct did not involve any hint of violence or weapon possession, from the presumption.

Take, for example, the firearm enhancement under§ 2D1.1(b)(1). The relevant conduct rule directs judges to assess a gun bump in the case of a firearm possessed by another within the scope and in furtherance of the conspiracy and reasonably foreseeable to the defendant.[31] First offenders assessed a gun bump due to the conduct of others or whose weapon possession was so de minimus that it did not result in a conviction, should not be barred from the relief.

The Commission's 2004 first offenders' report revealed that the vast majority of first offenders (87.1 percent) had no violence or weapon enhancements.[32] Moreover, limiting the relief to Zones A and B, even if the latter is combined with Zone C, means that the number of defendants who present with such low final offense levels – ones that include the enhancement for firearm or violence – will be quite small.

FAMM also opposes excluding so-called "white collar" offenses from those eligible for other than incarceration sentences under amended § 5C1.1. That exclusion would fly in the face of the statutory directive to ensure that first offenders convicted of other than a crime of violence be considered under a guideline that would impose a sentence other than incarceration. Of the 7,700 offenders sentenced under § 2B1.1 in 2015, the majority were located in Criminal History Category I,[33] which is itself composed primarily of first offenders.[34] Recidivism rates for

[31] U.S.S.G. § 1B1.3(a)(1)(B).
[32] *Recidivism and the First Offender* at 24, Ex. 4.
[33] U.S. Sentencing Commission, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (Aug. 2016).
[34] *Public Data Presentation* at 7.

defendants with prior convictions for fraud offenses are very low, well under the average for all offenders.[35]

Because the guidelines assess relevant conduct to include conduct not directly engaged in by the defendant, many otherwise deserving defendants would be excluded from this relief, notwithstanding congressional intent that they receive non-incarceration sentences. We can see no reason to exclude such defendants and doing so was not contemplated by Congress.

c. Retroactivity

FAMM encourages the Commission to study retroactivity of the first offender amendments should they be adopted. We believe they fit the criteria for retroactivity. First offenders who might benefit from retroactivity would nonetheless face important hurdles. The court considering retroactivity will need to determine that early release will not impair public safety and that determination will be based on a variety of considerations including the offense conduct and the prisoner's behavior while incarcerated.[36] The reductions will of course be limited to that authorized by the Commission to one, or hopefully two, levels.

The Commission considers the purpose of the amendment, the magnitude of the change, and the difficulty of applying the change when making an amendment retroactive. To the extent we have information, all of these considerations weigh heavily in favor of retroactivity.

As discussed above, recognizing first offenders is long overdue and that more than justifies retroactivity for those prisoners whose sentences should have been adjusted per congressional directive. The proposals are welcome, all the more so because overdue. Prisoners should benefit for the same reason that defendants will.

While the Commission has not indicated how many prisoners would be affected by the first offender adjustment and is considering alternative approaches, there is no question of the magnitude of the adjustment. According to the Commission's 2016 released figures, 44.3 percent of the criminal history sample of the 2014 sentenced population was first offenders.[37] Of those, 60.3 percent had no prior convictions and an additional 21.8 percent had non-countable prior convictions.[38] In 2014, 75,836 defendants were sentenced.[39] If the statistics hold, then over 20,000 prisoners could be eligible first time offenders from 2014 alone, minus prisoners whose sentences were short enough that they have already been released or were never subject to incarceration in the first place.

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[35] *Recidivism Among Federal Offenders* at 10, fig. 2. In 2004, the Commission found the overall recidivism rate for fraud and larceny offenders was 18 percent. *See* U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* 30, Exhibit 11 (May 2004).

[36] U.S.S.G. § 1B1.10, App. Note 2 requires the judge to "consider the nature and seriousness of the danger to any person or the communt8iy that may be posed by a reduction in the . . . term of imprisonment."

[37] *Public Data Presentation* at 6.

[38] *Id*. at 7.

[39] U.S. Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, Introduction.

At least as to the one- or two-level adjustment, assessing magnitude will be enhanced by an impact study from the Commission which could provide numbers of eligible prisoners, sentence length, and expected reductions. But it is safe to say that given the large number of first offenders, the impact of retroactivity on the prison population would be significant, saving bed spaces and tax dollars.

While those on the front lines of the system – prosecutors, judges, probation officers and federal defenders – bear the brunt of implementing retroactivity, we think it is safe to say that it could be done with relative ease. Three significant reductions have taken place with Commission leadership, starting in 2008. The resources developed over those years include knowledge, good will, and experience in handling reductions. That collaborative framework will be readily available to the parties handling first offender retroactivity.

Applying a one- or two-level reduction should be quite straightforward. Using Presentence Investigation Reports, the parties can determine easily who has qualifying zero points. Motions, similar to those fashioned in the last three rounds could be used.

Of course, the Commission can help answer whether these considerations are met by providing a retroactivity impact report. We ask that it vote to study retroactivity at the same time it votes for the amendment, should it do so.

2. Departure Based on Substantial Difference between Time-Served and Sentence Imposed.

FAMM supports the proposal to provide for a downward departure to reflect the defendant's time served when it is substantially shorter than the time imposed.

Under the guidelines, the definition of "sentence of imprisonment" for criminal history purposes, refers to the maximum sentence imposed.[40] This means that when a defendant was previously sentenced to an indeterminate term of, say, one to five years, the prior sentence is counted as five, rather than one year without regard to how much time the court intended or the prisoner served. [41]

Departures based on the sentence served would be a modest recognition of what can be significant disparities between the two. Along those lines, the guidelines already provide an adjustment for imposed sentences that are totally suspended or stayed without regard for the length of the imposed sentence.[42]

Releases by way of parole are one of the most common ways that prisoners leave prison before their maximum sentence has been served. The potential for parole is, or was, built into many sentences. In other words, the judge imposes a term of years that may be shortened by the paroling authority when a pre-determined minimum date has passed. The assumption is that

[40] *See* § 4A1.2(b)(1).
[41] *Id*. at n.2.
[42] *See* § $A1.2(a)(3).

should the prisoner meet certain conditions to the satisfaction of the parole board, their release to parole is authorized. That time served can be significantly shorter that the maximum sentence – the difference between the one and five years in the Commission's example, or a reduction by a hefty percentage.

For example, in the federal system, unless the court delineated a minimum term or imposed an indeterminate sentence, parole eligibility begins when one third of the sentence has been served.[43] This means a well behaved prisoner could shave as much as two-thirds from their sentence. This dramatic difference between the sentence imposed and the sentence served was contemplated by the court and reflects the court's recognition that the defendant had the potential to use his or her time in prison to such good effect that longer in prison would defeat the purposes of sentencing. In an era of indeterminate sentencing, courts routinely adjusted upward to account for parole so as to ensure a prisoner spent a sufficient amount of time in prison prior to release to parole. In other words, the maximum sentence was a reflection of the minimum sentence the court considered necessary to serve prior to parole. The court had expressed its considered judgment that the minimum, rather than the maximum, was the appropriate sentence for a prisoner who abides by institutional rules and otherwise meets parole board conditions.

Similarly, a prisoner released on parole has served what the parole authority believed to the sufficient sentence, rather than the maximum date. Recognizing the fact that the prisoner served a sentence that was appropriate and no longer than necessary, rather than using the maximum sentence, a term that was available but found unnecessary, means the commission would use the latest and best assessment of how long the prisoner deserved to be punished. This strikes us as uncontroversial.

While parole is not a feature of all sentencing systems and has fallen out of favor, hundreds of thousands of people enter the parole system every year. In 2015 alone, there were 194,791 discretionary releases, compared with 97,589 releases to mandatory parole.[44]

Even when a defendant is sentenced to a single term of years, other sentence reduction measures can dramatically lighten the sentence. For example, earned credits can shorten a sentence significantly and the original sentence imposed might be adjusted in light of that or other reduction mechanisms. The federal good conduct credit reduces an imposed term by nearly 15 percent if the prisoner complies with institutional rules and avoids serious infractions. [45]

Congress is expected to take up changes approved during the last Congress by the Senate Judiciary Committee that would provide for even more generous credit programs that would reduce time served in prison (by up to one third) and substitute for it community supervision or

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[43] U.S. Dep't of Justice, U. S. Parole Comm'n, *Frequently Asked Questions*, available at https://www.justice.gov/uspc/frequently-asked-questions#q2, (last visited Feb. 19, 2017).
[44] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Probation and Parole in the United States*, 2015 (Dec. 2016), *available at* https://www.bjs.gov/content/pub/pdf/ppus15.pdf.
[45] *See* 18 U.S.C. § 3424(b).

home confinement or a combination of those.[46] Bills such as these that reduce incarceration in favor of community supervision are designed to ensure the Bureau of Prisons chooses prisoners that legislators deem appropriate for shortened sentences and impose punishment other than incarceration as a means of recognizing and rewarding prisoners' recidivism reducing efforts.

We think the better course would be to base criminal history points on the sentence served, rather than that imposed.

3. **Youthful Offenders**

FAMM applauds the Commission's proposals to reduce or eliminate the impact of convictions sustained by juveniles. We endorse the comments and recommendations forwarded by the Campaign for the Fair Sentencing of Youth and the Campaign for Youth Justice on the proposals. We think it is beyond dispute that considering youthful criminal history as equal to adult criminal history is unwarranted and can lead to cruel outcomes given what is now known about juvenile brain development. We wholeheartedly join in their recommendation that the Commission "excludes from consideration all offenses that occurred prior to age 18 when evaluating a defendant's criminal history, regardless of whether the individual was convicted in adult or juvenile court." [47]

We also urge the Commission to consider making any ameliorative changes retroactive. The purposes of the amendment weigh in favor of retroactivity. The proposed changes would recognize the overwhelming scientific evidence that has taken so long to emerge and it would minimize or eliminate the impact of juvenile convictions on future sentences. That it has taken science (and the Commission) this long means that a number of prisoners who are equally deserving of shorter sentences based on their youthful priors were they sentenced as the proposed guideline contemplates will be left behind unless the Commission acts. It is precisely their experiences on which science and law have drawn to come to the conclusion that their current incarceration is unjustly enhanced. While we cannot comment on magnitude as we do not know of research from the commission about their numbers or the impact on their sentences of priors, we expect it is significant. Finally, it should be relatively straightforward to determine from Presentence Investigation Reports whether a youthful conviction had an impact that would be mitigated were the conviction not counted.

4. **Conclusion**

Thank you for considering our views on these proposed amendments and issues for comment. We look forward to working with the Commission this year.

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[46] Sentencing Reform and Corrections Act (S. 2123), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/2123.

[47] Jody Kent Lavy & Marcy Mistrett, Letter to Judge William H. Pryor, Jr. 4 (February 20, 2017).

Sincerely,

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With Unity Comes Change

February 9, 2017

Honorable Judge William H, Pryor, Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002
Attn: Public Affairs

RE: PROPOSED AMENDMENTS TO SECTION §4C1.1 (FIRST OFFENDERS) OF THE SENTENCING GUIDELINES

Dear Judge Pryor:

This letter serves as a public comment to the United States Sentencing Commission's proposed amendment regarding the addition of §4C1.1 (First Offenders).

The Florida Action Committee, Inc. ("FAC") is a not-for-profit, public safety advocacy organization with a membership base of over one thousand individuals. We support the Commission's efforts to provide relief to "first offenders" as defined and proposed in the December 19, 2016 edition of the Federal Register. (81 FR 92003 and 81 FR 92021). We also support the Commission's efforts to enforce the proposed relief as retroactive to those who qualify as a "first offender". We agree with the Commission's empirically based approach in determining that "first offenders" generally pose the lowest risk of recidivism.

In 2012, the Commission provided an exhaustive report to Congress entitled Federal Child Pornography Offenses. The Commission noted that its policy[1] for recommending the maximum term of supervised release for those convicted of sex offenses was made prior to the enactment of the 2003 PROTECT Act[2]. The Commission recognized a need to amend this policy "in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is tailored to an individual offender's risk and corresponding need for supervision[3]".

FAC encourages the Commission to revisit this initiative consistent with "first offenders" convicted of a non-production child pornography offense that have no history of sexual contact with children. In such cases, a policy statement recommending the imposition of the minimum mandatory term of 5 years of supervised release is appropriate. FAC suggests that this proposed policy change be made retroactive to those defendants who qualify.

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[1]U.S.S.G. §5D1.2(b).

[2]The PROTECT Act increased the supervised release term for those convicted of sex offenses to a statutory range of 5 years to life.

[3]http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212- federal-child-pornography-offenses/Full_Report_to_Congress.pdf at page xix.

FAC also requests that the Commission exclude 18 U.S.C.§ 2252(a) from the "crime of violence" definition under U.S.S.G. §4B1.2. The United States Supreme Court defines "crime of violence" within the United States Code as violent force capable of causing physical pain or injury to another person. See, *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (interpreting "crime of violence" definition in 18 U.S.C. § 16); ***Johnson v. United States***, 130 S.Ct. 1265, **1271** (2010) (interpreting "crime of violence" definition in 18 U.S.C. § 924(c)(3)).

Contrary to these decisions, 18 U.S.C. § 3156(a)(4)(C) includes any felony under chapter 110 as a "crime of violence" even though the required elements of violent physical force are not present within the plain statutory language of 18 U.S.C. § 2252(a). To further complicate matters, the Commission's definition of "crime of violence" provides enumerated offenses which includes "forcible sex offenses". In 2016, the Commission amended the definition of "forcible sex offense" as an offense with an element where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The Commission commented that this definition is consistent with U.S.S.G. § 2L1.2, and that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute "crimes of violence" under §4B1.2.[4] However, for the purposes of U.S.S.G. §2L1.2(b)(1), the terms "child pornography offense" and "crime of violence" are separately and exclusively defined. *See*, Commentary Application Note 1(B)(ii),(iii). This suggests that a violation under 18 U.S.C. § 2252(a) is neither a "forcible sex offense" nor a "crime of violence".

To avoid the inconsistencies within the United States Code and the United States Sentencing Guidelines, we request that the Sentencing Commission consider amending its §4B1.2 commentary to specifically exclude 18 U.S.C. 2252(a) from the "crime of violence" definition, as this change is appropriate and consistent with the Supreme Court's decisions.

FAC expresses gratitude to the United States Sentencing Commission for the opportunity to provide public comment to its proposed amendments, and for the Commission's dedication to create and change its policies in a manner that reflects a careful analysis of law, empirical data, and public commentary.

Kind regards,

Gail Colletta

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cc: Rachel E. Barkow, Commissioner
Ms. J. Patricia Wilson Smoot, Ex-officio representing the US Parole Commission
Mr. Jonathan J. Wroblewski, Designated ex-officio representing the Attorney General

[4]http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf at page 4.

National Association of Assistant United States Attorneys

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February 21, 2017

The Honorable William H. Pryor, Jr.
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Dear Chief Judge Pryor:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the proposed amendments to the Sentencing Guidelines dated December 19, 2016, regarding first time offenders, criminal history calculations and challenges to relevant conduct.

The National Association of Assistant United States Attorneys represents the interests of 5,600 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our system of justice. Our primary responsibility is to protect the innocent and convict the guilty.

NAAUSA takes no position on the majority of the proposed guideline amendments, but rather has chosen to voice our opposition to those amendments we believe would be most harmful to the fair application of the guidelines. As the nation's federal prosecutors, we will be affected on a daily basis by the real consequences of these amendments, as detailed below.

1. Creation of a New "First Time Offender" Status Under §4C1.1

The first proposed amendment adding a special category of criminal history for "true" first time offenders would create a set of special new benefits to offenders who have no prior conviction, including further offense level reductions of one or two levels. Yet the new guideline would go even farther, providing that for "first.offenders" of an offense that is "not a crime of violence" or where the "defendant did not use violence or credible threats of violence" or possess a firearm who fall within Zone A or B of the Sentencing Table, the court "ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline."

The Sentencing Commission's own report, entitled Recidivism Among Federal Offenders: A Comprehensive Overview (2016), does not support the reasoning behind this proposed amendment. In fact, according to that study, offenders with no conviction still reoffend at a rate of over 30%, and the average rate of recidivism for all those in Criminal History Category I (including individuals with zero or one criminal history point) is only slightly higher, 33.9%.

One area where the proposed amendment would wreak particular havoc involves the prosecution of individuals who supply a large number of the firearms utilized by violent felons. As has been well documented, the majority of firearms used to commit serious felonies were either stolen, or were obtained through the use of a non-prohibited "straw purchaser" by the convicted felon or firearms trafficker. Due to the need for the straw firearm buyer to pass a federal background check, this person is, of necessity, a "first time offender." These straw buyers are most typically prosecuted under Title18, United States Code Sections 922(a)(6) or 924(a)(1)(A).

As it is now, the guideline range for providing even dozens of firearms to a felon or felons typically falls within only 12 to 18 months' imprisonment. Adoption of the proposed guideline recommending non-incarceration of these "first time offenders" would effectively result in no specific or general deterrence of these precursor offenses to crimes of violence.

In the white collar crime context, creating this new category of offender would render the sentencing factors of Title 18, United States Code, Section 3553(a)(2) meaningless. Many, if not most, white collar offenders have no prior scoreable offenses for sentencing purposes, and come to federal court for the first time having committed serious and significant fraud. By further reducing their guidelines, the Commission would reduce the disincentive to defraud others by reducing the penalty.

Carving out an entirely new category for offenders with zero criminal history points would unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who already are subject to sentencing at the lowest range available for their offense conduct. Given the fact that judges already have the discretion to vary downward in extraordinary cases of uncharacteristic criminal conduct, NAAUSA believes this new class of low level offenders is not warranted and should be rejected.

2. Eliminating Consideration of Revocation Sentences Under §4A1.2(K)

Proposed amendment 4(A) would dramatically reduce punishment for revocations of Supervised Release, Probation, Parole and variations thereof, by essentially eliminating consideration of those violations other than under the "catch-all" provision of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Criminal history score is included in the Sentencing Guidelines because criminal history is a strong predictor of recidivism. Among all the components of criminal history that serve as predictors of recidivism, revocation is likely the strongest. Offenders who have had their

sentence of probation or supervised release revoked not only have committed a prior criminal offense, but they have breached the trust of the court. The additional period of time imposed reflects the seriousness of the breach of trust and indicates a very strong likelihood to re-offend despite being under court supervision. NAAUSA strongly believes that this additional time should be included in the criminal history score.

Indeed, the Introductory Commentary to Chapter Four Part A, confirms this, stating: "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." There can be no serious question that a significant revocation of supervision is criminal behavior and is "thus deserving of greater punishment." The question is how should it be weighted. NAAUSA believes revocations, resulting in additional incarceration, are serious violations, and therefore should be measured and accounted for consistently across our country by continuing to include them in the criminal history calculation.

There are many examples of offenders who are prosecuted in the state and are given a break on the original sentence, but when they continue to commit crimes are brought back before the original sentencing judge and finally given a prison sentence. In essence, this prison term becomes the only significant punishment for the original offense because the offender has breached the trust given in a non-incarcerative sentence. Under the proposed amendment, these offenders will be treated as though they never broke that trust, a benefit they have not earned.

True instances of injustice under §4A1.2(k) are already addressed by the Guidelines in §4A1.3, providing for a downward departure when necessary and appropriate. NAAUSA believes the current system properly addresses the revocation issue by specifically acknowledging and fairly accounting for the serious nature of a revocation violation, and recommends that it remain as currently written.

3. New Downward Departure Based on Indeterminate Sentences in §4A1.2

NAAUSA respectfully submits that proposal 4(B) to amend the Commentary to USSG § 4A1.2 to provide for a downward departure when an indeterminate sentence is substantially greater than the amount of time actually served for that sentence is unnecessary because such scenarios already are accounted for in the Sentencing Guidelines. USSG § 4A1.3 provides for departures based on over- or under-representation of criminal history. Adding a new downward departure based on an imposed sentence being substantially greater than the time actually served would be redundant to § 4A1.3(b)(1), which states: "If reliable information indicates that the defendant's criminal history substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." This language easily encompasses the notion of an indeterminate sentence imposed being substantially greater than the sentence actually served, especially when the judge has the ability to look behind the circumstances of the prior offense and depart or vary under Section 3553(a). This proposed amendment is unnecessary and duplicative, and ought to be rejected. At most, this proposed amendment should be considered for addition as an example of over-represented criminal history in USSG § 4A1.3, Application Note 3.

4. Allowing Defendants to Challenge Relevant Conduct While Still Receiving a Reduction for Acceptance of Responsibility Under §3E1.1

Proposal 6, which would amend the Application Notes to §3E1.1 to allow challenges to relevant conduct without the loss of credit for acceptance of responsibility, is wholly unnecessary and weakens the incentive for a defendant to take responsibility for his or her actions.

Under the guidelines, the reduction in sentence allowed for a defendant's acceptance of responsibility is significant because the timely notification of a guilty plea permits the government "to avoid preparing for trial" and permits "the government and the court to allocate their resources efficiently." §3E1.1(b). Only those who falsely deny or frivolously contest relevant conduct which the court finds to be true are penalized. This change to the application notes would water down the level of acceptance required of a defendant and lead to increased litigation in the sentencing phase over challenges to relevant conduct. The cost of this increased litigation is precisely one of the societal costs that was sought to be avoided by encouraging defendants to accept responsibility for their actions.

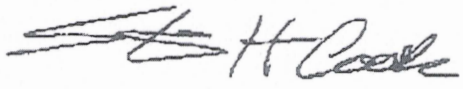
By way of example, the proposed amendment will affect drug prosecutions where a defendant contests the relevant drug weight attributed to him. In many cases, this will necessitate a multi-day sentencing hearing and require the government to produce witnesses. In a typical wiretap case, for instance, the government may now be required to produce testimony from the representative of a phone company, surveillance agents, chemists, and cooperating defendants in a de facto bench trial on this sentencing issue. This will result in a large expenditure of time and money, and is not markedly different from having to prepare for a jury trial, the precise burden that this guideline was designed to prevent.

NAAUSA sees no compelling reason to inject unnecessary uncertainty into the question of acceptance of responsibility, and recommends that the proposed revision of the application notes to §3E1.1 be rejected.

Conclusion

In summary, NAAUSA urges the rejection of the proposed changes described above. We appreciate your consideration of these comments in finalizing your proposed amendments to the Guidelines.

Sincerely yours,



Steven H. Cook
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February 21, 2017

Dear Judge Pryor:

The National Association of Criminal Defense Lawyers (NACDL) welcomes the opportunity to submit comments on the Commission's Proposed Amendments to the Sentencing Guidelines, dated December 19, 2016 (the "Amendments").

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL adopts the Federal Defender's comments, and here offers additional comments regarding these topics:

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

NACDL supports the broadest possible definition of "first offender," to include all defendants in Criminal History Category ("CHC") I (those scored with up to one criminal history point). Commission data illustrates that separate treatment is appropriate for two distinct kinds of "first offender": "true" first offenders making their first serious contact

with the criminal justice system; plus a broader category of "technical" first offenders whose prior criminal justice contacts either did not result in conviction or are so minor, or temporally distant ("stale"), as to be insignificant for typical Guidelines purposes.[1]

NACDL recognizes that a technical first offender will, by definition, have had prior criminal justice contacts. The Commission has recognized how several different criminal history patterns can lead to a CHC I scoring, including both true first offenders and defendants with multiple, but old, prior convictions. "Thus, the treatment of minor offenses in the criminal history calculation can vary."[2]

But to be in CHC I with prior offenses is generally to have been imprisonment-free for a very long time, or to have committed among a few select misdemeanors within more recent years.[3] We recognize that "[e]ach additional criminal history point was generally associated with a greater likelihood of recidivism."[4] But some increase in recidivistic risk exists with *any* prior contacts with the criminal justice system, not just convictions.

The Commission's recidivism data supports a bifurcated definition of "first offender" that could include even one criminal history point. Those criminal history *points* better forecast re-offense risks than the broader Criminal History Category.[5] We recognize that

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[1] *See* U.S.S.C., "Recidivism and the First Offender," (Release 2, May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf* , last visited 2/20/2017]," at 3, FN 5, and at 5.

NACDL continues to support excluding from criminal history computations all prior convictions already proscribed by Chapter Four (*e.g.*, sentences resulting from foreign or tribal court convictions, misdemeanors, or petty offenses listed in §4A1.2(c)). Any definition of "first offender" should also ignore these kinds of prior convictions.

[2] *See* U.S.S.C., "Impact of Prior Minor Offenses on Eligibility for Safety Valve," (March 2009) at 5, 2-3 [online at *http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2009/20090316_Safety_Valve.pdf* , last visited 2/20/2017].

[3] *See* USSG § 4A1.2(c)(1).

[4] *See* "Impact of Prior Minor Offenses on Eligibility for Safety Valve," at 5.

[5] U.S.S.C., "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines – A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate" (hereafter, "Criminal History Computation") (Release 1,

offenders without a prior arrest re-offend just 6.8% of the time, while offenders with even one criminal history point re-offend 22.6% of the time.[6] But even offenders with arrests, but no prior convictions, have been measured with a 17.2% recidivism rate.[7] Anything more than no contact with the law is associated with an elevated chance of re-offense. But those risks still appear to be around one-in-five, significantly less than the recidivistic risks among higher CHC offenders.

Distinguishing the various subcategories of CHC I offenders seems not only impractical, but also a task properly addressed by analyzing and revising the CHC system itself. Meanwhile, the Commission has already spoken of leniency for inmates with fewer "culpability criteria" than others, including for defendants with one criminal history point.[8]

NACDL notes that the "Total Offense Level," which measures an instant offense's seriousness, is neither designed to measure nor correlated with recidivistic risks.[9] It would therefore be inappropriate to key any adjustments to offense level on a final instant offense level that has nothing to do with risks of re-offense.

Reductions to instant offense level would more accurately reflect diminished recidivistic risk if, instead, a 1-level downward adjustment were allowed to technical first offenders – including those with up to one criminal history point – while a 2-level downward adjustment would go to offenders with zero criminal history points (even those with prior convictions or, perhaps more at risk, with only prior arrests).

NACDL does not believe that excluding additional offenses from rebuttable presumptions against imprisonment would serve sentencing's purposes. Many to most opportunities for public corruption, tax offenses, and white-collar crimes cease after an

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May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf* , last visited 2/20/2017], at 7.

[6] *See* "Recidivism and the First Offender," at 13-14.

[7] *See* "Recidivism and the First Offender," at 14.

[8] *See* U.S.S.C., "Recidivism and the First Offender," at 9-10.

[9] *See* U.S.S.C., "Recidivism and Criminal History," at 13 ("There is no apparent relationship between the sentencing guideline final offense level and recidivism risk.").

initial prosecution. The offender loses the role or other circumstances that made such an offense possible. In this way, at least some purpose of sentencing (incapacitation and specific deterrence) is served before sentencing.

Imprisonment in these circumstances, just for the sake of meting out prison time, not only ignores the final goals of sentencing – promoting rehabilitation and a crime-free existence -- but also exceeds the punishment allowed under 18 U.S.C. § 3553(a) (the "Parsimony Provision").

2. TRIBAL ISSUES

NACDL supports the recommendation of the Tribal Issues Advisory Group (TIAG) that tribal convictions continue not to be counted under USSG §4A1.2, but rather should be addressed using a more structured analytical framework under USSG §4A1.3.

As TIAG elaborates in its 2016 report, the quality of tribal justice varies widely across the 351 tribal courts in terms of its due process protections (including, *e.g.*, provision of appointed counsel, independence of the judiciary, recognition of the presumption of innocence) and consistency in its application, outcomes and recordkeeping. As such, a process of mechanically assigning criminal history points to tribal convictions is fraught with practical and fairness concerns.

Departure authority, on the other hand, permits a more nuanced and flexible approach, cognizant of the disparities in tribal justice. We further support TIAG's recommendation that the proposed list of factors in the departure analysis be non-exhaustive with no one factor determinative.

3. YOUTHFUL OFFENDERS

NACDL applauds the Commission's recognition that juvenile adjudications should not count in determining an offender's criminal history or for any other purpose. However, NACDL believes that this Amendment needs to go farther, in particular by not counting *any offense* committed by someone prior to age 18, whether the person is convicted and sentenced as a juvenile or as an adult. The reasons for broadening the Amendment are the same reasons that support its adoption in the first place:

First, as previously recognized by the U.S. Supreme Court,[10] juveniles are immature and have a diminished capacity to recognize the potential consequences of their behavior and are more likely to engage in risky and impulsive behavior without mature consideration. More recently, an overwhelming body of literature has recognized that the pre-frontal cortex, the part of the brain responsible for reasoning, self-control, judgment, and decision-making, is not fully developed until the mid to late 20s,[11] providing a scientific basis for holding juvenile offenders less morally culpable for their conduct.

Second, state laws vary considerably in determining at what age a juvenile may be tried as an adult. In some states, juveniles over a certain age are *automatically* tried as adults, at least for certain offenses, with no preliminary determination of the child's capacity. Because of these differences in state law, use of convictions for juveniles sentenced as adults would result in unwarranted disparity, based solely on the circumstance of the state in which the juvenile happened to commit the crime.

To the extent that the Amendment allows consideration of convictions for juveniles sentenced as adults, NACDL supports the commentary that a downward departure may be warranted if such a conviction has been included in the criminal history. Nevertheless, such language would not be necessary if convictions for offenses occurring before age 18 were never counted. Nor should juvenile offenses be a basis for an upward departure, as this would undermine the very reasons for this Amendment in the first place.

4. CRIMINAL HISTORY ISSUES

We at NACDL have had the opportunity to review the Written Statement of Marjorie Meyers, Federal Public Defender for the Southern District of Texas, prepared on behalf of the Federal Public and Community Defenders. We join the Federal Defenders in their comments regarding the proposed amendments to Guideline Sections 4A1.2(k) and 4A1.3.

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[10] *Roper v. Simmons,* 543 U.S. 551 (2005).

[11] *E.g.,* Melissa Caulum, Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System, 2007 Wis. L. Rev. 729, 730 (2007); Antoinnette Clarke, Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy, 56 DePaul L. Rev. 927, 934 (2007).

With regard to the proposed amendment to §4A1.2(k) and its interaction with §2L1.2, we join the Federal Defenders in their suggested revisions to §2L1.2.

Proposed Amendments to USSG § 4A1.2(k)

NACDL supports the proposed amendment to USSG § 4A1.2(k). Specifically, NACDL supports the removal of revocation sentences from consideration in determining one's criminal history score as provided in the proposed amendment. As discussed in the Defenders' Comments, the current rule of counting revocation sentences "can have a devastating and unjust impact on defendants in a number of different ways, including (a) deeming defendants 'career offenders' on the basis of old convictions that would not have otherwise counted; (b) rendering defendants ineligible for safety valve relief; and (c) elevating the criminal history category based on very old convictions."[12]

By amending §4A1.2(k) to exclude revocation sentences, the Commission will address the unwarranted increase in criminal history computation that results when revocation sentences based on technical violations (*e.g.,* failure to report a law enforcement contactor failure to attend a probation meeting) result in additional criminal history points. As noted in the Defenders' Comments, in many jurisdictions more than half of revocations are for technical violations.[13] The increase of one's criminal history points, and possibly one's criminal history category determination, in these instances is not supported by the policy underlying use of criminal history to increase the advisory sentencing guideline range.[14]

NACDL agrees that revocation sentences are more appropriately considered in the scope of a §4A1.3 upward departure. Such consideration would allow for the appropriate individualized assessment of the defendant and the defendant's history at sentencing. Indeed, consideration of revocation sentences would appear to fall directly within the types of information that may form the basis for upward departure as set forth in

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[12] *See* Comments from Federal Defender Sentencing Guidelines Committee on Proposed Amendment 4 (hereinafter "Defenders' Comments"), p. 38.

[13] *See* Defenders' Comments, p. 39, fn. 189.

[14] *See* USSG Ch. 4, Pt. A, Introductory Commentary.

§4A1.3(a)(2)(A)-(E). A reference to consideration of revocation sentences could easily be added as an addendum to subsection (A): "Prior sentence(s) not used in computing the criminal history category (*e.g.* revocations or sentences for foreign and tribal offenses."

NACDL agrees with the Defenders that the Commission should provide additional guidance about how courts may consider revocation sentences under USSG §4A1.3, to help narrow the consideration to revocations for serious violations that are not otherwise accounted for under the criminal history rules. As noted in the Defenders' Comments, the grading system in Chapter 7 could be incorporated to provide such guidance.[15]

If the Commission amends USSG §4A1.2(k) as proposed, NACDL would support a simultaneous revision of the definition of "sentence imposed" at §2L1.2 to avoid any confusion or disparate impact. As the Defenders suggested, revising the § 2L1.2 definition of "sentence imposed" should simply remove the last sentence of the current definition. This would avoid the confusion created when different definitions of the same term exist in different guidelines (*e.g., "crime of violence"* in USSG § 4B1.2 as opposed to *"crime of violence*" in USSG § 2L1.2 (n.2)).

Proposed Amendment to USSG § 4A1.3

NACDL supports the proposal to include an explicit statement that a downward departure under USSG §4A1.3 may be warranted in a case where the period of imprisonment actually served is substantially less than the length of the sentence imposed. NACDL agrees that the Defenders' proposed revision better clarifies that the specified examples are demonstrative, and not a specifically enumerated list limiting the departure's availability.

NACDL does not agree that the Commission should exclude from consideration cases where time actually served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant's case (*e.g.,* over-crowding). This exclusion could hamper a court's ability to consider this factor where, either based on the passage of time or the unfamiliarity with the locale in which the sentence was served, the information may be difficult to ascertain or

[15] *See* Defenders' Comments, p. 41.

may be unreliable. Moreover, it may inadvertently lead to prohibiting this factor from deserving candidates. For example, a defendant whose actual time served was reduced for *good conduct* might be deemed ineligible if the sentence originated in a jurisdiction known for early releases based on overcrowding.

5. ACCEPTANCE OF RESPONSIBILITY

NACDL urges the Commission to clarify that good faith challenges about relevant conduct shall not, by themselves, deprive defendants of §3E1.1's "Acceptance of Responsibility" downward adjustment. Specific conduct and offenses are admitted by the defendant in an ordinary plea agreement and guilty plea. The factual basis underlying that guilty plea is too often the *starting* point of allegations against the defendant, while the Presentence Investigation Report (PSR) can allege substantially larger volumes to drive substantially longer sentences (e.g., where total dollar loss or drug weight drives the Guidelines range). .

But those PSRs sometimes add to a plea agreement's factual basis, particularly where a cumulative value such as money loss or drug weight drives the calculation (even if on an advisory basis). . Basic fairness and the Due Process clause demand that defendants be allowed a good faith factual challenge of conduct not already admitted. .

Good faith fact challenges allow defendants the essential right to challenge incorrect memories, incomplete or faulty reporting, and even in some cases outright fabrication by, among others, other defendants hoping for "substantial assistance" relief. . Our adversarial system demands the ability to make good faith challenges to misinformation. .

This is not to say that perjury or other obstruction should not be penalized, including through the two-level enhancement available at §3C1.1. . But where a sentencing calculation is based upon facts not already admitted by a defendant, defendants have a right to be heard even as they continue to accept responsibility for their admitted misconduct. .

Allowing defendants to make good faith legal challenges will help develop sentencing law, which even today is too often driven by the Government's appellate wishes, while defendants are forced to waive appeal and collateral challenge rights to get any

resolution by plea. . Expressly prohibiting penalties for good faith legal arguments is not only, again, essential for operating our adversarial system -- it also ensures that defense counsel can meet its ethical obligations not just as a defendant's lawyer, but also an officer of the court.

Sincerely Yours,

NACDL Sentencing Committee

NEW YORK COUNCIL OF DEFENSE LAWYERS

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

TABLE OF CONTENTS

NEW YORK COUNCIL OF DEFENSE LAWYERS

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

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 § 281.1 (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/pdflamendment-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.

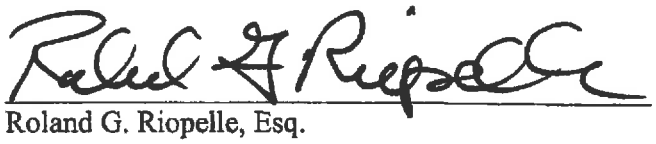
CONCLUSION

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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February 17, 2017

The Honorable William H. Pryor, Jr.
Acting Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Re: The Pew Charitable Trusts Public Comment on Proposed Amendments on First Offenders/Alternatives to Incarceration and Criminal History Changes

Dear Judge Pryor:

The Pew Charitable Trusts submits these comments in response to the Commission's request for comments on Proposed Amendment One, relating to new guideline ranges for first offenders and increased availability of alternatives to incarceration for low-level offenders, and Proposed Amendment Four, relating to criminal history issues. A wide range of research shows that these proposed amendments are on firm ground, and Pew urges their adoption.

Pew's Public Safety Performance Project helps states advance fiscally sound, data-driven policies and practices in adult and juvenile sentencing and corrections that protect public safety, hold offenders accountable, and control corrections costs. The project collaborates with policy leaders and criminal justice stakeholders to develop policy options based on analysis of their jurisdiction's particular challenges, the most rigorous research, and lessons learned from other states. Pew and its partners, including the federal Bureau of Justice Assistance, the Council of State Governments Justice Center, and the Crime and Justice Institute, have worked with more than 30 states to develop such policies as part of the Justice Reinvestment Initiative, which was formally established by Congress and the Department of Justice in 2010.

The Public Safety Performance Project also provides technical assistance to federal policymakers as they consider sentencing and corrections policy changes to the federal criminal justice system. The project has commented on previous amendments proposed by the U.S. Sentencing Commission and worked with members of Congress on pending legislation.

The Federal Prison Population

Despite some recent decline, from 1980 to 2016, the federal prison population increased from approximately 24,000 to nearly 190,000 people, making it the largest prison system in the

nation.[1] The largest share of this population is drug offenders, which has doubled since 1980 and makes up nearly half of the total population.[2] Many of these individuals were not leaders of their drug distribution networks: more than a quarter of federal drug offenders have been sentenced as "couriers" or "mules," the lowest-level trafficking roles on the Commission's culpability scale.[3]

The large federal drug offender population is due in part to longer sentences and more time served. From 1980 to 2011, the average prison sentence imposed on drug offenders increased 36 percent, even as it decreased by three percent for all other offense types.[4] These increases are due primarily to mandatory minimum sentence laws and compulsory sentence enhancements enacted by Congress in the 1980s and 1990s.[5] In addition to sentence length, the Sentencing Reform Act of 1984 also required offenders to serve 85 percent of their sentence before being eligible for release, and eliminated federal parole.[6]

The long-term growth of the federal prison population, driven in large part by the increased incarceration of drug offenders, has led to a parallel surge in cost. Federal spending on prison has risen nearly 600 percent since 1980, from $970 million to more than $6.6 billion in inflation-adjusted dollars.[7]

The increased incarceration of drug offenders has not led to more public safety. Data suggests that despite federal prison population growth, illegal drug prices have decreased and use has increased.[8] The retail prices of cocaine, heroin, and methamphetamine have all decreased,

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[1] The Pew Charitable Trusts. (2015). *Federal Prison System Shows Dramatic Long-Term Growth.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/02/federal-prison-system-shows-dramatic-long-term-growth

[2] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[3] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[4] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[5] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[6] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[7] The Pew Charitable Trusts. (2015). *Federal Prison System Shows Dramatic Long-Term Growth.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/02/federal-prison-system-shows-dramatic-long-term-growth

[8] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

indicating a wider availability, while the share of Americans who admitted to using an illegal drug increased to 9.2 percent in 2012.[9]

Both the state and federal prison populations have increased sharply since 1980. However, state prison populations began to decline between 2007 and 2015 as dozens of states participated in the Justice Reinvestment Initiative and made evidence-based policy changes to control prison growth and costs while reducing recidivism.[10] While the federal criminal justice system is different from the state systems, many of the lessons learned from the state experiences with justice reinvestment can be adapted and applied to the federal corrections system. The Commission's Drugs Minus Two amendments took a step in this direction and Pew commends the Commission for these efforts.

Research Backs Alternatives to Incarceration

Proposed Amendment One, relating to new guideline ranges for first offenders and increased availability of alternatives to incarceration for low-level offenders, is backed by research and similar policies enacted in states.

While many crimes may warrant prison terms purely for purposes of punishment, a growing body of research demonstrates that prison terms are not more likely to reduce recidivism than noncustodial sanctions.[11] Researchers have matched samples of offenders sent to prison with those sent to non-custodial sanctions and have consistently found no differences in re-arrest or re-conviction rates both in short-term and in long-term analyses, even when controlling for individuals' education, employment, drug abuse status, and current offense.[12] For some offenders, including drug offenders, technical violators, and first-time offenders, studies have shown that prison can actually increase the likelihood of recidivism.[13]

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[9] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[10] The Pew Charitable Trusts. (2015). *Growth in Federal Prison System Exceeds States'.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/growth-in-federal-prison-system-exceeds-states

[11] Villetaz, Patrice, Glwadys Gilleron, and Martin Killian. (2015). *The Effects on Reoffending of Custodial vs Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge.* Campbell Systematic Reviews. Retrieved from http://www.campbellcollaboration.org/lib/project/22/

[12] Villetaz, Patrice, Glwadys Gilleron, and Martin Killian. (2015). *The Effects on Reoffending of Custodial vs Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge.* Campbell Systematic Reviews, Retrieved from http://www.campbellcollaboration.org/lib/project/22/

[13] Spohn, Cassia and David Holleran (2002). *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*. Criminology, 40: 329–358.; E. K. Drake & S. Aos (2012). *Confinement for Technical Violations of Community Supervision: Is There an Effect on Felony Recidivism?* (Document No. 12-07-1201). Olympia: Washington State Institute for Public Policy.; Nieuwbeerta, P, Daniel Nagin, and AAJ Blokland (2009). *Assessing the impact of first-time imprisonment on offenders' subsequent criminal career development: a matched samples comparison*. Journal of Quantitative Criminology 25 (3), 227-257.

At the same time, the incapacitation of lower-level federal offenders has not been shown to significantly disrupt the drug trade.[14] Research indicates that low-level drug offenders are easily replaced if they are arrested and incarcerated, allowing drug trafficking to continue with minimal disruption.[15] Nor has research found that sentences for these offenders had a significant deterrent effect, if any at all.[16]

Despite this Research, Probation Remains an Underutilized Option in Federal Corrections

Over the past 30 years, prison has become the dominant sanction in the federal corrections system.[17] In 1980, less than half of all federal offenders received prison sentences, but as of 2014, nine in 10 offenders received prison sentences.[18] Federal courts sentenced 2,300 fewer offenders to probation in 2014 than in 1980, even though their caseload nearly tripled during that span.[19]

The reduction of the use of probation is largely due to sentencing laws and federal sentencing guidelines.[20] The aforementioned Sentencing Reform Act of 1984 created the Commission and charged it with promulgating guidelines that judges were required to follow during sentencing. These guidelines mandated imprisonment for a variety of offenses, and despite the U.S. Supreme Court's holding in *United States v. Booker (2005)* that the guidelines must be considered advisory, not mandatory, many lower-level offenders continue to receive prison sentences when probation may be more appropriate, less expensive, and equally effective.[21]

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[14] The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return

[15] Mark A.R. Kleiman. (2004). *Toward (More Nearly) Optimal Sentencing for Drug Offenders.* Criminology & Public Policy 3, no. 3: 435–440. Retrieved from https://drive.google.com/file/d/0B6taQDF0rdAwYnJNTDU2bDVBNFU/edit

[16] National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. 83. Retrieved from http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes

[17] The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders

[18] The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders

[19] The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders

[20] The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders

[21] The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders

At the same time, at least 18 states have successfully increased diversion to supervision and seen a reduction in recidivism and costs.[22] In 2007, Texas expanded diversion options in the probation and parole system by 4,500 beds for technical violations of supervision, transitional treatment, and substance abuse treatment.[23] When combined with additional reforms, this policy mitigated growth by about 9,000 beds and saved the state $441 million within a few years, part of which was reinvested to fund recidivism reduction programming.[24]

In 2013, South Dakota passed the Public Safety Improvement Act to avoid spending $207 million to build two new prisons and instead invest some of those dollars in recidivism reduction efforts.[25] The new policies and funding helped raise the state's parole success rate from 37 percent of offenders in FY 2012 to 65 percent in FY 2015.[26]

Similarly, in 2016, Alaska established a new diversion sentencing option and adopted several policies to limit the use of prison as a sanction for nonviolent offenders.[27] In conjunction with other reforms, these changes are expected to reduce Alaska's prison population by 13 percent and save the state $380 million, part of which will be used to fund evidence-based prison alternatives and victims' services programs.[28]

Federal Length of Stay has Increased, Driven in Part by Sentencing Enhancements Tied to Criminal History

Proposed Amendment Four, concerning changes to how criminal history points are calculated and when downward departures are appropriate, is backed by research and similar to policies developed in states.

Lengths of stay in the federal prison system have increased since 1980, in part due to criminal history enhancements. These increases have occurred despite a lack of evidence that longer

[22] The Pew Charitable Trusts. (2016). *33 States Reform Criminal Justice Policies Through Justice Reinvestment*. Retrieved from http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/33-states-reform-criminal-justice-policies-through-justice-reinvestment

[23] Levin, Marc. (2011). *The Texas Model: Adult Corrections Reform: Lower Crime, Lower Costs.* Texas Public Policy Foundation. Retrieved from http://www.texaspolicy.com/library/doclib/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf

[24] Levin, Marc. (2011). *The Texas Model: Adult Corrections Reform: Lower Crime, Lower Costs.* Texas Public Policy Foundation. Retrieved from http://www.texaspolicy.com/library/doclib/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf

[25] The Pew Charitable Trusts. (2013). *South Dakota's 2013 Criminal Justice Reforms.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/south-dakotas-2013-criminal-justice-initiative

[26] Public Safety Improvement Act Oversight Council. (2015). *South Dakota Public Safety Improvement Act 2015 Annual Report*. Retrieved from http://psia.sd.gov/PDFs/PSIA%202015%20Annual%20Report.pdf

[27] The Pew Charitable Trusts. (2016). *Alaska's Criminal Justice Reforms.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/alaskas-criminal-justice-reforms

[28] The Pew Charitable Trusts. (2016). *Alaska's Criminal Justice Reforms.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/alaskas-criminal-justice-reforms

prison terms improve recidivism outcomes.[29] The best measurement for whether longer lengths of stay reduce recidivism is whether similar offenders, when subjected to different terms of incarceration, recidivate at different levels.[30] The most rigorous research studies find no significant effect, positive or negative, of longer prison terms on recidivism rates.[31]

States are transforming this research into evidence-based policy. In 2014, for example, the Utah Commission on Criminal and Juvenile Justice, a bipartisan, inter-branch task force that included legislators, judges, prosecutors and other stakeholders, issued a report explaining how the "criminal history score currently double-counts certain elements, resulting in higher scores and, consequently, longer lengths of stay in prison."[32]

Later that year, the Utah State Legislature passed H.B. 348, which was signed into law by the Governor. Along with a wide variety of other sentencing and corrections policies, H.B. 348 reduced criminal history points for lower-level offenses, eliminated factors already counted in another criminal history categories, and removed factors that are not major indicators of risk of recidivism.[33] The law is expected to save Utah more than $500 million over 20 years, avert all projected prison population growth, and reduce recidivism rates.[34]

Conclusion

The Commission and Department of Justice have made multiple efforts to safely stem the growth of the federal prison system and those efforts are paying off: the Bureau of Prisons now holds about 190,000 inmates, some 30,000 fewer than at the peak in 2012. Yet, the federal system remains by far the largest in the nation and research indicates further reductions are possible and can be achieved without jeopardizing public safety. The size of the federal population is due in large part to increased sentences and lengths of stay for drug offenders which were driven by laws passed by Congress in the 1980s and 1990s. However, the best criminogenic research and lessons from evidence-based state reforms demonstrate that alternatives to incarceration for lower-level offenders and revisions to criminal history score calculations can reduce recidivism and help to focus the most expensive correctional resources on the most chronic, violent offenders. The Commission can be confident that research

[29] National Research Council. (2014*). The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 78. Retrieved from http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes

[30] Nagin, Daniel, Francis T. Cullen, and Cheryl Leo Jonson. (2009). *Imprisonment and Reoffending*. The University of Chicago.

[31] Nagin, Daniel, Francis T. Cullen, and Cheryl Leo Jonson. (2009). *Imprisonment and Reoffending*. The University of Chicago.

[32] Utah Commission on Criminal and Juvenile Justice. (2014). *Justice Reinvestment Report, 15.* Retrieved from https://justice.utah.gov/Documents/CCJJ/Reports/Justice_Reinvestment_Report_2014.pdf

[33] The Pew Charitable Trusts. (2015). *Utah's 2015 Criminal Justice Reforms.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/utahs-2015-criminal-justice-reforms

[34] The Pew Charitable Trusts. (2015). *Utah's 2015 Criminal Justice Reforms.* Retrieved from http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/utahs-2015-criminal-justice-reforms

indicates that Proposed Amendments One and Four will hold offenders accountable while achieving a better public safety return on taxpayer dollars.

Sincerely,

Adam Gelb
Director, Public Safety Performance Project
The Pew Charitable Trusts

I think the current method of aggregating the sentences imposed is the most accurate way to reflect the seriousness of such a prior conviction. For example, a sentence of probation typically reflects a break given to a defendant when a more serious sentence could have been imposed. When the defendant does not comply with conditions, greater punishment is imposed, regardless of whether that violation conduct includes additional prosecution and punishment. To disregard revocation sentences would seem to disregard the defendant's adherence to the conditions imposed.

In non violent and first time offenders with lighter sentences i would support home monitoring. If there is no other offense in a period of six months to begin reducing sentence time for good behavior. Many people have plenty of good left to help society and their families. Allow lessons learned to be forgiven and move on. Thank You

Hank Jones
Pastor

I am writing in support of an amendment to the US sentencing guidelines to grant points reduction for first time offenders.

In 1994, Richard DeCaro was acquitted in a Missouri state court of solicitation of murder. Later, he was recharged by the federal government for the same alleged offense. Having a second bite at the apple, the federal government was successful in getting a guilty verdict. While this may be a legitimate exception to the Double Jeopardy clause, the fact that he was first acquitted by a jury of his peers gives some indication of the weak evidence in the case. Nevertheless, experienced prosecutors have a huge advantage when trying a case twice, which is why we have a general prohibition against Double Jeopardy embedded in our US Constitution.

Mr. DeCaro has consistently maintained his innocence for 25 years. He loved his wife and played absolutely no role in her death. Having personally studied his case in detail, I can confidently state there are many factual, legal and constitutional questions in his case. Nonetheless, having exhausted all of his judicial remedies, Mr. DeCaro's best hope now is that he might receive a reduction in the points which dictated his LIFE sentence.

Prior to this case, Mr. DeCaro was a successful professional who never had any criminal record of any kind. He lived a productive and honorable life with his wife and four children. He is the epitome of a first time offender and a man who deserves a chance to rebuild his life after 25 years of incarceration.

Therefore, I enthusiastically support an amendment to the US Sentencing Guidelines that would permit a reduction in points for first time offenders. With a small reduction in points, Mr. DeCaro's sentence would be reduced to a number of years that would soon allow him to return to his children and grandchildren.

Respectfully,

Weldon Long

Weldon Long, Author

I support the First Time Offenders and Alternative to Incarceration Amendment. We have a member of our church who was given a extremely long sentence for a first time offence. We are also asking that this amendment be retroactive. So that people that have already been sentenced can be under the new rules. As a person who had a rough start myself, I understand that people make mistakes when they are young but later go on become productive citizens. Thank you,

John Morton, Pastor
Union Baptist Church

Regarding the "First Offender" proposed amendment, I would suggest not excluding individuals who have no more than two convictions for offenses that are listed in § 4A1.2(c)(2). Otherwise, something as simple as a speeding ticket could eliminate an individual from First Offender consideration, and many individuals who are never involved in the criminal
justice system otherwise have speeding tickets on their record.

Eliminating revocations from criminal history consideration will have a dramatic effect and result in a windfall for many defendants who are given
a chance at probation and violate the Court's order. These one-point convictions often turn into three-point convictions due to irresponsible behavior by the defendant. To not consider probation revocations will artificially lower the criminal history points, and exclude a significant number of qualifying convictions for Career Offender due to the age of the
offense, as probation sentences are only countable for 10 years from imposition. A defendant who cannot conform to the requirements of a probation sentence should not be rewarded by having his revocation mean nothing. Many prison sentences start out as probation cases, so this change would result in an extreme reduction in the criminal history score.
I would not apply this amendment to probation revocations.

John D. Olive
Sr. U.S. Probation Officer
Cheyenne, WY 82003

WEINER LAW GROUP LLP

Attorneys at Law
629 Parsippany Road
P.O. Box 0438
Parsippany, New Jersey 07054

Jay V. Surgent, Esq.
A Member of the Firm

February 16, 2017

VIA EMAIL: Public_Comment@ussc.gov.
U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Affairs

RE: Support for the Proposed 2017 "First Offenders/Alternatives to Incarceration" Amendment to the U.S.S.G.

Dear U.S. Sentencing Commission:

I strongly support the proposed 2017 amendment to the Federal Sentencing Guidelines that would amend the criminal history guidelines to "provide lower guideline ranges for first offenders generally and increase the availability of alternatives to incarnation for them at lower levels of Sentencing Table" (First Offenders/Alternatives to Incarceration).

In addition to this support of the "First Offender" Criminal History Guideline Amendment, I support the proposed recommendation for Alternatives to Incarceration.

I look forward to the retroactive approval of the proposed "First Offender/Alternatives to Incarceration" Amendment to the Criminal History Guidelines this year and future corrections to the U.S.S.G.

Respectfully,

WEINER LAW GROUP LLP

By: _____
Jay V. Surgent, Esq.

JVS/rp
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US Sentencing Commission,

I am Reverend James Tibbs. I would like to voice my opinion to let you know that I am definitely in support of the, 1st Offenders & Alternative To Incarceration Amendment. Please amend the sentencing for 1st time offenders so there is an alternative to going to prison. Please make this amendment as soon as possible and make it retroactive.

Thanks For Your Consideration.

Reverend James Tibbs...

To whom It May Concern:
I am writing regarding the proposed lowering of the sentencing guidelines. In my opinion " first offenders" should be anyone who has a prior history of misdemeanors or lower and those with a minor conviction that is stale. The proposed amendment should be made retroactive in fairness to not only benefit those going forward but for those who are serving sentences that might have benefited from a lower guideline if such guidelines had been in place at the time of sentencing. This would be a fair and across the board implementation of such an amendment and not a time cut-off issue to better serve the public with safety and justice without an over harsh and unneeded sentence length.

Sincerely,
Sydney Perrizo
Sent from my iPad

To the U.S Sentencing Commission:

We oppose any amendments to, Part B of the proposed amendment responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act ("International Megan's Law"), Pub. L. 114–119 (Feb. 8, 2016). Please do not add any new notification requirements to this law. This has already caused serious harm to family members who have traveled recently. As sex offenders and sex traffickers are entirely two separate groups.

Thank you

I support the proposed amendment for first time offenders with zero criminal history points. I believe it should be a 2 point reduction and made retroactive.
Thank you,
Rich Fiehler

Subject: Proposed Amendments to Sentencing Guidelines

I am writing to support the proposed amendments to the Federal Sentencing Guidelines.

Randall Wilson

Hi,

I would like to express my opinion and I disagree with the Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act ("International Megan's Law"), Pub. L. 114–119 (Feb. 8, 2016).

This is another ridiculous bill aimed at controlling people. Sex offenders and sex traffickers are entirely a different group of people. Please throw this one in the trash.

Shane Doggett
Industrial Hygienist

Good Morning,

In light of the proposed amendments to the criminal history guidelines, given the fact that we are the United States, not the United State, our laws should be the same in all fifty states. The "geographical location" of an offender should bear no difference as to how such a sentence applies to any particular offender. However, municipal court sentences depend on the individual discretion of the court and the district attorney.

Nevertheless, the charging discretion of the courts vary to a distinguishing degree. (i.e., an offender who commits a felony offense but pursuant to a plea "deal", pleads to a lesser offense such as a misdemeanor, as opposed to pleading to a felony, thus receiving a reduced sentence). This particular charging discretion varies from court to court, creating different degrees of disparity among non-similarly situated defendants. Although the policy statement of the criminal history guidelines "recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of the criminal history that may occur", and "authorizes the consideration of a departure". see 4A1.3 . The "recognition of this imperfection of this measure 4A1.3 authorizes the court court to depart from the otherwise applicable category" which only applies "in certain circumstances". Additionally, this is only an "authorization", not an "obligation" for the court to utilize its discretion in limited circumstances.

The guidelines proscribe that criminal history points are to be added "for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection", see 4A1.1(c), of "which the imposition...of the sentence...totally suspended or stayed shall be counted as a prior sentence", see 4A1.2(a)(3), and was "imposed within ten years of the defendants commencement of the instant offense is counted", see 4A1.2(e)(2)

Thus an offender who, for example, has a prior offense such as a misdemeanor for petit theft, that was committed 9 1/2 years prior but not past 10 years, where the sentence imposed was less than 30 days imprisonment or less than 1 year of probation. Such an offense would trigger one criminal history point to be added. see 4A1.1(c), 4A1.2(c) and (e)(2). Likewise, where a different offender committed a felony drug trafficking offense 6 months prior, which involved a gun; or a offender who committed an aggravated felony assault 1 year prior, resulting in bodily injury, of which either sentence imposed was less than 30 days imprisonment or less than 1 year of probation. Each of these prior offenses would, equally, result in the application of one criminal history point, regardless of the conduct involved or the duration between the offenses.

An offender who, then, received a municipal courts considerable discretion, leads to further disparities among non-similarly situated offenders, again, due to the Federal courts discretion under 4A1.3. This is to consider a departure, to reflect the seriousness of an offenders "criminal background or likelihood of recidivism". However, without an obligation to address the issue some offenders are treated with leniency twice while others are penalized twice, all due to their geographical location and a particular Judge's discretion.

Moreover, certain minor offenses and misdemeanor offenses should not affect the criminal history points after a substantial period has elapsed, such as 5 years. As even most businesses do not discriminate against felonies that occur over 5 years in the past, while conducting background checks. Offenses that contain more egregious behavior or sentences that were reduced pursuant to a plea agreement, should be the only prior offenses that are counted, beyond 5 years, up to the ten year limits the guideline proscribe.

Additionally, the guidelines governing application of the criminal history points were designed to increase a sentence based on crimes of violence and to inform the sentencing Judge of which conduct constitutes a pattern of criminal behavior. This is to increase a sentence, to reflect an offenders risk of recidivism. The way the guidelines apply, currently, criminal history points are applied to low risk offenders, found of minimal past criminal conduct. However, these lower risk offenders are held to the same accountability and duration as higher risk and more culpable offenders, thus creating great disparities when coupled with the discretion of both prior and current sentencing courts. This fails to adequately reflect the conduct of an offenders criminal background or likelihood of recidivism.

The disparity or the failure to reflect the criminal history of an offender goes against the mandated obligation to fulfill section 3553 factors. The Sentencing Commission should design some type of "Table" to better determine and accurately calculate an offenders criminal history and background, similar to that of the "Sentencing Table", see Chapter 5, Part A. This is especially important, in light of how heavily the Federal system relies on the criminal history of an offender. Simply put, misdemeanor crimes sentenced to a term, less than 30 days imprisonment or less than one year of probation or supervised release, should not be counted back 10 years in the past, the same as felonies that are counted under 4a1.2(b).

Best Regards,

Shelly R Whiting

1. Proposed Amendment: First Offenders/Alternatives to Incarceration, Section (A) -2 Under the Guidelines Manual, offenders with a minimal or no criminal history are classified into Criminal History Category I. "First Offenders." Offenders with no criminal history, are addressed in the guidelines only by reference to Criminal History Category I. Criminal History Category I. However Criminal History I includes not only "first" offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point. Accordingly,. The following offenders are classified in the same category: [1] first time offenders with no prior convictions that are not used in computing the criminal history category for reasons other than their "staleness" (i.e.) sentences resulting form foreign or tribal court convictions, minor misdemeanors convictions or infractions)" and (4) offenders with a prior conviction that received only one criminal history point. **COMMENT:** Pertaining to the proposed amendment, I am in agreement with the aforementioned changes in verbiage, procedure, and encourage the use of alternatives to incarceration whenever and wherever possible. **CRIMINAL HISTORY ISSUES, pg.55**
2. The proposed amendment would amend 4A1.2 to provide the revocations of probation, paroles, supervised release, special parole or mandatory release are not to be counted for purposes of calculating criminal history points, but may be considered under 4A1.3 (Departures based on Inadequacy of Criminal History Category (Policy Statement). The policy statement at 4A1.3 provides upward departures for cases in which reliable information indicates that the defendant's criminal/category substantially underrepresents the seriousness of the defendant's criminal history. As the proposed amendment is currently put forth, the semantics in question may be the term "reliable information" is used. The phraseology should be further explained as to what exactly is acceptable, as "reliable information is" as it could lead to an "upward departure", due to the criminal history of the defendant being higher than normally would be interpreted, were the information provided "unreliable". Guidelines must be established to ensure that information provided upon as reliable, must meet certain criteria, in order to be admissible in a court of law. Please insure that adequate explanation of exactly what "reliable information" is, per the sentencing guidelines, to preclude errors in sentencing and possible over or under sentencing by the presiding judge. This issue is being commented on, in reference to 4A1.3 (a) Standards for upward departure. Subsection (2) Types if Information Forming the basis for upward departure. There should be some type of clarification as to what exactly constitutes the "reliable information", resulting in an upward departure. The only items deemed as "reliable information", items 4A1.3 (a) (2) If this is the case, then the amendment should be prefaced with this clarification prior to annotating the proposed changes to the amendment.
3. **PROPOSED AMENDMENT:** Miscellaneous, 2A3.5. (b) (2) Commentary concerning application of subsection (b) (2) (A) in general. In order for subsection (b) (2) to apply, the defendants voluntary attempt to register or to correct the failure to register, must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure register. **COMMENTS:** Under subsection (b) (2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by e levels. It should be considered unjust to hold a defendant accountable for circumstances beyond their control, and still require points to be assigned

against them for charges of “Failure to Register” and decrease the points by -3, when, if in fact the defendant can prove that the defendant does in fact meet the requirements stated in Subsection (b) (2) (B) (A), then the defendant should be exonerated of the “Failure to Register” charge, and associated point assignments. This exoneration should apply if there are no Specific Offense Characteristics as listed in Subsections (b) (1) (A-C).

PROPOSED AMENDMENT: Technical, - All current proposed technical modifications and corrections should be submitted as documented for approval and subsequent inclusion.

PROPOSED ADMENDMENTS: TRIBAL ISSUES, YOUTHFUL OFFENDERS, BIPARTISAN BUDGET ACT, MIRIHUANA EQUIVALENCY, All current proposed modifications and corrections, should be submitted as documented for approval and subsequent inclusion.

Public_Comment@ussc.gov

United States Sentencing Commission,
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs

Kathleen Rich

Re: Support for the proposed 2017 "First Offenders / Alternatives to Incarceration" Amendment to the U.S.S.G.

Date: February 13, 2017

Dear United States Sentencing Commission:

I support the proposed 2017 amendment to the Federal Sentencing Guidelines that would amend the Criminal History Guideline to "provide lower guideline ranges for first offenders generally and increase the availability of alternatives to incarceration for [them] at the lower levels of the Sentencing Table" (First Offenders / Alternatives to Incarceration).

Currently, people with no criminal history points are treated the same as people with one criminal history point--both are placed in Criminal History Category I for sentencing calculation purposes. Thus creating an unfair and unbalanced sentencing guideline range and ultimately leading to the over-sentencing of people with no prior convictions or criminal history. This over-sentencing helps lead to the current over-crowding of our Federal Prisons and an increased burden on the U.S. taxpayer.

I support a 2-Level reduction under the proposed Criminal History Guideline that would be created for First Offenders. I also support making the proposed "First Offender" Criminal History Guideline retroactive in order to immediately correct the currently unfair sentence of all "First Offenders."

In addition to this support of the "First Offender" Criminal History Guideline Amendment, I support the proposed recommendation for Alternatives to Incarceration.

I feel strongly that the proposed "First Offender / Alternatives to Incarceration" amendment meets the mandate to the United States Sentencing Commission to see that Federal sentences in the United

States are carried out fairly, protects the citizens of the United States, and reduces the population of the Federal Bureau of Prisons.

I look forward to retroactive approval of the proposed "First Offender / Alternatives to Incarceration" amendment to the Criminal History Guidelines this year and future amendments to improve the over-sentencing/incarceration of non-violent offenders in the United States.

Respectfully,

Kathleen Rich

To whom it may concern:

By this email and public comment, I express my OPPOSITION to the proposed amendment to HR 515, "International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders" or IML.

Ongoing research of domestic (state and federal) laws imposing travel, proximity and residency restrictions on sex offenders has, in the 20+ year history of those laws, failed to demonstrate any statistically significant effect in reducing sexual crimes against minors. As with those laws, the chances that the proposed amendments to IML will significantly improve the safety of children living or traveling outside the US are vanishingly small. However, as with the state and federal sex offender restrictions already on the books, the proposed amendment IS likely to impose an undue burden on the offenders subject to the law, as well as an unnecessary cost on law enforcement authorities.

Therefore I oppose the proposed amendment.

Respectfully submitted,

Hans Maverick

Dear United States Sentencing Commission

RE: Support for the proposed 2017 "First Offenders / Alternatives to Incarceration" Amendment to the U.S.S.G.

I strongly support the above 2017 proposed amendment to the Federal Sentencing Guidelines that would amend the Criminal History Guideline to "provide lower guideline ranges for first offenders generally and increase the availability of alternatives to incarceration for (them) at the lower levels of the "Sentencing Table" (First Offenders / Alternatives to Incarceration).

Currently, people with no prior criminal history points are treated the same as people with one (1) criminal history point, which means that both are placed in Criminal History Category One (1) for sentencing calculation purposes. This creates an unfair and unbalanced sentencing guideline range that leads to the over-sentencing of individuals who have no prior convictions or criminal history. In turn, this leads to the current overcrowding situation of our Federal Prisons and also increases the burdens of U.S. Taxpayers.

Accordingly, I therefore support the Two (2) level reduction under the proposed Criminal History Guideline Amendment that would be created for first-time offenders.

I also support making the proposed "First Offender" Criminal History Guideline retroactive, in order to immediately correct the currently unfair sentence of all "First Offenders".

In addition to the above support for the "First Offender" Criminal History Guideline Amendment, I support the proposed recommendation for Alternatives to Incarceration.

I strongly believe that the proposed "First Offender / Alternatives to Incarceration" amendment meets the mandate of the U.S. Sentencing Commission to see that Federal sentences in the U.S. are carried out fairly, to protect the citizens of the U.S., and to reduce the population of the Federal Bureau of Prisons.

I sincerely look forward to the retroactive approval of the proposed "First Offender / Alternatives to Incarceration" amendment to the Criminal History Guidelines this year, and to whatever future amendments will improve the over-sentencing and incarceration of non-violent offenders in the U.S.

Respectfully,

Gerald Blumenthal Ph.D.

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500 Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Public Comment, Proposed 2017 Amendment: First
Offenders/Alternatives to Incarceration

Dear Judge Pryor:

I write to express my support for the entirety (Part A and Part B) of Proposed Amendment 1 (First Offenders/Alternatives to Incarceration) to the U.S.S.G.

In the interest of furthering the goals of the Sentencing Reform Act of 1984, specifically consistency between offenses and sentences, I support the addition of a category of literal "first offenders." As is stands currently, the forceful conflation of those who have no prior convictions with those who do leads to an imbalance in sentencing; that is, it over-penalizes those who are truly people with no criminal history.

While, under Part A, both Option 1 and Option2 in 4c1.1 improve the fairness of first-offender sentencing, Option 2 is preferable. A larger reduction in level for those with already relatively low levels better and more thoughtfully furthers the idea that sentencing should be adjusted to fit the seriousness of the offense.

Part B s consolidation of Zones reflects a conceptual step forward; discretionary probation in place of extended imprisonments is often the better choice for offenders, particularly those with offense levels as low as Zone B and Zone C. I fully support eliminating Zone C by folding it into Zone B and thereby allowing Zone B s probation substitution to be applied to offenders who would have fallen into Zone C. I would support, as the Issues for Comment consider, a Zone B that applies to all offenses, without additional categorization, because the further breakdown would be redundant. Offense levels already serve to reconcile sentencing with severity of offense; singling our offenses (such as white-collar offenders, to adhere to the example provided in the Issues) expressly works against the goal of consistency.

Finally and crucially, I support making all portions of the amendment retroactive. Sentencing guidelines must apply evenly across the board, to future offenders and t hose serving time, as a matter of equity.

Thank you for proposing the 2017 amendment and for considering public comments. The anticipated benefits of Amendment 1 are vast for current prisoners and their families, as well as for future first and low-level offenders.

Respectfully,

Firas

These comments are directed to proposed changes to Sections 4A1.2(k) and 4A1.3 and Section 3E1.1.

Although the sentencing guidelines are advisory, courts and lawyers rely on them heavily. The guidelines are already overly complicated and, in my opinion, they place too much emphasis on the length of a prior sentence rather than the conduct for which a defendant was convicted. Sentencing across the fifty states is highly variable. Someone like Brock Turner (Stanford swimmer who sexually assaulted a woman behind a dumpster) serves a 3 month sentence in California while someone in Florida could easily have received 15 years for the same conduct. Some states have "truth in sentencing" and require inmates to serve eighty-five percent of their sentences while other states still have parole and require much less time be served. Why turn sentencings into long drawn out mini-trials focused on why someone was released early for a crime committed all the way across the country? This would exponentially increase the burdens on prosecutors to seek out the most minute bits of information from a prior conviction to present to the court. Does it really matter whether a shortened sentence was the result of a state budget crunch versus a clerical error or a lenient judge who grants a sentence reduction? Alternately, if a "hanging" judge gives someone a harsh sentence for a fairly minor offense, why should they be punished more harshly? What should really matter are the facts of the case which are much more easily discernible and provable.

Changing the way sentences are counted when there is a revocation is the best way to underrepresent an offender's criminal history category. It is more likely that such a sentence, which then extends into the fifteen year window, was the result of a fairly serious offense, a crime of violence or a crime spree. This proposed change will further narrow the definition of a career offender to only people who commit qualifying offenses and serve short sentences. A person who committed a robbery and a rape or an aggravated battery, then violated their probation, parole or other form of release, should be a career offender when they are charged with a qualifying federal crime within fifteen years of their release from any previous sentence, not just the original sentence of incarceration. The guidelines presently account for these situations. The proposed changes would make harsh sentences for repeat violent offenders an exception (necessitating a motion for upward departure) rather than the rule.

Concerning the proposed change to Section 3E1.1, are a great number of defendants really being denied the two-point reduction after making a non-frivolous objection to relevant conduct? If a defendant makes demonstrably false denials and wastes the time of the Court and other participants they should not be eligible to claim the benefits of accepting responsibility. Hearings on some of these issues can take up almost as much time and resources as a short trial. It is one thing for a defendant to argue a fairly debatable issue. It is quite another to clog up the system with dozens of objections that have no chance of being sustained, simply because a lawyer can't stand up to a difficult client. Should defendants who enter into factual stipulations be able to challenge those stipulations at sentencing with no consequence? That is the ultimate question. If the answer is no, I don't believe the language should be changed.

As a citizen and a 15 year practitioner of criminal law I do not support the proposed changes.

Thank You,

Anita White

Roxanne Boling

Re: Support for the proposed 2017 "First Offenders / Alternatives to Incarceration" Amendment to the U.S.S.G.

Date: February 11, 2017

Dear United States Sentencing Commission:

I support the proposed 2017 amendment to the Federal Sentencing Guidelines that would amend the Criminal History Guideline to "provide lower guideline ranges for first offenders generally and increase the availability of alternatives to incarceration for [them] at the lower levels of the Sentencing Table" (First Offenders / Alternatives to Incarceration).

Currently, people with no criminal history points are treated the same as people with one criminal history point--both are placed in Criminal History Category I for sentencing calculation purposes. Thus creating an unfair and unbalanced sentencing guideline range and ultimately leading to the over-sentencing of people with no prior convictions or criminal history. This over-sentencing helps lead to the current over-crowding of our Federal Prisons and an increased burden on the U.S. taxpayer.

I support a 2-Level reduction under the proposed Criminal History Guideline that would be created for First Offenders. I also support making the proposed "First Offender" Criminal History Guideline retroactive in order to immediately correct the currently unfair sentence of all "First Offenders."

In addition to this support of the "First Offender" Criminal History Guideline Amendment, I support the proposed recommendation for Alternatives to Incarceration.

I feel strongly that the proposed "First Offender / Alternatives to Incarceration" amendment meets the mandate to the United States Sentencing Commission to see that Federal sentences in the United States are carried out fairly, protects the citizens of the United States, and reduces the population of the Federal Bureau of Prisons.

I look forward to retroactive approval of the proposed "First Offender / Alternatives to Incarceration" amendment to the Criminal History Guidelines this year and future amendments to improve the over-sentencing/incarceration of non-violent offenders in the United States.

Respectfully,

Roxanne Boling