FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

Chair: Marjorie Meyers Phone: 713.718.4600

November 6, 2017

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

Re: Reply Public Comment on Proposed 2017 Holdover Amendments

Dear Judge Pryor:

Defenders are pleased to have this opportunity to reply to issues raised in the original comment period for the proposed 2017 holdover amendments.[1]

I. Proposed Amendment #1: Bipartisan Budget Act

The comment submitted to the Commission[2] contains no evidence that the current guidelines are inadequate to address the 10-year statutory maximum sentence for a subgroup of people convicted of violating the three statutes at issue.[3] Instead, the Department of Justice (DOJ) turns to a hypothetical "Defendant X" to assert the guidelines are too low,[4] but omits the Chapter Three upward adjustment it later claims would apply to "most defendants" who would fall in the subgroup of people identified in the Bipartisan Budget Act.[5] And in the only named case in the

[1] 82 Fed. Reg. 40,651 (Aug. 25, 2017).

[2] October 2017 Public Comment Received on Proposed Amendments in Response to 82 FR 40661 (listing comment by Department of Justice; Social Security Administration, Office of the Inspector General; Federal Public and Community Defenders; Practitioners Advisory Group; Probation Officers Advisory Group), https://www.ussc.gov/policymaking/public-comment/public-comment-october-10-2017.

[3] 42 U.S.C. §§ 408, 1011, & 1383a.

[4] Letter from Zachary C. Bolitho, Counsel to the Deputy Attorney General & Department of Justice *Ex Officio*, U.S. Sentencing Comm'n, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 4 (Oct. 10, 2017) (*DOJ Holdover Comment*).

[5] *Id.* at 4, 6.

October letter from the Social Security Administration Office of the Inspector General (SSA OIG),[6] the defendant was not convicted of any of the statutes at issue, and the government agreed to a within guideline sentence.[7]

Instead of relying on evidence, DOJ seeks to support its preference for a 4-level enhancement,[8] and a floor of 14,[9] by pointing to three specific offense characteristics (SOCs) in §2B1.1,[10] all three of which were the product of congressional directives.[11] By pointing to these SOCs, and ignoring others, DOJ reveals how added complexity makes it challenging, if not impossible, to ensure proportionality within a single guideline, let alone across the manual.[12] For example, DOJ points to the 4-level enhancement at §2B1.1(b)(8)(B),[13] but fails to note it is a tiered enhancement, and that the defendant's status as an employee is really a 2-level enhancement above the 2 levels that attach for any offense involving "conduct described in 18 U.S.C. § 670." Nor does DOJ even mention §2B1.1(b)(12), which provides a 2-level enhancement, and a floor of 12, for "conduct described in 18 U.S.C. § 1040 [fraud in connection with major disaster or

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[6] Letter from Gale Stallworth Stone, Acting Inspector General, Social Security Administration Office of the Inspector General, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2 n.7 (Oct. 6, 2017) (referencing Luis Escabi-Perez) (*SSA OIG Holdover Comment*).

[7] *See United States v. Escabi-Perez*, Nos. 15-039, 15-040, 15-041, 15-045 (D.P.R.), Plea Agreement, Dkt. No. 30 (filed July 29, 2015) at 9. Cases named in earlier submissions by SSA OIG similarly provide no evidence that the guidelines need to be complicated. As Defenders noted, of the individuals named by the SSA OIG, only three were convicted under the statutes at issue, and in at least two of those cases the government recommended a sentence within the guidelines. *See* Letter from Marjorie Meyers Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 12 (July 25, 2016).

[8] *DOJ Holdover Comment*, at 5.

[9] *Id.* at 6.

[10] *Id.* at 5.

[11] *See* USSG App. C, Amend. 772, Reason for Amendment (Nov. 1, 2013); *Id.* at Amend. 654, Reason for Amendment (Nov. 1, 2003); *Id.* at Amend. 647, Reason for Amendment (Jan. 25, 2003). This highlights the problem of "factor creep," and illustrates why the Commission should resist requests to further complicate the guidelines without evidence that additional complexity is necessary to serve the purposes of sentencing. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

[12] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 4 (Oct. 10, 2017) (providing examples showing that a floor of 12 here is disproportionately high compared with other guidelines) (*Defender Holdover Comment*).

[13] *DOJ Holdover Comment*, at 5 & n.10.

emergency benefits]," where § 1040 sets a statutory maximum of 30 years. Moreover, none of the 4-level provisions the government picks as comparisons contain floors.[14]

Finally, no evidence supports that further complicating the guidelines through the addition of a 20th SOC to §2B1.1 will deter individuals from committing these offenses.[15] Research shows that "knowledge of sanction regimes is poor."[16] "[D]ecisions to refrain from crime are based on the mere knowledge that the behavior is legally prohibited or for other nonlegal considerations such as morality or fear of social sanctions."[17] In addition, "*certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent."[18]

Absent evidence that it is necessary to serve the purposes of sentencing, Defenders urge the Commission not to further complicate the guidelines. If, however, the Commission feels compelled to change the guidelines, Defenders urge the Commission to keep it simple and, as the Commission suggested in the issue 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."[19] If the Commission feels compelled to add the 20th SOC, 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.

II. Proposed Amendment #2: Tribal Issues

The range of comment on this proposed amendment reveals the complex issues associated with considering tribal convictions at federal sentencing.[20] Because of this complexity, Defenders

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[14] *See* §2B1.1(b)(8)(B), (b)(18)(a)(ii), and (b)(19)(A)-(B).

[15] *See, e.g.*, *DOJ Holdover Comment*, at 5 ("the Department believes an enhancement will help ensure that the penalties are sufficient to deter fraud and abuse").

[16] Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 204 (2013).

[17] *Id.* And even for those "for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration." *Id.*

[18] *Id.* at 201-202.

[19] As Defenders have noted, the Commission has taken this approach in other guidelines. *See Defender Holdover Comment*, at 3.

[20] October 2017 Public Comment Received on Proposed Amendments in Response to 82 FR 40661 (listing comment by Department of Justice; Federal Public and Community Defenders; Practitioners Advisory Group; Probation Officers Advisory Group; Tribal Issues Advisory Group; Victims Advisory

support the Commission's proposed amendment, which is based on recommendations from the Tribal Issues Advisory Group (TIAG).[21] Nothing submitted to the Commission during the initial comment period compels a different course. The submitted comment shows wide support for the Commission's proposal, based on the TIAG's recommendations, to address tribal convictions at federal sentencing as a possible basis for departure.[22]

Most of the disagreement in the submitted comment centers on the fifth factor in a list of multiple factors courts may consider in "determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate."[23] The fifth factor indicates a court may consider whether "[a]t 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."[24] While the fifth factor draws

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Group; Kalispel Tribe of Indians; Navajo Nation; Neah Bay Public Safety, Makah Tribe; Oneida Indian Nation; Swinomish Indian Tribal Community), https://www.ussc.gov/policymaking/public-comment/public-comment-october-10-2017.

[21] *Defender Holdover Comment*, at 5-6.

[22] *See, e.g.*, *DOJ Holdover Comment*, at 7-8 (supporting the "first four factors" of the proposed "five non-exclusive factors that a court may consider when deciding whether to grant an upward departure"); Letter from Ronald H. Levine, Chair & Knut S. Johnson, Vice Chair, Practitioners Advisory Group, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, Attachment at 6 (Oct. 10, 2017) (supporting the "Commission's recognition that tribal court convictions should not be assigned criminal history points" and "the amendment of § 4A1.3, as recommended by the TIAG, to provide guidance and a more structured framework"); Letter from Probation Officers Advisory Group, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2 (Sept. 28, 2017) (agreeing that "convictions should not be assessed criminal history points" and "concur[ring] with the proposed commentary" as to the first four factors) (*POAG Holdover Comment*); Letter from the Honorable Ralph R. Erickson, Chair, Tribal Issues Advisory Group, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2 (Oct. 10, 2017) (*TIAG Holdover Comment*); Letter from Glen Nenema, Chairman, Kalispel Tribe of Indians, to Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 1 (Oct. 10, 2017) (supporting "leaving tribal court convictions out of the base criminal history calculation, and instead consider[ing] tribal court convictions for a potential upward departure") (*Kalispel Holdover Comment*); Letter from the Navajo Nation, to the U.S. Sentencing Comm'n, at 1-2 (Oct. 10, 2017) (supporting "the use of tribal convictions in upward departures in federal sentencing" and describing the proposed amendment to the commentary as "a judicious approach considering the great variety of tribal court systems and procedures") (*Navajo Holdover Comment*); Letter from Jasper Bruner, Chief of Police, Neah Bay Public Safety for the Makah Tribe, to the U. S. Sentencing Comm'n, at 1 (Oct. 2, 2017) (indicating support for tribal convictions being "a consideration for upward departures"); Letter from the Honorable Robert G. Hurlbutt, Court of the Oneida Indian Nation, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 1 (Oct. 10, 2017) (indicating "the overall approach of the proposed amendment is prudent") (*Oneida Holdover Comment*).

[23] 82 Fed. Reg. 40,651, 40655 (Aug. 25, 2017).

[24] *Id.*

objections from DOJ and POAG,[25] the idea of giving tribes a voice in the treatment of tribal convictions at federal sentencing garners support from tribes.[26] Indeed, one tribe proposes an even larger role for this factor, giving the tribes veto power over the use of tribal convictions as a basis for upward departures where a tribe has "formally expressed a desire that convictions from its courts should not be counted for purposes of computing criminal history pursuant to the Guidelines Manual."[27]

DOJ takes issue with the fifth factor in this non-exhaustive list, asserting that "unwarranted disparities seem inevitable."[28] But with or without the fifth factor, "[s]ome tribes may rightfully deny access to information concerning tribal court convictions" and others will "utilize the Tribal Access Program (TAP) to enter tribal convictions into the National Crime Information Center database."[29] As the tribes note, unwarranted disparity is inherent in considering tribal convictions at all.[30]

To address the practical difficulties of implementing the fifth factor, Defenders urge the Commission to consider the TIAG's comment, which includes proposed refinements.[31]

In light of the submitted comment, the Commission's proposed amendment, based on the TIAG's recommendations, still seems like a workable approach to a complicated situation.

III. Proposed Amendment #3: First Offenders / Alternatives to Incarceration

Defenders are disappointed that the Department of Justice (DOJ) and the National Association of Assistant United Sates Attorneys (NAAUSA) are unwilling to support amendments to the

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[25] *See DOJ Holdover Comment*, at 8-9; *POAG Holdover Comment*, at 2.

[26] *See Navajo Holdover Comment*, at 3; *Oneida Holdover Comment*, at 2.

[27] *Oneida Holdover Comment*, at 2

[28] *DOJ Holdover Comment*, at 9.

[29] Letter from M. Brian Cladoosby, Chairman, Swinomish Indian Senate, to the U.S. Sentencing Comm'n, at 1 (Oct. 9, 2017)

[30] *Id.* at 1-2 (objecting to proposed amendment on basis that "[s]ome tribes may rightfully deny access to information concerning tribal court convictions" and thus there is the "potential for disparate sentencing between tribal member defendants," and concluding that "until such time as the sentencing court has access to *all* tribal members' criminal history from *all* tribal jurisdictions, the consideration of these convictions for upward departure at the sentencing is improper"); *Kalispel Holdover Comment*, at 4-5 ("While there is some concern this disparity may occur by including tribal court convictions at all, the use of such records in justifying an upward departure from the recommended sentencing range provides less of a risk than automatically including tribal court convictions in a base calculation.").

[31] *TIAG Holdover Comment*, at 4-5.

guidelines that would encourage courts to punish "first offenders" through means other than imprisonment. The Commission, however, should not be deterred because the prosecutors' objections are not based on meaningful legal analyses or empirical evidence.

Probation is punitive. DOJ ignores both federal statutory recognition of the appropriateness of probationary sentences,[32] and the reality that while sentences of incarceration are "qualitatively more severe than probationary sentences of equivalent terms," a non-incarceration sentence can be quite punitive.[33] Probation is a severe punishment: it places substantial restrictions on a person's liberty;[34] may require home detention, community confinement, and community service;[35] and places the person at risk of imprisonment for a minor technical violation.[36] And for "first offenders," a felony conviction by itself is enormously punitive given the significant collateral consequences of a conviction.[37] While collateral consequences are considered

[32] 18 U.S.C. § 3561(a) (authorizing sentences of probation unless the defendant was convicted of a Class A or B felony, probation was otherwise precluded, or the defendant is sentenced at the same time to a term of imprisonment).

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

[34] *Id*. *See also United States v. Walker*, 242 F. Supp. 3d 1269, 1294 (D. Utah 2017) (a longer term of probation and home confinement fulfills retributive purposes); *United States v. Dokmeci*, 2016 WL 915185, at *13 n.79 (E.D.N.Y. Mar. 9, 2016) ("[p]robation metes out significant punishment"); *United States v. Carson*, 560 F.3d 566, 591 (6th Cir. 2009) (rejecting government's challenge and finding that court's imposition of "three years of probation with six months of home confinement is not insignificant" even though guidelines recommend a 15-21 month term of imprisonment); *United States v. Bueno*, 549 F.3d 1176, 1182 (8th Cir. 2008) (affirming sentence of probation; district court observed that the defendant was "subject to house arrest during the entire five year period of probation"); *United States v. Pyles*, 272 F. App'x 258, 262 (4th Cir. 2008) (affirming sentence of 36 months probation for aiding and abetting the distribution of crack cocaine, noting that "probation, although less severe than incarceration, is not a 'get-out-of-jail free card'").

[35] *See* USSG §§5F1.1, 5F1.2, and 5F1.3.

[36] *See, e.g.*, USSG §7B1.3(a)(2) (court may revoke probation for a Grade C violation, which includes the least serious violations of a condition of supervision); *United States v. Kippers*, 685 F.3d 491, 499 (5th Cir. 2012) ("leniency at the original sentencing generally may justify a harsher revocation sentence"); *United States v. Chao Vang*, 789 F. Supp. 2d 1020, 1023 (E.D. Wis. 2011) (court's advice to defendant at sentencing when imposing 4-year probation term for conspiracy to distribute MDMA: "an offender revoked from probation may be sentenced to any term available originally, up to the statutory maximum; thus, probation is not to be taken lightly").

[37] *See* Sarah Berson, U.S. Dep't of Just., Nat'l Inst. of Just., *Beyond the Sentence-Understanding Collateral Consequences*, 272 Nat'l Inst. of Just. J. 24 (2013) (a conviction "brings with it a host of sanctions and disqualifications that can place an unanticipated burden on individuals trying to re-enter society and lead lives as productive citizens"); *Collateral Consequences Resource Center*, http://ccresourcecenter.org/about-the-collateral-consequences-resource-center; Council of State Gov'ts, *Nat'l Inventory of Collateral Consequences*, https://niccc.csgjusticecenter.org/.

"invisible" punishment because they are not announced at sentencing, they are nonetheless relevant to the overall purposes of sentencing because they increase the importance of educational, vocational, and correctional treatment,[38] which are better served through alternatives to incarceration than imprisonment.

Alternatives to incarceration serve the purposes of sentencing. Contrary to DOJ and NAAUSA claims,[39] deterrence, just punishment, and the need to promote respect for the law are reasons to encourage alternatives to incarceration. Neither DOJ nor NAAUSA provide any empirical data to support their position and they ignore the literature on deterrence and other evidence on what kinds of sentences provide just punishment and promote respect for the law. In previous comments, Defenders have discussed at length the current empirical data that sentence length has, at most, a marginal deterrent effect.[40] As to just punishment and respect for the law, the Commission should consider society's views as to appropriate penalties.[41] Public opinion surveys show society supports rehabilitation and alternatives over imprisonment.[42] Moreover,

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[38] 18 U.S.C. § 3553(a)(1)(D).

[39] *DOJ Holdover Comment*, at 10-13; Letter from Lawrence Leiser, President, Nat'l Assoc. of Ass'n of Assistant U.S. Attorneys, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2, 3 (Oct. 10, 2017) (*NAAUSA Holdover Comment*).

[40] *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2-7 (Oct. 26, 2017). *See also* Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony* (June 8, 2017) (discussing findings that increases in punishment have no deterrent effect or "that any effects found are too small and contingent on particular conditions to have policy relevance"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981749.

The available evidence also repudiates DOJ's claim that providing alternatives to incarceration for "first offenders" convicted of tax fraud will be "insufficient to provide even a modicum of deterrence." *DOJ Holdover Comment*, at 13. The Commission's own research shows sentence length is not connected to recidivism. Individuals sentenced to probation (35.1%) had lower rearrest rates than those sentenced to imprisonment (52.5%), and individuals convicted of fraud had the lowest rates (34.2%). USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 22, 20 (2016). The rate of federal prosecutions for tax fraud also shows that DOJ does not adhere to the science of deterrence. As the Commission is well aware, certainty of punishment is far more likely to deter crime than the length of a sentence. Yet, in FY 2014, tax fraud offenses accounted for only 1.1% of the federal caseload. USSC, *Quick Facts: Tax Fraud Offenses* (2014). That the government sponsored departures for reasons other than substantial assistance in six to ten percent of those cases, *id*., shows that DOJ's claim that sentence length is a necessary deterrent effect is just an excuse for prosecutors to want to maintain control over the sentence.

[41] The Senate Report of the Sentencing Reform Act explained that "just punishment" is connected to the public's standpoint. S. Rep. No. 98-225, 98th Cong., at 294 (1983).

[42] *See, e.g.*, National Institute of Corrections, *Myths and Facts: Why Incarceration is Not the Best Way to Keep Communities Safe* 8 (2016) (national surveys show that a majority of the American public favors

Congress made clear that various sentencing options, including probation, could achieve the multiple objectives of sentencing.[43]

Straw Purchasers. DOJ's and NAAUSA's claims about "straw purchasers" is "especially problematic."[44] First, the number of cases at issue is small. In FY 2016, only 23 individuals with 0 criminal history points were sentenced under §2K2.1(a)(6)(C).[45] Second, Commission data shows the guideline range for straw purchasers is often considered too high. Sixty-nine and one-half percent were sentenced below the guideline range, with 30.4% receiving a government-sponsored below range sentence.[46] If anything, the evidence supports the appropriateness of alternatives for certain straw purchasers. It also should cause the Commission to reconsider

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alternatives to incarceration), https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf; Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victim's Views on Safety and Justice* 5 (2016) ("By a margin of 3 to 1 victims prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service"), https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf; Pew Charitable Trusts, *Nat'l Survey Key Findings-Federal Sentencing & Prisons* 1 (Feb. 2016) (61% of voters believe that federal prisons house too many people convicted of dealing or transporting drugs), http://www.pewtrusts.org/~/media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf.

[43] S. Rep. No. 98-225, at 261. Courts that believe punishment can send a message of general deterrence also have acknowledged that a lengthy term of imprisonment is not the only option. *See United States v. Musgrave*, 647 F. App'x. 529 (6th Cir. 2016) (rejecting government argument that a 1-day sentence of imprisonment, 5 years of supervised release with 2 years of home confinement in a white collar fraud case did not serve purpose of general deterrence).

[44] *DOJ Holdover Comment*, at 12-13; *NAAUSA Holdover Comment*, at 2.

[45] USSC, *FY 2016 Monitoring Dataset*.

[46] *Id*. In FY 2016, 166 defendants with 0 criminal history points were sentenced under §2K2.1(a)(7); 54.2% received below guideline sentences, with 29.5% government-sponsored. USSC, *FY 2016 Monitoring Dataset*. Our polling of Federal Defenders also revealed several cases of women whose spouse or significant other abused them and forced them into purchasing a firearm. For example, a 69-year-old woman with no criminal history had been in a twenty-year emotionally and physically abusive marriage. The husband, a convicted felon, took her to a store to buy a gun. He then shot his daughter's boyfriend. Even though her guideline range was 12-18 months, the court imposed one year of probation and twenty hours of community service. In another case, both the prosecutor and defender recommended a sentence of probation for a woman who bought a firearm for her husband. She had filed for a divorce against him because he would choke her to the point of unconsciousness and drag her through the house by her hair. He would not let her and her children move out, threating to harm her and her extended family. He continued to abuse her and eventually told her she could move out if she bought him a gun.

guidelines that recommend the exact same sentence for a straw purchaser convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A), as for a person prohibited from possessing the firearm.[47]

In addition, contrary to NAAUSA's claim,[48] an individual who provides dozens of firearms to a single person or multiple persons convicted of an offense considered a felony under federal law would have a guideline range greater than 12-18 months imprisonment. The BOL would be 14, and the offense level would increase for the number of firearms.[49] Even with a three-level downward departure for acceptance of responsibility, providing 8-24 firearms would result in a range of 18-24 months. And if the individual sells even more firearms or a specific type of firearm to a person considered a "felon" under federal law,[50]the guidelines would be even higher.

Imprisonment for "First Offenders" can be too severe and disproportionate. DOJ's claim that the sentences imposed on "first offenders" are not too long and likely under 24 months, ignores the problems with proportionate sentencing.[51] In FY 2016, 34% of defendants with 0 criminal history were convicted of drug trafficking. The median sentence length was 32 months – just 1.5 months below manslaughter,[52] and 8 months longer than the median sentence the Commission reported as the length of imprisonment for all persons in Criminal History Category I.[53] The data plainly shows that the sentences imposed under the current guidelines are often too severe. Imprisonment also has significant negative consequences for the imprisoned person, family, and society.[54] Accordingly, the Commission should amend the guidelines to encourage judges to impose probation for most "first offenders."[55]

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[47] USSG §2K2.1(a)(6)(A).

[48] *NAAUSA Holdover Comment*, at 2.

[49] USSG §2K2.1(b)(1) (offense level increase of 2 to 10 depending on number of firearms).

[50] USSG §2K2.1(a)(3) (base offense level of 22 for specified firearms).

[51] *DOJ Holdover Comment*, at 14.

[52] USSC, *FY 2016 Monitoring Dataset* (unlike the Commission's Sourcebook analysis, which does not count probationary sentences when reporting on the length of a sentence of imprisonment, this data analysis counts probation as 0 months of imprisonment).

[53] USSC, *2016 Sourcebook of Federal Sentencing Statistics* tbl. 14 (2016).

[54] *See, e.g.*, United Nations Office on Drugs and Crime, *Why Promote Prison Reform* (prison has significant impact individuals and families living in poverty, public health, relationships, and social cohesion), https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html; National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Jeremy Travis et al. eds., 2014) ("Many aspects of prison life-including material deprivations; restricted movement and liberty; a lack of meaningful activity; a nearly total absence of personal privacy; and high levels of interpersonal uncertainty, danger, and fear-expose

Federal Offenses as Crimes of Violence. DOJ and NAAUSA assert that if the Commission chooses to incorporate the §4B1.2 definition of "crime of violence" in §5C1.1(g) that it will generate more litigation.[56] While Defenders believe the better solution is to exclude from the presumption of probation "first offenders" whose instant offense of conviction resulted in serious bodily injury or whose offense involved substantial harm to the victim, the "crime of violence" option will not complicate the guidelines. Whether a particular federal offense meets the current definition of a "crime of violence" already has been resolved in many cases.[57] In addition, very few "first offenders" whose instant offense might be considered a crime of violence would qualify for a presumption of probation because they would not fall within Zones A or B of the Sentencing Table.[58] And, the most prevalent offense of conviction for persons with 0 criminal history points plainly do not qualify as a crime of violence – e.g., drug trafficking, fraud, and immigration.[59] Hence, the risk of the proposed amendment increasing litigation is quite low.

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prisoners to powerful psychological stressors that can adversely impact their emotional well-being."); *id*. at 193 (prison can have criminogenic effects that "increase the probability of engaging in future crime"); *id*. at 338-339 ("incarceration is strongly correlated with negative social and economic outcomes," including "very low earnings, high rates of unemployment;" and "[f]amily instability").

For persons undergoing treatment and who are able to continue employment before sentencing, imprisonment can have devastating consequences and disrupt rather than promote rehabilitation.

[55] Among other changes that will encourage alternatives to incarceration for offenses such as drug trafficking, the Commission should move away from its original decision to depart from the directive encouraging probationary sentences for "first offenders" when it "unilaterally declared in 1987 that every theft, tax evasion, antitrust, insider trading, fraud, and embezzlement case is 'otherwise serious.'" *United States v. Dokmeci*, 2016 WL 915185, at *13 (E.D.N.Y. Mar. 9, 2016) (noting "Commission's gross departure from Congress's directive encouraging probation").

[56] *DOJ Holdover Comment*, at 14-15.

[57] *See, e.g.*, *United States v. O'Connor*, 2017 WL 4872571 (10th Cir. Oct. 30, 2017) (Hobbs Act robbery is not a crime of violence under §4B1.2(a)(1)); *United States v. Claret*, 2017 WL 4899728 (11th Cir. Oct. 31, 2017) (noting that the elements clause in §4B1.2)(a)(1) "remained unchanged [in the August 2016 amendment] and thus crimes of violence qualifying under the elements clause before the amendment continue to qualify under the clause after the amendment"); *United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017) (finding that bank robbery qualifies as a crime of violence); *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017) (same); *United States v. Evans*, 848 F.3d 242 (4th Cir. 2016) (federal carjacking qualifies as a "crime of violence" under § 924(c) force clause).

[58] *See, e.g.*, USSG §2A1.1 (First Degree Murder) (BOL 43); §2A1.2 (Second Degree Murder) (BOL 38); §2A1.3 (Voluntary Manslaughter) (BOL 29); §2A2.2 (Aggravated Assault) (BOL 14 with numerous specific offense characteristics that are frequently applied to increase the guideline range – e.g., 3- or 5-level increase for simple or serious bodily injury); §2A3.1 (Criminal Sexual Abuse) (BOL 38 or 30); §2A4.1 (Kidnapping) (BOL 32); §2B3.1 (Robbery) (BOL 20); §2B3.2 (Extortion) (BOL 18); §2K2.1 (firearm offense involving a firearm described in § 5845(a)) (BOL 18, 20).

[59] USSC, *FY 2016 Monitoring Dataset*.

IV. Proposed Amendment #4: Acceptance of Responsibility

DOJ, NAAUSA, the Probation Officers Advisory Group, and the Victims Advisory Group provide the Commission with inaccurate information in an effort to discourage the Commission from making appropriate amendments to §3E1.1 that would not punish a defendant for an unsuccessful challenge to relevant conduct.

Lack of Uniformity in Meaning of "Frivolously Contest." DOJ suggests that the Commission's failure to identify a "circuit split regarding the language currently found in Application Note 1 to §3E1.1" is a reason not to pursue the amendment.[60] But, as Defenders explained at length, courts have applied the current rule in radically different ways and have different interpretations of what it means to "frivolously contest" relevant conduct.[61] For example, some Circuits rule that any unsuccessful challenge to relevant conduct may be considered frivolous whereas others take a more refined approach by focusing on whether the challenge "lacks an arguable basis in law or fact" or is "based on an indisputably meritless legal theory."[62] Option 2 of the Commission's proposed amendment acknowledges the difference in how courts interpret the meaning of "frivolously contest."

Concerns about increased litigation are ill-founded and ignore inconsistent application of the guidelines. DOJ's and NAAUSA's professed concern about additional litigation if the Commission amends §3E1.1[63] does not acknowledge how attorneys in some districts with significant caseloads are already free to challenge relevant conduct without risking a client not receiving a reduction for acceptance of responsibility. For example, in the District of Arizona, defense counsel routinely challenge relevant conduct, sometimes with extended hearings, without suggestion that the defendant should be denied a reduction under §3E1.1. Because some other courts take the opposite approach (e.g., N.D. Ind.) and punish a defendant for challenging relevant conduct, Defenders requested that the Commission amend the guidelines. Ignoring those differences runs contrary to the Commission's goal of promoting uniform application of the guidelines.

The comment about the supposed risk of additional litigation also disregards that the acceptance of responsibility provision is a trial penalty, which operates to reduce litigation at the trial stage

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[60] *DOJ Holdover Comment*, at 17.

[61] Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 52, 55 (Feb. 20, 2017); *id*. at 25-27 (Oct. 10, 2017).

[62] *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)).

[63] *DOJ Holdover Comment*, at 17; *NAAUSA Holdover Comment*, at 3.

by providing incentives for a guilty plea.[64] That a defendant relieves the government of its burden of proof at trial is alone a sufficient basis for a sentencing reduction. The guidelines also reduce litigation by allowing a judge, based on a mere preponderance of evidence, to determine if the prosecutor has carried the burden of proving relevant conduct. It is fundamentally unfair to penalize a person for appropriate challenges to the reliability of information that prosecutors give to probation officers to support enhanced sentences.

Victims Will Not be Forced to Testify About Relevant Conduct. The suggestion that a change in in the amendment would force a victim to testify is misleading.[65] In districts where the defense does not risk losing the reduction for acceptance of responsibility when relevant conduct is litigated, long-time-Defenders report that they have rarely seen victims testify about relevant conduct. Moreover, because the government need only prove relevant conduct by a preponderance of the evidence, and can use hearsay evidence, the government can choose not to present the testimony of a victim. A recent case from the Middle District of Alabama demonstrates this point, ruling that "the Government is not required to obtain statements or testimony from all identify-theft victims since relevant conduct under the Sentencing Guidelines need only be proven by preponderance of the evidence."[66] And even if challenges to relevant conduct required victims of the offense to testify at a sentencing hearing, the position of DOJ is at odds with their practice of having victims from past offenses testify to support upward departures.[67]

[64] The acceptance of responsibility provision was never "a foregone conclusion" when the guidelines were first promulgated. Indeed, "the Commissioners were concerned that a reduction in penalty levels based on a guilty plea could be deemed an unconstitutional 'trial penalty' for those defendants who did not plead guilty." Brent Newton & Dawinder Sidhu, *The History of the Original United States Sentencing Commission*, 1985-1987, 45 Hofstra L. Rev. 1167, 1282 (2017).

[65] *DOJ Holdover Comment*, at 18; Letter from T. Michael Andrews, Chair, Victims Advisory Group, to Chairman Pryor and Members of the Commission, at 2 (Sept. 29, 2017).

[66] *Young v. United States*, 2017 WL 939017, at *4 (M.D. Ala. Jan. 31, 2017).

[67] *See, e.g.*, *United States v. Spiwak*, 377 F. App'x 319, 323 (4th Cir. 2010) (finding no error in government presenting testimony of victim of prior sexual abuse crime to support upward departure in child pornography possession case even though witness did not fall within the definition of a victim under the Crime Victims Rights Act, 18 U.S.C. § 3771).

V. Conclusion

We appreciate this opportunity to reply to comments submitted by others during the initial comment period. And, as always, 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
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary C. Bolitho, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel