Public Comment

Proposed Amendments

2007

Open Letter to Congress
"Time to Mend the 'Crack' in Justice"

February 16, 2006

The Honorable Arlen Specter,
Chairman
The Honorable Patrick Leahy,
Ranking Member
Committee on the Judiciary
Unites States Senate

The Honorable James Sensenbrenner, Jr.,
Chairman
The Honorable John Conyers, Jr.,
Ranking Member
Committee on the Judiciary
United States House of Representatives

Dear Senators and Representatives:

This year marks the twentieth anniversary of the passage of the law mandating disparate punishment for crack and powder cocaine offenders. In 1986 Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine – powder and crack – and singled out crack cocaine for dramatically harsher punishment. In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine.

In what has come to be known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five- and ten-year mandatory minimum sentences. This sentencing scheme has had an enormous racially discriminatory impact, largely because of federal law enforcement's focus on inner city communities, resulting in blacks being disproportionately impacted by the facially neutral, yet unreasonably harsh, crack penalties.

In 1995 the bipartisan, independent U.S. Sentencing Commission transmitted to Congress recommendations that would equalize the penalties between crack and powder cocaine possession and distribution.[1] Although these recommendations were widely endorsed by a multitude of groups, including the American Bar Association, they were nevertheless rejected.[2] The Commission recently reported that revising this one sentencing rule would do more to reduce the sentencing gap between blacks and whites "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system."[3]

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[1] 60 Fed. Reg. 25074, amend. No. 5 (proposed May 1, 1995).
[2] CONG. REC. H10255-56 (daily ed. Oct. 18, 1995), H. Res. 237, 104th Cong.; CONG. REC. S14645-56 (daily ed. Sept. 29, 1995), S. 1254, 104th Cong.
[3] United States Sentencing Commission [USSC], Fifteen Years of Guidelines Sentencing (Nov. 2003), p. 132.

For twenty years the 100:1 ratio has punished low-level crack cocaine offenders, many with no previous criminal history, far more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. The Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and interstate crack sellers receive average sentences longer than international powder cocaine traffickers.[4] Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

We recognize that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analysis by the U.S. Sentencing Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.

The undersigned organizations agree with the expert Sentencing Commission's careful analysis that the present 100:1 quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing. Justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine. Aligning crack cocaine sentences with current powder cocaine sentences is the sound way to eliminate this unfair disparity.[5]

The twentieth anniversary of statutory crack penalties is the perfect time to revisit and finally correct the gross unfairness that has been the legacy of the 100:1 ratio. We call for hearings without delay, and the enactment of legislation consistent with the Sentencing Commission's 1995 recommendation that equalizes the quantity triggers and places the focus of federal cocaine drug enforcement on major traffickers, where it should be. We strongly urge that you not let this anniversary pass without fixing this injustice.

Thank you for your prompt attention to our concerns.

Sincerely,

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[4] U.S. SENTENCING COMM'N, 104th CONG, 2nd SESS., SPECIAL REPORT TO CONGRESS: COCAINE AND FED. SENTENCING POL'Y (1995) at 175-77 (Figures 10 & 11).

[5] Reducing the quantity threshold for powder cocaine to that of crack cocaine, is an option that was unanimously rejected by the Sentencing Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug "kingpins," but would lead to dramatically increased levels of federal incarceration, further burdening the federal system at a great cost to taxpayers.

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Peter Hayden
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National Conference of Black Lawyers

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National Legal Aid and
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Reverend Jesse Jackson
President and Founder
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Director of Civil and Human Rights
General Board of Church and Society
United Methodist Church

Kevin Judd
President
Washington Bar Association

Cc: Members, Senate Committee on the Judiciary
Members, House Committee on the Judiciary

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September 13, 2006

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No Comment Received for this Issue

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No Comment Received for this Issue

Issue No. 1(C) - Violence Against Women and Department of Justice Reauthorization Act of 2005

No Comment Received for this Issue

Issue No. 1(D) - Trafficking Victims Protection Reauthorization Act of 2005

No Comment Received for this Issue

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POSSIBLE PRIORITY ISSUES

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed priorities. Request for public comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with Rule 5.2 of its Rules of Practice and Procedure, the Commission is seeking comment on possible priority policy issues for the amendment cycle ending May 1, 2007.

DATE: Public comment should be received on or before September 1, 2006.

ADDRESS: Send comments to: United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention: Public Affairs-Priorities Comment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

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 sentencing 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 Commission provides this notice to identify tentative priorities for the amendment cycle ending May 1, 2007. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of the tentative priorities by the statutory deadline of May 1, 2007. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2007.

As so prefaced, the Commission has identified the following tentative priorities:

(1) implementation of crime legislation enacted during the 109th Congresses warranting a Commission response, including (A) the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181; (B) the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L.

109–177; (C) the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162; (D) the Trafficking Victims Protection Reauthorization of 2005, Pub. L. 109–164; (E) the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59; and (F) other legislation authorizing statutory penalties, creating new offenses, or pertaining to victims, that requires incorporation into the guidelines;

(2) continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on appropriate responses to United States v. Booker, including any appropriate guideline changes in light of the Commission's 2006 report to Congress, Final Report on the Impact of United States v. Booker on Federal Sentencing, and continuation of its analysis of post-Booker data, case law, and other feedback, including reasons for departures and variances stated by sentencing courts;

(3) continuation of its policy work regarding immigration offenses, specifically, offenses sentenced under §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and 2L1.2 (Unlawfully Entering or Remaining in the United States) and implementation of any immigration legislation that may be enacted;

(4) continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy, including holding a hearing on this issue and reevaluating the Commission's 2002 report to Congress, Cocaine and Federal Sentencing Policy;

(5) beginning of a guideline simplification effort to develop and consider possible options that might improve the overall effectiveness of the sentencing guidelines;

(6) continuation of its policy work, in light of the Commission's prior research on criminal history, to develop and consider possible options that might improve the operation of Chapter Four (Criminal History);

(7) continuation of its policy work to implement 28 U.S.C. § 994(t), specifically regarding the development of further commentary to §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons); and

(8) resolution of a number of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

The Commission hereby gives notice that it is seeking comment on these tentative priorities and on any other issues that interested persons believe the Commission should address during the amendment cycle ending May 1, 2007, including short- and long-term research issues. To the extent practicable, comments submitted on such issues should include the following: (1) a statement of the issue, including scope and manner of study, particular problem areas and possible solutions, and any other matters relevant to a proposed priority; (2) citations to applicable sentencing guidelines, statutes, case law, and constitutional provisions; and (3) a

direct and concise statement of why the Commission should make the issue a priority.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Ricardo H. Hinojosa,

Chair

Issue No. 1(A) - Stop Counterfeiting in Manufactured Goods Act

No Comment Received for this Issue

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No Comment Received for this Issue

Issue No. 1(E) - Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

No Comment Received for this Issue

Issue No. 1(F) - Other Legislation Requiring Incorporation into the Guidelines

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

The U.S. Department of Justice (DOJ) believes that the current version of the Guidelines Manual is "sufficiently calibrated to guide judicial decision making" and that the Commission should not make widespread amendments right now. The DOJ asserts that "until the courts and Congress make clearer the long term direction and legal parameters of federal sentencing policy, the Commission need not make fundamental changes to the Guidelines Manual." However, while the DOJ does not advocate for widespread change, it urges the Commission to treat implementation of the Adam Walsh Child Protection and Safety Act of 2006 and other new crime legislation as a priority for the current amendment cycle.

Issue No. 2 - *United States v. Booker*

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

The U.S. Department of Justice (DOJ) commends the Commission for all of its work in response to *United States v. Booker*, 543 U.S. 220 (2005), and especially for the Final Report on the Impact of *United States v. Booker* On Federal Sentencing ("the Report"). The DOJ points to the Report's analysis of "troubling trends" in sentencing, "where certain districts are experiencing substantially higher departure and variance rates – and other districts substantially lower rates – than the national average" as support for "the Department's legislative proposal to reestablish the mandatory nature of the federal sentencing guidelines through a minimum guidelines system." The DOJ believes it is crucial to prevent the further degradation of the federal sentencing system and looks forward to working with the Commission to ensure a system that embodies the uniformity and fairness established by the Sentencing Reform Act.

Practitioners' Advisory Group
Mark Flanagan and David Debold, Co-Chairs

The Practitioners' Advisory Group (PAG) believes that during the 2007 amendment cycle the Commission should carry out a comprehensive update of the manual which it states is now out of date to reflect the Supreme Court's decision in *Booker*. In its opinion, this would ensure that the Commission accurately accounts for the Court's holding rendering the guidelines advisory and requiring sentencing courts to consider all factors under Section 3553(a).

The PAG asserts that the manual's discussion of plea agreements provides an illustration of the need for revisions that account for *Booker*. In Chapter 6, for example, the PAG states that the manual cites the correct rule, but the wrong standard, for determining whether a court should accept a binding plea agreement under Rule 11(c)(1)(C). In subsections (b) and (c) of §6B1.2, the manual instructs that the court should only accept a sentencing recommendation or agreement if the recommended or specific sentence is within the guideline range or departs for justifiable reasons. The PAG explains that post-*Booker*, the sentencing court must now consider the full range of § 3553(a) factors in deciding whether or not a recommended or specific sentence is appropriate, not just the guidelines and the recognized guideline departures. Although unrelated to *Booker*, the PAG also suggests that the Commission take this opportunity to correct the cite to Rule 11 in sec. 1A1.1(4)(c) regarding plea agreements. The PAG recommends changing the prior reference to Rule 11 from Rule 11(e) to Rule 11(c) in order to reflect the amendment made in 2002.

Additionally, the PAG believes many other passages in the manual reflect the pre-*Booker* world of federal sentencing and therefore should be revised. These sections include discussions of the reliability of the fact-finding process, the due process implications of a preponderance standard of proof, and the continued force of the Supreme Court's decisions in *Witte* and *Watts*. However, the PAG argues that if the Commission takes this recommended step, it would strongly discourage adding language directing that the guidelines be given "substantial weight," based on the split in the circuits on whether a guidelines sentence is presumptively reasonable.

Issue No. 3 - Immigration Offenses

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

The U.S. Department of Justice (DOJ) believes that the current version of the Guidelines Manual is "sufficiently calibrated to guide judicial decision making" and that the Commission should not make widespread amendments right now. The DOJ asserts that "until the courts and Congress make clearer the long term direction and legal parameters of federal sentencing policy, the Commission need not make fundamental changes to the Guidelines Manual." However, while the DOJ does not advocate for widespread change, the agency does encourage the Commission to finish the work it has already begun on revising the immigration guidelines.

Federal Public and Community Defenders
Jon M. Sands, Chair, Federal Defender Sentencing Guidelines Committee
Amy Baron-Evans, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel

The Federal Public and Community Defenders (FPD) urges the Commission to reduce and rationalize sentences under the illegal re-entry guideline, maintaining that the §2L1.2 guideline is unduly severe, unsupported by research, not followed in a majority of applicable cases, and inconsistent with the goal of reducing disparity among similarly situated offenders. Citing Commission studies and case law, the FPD highlights one "tragic and irrational" sentence that resulted from a broadly-defined aggravated felony enhancement. It emphasizes that defendants in districts with fast track dispositions generally avoid the harsher sentences received by defendants in other districts.

The FPD reports that in 1991, the Commission sharply increased sentences under §2L1.2 with the 16-level "cliff" for re-entering or remaining after a conviction for an aggravated felony, defined initially as murder, drug trafficking, firearms trafficking, money laundering, and crimes of violence for which the term of imprisonment was at least five years. It also notes that in 1997, the Commission broadened the definition to any aggravated felony as defined in 8 U.S.C. §1101(a)(43), which swept in recent statutory amendments adding rape, sexual abuse of a minor, and any crime of violence for which the term of imprisonment was at least one year. The FPD observes that neither of these amendments were required by Congress, and believes that they were not supported by data or research.

In 2003, the Commission again extended the reach of the 16-level enhancement and complicated the sentencing process by defining certain aggravated felonies more broadly than in 8 U.S.C. § 1101(a)(43). The Commission also redefined "crime of violence" to include statutory rape where previously only "forcible sex offenses (including sexual abuse of a minor)" were included, and "clarified" that the enumerated "crimes of violence" were subject to the 16-level enhancement regardless of whether the offense had as an element the use, attempted use, or threatened use of physical force against the person of another. The FPD reminds the Commission that it did not provide a reason for this clarification.

The FPD asserts that the result of the Commission's amendments to the illegal re-entry guideline is that the guideline is not followed in the vast majority of cases because lesser sentences, meted out through fast track dispositions, are sufficient to satisfy sentencing purposes. However, the FPD notes that for those arrested or "found" in districts without fast track programs, the result is unwarranted severity and unwarranted disparity.

The FPD observes that in 1998, Commission researchers presented a paper finding that the government's use of fast track charge bargains and departures created unwarranted disparity in that shorter sentences were unavailable to all similarly situated offenders. Updated in 2002, the Commission's findings reported that the courts of appeals had ruled that departure to address the "inequity" was impermissible. However, the Commission made no official statement, took no action, and continued to report fast track dispositions along with defense- and judge-initiated downward departures.

In 2003, after the Protect Act was passed, the Commission eventually reported that at least 40% of non-substantial assistance departures in 2001 were initiated by the government, and that most of these were fast-track departures. The Commission concluded: "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders." In fact, it concludes, defendants can receive sentences double or more the average because they are among the 20% unlucky enough to be arrested or "found" in a district without a fast track program.

Issue No. 4 - Cocaine Sentencing Policy

Practitioners' Advisory Group
Mark Flanagan and David Debold, Co-Chairs

The Practitioners' Advisory Group (PAG) reminds the Commission that this year marks the 20-year anniversary of the death of Len Bias, the basketball star whose overdose on cocaine triggered the modern era of mandatory minimum sentencing for drug offenses. Bias' death influenced Congress to pass the Anti-Drug Abuse Act of 1986. This Act included harsh mandatory minimums for powder cocaine and even more severe penalties for crack cocaine, including five-year mandatory minimums for simple possession of five grams. The PAG further reminds the Commission that it used those minimums as reference points in the drug guideline so that the base offense levels and triggering quantities mirrored the crack cocaine penalty structure. The PAG argues that the mandatory minimums were meant to have targeted serious and high-level traffickers but that, in practice, the crack-to-powder ratio has had a far different impact, as the Commission pointed out in its 2004 Sourcebook which reported that half of all crack defendants were sentenced to the ten-year mandatory and nearly 30 percent more to the five-year mandatory minimum sentence that year. The PAG encourages the Commission to take this opportunity both to urge Congress to revisit the mandatory minimum sentence for crack cocaine and to propose a new crack cocaine guideline to Congress that better reflects the Commission's evaluation of an appropriate sentencing structure.

Open Society Policy Center
Nkechi Taifa, Senior Policy Analyst

The Open Society Policy Center (the Center) believes that a review of the federal sentencing policy concerning cocaine should remain a critical priority area for the Commission. The Center urges the Commission to reinstate its initial recommendations to Congress (May 1, 1995), which proposed: 1) the equalization of the penalty triggers between crack and powder cocaine possession and distribution; and, 2) harmonizing the mandatory minimum crack statutes with the proposed guideline amendments.

The Center recounts the Commission's history with respect to the sentencing guideline's 100:1 crack to powder cocaine ratio. The Center asks the Commission to consider a February 16, 2006 Open Letter to Congress, which cites more than fifty organizations' agreement with the Commission's 1995 analysis that "the present 100:1 quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing." The Center concludes by imploring the Commission to revisit its original 1995 recommendation in light of the statutory and guideline cocaine penalties' twentieth anniversary.

Issue No. 5 - Guideline Simplification

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

The U.S. Department of Justice (DOJ) believes it is inappropriate for the Commission to fundamentally change the Guidelines Manual at this time. However, the DOJ does support "the study of simplification to determine, over the next several years, the potential benefits of simplification, the statutory and technical barriers to simplification, as well as any negative ramifications of simplification." The DOJ adds that "statistical analyses of sentencing practices – including analyses of the application of individual aggravating and mitigating factors – should be a part of this study." The DOJ comments that a study of this nature "will help determine the feasibility of undertaking a simplification project in future amendment years and the possible scope of such a project."

U.S. Probation and Pretrial Services, Nashville, TN
Tim Searcy, Senior U.S. Probation Officer

SUSPO Searcy offers a possible solution to simplifying criminal history guideline calculations. In his experience, a lot of time is wasted in probation officers attempting to decipher local and state judgments that are, in his view, frequently silent or insufficient to make clear scoring decisions. Therefore, he suggests scoring all felony "crimes of violence" and "drug trafficking offenses" 3 points, using the same definitions currently at §4B1.2 for these terms. He further suggests scoring all other felonies 2 points, and all misdemeanor convictions 1 point. He believes this simplification would not only save time and resources, but also reduce sentence disparities across state and local jurisdictions.

Issue No. 6 - Criminal History

Practitioners' Advisory Group
Mark Flanagan and David Debold, Co-Chairs

I. CRIMINAL HISTORY CHAPTER REVIEW

The Practitioners' Advisory Group (PAG) believes the Commission's own extensive research on criminal history and recidivism, coupled with lessons learned from the field, warrant changes in the guideline provisions that relate to criminal history. Further, the PAG asserts that a thorough review of the Criminal History Chapter and related provisions is warranted so that the manual better accounts for offender characteristics that truly measure the risk of recidivism as well as the culpability of the defendant. In the meantime, the PAG urges the Commission to include the following two revisions in its next round of proposed amendments.

1. CERTAIN NON-CRIMINAL OR VIOLATION OFFENSES SHOULD NOT BE COUNTED

The PAG is particularly concerned that criminal history may be overstated through the inclusion of minor matters that do not serve the predictive or punitive functions of criminal history. It also appears, in its opinion, that variations in state and local sentencing practices with respect to minor offenses causes ambiguity and uncertainty in the application of the current criminal history guidelines. Further, the PAG argues that the counting of non-criminal and violation/minor offenses varies across federal judicial districts, creating more disparity in ways that were *not* intended by the Commission when it drafted §4A1.2(c)(1). Additionally, the PAG asserts that courts are misapplying and misinterpreting it in ways that create disparity and increase sentences for non-criminal acts that should be presumptively excluded from criminal history computations. Therefore, the PAG endorses the earlier recommendation of the Probation Officers' Advisory Group that the offenses listed in §4A1.2(c)(1) should be excluded regardless of the sentence imposed.

2. ADJUSTMENTS TO THE MANUAL FOR FIRST-TIME/NON-VIOLENT OFFENDERS

The PAG argues that criminal history also plays an important role in determining the sentence, including the availability of alternatives to incarceration, for first-time non-violent offenders. The PAG believes that the availability of these alternatives should be increased and that this is a matter of even greater priority now that the Bureau of Prisons no longer designates offenders to serve their sentences in a "community corrections" setting. While the PAG has previously suggested accomplishing this through an expansion of Zones B and C, particularly within criminal history category I of the sentencing table, it states the same goal could be achieved through other means, such as the creation of a new criminal history category 0.

The PAG opines that the Commission's mandate from the outset has been to ensure that the guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of

violence or an otherwise serious offense." In its view, the data the Commission has compiled support additional revisions to the manual in order to carry out this important statutory mandate.

II. CAREER OFFENDER GUIDELINE

The PAG states that the Commission promulgated the career offender guideline in response to the directive in 28 U.S.C. § 994(h) to provide for a sentence at or near the statutory maximum for certain offenses where the defendant has two or more prior felonies that were "crimes of violence" or qualifying controlled substance offenses. The PAG believes that the Commission should adjust the operation of this guideline to reduce the disproportionality it creates and to ensure that the most severe sanctions are reserved for those defendants who have the greatest degree of culpability and who pose the greatest danger to the community. To achieve these goals, the PAG recommends the following changes.

1. MODIFY THE DEFINITION OF "CRIME OF VIOLENCE"

The PAG argues that the courts have applied the career offender guideline in circumstances far afield from those Congress had in mind when it mandated a career offender provision, as a result of the overly broad definition of "crime of violence" as a predicate for career offender status. Because §4B1.2(a)(2) includes within the definition any offense that "otherwise involved conduct that presents a serious potential risk of physical injury to another," the PAG states that many courts have sentenced defendants at or near the statutory maximum where one or both of the predicate offenses was burglary of a garage or child neglect, for example, or some other crime that does not have as an element the use or threatened use of physical force. The Commission should modify the definition to reserve it for offenses that involve physical force or the threat of physical force against the person or property of another, in the PAG's view.

2. MODIFY DEFINITION OF "CONTROLLED SUBSTANCE OFFENSE"

The PAG opines that the definition of "controlled substance offenses" under the career offender guideline also fails to achieve proportional treatment of persons with prior drug convictions because it includes any defendant who was convicted of distributing or possession with intent to distribute any quantity of a controlled substance under a statute that carries a maximum potential penalty of more than one year. The guideline, it argues, does not take into account the vast differences in the seriousness of the prior conduct for two different defendants, one of whom has two prior sentences of probation for selling marijuana cigarettes and one of whom has multiple predicate convictions for distributing planeloads of cocaine, because it assigns them the same offense level and the same criminal history category.

Additionally, the PAG argues the problem is further aggravated by the fact that the definition reaches state misdemeanor offenses, because the guideline is triggered by the maximum prison term for the prior offense without regard for whether that offense is classified as a misdemeanor or a felony in the enacting jurisdiction.

In the PAG's opinion, this approach is inconsistent with the approach taken under other federal laws such as the Armed Career Criminal Act, and therefore causes different treatment of like

cases based solely on the government's charging decision. More troubling for the PAG, however, is the fact that this failure to account for the seriousness of the offense aggravates racial disparity in sentencing.

3. ACCOUNT FOR THE SERIOUSNESS OF THE INSTANT OFFENSE

Because the career offender guideline generates an offense level and criminal history category calibrated to the statutory maximum and the type of prior conviction, the PAG argues that there is no variation based on the circumstances of the instant offense and thus, defendants who engage in dissimilar conduct generally fall within the same guideline range. The PAG believes that just as the Commission should amend the career offense guideline to achieve proportionality based upon the offender's criminal history, it should also ensure that differences in offense characteristics lead to appropriately different ranges.

The PAG reminds the Commission that provisions other than the career offender guideline serve the role of imposing the maximum possible punishment on the most serious and dangerous offenders, for example 18 U.S.C. § 3559(c)(1); 18 U.S.C. § 3559(e)(1); and 21 U.S.C. § 841(b)(1)(A). Also, the PAG argues that the career offender guideline fails to achieve the proportionality in punishment required in Section 3553(a)(2)(A).

One solution to this claimed lack of proportionality the PAG offers is to revise the table in §4B1.1(b) to provide for changes in the offense level based on Specific Offense Characteristics for the instant offense. Thus, it argues, defendants with significantly different offense characteristics would not end up in the same guideline range. The PAG further asserts that changes such as those proposed would likely lower the rate and extent of variances from the guidelines that the Commission's data have reported for career offender sentences. Therefore, it urges the Commission to include changes to the Career Offender Guideline in its proposed amendments for 2007.

Federal Public and Community Defenders
Jon M. Sands, Chair, Federal Defender Sentencing Guidelines Committee
Amy Baron-Evans, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel

I. CRIMINAL HISTORY OVERVIEW

The FPD asserts that the Commission must revise certain specific provisions of the Criminal History section because they create sentencing disparities and fail to take into account new data about recidivism. The FPD maintains that recent evidence supports its view that the Commission has expanded or ignored congressional directives in ways that result in overly harsh sentences and cites the following as examples: 1) the definition of "crime of violence," which includes relatively minor crimes; 2) the career offender provisions, which sweep broader than Congress intended; and, 3) the Commission's failure to implement guidelines providing for more lenient treatment of first offenders who have not been convicted of a crime of violence or otherwise serious offense.

The FPD observes that the Criminal History Category (CHC) rules were not initially based on empirical data and it reminds the Commission of its intention to incorporate empirical data into the CHC rules when it became available. Referring to the data in the Commission's *Booker* Report as evidence that the data is available, the FPD contends that the Commission has not honored its intention to incorporate the data into the rules. Observing that recidivism is relevant to most of the factors listed in 18 U.S.C. § 3553(a), the FPD suggests that it is time to amend the guidelines to reflect what has been learned from the available empirical data regarding recidivism.

The FPD observes that the CHC rules exclude considerations that predict a reduced risk of recidivism or an increased likelihood of rehabilitation and include factors that increase the criminal history score but have no predictive value or overstate the risk of recidivism. Suggesting that the Commission's own recidivism studies support this claim, the FPD urges the Commission to amend the guidelines and make specific recommendations to Congress consistent with the studies' conclusions. Examples of suggested recommendations include: 1) rehabilitation programs focused on drug use and educational opportunities would have a high cost-benefit value; 2) mitigating offender characteristics should be incorporated into the guideline computations; 3) first offender status should be taken into account in the criminal history score; 4) that USSG §4A1.1(f) should be removed from the criminal history rules; 5) using prior drug convictions as career offender predicates vastly overstates the risk of recidivism; and, 6) and non-moving traffic violations and other minor offenses should not be included in criminal history score.

The FPD addresses what it characterizes as some of the more egregious problems and urges the Commission to revise the CHC rules based on these concerns.

A. CAREER OFFENDER

Asserting that the career offender guideline is "broken," the FPD opines that Congress intended the guideline as a means of ensuring that "repeat violent offenders and repeat drug traffickers" convicted of specified drug trafficking crimes should receive stiff sentences. Nonetheless, in the FPD's view, the guideline as implemented by the Commission frequently results in draconian punishment for defendants who have never been convicted of any violent offense and whose criminal history consists solely of low-level drug-dealing or minor misdemeanor convictions. The FPD contends that, instead of correcting this problem, the Commission's only work in this area has been to greatly restrict any departures from the guideline. The FPD also refers to the Rossi and Berk public opinion survey to support its view.

The FPD identify the following problems with the CHC rules:

1. CAREER OFFENDER IS A POOR PREDICTOR OF RECIDIVISM

The FPD states that the career offender guideline is not an accurate predictor of recidivism for a large number of defendants who fall within its reach, that the Commission's own recidivism studies support this conclusion. It believes that the career offender guideline vastly overstates the risk of recidivism when the defendant's predicates are drug offenses.

2. THE DEFINITION OF CRIME OF VIOLENCE IS OVERLY BROAD AND EMPIRICALLY UNJUSTIFIED

In the FPD's opinion, the guideline's definition of "crime of violence" commonly reaches offenders who have not committed violent acts. The FPD lists several examples supporting this claim where the courts have interpreted the definition to cover state offenses such as: tampering with a motor vehicle, fleeing and eluding, operating a motor vehicle with the owner's consent, oral threatening, and failing to return to a halfway house. It also notes other offenses that have been found to be crimes of violence under an identical "crime of violence" definition used for the Armed Career Criminal Act (ACCA) enhancement include pickpocketing, possession of a sap (blackjack), failing to stop for a blue light, carrying a concealed weapon, and driving while intoxicated. Citing specifically to the provision in the "crime of violence" definition at §4B1.2(a) which states that only a crime that presents a "serious potential risk" of physical injury should be counted, the FPD observes that the Commission has never endeavored to quantify or otherwise give content to this "ambiguous" standard and leaves it to each court to determine for itself which non-violent offenses present sufficient risk to qualify.

3. THE DEFINITION OF CONTROLLED SUBSTANCE FAILS TO DISTINGUISH SERIOUS FROM NON-SERIOUS OFFENDERS

In the FPD's opinion, the primary problem with the definition of "controlled substance" is that it is too broad and that such a broad definition causes the crimes of all offenders to be treated exactly alike, regardless of the severity of the individual offender's conduct. The FPD believes that either the length of sentence imposed for the predicate offense or the offense's statutory maximum would better illuminate the relative severity of the offense.

The FPD reminds the Commission that originally, a controlled substance offense under the career offender provision was defined as "an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 959, and similar offenses," but it was soon broadened to include many federal or state drug laws. It is the FPD's opinion that the Commission has exceeded the statutory directive by including crimes not specified in 28 U.S.C. § 994(h).

The FPD also observes that the weight of the controlled substance provisions in the career offender enhancement falls disproportionately on Black offenders and cites the Commission's Fifteen Year Report on recidivism that "although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline."

4. MISDEMEANOR OFFENSES SHOULD NOT QUALIFY AS CAREER OFFENDER PREDICATES

The FPD suggests that the career offender guideline contains a similar problem with respect to its treatment of misdemeanor offenses by defining "prior felony conviction" as "prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." USSG §4B1.2, comment. (n.1). The FPD believes that because some

states have misdemeanors punishable by up to two, three, or even ten years, defendants are regularly classified as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court. The FPD observes that the definition of felony used in the ACCA statute, for instance, specifically excludes for consideration any convictions designated as misdemeanors even if punishable by more than a year. 18 U.S.C. § 921(a)(20)(B).

5. PROPOSED CHANGES TO THE CAREER OFFENDER GUIDELINE

1. The Commission should re-calibrate the career offender guideline so that it more accurately reflects a defendant's risk of recidivism.

2. The Commission should tighten the definition of "crime of violence" by omitting the "catchall" definition of §4B1.2(a)(2) and restrict crimes of violence to offenses that have "physical force " as an element and to certain specifically enumerated offenses.

3. The Commission should differentiate between serious and non-serious controlled substance offenses.

4. The Commission should not include state misdemeanor convictions as career offender predicates.

B. FIRST OFFENDERS

In 28 U.S.C. § 994(j), Congress directed the Commission to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." While the Commission recognized the need to act on this directive, the FPD contends that it has never done so.

The FPD suggest that the population that would be affected by a revision is large: over 49% of federal offenders in 1992 had zero criminal history points; in 2001, that percentage was over 40%. The FPD reports that, however "first offender" status is defined, the rate of recidivism (including rearrest or revocation) for first offenders is 11.7%, which is significantly lower than the rate of 22.6% for offenders with one criminal history point, or that of 36.5% for offenders with two or more criminal history points.

Consistent with the recognition that first offenders should be treated with leniency, the FPD notes that the rate of non-government-sponsored below-range sentences after *Booker* increased for first offenders, defined as those with no contact with the criminal justice system whatsoever, including no arrests or other non-countable events. Despite this recognition, however, the proportion of first offenders receiving prison sentences increased both after the Protect Act and after *Booker,* and sentence severity for those offenders also increased during those periods. In the FPD's opinion, these tendencies suggest that even after *Booker*, there is a need for the Commission to clarify the appropriateness of imposing a sentence other than imprisonment for

first offenders, including in immigration offenses, and the appropriateness of reducing prison sentences accordingly to reflect a lower risk of recidivism.

The FPD assert that the Commission's failure to implement § 994(j) stands in contrast to its implementation and, in the FPD's view, the overly broad interpretation of § 994(h) (where the Commission has declined to limit application of the career offender guidelines to the most dangerous individuals or those most likely to recidivate and declined to implement any provisions justifying more lenient treatment of first offenders). The FPD urges the Commission to interpret the data and § 994(j) broadly to justify lower sentences as well as alternatives to prison for first offenders. It suggests that this could be done through a new criminal history category of 0, through recommended departures, or through a two-level reduction in the offense level.

C. OTHER CRIMINAL HISTORY ISSUES

The FPD believes that the Commission's Fifteen Year Report and other recidivism studies highlight several additional areas that deserve Commission attention.

1. OFFENDER CHARACTERISTICS

The FPD calls the Commission's attention to the correlation between offender characteristics and the risk of recidivism, including such characteristics as: age, employment, education, family ties, gender, abstinence from drug use, and whether the offender committed non-violent offenses. The FPD suggest building reductions into the CHC guidelines when such factors are present. It also believes that the Commission should change the approach in Chapter 5H from discouraging departure to encouraging departure when factors relevant to the purposes of sentencing are present. In the FPD's opinion, this current approach supports one of the strongest criticisms of the Sentencing Guidelines, namely, that the wrongs a person may have committed in the past count for everything, while his or her personal characteristics count for nothing.

2. UNCOUNTED CRIMES OF VIOLENCE

The FPD considers the Parole Commission's Salient Factor Score (SFS) a better predictor of recidivism than CHC, and observes that it has no violence component. It suggests that the predictive power of USSG §4A1.1(f) is statistically insignificant and therefore should be deleted.

3. MINOR OFFENSES

Citing the Commission's findings in the Fifteen Year Report that inclusion of non-moving violations in the criminal history score may affect minorities adversely, the FPD urges the Commission to delete non-moving traffic violations and other non-criminal offenses from the criminal history scoring.

4. RECENCY POINTS

The FPD believes that the addition of three points for recency of a prior conviction or an existing conviction is frequently too harsh and suggests that the Commission should lower the scores associated with these points under those circumstances.

D. CONCLUSION

It is the opinion of the FPD that the criminal history rules contain many problems which have been highlighted by the Commission's recent recidivism studies. On all of these issues, the FPD would appreciate being invited to the table to take part in an effort by the Commission to craft specific proposals aimed at improving fairness and achieving the multiple purposes of sentencing.

Law Office of Bourbeau & Bonilla, LLP
Attorneys Bourbeau, Bonilla, and Cipoletta

Attorneys Bourbeau, Bonilla, and Cipoletta, of the Law Office of Bourbeau & Bonilla, LLP, urge the Sentencing Commission to address the "gross disparity" in sentences, as a result of the "Career Offender" guideline at §4B1.2, that occurs between similarly situated defendants in different states.

The attorneys are concerned that citizens of Massachusetts are particularly disadvantaged under §4B1.2, because under the state's common law tradition, misdemeanors are punishable by a sentence of up to two and a half years. They note that under §4A1.2, sentences punishable by death or a term of imprisonment exceeding one year, regardless of the sentenced imposed, are considered felonies. Therefore, they argue, all misdemeanors in Massachusetts are counted as "felonies" under the Guidelines.

The attorneys also note that in Massachusetts traditional misdemeanors such as simple assault and battery are counted under §4B1.2 as "crimes of violence." For example, the attorneys point out that a person convicted of distributing 5 grams of crack cocaine with two prior convictions in the state of Massachusetts for assault and battery, and resisting arrest, would receive a Guideline sentence of Level 34, Criminal History Category VI, 262-327 months following trial, and 188-235 months following a plea with credit for acceptance of responsibility, whereas a similar offender in virtually every other state would be considered a Level 26, Criminal History Category II, with a resulting sentence of 70-87 months after trial, and 51-63 months after plea. This disparity, they argue, results in "astronomical [federal] penalties" for citizens of Massachusetts.

The attorneys acknowledge that the Commission has attempted to address this jurisdictional sentencing disparity in the background note at §4A1.1. They note that the Commission has based criminal history categories on the maximum sentence imposed on previous sentences, rather than on whether the offense was designated a felony or misdemeanor. They further note that the Commission has also authorized departures under §4A1.3 to address the imperfection of this measure. However, the attorneys argue, these measures are inadequate because career offender status is determined solely by whether the underlying offense is punishable by more than one

year. They argue that this problem is further exacerbated by the October, 2003 revision to §4A1.3 which limited the extent of a departure where the criminal history score overstates the risk of recidivism of a career offender to one level. They point out that this revision further eliminates any ability to correct jurisdictional sentencing disparity other than by the court imposing a sentence that varies from that produced by the career offender guideline.

In the attorneys' opinions, a possible remedy is to redefine the career offender predicates to require that the sentence imposed at the time of original sentencing be greater than one year. They also propose that the term "crime of violence" should be redefined to include only those offenses where the defendant used actual violence against another, or where the crime, by its nature, involved a substantial risk that force against another would be used and created the likely risk of serious injury to another. The attorneys view these remedies as steps towards correcting the disparity in sentences under §4B1.2 between similarly situated defendants in different states.

Issue No. 7 - Reduction in Term of Imprisonment as a Result of Motion by Directory of Bureau of Prisons

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

The Department of Justice (DOJ) favors a policy statement on compassionate release that reiterates 18 U.S.C. § 3582 to the extent that no sentence may be reduced absent a motion by the DOJ based upon certain determinations by the Bureau of Prisons (BOP). Said BOP determinations would include:

> (1) a finding that the inmate for whom the reduction of sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate's ability to attend to bodily functions and personal care needs without substantial assistance from others;
>
> (2) a finding that a reduction in sentence is appropriate after assessing public safety concerns and the totality of the circumstances; and
>
> (3) provision of a satisfactory release plan that includes information about where the inmate will live and receive medical treatment and the inmate's means of support and payment for medical care.

The DOJ further recommends that the amount of any sentence reduction or modification to a term of supervised release be no more lenient than those requested in the § 3582 motion. The DOJ asserts that to permit sentence reductions under the principle of compassionate release for reasons other than those specified in its letter to the Commission would constitute both an "overly broad reading of the statutory authority" and an "undermining" of Congress's rationale for abolishing parole in the Sentencing Reform Act.

The DOJ also states that, should the Commission draft a more flexible policy statement than it prefers, the DOJ will simply not make any motion for reduction of sentence on grounds more permissive than those outlined in its letter to the Commission, thus reducing "an excess of permissiveness in the policy statement" to a "dead letter."

American Bar Association
Robert D. Evans, Director
July 12, 2006

The American Bar Association (ABA) writes in response to the Commission's request for specific suggestions for appropriate criteria and examples of extraordinary and compelling reasons for reduction of a term of imprisonment, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release. Recalling its testimony before the Commission on March 15, 2006, during which Commissioner Castillo invited further response, the ABA submitted proposed language on March 28, 2006, for a policy statement

describing specific criteria for determining when a prisoner's situation warrants sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), and gave specific examples of situations where these criteria might apply. The ABA states that it stands by the proposed criteria and examples in its March 28th submission, believing it would appropriately implement the congressional mandate to the Commission in 28 U.S.C. § 994(t), and offers a revised proposed policy statement, which is dated July 12, 2006, and incorporates the contents of both the March 15th testimony and the March 28th letter. (Copies of the earlier documents are included in the ABA's current submission and are included with this summary. The summary of the ABA's March 28, 2006, submission is also included and immediately follows this summary.)

The ABA comments on two issues it did not discuss in its previous submission and testimony: the extent of any sentence reduction authorized by § 3582(c)(1)(A)(i); and the court's authority to modify a term of supervised release. The ABA believes that Congress intended a court to have discretion under this Section to reduce a term of imprisonment to whatever term it deems appropriate in light of the particular reasons put forward for the reduction. Pursuant to this discretion, the ABA asserts that a court may (but is not required to) substitute a term of community supervision equivalent to the original prison term, while the period of supervised release originally imposed would remain in effect because the court's authority under this statute extends only to the term of imprisonment. The ABA adds a new provision in its revised proposed policy statement concerning the scope of the court's sentence reduction authority and its power to substitute a period of supervised release for the unserved portion of the prison term.

In closing, the ABA seeks to allay concerns that the court's authority to reduce a sentence could undercut the core values of certainty and finality in sentencing embodied in the federal sentencing guidelines scheme. It reminds the Commission that the court's jurisdiction under § 3582(c)(1)(A)(i) is entirely dependent upon the government's decision to file a motion. Further, it believes that the government can be counted upon to take a careful course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling, and that Congress plainly intended the sentencing court to have authority to respond to such a recommendation.

American Bar Association
Robert D. Evans, Director
March 28, 2006 - Included for Reference

The ABA writes to amplify its March 15, 2006, testimony before the Commission and to respond to Judge Castillo's invitation to submit specific language for the Commission's consideration. The ABA restates its support for the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final.

The ABA references its ABA House's 2004 recommendation to the Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons (BOP) in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances."[1]

The ABA repeats its assertion that the only limitation on the court's authority under Section 3582(c)(1)(A)(I), after its jurisdiction has been established by a BOP motion, is that it must find that "extraordinary and compelling reasons" justify such a reduction. The Commission's proposal, however, fails to implement all the components of the directive in Section 994(t). Specifically, it does not include "the criteria to be applied and a list of specific examples." Further, the proposal appears to suggest that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by [BOP] that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." The ABA has trouble with this approach because it fails to satisfy the mandate of Section 994(t) that the Commission should establish general policy guidance for sentence reduction under Section 3582(c)(1)(A)(I) and because it contemplates that any policy for implementation of Section 3582(c)(1)(A)(I) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission

The ABA submits a proposed policy statement that contains language describing specific criteria for determining when a prisoner's situation warrants sentence reduction under Section 3582(c)(1)(A)(I), and giving specific examples of situations where these criteria might apply. The language of the ABA proposal also makes several other changes in the language of the Commission's proposal, as discussed in the March 15 testimony: it makes clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court can properly rely on several factors in combination as justification for sentence reduction.

The ABA proposes three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

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[1] The ABA takes no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). Although the ABA's proposal contains a provision referring to subsection (ii) cases, the provision is copied verbatim from the Commission's proposal. The ABA assumes that expansion of this authority in subsection (ii) to non-three-strikes cases would necessarily have to rely on some statutory ground other than subsection (ii) itself.

The ABA proposal also contains, as part of an application note, eight specific examples of extraordinary and compelling reasons, all of which find support, the ABA asserts, in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under its statutory predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or 8) where the defendant's rehabilitation while in prison has been extraordinary. Finally, the ABA proposes that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

Practitioners' Advisory Group
Mark Flanagan & David Debold, Co-Chairs

The Practitioners' Advisory Group (PAG) writes in response to the Commission's request for specific suggestions and guidance regarding the reduction of a sentence for extraordinary and compelling reasons. The PAG informs the Commission that it worked with the American Bar Association (ABA) and other interested practitioner groups to develop the proposed policy statement submitted by the ABA dated July 12, 2006. The PAG states that it fully endorses the proposed policy statement and concurs with the views expressed in the ABA's letter of July 12, 2006, regarding the extent of any such reduction and possible substitution of a term of supervised release. The PAG closes by commending the Commission on its work regarding sentence reductions under §1B1.13 and expresses its opinion that by elaborating on the appropriate criteria and providing examples, the Commission will help ensure the fair and consistent application of this important provision.

Federal Public and Community Defenders
Jon M. Sands, Chair, Federal Defender Sentencing Guidelines Committee
Anne Blanchard, Sentencing Resource Counsel
Amy Baron-Evans, Sentencing Resource Counsel
July 14, 2006

The Federal Public and Community Defenders (FPD) writes regarding the proposed amendment creating a policy statement governing reduction of prison sentences based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). The FPD reminds the Commission of its testimony in March 2006, the summary of which is included below for ready reference, in which it pointed out that the policy statement proposed at that time did not address a portion of

the statutory mandate of 28 U.S.C. § 994(t), which requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Further, the FPD reminds the Commission that after adopting the proposed amendment language as a first step, the Commission issued another request for comment for possible use in the 2006-2007 amendment cycle.

The FPD reports that since that time, it has worked with a number of interested groups to develop a proposed policy statement which addresses the needs for criteria and examples called for in the Commission's request for comment. It notes that the American Bar Association (ABA) has revised the proposed policy statement it submitted in March 2006 after consultation with the FPD and others. The FPD states that it endorses the ABA proposal, which is dated July 12, 2006, and included in the FPD's submission. The FPD believes the ABA's proposed policy statement provides a model which allows sentence reductions in extraordinary situations where changed circumstances compel the conclusion that a reduction is appropriate. It also believes the proposed policy allows the court flexibility regarding the extent of reduction and allows the government to remain the gatekeeper because the guideline only applies after a motion by the Bureau of Prisons.

The FPD finally states that the ABA's proposed policy statement fulfills the congressional mandate of § 3582(c)(1)(A)(i) for criteria and examples and provides a proper structure for the exercise of the sentencing court's discretion.

Federal Public and Community Defenders
Jon M. Sands, Chair, Federal Defender Sentencing Guidelines Committee
Anne Blanchard, Sentencing Resource Counsel
Amy Baron-Evans, Sentencing Resource Counsel
March 13, 2006 - Included for Reference

The Federal Public and Community Defenders (FPD) applauds the Commission's attempt to provide guidance for court consideration of Bureau of Prisons (BOP) motions to reduce sentences based on extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A)(ii); the FPD responds to issues for comment regarding release after age 70 pursuant to that statute, and offers suggestions to modify the Commission's draft guidance which the FPD believes would respond more definitively to the congressional directive in 28 U.S.C. § 994(t).

A. BACKGROUND OF REDUCTION FOR "EXTRAORDINARY AND COMPELLING REASONS"

The FPD contends that many people who work in the federal criminal justice system are unfamiliar with 18 U.S.C. § 3582(c)(1)(A)(i); it claims it is "little known and little utilized." The FPD asserts that while the statute initially appears to offer relief to already-sentenced clients who face a radical change of circumstances (i.e. a family emergency, a matter of life or death, concern about the welfare of a child) that truly appears compelling and extraordinary, in actuality the statute seldom provides relief; in its opinion, the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. The FPD believes that the "unduly cramped usage of the statute" could be altered by a policy statement that reflects

congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

The FPD notes that prior to the Sentencing Reform Act (SRA) and the guidelines, the federal criminal justice system used indeterminate sentences. The accompanying parole system allowed a variety of factors, including progress toward rehabilitation, to count towards release on parole before a sentence expired. Congress allowed the BOP to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility (the sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility under 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987)). 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances; as the FPD notes, the motion could even be made based on prison overcrowding.

The FPD also notes that the SRA established a determinate sentencing system, and that the parole system changed from a rehabilitative model which took a variety of factors into account to a guidelines-based system that provided more "certainty, finality, and uniformity." The FPD cites to *Mistretta* to support this proposition. When Congress passed the SRA, the FPD observes, Congress also recognized that post-sentencing developments might provide appropriate grounds to reduce a sentence. Using Section 4205(g) as a model for sentencing adjustments, the FPD asserts, Congress included the following provision in 18 U.S.C. § 3582(c)(1)(A)(i) to accommodate post-sentence developments, permitting courts to adjust sentences accordingly:

> The court may not modify a term of imprisonment once it has been imposed except that-
> (1) in any case–
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that– (ii) extraordinary and compelling reasons warrant such a reduction;

The FPD also points to Congress's mandate that the Commission promulgate policy statements regarding how § 3582(c)(1)(A) should function and what circumstances should be considered extraordinary and compelling:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 944(t).

The FPD asserts that these provisions' legislative history demonstrates that Congress intended the release motion as a way to account for changed circumstances citing to the Senate Judiciary

Committee's Report, which it views as the authoritative source of legislative history on the SRA. That report, according to the FPD stated:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described. S. Rep. No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

B. HISTORY OF SENTENCE REDUCTIONS

The FPD, citing to an article by Mary Price in the Federal Sentencing Reporter from 2001, asserts that historically, the BOP has only used §3582(c)(1)(A)(i) to seek the release of dying inmates, despite the broad language of the statutory provision. The FPD notes that the original BOP policy allowed consideration of release when death was predictable within six months, but that the policy was amended in 1994 to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. The FPD states that although neither the text of the statute nor the BOP policy statement disallows a sentence reduction based on grounds other than an inmate's medical condition, the BOP has never acted on any other basis.

The FPD asserts that since the SRA's enactment, the Commission has not responded to the congressional directive to issue policy statements and to give examples of extraordinary and compelling reasons for early release. The FPD quotes Vice Chair Steer from an article written in the Federal Sentencing Reporter in 2001 to suggest that the lack of the policy statements issued by the Commission might be partly responsible for the BOP's narrow use of the statutory provision:

> Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

The FPD notes that the actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through the year 2000, and asserts that the numbers for 2001 through 2004 continue to be quite low despite a growing prison population (the 2001 through 2004 figures received from BOP are attached).

C. THE PROPOSED AMENDMENT; EXTRAORDINARY AND COMPELLING REASONS

The FPD believes that the Commission's proposed amendment provides a "first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions" but takes issue 1) with the fact that the amendment does not comply with the statutory directives under 28 U.S.C. § 944(t) to describe what should be considered extraordinary and compelling reasons; and 2) that the amendment does not provide examples as required by statute. The FPD provides suggestions for how the Commission can comply with the statutory requirements, and offers additional comments on the draft. The FPD also suggests the Appendix of Ms. Price's article as "a very good model for addressing these difficult issues."

The FPD first proposes a drafting change to guideline §1B.1.13(1)(A), asserting that it should be amended to state "reasons" in the plural, as in the statute, instead of singular. The FPD believes that its current state would alter what it views as the statute's clear intent to allow consideration of multiple reasons and their combination as opposed to one single reason. In the alternative, the FPD suggests that the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

The FPD asserts that the suggested language "clearly" restates the statutory intent that reasons to be considered may be plural, "to prevent a mechanistic approach to this broadly worded provision."

Second, the FPD believes that for §1B1.13(2), the Commission should insert the word "present" before the word "danger" to assure the proper interpretation stated in the synopsis, *i.e.*, that the person is "no longer" a danger. The FPD notes that the proposed draft requires that the person not be a danger, which imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to §3582(c)(1)(A)(i) as well. However, the FPD asserts that the draft's expanded requirement will probably have little practical effect, as it finds it difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. The FPD comments that in its experience, the BOP has taken great care to eliminate prisoners from early release consideration if they are considered a danger to the community.

Third, the FPD argues that the language used in Application Note 1A --"shall be considered as such"-- does not appear to operate to create a rebuttable presumption, even though the synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. The FPD asserts that if the Commission intends to create that presumption, it should be stated simply and in those words. The FPD strongly believes that the current definition "provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission."

The FPD further believes that the Commission has only provided a circular definition of extraordinary and compelling reasons (*i.e.* they presumptively exist when BOP makes a motion) and that the Commission has failed to comport with its congressional directive. Instead, the FPD suggests, the Commission should broadly define those reasons to include all basic post-sentencing changes that could support a reduction, as the FPD contends was intended by Congress. The FPD believes that the reasons should be more expansive than BOP policy thus far, which has limited the reasons to an inmate's terminal illness or other extreme medical conditions.

The FPD further references Ms. Price's article as a source for proposed language that reflects Congressional intent. The FPD notes that the article contains a description of extraordinary and compelling reasons in the proposed policy statement:

> An "extraordinary and compelling reason" is a reason that involves a situation or condition that–
> (1) was unknown to the court at the time of sentencing;
> (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or
> (3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

The FPD asserts that Ms. Price's proposed language could support a sentence reduction consistent with the SRA and the guidelines that accommodated an inmate's changed conditions or circumstances. The FPD believes that Congress included the §3583(c)(1)(A)(i) provision in the SRA " to allow some safety valve for post-sentencing changed circumstances" in a determinate sentencing system. The FPD views the statutory definition as a "flexible model" which is not confined to an inmate's extreme illness, but instead permits the court to consider additional facts or law which changed post-sentencing and which would present a compelling case for a sentence reduction.

Finally, the FPD believes that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the FPD points to the proposed list in Ms. Price's article as an appropriate application note:

> The term "extraordinary and compelling reason" includes, for example, that–
> (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
> (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
> (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;
> (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
> (E) the defendant would have received a significantly lower sentence had there been in

effect a change in applicable law that has not been made retroactive;
(F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
(G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

D. ISSUES FOR COMMENT

The FPD believes that extending the possibility of release for aged inmates to sentences outside of Section 3559(c) sentences would be good policy, and notes that this portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which it states was the only reason it was restricted to those sentenced under that statute. The FPD notes that there are many other statutes which provide for extremely long, even life terms, *e.g.*, the drug statutes found in 21 U.S.C. § 841(b)(1)(A). The FPD comments that the Commission itself has concluded that the risk of recidivism drops dramatically after age 50, and even more dramatically after age 70, citing to the Commission's Recidivism Report. The FPD references DOJ statistics demonstrating that increased sentence severity over the past twenty years has been accompanied by an aging prison population who has medical problems and little risk of re-offense. The FPD then notes a Sentencing Project report that estimates housing for an elderly prisoner costs $60,000 annually. The FPD concludes that the release possibility should be expanded to other cases.

The FPD comments that if the expansion were available, it would be "unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter." The FPD asserts that the statute and policy statements requiring a current lack of dangerousness already fully address the concerns about public safety implicit in the Commission's issue for comment; the FPD argues that for defendants who have either served 30 years or are over 70 years old, "there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains."

National Association of Criminal Defense Lawyers
Carmen D. Hernandez, Vice President & Chair, Federal Sentencing Guidelines Committee

The National Association of Criminal Defense Lawyers (NACDL) writes in response to the Commission's request for comment on sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A). The NACDL fully supports the American Bar Association's (ABA) proposed language for a policy statement, which is dated July 12, 2006, and believes the proposal provides detailed guidance regarding "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). The NACDL further states that the criteria and examples set forth by the ABA capture a broad range of changed circumstances that well justify modifications to otherwise final sentences. The NACDL asserts that the guidance given the courts by the proposed policy statement would advance the goals of consistency and fairness, and fulfill the Commission's statutory responsibility. Though the exercise of such authority remains subject to the government's approval, the NACDL hopes a more detailed policy statement will encourage greater reliance on this valuable authority to achieve justice, avoid undue punishment, and dispense mercy in appropriate cases.

Families Against Mandatory Minimums
Julie Stewart, President
Mary Price, General Counsel

The Families Against Mandatory Minimums (FAMM) writes to encourage the Commission to adopt the American Bar Association's (ABA) proposed policy statement, which is dated July 12, 2006, regarding sentence reductions pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Welcoming the Commission's continued interest in this area, the FAMM reminds the Commissioners of its own interest in motions pursuant to § 3582(1)(A)(i), which dates back to a letter it sent to the Commission on June 25, 2001. The FAMM states its concern in this area is based on the Bureau of Prison's (BOP) limited application of § 3582(c)(1)(A)(i), noting that the BOP Director makes few sentence reductions per year and only on behalf of terminally ill prisoners or, more recently, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life." In the FAMM's opinion, the legislative history of the statute reveals that Congress had a more robust view of what constitutes extraordinary and compelling circumstances. The FAMM believes that the ABA's proposed policy statement captures Congress' intent and that its adoption may have the added benefit of encouraging the BOP to expand the criteria it currently employs when evaluating a motion under § 3582(c)(1)(A)(i).

Issue No. 8 - Circuit Conflicts

U.S. Department of Justice
Michael J. Elston, Senior Counsel to the Assistant Attorney General

Noting there are many important circuit conflicts concerning the federal sentencing guidelines, the Department of Justice (DOJ) recommends that the Commission make resolving circuit conflicts a priority for the current amendment cycle. The DOJ reminds the Commission that it has the principle responsibility to resolve circuits conflicts that involving the sentencing guidelines. *Braxton v. United States*, 500 U.S. 344, 347-49 (1991).

POSSIBLE PRIORITY ISSUES

Practitioners' Advisory Group
Mark Flanagan and David Debold, Co-Chairs

I. RELEVANT CONDUCT

The PAG continues to urge the elimination of acquitted, uncharged or dismissed conduct as sentencing considerations, or, alternatively, implementation of a beyond a reasonable doubt standard as to all uncharged and dismissed conduct, as well as full notice of all relevant conduct before the entry of a guilty plea. As it explains, use of acquitted conduct at sentencing was previously justified by the difference between the standards of proof at a criminal trial and those at sentencing. But *Booker*, with its emphasis on the fundamental reservation of power in the people through the jury, discourages the use of acquitted conduct in sentencing. Moreover, the PAG opines, nothing in *Watts* requires that acquitted conduct be considered, that it is well within the Commission's authority to eliminate its use in sentencing, and that it "is the right thing to do." Because the use of acquitted and uncharged conduct is roundly criticized, the PAG urges the Commission to eliminate use of such conduct as a consideration at sentencing.

Further, the PAG submits that under the Due Process Clause of the Fifth Amendment, it is inappropriate to permit punishment based on unconvicted conduct, especially in those circuits where the factual findings at issue result in a sentence range that is given a presumption of reasonableness. In *Apprendi* and the cases that followed, the PAG argues, the Court has strongly indicated that such a scheme is unconstitutional. The PAG opines that the protection of defendants' rights truly requires a more rigorous standard if uncharged or dismissed conduct is allowed to affect the guideline range.

Finally, the PAG states that in order for a defendant to make an intelligent decision as to whether to accept a plea offer or proceed with his constitutionally protected right to trial, he must know whether the government intends to offer any relevant conduct evidence at his sentencing hearing. The PAG therefore recommends that the government be required to provide all such material by the time of plea.

II. MANDATORY MINIMUMS

The PAG strongly urges the Commission to revisit and update its comprehensive and critical study, the Mandatory Minimum Penalties in the Criminal Justice System, released fifteen years ago. In its view, as Congress considers whether and how to further legislate sentencing as a result of *Booker*, a deeper understanding of the role, usefulness and effects of mandatory minimums will be crucial. It argues that the Commission is in the best position to revisit the questions and conclusions it considered in the 1991 report, gather and analyze new empirical evidence, and reconsider its policy recommendations. It reminds the Commission that it asserted last year that the questions the initial report posed remain relevant today.

III. RETROACTIVE APPLICATION OF THE "ROLE IN OFFENSE" ADJUSTMENT TO THE BASE OFFENSE LEVEL IN DRUG CASES

The PAG urges the Commission to make retroactive the 2004 "role in offense" cap for drug offenses with adjustments calibrated to the base offense level for the offense of conviction. In its view, the reasons that compelled the Commission to adopt this prospective measure of justice for defendants hold especially true for those already imprisoned, in part because their lengthy sentences moved the Commission to design the relief in the first place. Further, the PAG argues that retroactivity is justified in light of the factors (set forth in the Commentary to §1B1.10) the Commission takes into account in making a retroactivity determination: the purpose of the amendment; the magnitude of the change; and the level of difficulty in applying the change retroactively.

IV. CREDITING UNDISCHARGED TERMS OF IMPRISONMENT

The PAG states that an anomaly in §5G1.3 recently came to its attention and it believes this anomaly warrants the Commission's attention and action. As currently drafted, the PAG states that the provisions in subsection (1) and (2) of §5G1.3(b), which mandate the sentence to be imposed for the instant offense, creates a potential for inequity. The PAG argues that the only mechanism within the guidelines for avoiding this inequitable result is for the court to impose a concurrent, or partially concurrent, sentence to "achieve a reasonable punishment." Such a determination is wholly discretionary and, therefore, in its opinion, is an inadequate safeguard against the disparity stemming from § 5G1.3(b)'s mandatory language. The PAG submits that the appropriate course is to delete the enhancement language as follows:

> If ... a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) ~~and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)~~, the sentence for the instant offense shall be imposed as follows....

So constructed, the PAG argues, §5G1.3 is more consistent with Congress's directives regarding concurrent and consecutive sentences in 28 U.S.C. §§ 994(l)(1)(A), (l)(2), and (v).

Federal Public and Community Defenders
Jon M. Sands, Chair, Federal Defender Sentencing Guidelines Committee
Amy Baron-Evans, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel

I. PROCEDURAL FAIRNESS AND ACCURACY

The FPD believes that the preponderance of evidence standard that governs factual determinations under the guidelines fails to ensure procedural fairness and accuracy at sentencing. It further contends that the Policy Statement at §6A1.3 may actually invite unreliable and unfair sentencing practices that result in questionable outcomes in individual cases

and taints the perceived legitimacy of the system. The FPD includes an appendix of cases with its submission which provides examples of these application issues. The FPD recommends that the Commission remove the commentary regarding the "preponderance of evidence standard" at §6A1.3 and either recommend a higher standard or refrain from making any recommendation.

The FPD also urges the Commission to delete commentary recommending the use of hearsay at sentencing, and to make clear that any information used must be accurate, not "probably accurate." It reports that the Commission's advice regarding "indicia of reliability" is routinely ignored because it is cancelled out by the advice that inadmissible information need only be "probably accurate." *See* §6A1.3. The FPD believes such advice results in the admission of unreliable or even false testimony that defendants must then disprove, but are often not afforded a meaningful opportunity to do so as the purported witnesses are not produced in court or even identified. In the appendix of cases attached to its submission, the FPD provides extensive case law to support its arguments. The FPD concludes that the use of information that is "probably accurate" invites the use of unreliable evidence at sentencing and may violate both the Constitution's Due Process and Confrontation Clauses.

II. RELEVANT CONDUCT

A. RELEVANT CONDUCT IS DETRIMENTAL TO THE GOALS OF THE SENTENCING REFORM ACT

The FPD entreats the Commission to abolish the use of uncharged, dismissed and acquitted offenses when calculating relevant conduct. It contends that by "transferring power *to* prosecutors, this type of relevant conduct has accomplished the opposite of the theory used to justify it" and "results in unfairness, unwarranted disparity and unwarranted uniformity, and the guidelines are constitutionally vulnerable as long as it exists." If the Commission declines to eliminate the use of such conduct, the FPD recommends that the Commission at least "abolish the use of acquitted conduct, recommend the beyond a reasonable doubt standard for uncharged and dismissed conduct, and recommend notice of all relevant conduct before entry of a guilty plea."

1. Unfairness, Inaccuracy, Unwarranted Disparity: The FPD cites the Commission's Fifteen Year Report, which states "research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators." It observes that many, if not all, probation officers incorporate the prosecutor's written version of the facts or law enforcement reports directly into the PSR in some circuits, these factual recitations are thereby transformed into "evidence" which the defendant must rebut.

2. Transfer of Power to Prosecutors: The FPD notes that the relevant conduct rules were based on concerns that a charge system would transfer power to prosecutors and thereby increase disparities, but asserts that the relevant conduct rules "are not working as intended," and "tend to work in one direction." The FPD contends that as a result of this transfer, the government need not produce the purported source of the information, the defendant has no right to cross-examine

the purported source, and often the source is not even identified, all of which the guidelines encourage. In this way, the "burden is effectively or explicitly shifted to the defendant."

3. Unwarranted Uniformity: The FPD believes that relevant conduct exacerbates the guidelines' over-emphasis on quantity and neglect of personal culpability, creating sentences that are vastly disproportionate to culpability and unwarranted uniformity among unlike offenders. It reports that probation officers and judges routinely apply concepts of "foreseeability" and "jointly undertaken activity" in a manner that obliterates important distinctions in culpability.

4. Unwarranted Disparity: The FPD believes that relevant conduct is not consistently applied because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result" and "prosecutors, judges and defense counsel circumvent the rules because they feel they are unjust." It agrees that while circumvention can result in sentences that "are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law," these decisions are controlled by prosecutors and only benefit some defendants and not others, resulting in unwarranted disparity and sentences that are often disproportionate to the seriousness of the offense.

B. RELEVANT CONDUCT IS CONSTITUTIONALLY UNSOUND

The FPD notes that five justices in the majority in *Blakely* and in the constitutional majority in *Booker* (all still on the Court) were "appalled" that the equivalent of convictions for uncharged, dismissed and acquitted crimes were being obtained without the fundamental components of the adversary system the Framers intended, *i.e.*, notice, jury trial, and proof beyond a reasonable doubt. The justices held that "real conduct" sentencing is an "assault" on the Sixth Amendment's "'fundamental reservation of power' in the people within 'our constitutional structure.'"

III. DRUG GUIDELINES

The FPD urges the Commission to revise the guidelines applicable in drug cases to more accurately and fairly reflect a defendant's actual level of culpability and participation in the offense, the need for deterrence, the need for incapacitation, and the efficacy of treatment and rehabilitation. It believes that increased sentences for drug offenses have been "the major cause of federal prison population growth" since the guidelines' inception, and a "primary cause" of racial disparity in sentencing. The FPD observes that since the early 1990s, the Commission has received a stream of evidence from its own research staff, other experts, judges, and even the Department of Justice and the Bureau of Prisons that the guidelines produce sentences in drug cases that are far greater than necessary to achieve sentencing purposes in many cases, result in unwarranted disparity, and require excessive uniformity.

A. WHAT CONGRESS INTENDED

In enacting the Anti-Drug Abuse Act of 1986 (ADAA), the FPD asserts that Congress intended to create a two-tiered penalty structure aimed at "discrete categories of traffickers": a ten-year

mandatory minimum for "major" traffickers, and a five-year mandatory minimum for "serious" traffickers. Congress selected quantities of particular drugs possessed, controlled, directed or handled *by the defendant* as a proxy to identify "major" and "serious" traffickers.

B. SEVERITY BROADENED AND INCREASED BY THE COMMISSION

In the FPD's opinion, the Commission extended the ADAA's quantity-based approach "well beyond those judgments that flow naturally from deference to congressional decisions," and notes that the Commission gave no contemporaneous explanation for doing so.

The FPD observes that the Commission has added a variety of aggravating factors that increase the guideline sentence above that dictated by quantity, and some of these factors double count aspects of the offense that Congress contemplated would be reflected in quantity. The FPD acknowledges the explanation given in the Fifteen Year Report that the Commission decided not to give more weight to mitigating role in the offense because guideline sentences might conflict with mandatory minimum sentences in some cases.

The FPD also contends that the Commission's definition of "relevant conduct" is not consistent with Congress' intention of focusing resources on major and serious traffickers based on quantities possessed, controlled, directed or handled by the individual defendant in the offense of conviction: It increases the sentence based on amounts involved in separate transactions of which the defendant was not convicted and on amounts "reasonably foreseeable" to the defendant in "jointly undertaken criminal activity."

In the FPD's estimation, the Commission's actions resulted in prison terms "far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."

C. SEVERITY DISPROPORTIONATE TO THE SERIOUSNESS OF THE OFFENSE, UNWARRANTED UNIFORMITY, UNWARRANTED DISPARITY

By elevating the impact of quantity to the exclusion of offense circumstances and offender characteristics pertinent to personal culpability, the FPD believes that the guidelines overstate the seriousness of the offense even from a pure "just deserts" perspective. It asserts that the quantity-driven rules "mandate inequity" and "excessive uniformity" by "requiring that different cases be treated alike," with rules that make arbitrary distinctions among offenders, creating a false precision.

In the FPD's opinion, the Commission has inexplicably encouraged *upward* departure in the event drug quantity happens to understate offense seriousness, but has not invited *downward* departures, though "these are the guidelines most in need of rationalizing interpretation."