

MEMORANDUM REGARDING PRIORITIES

I. PROCEDURAL FAIRNESS AND ACCURACY

Critics, neutral observers, and guideline supporters have uniformly criticized the lax procedures governing factual determinations under the guidelines.¹ Section 6A1.3 advises courts that a preponderance of the evidence standard satisfies the Due Process Clause, and that they are free to consider “[a]ny information . . . without regard to its admissibility under the rules of evidence,” including hearsay, “so long as it has sufficient indicia of reliability to ensure its probable accuracy.” This advice does not ensure fairness and reliability, as the Supreme Court has recognized.²

While some judges require the use of reliable evidence, in many cases, such as the cases summarized in the Appendix of Sample Cases and below, no reliable evidence or standard of proof is used. Instead, enhancements are based on nothing more than the multi-level hearsay statements of untrustworthy cooperators with the burden on the defendant to disprove them. As these cases demonstrate, the guidelines’ policy statements allow (in fact, *invite*) unreliable and unfair sentencing practices. This calls into question the outcomes in individual cases and taints the perceived legitimacy of the system.

Defendants should not be sentenced reliably in some courts, but not others. The Commission should therefore either encourage “better sentencing practices” by *all* judges, *Booker*, 543 U.S. at 263, or remove commentary that invites unfair and unreliable factfinding. The Commission should not continue to recommend minimal constitutional protections. Further, because the Commission is not a court, it would seem to be out of bounds in doing so. See *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989).

¹ American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1501 (2001) (“A substantial portion of the Committee believes that, in light of the fundamental liberty interests at stake in sentencing, the judicial system would be better served by implementation of a ‘beyond a reasonable doubt’ standard of proof for any and all ‘relevant conduct’ upon which a criminal sentence is based.”); Julie O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. Rev. 1342 at 1351, 1393-94 (arguing that the current relaxed procedures taint the perceived legitimacy of the system, are not an inevitable component of it, and should be remedied with respect to all forms of relevant conduct, regardless of the size of the increase).

² See *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004) (“defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong”); *Booker*, 543 U.S. at 304 (federal judges “determine ‘real conduct’ on the basis of bureaucratically-prepared, hearsay-riddled presentence reports”) (Scalia, J., dissenting).

A. The Preponderance Standard Invites Inaccuracy and May Violate the Due Process Clause.

The Commission should remove the commentary that states that the Commission “believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” U.S.S.G. § 6A1.3, comment. (¶3). The Commission should either recommend use of a higher standard,³ or refrain from recommending any standard.

Congress did not prescribe a standard of proof in the Sentencing Reform Act, but it did direct the Commission to assure that sentences imposed under the guidelines “promote respect for the law.” See 18 U.S.C. § 3553(a)(2)(A); 28 U.S.C. § 991(b)(1)(A). In criminal cases, the beyond a reasonable doubt standard is “indispensable” to this goal. *In re Winship*, 397 U.S. 358, 364 (1970) (the reasonable doubt standard, which derives from the Fifth Amendment Due Process Clause, is “indispensable to command the respect and confidence of the community in applications of the criminal law.”).

It is far from clear in *Booker*'s wake that the preponderance standard satisfies due process.⁴ The Supreme Court did not reach the standard of proof issue in *Booker*, which was strictly a Sixth Amendment case, and it remains an open question whether a heightened standard of proof is required by the *Apprendi* line of cases. After *Booker*, factfinding under the guidelines continues to have a definite and measurable effect on sentence length, which is obvious where the guideline range is treated as *de facto* mandatory,⁵ and is also true where it is treated as advisory.⁶

³ Ten years ago, the Commission said that it may explore “increasing the burden of proof at sentencing to a ‘clear and convincing’ standard” during future amendment cycles. 61 Fed. Reg. 34,465 (July 2, 1996).

⁴ See, e.g., *United States v. Staten*, 450 F.3d 384, 392-94 (9th Cir. 2006) (clear and convincing standard applies to disproportionate increases to ensure accuracy under the Due Process Clause); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 & n.8 (D. Neb. 2005)(Bataillon, J.) (“In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant’s sentence.”); *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005)(Gertner, J.) (“[E]ven if the Sixth Amendment’s jury trial guarantee is not directly implicated because the regime is no longer a mandatory one, the Fifth Amendment’s Due Process requirement [from which the beyond a reasonable doubt standard of proof arises] is.”).

⁵ E.g., *United States v. Johnson*, 445 F.3d 339, 342-43 (4th Cir. 2006) (guidelines are “presumptively reasonable” because guidelines development “has led to the incorporation into the Guidelines of the factors Congress identified in 18 U.S.C. § 3553(a)”; *United States v. Wilson*, 350 F. Supp.2d 910, 912 (D. Utah 2005) (“court will give heavy weight to the Guidelines in determining an appropriate sentence,” and “will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons”).

⁶ See *Staten*, 450 F.3d at 392-94 (“As the concern with accuracy remains critical, so does the concern that enhancements having a drastic impact be determined with particular accuracy.”); *United States v. Grier*,

As the Supreme Court explained in *In re Winship*, the function of a standard of proof as embodied in the Due Process Clause is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”⁷ In a civil suit for damages, the preponderance standard is acceptable because it is viewed as no more serious for there to be an error in the plaintiff’s favor than in the defendant’s favor.⁸ But “[w]here one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.”⁹ *Winship* involved factfinding in a juvenile delinquency proceeding, where, as in federal sentencing today, the judge did the factfinding, and it did not literally result in “conviction” of a “crime.” The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.¹⁰

In *Apprendi v. New Jersey*, the Court said, “Since *Winship*, we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”¹¹

In his dissent from the remedial decision in *Booker*, Justice Thomas stated succinctly (and, perhaps, presciently):

The commentary to § 6A1.3 states that “[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of

449 F.3d 558, 567, 571 (3d Cir. 2006) (though guideline range “merely serves as one of a number of factors to be considered in fashioning the ultimate sentence,” an error in factfinding in calculating the guideline range “will result in an error in the recommended sentencing range and, thus, will necessarily impact the district court’s assessment of the factors of 18 U.S.C. § 3553(a)”).

⁷ 397 U.S. 358, 370 (1970).

⁸ *Id.* at 371-72.

⁹ *Id.* at 363-64; *id.* at 370, 371-72 (Harlan, J. concurring). See also *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision,” holding that clear and convincing standard is required for civil commitment).

¹⁰ *Winship*, 397 U.S. at 365-66.

¹¹ 530 U.S. 466, 484 (1999). See also *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).

the guidelines to the facts of a case.' The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

Booker, 543 U.S. at 319 n.6.

The Third Circuit recently held, over vigorous dissent, that the preponderance standard may be used because, after *Booker*, the guideline range "merely serves as one of a number of factors to be considered in fashioning the ultimate sentence." *Grier, supra*, at 567. However, six other circuits have adopted a rebuttable presumption of reasonableness. This is based on the notion, promoted by the Commission, that the guidelines incorporate the purposes and factors set forth in § 3553(a), making the guidelines at least as mandatory as they were before *Booker*. These courts insist on the one hand that the guidelines are due a presumption of reasonableness that defendants will rarely if ever be able to rebut, but on the other that the beyond a reasonable doubt standard is not required because the guidelines are now applied flexibly. See Sample Case # 2. The illogic is patent. Further, under the Court's burden shifting cases, the burden of rebutting a presumption may not be shifted to the defendant without proof beyond a reasonable doubt of the operative facts supporting the presumption. See *Ulster County v. Allen*, 442 U.S. 140 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R. __ (March 2006).

B. The Recommendation to Use "Probably Accurate" Hearsay and Other "Information" Invites Inaccuracy, Violates the Due Process Clause, and is Likely to Violate the Confrontation Clause.

The Commission should delete commentary recommending the use of hearsay at sentencing, and should make clear that any information used must be accurate, not probably accurate.

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. As the Commission knows, highly-disputed facts, especially relevant conduct in drug cases, must be resolved on the basis of "untrustworthy factors, such as the testimony of co-conspirators." See Fifteen Year Report at 50. By requiring judges to "approximate" when no drugs are seized or the amount seized allegedly does not reflect the scale of the offense, § 2D1.1, comment. (n.12), the drug guideline provides the opening for untrustworthy informant testimony. In a rare case, evidence of false informant testimony may be uncovered before it is too late. See Sample Case #1. In many cases, however, the defendant pleads guilty to a drug offense, is accused at sentencing of multiple drug transactions, is required to disprove these transactions, but has no meaningful opportunity to do so because the purported witnesses are not produced in court or even identified. See, e.g., Sample Case #4; *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993).

In several circuits, the mere inclusion of factual allegations in a PSR transforms them to “evidence” which the judge may adopt without the government introducing any actual evidence to support them. This then shifts the burden to the defendant to rebut the allegations with actual evidence. See *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005) (“PSR generally bears ‘sufficient indicia of reliability,’” defendant must rebut with “countervailing proof . . . beyond defendant’s self-serving words”); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999) (“sentencing judge may consider [PSR] as evidence in making the factual determinations,” and “defendant’s rebuttal evidence must demonstrate that the information contained in the PSR is ‘materially untrue, inaccurate or unreliable,’ and ‘[m]ere objections do not suffice’”); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997) (“When the district court adopts the PSR’s findings [here, probation officer’s extrapolation of weight from dollar amounts mentioned by drug addicted informant who did not testify in person], the defendant must offer more than a bare denial of its factual allegations to mount a successful challenge.”); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990) (“defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable,” and unless the defendant carries that burden, the “court is ‘free to adopt the findings of the [presentence report] without more specific inquiry or explanation.”). The Ninth Circuit treats the PSR as “evidence” without requiring actual evidence, though perhaps not going so far as to require rebuttal by the defendant. See *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000) (“district court may, without error, rely on evidence presented in the PSR to find by a preponderance of the evidence that the facts underlying a sentence enhancement have been established”).

The origin of the jurisprudence sanctioning such sentencing procedures is the Commission’s policy statement. The cases cite to prior cases that cite the assertion in § 6A1.3 that the court is free to rely on “information without regard to its admissibility under the rules of evidence,” so long as it has “sufficient indicia of reliability” to support its “probable accuracy.” See *United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir. 1998); *United States v. Parker*, 133 F.3d 322, 329 (5th Cir. 1998); *United States v. Mumford*, 25 F.3d 461, 467 (7th Cir. 1994). These courts have either dropped the notion of “indicia of reliability” altogether or declared, *ipse dixit*, that the PSR is reliable. Again, we believe this is because the “probable accuracy” language cancels out the concept of reliability. This not only turns due process on its head, but creates unwarranted disparity.¹²

The recommendation to use “probably accurate” information also invites unreliable estimates. For example, in *United States v. Alford*, 142 F.3d 825, 832 (5th Cir. 1998), the Fifth Circuit found no problem with the district court using quantities the witness characterized “as guesses and acknowledged that the actual quantities could have been smaller,” because all that is required is an “estimate,” citing *United States v. Sherrod*, 964 F.3d 1501, 1508 (5th Cir. 1992),

¹² Some circuits hold that the PSR is *not* evidence, and, therefore, the prosecution must introduce evidence in support of disputed facts. See *United States v. Keifer*, 198 F.3d 798, 800 (10th Cir. 1999); *United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996); *United States v. Greene*, 71 F.3d 232, 236 (6th Cir. 1995); *United States v. Wise*, 976 F.2d 393, 402-03 (8th Cir. 1992); *United State v. Gessa*, 971 F.2d 1257, 1266 n.7 (6th Cir. 1992); *United States v. Prescott*, 920 F.2d 139, 143-44 (2^d Cir. 1990).

citing U.S.S.G. § 6A1.3. Some courts use estimates even when there was a seizure, no allegation of relevant conduct, and no good reason for not actually weighing the drugs. *See* Sample Case #8 (defendant sentenced on the basis of drug weight estimated by agent based on weighing 4 of 18 packets seized and extrapolating though nothing prevented her from weighing all 18 packets). Some courts accept estimates without any supporting evidence. *See* Sample Case #5 (drug courier's sentence was doubled based on probation officer's multiplication of amount of marijuana seized times three, absent evidence that defendant carried any marijuana when he crossed the border twice before). Other courts recognize that this is mere speculation. *See United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993) (evidence of amount courier was caught with on one occasion and that he made other trips did not constitute evidence that he carried the same amount or any amount on prior trips; "specific evidence- e.g., drug records, admissions or live testimony [is required] to calculate drug quantities for sentencing purposes").

The "probable accuracy" standard violates the Due Process Clause. Even in a purely discretionary system in which factfinding had no definite or measurable effect at all, defendants had a right under the Due Process Clause to be sentenced on the basis of "accurate" information, not "probably accurate" information, not "misinformation," and not facts that are "materially untrue." *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (defendant has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (defendant has a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that are "materially untrue").

The guidelines' invitation to use hearsay may well violate the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court applied the Confrontation Clause to bar the use at trial of out-of-court testimonial statements, including statements to law enforcement officers, regardless of whether the court may deem the statement reliable. Following *Crawford* and *Booker*, the courts have questioned the continuing use of testimonial hearsay at sentencing. *See United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005) ("While [the *Crawford*] rule may eventually be extended to the sentencing context, that has not happened yet."); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) (*Blakely*, *Booker* and *Crawford* "may be a broad signal of the future," but declining to require *Crawford* at sentencing "without a clear directive from the Supreme Court."). They have declined to require confrontation rights at sentencing either because the Supreme Court has not yet directed them to do so, or because the guidelines are no longer mandatory. *See United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005). Again, however, the guidelines are effectively mandatory in six circuits.

II. CRIMINAL HISTORY

It is imperative for the Commission to revise guideline provisions regarding Criminal History that result in disparities and fail to take into account new data about recidivism. Recent evidence confirms that the Commission has expanded or ignored original congressional directives in ways that result in overly harsh sentences on both ends of the criminal history spectrum. The directive for stiff sentences for certain repeat offenders in 28 U.S.C. § 994(h) has been instituted to apply far too broadly and career offender guidelines should be amended to

apply only to offenders with very serious criminal histories. Crimes of violence have been defined and interpreted to include relatively minor offenses, leading to the categorization of far too many defendants as career offenders. Similarly, studies now available from the Commission itself show that the sweep of drug offenders into the career offender provisions is more comprehensive than needed or mandated by Congress, and has resulted in seriously disparate racial impact.

On the other end of the scale, notwithstanding the directive stated in 28 U.S.C. § 994(j), the Commission has never implemented guidelines providing for more lenient treatment, specifically non-imprisonment, of first offenders who have not been convicted of a crime of violence or otherwise serious offense. Empirical data now strongly supports acting on this directive and, in addition, lowering prison sentences for first offenders.

The Criminal History Category (CHC) rules were not initially based on empirical data and, though the Commission intended to incorporate empirical data when it became available,¹³ it has not yet done so. The likelihood of recidivism is relevant to most of the purposes listed in § 3553(a), including the need to deter the defendant from committing repeated offenses, the need to protect the public from future crimes committed by repeat offenders and the need for effective correctional treatment or education, training or medical care. Quite simply, there is a reduced need for imprisonment to punish, deter or incapacitate if it is unlikely the defendant will recidivate, there is a high potential for rehabilitation, or root causes, such as addiction, would be better addressed through treatment than lengthy incarceration. Much of the empirical data is now in and it supports amending the Guidelines in several regards to reflect what we now know.

After *Booker*, criminal history is the most frequent reason for imposing non-government sponsored below-range sentences,¹⁴ underscoring current problems with the CHC rules. The Commission's recent recidivism studies highlight these problems, demonstrating that the Guidelines 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. Having now completed these studies, the Commission should take action by proposing amendments to the guidelines and making specific recommendations to Congress consistent with its conclusions, including that rehabilitation programs focused on drug use and educational opportunities would have a high cost-benefit value,¹⁵ that mitigating offender characteristics should be incorporated into the guideline.

¹³ See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "Release 1") at 1-2; see also *A Comparison of the Federal Sentence Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (January 4, 2005) (hereinafter "Release 3") at 2-4.

¹⁴ *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006) (hereinafter "Booker Report") at 131.

¹⁵ Release 1 at 15-16.

computations,¹⁶ that first offender status should be taken into account in the criminal history score,¹⁷ that U.S.S.G. 4A1.1(f) should be removed from the criminal history rules,¹⁸ that using prior drug convictions as career offender predicates vastly overstates the risk of recidivism,¹⁹ and that non-moving traffic violations and other minor offenses should not be included in criminal history score.²⁰

We address here some of the more egregious problems and urge the Commission to adopt and recommend revisions to the CHC consistent with these concerns.

A. Career Offender

The “career offender” guideline is broken. Envisioned by Congress as a means of ensuring that “repeat violent offenders and repeat drug traffickers” convicted of specified drug trafficking crimes,²¹ received stiff sentences, the career offender provisions as implemented by the Sentencing Commission instead all too frequently result 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, worse, minor misdemeanor convictions. This is the result of flawed policy decisions made by the Commission in crafting the career offender guideline and, more importantly, by its failure to correct these flaws despite a wealth of experience and empirical data suggesting obvious areas for improvement. Instead of correcting the problems detailed more extensively below, the only significant Commission action regarding the career offender guideline in recent years was to further compound its flaws by restricting any departures from the guideline to next to nothing. In October, 2003, the Commission limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level.²² Not surprisingly, in career offender cases after Booker, courts have substantially reduced career offender sentences,²³ the rate of within guideline sentences has “noticeably declined,” and average sentence length has decreased.²⁴

¹⁶ *Id.* at 16.

¹⁷ *Recidivism and the “First Offender”* (May 2004) (hereinafter “Release 2”).

¹⁸ Release 3 at 7, 11, 15.

¹⁹ *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (November 2004) (hereinafter “Fifteen Year Report”).

²⁰ Fifteen Year Report at 134.

²¹ S.Rep. No.98-225, 98th Cong. 2d Sess. 175 (1983).

²² U.S.S.G., App. C, amend. 651 (2003).

²³ *E.g.*, *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006); *United States v. MacKinnon*, 401 F.3d 8 (1st Cir. 2005); *United States v. Person*, 377 F. Supp.2d 308 (D. Mass. 2005); *United States v. Williams*, 372 F. Supp.2d 1335, 2005 (M.D. Fla. 2005);

In addressing what otherwise might be perceived as a politically controversial area, assumptions about public attitudes must be tempered with actual data. According to the Rossi & Berk public opinion survey, "there was little support for sentences consistent with most habitual offender legislation. To be sure, in the past, longer criminal records have led to longer sentences, but at substantially smaller increments than under such initiatives as 'three-strikes-and-you're out.'"²⁵ The Career Offender guideline as currently constituted runs counter to common sense and any rational need for stiff sentences for repeat offenders. A major overhaul is needed to bring it in line with congressional intent as well as good public policy.

1. Career Offender is a Poor Predictor of Recidivism.

The career offender guideline is not an accurate predictor of recidivism for a large number of defendants who fall within its reach. According to the Commission's own recidivism studies, the career offender guideline vastly overstates the risk of recidivism when the defendant's predicates are drug offenses. In the words of the Commission,

preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI. The overall rate of recidivism for category VI offenders two years after release from prison is 55 percent (USSC, 2004). The rate for offenders qualifying for the career criminal guideline based on one or more violent offenses is about 52 percent. But the rate for offenders qualifying only on the basis of prior drug offenses is only 27 percent. The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*. The career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.²⁶

Simply put, the Guidelines make assumptions about the risk of recidivism presented by these defendants that are empirically incorrect.

United States v. Hubbard, 369 F. Supp.2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005); *United States v. Carvajal*, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005).

²⁴ Booker Report at 137-140.

²⁵ Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary (1997) (hereinafter "Rossi & Berk").

²⁶ Fifteen Year Report at 134 (emphasis in original).

2. ***The Definition of Crime of Violence is Overly Broad and Empirically Unjustified.***

The definition of “crime of violence” in the career offender guideline commonly reaches offenders who have not committed violent acts. The main difficulty with the crime of violence definition found in U.S.S.G. § 4B1.2(a) is not the provision covering crimes that have “as an element the use, attempted use or threatened use of physical force against the person of another.” Rather, it is the catchall provision of § 4B1.2(a)(2), which expands the definition to cover any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The courts have interpreted this provision to include offenses that are not actually violent and that present, at best, an attenuated and remote risk of harm to others. Among the offenses that courts have found to be “violent” under this definition are tampering with a motor vehicle,²⁷ burglary of a non-dwelling,²⁸ fleeing and eluding,²⁹ operating a motor vehicle without the owner’s consent,³⁰ possession of a short-barreled shotgun,³¹ oral threatening,³² car theft,³³ and failing to return to a halfway house.³⁴ 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,³⁵ possession of a sap,³⁶ failing to stop for a blue light,³⁷ carrying a concealed weapon,³⁸ and driving while intoxicated.³⁹

²⁷ *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006).

²⁸ *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992).

²⁹ *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

³⁰ *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

³¹ *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

³² *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

³³ *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir.2002).

³⁴ *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir.2002).

³⁵ *United States v. Mobley*, 40 F3d 688 (4th Cir. 1994).

³⁶ *United States v. Canon*, 993 F2d 1439 (9th Cir. 1993).

³⁷ *United States v. James*, 337 F.3d 387 (4th Cir. 2003).

³⁸ *United States v. Hall*, 77 F3d 398 (11th Cir. 1996).

³⁹ *United States v. Begay*, 377 F. Supp. 2d 1141 (D. N.M. 2005).

Beyond the Orwellian aspect of labeling crimes "violent" which involve no actual violence or injury, there is an empirical problem with the way the catchall provision has been applied. This provision states that only crimes that present a "serious potential risk" of physical injury should be counted. However, the Commission has never endeavored to quantify or otherwise give content to this ambiguous standard, leaving each court to determine for itself which non-violent offenses present sufficient risk to qualify. It is unclear what a "potential risk" is and whether "serious" modifies the potential, the risk, or the physical injury. Importantly, if only one out of one hundred pickpocketing offenses results in actual violence, then pickpocketing should not be said to present a high or even a substantial probability of violence, much less a serious potential risk. Far too many crimes categorized as violent under this catchall provision such as those listed above do not involve violence or actual injury to another. The Commission has a mandate to conduct empirical research to improve sentencing accuracy.⁴⁰ Yet it has never attempted to measure the rate and frequency at which supposedly "violent" crimes such as pickpocketing and walking away from a halfway house actually result in real world violence. As a result, many defendants who have never physically harmed another human being have been classified as violent career offenders based on nothing more than a court's data-free speculation about the level of risk presented by their predicate offenses. Rather than accurately identifying and punishing violent, predatory offenders, too often career offender snatches up defendants convicted of nothing more than low-risk crimes of opportunity and property offenses that seem in no way intrinsically violent.

3. *The Definition of Controlled Substance Offense Fails to Distinguish Serious from Non-Serious Offenders.*

The definition of controlled substance offense used in the career offender guideline also undermines the goal of singling out the worst, most dangerous offenders for enhanced punishment. The primary problem with the definition is that it covers a vast range of conduct, from the drug-addicted street-dealer selling dime bags of marijuana to the drug kingpin distributing thousands of kilos of cocaine. For career offender purposes, the crimes of these two offenders are treated exactly alike. This nonsensical outcome is driven by the fact that the career offender guideline does not take into account either the length of sentence imposed for the predicate offense or the offense's statutory maximum punishment, either of which would illuminate the relative severity of the offense. As a result, two street-level drug sales resulting in no jail time are, for career offender purposes, the precise equivalent of any number of multi-kilo transactions punished by stiff prison sentences. This is contrary to any theory of just desserts or proportional punishment and, as importantly, cannot be justified as a contribution to deterrence or incapacitation.

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 "an offense under federal or state law, punishable by imprisonment exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of

⁴⁰ Release 1 at 2.

a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense.” U.S.S.G. § 4B1.2(b). The inclusion of state offenses seems defensible though not mandated, but the Commission has exceeded the statutory directive by including crimes not specified in 28 U.S.C. § 994(h), including export, conspiracy, attempt, possession of a flask or equipment with intent to manufacture under 21 U.S.C. § 843(a)(6), maintaining a place for the purpose of facilitating a controlled substance offense under 21 U.S.C. § 856, use of a communications facility in committing or facilitating a controlled substance offense under 21 U.S.C. § 843(b), and any “controlled substance offense” punishable by a statutory maximum as low as a year and a day.⁴¹ *Id.* & comment. (n.1). The data does not support applying the career offender provisions to the myriad of possible offenses related to controlled substances.

As the Commission itself has noted,

[t]he question for policymakers is whether the career offender guideline, especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing. Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.⁴²

The weight of the controlled substance provisions in the career offender enhancement falls disproportionately on Black offenders. In the words of the Commission, “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.”⁴³ According to the Commission, the reason for this racial disparity is primarily attributable to “the inclusion of drug trafficking crimes in the criteria qualifying offenders for....the career offender guideline. Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often

⁴¹ The lowest statutory maximum for the vast majority of the offenses specified by Congress in 28 U.S.C. § 994(h) is twenty years. See 21 U.S.C. §§ 841(b), 960(b). Only two of the specified offenses are subject to a lower statutory maximum of five years: wrongful distribution or possession of a List I or II chemical, 21 U.S.C. § 841(f), and importation of lesser amounts of marijuana or hashish, 21 U.S.C. §960(b)(4).

⁴² Fifteen Year Report at 133-34; see also, *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir.2001) (“In some circumstances, a large disparity [between the length of the prior sentences and the sentence produced by the guideline] might indicate that the career offender sentence provides a deterrent effect so in excess of what is required ... as to constitute a mitigating circumstance present ‘to a degree’ not adequately considered by the Commission.”).

⁴³ Fifteen Year Report at 133-34.

found in impoverished minority neighborhoods and which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers.”⁴⁴

The failure of the Commission to differentiate between serious and non-serious drug offenders has repeatedly been cited by courts as a reason to depart or vary from the career offender guideline range.⁴⁵ This failure is especially unfortunate because it is wholly avoidable. Nothing in Congress’s mandate to the Commission would prevent it from crafting a definition that would distinguish between serious and non-serious drug offenses. Indeed, the ACCA definition makes just such a distinction, requiring the drug offense to be punishable by at least ten years in prison before it may be used as a predicate. 18 U.S.C. § 922(e)(2).

4. *Misdemeanor Offenses Should Not Qualify as Career Offender Predicates.*

The career offender guideline contains a similar problem with respect to its treatment of misdemeanor offenses. The guideline defines “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.” U.S.S.G. § 4B1.2, comment. (n.1). Unfortunately, some states have misdemeanors punishable by up to two, three, or even ten years. This means defendants are regularly classified as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court.⁴⁶ Again the problem is one of proportionality. A defendant who receives two simple assault convictions for bar room scuffles and spends not a day in jail is treated no differently under the career offender guideline than a defendant with murder and rape convictions. There is no need for the Commission to have chosen a definition so wildly over-inclusive. The definition of felony used in the ACCA statute, for instance,

⁴⁴ *Id.* at 134 (citations omitted).

⁴⁵ *E.g., United States v. Fernandez*, ___ F.Supp.2d ___, 2006 WL 1770268 (E.D.Wis.2006); *United States v. Serrano*, No. 04-CR-414, 2005 U.S. Dist LEXIS 9782, at *22-25 (S.D.N.Y. May 19, 2005).

⁴⁶ *E.g., United States v. Thompson*, 88 Fed.Appx. 480 (3d. Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and \$25 fine qualified as career offender predicate); *see also. NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (discussing case in which defendant’s Guideline sentence was increased nine-fold as a result of a criminal history involving four South Carolina misdemeanors: (1) assault and battery, a misdemeanor under state law punishable by 0-10 years; (2) “failure to stop for a blue light,” a misdemeanor under state law punishable by 90 days to three years; (3) possession of less than one gram of cocaine base, a felony under state law punishable by 0-5 years; and (4) resisting arrest, a misdemeanor under state law punishable by not more than one year, all classified as non-violent under South Carolina law, all four of which the defendant pled guilty to on the same day at the age of 18, and for all of which the defendant received a suspended sentence and served seven months for after revocation of probation).

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

1. The Commission should re-calibrate the career offender guideline so that it more accurately reflects a defendant's risk of recidivism. One obvious way of doing this, suggested by the Commission's own research, would be to omit the provision that automatically elevates a defendant to Criminal History Category VI when the defendant's predicates are for controlled substance offenses.

2. The Commission should tighten the definition of "crime of violence." The Commission should omit the catchall definition of §4B1.2(a)(2) and restrict crimes of violence to offenses that have as an element "the use, attempted use, or threatened use of physical force against the person of another" and to certain specifically enumerated offenses such as burglary of a dwelling, arson, or extortion.

3. The Commission should differentiate between serious and non-serious controlled substance offenses. The most accurate, easily accessible measure of the severity of a defendant's predicate drug offense is the sentence actually imposed for that offense, or, if in a parole jurisdiction, the sentence served.⁴⁷ Limiting drug predicates to those convictions that were serious enough to have resulted in a substantial term of imprisonment would go a long way toward correcting the unfairness and disparate racial impact of this guideline. In addition, the Commission could restrict career offender predicates to drug offenses carrying a statutory maximum of at least ten years, in conformance with the Armed Career Criminal enhancement.

4. The Commission should not include state misdemeanor convictions as career offender predicates. The convictions, by definition, involve less serious conduct than felony offenses and are rarely accorded the same level of care in process or disposition as felonies. It is neither fair nor reasonable for dramatic increases in punishment to hinge on convictions which, at the time they were sustained, the defendant had no way of knowing could possibly be of such monumental import.

B. First Offenders

Minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism, which the Guidelines do not take into account.⁴⁸ 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

⁴⁷ U.S. Sentencing Commission, Simplification Draft Paper, Chapter Four, Part V (failing to distinguish between sentences imposed in parole and non-parole systems is problematic because defendants may serve two very different terms of imprisonment).

⁴⁸ Release 3 at 15.

defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." The Commission recognizes the need to act on this directive, but has never done so.⁴⁹

In 1991, a working group of the Commission proposed several alternatives to implement § 994(j), including (1) a two-level reduction for offenders who had zero criminal history points and did not use violence or weapons in the instant offense; or (2) allowing first offenders access to probation or other alternatives to prison.⁵⁰ In 2000, another working group also studied alternatives and in 2001, former Commissioner Michael O'Neill proposed a new first offender CHC or a downward departure for first offenders.⁵¹ The Commission did not act, apparently due to the lack of empirical data.

Now, however, the Commission has compiled that data. 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%.⁵² First offenders are more likely to be involved in less dangerous offenses and their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role or acceptance of responsibility.⁵³ They are also more likely than offenders with criminal histories to have a high school education, to be employed or to have dependents.⁵⁴ Further supporting alternatives to prison for this group is the finding that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.⁵⁵

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.⁵⁶ These statistics include arrests and revocations in calculating recidivism; the rate of reconviction is similarly much lower: offenders with zero criminal history points have a reconviction rate of 3.5%, those with one point have a reconviction rate of 5.5%, those with two or more points have a reconviction rate of 10.3%.

⁴⁹ Release 2 at 1-2.

⁵⁰ Release 2 at 3.

⁵¹ Release 2 at 3 (citing Michael E. O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 Bost. Coll. L. Rev. 291 (2001)).

⁵² Release 2 at 4.

⁵³ Release 2 at 9-10.

⁵⁴ Release 2 at 6-11.

⁵⁵ Release 1 at 13 & Exhibit 12.

⁵⁶ Release 2 at 13-14.

The Commission closely compared different definitions of first offenders and each of them demonstrate substantially reduced rates of recidivism, as well as lower culpability in connection with the instant offense. Despite data indicating that first offenders with a prior arrest record have higher rates of recidivism than those without such a history,⁵⁷ it would be unfair and inappropriate for the Commission to base any revision to the guidelines on the presence or lack of an arrest record because that record does not represent reliable proof of prior conduct. We believe the best solution is to define first offenders as those with no criminal history points.

Consistent with the recognition that first offenders should be treated with leniency, 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.⁵⁸ Despite this recognition, however, the proportion of first offenders receiving prison sentences increased both after the Protect Act and after *Booker*. Sentence severity for those offenders also increased during those periods.⁵⁹ Moreover, the rate of non-government-sponsored below-range sentences after *Booker* was lower for Hispanic and non-citizen first offenders than it was for White and citizen first offenders.⁶⁰ That result is consistent with a lower rate of non-government-sponsored below-range sentences for immigration offenses in general, suggesting more severe treatment of immigration offenses and/or Hispanic or non-citizen offenders. 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 on first offenders, including in immigration offenses, and the appropriateness of reducing prison sentences accordingly to reflect a lower risk of recidivism.⁶¹

The Commission's failure to implement § 994(j) stands in stark contrast to its implementation and overly broad interpretation of § 994(h), as discussed above. The Commission 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. There is no reason for further delay and it is essential and urgent that the Commission finally act on this directive, particularly after compiling data strongly supporting it. The Commission should interpret the data and § 994(j) broadly to justify lower sentences as well as alternatives to prison for first offenders. 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. In addition to one or more of these changes and consistent with §

⁵⁷ Release 2 at 14-17.

⁵⁸ *Booker* Report at 132 & n.348.

⁵⁹ *Id.* at 133.

⁶⁰ *Id.* at 135-36.

⁶¹ See also Michael Edmund O'Neill *Re-conceptualizing Criminal History for First Time Offenders* 18 *Federal Sentencing Reporter* 191 (Feb. 2005); Michael Edmund O'Neill, Linda Drazga Maxfield, Miles Harer, *Past as Prologue: Reconciling Recidivism and Culpability*, 73 *Fordham L. Rev.* 245 (2004).

994(j), the Commission should amend the guidelines to specifically recommend alternatives to prison for first offenders who have not been convicted of a crime of violence or a serious offense. As discussed above in connection with career offender provisions, crimes of violence and serious offenses in the first offender directive should be interpreted to apply only to actually violent crimes and truly serious offenses.

C. Other Criminal History Issues

The Fifteen Year Report and the recidivism studies highlight several other areas that deserve Commission attention.

1. Offender Characteristics

One of the results of the recidivism studies is the correlation between many offender characteristics and the risk of recidivism:

•Age: "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.⁶² Under the Parole Commission's Salient Factor Score (SFS), which is a better predictor of recidivism than CHC, the older the defendant is and the fewer the number of prior commitments, the less likelihood of recidivism, and defendants over 41 get an automatic reduction. Age is a powerful component of recidivism prediction, which the Guidelines do not take into account.⁶³

•Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism.⁶⁴

•Education: Recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree).⁶⁵

•Family: Recidivism rates are lower for defendants who are or were ever married, even if divorced.⁶⁶

•Gender: Women recidivate at a lower rate than men, and the difference is even greater in CHC V and VI.⁶⁷

⁶² Release 1 at 12 & Exhibit 9.

⁶³ Release 3 at 8, 13-15.

⁶⁴ Release 1 at 12 & Exhibit 10.

⁶⁵ *Id.* at 12 & Exhibit 10.

⁶⁶ *Id.* at 12 & Exhibit 10.

⁶⁷ *Id.* at 11 & Exhibit 9.

•Abstinence from drug use: Recidivism rates are lower for those without illicit drug use in the year prior to the offense.⁶⁸

•Non-Violent Offenders: Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate.⁶⁹

As previously discussed, factors which indicate a significantly reduced risk of recidivism militate toward reduced need to incarcerate to achieve many of the § 3553(a) purposes of sentencing. Thus, for some of the above factors, it may be advisable to try to build in guideline reductions when a factor is present. For instance, the Commission's recidivism study comparing the CHC to the Parole Salient Factor Score suggests that it may be advisable to add an age factor to the CHC.⁷⁰

Whether or not the Commission builds age or any of the other offender characteristics corresponding with reduced recidivism into the CHC, it should change the approach in Chapter 5H from discouraging departure to encouraging departure when factors relevant to the purposes of sentencing are present. This highlights one of the strongest criticisms of the Sentencing Guidelines as formulated, namely that the wrongs a person may have committed in the past count for everything, while his or her personal characteristics count for nothing. Clearly, when an offender's characteristics can be statistically tied to a reduced need to incarcerate, the sentencing court should not be discouraged from implementing that fact in imposing sentence. If the Commission fails to act in this area within the guideline structure, courts should be encouraged to sentence outside the guidelines using what has been termed a *Booker* "variance" based on the purposes of sentencing enunciated in § 3553(a), but not addressed by the guidelines.

2. *Uncounted Crimes of Violence*

The Parole Commission's Salient Factor Score (SFS), which is a better predictor of recidivism than CHC, has no violence component. CHC adds 1 point for each prior conviction of a crime of violence otherwise uncounted, U.S.S.G. § 4A1.1(f). The predictive power of U.S.S.G. § 4A1.1(f) is statistically insignificant and therefore should be deleted.⁷¹

3. *Minor offenses*

According to the Commission, inclusion of non-moving violations in the criminal history score does not clearly advance sentencing purposes, and may adversely affect minorities, and

⁶⁸ Release 1 at 13 & Exhibit 10.

⁶⁹ Release 1 at 13 & Exhibit 11.

⁷⁰ Release 3 at 15-17.

⁷¹ Release 3 at 7, 11, 15.

“there are many other” such possibilities.⁷² Many courts and commentators have recognized, and many studies have shown, that Blacks are stopped by the police and charged only with traffic offenses in disproportionate numbers, often called “driving while black.”⁷³ It is time to simply delete non-moving traffic violations from the criminal history scoring. Non-criminal offenses should also be deleted from the criminal history scoring.⁷⁴ The Commission should determine what other minor offenses do not clearly advance sentencing purposes, and exclude them.

4. *Recency Points*

The addition of a total of three points for recency of a prior conviction or an existing conviction is frequently too harsh, adding the equivalent of another serious felony conviction to the score when the defendant’s criminal history and its recency does not warrant that increase.⁷⁵ These points are unjustly punitive when a defendant’s criminal history is otherwise minor and when both recency and current offense points are added for the same offense. They are also particularly punitive when applied to defendants who happen to be incarcerated at the point when authorities “find” and charge them with federal immigration offenses. The Commission should lower the scores associated with these points under those circumstances.

D. *Conclusion*

The criminal history rules are rife with grave problems, many of which are highlighted by recent recidivism studies. With respect to some of these problems, we recommend particular changes and with respect to others, we identify disparities and request action by the Commission. On all of these issues, Defenders would appreciate being invited to the table to take part in an

⁷² Fifteen Year Report at 134.

⁷³ See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-52 (1998); Jennifer A. Larrabee, “DWB (Driving While Black)” and Equal Protection: *The Realities of an Unconstitutional Police Practice*, 6 J.L. & Pl’y 291, 296 (1997).

⁷⁴ E.g., *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005) (counting New York one-year “conditional discharge” for noncriminal offense because it was equivalent to term of probation, despite fact that conditional discharge is not probation under New York law).

⁷⁵ See *United States v. Johnson*, No. 05-CR-80, 2005 WL 1788784, at *3 n.1 (E.D. Wisc. July 25, 2005) (recognizing unfairness of double counting where defendant is convicted of failure to report and assigned two additional points for being in escape status, thus “was punished for failing to surrender while in escape status because she failed to surrender”); *United States v. Galvan-Zermeno*, 52 F.Supp.2d 922, 924-25 (C.D. Ill. 1999) (as Government agrees, downward departure warranted where illegal alien’s sentence is enhanced under § 4A1.1(d) after being “found” while in custody for another offense committed after illegal entry into United States).

effort by the Commission to craft specific proposals aimed at improving fairness and achieving the multiple purposes of sentencing

III. RELEVANT CONDUCT

For many years, judges, the Defenders, PAG, and other experts have urged the Commission to abolish “relevant conduct” rules that require the inclusion of uncharged, dismissed and acquitted offenses in calculating the guideline range. During the 1990s, the Commission and its staff proposed ways to abolish or limit the impact of these rules and even made it a top priority,⁷⁶ but nothing was done. In 1997, Justice Breyer encouraged the Commission to abolish acquitted conduct, given the jury’s role in our system.⁷⁷ Still the Commission did not act. In *Booker*, the Supreme Court ruled that sentencing on the basis of separate and greater crimes is unconstitutional.

The Commission should abolish uncharged, dismissed and acquitted offenses in calculating the guideline range. By transferring power to prosecutors, this type of relevant conduct has accomplished the opposite of the theory used to justify it. It results in unfairness, unwarranted disparity and unwarranted uniformity, and the guidelines are constitutionally vulnerable as long as it exists.

At the very least, the Commission should 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.

As the Constitution Project’s Sentencing Initiative said just last week, “The Guidelines . . . place excessive emphasis on conduct not centrally related to the offense of conviction. . . . *Watts* might be reconsidered in the wake of *Blakely* and *Booker*, and at all events, enhancing a defendant’s sentence with acquitted conduct lends such an air of unfairness to the system as a whole that some attention to the question is in order,” and further, “Fair notice should be provided and reliable fact-finding mechanisms ensured.” See Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 10-11 (July 11, 2006).

A. Relevant Conduct is Detrimental to the Goals of the Sentencing Reform Act.

Contrary to Justice Breyer’s apparent belief, the guidelines’ relevant conduct rules go well beyond facts about “the way in which” the offense of conviction was committed. The Commission characterizes these rules, which were not required or even suggested by Congress,

⁷⁶U.S. Sentencing Commission, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993); 61 Fed. Reg. 34,465 (1996); 62 Fed. Reg. 152, 161 (1997).

⁷⁷ *Watts v. United States*, 519 U.S. 148, 158-59 (Breyer, J., concurring).

as “an admitted policy compromise.”⁷⁸ The “compromise” was radical and one-sided. Some state guideline systems permit the use of some facts beyond the offense of conviction, but the sentence is capped based on the offense of conviction.⁷⁹ Under the federal guidelines, separate offenses of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted. This is not confined to a small subset of federal cases. The most frequently applied guidelines (drugs, economic crimes, firearms) require inclusion of uncharged, dismissed and acquitted offenses, and there are now at least eighty-five cross references to more serious offenses.

As the Commission and many experts have found, the relevant conduct rules result in unfairness and inaccuracy, and have not avoided unwarranted disparity or the transfer of power to prosecutors, but just the opposite.

Unfairness, Inaccuracy, Unwarranted Disparity According to the Fifteen Year Report, “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.”⁸⁰ Many (according to the Commission) or nearly all (in our experience) probation officers incorporate the prosecutor’s written version of the facts or law enforcement reports directly into the PSR.⁸¹ In some circuits, these factual recitations are thereby transformed into “evidence” which the defendant must rebut. See Part I, *supra*.

Transfer of Power to Prosecutors The relevant conduct rules and cross references were based on concerns that a charge system would transfer power to prosecutors and thereby increase disparities,⁸² but the relevant conduct rules “are not working as intended,” and “tend to work in one direction,” *i.e.*, to the disadvantage of defendants.⁸³ “Real offense conduct” has not

⁷⁸ Fifteen Year Report at 144.

⁷⁹ U.S. Sentencing Commission, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996) (hereinafter “Relevant Conduct Staff Paper”), <http://www.ussc.gov/SIMPLE/relevant.htm>.

⁸⁰ Fifteen Year Report at 50. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. Rev. 211, 222 (2004) (discussing “increase in ‘dry conspiracies’ where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.”).

⁸¹ Fifteen Year Report at 84, 86.

⁸² *Id.* at 25-27.

⁸³ *Id.* at 92.

prevented prosecutors from controlling sentencing outcomes, but instead has transferred sentencing power to prosecutors.⁸⁴

The relevant conduct rules invite prosecutors to obtain, or threaten to obtain, the equivalent of a conviction on charges that cannot be proved with competent evidence but are impossible to challenge. If the charges were brought, the defendant would have notice, discovery, and the right to cross-examination and proof beyond a reasonable doubt. If charges are not brought or dropped, they can be "proved" in a presentence report. 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. See U.S.S.G. § 6A1.3. In this way, the burden is effectively or explicitly shifted to the defendant. See Part I, *supra*. But if the defendant contests the allegations, he may lose an acceptance of responsibility reduction and even receive an enhancement for obstruction of justice.⁸⁵ Hence, it is far easier for prosecutors to obtain the equivalent of a conviction in the Probation Office than to bother with the adversarial testing the Framers had in mind.⁸⁶ See Sample Case #2 (defendant convicted of one bank robbery was sentenced on the basis of two robberies that were dismissed for lack of evidence and two that were never charged); Case #7 (defendant who pled guilty to being a felon in possession was sentenced on the basis of carjacking dismissed for lack of evidence). Further, with this awesome power in hand, prosecutors can and do extract agreements to dubious enhancements or guilty pleas from defendants who would otherwise be acquitted.⁸⁷ "The inducement to plead guilty may be irresistible even to a defendant with a strong defense or who is actually innocent."⁸⁸

Unwarranted Uniformity 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.⁸⁹ In drug

⁸⁴ *Id.* at 86; Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005).

⁸⁵ Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425 (2004).

⁸⁶ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1714 (1992).

⁸⁷ Michael O'Hear, *The Original Intent of Uniformity in Sentencing*, 74 U. Cin. L. Rev. 749, 809 & n.304 (2006).

⁸⁸ American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1492-93 (2001). See also David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 449 (1993); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 274 (1989).

⁸⁹ *Id.* at 50, 52. See also, e.g., Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10

cases, it punishes offenders in excess of Congress' intent in enacting the mandatory minimum statutes 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. See Part IV, *infra*. Probation officers and judges routinely apply concepts of "foreseeability" and "jointly undertaken activity" in a manner that obliterates important distinctions in culpability.⁹⁰

Unwarranted Disparity 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."⁹¹ In a sample test administered by Commission researchers for the Federal Judicial Center, probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.⁹²

Prosecutors, judges and defense counsel circumvent the rules because they feel they are unjust.⁹³ 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," but those decisions are controlled by prosecutors and only benefit some defendants and not others. This results in unwarranted disparity and sentences that are often disproportionate to the seriousness of the offense.⁹⁴

B. Relevant Conduct is Constitutionally Unsound.

The importance of this issue for the future of the guidelines in the Supreme Court cannot be overstated. 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.⁹⁵ They held that "real conduct" sentencing is an "assault" on the Sixth Amendment's

Fed. Sent. Rep. 16 (July/August 1997); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

⁹⁰ Stephen J. Schulhofer, *Excessive Uniformity and How to Fix It*, 5 Fed. Sent. Rep. 169, 1992 WL 439725 **2-3 (Nov./Dec. 1992).

⁹¹ Fifteen Year Report at 87.

⁹² See Lawrence & Hofer, *supra* note __.

⁹³ Fifteen Year Report at 32, 87.

⁹⁴ *Id.* at 82, 141-42.

⁹⁵ See *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (not even *Apprendi*'s critics can support the "absurd result" of a man being sentenced "for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death

“fundamental reservation of power” in the people within “our constitutional structure.”⁹⁶ “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”⁹⁷

If the Sixth Amendment issue had been raised in *Witte v. United States*, 515 U.S. 389 (1995) (upholding uncharged conduct against double jeopardy challenge) and *United States v. Watts*, 519 U.S. 148 (1997) (upholding acquitted conduct against double jeopardy challenge), these justices would have decided those cases differently.⁹⁸ Further, they are aware that the “facts” of these uncharged, dismissed and acquitted offenses are determined unfairly and unreliably, *i.e.*, without notice by indictment or plea, based on “hearsay-riddled presentence reports” prepared by probation officers who the judge thinks “more likely got it right than got it wrong.”⁹⁹

The same continues after *Booker*. As before, defendants are regularly convicted and sentenced for separate and greater crimes, without notice, jury trial, admissible evidence, or proof beyond a reasonable doubt, in many circuits under a presumptive guideline system. *See, e.g.*, Appendix of Sample Cases, Cases #2-9; *United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double homicide to which firearms were unrelated); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted).

Justices Scalia, Stevens, Souter, Thomas and Ginsburg have already ruled that this is unconstitutional. Though Justice Ginsburg signed onto the remedy in *Booker*, she did so believing that the guidelines would be “advisory.” Her position on “real conduct” sentencing under mandatory guidelines has not changed: “In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments.”¹⁰⁰

scene”); *id.* at 307 (Blakely was sentenced based on the “very charge” that was dismissed pursuant to his guilty plea); *Booker*, 543 U.S. at 273 (noting that Booker was sentenced on the basis of uncharged crimes) (Stevens, J., dissenting).

⁹⁶ *Blakely*, 542 U.S. at 305-08, 313.

⁹⁷ *Id.* at 307 (emphasis in original).

⁹⁸ *Booker*, 543 U.S. at 240.

⁹⁹ *Id.* at 304 (Scalia, J., dissenting); *Blakely*, 542 US at 311-12.

¹⁰⁰ *Washington v. Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting).

IV. DRUG GUIDELINES

The Commission should 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.

Increased sentence length for drug offenses has been "the major cause of federal prison population growth" since the guidelines' inception, and a "primary cause" of racial disparity in sentencing.¹⁰¹ The Commission rightfully has condemned mandatory minimum penalties for creating disproportionate severity, unwarranted uniformity, and unwarranted disparity,¹⁰² but the Commission has unnecessarily exacerbated these problems. 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.

Thirty-one percent of judges surveyed in 2002 listed drug sentencing as "the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing," with "73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses."¹⁰³ Before *Booker*, prosecutors and judges often circumvented the guidelines in drug cases to mitigate their harshness and inflexibility.¹⁰⁴ After *Booker*, the rate of below-guideline sentences in all types of drug cases has increased markedly.¹⁰⁵

1. *What Congress Intended*

In enacting the Anti-Drug Abuse Act of 1986 (ADAA), Congress intended to create a two-tiered penalty structure aimed at "discrete categories of traffickers": a ten-year mandatory minimum for "major" traffickers, *i.e.*, "manufacturers or the heads of organizations," and a five-

¹⁰¹ Fifteen Year Report at 47-48, 76.

¹⁰² *Id.* at 15, 22. See also U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991).

¹⁰³ Fifteen Year Report at 52, citing U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines* (Feb. 2003), available at <http://www.uscc.gov/judsurv/judsurv.htm>.

¹⁰⁴ Fifteen Year Report at 54-55. See also Frank O. Bowman and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 479-83 (January 2002).

¹⁰⁵ *Booker* Report at 128.

year mandatory minimum for “serious” traffickers, *i.e.*, “managers of the retail traffic.”¹⁰⁶ Congress selected quantities of particular drugs possessed, controlled, directed or handled by the defendant as a proxy to identify “major” and “serious” traffickers.¹⁰⁷ A “major goal” of the legislation was “to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”¹⁰⁸

2. *Severity Broadened and Increased by the Commission*

The Commission extended the ADAA’s quantity-based approach across 17 levels, resulting in increased punishment below, between and above the statutory levels.¹⁰⁹ This went “well beyond those judgments that flow naturally from deference to congressional decisions.”¹¹⁰ The Commission gave no contemporaneous explanation for doing so, which “is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population.”¹¹¹

The Commission added a variety of aggravating factors that increase the guideline sentence above that dictated by quantity. Some of these double count aspects of the offense that Congress contemplated would be reflected in quantity. For example, Congress used quantity at the statutory thresholds as a proxy for aggravating role, but the Commission added points for aggravating role. Congress used a low threshold quantity for crack because it thought crack cases often involved violence and young people,¹¹² but the guidelines add points for weapons and use of a minor in crack cases.

The Commission decided not to give more weight to mitigating role in the offense and other potentially significant factors because if so, guideline sentences might conflict with mandatory minimum sentences in some cases.¹¹³

¹⁰⁶U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* at 5-7 (2002) (reviewing legislative history) (hereinafter “2002 Cocaine Report”); Fifteen Year Report at 48-49 (same); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

¹⁰⁷ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background) (emphasis supplied).

¹⁰⁸ *Id.*

¹⁰⁹ Fifteen Year Report at 50.

¹¹⁰ Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853 (1992).

¹¹¹ Fifteen Year Report at 49.

¹¹² 2002 Cocaine Report at 9-10.

¹¹³ Fifteen Year Report at 49.

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 amounts "reasonably foreseeable" to the defendant in "jointly undertaken criminal activity." Even in transactions in which the defendant was personally involved and of which he was convicted, application of the relevant conduct rule can exceed congressional intent. For example, a defendant who helped offload a single shipment can be sentenced, based on that single shipment, "well in excess of the ten-year mandatory minimum penalty," though "it cannot be said that Congress required . . . more than ten years imprisonment" in such a case. See U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group 2-3* (Nov. 10, 1992) (hereinafter "1992 USSC Drug Report").

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."¹¹⁴ The Commission initially estimated that the drug guidelines would add only one additional month to prison sentences, but as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties.¹¹⁵

3. *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 guidelines overstate the seriousness of the offense even from a pure "just deserts" perspective.¹¹⁶ The quantity-driven rules "mandate

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 54.

¹¹⁶ *Id.* at 50 (quantity a "particularly poor proxy for the culpability of low-level offenders . . . who do not share in the profits or decision-making"); Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991) (guidelines disregard factors that are important from a just deserts perspective in favor of "harm" only because it is easier, on the surface, to quantify); Hofer & Lawrence, *An Empirical Study of the Application of the Relevant Conduct Guidelines § 1B1.3*, 4 Fed. Sent. Rep. 330, 1992 WL 195017 (May/June 1992) (sentences imposed are "vastly disproportionate to the defendant's culpability" when based on amounts involved in a conspiracy in which the defendant played a minor part); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-57 (1992) ("Drug quantity, which should count as one among many sentencing factors, and not the most important one at that, becomes the only sentencing factor."); U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group 51* (Nov. 10, 1992) (hereinafter "1992 USSC Drug Report") (discussing need for "a greater reduction for mitigating role"); Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission 2* (1995) ("[T]he Judicial Conference . . . encourages the Commission

inequity” and “excessive uniformity” by “requiring that different cases be treated alike.”¹¹⁷ The rules make arbitrary distinctions among offenders, creating a false precision.¹¹⁸ It is doubtful that quantity can “be determined with sufficient precision to justify seventeen meaningful distinctions,” and “arbitrary variations due to the weight of inactive ingredients remain.”¹¹⁹ Quantity “is often opportunistic,” and results in “inequity and unfairness.”¹²⁰ Manipulation of sentencing factors by prosecutors and police (e.g., inducement to cook the powder, repeated transactions, transactions in a prohibited location) is a “significant source of continuing disparity in the federal system.”¹²¹ As noted above, there are “significant disparities” in how the relevant conduct rules are understood and applied, and it is questionable that disputes over drug quantity could ever be consistently applied, since they “must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.”¹²²

Inexplicably, the Commission has encouraged *upward* departure in the event drug quantity happens to understate offense seriousness, but has not invited *downward* departures,¹²³ though “these are the guidelines most in need of rationalizing interpretation.”¹²⁴

4. *Ineffective Sentences Not Worth the Financial and Human Cost*

Contrary to congressional intent in enacting the ADA, prosecutors have used the severe sentences offered by the guidelines to focus on low-level drug offenders. Fifty-five percent of federal prisoners are serving time for a drug offense.¹²⁵ Over 50% are in Criminal History

to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved”).

¹¹⁷ See Schulhofer, *supra* note 121, at 851-57. See also Alschuler, *supra* note 121, at 919-21 (guidelines require same treatment of a runner and his supplier); Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 Brooklyn L. Rev. 643 (1995) (same regarding couriers).

¹¹⁸ Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24 (2003).

¹¹⁹ Fifteen Year Report at 50.

¹²⁰ 1992 USSC Drug Report at 51, 60.

¹²¹ Fifteen Year Report at 82.

¹²² *Id.* at 50.

¹²³ *Id.*

¹²⁴ Hofer & Allenbaugh, *supra* note 123, at 79.

¹²⁵ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) (hereinafter “*Incarceration and Crime*”), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

Category I, and at least 83% had no weapon involvement.¹²⁶ Only 17.1% of federal cocaine traffickers are classified as high-level offenders, 70% are low-level, and the other 12.4% are in between.¹²⁷

A study published by the Department of Justice in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders “are much less likely than high-level defendants to re-offend” and “a short prison sentence is just as likely to deter them from future offending as a long prison sentence,” they “still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme.” DOJ concluded that the resources expended on these offenders “could be used more efficiently to promote other criminal justice needs.”¹²⁸ A recidivism study published by a Bureau of Prisons researcher in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who at that time were in Criminal History Category I, guideline sentences were costly to taxpayers, had little, if any, incapacitation or deterrent value, and were likely to negatively impact recidivism.¹²⁹

In 1995, a RAND Corporation working group recommended that the “U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug,” because “[f]ederal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out.”¹³⁰ In 1999, Commission research staff reported that the Bureau of Prisons had found that drug trafficking offenders were less likely to recidivate than the average federal offender, and that their risk of recidivism could be reduced further with drug treatment.¹³¹ In 2004, the Commission reported its own findings that drug trafficking offenders (along with

¹²⁶ Fifteen Year Report at 54-55; U.S. Sentencing Commission, 2005 Sourcebook of Federal Sentencing Statistics, Tables 37, 39.

¹²⁷ 2002 Cocaine Report at 39.

¹²⁸ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994) (“DOJ Drug Offender Analysis”), available at <http://www.fd.org>.

¹²⁹ Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994).

¹³⁰ Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995).

¹³¹ Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 at *9 n.20 (July/August 1999), citing Bureau of Prisons, *Recidivism Among Federal Prison Releases in 1987: A Preliminary Report* (March 1994), Bureau of Prisons, *TRIAD Drug Treatment Evaluation Project: Six-Month Interim Report* (July 1998).

larceny and fraud offenders) are the least likely to recidivate and that drug treatment and education are likely to have a high cost/benefit value.¹³²

The Commission has been aware since at least the mid-1990s that incarceration prevents little if any drug crime because drug crime is driven by demand, street dealers and couriers are easily replaced, so the crime is simply committed by someone else.¹³³ While the federal prison population has skyrocketed, drug use rates have increased over the past few years,¹³⁴ and teenagers are using dangerous drugs at twice the rate they did in the 1980s.¹³⁵ At the same time, the persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, contributes to increased recidivism, and harms families and communities.¹³⁶ Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.¹³⁷

5. Crack Sentences

The Commission has long recognized that the punishment recommended by the guidelines for crack cocaine offenses is grossly disproportionate in comparison to recommended sentences for other drugs.¹³⁸ The Commission has remained silent for nearly five years as the prison population has continued to explode with low-level drug offenders who have fallen victim to the inequity in the guidelines. With recent focus on this issue in the press, see Eric E. Sterling

¹³² Release 1 at 13, 16 & Exh. 11.

¹³³ U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced), available at <http://www.ussc.gov/crack/CHAP4.HTM>; *Incarceration and Crime* at 6; Hofer & Semisch, *supra* note 136, at *9 n.20; Release 1 at 9; Fifteen Year Report at 133-34.

¹³⁴ *Incarceration and Crime* at 6.

¹³⁵ Opinion editorial by Eric E. Sterling and Julie Stewart, *Undo This Legacy of Len Bias' Death*, Washington Post, July 24, 2006.

¹³⁶ *Incarceration and Crime* at 7-8.

¹³⁷ *Id.* at 8; Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

¹³⁸ See U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1997), *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1999), *Special Report to Congress: Cocaine and Federal Sentencing Policy* (2002).

& Julie Stewart, Undo This Legacy of Len Bias's Death, The Washington Post, June 24, 2006, at A21, and among other expert bodies like the Constitution Project and the ABA's Justice Kennedy Commission, it is time for the Sentencing Commission to renew its effort on behalf of fairness in federal drug sentencing.

Such advocacy was noticeably absent from the Commission's Booker Report. It summarizes the findings in its 2002 cocaine report to Congress,¹³⁹ but suggests that the courts have not used their discretion to reduce sentences on that basis: "Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3553(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/cocaine powder sentencing disparity as a reason to impose below-range sentences in crack cases."¹⁴⁰ However, the rate of sentences below the guideline range in crack cases has more than doubled since the pre-PROTECT Act period, and has more than tripled since the post-PROTECT Act period.¹⁴¹ Courts may not often explicitly cite the ratio as the reason,¹⁴² but it is quite obvious that the Judiciary disapproves and that they are sentencing below the guideline range far more often in crack cases. See Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee (March 16, 2006); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006) (describing the disparity as "a problem that has tormented many enlightened observers ever since Congress promulgated the 100:1 ratio," and encouraging courts to consider "the nature of the contraband and/or the severity of a projected guideline sentence . . . on a case-by-case basis"); *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006) (court of appeals can "certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine case. However, a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable.").

6. *The Public Disapproves.*

According to the Rossi and Berk study, the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases:

¹³⁹ Booker Report at 126.

¹⁴⁰ *Id.* at x, 111.

¹⁴¹ *Id.* at 128.

¹⁴² *But see United States v. Perry*, 389 F.Supp.2d 278 (D.R.I. 2005); *United States v. Clay*, 2005 WL 1076243 at **3-6 (E.D. Tenn. May 6, 2005); *United States v. Williams*, 372 F. Supp.2d 1335 (M.D. Fla. 2005); *Simon v. United States*, 361 F.Supp.2d 35 (E.D.N.Y. 2005); *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005); *United States v. Smith*, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005).

The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. The result is strong differences in sentencing drug trafficking crimes with the guideline sentences being much harsher. . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year. For marijuana, the average sentence was essentially probation.¹⁴³

7. Solutions

We recommend the following:

- We join PAG and the Constitution Project in urging the Commission both to recommend that Congress 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.
- Separate offense relevant conduct should be abandoned as recommended in Part III, *supra*.
- Quantity should be de-emphasized in the drug guideline itself. One way to do this is to set guideline sentences without regard to mandatory minimum sentences; mandatory minimum sentences would still apply at the kingpin and manager levels Congress specified.¹⁴⁴

Another is to (a) eliminate extrapolation of drug quantities above the ten-year mandatory minimum threshold, which is "unnecessary, unjust and counterproductive for effective law enforcement," (b) reduce the number of drug quantity levels between the five and ten-year mandatory minimum thresholds, and (c) ensure that sentences above the two mandatory minimum thresholds are driven not by quantity but by differences in responsibility (aggravating role in the offense) and risk to society (*e.g.*, the use of violence).¹⁴⁵

¹⁴³ Rossi & Berk, *supra* note 30.

¹⁴⁴ Michael A. Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 358 (May/June 1992).

¹⁴⁵ Stephen J. Schulhofer, *Excessive Uniformity and How to Fix It*, 5 Fed. Sent. Rep. 169, 1992 WL 439725 *7 (Nov./Dec. 1992); See Constitution Project's Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9 (July 11, 2006).

- The number of points for mitigating role in the offense should be expanded, especially at higher levels.
- As recommended in Part II, *supra*, restrictions on consideration of offender characteristics should be removed generally.

V. MANDATORY MINIMUMS

The Commission should produce an updated report on mandatory minimum sentences. More than fifteen years ago, the Commission led the way in showing that mandatory minimums result in unwarranted disparity, unwarranted uniformity, and transfer sentencing power to prosecutors.¹⁴⁶

Mandatory minimum drug and gun statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory. The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders.” See Fifteen Year Report at 51, citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994). Further, the Commission concluded, “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.” *Id.* at 135. Mandatory minimums for firearms offenses require a closer look at this time. See *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004), in which a twenty-four-year-old first offender, a music executive with two young children, was sentenced under § 924(c) to a consecutive mandatory minimum term of 55 years based on his three convictions in the same trial for possessing (not even displaying) a firearm in connection with small marijuana deals. The judge found this sentence to be “unjust, cruel, and even irrational,” but felt he had no choice but to

¹⁴⁶ See Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991). Since then, a solid consensus has formed in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including most recently the U.S. Conference of Mayors, the Justice Kennedy Commission, Justice Kennedy himself, the Constitution Project’s Sentencing Initiative, and (again) the Judicial Conference of the United States. See U.S. Conference of Mayors, Resolution Opposing Mandatory Minimum Sentences (June 2006) 47-48; Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 59-65 (March 16, 2006); Constitution Project, Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, Justice on Trial (2000); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994).

impose it. He called upon Congress to modify § 924(c), at least so that its harsh multiple sentencing provisions would apply only to true recidivists who had already been sent to prison but failed to learn their lesson. One hundred and sixty-three former U.S. Attorneys, federal judges, and DOJ officials, including four former Attorneys General, filed an *amicus* brief in the Tenth Circuit, and are filing an *amicus* petition for certiorari in the Supreme Court.

The Commission should reassert some leadership in this area by issuing an updated report detailing the irrationality of mandatory minimum sentencing and calling on Congress to abandon this aspect of sentencing law. In the process, the Commission should revisit its own decisions, primarily through the drug guidelines and relevant conduct rules, resulting in guideline sentences in excess of the ineffective and inefficient mandatory minimum statutes.

VI. NON-PRISON ALTERNATIVES

The need to allow for more options and flexibility at lower offense and criminal history levels was manifest in the first years of the Guidelines. In 1989 a Commission project was authorized to address this need. The result came in a 1990 report from the Commission's Alternatives to Imprisonment Project, *The Federal Offender: A Program of Intermediate Punishments*, also known as "The Corrothers White Paper." The report gathered data from the federal system, various state programs, and surveyed the judiciary. It produced a detailed analysis. Cost savings, fairness, effectiveness and efficient utilization of prison space were all important considerations.

The report recommended a number of sentencing alternatives, most of which were already available in the context of supervised release. It was careful to limit the application to defendants in Criminal History Category III or less, but expanded the availability of such sentences to a greater number of offense levels (in effect, increasing Zone B and Zone C sentences by five offense levels, but only through Criminal History Category III). The programs recommended as intermediate punishments included:

- Intermittent Confinement
- Community Confinement
- Residential Incarceration
- Home Detention
- Intensive Supervision
- Public Service Work
- Shock Incarceration (boot camps).

In 1991 the Guidelines were amended to include a policy statement supporting shock incarceration, § 5G1.2, and in 1992, Zone A sentences were made available for two additional offense levels, but only for Criminal History Category I defendants. That is all. There have been no substantive modifications or amendments involving non-prison, non-probationary sentencing in the last fourteen years. The extensive and earnest work of the Corrothers committee went awasting, like so many other initiatives that might reduce rather than increase the irrational and inefficient severity of the guidelines.

In 1994, the General Accounting Office recommended intermediate sanctions for punishing low-risk offenders at a lower cost to the taxpayers.¹⁴⁷ A survey of judges in 2002 revealed that a majority urged greater availability of probation with confinement conditions, especially for drug offenders.¹⁴⁸ The Commission reported in 2004 that drug treatment programs and educational opportunities would have a high cost-benefit value.¹⁴⁹

With the federal prisons at 40% overcapacity, filled with low-risk offenders with a high potential for rehabilitation, at great financial and human cost, it is time for the Commission to act. See Nora Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (2005).

VII. IMMIGRATION

The immigration guidelines have been the subject of intense and pervasive criticism, the most serious and longstanding of which has been aimed at the disproportionate severity of the illegal re-entry guideline. As a result, last year, the Commission held a round table and two hearings on the subject. The Defenders attended, testified and submitted written comments on each of the Commission's proposed options, as well as its own proposed amendment to the illegal re-entry guideline, §2L1.2, which would have rationalized and reduced penalties.¹⁵⁰ By early March, bills had been introduced in the House and the Senate, which, in very different ways, would drastically change immigration offenses and penalties. At that point, given the volatile and changeable political environment, we recommended that the Commission not act on any of the immigration guidelines. Assured by DOJ that raising penalties would not conflict with its recommendations to Congress, the Commission raised sentences in numerous ways for alien smuggling (§2L1.1), trafficking in immigration documents (§2L1.1), and fraud in obtaining immigration documents (§2L2.2), but did not reduce sentences for illegal re-entry. Hence, another chapter in the one-way upward ratchet.

At an opportune time, the Commission should reduce sentences under the illegal re-entry guideline.

Average sentence length for immigration offenses nearly tripled from 1990 to 2000, as the Commission increased penalties nearly every year for alien smuggling, §2L1.1, and illegally

¹⁴⁷ United States General Accounting Office, *Sentencing: Intermediate Sanctions in the Federal Justice System* (1994).

¹⁴⁸ Fifteen Year Report at 44-45.

¹⁴⁹ Release 1 at 16.

¹⁵⁰ Testimony of Marjorie A. Meyers & Lucien B. Campbell Before the U.S. Sentencing Commission (Fe. 21, 2006), http://www.ussc.gov/hearings/02_21_06/Defenders_San_Antonio.pdf; Testimony of Jon M. Sands & Reuben Camper Cahn Before the U.S. Sentencing Commission (Mar. 6, 2006).

re-entry, §2L1.2.¹⁵¹ The best evidence that the immigration guidelines produce sentences that are unduly severe is that they are not followed in the vast majority of cases.¹⁵² Judges and prosecutors have avoided their harshness through “fast track” charge bargaining and departures for many years.¹⁵³ Over 80% of immigration cases are prosecuted in districts with fast track programs.¹⁵⁴ Fast track departures represent the highest departure rates by district.¹⁵⁵ Average sentence length in immigration cases has dropped by nearly 20% since 2000,¹⁵⁶ reflecting an increase in fast track departures,¹⁵⁷ and an increase in fast track charge bargains, the number and precise effect of which only DOJ knows.

The illegal re-entry guideline in particular has not been well-served by the Commission. 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.¹⁵⁸ This was not required by Congress, and was not supported by data or research. It was suggested by a Commissioner, voted on with little

¹⁵¹ Fifteen Year Report at 62-65.

¹⁵² See Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 Ariz. St. L.J. 517 (2006); Frank O. Bowman III, *Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System* at 4 (September 23, 2003), available at http://www.usc.gov/hearings/9_23_03/fbowman.pdf; *Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since United States v. Booker* 10-11, January 10, 2006, 18 Fed. Sent. Rep. ___ (forthcoming 2006), available now at http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html.

¹⁵³ Fifteen Year Report at 87, 91.

¹⁵⁴ According to documents submitted in the *Medrano-Duran* case, *infra*, fast track programs were authorized through at least September 30, 2005 in the Districts of Arizona, Idaho, Nebraska, New Mexico, North Dakota and Oregon, all four California districts, the Southern District of Florida, the Northern District of Georgia, the Eastern District of New York, the Southern and Western Districts of Texas, and the Western District of Washington. Those districts handled 9,150 of the 11,132 immigration cases terminated in 2002. See Federal Justice Statistics Resource Center, available at http://fjsrc.urban.org/noframe/dist/d2002/cat/s2_t2.cfm.

¹⁵⁵ Fifteen Year Report at 112.

¹⁵⁶ U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 14 (2000-2005) (showing steady decrease from 28.8 months in 2000 to 23.2 months in 2005), available at <http://www.usc.gov/annrpts.htm>.

¹⁵⁷ Booker Report at 57-58 n.268.

¹⁵⁸ U.S.S.G., App. C, amend. 375.

discussion, and passed with no explanation.¹⁵⁹ 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.¹⁶⁰ This was not required by Congress.¹⁶¹

In 2001, after a decade of sustained criticism of §2L1.2's "disproportionate penalties,"¹⁶² the Commission still retained the 16-level increase for any federal, state or local offense punishable by more than one year that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months, (ii) a crime of violence, (iii) a firearms offense, (iv) a child pornography offense, (v) a national security or terrorism offense, (vi) a human trafficking offense, or (vii) an alien smuggling offense, though it reduced the increase to 12 levels for a felony drug trafficking offense for which the sentence imposed was 13 months or less, and reduced it to 8 levels for any other aggravated felony.¹⁶³

In 2003, the Commission again extended the reach of the 16-level enhancement and complicated the process by defining certain aggravated felonies more broadly than in 8 U.S.C. § 1101(a)(43).¹⁶⁴ It 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.¹⁶⁵ No reason was given. In *United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006), this resulted in a tragic and irrational sentence of 57 months for a young man who had a consensual sexual relationship with his fourteen-year-old girlfriend when he was 18 years old, with parental approval, and with whom he had a child who he supported financially until he was arrested at the border six years later. The Tenth Circuit recognized that the sentence was "greater than can be justified," but defense counsel did not challenge its reasonableness, so the young man was out of luck.

¹⁵⁹ *United States v. Galvez-Barrrios*, 355 F.Supp.2d 958 (E.D. Wis. 2005); Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr. 1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr. 1996).

¹⁶⁰ U.S.S.G. App. C, amend. 562.

¹⁶¹ See Illegal Immigrant Responsibility Act of 1996, Sec. 321, Pub. L. 104-208, 110 Stat. 3009-627-628.

¹⁶² U.S.S.G. App. C, amend. 632.

¹⁶³ U.S.S.G. § 2L1.2 (2001 Guideline Manual).

¹⁶⁴ U.S.S.G. App. C, amend. 658.

¹⁶⁵ *Id.*

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

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.¹⁶⁶ They updated their findings in 2002, noting that the courts of appeals had ruled that departure to address the "inequity" was impermissible.¹⁶⁷ 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.¹⁶⁸ It 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."¹⁶⁹ In fact, 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.

Despite its duty to avoid unwarranted disparities and its stated methodology of revising the guidelines based on data from actual practice, the Commission has not reduced immigration sentences. After *Booker*, several courts in districts without fast track programs have reduced sentences in immigration cases pursuant to *their* duty to avoid unwarranted disparities under 18 U.S.C. § 3553(a)(6).¹⁷⁰

¹⁶⁶ Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

¹⁶⁷ Linda Drazga Maxfield, *Fiscal Year 2000 Update*, 14 Fed. Sent. Rep. 267, 2002 WL 31304862 (Mar./Apr. 2002).

¹⁶⁸ U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines iv-v* (October 2003).

¹⁶⁹ *Id.* at 66-67.

¹⁷⁰ *E.g.*, *United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y. 2005) (and citing unreported cases); *United States v. Medrano-Duran*, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); *United States v. Peralta-Espinoza*, 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); *United States v. Ramirez-Ramirez*, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); *United States v. Galvez-Barrios*, 355 F.Supp.2d 958, 963 (E.D. Wis. 2005).

In light of this history, the Commission's treatment of fast track programs in its Booker Report is puzzling. The Commission frames its concern in 2003 as that districts without early disposition programs "increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts."¹⁷¹ It seems odd that the Commission would be concerned about courts correcting what it said in 2003 was unwarranted disparity, and which its research staff reported as "inequity" in 2002. Stranger still, the Booker Report says: "Since then, some courts have expressed the same concern, *i.e.*, that non-government-sponsored, below-range sentences would be used in districts without these programs in an effort to avoid disparity among similarly-situated defendants,"¹⁷² citing to four cases in districts without fast track programs in which the courts imposed below-guideline sentences to avoid unwarranted disparity. The Report then announces that this "concern has not been realized generally" because "immigration cases account for only a fraction of the cases sentenced in the 78 districts that do not have early disposition programs."¹⁷³

There is no mention of the defendants who must bear the brunt of unduly severe sentences in the other districts. This is wrong and should be remedied.

¹⁷¹ Booker Report at xi, 141.

¹⁷² *Id.* at 141.

¹⁷³ *Id.*

APPENDIX OF SAMPLE CASES

Case #1: Fifth Circuit, Eastern District of Louisiana

A mother and her three sons were found guilty of a crack distribution conspiracy. The government's case consisted of the testimony of twenty federal prison inmates who received reduced sentences in exchange for their testimony. These witnesses testified that the family had sold a total of 250 kilograms of crack cocaine worth over \$5 million out of the family home, a practical impossibility. At a hearing on July 14, 2006, one of the inmates testified that he had seen other inmates exchanging, buying and selling detailed information about the family to each other, enabling them to appear more credible. Judge Melancon granted the family a new trial.

Some of the details of this case are reported in Kayla Gagnet, *Mother, three sons will get a new trial*, *The Daily Advertiser*, July 15, 2006.

<http://www.acadiananow.com/apps/pbcs.dll/article?AID=/20060715/NEWS01/607150313/1002>

Case #2: Seventh Circuit, Northern District of Illinois

The defendant, after being charged with and convicted of one bank robbery, had his presumptive guideline sentence doubled (from 84-105 months to 160 months) based on the government's argument for an upward departure based on four bank robberies it could not, or chose not, to prove to a jury: (1) one that was charged but dismissed by a magistrate judge for lack of probable cause six years before sentencing; (2) one that was charged but dismissed by the government for lack of evidence six years before sentencing; and (3) two that were never charged that allegedly occurred six years before sentencing.

The evidence at trial was exceedingly thin, but the "information" at sentencing was thinner still. The four bank robberies were "proved" at sentencing based on a hearsay account by an FBI agent that the defendant's ex-wife, who had left him because he had an extramarital affair, had identified him as the person in the bank surveillance tapes. The defendant presented evidence that eight bank tellers who witnessed the robberies picked someone else or no one out of a lineup. Only one bank teller picked the defendant out of a lineup, but a magistrate judge previously found that identification unreliable because it was inconsistent with the description she gave the police after the robbery. Nonetheless, the judge found that while none of the government's evidence alone implicated the defendant, the "totality" of it satisfied the preponderance standard.

On the one hand, the court of appeals stressed that *any* correctly calculated guideline sentence is subject to a presumption of reasonableness which a defendant can only rarely rebut, but on the other that proof beyond a reasonable doubt was not required because the guidelines are applied flexibly. *United States v. Welch*, 429 F.3d 702 (7th Cir. 2005). The only flexibility evident in this sentencing was in the standard and quality of proof used to obtain the equivalent of a conviction the government could not, or chose not to, prove to a jury.