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March 22, 2010

Honorable William K. Sessions, III
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

*Re: Comments on Proposed Amendments to the Sentencing Guidelines
Issued January 21, 2010*

Dear Chief Judge Sessions:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments that were issued by the Commission on January 21, 2010. At the public hearing on March 17, 2010, we submitted written testimony on the proposals, which is attached and incorporated as part of our public comment. We expand on that testimony as necessary here to address issues that were raised during the March 17th hearing and to further clarify our position on the proposed amendments.

I. ALTERNATIVES TO INCARCERATION

A. Proposed §5C1.3

The Commission has proposed a new guideline, §5C1.3, to expand a court's ability under the guidelines to impose a sentence of probation with treatment, rather than a term of imprisonment, for defendants who meet certain criteria. At the hearing it appeared that the Commission misconstrued our testimony as opposing this proposal - we do not. The Defenders recognize that this is the first time the Commission has set forth a specific amendment that would encourage treatment in lieu of imprisonment as a guideline sentence, and we commend the Commission for taking this historic step.

At the hearing, the Commission made clear that it agrees that drug treatment for defendants with substance abuse issues is an imperative, and concerns were raised about the appropriate scope of eligibility. While in our testimony we urged the Commission to expand its proposed guideline by loosening the current limitations relating to offense

type, offense level, and criminal history score in the next amendment cycle,¹ if the Commission intends to act on §5C1.3 this year, we make the following six recommendations designed to improve the Commission's proposed amendment.

First, we agree with the American Bar Association's position that "[b]ecause the proposal as currently formulated may have an impact on an exceedingly small number of offenders, it is essential that the Commission couple its amendment with a policy statement [or commentary] explaining that the drug treatment alternatives in the amendment are *not* intended to be exclusive or to 'occupy the field.'"² Second, the Commission should add commentary that if the defendant fails in treatment, the court should consider graduated sanctions rather than a straight revocation to prison.³ Third, the final guideline should incorporate the more precise diagnostic terminology of "substance use disorder" rather than the outmoded – and litigation provoking – term "addicted."⁴ Fourth, the guideline should not require residential treatment because it violates a standard principle of drug treatment that "no single treatment is appropriate for everyone."⁵ Fifth, it should not adopt the requirement that the disorder "contribute[d] substantially to the offense" because that requirement is redundant to the "substance use disorder" diagnosis and will cause excessive litigation by requiring that the issue be proven up in each case.⁶ Sixth, the offense level cap should be set at sixteen to maximize the number of defendants who will meet the guideline's criteria, thereby maximizing public safety.

¹ Statement of Margy Meyers and Marianne Mariano at 3-10 (USSC Public Hearing, Washington, D.C., 3/17/2010) (hereinafter *Meyers/Mariano Statement*)

² Statement of James E. Felman, American Bar Association, at 10-11 (USSC Public Hearing, Washington D.C., 3/17/2010).

³ See, e.g., NIDA, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research Based Guide*, at 22 (hereinafter *Treatment for Criminal Justice Populations*) ("Graduated sanctions, which invoke less punitive responses for early and less serious noncompliance and increasingly severe sanctions for more serious or continuing problems, can be an effective tool [for securing compliance with court-ordered treatment] in conjunction with drug testing. The effective use of graduated sanctions involves consistent, predictable, and clear responses to noncompliant behavior."), available at http://www.drugabuse.gov/PDF/PODAT_CJ/PODAT_CJ.pdf; see also *id.* at 23 ("The first response to drug use detected through urinalysis should be clinical – for example, an increase in treatment intensity or a change to an alternative treatment.").

⁴ See *Meyers/Mariano Statement* at 4, n.1.

⁵ See National Institute of Drug Abuse, *Principles of Drug Abuse Treatment: A Research Based Guide*, at 2 (hereinafter *Principles of Drug Abuse Treatment*), available at <http://www.drugabuse.gov/PDF/PODAT/PODAT.pdf>.

⁶ See *Meyers/Mariano Statement* at 11.

B. Proposed Zone Expansion

We disagree with the Department of Justice's position that there is insufficient empirical data for the Commission to go forward with its proposal to expand Zones B and C by one offense level each. Courts are already sentencing defendants in Zone B to non-guideline sentences of straight probation in 9.9% of cases.⁷ And they are sentencing defendants in Zone C to non-guideline sentences of probation (with or without conditions) in 15.6% of cases.⁸ If the proposed changes had been in effect in 2008, they would have potentially benefited only 1272 defendants, or 1.7% of all FY 2008 offenders.⁹ It is hard to imagine a more modest proposal.

More to the point, if the Commission's goals are to decrease crime, enhance public safety, and save taxpayer money, study after study has shown that alternative sanctions work better than prison.¹⁰ The Commission's modest proposal is well substantiated by the empirical evidence and we support it.

C. Standards for Effective Treatment

We believe that it is neither appropriate nor desirable for the Commission to set standards for effective treatment programs. The mere act of setting forth standards suggests that there is only one form of an effective program and this simply is not true. As the Commission learned at its recent hearing, effective treatment requires a "collaboration of a variety of community resources and multidisciplinary case management."¹¹

The National Institute on Drug Abuse does not define "effective treatment" by accreditation or staffing requirements. Instead, it counsels that "[e]ffective drug abuse treatment engages participants in a therapeutic process, retains them in treatment for an appropriate length of time, and helps them learn to maintain abstinence over time."¹² "[T]ailoring services to fit the needs of the individual is an important part of effective drug abuse treatment for criminal justice populations."¹³ Individuals "respond differently

⁷ See USSG, *2008 Sourcebook of Federal Sentencing Statistics* at Table 16.

⁸ *Id.*

⁹ See *Meyers/Mariano Statement* at 14-15.

¹⁰ See generally USSC, *Proceedings from the Symposium on Alternatives to Incarceration* (July 14-15, 2008).

¹¹ See Statement of E.T. Briggs, Clinical Director, Kolmac Clinic at 4 (USSC Public Hearing, Washington D.C., 3/17/2010).

¹² See *Treatment for Criminal Justice Populations* at 1.

¹³ *Id.* at 2.

to different treatment approaches and treatment providers . . . [and t]he effectiveness of drug treatment depends on both the individual and the program, and on whether interventions and treatment services are available and appropriate for the individual's needs."¹⁴ The Commission's attempt to set standards for "effective" treatment violates these core principles that treatment must be individualized for it to work.

It is not in anyone's interest for the Commission to pigeonhole (and thereby limit) the types of treatment services available: "More offenders can receive appropriate treatment if a range of substance abuse treatment options is provided in criminal justice settings."¹⁵ We agree with POAG that the Commission's proposed standards simply may not gel with the realities facing many of our clients, particularly our rural clients. Treatment resources are scarce, and treatment providers can be effective even if they do not precisely adhere to ideal standards. Indeed, the reason we know so much about what works today is that treatment providers have been far more willing to experiment with new approaches than the criminal justice system.¹⁶

We see no reason for the Manual to make recommendations in medical, psychological or social science areas far removed from the Commission's area of expertise. The Commission has no institutional medical or psychological training, and no experience with administering treatment programs or otherwise providing treatment to anyone. In contrast, there are numerous federal (and countless state and local) organizations that have studied these issues for decades, including the Bureau of Justice, the Substance Abuse and Mental Health Services Administration and its Center for Substance Abuse Treatment, the National Criminal Justice Referral Service, the National Institute on Alcohol Abuse and Alcoholism, the National Institute of Corrections, the National Institute of Justice, the National Institute of Mental Health, the Office of Applied Studies, the Office of Juvenile Justice and Delinquency Prevention, and the Administrative Office of the Courts.

We are sympathetic to the Commission's desire to ensure the best possible treatment for everyone who needs it. At heart, however, the subject area lies far outside the Commission's expertise and the Commission's proposal appears contrary to the leading research in the area. We urge the Commission to focus its attention on establishing effective sentencing practices, and leave to other more appropriate stakeholders the task of ensuring that those sentences are effectively carried out.

¹⁴ *Id.* at 2, 17; see also *Principles of Drug Abuse Treatment* at 11 ("effective" treatment "depend[s] on the nature and extent of the patient's problems, the appropriateness of treatment and related services used to address those problems, and the quality of interaction between the patient and his or her own treatment providers").

¹⁵ See *Treatment for Criminal Justice Populations* at Executive Summary.

¹⁶ See, e.g., *id.* at 23 ("Despite evidence of their effectiveness, addiction medications are underutilized in the treatment of drug abusers within the criminal justice system.").

II. OFFENDER CHARACTERISTICS

A. Offender Characteristics and Departures

For clarity, we offer the following summary of the Defenders' position on the offender characteristics in Chapter 5, Part H and their relevance to departures:

The Commission should revise the Introduction to Chapter 5H to make clear that the policy statements therein apply only to a decision whether to "depart." The Commission should delete the statements regarding appearance and physique and gambling addiction in §5H1.4; the statement regarding military service, charitable contributions, and other prior good works in §5H1.11; and the statement regarding lack of youthful guidance and disadvantaged upbringing in §5H1.12. For the remaining offender characteristics at issue in this amendment cycle, we recommend that the Commission remove the language in §§5H1.1, 5H1.3, and 5H1.4 stating that the offender characteristic is "not ordinarily relevant" in determining whether a departure may be warranted or "not a reason" for downward departure. Instead, the Commission should state that the characteristic "is relevant" or "may be relevant" in determining whether a departure may be warranted.

The Commission should state only that these factors are or may be relevant. Yet, it is apparent that none of these factors provides a reason for upward departure. As Ms. Mariano testified, all available evidence shows that these characteristics do and should function as *mitigating* factors. The Commission has received consistent and uniform evidence that judges (and prosecutors) treat these offender characteristics as mitigating. There is no evidence that the guideline rules, primarily constructed of aggravating factors with numerical values, are not adequately severe because they do not include individual offender characteristics. Thus, while these offender characteristics are often relevant for departing downward, they are generally inappropriate for departing upward.

We add here that encouraging judges to consider offender characteristics would help alleviate the serious problem of overcrowding in federal prisons, now "nearly 40 percent over capacity."¹⁷

B. Conforming Changes to USSG §5K2.0

Most of the restrictive language in §5K2.0 was added in response to, though not required by, the PROTECT Act.¹⁸ In our written testimony, we recommend that the Commission return to the pre-PROTECT Act version of §5K2.0 without the first sentence, a change that would effectively remove from the policy statement the word

¹⁷ Nick Wilson, *Prisons Swollen by Foreigners, Druggies*, Courthouse News Service (Mar. 18, 2010) (reporting on BOP Director Harley Lappin's testimony before Congress the day after the Commission's hearing), available at <http://www.courthousenews.com/2010/03/18/25696.htm>.

¹⁸ See USSG, App. C, Amend. 651 (Oct. 27, 2003).

“exceptional” and its reference to the excised 18 U.S.C. § 3553(b). We add here that the Commission should also delete the last paragraph of the pre-PROTECT Act version of §5K2.0. It is inconsistent with the removal of language in Chapter 5, Part H stating that offender characteristics are “not ordinarily relevant” or “not a reason” to depart, as we recommend.

C. Directives to the Commission in 28 U.S.C. § 994

At the hearing, a witness was asked whether judges should interpret 18 U.S.C. § 3553(a)(1), which requires the sentencing court to consider the history and characteristics of the defendant, in light of Congress’s directives to the Commission in 28 U.S.C. § 994(d) and (e). We believe that the interpretations of 28 U.S.C. § 994(d) and (e) apparently adopted by earlier Commissions were unnecessarily restrictive and not correct. In any event, the answer to the question is no. Section 994 is directed to the Commission, not the courts. Courts are required to follow directives to the courts, not directives to the Commission.¹⁹

D. The Commission’s Recent Report

We are concerned that the Department of Justice may misread the Commission’s recent report regarding multivariate regression analysis, released six days before the hearing,²⁰ in an effort to support its thus far unsupported opposition to amendments that would encourage judges to consider offender characteristics for purposes of departure. The Defenders are in the process of reviewing and analyzing this report,²¹ but we are certain now that it has no bearing on the proper treatment of offender characteristics.

The pertinent question here is whether offender characteristics are relevant to the legitimate purposes of sentencing. This report does not address this question at all. Indeed, the Commission recognizes that judges “make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot

¹⁹ See Brief of the United States at 9, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009) (arguing that the premise that congressional directives to the Commission are binding on sentencing courts is incorrect); *Vazquez v. United States*, No. 09-5370, 130 S. Ct. 1135 (Jan. 19, 2010) (granting certiorari, vacating the judgment, and remanding for further consideration in light of the government’s position); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009) (“By its terms, [§ 994(h)] tells the Sentencing Commission, not the courts, what to do.”); *United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008) (“Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts.”).

²⁰ See USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* (Mar. 2010) (hereinafter *Demographic Differences*).

²¹ Full review and analysis is not possible, however, without the 2009 dataset upon which the report is based.

be measured” and thus are not included as control variables.²² For example, data on an offender’s employment record “may have some influence on the sentence imposed,” but data on this factor is “not available in the Commission’s datasets.”²³ The same is true of most other offender characteristics.²⁴

The Commission also recognizes that mere correlation between a factor and sentence outcomes does not necessarily mean causation, noting that the differences it has identified “may be attributable to one or more of a number of factors that, while correlated with the demographic characteristics of offenders, are not caused by them.”²⁵ “Some of these factors could be correlated with one or more of the demographic characteristics of offenders but not be influenced by any consideration of those characteristics.”²⁶

The report does not analyze whether judges’ reliance on offender characteristics has a disproportionate impact on certain demographic groups. As we explained in our testimony, no study can analyze this question because the necessary data is not collected. And the report cannot reflect any disproportionality in the rate of use of offender characteristics as a reason for departure because different rates among groups are taken into account in the analysis by the inclusion of departure as a control variable.

If the Commission is truly interested in narrowing demographic gaps in federal sentencing, it should at the very least remove from Chapter 5 statements that discourage or prohibit consideration of drug and alcohol dependence, §5H1.4, personal financial difficulties, §5K2.12, and lack of youthful guidance and similar circumstances indicating a disadvantage upbringing, §5H1.12. As we explained in our testimony, these factors are relevant to legitimate purposes of sentencing.

III. MATTHEW SHEPARD AND JAMES BYRD, JR., HATE CRIMES PREVENTION ACT

The Commission has proposed to respond to the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, in part, by striking §3A1.1(b), which currently states that the three-level enhancement in §3A1.1(a) does not apply to a defendant who also receives a six-level enhancement under §2H1.1(b)(1).

We object to the Commission’s proposal to strike §3A1.1(b). This would have the effect of increasing the sentence for hate crimes committed by a defendant who was a

²² *Demographic Differences* at 4.

²³ *Id.* at 10.

²⁴ The Commission collects data only on age, number of dependents, and educational level.

²⁵ *Demographic Differences* at 4.

²⁶ *Id.*

public official at the time of the offense or hate crimes committed under color of law by an additional three levels, for a total level increase of nine levels. Congress did not direct that the Commission take such action and we can discern no empirical basis for it.

The Commission created §3A1.1 – not on the basis of its own empirical evidence – but rather in response to a congressional directive. Sec. 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directed the Commission to:

[P]romulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.²⁷

Amendment 521 added §3A1.1 (including subsection (b)) “to implement the directive contained in Section 280003 . . . by providing a three-level increase in the offense level for offenses that are ‘hate crimes.’”²⁸ Amendment 521 also combined former §§2H1.1, 2H1.3, 2H1.4, and 2H1.5 into a revised §2H1.1, because the Commission determined that “[t]he addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments.”²⁹

The deleted versions of §§2H1.1, 2H1.3 and 2H1.5 had each provided an increase of four levels “if the defendant was a public official at the time of the offense” (deleted version of §2H1.4 did not contain any increase).³⁰ When the Commission combined those guidelines into new §2H1.1, it increased the “public official” enhancement to six levels and added an alternative six-level increase if the offense was committed “under color of law.”³¹ In so doing, the Commission noted that the consolidated guidelines had been adjusted “to take into account the new enhancement under §3A1.1(a)” and stated that the “revised guideline provides greater consistency in offense levels for similar conduct, reflects the additional enhancement now contained in §3A1.1, and better reflects the seriousness of the underlying conduct.”³²

²⁷ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994).

²⁸ See USSG, App. C, amend. 521.

²⁹ *Id.*

³⁰ See USSG §§2H1.1(b)(1), 2H1.3(b)(1), §2H1.4, 2H1.5(b)(1) (1994).

³¹ See USSG §2H1.1 (1995).

³² See USSG, App. C, amend. 521.

The Commission's proposal to remove §3A1.1(b) and thereby increase offenses committed by a public official or under color of law by an additional three levels is not required (or even suggested) by the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act. The Act did not direct the Commission to increase punishments under §§2H1.1 or 3A1.1. It merely amended the directive in sec. 28003 to include "gender identity" in the definition of "hate crime."³³

There is absolutely no empirical evidence showing that the penalties established by the Commission under §2H1.1 are no longer severe enough. The most recent data shows that the majority of offenders sentenced under §2H1.1 received sentences within or below the guideline range. In FY 2008, there were 66 offenders sentenced under §2H1.1.³⁴ Of those, only 2 (3%) received sentences above the guideline range, while 40 (60.6%) received sentences below the guideline range and 24 (36.3%) received within-range sentences. Even if the two cases that received sentences above the guideline range were hate crimes committed by a public official or under color of law, the number of cases affected does not warrant a change in the guidelines.

Finally, we encourage the Commission in future amendment cycles to follow that portion of sec. 28003's directive to "take into account any mitigating circumstances that might justify exception" to the 3-level increase under §3A1.1(a).³⁵ While the Commission carried out much of the directive in 1995 through Amendment 521, it did not provide for any mitigating circumstances then or thereafter. One mitigating circumstance that the Commission might acknowledge in §3A1.1 is an encouraged departure for defendants who participate in restorative justice initiatives. As the Commission heard at the Symposium on Alternatives to Incarceration, hate crimes lend themselves to such efforts.³⁶

³³ See The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Division E of Pub. L. 111-84, § 4703, 123 Stat. 2190 (2009).

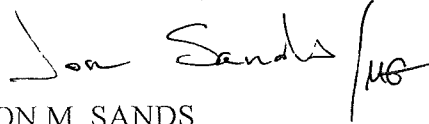
³⁴ See USSC, *2008 Sourcebook of Federal Sentencing Statistics* at Table 28.

³⁵ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994) ("[i]n carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions").

³⁶ See USSC, *Symposium on Alternatives to Incarceration*, at 59-62, Barrett 1-9(2008).

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

Sincerely,

A handwritten signature in black ink that reads "Jon Sands" followed by a stylized flourish or initials.

JON M. SANDS
Federal Public Defender, District of Arizona
Chair, Defender Sentencing Guidelines Committee

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