



August 16, 2010

Hon. William K. Sessions, III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Request for public comment on 2011 Priorities

Dear Judge Sessions:

FAMM welcomes this opportunity to comment on the United States Sentencing Commission's proposed priorities for the 2011 amendment year.

Priority 1: Study of the manner in which *United States v. Booker*¹ and subsequent cases have affected federal sentencing practices and recommendations for federal sentencing.

FAMM welcomes data and analysis by the Commission regarding federal sentencing practices after *Booker* as it will provide critical information for understanding the relevance, effectiveness and appropriateness of the federal sentencing guidelines. However, the Commission should be encouraged to resist any temptation to recommend that the guidelines be enforced more strictly or limit their advisory nature in any way.

To recommend that the judicial discretion mandated under 18 U.S.C. § 3553(a) be limited or that the guidelines, one of the factors judges must take into account under that statute, be elevated to first among equals, would unduly hamper the necessary role of individualized consideration at sentencing. It would also be inconsistent with the Supreme Court's jurisprudence on the sentencing guidelines, which acknowledges the flexibility required to approximate sentences that effectively accomplish crime control goals.² As "judges ... can differ as to how best to reconcile the disparate ends of punishment"³ they should have the discretion necessary to continue the "evolution" of the Commission's work.⁴

¹ 543 U.S. 220 (2005).

² See *Booker*, 543 U.S. at 264.

³ See, e.g., *Rita v. United States*, 551 U.S. 338, 349.

⁴ *Id.* at 350.

If the Commission is concerned with departures and/or variances from particular guidelines, it should view those departures as feedback on the fairness of the recommended punishment.⁵ For example, receipt, possession, or trafficking in child pornography features a high departure/variance rate, almost exclusively below the guidelines.⁶ In the Commission's survey of federal judges, these guidelines were identified as overly harsh by nearly 70 percent of judges,⁷ reflecting that judges view them as needlessly retributive in many cases. Other offense ranges have much lower rates of noncompliance, so the variance on child pornography and other offenses, like drug trafficking and fraud, reflects on the particularity of that sentence, not judicial unwillingness to follow guidelines.

FAMM commends the Commission for contemplating a post-*Booker* report, but encourages it that any recommendations for changes be made in the context of a scheme in which individualized sentencing is paramount.⁸

Priority 2: Study and report to Congress on statutory mandatory minimum penalties.

FAMM applauds the Commission for continuing its study and review of statutory mandatory minimum penalties and their impact on the federal sentencing system. The Commission's 1991 critical report on mandatory minimums spurred some reform of these harsh and restrictive sentences, including passage of the statutory safety valve.⁹ But as this new report is prepared, reform is even more necessary to lessen the burden of mandatory minimums on taxpayers, families of inmates, and prisoners themselves.

Momentum is building for changes to mandatory minimum sentencing. A recent Commission report found that 62 percent of federal judges viewed mandatory minimums as inappropriately harsh.¹⁰ The regional hearings held by the Commission heard from a judiciary nearly unanimous in its condemnation of mandatory minimums. At the federal level, legislation to reduce the disparity between crack and powder cocaine passed with bipartisan support in both the House and Senate, and was signed into law by President Obama.¹¹ This bill included the first repeal of a mandatory minimum – the five year penalty for simple possession of crack cocaine – since the Nixon administration.¹²

Meanwhile, many states, including South Carolina, New Jersey and Massachusetts, spurred by a desire to reduce the budgetary and social costs of over-incarceration, have enacted their own mandatory minimum sentencing reforms. The Commission's report could help to spark necessary action to build upon these changes at the federal level.

⁵ *Id.*

⁶ UNITED STATES SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 (2010).

⁷ UNITED STATES SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 11 (2010).

⁸ *See* 18 U.S.C. § 3553(a) (2006). The statute requires judges to consider individual factors in determining the most appropriate sentence.

⁹ *See* 18 U.S.C. § 3553(f) (2006).

¹⁰ RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES at 5.

¹¹ Fair Sentencing Act of 2010, S. 1789, 111th Cong. (2010).

¹² *Id.*

FAMM would welcome the Commission's examination and analysis of the operation of the statutory safety valve provision.¹³ The statutory safety valve, as currently constituted, allows courts to depart from a mandatory minimum sentence for certain drug offenders and instead impose a sentence based on the sentencing guidelines if five criteria are met.¹⁴ Pursuant to the guidelines, defendants who meet the criteria of the safety valve can also receive a two-level reduction from their prescribed guideline sentence.¹⁵

However, the safety valve should be expanded to apply to all low-level offenders subject to harsh sentences for any crime and should be amended with regard to its calculation of criminal history.

Many individuals have benefited from the current safety valve provision, including the two-step reduction from the guidelines. But, the current guideline and statutory language restricts the availability of the safety valve only to drug offenders.¹⁶ As the Commission argued in its past testimony to Congress, this safety valve reflected a desire to allow flexibility in sentencing for the least culpable offenders.¹⁷ This logic should be applied more broadly, as nonviolent and low-level offenders continue to face unduly harsh mandatory minimums, as well as long guideline sentences.¹⁸ As a result, 69 percent of federal judges called for the safety valve to be expanded to all crimes with a mandatory minimum.¹⁹

Even if Congress fails to broaden the scope of the safety valve, the Commission could address this problem by allowing the guideline safety valve to be applied more broadly to low-level offenders convicted of crimes other than drug trafficking. The Commission can determine if this is an appropriate measure by tracking more data on the safety valve, including calculating average sentence reductions from its use, its application in different jurisdictions, and the impact of eligibility restrictions on its use.

¹³ 18 U.S.C. § 3553(f) (2006).

¹⁴ *Id.* The five criteria are: (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

¹⁵ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(11) (2009).

¹⁶ *Id.*; 18 U.S.C. § 3553(f) (2006).

¹⁷ *Mandatory Minimum Sentencing Laws: The Issues, Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 6-7 (2007) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission).

¹⁸ In its survey of federal judges, the Commission reported that a majority of federal judges were concerned about unduly long sentences for crimes like receipt of child pornography. UNITED STATES SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 5, 11 (2010).

¹⁹ *Id.* at 5.

In addition, the safety valve only applies to individuals who do not have more than one criminal history point.²⁰ Criminal history calculations can be unrepresentative of the offender's culpability and danger of recidivism, as indicated by the fact that 42.2 percent of downward departures in 2009 were related to issues of criminal history, substantially higher than for any other reason.²¹ Offenders can earn criminal history points for minor offenses that include contempt of court, reckless driving, or trespassing.²² Individuals like Brian Ison, who was ineligible for the safety valve because of his past offenses of speeding without a license, drinking in public, and possession of alcohol by a minor and received over 11 years in prison, continue to face unduly harsh sentences because of this restriction. In a report, the Commission found that 260 offenders like Mr. Ison would have been eligible for the safety valve if not for prior minor convictions in 2006.²³ The Commission should recommend to Congress that this statutory restriction be changed to make the safety valve available to individuals in Criminal History Category I or II, and use its own authority to make the guideline safety valve available to these types of defendants. By changing the eligibility to categories as opposed to criminal history points, the courts can credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

Priority 3: Study and report to Congress regarding violations of section 5(a) of the United Nations Participation Act of 1945, sections 38, 39, and 40 of the Arms Export Control Act, and the Trading with the Enemy Act.

Pursuant to the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, the Commission has been tasked with conducting a study about the impact and feasibility of imposing mandatory minimum sentences for violations of three code sections related to exports controls.²⁴ The Commission should recommend that mandatory minimum sentences not be imposed for violations of these statutes.

Significant criminal penalties already exist for these offenses. For violations of Section 5(a) of the United Nations Participation Act of 1945, judges can give offenders a prison term of 10 years, a fine of up to \$10,000, or both.²⁵ Offenders convicted under the specified sections of the Arms Export Control Act can receive a prison term up to 10 years, a fine of \$1,000,000, or both.²⁶ The Trading with the Enemy Act carries a penalty of a maximum prison term of 10 years, a fine of not more than \$1,000,000, or both.²⁷ Under the Sentencing Guidelines, export violations are punished either as a Level 14 offense (15-21 months for someone with no criminal history) or a Level 26 offense (63-78 months for someone with no criminal history), if national

²⁰ 18 U.S.C. § 3553(f)(1) (2006).

²¹ UNITED STATES SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 67 (2010).

²² ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1282 (2009).

²³ UNITED STATES SENTENCING COMMISSION, IMPACT OF PRIOR MINOR OFFENSES ON ELIGIBILITY FOR SAFETY VALVE 5 (2009).

²⁴ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, Sec. 107(b), 124 Stat. 1337 (2010).

²⁵ 22 U.S.C. § 287c(a) (2006).

²⁶ 22 U.S.C. § 2778(c) (2006); 22 U.S.C. § 2780(j) (2006).

²⁷ 50 U.S.C. app. § 16 (2006).

security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons were evaded, or the offense involved a financial transaction with a country supporting international terrorism.²⁸ Adding mandatory minimum penalties to these existing sentences is unnecessary.

Mandatory minimum penalties have proven ineffective for dealing with many other crimes. These draconian sentences have increased prison populations, cost taxpayers billions, and reduced faith in our criminal justice system. These sentences should be eliminated or reduced, but certainly not added to existing federal laws. If the Commission is concerned that judges are not taking exports controls violations seriously, it should consider alternatives to mandatory minimum sentences, such as recommending increases to existing statutory fines and penalties, or explaining the importance of these offenses to judges through judicial conferences. The Commission could also study and if necessary amend the guidelines to provide for enhancements or reductions, which would enable judges to prescribe a more appropriate sentence based on the individual circumstances of the case.

Priority 5: Continued work on cocaine sentencing policy, possible consideration of amending the Drug Quantity Table across drug types, and development of appropriate guideline amendments in response to any related legislation enacted during the 111th Congress.

S. 1789. The Commission will need to respond to the passage of S.1789, which reduced the sentencing disparity between crack and powder cocaine and eliminated the simple possession mandatory minimum penalty for crack cocaine.²⁹ At a minimum, the Commission should index the guidelines accordingly. As an example, the Commission should adjust the amounts of crack cocaine that trigger the base offense level 24 for trafficking from 5 grams to 28 grams,³⁰ and make similar changes to crack amounts in all other categories.

The Commission should also make these changes retroactive to ameliorate the unfairness of the existing penalty. Congress's decision to change the statutory mandatory minimum should be viewed as recognition that the existing sentencing regime was unjust. To force individuals to continue to serve sentences which are now understood to be unfair will only further injustice. The Commission has previously made sentence reductions retroactive without negative consequences, such as the crack guideline adjustment, in which the Commission acknowledged that "a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants"³¹ and that "the statutory purposes of sentencing are best served by retroactive application of the amendment."³²

²⁸ U.S. SENTENCING GUIDELINES MANUAL § 2M5.1(a) (2009).

²⁹ Fair Sentencing Act of 2010, S. 1789, 111th Cong. (2010).

³⁰ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(8) (2009).

³¹ UNITED STATES SENTENCING COMMISSION, "READER-FRIENDLY" VERSION OF AMENDMENTS ON RETROACTIVITY EFFECTIVE MARCH 3, 2008 4 (2008).

³² Press Release, United States Sentencing Commission, U.S. Sentencing Commission Votes Unanimously To Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007) (on file with U.S. Sentencing Commission).

Drug guideline adjustments. FAMM strongly urges the Commission to adopt the two-level crack guideline adjustment across drug types. When Congress adopted mandatory minimum sentences for drug offenses in 1986, the Commission responded by placing guideline ranges above the mandatory minimum sentence, thereby creating unnecessarily long sentences.³³ This step was unnecessary, as the Commission has the authority to set the base offense level to the guideline range that is the first on the table to include the mandatory minimum (such as 51-63 months for a 60 month mandatory minimum), or to set the base offense level below the mandatory minimum and rely on specific offense characteristics and adjustments to reach the mandatory minimum.³⁴ Utilizing this authority, the Commission adjusted crack sentences downward in 2007, placing the mandatory minimum penalty at the high end of the guideline range.

This change has benefited a number of citizens, including Marcus Boyd, a father of two who became addicted to drugs after the death of his mother. Marcus met a confidential informant through a family friend, and while only 5.6 grams of crack cocaine were found on him at the time of his arrest, he was held liable for 37.4 grams based on statements made by the informant and a witness. As a result, Marcus was sentenced to over 10 years in federal prison when he was only 24 years old. Fortunately, the decision by the Commission to make the crack guideline adjustment retroactive allowed Marcus to secure early release, and he has returned home to his children. According to the Commission's own reports, as of 2009, 24,209 other people like Marcus have benefited from the retroactive application of this guideline adjustment.³⁵

However, crack is not the only drug with overly harsh penalties. The Commission has acknowledged that many penalty ratios within the guidelines do not reflect the "relative harmfulness" of particular drugs.³⁶ For example, trafficking in 5 grams of pure methamphetamine carries a 60 month mandatory minimum penalty,³⁷ but is listed at offense level 26, which carries a 63-78 month sentence under the guidelines.³⁸ FAMM receives calls often from frustrated inmates convicted of harsh methamphetamine penalties and their families. These penalties have contributed to a perception of unfairness within the criminal justice system. Given that the Commission has consistently urged Congress to reform mandatory minimum sentences for drug offenses,³⁹ it makes little sense to maintain guideline ranges above these sentences. Instead, the Commission should utilize its acknowledged authority to place the minimum sentences within the guidelines as in the crack adjustment, and should make such

³³ UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 49 (2004).

³⁴ UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 45 (2009). In the second scenario, the mandatory minimum would trump the guidelines if the adjustments failed to reach the minimum sentence required by statute.

³⁵ UNITED STATES SENTENCING COMMISSION, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT (July 20, 2010).

³⁶ FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.

³⁷ 21 U.S.C. § 841(b)(1)(B)(viii) (2006).

³⁸ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2009).

³⁹ See, e.g., *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Commission).

changes retroactive to benefit individuals who have suffered injustice as a result of these unduly harsh penalties.

Of course, the Commission need not limit itself to reducing drug sentences by two levels to readjust the relationship to the mandatory minimum. In fact, the Commission should take a close look at the overall harshness of the drug guidelines and delink the guidelines from the mandatory minimums altogether so that sentences are more rational, relevant and meaningful. As the Commission pointed out in its report, “The History of the Child Pornography Guidelines,”⁴⁰ there is no statutory basis for anchoring the guidelines with the mandatory minimums. When addressing mandatory minimums, the Commission has four choices, according to the report. They include setting “the base offense level for the offense so that the base offense level for a Criminal History Category I offender corresponds to the first guideline range on the sentencing table with a minimum guideline range *in excess of the mandatory minimum*.”⁴¹ This is the case for the current drug guidelines where mandatory minimums operate but with the exception of crack cocaine. Then, of course, according to the report, the Commission can calibrate the guideline so that it “*include[s] the mandatory minimum* at any point within the range.”⁴²

“Third,” the Report continues, “the Commission may set the base offense level below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum.”⁴³ The report goes on to explain that in the case where a mandatory minimum must still apply, in the case of a defendant who cannot benefit from the safety valve or cooperation reduction, U.S.S.G. § 5G1.1(b) will take over to insert the mandatory minimum.

Clearly, the Commission considers itself authorized to depart from strict adherence to the mandatory minimum in order to provide for a sentence that still acknowledges the need for mandatory minimums in certain cases but permits more flexibility in sentencing in others.

We endorse that approach, particularly with respect to drug sentencing and urge the Commission to delink the guidelines from the mandatory minimums in fashion contemplated by the report.

Priority 6: Continued review of child pornography offenses

The Commission should be commended for examining departures and variances from guideline sentences for child pornography offenses. The frequency of departures and variances from particular child pornography guidelines, especially receipt and possession, should indicate to the Commission that the sentences are too harsh and should be amended. The Commission

⁴⁰ UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009).

⁴¹ *Id.* at 44 (emphasis in original).

⁴² *Id.* at 45 (emphasis in original).

⁴³ *Id.*

should also recommend to Congress that statutory mandatory minimum penalties for certain child pornography offenses be reduced or repealed.

Federal judges have demonstrated considerable concern about the length of mandatory minimum sentences for receipt of child pornography. Fully 71 percent viewed the mandatory minimum penalty for receipt of child pornography to be too high, while only 15 percent opposed the expansion of the safety valve to include these offenses.⁴⁴ In response to this widespread view that this mandatory minimum penalty is too high, the Commission should recommend a change in the statutory scheme to Congress.

Certain child pornography offenses feature frequent departures from the guidelines as well. In 2009, less than half (44.6 percent) of USSG § 2G2.2 offenses, for receipt, possession, or trafficking in child pornography, were within the guideline range.⁴⁵ Almost all of the departures were below the guideline range.⁴⁶ These departures reflect the view, held by federal judges, that the guidelines are too harsh for these offenses. In addition, the enhancements within the child pornography guidelines are applied too frequently and result in harsher sentences. For example, one of the enhancements involves the use of the computer.⁴⁷ The saturation of computer technology assures that most offenders under this section will be subject to this enhancement, as argued by federal judges in recent cases,⁴⁸ and it should be eliminated from the guidelines manual as needlessly duplicative and unduly harsh.

As the Supreme Court has stated, the departures of federal judges from particular guideline sentences should be treated as feedback on those guidelines.⁴⁹ In this case, it is clear that these guidelines are too harsh, and should be amended to reduce the base offense level and enhancements. While the guidelines were adopted in connection with the mandatory minimum penalty established by Congress, the Commission has the option of creating a new base offense level without regard for the established mandatory minimum.⁵⁰

Priority 11: Continued study of alternatives to incarceration

The Commission should be commended for its continued study of alternatives to incarceration. As the federal prison population continues to expand beyond capacity, these approaches would lower exorbitant costs. At midyear 2009, over 206,000 individuals were incarcerated in federal prison.⁵¹ In addition, the federal prison population accounted for approximately 70 percent of all prison growth over a six month period.⁵² These levels of

⁴⁴ UNITED STATES SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 5, 6 (2010).

⁴⁵ UNITED STATES SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 (2010).

⁴⁶ *Id.*

⁴⁷ U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2009).

⁴⁸ *See, e.g.,* United States v. Durvee, 604 F.3d 84, 96 (2d Cir. 2010).

⁴⁹ Rita v. United States, 551 U.S. 338, 349-50 (2007).

⁵⁰ The Commission acknowledged this authority in its report on child pornography guidelines. *See* UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 45-46 (2009).

⁵¹ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009-STATISTICAL TABLES 4 (2010).

⁵² *Id.* at 2.

incarceration carry high monetary and social costs. It costs nearly \$26,000 a year to keep offenders incarcerated,⁵³ and, as the Commission has described, “social costs of imprisonment include the separation of families, isolation from the community, and transitional difficulties when offenders re-enter the community.”⁵⁴

Alternatives to incarceration also have the potential to improve public safety by reducing recidivism. Many of these programs, such as community corrections, can “provid[e] the life skills and treatment necessary to become law-abiding and productive members of society.”⁵⁵ Despite the feasibility of these alternatives, the overwhelming majority of offenders still receive sentences of imprisonment only. The Commission’s 2009 study found that, while nearly one-fourth of offenders will eligible for alternatives, 86.5 percent received prison sentences only.⁵⁶ Since 1997, prison rates have increased, while other sentence categories, probation, probation with alternatives, and prison with alternatives, have all declined.⁵⁷

In response to these concerns, the Commission enacted two amendments in 2010 to enhance the use of alternatives to incarceration. One of these amendments expanded Zones B and C of the Sentencing Table, thereby increasing the eligibility of certain offenders for alternatives to incarceration.⁵⁸ However, the Commission estimates that only 2.2 percent of offenders in Zone C and 3.8 percent of offenders in Zone D would have been placed in a different zone under the amendment.⁵⁹ In addition, offenders in Zones B and C are less likely to receive alternative sentences than offenders in Zone A.⁶⁰ In order to more substantially increase the use of alternatives to incarceration, the Commission should consider expanding Zone A to make more low-level offenders eligible for these alternatives. At a minimum, the Commission should expand Zones B and C an additional level, and should track the implementation of these amendments to determine if the zone changes had an impact on the use of alternatives.

The Commission also amended Application Note 6 to clarify and illustrate cases in which a departure would be warranted for treatment purposes.⁶¹ However, the Commission should also revise Application Note 7, which provides that “The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.”⁶² Given that offenders in this criminal history category have a

⁵³ JOHN SCHMITT, KRIS WARNER, & SARIKA GUPTA, CENTER FOR ECONOMIC AND POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 11 (2010). This study suggested that shifting non-violent offenders from prison to probation or parole would save \$23,000-\$25,000 per inmate per year, saving the federal government \$2.1 billion per year.

⁵⁴ UNITED STATES SENTENCING COMMISSION, ALTERNATIVE SENTENCING IN THE CRIMINAL JUSTICE SYSTEM 2 (2009).

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at 5.

⁵⁸ UNITED STATES SENTENCING COMMISSION, AMENDING THE SENTENCING GUIDELINES 1 (2010).

⁵⁹ *Id.*

⁶⁰ ALTERNATIVE SENTENCING IN THE CRIMINAL JUSTICE SYSTEM at 4. The Commission found that 48.4% of Zone A offenders receive prison only, compared to 58.4% of offenders in Zone B and 66.4% of offenders in Zone C.

⁶¹ AMENDING THE SENTENCING GUIDELINES at 1.

⁶² U.S. SENTENCING GUIDELINES MANUAL § 5C1.1, app. n. 7 (2009).

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lower risk of recidivism than individuals in higher categories,⁶³ and the fact that these offenders could have committed only minor offenses,⁶⁴ this note should be amended to discourage alternatives to incarceration only for those offenders with high criminal history scores and offense levels.

Conclusion

Thank you for considering our views. We look forward to working with the Commission during this amendment cycle.

Sincerely,



Julie Stewart
President



Mary Price
Vice President and General Counsel

cc:

Hon. Ruben Castillo, Vice Chair
Commissioner William B. Carr, Vice Chair
Commissioner Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa
Beryl A. Howell
Dabney L. Friedrich
Isaac Fulwood, Jr.
Jonathan J. Wroblewski
Judith M. Sheon, Staff Director
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⁶³ UNITED STATES SENTENCING COMMISSION, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 6 (2004). In this report, the Commission found that offenders in Criminal History Category III had a two-year recidivism rate of 34.2%, compared to 44.6% in Criminal History Category IV, 51.6% in Criminal History Category V, and 55.2% in Criminal History Category VI. *See id.* at 21.

⁶⁴ ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1282 (2009).