

**FEDERAL PUBLIC DEFENDER
Western District of Washington**

Thomas W. Hillier, II
Federal Public Defender

August 19, 2010

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

Re: Priorities 1 and 2

Dear Judge Sessions:

This letter offers comments on the Commission's priorities regarding (1) a possible report on matters related to the advisory guideline system, and (2) a report to Congress on statutory mandatory minimum penalties.

I. ADVISORY GUIDELINE SYSTEM (Priority #1)

The Commission anticipates issuing a report that would possibly include (A) an evaluation of the impact of *United States v. Booker*, 543 U.S. 220 (2005) and subsequent Supreme Court decisions on the guideline system; (B) recommendations for legislation regarding federal sentencing policy; (C) the appellate standard of review; and (D) amendments to the guidelines.

Defenders have addressed most of these issues in testimony for the Commission's regional hearings. In addition, we hope to complete a report on these and other issues this Fall, which we would share with the Commission. The following comments address some of our most important concerns.

A. Impact of Supreme Court Decisions on the System

The Commission should emphasize the positive impact of the Supreme Court's decisions on the system. The advisory guideline system has improved sentencing by permitting judges to impose individualized sentences that best advance the purposes of sentencing in consideration of all relevant facts, and by permitting judges to scrutinize and reject unsound guidelines. Unlike the mechanical calculation of months corresponding to a variety of aggravating factors, sentences that are explained in terms of the background and

circumstances of the defendant and the purposes of sentencing are transparent, show respect to defendants and their families, and increase respect for law. The sentencing decision (unless there is a mandatory minimum) is made by an impartial judge who explains her decision in open court, subject to appellate review. Prosecutors' former dominion over sentencing has been lessened, to the benefit of the system as a whole.

Importantly, the advisory guideline system gives judges a significant role in the constructive evolution of the guidelines, as Congress intended. If fully accepted by the Commission, the new system will restore the Commission to its proper role as an independent expert body. The Commission has a potential new ally in the Judiciary, and a new opportunity to gain respect on the merits of its work.

We are concerned, based on the Department's letter dated June 28, 2010,¹ and the topic of the report -- the impact of *Booker* and subsequent cases -- that the report not reflect a myopic focus on increased judicial discretion in narrow terms (e.g., rates of compliance, differences in rates of compliance) that fail to recognize the big picture. If so, as in the past, this would divert attention from the most serious causes of unfairness and *unwarranted* disparity in sentencing -- structural disparity built into the guidelines and mandatory minimums, and the unfair use of those rules by prosecutors and law enforcement agents.

We believe that any productive discussion of the advisory guideline system must recognize the problems in the mandatory guideline system it replaced, and include an analysis of how increased judicial discretion has alleviated some of those problems.

1. Increased judicial discretion has decreased unwarranted disparity overall.

One form of structural disparity in the guidelines is that they are constructed almost exclusively of aggravating factors. Because mitigating factors are difficult to quantify, it is understandable that few mitigating factors are included in the guideline rules. Under the mandatory guidelines system, structural disparity existed due to policy statements prohibiting and discouraging consideration of mitigating factors, which were required to be followed. See § 3553(b) (requiring sentence within the guideline range absent a circumstance not adequately taken into consideration by the Commission, to be determined solely in consideration of guidelines, policy statements, and commentary). This created unwarranted uniformity, *i.e.*, "similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing."² Increased judicial discretion to consider all

¹ Letter to Hon. William K. Sessions III from Jonathan Wroblewski (June 28, 2010).

² U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (hereinafter *USSC Fifteen Year Review*) (emphasis in original).

relevant factors under § 3553(a) has addressed this unwarranted uniformity.

Another form of structural disparity is when a rule is not necessary to achieve sentencing purposes. For example, the 100:1 powder to crack ratio in the statute, as well as the various ratios that exist in the guidelines after the two-level reduction,³ overstate the harms of crack cocaine and result in penalties that were meant for drug “kingpins” being applied to low-level offenders. Similarly, the career offender guideline vastly overstates the risk of recidivism and serves no deterrent or crime prevention purpose for most offenders to whom it applies.⁴ Other examples of guidelines that produce sentences that are greater than necessary to achieve sentencing purposes are the illegal re-entry guideline and the child pornography guideline. Structural disparity is particularly problematic when it has an adverse impact on racial or ethnic minorities because it widens the gap in average sentences among groups without a justifiable reason and undermines confidence in the criminal justice system. Increased judicial discretion has allowed judges to correct for structural disparity resulting from unjust rules.⁵

Another form of unwarranted disparity is that caused by the exercise of prosecutorial and law enforcement discretion, practices, and policies. Judges have begun to identify and correct for some forms of prosecutor-created disparity. One category is the existence of “fast track” programs in some districts but not others.⁶ Another is when prosecutors unfairly refuse to move for a substantial assistance departure to recognize

³ The amendment was “a partial remedy” to correct for “the manner in which [the Commission] constructed . . . the Drug Quantity Table in USSG § 2D1.1” by setting base offense levels two levels above the statutory mandatory minimum penalties. U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing Policy* 9-10 (2007).

⁴ *Fifteen Year Review* at 133-34.

⁵ See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007) (crack); *United States v. Santillanes*, 274 Fed. Appx. 718, 718-19 (10th Cir. 2008) (methamphetamine); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (same); *United States v. Dorvee*, ___ F.3d ___, 2010 WL 3023799 (2d Cir. Aug. 04, 2010) (child pornography); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (acquitted conduct); *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008) (same); *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (illegal re-entry); *United States v. Amezcuavazquez*, 567 F.3d 1050 (9th Cir. 2009) (same).

⁶ In most circuits, judges may grant the equivalent of a fast track departure where there is no fast track program. See, e.g., *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Camacho-Arellano*, ___ F.3d ___, 2010 WL 2869394 (6th Cir. July 16, 2010); see also *United States v. Hernandez-Lopez*, 2009 WL 921121, *5 (10th Cir. Apr. 7, 2009) (noting without discussion district court’s statement that it had previously granted variances based on the disparity between sentences in fast track and other districts).

defendants' cooperation.⁷ Another is manipulation of the type or quantity of drugs by law enforcement agents,⁸ and another is the unfair piling on of consecutive mandatory minimums.⁹

2. The government's complaints about judicial discretion are without merit.

Notably, the complaints the Commission has heard about the advisory guideline system have come from some (not all) prosecutors. Some prosecutors at the regional hearings provided anecdotes in an attempt to show undue leniency or unwarranted disparity by judges,¹⁰ but these claims collapsed when the true facts were known.¹¹ Some prosecutors appeared to believe that judges should not have discretion, but that prosecutors should have wide discretion to control or limit sentencing outcomes through mandatory minimums, binding plea agreements, and departures and variances in the prosecutor's discretion.¹²

⁷ See, e.g., *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006); see also USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbls.25, 25A, 25B (223 below guideline sentences for cooperation without a § 5K1.1 motion).

⁸ See, e.g., *United States v. Torres*, 563 F.3d 731, 736 (8th Cir. 2009); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

⁹ See, e.g., *United States v. Angelos*, 433 F.3d 738, 754 (10th Cir. 2006); *United States v. Barriera-Vera*, 354 Fed. App'x 404, 410-11 (11th Cir. 2009); *United States v. Guthrie*, 557 F.3d 243, 256 (6th Cir. 2009).

¹⁰ Statement of Dana Boente, U.S. Attorney, Eastern District of Virginia, Before the U.S. Sent'g Comm'n, New York (July 9, 2009). The Eastern District of Virginia processes more crack cases than any district in the nation, and has the highest number of Rule 35 motions in the nation. USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 62.

¹¹ Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender, Northern District of Ohio, Before the U.S. Sent'g Comm'n, Chicago at 35-36 (Sept. 10, 2009) (providing full description of cases described by AUSA Boente).

¹² For example, the U.S. Attorney for the District of Oregon complained about judicial consideration of mitigating evidence, characterized judicial variances as creating unwarranted disparity, and noted that prosecutors in the district rely on binding plea agreements and mandatory minimums to limit and prevent judicial discretion. Statement of Karin J. Immergut, U.S. Attorney, District of Oregon, Before the U.S. Sent'g Comm'n, Stanford at 9-11 (May 27, 2009) In the District of Oregon, the rate of "Government Sponsored" below guideline sentences has increased from 21.8% in 2005 to 32.6% in 2008 to 36.5% in 2009, while the rate of "Non-Government

The rate of “Government Sponsored” below range sentences is almost 10 percentage points higher than the rate of “Non-Government Sponsored” below range sentences.¹³ These statistics understate the extent to which the government sponsors or acquiesces in below range sentences,¹⁴ and do not include Rule 35 reductions, which are used in a large majority of cooperation cases in several districts.¹⁵ While many of our clients benefit from “Government-Sponsored” departures and variances, sentencing should not be dominated by government-controlled incentives to obtain cooperation, quick guilty pleas, and waiver of constitutional rights. The congressionally mandated purposes and factors set forth in § 3553(a) should be the primary considerations at sentencing.

In its recent letter, the Department notes that it has received reports from prosecutors in some districts that sentences depend on which judge is assigned to the case, and that it sees a “troubling” trend of rates of below guideline sentences being substantially higher or lower in some districts than the national average.¹⁶ If this is a problem, the varied practices of individual prosecutors and U.S. Attorneys’ Offices should be even more troubling. The difference between the highest and lowest “Government Sponsored” rates by district is 62.1 percentage points, while the difference between the highest and lowest “Non-Government Sponsored” rates by district is only 36.1%.¹⁷ Moreover, while 75% of “Non-

Sponsored” below guideline sentences has *decreased* from 22.9% in 2005 to 19.4% in 2008 to 17.6% in 2009. USSC, *Federal Sentencing Statistics by State, District and Circuit, 2005-2009*, District of Oregon, Table 8. In 2009, the government moved for a below-guideline sentence based on substantial assistance or fast track in 23.9% of cases, and for other reasons in 12.6% of cases. *Id.*

¹³ *Id.*, Table 1.

¹⁴ Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22 Fed. Sent. Rep. 89 (Dec. 2009).

¹⁵ Defenders who answered a survey reported that Rule 35s are used in 80-100% of cooperation cases in the Eastern District of Arkansas, the Southern District of Illinois, the Southern District of Louisiana, the District of Nebraska, the Eastern District of Virginia, and the Western District of Wisconsin; and are used over half the time in one division of the Western District of Virginia. Commission statistics also show large numbers of Rule 35s in South Carolina, Wyoming and the Southern District of Florida. See USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbl.62.

¹⁶ Letter to Hon. William K. Sessions III from Jonathan Wroblewski at 2 (June 28, 2010).

¹⁷ Prosecutors seek downward departures and variances in 67% of cases in the District of the District of Columbia, while prosecutors seek downward departures and variances in 4.9% of cases in the District of South Dakota. Judges impose downward departures and variances in 41.6% of cases in the District of Rhode Island, while judges impose downward departures and variances in 5.5% of cases in the Northern District of Mississippi. See USSC, *2nd Quarter 2010 Preliminary Cumulative Data (October 1, 2009, through March 31, 2010)*, Table 2.

Government Sponsored” below guideline sentences are 24 months or less below the guideline range, only 43% of “Government Sponsored” § 5K1.1 departures are 24 months or less below the guideline range and 75% are 60 months or less below the range.¹⁸

Meanwhile, the Department appears not to intend to provide or publish data that would assist the Commission in examining, or the public in understanding, the results of prosecutorial discretion. At the hearing on mandatory minimums, the Department’s witness said that there was no central database that would provide that information, and noted that if statistics were gathered from presentence reports, they could not tell the full story because prosecutors consider factors not reflected in presentence reports.¹⁹ Of course, statistics that are gathered on judicial decisionmaking do not reflect many legitimate factors that judges consider, as the Commission has noted.²⁰ Since prosecutors are partisans for one side in an adversary process and their decisions are not explained in open court or subject to judicial review, it seems likely, and what evidence there is appears to confirm, that disparity resulting from the exercise of their discretion would often be unwarranted.

3. Judges have exercised their discretion moderately.

The guidelines remain the focal point at sentencing,²¹ and judges have exercised their discretion moderately. One year after *Booker*, when the guidelines were still being widely enforced, the Commission reported that judges sentenced below the guideline range without government sponsorship in 12.5 percent of cases,²² an increase from 11 percent in 2001 when the guidelines were mandatory.²³ During the first two quarters of FY 2010 --

¹⁸ USSC 2009 Monitoring Dataset. This analysis includes only cases with complete documentation and excludes cases with a guideline minimum of life or life equivalent (more than 470 months) for which calculation of the extent of departure is not possible.

¹⁹ U.S. Sent’g Comm’n, Transcript, Hearing on Mandatory Minimum Statutes 63-65, May 27, 2010 (testimony of Sally Quillan Yates).

²⁰ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* 4, 9-10 (March 2010).

²¹ USSC, Preliminary Quarterly Data Report, 2d Quarter, Figure C.

²² USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* vi-vii (2006).

²³ The reported rate in 2001 was 18.3%, see *2001 Sourcebook of Federal Sentencing Statistics*, tbl.26, but the Commission later reported that at least 40% of these departures were government-sponsored. See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

three years after the Supreme Court made clear that judges may consider all relevant circumstances including those placed off limits by the Commission's policy statements, and may disagree with unsound guidelines -- the rate of sentences below the guideline range classified as "Non-Government Sponsored" was only 16.9 percent.²⁴ A 4.4 percent increase between March of 2006 and March of 2010 is remarkably small, given the clarification of the law in the interim.²⁵ And even these low rates overstate how frequently judges initiate downward departures or variances or act over the government's objection.²⁶

The judicial variance rate is remarkably low, given that surveys of judges show that many rate the guidelines as ineffective at achieving the purposes of sentencing. A plurality of judges responding to a survey in 2002 rated the mandatory guidelines as ineffective at maintaining sufficient flexibility to permit individualized sentences when warranted and at providing defendants with training, medical care, or treatment in the most effective manner.²⁷ In the Commission's recent survey, large majorities of judges reported that offense and offender characteristics that the guidelines deem never or not ordinarily relevant are "ordinarily relevant" to the decision whether to depart or vary.²⁸ Large portions believed that probation or alternatives to straight prison should be more available for most types of offenses.²⁹ The majority of judges believe that the guidelines for crack and for possession and receipt of child pornography are too high, and large portions believe that many other guidelines, including those for trafficking in drugs other than crack and illegal reentry, are

²⁴ USSC, *Preliminary Quarterly Data Report, 2d Quarter Release 2010*, tbl.1.

²⁵ For at least a year and a half following *Booker*, many courts of appeals continued to enforce the guidelines and policy statements, holding that judges could not consider mitigating factors if discouraged or prohibited by policy statements, and that they could not disagree with the most obviously unsound guidelines, such as crack. This came into doubt on June 21, 2007, when the Supreme Court said that a judge may vary when the guideline itself fails to reflect § 3553(a) considerations, or when the guidelines treat offender characteristics improperly. *Rita*, 551 U.S. at 351, 357. These instructions became unmistakably clear on December 10, 2007, when the Court held that judges must consider all of the relevant factors under § 3553(a)(1), *Gall*, 552 U.S. at 49-50 & n.6, and that judges may disagree with a guideline that is not based on empirical evidence when it produces a sentence that is greater than necessary to satisfy sentencing purposes and/or creates unwarranted disparity. *Kimbrough*, 552 U.S. at 101-02, 109-10.

²⁶ Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22 Fed. Sent. Rep. 89 (Dec. 2009).

²⁷ *Summary Report: U. S. Sentencing Commission's Survey of Article III Judges (2002)*, available at http://www.ussc.gov/Judge_Survey/jsurvey02.pdf.

²⁸ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13, available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

²⁹ *Id.*, tbl.11.

also too high.³⁰ Based on these results, one might have expected judges to sentence below the guideline range in the majority of cases.

Further, the extent of downward departures and variance is moderate and has not increased over time. The Table in the Appendix shows the number of cases receiving various types of below-range sentences in FY2006-FY2009. The median sentence, median decrease, and median percent decrease are also shown. All three types of government-sponsored sentences show modest increases in the extent of decrease below the guideline range. But for non-government sponsored departures and variances, the extent of decrease has remained constant and may have even decreased.

Fortunately, given the over-incarceration problem, average sentence length has begun to drop slightly.³¹ This drop, however, is not primarily due to departures or variances, because the difference between the average guideline range and average sentence imposed has remained stable since *Booker* was decided.³² *Id.* Rather, the drop is driven by lower guideline ranges, primarily in cases sentenced under § 2L1.2, and to a lesser extent under § 2D1.1, with the latter the result of the Commission's amendment of the thresholds applicable to crack cocaine.³³

Most important, rates of sentences outside the guideline range are often a measure of disparity *prevented* instead of disparity caused. When judges decline to follow guidelines that create unwarranted disparity or excessive uniformity, they are moving toward treating similar defendants similarly and different defendants differently based on the purposes of sentencing rather than unsound guideline rules. Rates of sentences outside the guideline range were not a good measure of unwarranted disparity in the mandatory guidelines era,³⁴

³⁰ *Id.*, tbl.8.

³¹ USSC, Preliminary Quarterly Data Report, 2d Quarter, Figure C.

³² *Id.*

³³ *Id.*, Figures C, G and H.

³⁴ The guidelines do not include all relevant factors, and the guideline range is frequently "calculated" very differently in cases that are essentially the same. *See, e.g., United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant); Panel Discussion, *Federal Sentencing Under "Advisory Guidelines": Observations by District Judges*, 75 Fordham L. Rev. 1, 16 (2006) (Judge Lynch describing how when application of an enhancement is a close call, he could find that it does not apply, which is counted as compliant, or apply it and vary, which is counted as noncompliant); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission (Feb. 11, 2009) (listing ways in which different guideline ranges in similar cases result from the government's actions or happenstance,

and they are even less appropriate now.

4. The solution to differences among judges is for the Commission to revise those guidelines that have lost credibility.

We agree with the Department insofar as it recognizes that differences among judges stem in large measure from the fact that certain guidelines have lost credibility with the Judiciary, and that such guidelines should be revised downward.³⁵

While most judges consider all relevant facts about the offense and the offender and consider arguments to reject or discount guidelines that are not justified by sentencing purposes, some continue to impose sentences within guideline ranges when the guideline does not fit the offense or the offender or when the guideline itself is unsound. However, this represents a reduction in much more serious forms of unwarranted disparity that occurred when judges were not permitted to consider relevant factors and were forced to impose sentences that they knew were unjust.

If some judges take relevant mitigating factors into account as required by § 3553(a), though others do not, there has been a reduction in unwarranted uniformity. If prior to *Booker*, all ten judges in a district sentenced within the guideline range for ordinary crack cases, but today five of those judges sentence below the range to better reflect the true seriousness of crack offenses, there has been an increase in inter-judge disparity, but the structural disparity caused by the unsound crack guideline is reduced by half. Chief Judge Hinkle put it well: "It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences. And it would be better still to have ten good sentences even if they could be explained only as the considered judgment of a good and honest and experienced district judge whose goal was to get it right, and even if that explanation could not be fit into the grids on a guideline chart."³⁶

and stating, "Your statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range.", http://www.ussc.gov/AGENDAS/20090210/Hinkle_statement.pdf; Michael Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?*, 2 Fed. Sent'g Rep. 122 (1989) ("[J]udges can manipulate the guidelines to pick a sentence just as a pianist plays the keyboard to pick a melody. Thus, 'compliance rates' indicate only whether judges sentence within the guideline range, they do not indicate whether judges are applying the guideline range that most appropriately applies. It would make little sense for a judge to choose a guideline that permits the sentence he wishes to impose, and then to depart from that guideline range and have to justify a departure.").

³⁵ Letter to Hon. William K. Sessions III from Jonathan Wroblewski at 2-3 (June 28, 2010).

³⁶ Transcript of Hearing Before the U.S. Sentencing Comm'n, Atlanta, Georgia, at 136 (Feb. 10-11, 2009).

As the Commission takes on the evolutionary development of the guidelines, differences among judges will lessen. If the guidelines were revised downward, most judges who today feel bound to impose an excessive guideline sentence would presumably be comfortable imposing the amended guideline sentence. In that case, both structural and inter-judge disparity would be eliminated. As the Supreme Court said, “ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” *Kimbrough v. United States*, 552 U.S. 85, 107 (2007) (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)); see also *Rita v. United States*, 551 U.S. 338 358 (2007) (the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw”).

The author of a recent study finding differences in the rates at which judges in the District of Massachusetts sentence outside the guideline range notes that “inter-judge disparity is but one consideration among many in evaluating the federal sentencing system. It is entirely possible that *Booker* has, on balance, produced more just sentences by allowing judges greater flexibility and authorizing them to reject unsound guidelines, despite the corresponding increase in inter-judge disparity.” Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 Fed. Sent. Rep. 104, 107 (Dec. 2009). He also notes that “plenty of other federal sentencing priorities deserve attention,” including “reevaluating the wisdom of mandatory minimum sentences, and investigation of unwarranted disparity created by prosecutorial charging and bargaining practices.” *Id.*

5. There is no evidence that judges determine the kind or length of sentences based on invidious factors.

A comprehensive study published by the Department of Justice’s Bureau of Justice Statistics in 1993 found that prior to the guidelines when judges had complete discretion, sentencing differences by race or ethnicity were uniformly small or insignificant. After mandatory minimums and mandatory guidelines went into effect, however, there were substantial aggregate differences by race and ethnicity and this was because of factors built into the guidelines and statutes.³⁷ Similarly, the Commission’s 2004 Fifteen Year Review found: “The evidence shows that if unfairness continues in the federal sentencing process, it is more an ‘institutionalized unfairness’ built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. . . . Today’s sentencing policies, crystallized into the 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 the guidelines implementation. Attention might fruitfully be turned to asking whether these

³⁷ Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 1-2, 24-25 (1993).

new policies are necessary to achieve any legitimate purpose of sentencing.”³⁸

More recently, the Commission issued a report concluding that black male offenders received longer sentences than white male offenders after *Booker*.³⁹ It also found that black females received shorter sentences than males of any race and females of any race except “other.”⁴⁰ Under a different model spanning a ten-year period, the Commission found the greatest black/white difference in 1999, during the mandatory guidelines era.⁴¹ The Commission noted that legitimate factors likely to explain the differences it found, such as differences in employment history and kinds of criminal history, were not included in its analysis because data on those factors are not in its datasets.⁴²

Shortly after the release of the Commission’s report, a study by a team of researchers at Pennsylvania State University found that “extralegal effects have not increased post-Booker.”⁴³ The difference in these findings is the result of differences in methodology,

³⁸ USSC *Fifteen Year Review* at 135.

³⁹ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis 2* (March 2010) (“USSC *Demographic Differences Report*”).

⁴⁰ *Id.* at 4, 22, 23. “Other” includes Native American, Asian, Alaskan Native, and Pacific Islander.

⁴¹ *Id.* at 14.

⁴² *Id.* at 4, 9-10 (“[O]ne or more key factors which could affect the analysis may have been omitted from the methodologies used because a particular factor is unknown or was erroneously excluded from the analysis, or because data concerning such a factor is unavailable in the Commission’s dataset. Examples of factors for which no data is readily available . . . include a measure of the violence in an offenders’ criminal past, information about crimes not reflected in an offender’s criminal history . . . and information about an offender’s employment record. For these reasons, the results presented in the report should be interpreted with caution.”). The only offender characteristics included in the Commission’s datasets are age, educational level, and number of dependents.

⁴³ Jeffrey T. Ulmer, Michael T. Light, James Eisenstein, and John H. Kramer, *Does Increased Judicial Discretion Lead to Increased Disparity: The Liberation of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision* at 22 (“Penn State Study”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577238. This study concluded that disparity in sentences based on race, ethnicity and gender has not increased after *Booker*. *Id.* at 32-33. It found that black/white and gender differences in sentence length are slightly but significantly smaller after *Booker* compared to October 2001-April 2003 when the guidelines were mandatory, *id.* at 20, 21, 31, and that the effects of race, ethnicity and gender were considerably less after *Booker* than in 1994-95 when the guidelines were mandatory. *Id.* at 33 n.24. It found that there were no statistically significant differences across time periods for Hispanics or non-citizens. *Id.* at 20-21. And it found that there is no evidence that downward departures result in greater disparity

primarily that the Commission included all sentences together, treating probationary sentences as zero months, while the Penn State researchers studied the in/out decision and the decision how long to imprison separately.⁴⁴ The Penn State researchers tested the statistical significance of changes across time periods,⁴⁵ and found that changes in the post-*Booker* period were limited to the in/out decision and were *not* statistically significant.⁴⁶

Divergent findings in this area of research are long-standing and common, due to the relatively modest size of the effects, methodological differences among researchers, random fluctuations, and other sources of error. Findings that fluctuate depending on technical differences in statistical models, or that fluctuate from year to year, are insufficiently reliable for policy making.⁴⁷

Because these studies treat the rules and pre-sentencing decisions as “legally relevant,” they do not assess the impact of rules that are needlessly harsh and that disproportionately punish minorities, or the impact of unequal law enforcement scrutiny, arrests, or charging and plea bargaining practices. Nor do they assess how much increased judicial discretion after *Booker* has improved the fairness of sentencing. The fact is, defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules and take greater account of relevant differences among defendants.

B. Recommendations for Legislation

Numerous witnesses at the regional hearings, at the hearing on mandatory minimums, and at the Commission’s conference in New Orleans have been asked whether the Commission should recommend to Congress that it repeal some mandatory minimums in exchange for mandatory guidelines with broader ranges and jury factfinding. This question

post-*Booker* than when the guidelines were mandatory. *Id.* at 31. The paper is being prepared for publication.

⁴⁴ Penn State Study at 30-31.

⁴⁵ *Id.* at 12, 30.

⁴⁶ *Id.* at 31. The Penn State study used the Commission’s datasets. Factors that are not included in the datasets, such as violence in criminal history or the need to maintain a job, are likely to be more important to the in/out decision than to the decision how long to incarcerate.

⁴⁷ “Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution.” See Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* at 21-35 (1993) (discussing divergent findings in the pre-guidelines era and cautioning against reliance on findings that vary depending on statistical model).

was also posed in the Survey of United States District Judges. The overwhelming response has been “No.”

As Mr. Nachmanoff and Mr. Drees have testified, the Defenders also oppose this idea.⁴⁸ We believe that sentencing should be primarily in the hands of impartial judges, applying the purposes and factors set forth in 18 U.S.C. § 3553(a), including advisory guidelines. We believe that the advisory guidelines should be developed by this Commission as a neutral expert body, using feedback from judges in the form of data and reasons, and empirical research. The result of this proposal would be a new set of mandatory ranges applicable to all instead of some cases, once again placing sentencing in the hands of prosecutors, preventing the evolution of responsible guidelines, and possibly obviating any role for the Commission.

Five and a half years after *Booker* was decided, Congress has taken no action to replace the advisory guideline system.⁴⁹ The system is remarkably stable. It is working well,

⁴⁸ U.S. Sent’g Comm’n, Transcript, Hearing on Mandatory Minimum Statutes 135-40, May 27, 2010 (testimony of Michael Nachmanoff); Statement of Nicholas T. Drees before the U.S. Sent’g Comm’n at 28, Denver, CO (Oct. 21, 2009).

⁴⁹ In 2004, following the decision in *Blakely v. Washington*, 542 U.S. 296 (2004) when it appeared that there may be a legislative “fix” and that the choice was between mandatory guidelines with jury factfinding and so-called “topless” guidelines, the defense bar generally supported the former. See Memorandum from James E. Felman to U.S. Sentencing Commission (Sept. 16, 2004); Transcript of Public Hearing Before the U.S. Sent’g Comm’n (Nov. 16, 2004) (testimony on behalf of Defenders, Practitioners Advisory Group, NACDL). Immediately after *Booker*, the defense bar recommended to the Commission that it not support or propose any legislative change, that advisory guidelines within the framework of § 3553(a) was a workable solution, and that the Commission should study and learn from the new system. See Testimony of Jon Sands on Behalf of the Federal Defenders Before the U.S. Sentencing Comm’n (Feb. 15-16, 2005); Testimony of Amy Baron-Evans on Behalf of the Practitioners Advisory Group Before the U.S. Sentencing Comm’n (Feb. 15-16, 2005); Transcript of Hearing Before the U.S. Sentencing Comm’n, at 105-06 (Feb. 16, 2005) (Carmen Hernandez on behalf of NACDL). Those who had initially proposed the two legislative “fixes” and the Judiciary took the same view. See Testimony of Frank O. Bowman, III, *A Counsel of Caution*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Feb 10, 2005); Testimony of James E. Felman Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Mar. 16, 2006); Testimony of Judge Paul G. Cassell Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Mar. 16, 2006). The policy merits of “topless” guidelines were never seriously defended by anyone, and would most likely be held unconstitutional today. In *Harris v. United States*, 536 U.S. 545 (2002), five members of the Court agreed that *Apprendi* applies to facts that raise the minimum of a sentencing range, including Justice Breyer. Justice Breyer concurred with four other justices, however, in permitting judicial factfinding to increase a mandatory minimum, because he did not “yet” accept *Apprendi*. *Id.* at 569-71 (Breyer, J., concurring). Justice Breyer now accepts *Apprendi* “because it’s the law

and holds the promise of working even better as the Commission improves the guidelines. It has overwhelming support. There is no good reason to disrupt it. The hypothetical trade is overwhelmingly opposed by judges, key leaders in Congress, the defense bar, sentencing policy advocates including Families Against Mandatory Minimums,⁵⁰ and academics. The Department of Justice does not endorse it.⁵¹

The Commission should take seriously the fact that 75% of sentencing judges believe that the advisory guidelines system best achieves sentencing purposes, and only 14% think that a system of mandatory guidelines with jury factfinding, broader ranges, and fewer mandatory minimums may be better.⁵² Judges are the only impartial actors in the system, and they take sentencing very seriously. Their duty is to impose sentences that protect the public and that are fair to defendants. They believe that they are best equipped to do so by finding the facts, consulting the advisory guidelines, and imposing the appropriate sentence pursuant to § 3553(a). In addition, key congressional leaders support the advisory guidelines system, and support the Commission in doing the job it was created to do, including advising Congress about the problems with mandatory minimums and guidelines that are driven by mandatory minimums and congressional directives.⁵³

and has been for some time.” See Transcript of Oral Argument at 19-20, *United States v. O’Brien*, No. 08-1569, 19-20 (Feb. 23, 2010).

⁵⁰ “Such a compromise would abandon mandatory sentences that apply to some crimes and replace them with mandatory or near-mandatory guidelines across the criminal code. There is no reason to alter the advisory nature of the guidelines.” See Memorandum from Families Against Mandatory Minimums to Spencer Overton, Jonathan Wroblewski and Stephanie Baucus, Extension of Remarks Listening Session at 7, August 14, 2009.

⁵¹ Statement of Sally Quillan Yates, U. S. Attorney for the District of Georgia, on Behalf of the U.S. Department of Justice, Hearing Before the U.S. Sent’g Comm’n 9 (May 28, 2010)

⁵² USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19, available at http://www.usc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

⁵³ See *Plenary Speech by Mr. Robert C. “Bobby” Scott*, at 11-13, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section (Oct. 24, 2008); Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. “Bobby” Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William J. Sessions, Chair of the U.S. Sentencing Commission (Apr. 6, 2010); Letter from Patrick Leahy, Chairman, Committee on the Judiciary to Hon. William J. Sessions, Chair of the U.S. Sentencing Commission (Mar. 22, 2010); NYU Law School, Center on the Administration of Criminal Law, *Federal Sentencing at a Crossroads: A Call for Leadership*, May 24, 2010, webcast at 31:29-31:54 (Honorable John Conyers, Jr.), <http://www.law.nyu.edu/centers/adminofcrimallaw/events/federalsentencingatacrossroads/index.htm>.

We and others who oppose the hypothetical trade do so in part because it is implausible. As most optimistically described, Congress would repeal all or some mandatory minimums, issue fewer directives, lower sentences overall, and include an appropriate departure power. However, the central feature is that there would *not* be an appropriate departure power, since the absence of judicial discretion is what would make jury factfinding necessary. As stated in the Commission's Judge Survey, the guidelines would be "mandatory," thus replacing mandatory minimums for some offenses (assuming any mandatory minimums would be repealed) with mandatory sentences for all offenses. Congress would not lower sentences overall,⁵⁴ and it would not refrain from issuing directives.⁵⁵ Directives would still be issued, but with a more severe, and mandatory, effect.⁵⁶

Perhaps worst of all, this proposal would put a halt to the evolution of responsible guidelines, just as it has begun. The sentencing range in each case would be set by the prosecutor's charges and the jury's factfinding or the defendant's admissions. Since judges would have no role in determining the range and little or no power to depart from a range, judicial feedback to the Commission about guideline ranges would be non-existent. Without a mechanism for impartial input from the Judiciary, the Commission would need to respond only to the wishes of Congress and the Department of Justice. The views of other stakeholders would be rendered irrelevant. Empirical evidence would play no role. Assuming that the Commission would still be setting ranges in theory, the ranges would be set by the political branches in fact.

⁵⁴ This is evidenced by the difficulty of passing a bill to reduce sentences for crack offenders and the compromises it required, even after fifteen years of education by the Commission and a favorable political climate.

⁵⁵ NYU Law School, Center on the Administration of Criminal Law, *Federal Sentencing at a Crossroads: A Call for Leadership*, May 24, 2010, webcast at 29:04-30:13 (Honorable John Conyers, Jr., explaining that Congress issues directives for political, emotional, and irrational reasons), <http://www.law.nyu.edu/centers/adminofcriminallaw/events/federsentencingatacrossroads/index.htm>.

⁵⁶ For example, under the current system, if Congress issues a directive to the Commission to increase the guideline range for an offense by two levels, assuming a base range of 24-30 months, a two-level increase would increase the range to 30-37 months. Under a system with 10 levels, Congress would either move the whole offense into a higher range or direct the Commission to add a new fact that would move the offense with that fact into a higher range. Assuming a starting range of 24-36 months, raising the range even one level would increase it to 36-54 months, and raising it two levels would bring it to 54-81 months. For what a system of 10 ranges would look like, see Memorandum from James E. Felman to U.S. Sentencing Commission at 3 (Sept. 16, 2004).

There is a possibility that asking Congress to intervene in the manner suggested would end the Commission's role as an expert body, something the Defenders would not like to see. Congress may see no need to have a Sentencing Commission to promulgate a small number of ranges based on a limited set of facts to be charged in an indictment and proved to a jury. Even if Congress chose to delegate this legislative function to the Commission, it may well violate Separation of Powers. Judges on the Commission would not be making rules for the use of judges in imposing sentences – “the Judicial Branch's own business” – but would be determining what criminal conduct must be charged in an indictment and proved to a jury beyond a reasonable doubt. The prosecutor's charges and the jury's factfinding, not the judge, would determine the sentencing range in each case. Making rules for that purpose is the business of Congress, not “the Judicial Branch's own business-that of passing sentence on every criminal defendant.” *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

In light of the overwhelming opposition to this proposal, the dangers it presents, and the disruption it would cause, the Commission should not pursue it.

C. Standard of Appellate Review

Contrary to a suggestion at the hearing on mandatory minimums, we do not believe that Congress is free to enact a stricter standard of review for sentences outside the guideline range without also requiring jury factfinding. The Supreme Court found it necessary to excise *de novo* review so that the guidelines would be sufficiently advisory to pass constitutional muster. See *Booker*, 543 U.S. at 259, 261. It also held that courts of appeals may not adopt a presumption of unreasonableness for sentences outside the guideline range. *Rita*, 551 U.S. at 354-55. The furthest the Court could go was to permit, but not require, a presumption of reasonableness for sentences within the guideline range.

In *Rita*, Justice Scalia, joined by Justice Thomas, wrote separately to point out that any kind of substantive reasonableness review will result in constitutional violations in some cases. *Id.* at 368-84 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); see also *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J. concurring); *Rita*, 551 U.S. at 353 (“the Sixth Amendment concerns [Justice Scalia] foresees are not presented by this case.”); *id.* at 365-66 (Stevens, J., joined by Ginsburg, J., concurring) (“this case does not present such a problem”); *Cunningham v. California*, 549 U.S. 270, 309 & n.11 (2007) (Alito, Kennedy & Breyer, JJ., dissenting) (first articulating the problem Justice Scalia pointed out in *Rita*).

We are unaware of any proposal to change the standard of review that would not run afoul of the Sixth Amendment. If the Commission has something in mind, we would appreciate the opportunity to consider and discuss it.

In any event, concerns that reasonableness review is ineffective or creates “needless litigation”⁵⁷ are much overstated. The government has successfully appealed many cases on the ground that the sentence imposed was substantively unreasonable.⁵⁸ When cases are

⁵⁷ Comments of Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, Department of Justice, at the Nineteenth Annual National Seminar on the Federal Sentencing Guidelines, St. Petersburg, Florida (May 15, 2010).

⁵⁸ *United States v. Irely*, ___ F.3d ___, 2010 WL 2949265 (11th Cir. July 29, 2010) (en banc) (where defendant sexually tortured young children and produced and distributed child pornography, variance from 30 years to 17 ½ years was substantively unreasonable); *United States v. Ressam*, 593 F.3d 1095 (9th Cir. 2010) (in a terrorism case, reversing as both procedurally and substantively unreasonable below-guideline sentence of 22 years where guideline range was 35 years to life); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010) (in a child pornography case, reversing as substantively unreasonable sentence of a partial day in the custody of the United States Marshal’s Office and three years of supervised release in a child porn case where the recommended guideline range was 27 to 33 months in prison); *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (in a tax evasion case, reversing sentence of 4 years’ probation as both procedurally and substantively unreasonable where the guideline range was 24 to 30 months’ imprisonment); *United States v. Lychock*, 578 F.3d 214 (3^d Cir. 2009) (in a child pornography case, vacating as substantively unreasonable a below guideline sentence (no prison term imposed where guideline range was 30 to 37 months); *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009) (reversing as substantively unreasonable a 57-month sentence for a defendant classified as a career offender convicted of bank robbery, where advisory guideline range was 151 to 188 months); *United States v. Harris*, 339 Fed. App’x 533, 539 (6th Cir. 2009) (in a child porn case, reversing as substantively unreasonable a below-guideline sentence because the district court placed “an unreasonable amount of weight” on the character of the defendant); *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (in a wire fraud case, vacating as substantively unreasonable sentence of 36 months because the sentencing judge failed to offer a compelling justification for a sentence so far below the applicable guideline range of 87 to 102 months, and because nothing in the record supported such a reduced sentence); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (reversing as substantively unreasonable (“a clear error of judgment”) a sentence of probation in a child porn case; stating that “an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished”); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (in health care fraud case, reversing as substantively unreasonable sentence of five years’ probation (where guidelines recommended range of 27 to 33 months) because district court may have relied on factor (the defendant’s possible innocence) that “cannot be legitimately relied upon”); *United States v. Hughes*, 283 Fed. App’x 345 (6th Cir. 2008) (unpublished) (in a bank fraud case, reversing as substantively unreasonable sentence of one day in prison and five years’ supervised release); *United States v. Cutler*, 520 F.3d 136 (2^d Cir. 2008) (in a bank fraud case, reversing as both procedurally and substantively unreasonable two below guideline sentences (one for a year and a day in prison where guideline range was 78 to 87 months, the other for three years’ probation where guideline range was 108 to 135 months); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (in a terrorism case, reversing as substantively unreasonable sentence of 360 months’ imprisonment and 360 months’ supervised release, stating “we decline to adopt the view that *Gall* eviscerated any form of appellate review of trial court sentencing” and emphasizing that “*Gall* did not substitute a regime of total

reversed as unreasonable, whether on procedural or substantive grounds, whether inside or outside the guidelines, the district courts more often than not impose a different sentence on remand.⁵⁹

The courts of appeals are no longer substituting their judgment for that of the district court judge, the judicial actor in the best position to make the sentencing decision,

unreviewability for the fallen regime of Guidelines rigidity”).

⁵⁹ See, e.g., *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (on government's appeal, reversed as substantively unreasonable; higher sentence imposed on remand); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (same); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (same); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (same); *United States v. Hughes*, 283 Fed. App'x 345 (6th Cir. 2008) (unpublished) (same); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (same); *United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008) (on defendant's appeal, reversed as substantively unreasonable; lower sentence on remand); *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009) (same); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (same); *United States v. Paul*, 561 F.3d 970, 973-74 (9th Cir. 2009) (same); *United States v. Marroquin-Frias*, 2010 WL 510640 (9th Cir. Feb. 12, 2010) (unpublished) (same); *United States v. Lopez*, 343 Fed. App'x 484 (11th Cir. 2009) (same); see also *United States v. Levinson*, 543 F.3d 190 (3d Cir. 2008) (on government's appeal, reversed as procedurally unreasonable; higher sentence on remand); *United States v. Gaskill*, 318 Fed. App'x 251, 259 (4th Cir. 2009) (same); *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (same); *United States v. Johnson*, 273 Fed. Appx. 95 (2d Cir. 2008) (same); *United States v. Sevilla*, 541 F.3d 226, 232-33 (3d Cir. 2008) (on defendant's appeal, reversing due to insufficient explanation; lower sentence on remand); *United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010) (same); *United States v. Swift*, 357 Fed. Appx. 489 (3d Cir. 2009) (same); *United States v. Grant*, 323 Fed. App'x 189, 192 (3d Cir. 2009) (same); *United States v. Shambry*, 343 Fed. App'x 941 (4th Cir. 2009) (same); *United States v. Cameron*, 340 Fed. App'x 872 (4th Cir. 2009) (same); *United States v. Raby*, 575 F.3d 376, 381-83 (4th Cir. 2009) (same); *United States v. Terry*, 2009 WL 1845598, *3 (4th Cir. June 29, 2009) (same); *United States v. Batts*, 317 Fed. App'x 329, 331-33 (4th Cir. 2009) (same); *United States v. Maynor*, 310 Fed. App'x 595, 597 (4th Cir. 2009) (same); *United States v. Troupe*, 307 Fed. App'x 715, 717-18 (4th Cir. 2008) (same); *United States v. Strickland*, 2010 WL 235080 (4th Cir. Jan. 21, 2010) (same); *United States v. Simmons*, 568 F.3d 564, 569-70 (5th Cir. 2009) (same); *United States v. Brown*, 578 F.3d 221 (3d Cir. 2009) (same); *United States v. Moreno-Florean*, 542 F.3d 445, 457 (5th Cir. 2008) (same); *United States v. Aguilar-Rodriguez*, 288 Fed. App'x 918, 921 (5th Cir. 2008) (same); *United States v. Tisdale*, 264 Fed. App'x 403 (5th Cir. 2008) (same); *United States v. Blackie*, 548 F.3d 395, 401-02 (6th Cir. 2008) (same); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009) (same); *United States v. Steward*, 339 Fed. App'x 650, 653 (7th Cir. 2009) (same); *United States v. Lovelace*, 565 F.3d 1080, 1088-93 (8th Cir. 2009) (same); *United States v. Viezcas-Soto*, 562 F.3d 903, 906 (8th Cir. 2009) (same); *United States v. Smith*, 573 F.3d 639, 662 (8th Cir. 2009) (same); *United States v. Oba*, 2009 WL 604936, at *1 (9th Cir. Mar. 9, 2009) (same); *United States v. Santillanes*, 274 Fed. App'x 718, 718-19 (10th Cir. 2008) (same); *United States v. Simone*, 2009 WL 2168944, *2 (11th Cir. July 22, 2009) (same); *United States v. Phalo*, 283 Fed. App'x 757, 765 (11th Cir. 2009) (same).

and that is as it should be.⁶⁰ They are reversing sentences that are *outside the bounds of reasonableness*. For example, the Second Circuit recently reversed a guideline sentence of 240 months under § 2G2.2 (capped at the statutory maximum) as substantively unreasonable where the defendant pled guilty to one count of distributing child pornography.⁶¹ A few days earlier, the Eleventh Circuit reversed a 210-month sentence below the guideline range of 360 months under § 2G2.1 (capped at the statutory maximum) as substantively unreasonable in a case involving sexual torture of young children and production of child pornography overseas.⁶²

D. Amendments to the Guidelines

We address some needed revisions to the guidelines that are within the scope of the Commission's proposed priorities in the other letter submitted to the Commission today. In addition, we hope that the Commission will soon address the career offender guideline, other criminal history issues, and relevant conduct, as discussed in our letter of July 1, 2010.

II. MANDATORY MINIMUM PENALTIES (Priority #2)

The following supplements Michael Nachmanoff's testimony for the hearing on May 27, 2010.

A. Description of Interaction Between Mandatory Minimums and Plea Agreements

The Commission is directed to include in its report "a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements." Pub. L. 111-84, § 4713(b)(5).

First, we urge the Commission to reject the notion that mandatory minimums might be a good idea if they are useful or to induce cooperation. Sentencing policies, including mandatory minimum penalties, should be evaluated in light of their fairness and effectiveness at meeting the purposes of sentencing. 28 U.S.C. § 991(b)(2). Like the American Bar Association, we "reject the very premise that the inducement of cooperation is a legitimate aim of sentencing policy."⁶³ This is particularly so in light of evidence that mandatory

⁶⁰ *Booker*, 543 U.S. at 260-62; *Rita*, 551 U.S. at 357-58; *Gall*, 552 U.S. at 51-52.

⁶¹ *United States v. Dorvee*, ___ F.3d ___, 2010 WL 3023799 (2d Cir. Aug. 04, 2010).

⁶² *United States v. Irely*, ___ F.3d ___, 2010 WL 2949265 (11th Cir. July 29, 2010) (en banc).

⁶³ Testimony of James E. Felman before the U.S. Sent'g Comm'n for the Hearing on Mandatory Minimums at 13 (May 27, 2010).

minimums appear to have played a role in inducing false testimony and guilty pleas by innocent people, and appear to have been used by law enforcement agents and informants for corrupt ends.⁶⁴ The premise that inducement of cooperation is a legitimate purpose of sentencing policy assumes that mandatory minimums might be worth it if they make it easier for prosecutors to obtain evidence. It assumes that the tens of thousands of low-level, non-violent offenders who bear the brunt of disproportionately severe mandatory minimums might be a justifiable sacrifice to this end. The directive calls for a neutral description of the interaction between mandatory minimum sentencing provisions and plea agreements. It does not direct the Commission to presume that mandatory minimums might be legitimate if they induce cooperation.

We also do not believe that the Commission can say with assurance whether or not mandatory minimums are necessary to induce cooperation. Prosecutors often claim, and may believe, that mandatory minimums are essential to obtain cooperation. But they do not offer evidence that this is so, and we do not believe that such evidence exists. Guilty pleas and other forms of cooperation are affected by a wide variety of factors. Mandatory minimums have a variety of effects on different defendants, including increasing the likelihood of trial in some cases. In any case involving both a mandatory minimum and cooperation, how can we tell whether the prosecutor charged a mandatory minimum because he thought it was necessary to obtain cooperation but it was not, or the defendant cooperated because he was charged with a mandatory minimum? Our experience is that defendants cooperate if they have information to give in the hope of receiving a reduced sentence, whether or not a mandatory minimum applies. Some Defenders recommend against cooperation because of the danger involved,⁶⁵ or because prosecutors in the district are too stingy or unreliable in moving for departure.⁶⁶ Despite these warnings, clients usually cooperate. It does not matter whether the sentence is mandatory or not, or how uncertain it is that the prosecutor will move for a departure.

It seems impossible to statistically assess the effect of mandatory minimums on cooperation. What pattern would prove that mandatory minimums work as an incentive? Would we expect high rates of cooperation in cases where mandatory minimums *were* imposed (applicability of a mandatory minimum induced cooperation) or *were not* imposed

⁶⁴ See Statement of Michael Nachmanoff at 13-14, Public Hearing before the U.S. Sent'g Comm'n, Mandatory Minimum Sentencing Provisions Under Federal Law (May 27, 2010); Statement of Julia O'Connell at 12-14, Hearing before the U.S. Sent'g Comm'n, Austin (Nov. 19, 2009).

⁶⁵ See Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, before the United States Sentencing Comm'n, Austin, Texas (Nov. 19, 2009) (cooperating client was brutally murdered, most likely a direct result of suspicions that she was cooperating).

⁶⁶ See Statement of Jason D. Hawkins, First Assistant Federal Public Defender for the Northern District of Texas, at 2, 7-8, before the United States Sentencing Comm'n, Austin, Texas (Nov. 19, 2009).

(withdrawal of an applicable mandatory induced cooperation)? There is no data showing whether a mandatory penalty was threatened in cases that did not receive one.

We do know from the Commission's statistics that cooperation is routinely obtained in cases involving offenses that do not carry mandatory minimums. In 2009, the rate of substantial assistance departures in drug trafficking cases was 25.9%. For the 311 cases involving Oxycodone, Oxycontin, Oxymorphone and Hydrocodone, in which no mandatory minimum applies, the rate was 39.4%.⁶⁷ The rate was comparable or higher in many other kinds of cases without mandatory minimums: 85% in antitrust cases, 25% in arson cases, 32.2% in bribery cases, 17.7% in civil rights cases, 26.8% in kidnapping cases, 24% in money laundering cases, and 19.7% in racketeering/extortion cases.⁶⁸ The rate is naturally lower in cases where there is ordinarily no one to cooperate against, such as burglary (5.6%), larceny (5.8%), embezzlement (3%), sexual abuse (2.5%), pornography/prostitution (4%), and assault (1.3%).⁶⁹

Second, we urge the Commission to examine the disparity caused by the interaction of mandatory minimums and prosecutorial power over plea bargaining. We realize that this is difficult because for most mandatory minimums the Commission does not know whether prosecutors declined to charge a mandatory minimum where they could have. As reviewed in previous testimony, the data that are available has always shown uneven charging of mandatory minimums, including disproportionate effects on minority offenders. Nor would full and consistent charging solve the problem, because mandatory minimums routinely require sentences far above that necessary to achieve the purposes of sentencing, and even above the guideline range. If the Commission cannot unearth all of the facts, it should highlight the information that is missing.

Before the guidelines, discretion was shared by the judge and prosecutor and each acted as a check on the other. During the debates leading to the SRA, Congress became aware of concerns that mandatory rules could transfer sentencing power from judges to prosecutors, and thus create disparities more pronounced and less transparent than any disparity created by the decisions of neutral judges made in open court. Research by the Federal Judicial Center confirmed these concerns and warned against the constraint of judicial discretion without corresponding regulation of prosecutorial discretion.⁷⁰ Congress became convinced that "without attention to plea bargaining, sentencing reform could

⁶⁷ USSC, 2009 Monitoring Dataset.

⁶⁸ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.27.

⁶⁹ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.27.

⁷⁰ Federal Judicial Center, *Prosecutorial Discretion and Federal Sentencing Reform* (1979).

actually increase disparities in the federal sentencing process.”⁷¹ Congress decided to try to regulate charging and plea bargaining through judicial power to review and reject plea agreements. It directed the Commission to issue policy statements regarding the appropriate use of “the authority granted [by Fed. R. Crim. P. 11] to accept or reject a plea agreement.” 28 U.S.C. § 994(a)(2)(E). “The legislative history illustrates that both the House and Senate viewed this provision as crucial to the success of the sentencing reform effort.”⁷²

The Commission responded by adopting policy statements regarding judicial review of plea agreements along with other policies, such as the relevant conduct rule. These mechanisms did not work for obvious reasons. They were aimed only at controlling prosecutorial leniency, while leaving prosecutors free to wield severity under rules that were mandatory on judges. Mandatory minimums, mandatory guidelines (aided by relevant conduct and severe restrictions on judicial departures), and prosecutorial control over mechanisms for leniency all placed tremendous sentencing power in the hands of prosecutors,⁷³ and law enforcement agents,⁷⁴ with resulting unwarranted disparity. Now that the guidelines are advisory, the situation has much improved in cases where mandatory minimums do not apply. But there is little or nothing a judge can do to control prosecutors’ choices in charging or not charging mandatory minimums, even in the rare situation that the judge knows what choices have been made and directly questions those choices. See *United States v. Vasquez*, slip op., 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).

The full extent of this disparity remains unknown because prosecutors do not make their decisions in open court or reveal the reasons for their decisions, and DOJ does not collect or provide the relevant information. Nonetheless, it is obvious to everyone else involved in handling federal criminal cases that prosecutorial decisions in the use of mandatory minimums remains the most serious source of disparity in the system. See U.S. Sent’g Comm’n, *Results of Survey of United States District Judges, January 2010 through March 2010*, tbl.16.

⁷¹ Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 240 (1989).

⁷² *Id.* at 241.

⁷³ See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1425 (May 2008); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 244 (2005).

⁷⁴ Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187; David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211 (2004); Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996).

B. Compatibility With Different Guideline Systems

Congress has directed the Commission to assess “the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98-473; 98 Stat. 1987) and the sentencing guidelines system in place after *Booker v. United States*, 543 U.S. 220 (2005).” Pub. L. 111-84, § 4713(b)(4).

Mandatory minimums are incompatible with any kind of guideline system. First, they interfere with the Commission’s duty to construct guidelines based on empirical research, sentencing data and decisions, and consultation with all stakeholders. Second, they prevent judges from imposing individualized sentences. Mandatory minimums were “compatible” with the mandatory guideline system in an artificial sense, because many of the guidelines were designed to mirror mandatory minimums and both sets of rules were mandatory. This does not mean that mandatory minimums, or guidelines designed to mirror them, reflect the purposes of sentencing or the other goals of the Sentencing Reform Act. Both suffered from the same lack of empirical basis at their inception and the same resistance to change in light of research, data and feedback from judges.⁷⁵

The advisory guideline system is superior to any system of mandatory rules. It permits individualized sentencing and restores some balance between neutral judges and partisan prosecutors, thus preventing unwarranted disparity and unwarranted uniformity. It makes the problems with mandatory minimums even more obvious, which is a healthy development. By generating data and judicial decisions that expose the problems with mandatory minimums and the guidelines that are tied to them, the advisory system can help the Commission to educate Congress about the advisability of repealing mandatory minimums.

C. Effect of Mandatory Minimums on the Federal Prison Population, Crime Control and Deterrence

DOJ continues to contend that the drop in the crime rate can be attributed, at least in part, to the increase in federal incarceration over the past three decades and the role of mandatory minimums in particular.⁷⁶ Mandatory minimums have certainly been the main

⁷⁵ See *Gall*, 552 U.S. at 46 & n.2; *Kimbrough*, 552 U.S. at 96.

⁷⁶ Statement of Sally Quillan Yates, U. S. Attorney for the District of Georgia, on Behalf of the U. S. Department of Justice, Hearing Before the U.S. Sent’g Comm’n (May 28, 2010) (stating that “Congress enacted mandatory minimum sentencing statutes to work together with the federal sentencing guidelines. . . . As a result of these sentencing reforms, many other criminal justice reforms, and larger cultural changes in society, crime rates have been reduced dramatically Mandatory sentencing laws increase deterrence and cooperation by those involved in crime.”).

reason for the dramatic growth in the federal prison population. As the Commission predicted,⁷⁷ and as confirmed by later research,⁷⁸ the quantity-based minimum penalties in the Anti-Drug Abuse Act of 1986 have been the primary cause of the severe over-crowding the Bureau of Prisons now faces. The budget of the Federal Bureau of Prisons has grown to over \$6 billion a year,⁷⁹ with another \$1.4 billion spent on the Office of the Federal Detention Trustee.

The cost-effectiveness of incarceration depends on whether it incapacitates dangerous and crime-prone offenders. Mandatory minimums (and the guidelines that are tied to them) do an especially poor job of focusing prison resources on the most serious and dangerous offenders. Instead, they have resulted in the lengthy incarceration of many tens of thousands of non-violent, low-level drug offenders with little or no criminal history and relatively low risks of recidivism.⁸⁰ Drug offenders comprise one third of the federal docket,⁸¹ and approximately half the federal prison population.⁸² Of 24,918 defendants convicted of drug trafficking in 2009, nearly two thirds (16,052) were subject to a mandatory minimum of five, ten, or more than ten years.⁸³ But 83.2% of all drug trafficking offenses involved no weapon, 94.1% of defendants in these cases played no aggravating role or a mitigating role, and 63.1% had only zero to three criminal history points.⁸⁴ Except in Criminal History Category I, drug trafficking offenders have the lowest, or second lowest,

⁷⁷ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 74 (1987).

⁷⁸ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed Sent'g Rep. 26 (1990).

⁷⁹ U.S. Dep't of Justice, Budget and Accountability Summary, available at <http://www.justice.gov/jmd/2010summary/pdf/bop-bud-summary.pdf>.

⁸⁰ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (2004).

⁸¹ USSC, 2009 Sourcebook of Federal Sentencing Statistics, Figure A.

⁸² The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* 1 (2006) (55% of federal prisoners serving time for a drug offense), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf; The Sentencing Project, *Changing Racial Dynamics of the War on Drugs* 6 (2009) (in 2005, 95,211 federal inmates were drug offenders), http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

⁸³ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.43.

⁸⁴ *Id.*, tbls.37, 39 & 40.

rate of recidivism across criminal history categories.⁸⁵ Locking up nonviolent, low-level offenders for long periods is likely to increase recidivism by disrupting employment, reducing prospects of future employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.⁸⁶ Imprisoning offenders with a low risk of re-offending is more expensive than the benefits of any crimes averted, especially if the costs associated with disruption of families, lost wages, and other social costs are included.⁸⁷

As to deterrence, “the clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.”⁸⁸ This is especially true of federal mandatory minimums. The Commission reports that “[d]rug offenders . . . represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty . . . with 16,198 (82.5%) of the 19,628 offenders convicted under such statutes [in FY 2008] having committed a drug offense.”⁸⁹ Yet drug crimes are “uniquely insensitive to the deterrent effects of sanctions,” because, as many studies have shown, “[m]arket niches created by the arrest of dealers are . . . often filled within hours.”⁹⁰ For many crimes, including “drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducing to the crime.”⁹¹ As put by one criminologist: “Lock up a rapist and there is one less rapist on the street. Lock up a drug dealer and you’ve created an employment opportunity for someone else.”⁹² As long as there is user demand, the

⁸⁵ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (2004).

⁸⁶ See Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974–2002*, 6 *Criminology & Pub. Pol’y* 589 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* at 19 (Nov. 1996) (recognizing imprisonment has criminogenic effects including “contact with more serious offenders, disruption of legal employment, and weakening of family ties.”).

⁸⁷ John J. Donohue, III, *Economic Models of Crime and Punishment*, 74 *Soc. Res.* 379 (2007).

⁸⁸ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65, 100 (2009) (hereinafter Tonry, *Mostly Unintended*); see also *id.* at 69, 91-100.

⁸⁹ USSC, Memorandum of July 15, 2009, *Overview of Statutory Mandatory Minimum Sentencing*, available at http://www.ussc.gov/MANMIN/man_min.pdf.

⁹⁰ *Id.* at 102. “Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” Fifteen Year Review at 134.

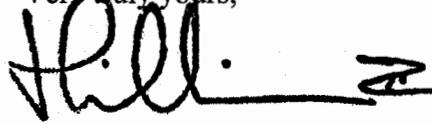
⁹¹ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 29 (2006).

⁹² Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 *Fed. Sent’g Rep.* 12, 19 n.20, 1999 WL 1458615 (July/August 1999) (quoting Alfred Blumstein).

drug market quickly replaces sellers that are imprisoned and the drug crime is not prevented.⁹³

We hope that these comments are helpful, and are available to discuss these issues further.

Very truly yours,



Thomas W. Hillier, II, Co-Chair, Defender
Legislative Expert Panel
Michael Nachmanoff, Defender
Legislative Expert Panel
Marjorie Meyers, Chair, Defender
Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair
William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel
Michael Courlander, Public Affairs Officer

⁹³ USSC *Fifteen Year Review* at 134; *see also* USSC, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

**APPENDIX
NUMBER OF CASES AND DEGREE OF DECREASE
FOR VARIOUS TYPES OF SENTENCES FY2006 – FY2009**

			2006	2007	2008	2009
GOVERNMENTSPONSORED						
5K1.1	Number of cases		10,134	10,049	10,048	9,296
	Median Sentence		37	36	36	36
	Median Decrease		30	29	30	30
	Median Decrease %		47.8	47.4	47.8	48.9
5K3.1	Number of cases		5,166	5,233	5,894	6,701
	Median Sentence		18	18	18	18
	Median Decrease		8	7	7	7.0
	Median Decrease %		28.3	27.8	28.6	33.2
Other Govt	Number of cases		1,939	2,614	3,121	2,674
	Median Sentence		24	24	21	25.5
	Median Decrease		12	10	10	12
	Median Decrease %		33.2	26.8	27.4	33.3
NON-GOVERNMENT SPONSORED						
Down Dep	Number of cases		1,903	1,757	1,544	1,456
	Median Sentence		24	24	24	24
	Median Decrease		10	10	10	10
	Median Decrease %		29.8	26.8	28.6	28.5

Down Dep w/3553(a)	Number cases	of	1,432	1,013	915	807
	Median Sentence		24	24	24	24
	Median Decrease		15	15	15	18
	Median Decrease	%	40.3	39.1	40.5	44.4
3553(a)	Number cases	of	4,243	4,957	6,678	8,892
	Median Sentence		24	27	27	27
	Median Decrease		12	12	12	13
	Median Decrease	%	34.3	33.3	33.3	34.8
Other Judicial	Number cases	of	929	706	835	770
	Median Sentence		16.5	12	13	12
	Median Decrease		8	6	6	6
	Median Decrease	%	39.3	45.9	39.2	38.5

Source: USSC, 2006, 2007, 2008, 2009 *Sourcebook of Federal Sentencing Statistics* Tables 30-31a.

FEDERAL PUBLIC DEFENDER
Southern District of Texas
Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

FEDERAL PUBLIC DEFENDER:

Telephone:

MARJORIE A. MEYERS

713.718.4600

August 18, 2010

First Assistant:

Fax:

H. MICHAEL SOKOLOW

713.718.4610

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Attention: Public Affairs – Priorities Comment

Re: Public Comment on USSC Notice of Proposed Priorities for Cycle Ending May 1, 2011

Dear Judge Sessions:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission’s proposed priorities for the upcoming amendment cycle. We look forward to working with the Commission to ensure fair and just sentences and to address unwarranted disparities in application of federal statutes and guidelines. Here we address many of the priorities proposed in the notice and request for comment. We address the Commission’s post-*Booker* review and study of mandatory minimums by separate cover.

Proposed Priority #3: Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 and Possible Amendments to Part K or Part M of Chapter Two.

In Pub. L. 111-195, effective July 1, 2010, Congress directed the Commission to study and report within one year on the “impact and advisability of imposing mandatory minimum sentences for violations of -- (1) section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(a)); (2) sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. 2778, 2779, and 2780); and (3) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.).” The Commission has proposed that in addition to conducting this study, it consider amendments to §2M5.2 or other guidelines in part K or Part M of Chapter Two “that might be appropriate in

light of the information obtained from such study.” We address this proposed priority in four parts discussing (1) our opposition to new mandatory minimums; (2) the need to revise the guidelines for possession of a stolen firearm or firearm with an altered or obliterated serial number; (3) the problems with the definitions of crimes of violence and controlled substance offenses in §2K2.1(a)(1)-(4); and (4) the absence of evidence supporting the Department of Justice’s (DOJ) request for increased sentences for straw purchasers.¹

A. Recommend No New Mandatory Minimums

As the Commission is well aware, we oppose any new mandatory minimum sentences. The chief reasons for our opposition were set forth in our testimony at the Commission’s mandatory minimum hearing on May 27, 2010.² Statutory mandatory minimum penalties, along with prosecutorial charging decisions, are ranked as a leading cause of unwarranted disparity.³ They have not been proven to deter crime. Mandatory minimum penalties also waste prison resources, undermine the role of the Sentencing Commission, and make impossible individualized sentencing tailored to the circumstances of each offense and offender. The only real purpose they serve is to shift power over sentencing from the Commission and judges to prosecutors who view them as tools to leverage plea bargains, often on the least culpable defendants. Sound sentencing policy should not be based on what might make it easier for prosecutors to obtain convictions. Indeed, the presence of mandatory minimum sentencing provisions and the leverage they provide prosecutors undermines communities and promotes disrespect for the law. They also encourage cooperators to fabricate and exaggerate to curry favor with prosecutors.⁴

¹ We have additional concerns about §2K2.1, including the broad reach of the four-level increase under §2K2.1(b)(6) (“reason to believe” that the firearm “would be used or possessed in connection with another felony offense”). The standard is so broad and vague, and the number of potential felony offenses so vast, that the provision applies to nearly a quarter of the cases sentenced under that guideline. *USSC, 2009 Sourcebook of Federal Sentencing Statistics*, at 45 (2009) (hereinafter *2009 Sourcebook*).

² Statement of Michael Nachmanoff, Before the U.S. Sentencing Comm’n, Washington, D.C. (May 27, 2010). We are not alone in our opposition. The Judicial Conference of the United States has consistently and vigorously opposed mandatory minimums for over fifty years. *Mandatory Minimums and Unintended Consequences*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 11th Cong. (July 14, 2009) (Honorable Julie E. Carnes, Chair, Criminal law Committee of the Judicial Conference of the United States) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:51013.pdf. The number of judges supporting expansion of the safety valve across all offenses provides additional evidence that mandatory minimum sentencing regimes are disfavored. *USSC, Results of Survey of United States District Judges January 2010 through March 2010*, Question 2 (June 2010) (hereinafter *Judges Survey*).

³ *Judges Survey*, Question 16.

⁴ See Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (2009).

While we firmly oppose mandatory minimums and hoped DOJ would join in that opposition, we are pleased to see that the Department has set forth stringent criteria for any new mandatory minimum legislation. At the Commission's May hearing on mandatory minimums, it stated "that no new mandatory minimum should be proposed unless there is *substantial evidence* that such a minimum would *rectify a genuine problem* with imposition of sentences below the advisory guidelines; would *not have an unwarranted adverse impact* on any racial or ethnic group; and would not substantially exacerbate prison crowding." (emphasis added).⁵ These criteria set a high bar for any new mandatory minimums.

Should the Commission change its historical opposition to mandatory minimums (which we strongly urge it not to do), we encourage it to proceed with great care and adopt a similarly strict test for when it might recommend any new ones. For the statutes subject to this congressional directive, we doubt if the evidence would pass even the bar DOJ has set. For example, even a cursory review of preliminary data raises concerns that any new mandatory minimum directed at arms export violations sentenced under §2M5.2 will have a disproportionate impact on people of color. In 2008, Hispanic defendants comprised 69.8% of the defendants sentenced under §2M5.2.⁶ A new mandatory minimum for those offenders would only add to the adverse impact of already existing mandatory minimums directed at firearms offenders.⁷

B. Modify the Stolen Firearms and Altered or Obliterated Serial Number Enhancement under §2K2.1

The Commission should add a mens rea requirement to the adjustment at §2K2.1(b)(4) for a stolen firearm and firearm with an altered or obliterated serial number, lower the adjustment from 4 to 2 for an altered or obliterated serial number, and clarify that the altered or obliterated serial number adjustment does not apply where the serial number is visible with microscopy or is otherwise recoverable.

No sound penological objective supports §2K2.1(b)(4), which treats the unknowing possession of a stolen firearm or firearm with an altered or obliterated serial number the same as knowing possession. The Commission did not explain why it removed the mens rea requirement in 1991.⁸ Nor has any explanation emerged since then. The adjustments in §2K2.1(b)(4) stand

⁵ Statement of Sally Quillian Yates. U.S. Attorney, N.D. Ga., Before the U.S. Sentencing Comm'n, Washington, D.C. (May 27, 2010).

⁶ Source: USSC, *2009 Datafile*, FY 2009.

⁷ The Commission's data shows that African-Americans constitute 49% of all firearms offenders, but 63% of those subject to mandatory minimum penalties. USSC, *Overview of Statutory Mandatory Minimum Sentencing* 13 (2008).

⁸ The guideline originally called for a one-level adjustment "if the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number." The Commission doubled the offense level in 1989 to "better reflect the seriousness of this conduct." USSG App C, Amend. 189 (Nov. 1, 1989). It removed the mens rea requirement in 1991 without explanation, USSG App. C, Amend. 374, and then added an application note in 1993 that merely stated the enhancement

out for their lack of a scienter requirement. The most analogous guideline – §2K1.3(b)(2) (stolen explosive material) – requires that the “defendant knew or had reason to believe” the material was stolen. To single out possession of a stolen firearm (or a firearm with an obliterated or altered serial number) as a strict liability adjustment, absent any sound objective for the enhancement, is an arbitrary and capricious “tough luck”⁹ policy that is antithetical to the statutory purposes of sentencing.

Candid criticism on this issue has come from several quarters. As one court put it, “To add many months of incarceration for possession of a gun because the gun was stolen, when the defendant did not and could not know it was stolen, is to punish by lottery. Haphazard chance is not a guiding spirit of our rule of law.”¹⁰ As a strict liability enhancement, §2K2.1 (b) (4) permits punishment “on the cheap” and promotes disrespect for the rule of law.¹¹

The strict liability enhancement in §2K2.1(b)(4) also is not “consistent with all pertinent provisions of any Federal statute.” 28 U.S.C. § 994(a). Congress meant for defendants to be punished for possession of a stolen firearm or a firearm with an obliterated or altered serial number only if they knowingly did so. 18 U.S.C. §§ 922(j) and (k). To convict a defendant of such an offense, the prosecution would have to prove the scienter requirement beyond a reasonable doubt, using only evidence admissible under the Constitution and the Federal Rules of Evidence. Under the current guideline, the prosecution can exact punishment without proving any mens rea and without having to follow strict evidentiary standards.

The statistics confirm that the government uses the enhancement in lieu of prosecution under §§ 922(j) (stolen) and (k) (obliterated). In 2008, 197 defendants were reportedly convicted under § 922(j).¹² That same year, the enhancement for a stolen firearm was applied over 992 times.¹³ In FY 2009, the enhancement applied in 17.5% of §2K2.1 cases, or 1114 times.¹⁴ In

applies “whether or not the defendant knew or had reason to believe that the firearm was stolen or had an obliterated serial number.” USSG App. C, Amend. 478 (Nov. 1, 1993). In 2006, it doubled the enhancement for an altered or obliterated serial number, claiming that the “increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers and the increased market for these types of weapons. USSG App. C, Amend. 691 (Nov. 1, 2006). Its market theory was not the subject of any hearing testimony and no evidence was provided regarding a “market” for firearms with obliterated or altered serial numbers.

⁹ See Sanford H. Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 267 (1987).

¹⁰ *United States v. Handy*, 570 F. Supp. 2d 437, 439 (E.D.N.Y. 2008); see also *United States v. Mobley*, 956 F.2d 450, 459-68 (Mansmann, J., dissenting).

¹¹ *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2006) (Rendell, J., concurring).

¹² Source: FY2008 Number of defendants in cases closed, 18 U.S.C. § 922(j), available at <http://fjsrc.urban.org/tsec.cfm>.

¹³ USSC, *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2008*, at 45 (2009) (the total number of cases is over 992 because the adjustments for stolen firearm and obliterated or altered serial number for offenses occurring before November 2006 are not included).

2008, 52 defendants were reportedly convicted of § 922(k).¹⁵ That same year, the obliterated or altered serial number enhancement applied in 454 cases.¹⁶ In FY 2009, the four-level enhancement for altered or obliterated serial number applied in 6% of cases under §2K2.1, or 384 cases.

In addition to requesting that the Commission add a mens rea requirement to §2K2.1 (b) (4) (A) and (B), we encourage the Commission to reduce and modify the adjustment for an obliterated or altered serial number because it overstates the seriousness of merely possessing a firearm with an altered or obliterated serial number and the individual's personal culpability for that harm.¹⁷ An understanding of how tracing works and the punishments available for other conduct that interferes with tracing reveals why the current strict liability four-level increase is a grossly disproportionate punishment.

A serial number on a firearm allows the ATF to trace the firearm from the point of manufacturer to the *first* retail purchaser.¹⁸ The ATF does not routinely trace the firearm beyond the point of sale.¹⁹ The chief benefits of tracing data for law enforcement officers is that it may identify the purchaser of a firearm recovered in a crime or raise a red flag about illegal firearm trafficking *at the point of sale*. Those benefits, however, very much depend on the amount of time that has passed from the retail sale and law enforcement's recovery of a firearm ("time-to-crime" rate). As the ATF itself puts it, if the time-to-crime rate is short, and "several short time-to-crime traces involve the same individual/Federal firearm licensee, illegal trafficking activity is highly probable."²⁰

The ATF's use of serial numbers to trace firearms from the manufacturer to the point of retail sale has several implications for §2K2.1 (b)(4) and whether a four-level enhancement serves a legitimate purpose of sentencing. First, since the chief vice of an altered or obliterated serial number is that it obstructs the ATF's ability to trace the firearm from manufacture to point of sale and then follow investigative leads from there, the possession of a firearm with an altered or obliterated serial number should not be punished any more harshly than other acts that

¹⁴ USSC, *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2009*, at 45 (2010).

¹⁵ Source: FY2008 Number of defendants in cases closed, 18 U.S.C. § 922(k), available at <http://fjsrc.urban.org/tsec.cfm>.

¹⁶ *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2009*, at 45.

¹⁷ See *United States v. Weaver*, 1999 WL 1253972 (2d Cir. Dec. 15, 1999) (unpub) (district judge concluded that the presence of an obliterated serial number "was not relevant to 'the true measure of [the defendant's] moral turpitude'").

¹⁸ PL 110-161 (Consolidated Appropriations Act, 2008) ("Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.").

¹⁹ See National Tracing Center, available at http://www.ojjdp.ncjrs.gov/pubs/gun_violence/sect08-j.html.

²⁰ *Id.* (describing Project LEAD of the ATF).

obstruct law enforcement investigations. USSG § 3C1.1 contains a two-level enhancement for obstruction or impeding the administration of justice.²¹ No greater penalty should apply to §2K1.2(b)(4).

The unfairly high punishment for unknowingly possessing a firearm with an altered or obliterated serial number becomes more stark when compared to the penalty for other acts that impede the tracing of firearms. For example, a dealer who fails to maintain adequate records regarding the sale of a firearm impedes the ability of the ATF to identify the first retail purchaser as much, if not more, than an altered or obliterated serial number. Yet, the *knowing* failure to keep records is nothing more than a misdemeanor punishable by no more than one-year of imprisonment.²² Such dealers rarely face criminal prosecution and typically escape with a warning. Only after repeated violations does the ATF seek to revoke their license to sell firearms.²³ It is strangely disproportionate for a person who unknowingly possesses a firearm that may or may not be traceable to face a more severe punishment than one who knowingly fails to keep records designed to facilitate the tracing of firearms.

Aside from restoring the mens rea element it removed in 1991 and returning to the pre-2006 two-level adjustment, the Commission should also clarify the definition of an altered or obliterated number to exclude firearms with serial numbers that are recoverable. Some courts read the enhancement so broadly that it applies even if the serial number is detectable by a microscope; uncovered with paint remover; or readable, but scratched.²⁴ The ATF has an

²¹ The likelihood of an altered or obliterated serial number actually obstructing the ability of the ATF to identify illegal trafficking at the point of sale is small. As the time-to-crime rate increases, the usefulness of tracing in identifying illegal trafficking declines. In most cases, the time-to-crime rate for a firearm exceeds three years. *See generally* ATF, *Firearms Trace Data – 2009*, available at <http://www.atf.gov/statistics/trace-data/2--0-trace-data.html>. Additionally, the typical number of years between the point of retail sale to recovery of a firearm makes it more likely that the firearm passed through a number of unregulated secondary markets, including one or more of the 4000+ gun shows dedicated primarily to the sale and exchange of firearms, as well as “countless other public markets.” Dep’t of Justice, Dep’t of Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Gun Shows: Brady Checks and Crime Gun Traces 1* (1999), available at <http://www.atf.gov/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces> pdf; Philip J. Cood, Stephanie Molliconi, and Thomas Cole, *Regulating Gun Markets*, 86 J. Crim. L. & Crim. 59, 70 (1995) (estimating that half of gun purchases each year are used guns purchased in the secondary market). According to the ATF, used firearms purchased in such markets are “rarely” traceable, even with a serial number. *Gun Shows*, at 7, n.18.

²² 18 U.S.C. § 922(m); 18 U.S.C. § 924(a)(3)(B).

²³ *See, e.g.*, USAO District of Maryland Press Release, *Court Upholds ATF’s Revocation of Gun License of Bel Air Guns* (recounting license revocation of dealer who failed to maintain records on 124 firearms, making it “hard for ATF to do its job and trace guns recovered in crimes back to their purchasers”), available at http://www.justice.gov/usao/md/Public-Affairs/press_releases/press07/CourtUpholdsATFsRevocationofGunLicenseofBelAirGuns.html

²⁴ *United States v. Carter*, 421 F.3d 909, 911-17 (9th Cir. 2005) (microscopy); *United States v. Shabazz*, 2007 WL 580666 (9th Cir. Feb. 22, 2007) (acetone); *see also United States v. Perez*, 585 F.3d 880, 883-84 (5th Cir. 2009) (damage to serial number that did not render it unreadable qualifies as alteration).

“Obliterated Serial Number Program” designed to “assist in the positive identification of firearms when serial numbers have been partially obliterated or have been partially recovered.”²⁵ According to forensic scientists, “[r]estoration of obliterated serial numbers can many times be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers.”²⁶

C. Narrow the Reach of USSG §2K2.1 (a)(1) -(4)

We also believe that the Commission should review USSG §§2K2.1(a)(1)-(4) and the manner in which those provisions increase sentences for defendants with prior convictions for a crime of violence or a controlled substance offense. The double-counting of convictions to increase the offense level and criminal history score is unfair and promotes disrespect for the law. Defendants simply do not understand how a prior conviction, for which they have been punished, can justify a substantially increased sentence for a new offense.

These guidelines also suffer from many of the same overbreadth problems as the career offender guideline and we offer here some of the same amendments to §2K2.1 that we have offered in the career offender context: define “crime of violence” to bring it in line with Supreme Court precedent, limit the definition of “controlled substance offense,” and define “prior felony conviction” consistent with 21 U.S.C. § 802(13).²⁷ For this amendment cycle, the Commission might start with the modest goal of revising the definition of “controlled substance offense” to make a meaningful distinction between more and less serious drug offenders, reflect the data on recidivism risk, and alleviate the stark and unjustifiable racial disparity caused by the current definition.²⁸

The rate of below guideline sentences in §2K2.1 cases raises concerns worthy of the Commission’s attention. The Commission has long recognized that “departures serve as an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”²⁹ As envisioned by the original Commission,

²⁵ See ATF Fact Sheet, available at <http://www.atf.gov/publications/factsheets/factsheet-national-tracing-center.html>

²⁶ Iowa Division of Criminal Investigation Crimalistics Laboratory Firearm & Toolmark Section Restoration of Obliterated Serial Numbers, available at <http://www.dps.state.ia.us/DCI/lab/firearms/restoration.shtml>.

²⁷ See generally Letter of Jon Sands, Chair, Federal Defender Guideline Committee, to Honorable Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm’n 11 (Aug. 24, 2009).

²⁸ See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-134 (Nov. 2004) (hereinafter *Fifteen Year Review*).

²⁹ See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003) (hereinafter *Downward Departures*); see USSG ch. 1, intro, pt. 4(b); see also 28 U.S.C. §

“such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines.”³⁰ The Commission has explained, “a high or increasing rate of departures for a particular offense . . . might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.”³¹ For example, in 1991 the Commission found that the rate of upward departure for those sentenced under §2K2.1 was 8.4%, which led to a steep increase in guideline ranges.

Here, the rate of below guideline sentences in §2K2.1 cases suggests that the guidelines are too high. The Commission’s 2009 4th quarter data shows that a below guideline sentence was imposed in 30.5% of §2K2.1 cases, with a judicial below guideline rate of 17.6% and government-sponsored rate of 12.9%.³² These data reflect sufficient dissatisfaction with the firearms guidelines for the Commission to study how the guidelines can be restructured to better reflect the purposes of sentencing.

D. Guideline Ranges Should Not Be Increased for Straw Purchasers

We are concerned with the suggestion DOJ sets forth in its June letter that the Commission review §2K2.1 with an eye toward increasing sentences for straw purchasers prosecuted under §922(a) (6) and adding enhancements where the offense involved trafficking of semi-automatic weapons or the defendant knew or should have known that a firearm was either being transferred to a prohibited person or to a foreign country.

We take issue with DOJ’s suggestion that sentences for those convicted under 18 U.S.C. § 922(a) (6) are too low. Defendants convicted under 18 U.S.C. § 922(a)(6) are overwhelmingly first time, non-violent offenders for whom prison should be “generally” inappropriate. 28 U.S.C. § 994(j). Courts already are imposing prison terms on these first-time offenders who upon release will be convicted felons facing a myriad of collateral consequences of conviction that will haunt them for the rest of their lives.³³ Just earlier this year, judges in the Southern

994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

³⁰ *Downward Departures*, at 5.

³¹ *Id.* at 5.

³² Source: USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, tbl. 4

³³ See, e.g., U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences Upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders’ ability to vote; serve on federal jury; hold federal office, federal employment or certain federally-issued licenses; serve in armed forces; participate in federal contracts or programs; receive federal benefits; become a U.S. citizen or remain in the U.S.; and live free from registration or community notification requirements), available at http://www.justice.gov/pardon/collateral_consequences.pdf. ; Legal Action Center, *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records* (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf; ABA Standards on Collateral Sanctions, *Internal Exile:*

District of Texas imposed prison terms ranging from six to fifteen months on straw purchasers. Three of them were 20 years old.³⁴ Lengthier terms of imprisonment will do nothing but increase their risk of recidivism and expose them to more serious offenders, prison gangs, and prison violence.³⁵

An increase in the guideline ranges for straw purchasers also would have a devastating impact on our clients who buy firearms for their spouse, partner or other family members. These clients typically receive no compensation for their acts and are often motivated by an intimate or familial relationship or fear. They too often go to prison under the current guideline.³⁶ No legitimate purpose of sentencing is served by sending them away for longer periods of time.

DOJ contends that the sentences for §922(a)(6) should be greater because the statutory maximum term of imprisonment is ten years under 18 U.S.C. § 924(a) (2), while the §2K2.1 range for criminal history I offenders is 10-16 months. The Department's reasoning does not support an increase in the guideline range. The ten-year statutory maximum sentence set in 18 U.S.C. § 924(a)(2) covers a wide range of offenses under the firearms statute, including possession of a firearm by a prohibited person, shipment of stolen firearms, trafficking in stolen firearms, and possession of a machinegun. Of those, a straw purchaser who makes a false statement during the purchase of a firearm, is the least culpable and should receive a sentence well below the statutory maximum penalty. Additionally, statutory maximum penalties are a poor proxy for the seriousness of an offense because they are driven by politics rather than empirical data or principles of proportionality.

Collateral Consequences of Conviction in Federal Laws and Regulations (January 2009), available at <http://www.abanet.org/cecs/internalexile.pdf>.

³⁴ See US Attorney for Southern District of Texas, Press Release: *Three 20-Year-Olds Sentenced to Prison for Lying to Buy Firearms* (June 22, 2010); US Attorney for Southern District of Texas, Press Release: *San Juan Man Sentenced for Lying and Buying 18 Firearms* (March 30, 2010).

³⁵ See generally Christopher T. Lowenkamp and Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections - 2004, at 3 (2004), available at <http://nicic.gov/pubs/2004/period266.pdf>; Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (2008) (cataloging criminogenic effects of incarceration).

³⁶ See, e.g., *Dixon v. United States*, 548 U.S. 1,4 (2006) (defendant purchased firearms for her boyfriend after he “threatened to kill her or hurt her daughters if she did not buy the guns for him”); see also *United States v. Flory*, 2007 WL 1849452*1 (7th Cir. 2007) (year and a day sentence for defendant who purchased 3 firearms for her boyfriend); *United States v. Pierre*, 71 Fed. Appx. 187, 190 (4th Cir. 2003) (wife sentenced to 15 months imprisonment for purchasing two firearms for her husband). These more recent sentences are significantly greater than sentences imposed over a decade ago. See *United States v. Howell*, 37 F.3d 1197, 1201 (7th Cir. 1994) (wife who purchased four handguns for husband sentenced to four years probation with six months home detention); *United States v. Outlaw*, 1991 WL 157271, *1 (4th Cir. Aug. 19, 1991) (girlfriend sentenced to three months community confinement and two years supervised release for purchasing two firearms for her boyfriend).

What DOJ seems to be complaining about here is not that the guideline range of 10-16 months is too short, but that the Commission's 2010 zone expansion now may make more defendants convicted under § 922(a)(6) eligible for split sentences that include community confinement or home detention. The Commission should not entertain a proposal that circumvents the Commission's decision to expand alternatives to detention for non-violent offenders by turning around and raising offense levels.³⁷

As to DOJ's concern about certain factors that may "aggravate" a straw purchase case, current law provides prosecutors with ample tools to prosecute and punish offenders involved with transferring semi-automatic weapons or other firearms to prohibited persons or foreign countries:

- §2K2.1 has a higher base offense level (14 rather than 12) for a defendant who has falsified a record to conceal the sale to a prohibited person, *i.e.*, they knew or had reasonable cause to believe that such person was a prohibited person. USSG §2K1.2, n. 9.
- §2K2.1(c) contains a cross-reference that may be applied to violations of the export laws, which carry greater penalties under §2M5.2.
- § 2K2.1 n. 14(D) contains an encouraged upward departure where the defendant possessed the firearm to facilitate another firearms offense, *e.g.*, attempting to export a firearm without a license under 22 U.S.C. § 2778. *See* §2K2.1n. 14(D).
- §2K1.2(b)(5) contains a hefty four- level increase if the defendant engaged in trafficking of firearms – an increase that the Commission put in place just four years ago at DOJ's request.

In addition to the firearms statutes in title 18, which are generally referenced to §2K2.1, the government has other tools to prosecute those involved in firearms trafficking across the border. In the past, it has used 22 U.S.C. § 2278 to prosecute defendants who export or attempt to export firearms and munitions across the Mexican border without a license. Section 2278, which is referred to §2M5.2, carries substantial penalties even for first-time offenders.³⁸ Straw purchasers

³⁷ No evidence supports the need for increased penalties for any firearm offenses, much less straw purchasers. Seventy percent of judges surveyed believe the firearms guidelines are generally appropriate. Twenty-three-percent thought they were too high. Only a small percentage thought they were too low. *Judges Survey*, Question 8. One-third of judges surveyed believed that in firearm cases split sentences rather than straight terms of imprisonment should be more available not less, as the government would have it. *Id.* at Question 11.

³⁸ *See, e.g., United States v. Castro-Trevino*, 464 F.3d 536, 540 (5th Cir. 2006) (criminal history category I defendant sentenced to 46 months imprisonment for attempting to export ammunition across border); *United States v. Galvan-Revuelta*, 958 F.2d 66, 69 (5th Cir. 1992) (defendant responsible for attempting to export ammunition to Mexico sentenced to 24 months – a departure from a guideline range of 33-41 months).

who aid and abet the export of a firearm without a license may be prosecuted under § 2278 and sentenced under §2M5.2, as well.

Just four years ago, Congress passed a new smuggling statute, 18 U.S.C. § 554, which law enforcement authorities have described as “particularly useful in targeting weapons smuggling.”³⁹ The statute is broad enough to prosecute those who facilitate the transportation, concealment or sale of items, including a firearm, knowing it would be transferred to a foreign country contrary to law. Thus, defendants who purchase a firearm knowing it would be transferred to a foreign country without an export license may be prosecuted under this statute and sentenced under §2M5.2, which carries a base offense level of 26 when the offense involves semi-automatic firearms.⁴⁰

Not only does the government have ample tools to prosecute and severely punish straw purchasers and others involved in trafficking firearms across the border, we question the usefulness of harsh sentences for these first-time, non-violent defendants. Indeed, although Congress and other government agencies have conducted many hearings and researched the issues surrounding gun trafficking across the border, government representatives have not focused on the need for higher sentences for straw purchasers. The reason is obvious. Harsher sentences for poor, first-time offenders who accept money to purchase firearms will not stop the flow of firearms into Mexico. Just as mandatory minimum sentences for low-level street sellers of drugs do nothing to stop dealing, there will always be a fresh supply of young men or women who will agree to buy a firearm for quick cash or because of an intimate or familial relationship.

Even if the government could successfully shut down straw purchases, the efficacy of that strategy in stopping the flow of firearms to Mexico is doubtful. The drug cartels will simply turn elsewhere for their supply, including the secondary market or other countries.⁴¹ At gun

³⁹ *Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 111th Congress 44* (May 6, 2009) (statement of Janice Ayala, Deputy Assistant Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U. S. Dep’t of Homeland Security,).

⁴⁰ The base offense level is 14 when the offense involves 10 or less non-fully automatic small arms.

In 2008, 46 defendants were sentenced under §2M5.2. Forty-four of them were criminal history category I offenders. Thirty-eight received prison only sentences, 4 received split sentences, and only 2 received probation only sentences. BJS’ Federal Justice Statistics Program website (<http://fjsrc.urban.org>) (Data Source: U.S. Sentencing Commission - USSC Offender Dataset (Standardized Research data file), FY 2008 (as standardized by the FJSRC). In 2009, the average sentence for defendants sentenced under 2M5.2 was 32.9 months, while the median was 21 months. An overwhelming percentage of these defendants, 69.8 were Hispanic. Source: USSC, 2009 Datafile, FY 2009.

⁴¹ James C. McKinley, *U.S. Stymied as Guns Flow to Mexican Cartels*, New York Times, April 15, 2009. See also Anthony Braga, *Disrupting Illegal Firearms Markets in Boston: The Effects of Operation Ceasefire on the Supply of New Handguns to Criminals*, 4 Criminology & Public Policy 717 (2005)

shows in Texas, and Arizona, “[i]ndividuals may sell guns at gun shows or even through classified advertisements without running a criminal background check or even recording the buyer’s name.”⁴² Given that market, prosecuting straw purchasers and sending them to prison for longer periods of time is an ill-advised use of scarce resources, including prison bed space.

To be clear, we understand that weapons trafficking in Mexico is a law enforcement problem, but for the Department to suggest that it can combat the problem by imposing longer periods of imprisonment on non-violent first-offenders is seriously misguided and without one iota of evidentiary support.⁴³

Proposed Priority #4: Patient Protection and Affordable Care Act, Pub. L. 111-148

Section 10606(a) of the Patient Protection and Affordable Care Act, Pub. L. 111-148, directs the Sentencing Commission to amend the guidelines to provide 2-level, 3-level, and 4-level increases in offense levels for any defendant convicted of a Federal health care offense relating to a Government health care program, depending on the amount of the loss. It also directs the Sentencing Commission to provide that “the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss.” Finally, in carrying out this section, the law generally directs the Sentencing Commission to ensure that the guidelines and policy statements are reasonably consistent with other guidelines and policy statements, account for appropriate aggravating or mitigating circumstances that might justify exceptions, reflect the seriousness of the harm, provide increased penalties in appropriate circumstances, and adequately meet the purposes of sentencing.

Here, we set forth our preliminary concerns regarding this directive. Our primary concern is that the loss amount in §2B1.1 (as amended by this directive) will not accurately reflect the culpability of “low-level” defendants who participate in a health care fraud scheme, especially when that scheme involves numerous perpetrators and a large monetary loss. Without appropriate guideline adjustments for these offenders, the resulting guideline sentence will be unjust and unfair, will violate 18 U.S.C. § 3553(a), and will decrease confidence not only in the criminal justice system, but also in the guidelines themselves. If the Commission were to promulgate guidelines that treat all defendants the same, based on the aggregate dollar amount of fraudulent bills, without providing for mitigating circumstances, it will create “unwarranted similarities” among dissimilarly situated individuals. *See Gall v. United States*, 552 U.S. 38, 55-56 (2008).

(noting how a focus on supply-side enforcement strategies may shift market to older guns and away from retail outlets).

⁴² *U.S. Stymied as Guns Flow to Mexican Cartels, supra.*

⁴³ FY 2009 data do not support the notion that the guideline for straw purchasers is too low. Of the 117 criminal history category I defendants convicted under § 922(a)(6) in 2009, only one received an above range sentence. Forty-one percent received a sentence within the range, 29.9% received a government sponsored below guideline sentence, and 26.2% received other below guideline sentences. Source: USSC, *2009 Data File*, FY 2009.

Health care fraud involves a variety of defendants, from major corporations and institutions, to doctors and nurses, to receptionists and secretaries, to street gang members, to “straw” or nominee owners and middlemen, to recruiters, and finally to purported beneficiaries who are often recruited at soup kitchens, senior centers and even skid row.⁴⁴ Many of the “lower-level” defendants have little or no knowledge of the scope of the fraudulent scheme and receive little personal gain for their role in the offense. While the defendants who conceive and implement the scheme may receive millions of dollars in fraudulent payments, these smaller participants may realize only small sums of money for their efforts. A few examples from defender caseloads demonstrate our point and how the current guidelines do not adequately account for mitigating circumstances in cases like these.

Mercedes Yanes, was the nominee owner of a durable medical equipment (DME) company controlled by a third party for whom Ms. Yanes worked as a chauffeur and delivery driver.⁴⁵ Ms. Yanes, who speaks only Spanish, agreed to act as a nominee for the company so that she could keep her job. The only remuneration she received was her continued employment as a driver. The actual owner of the DME company billed Medicare approximately \$1,647,759.97. The actual loss – what Medicare actually paid out -- was \$327,967.30. One might expect for the mitigating role adjustment at §3B1.2 to lessen Ms. Yanes’s sentence, particularly as compared to the actual owner of the company. The adjustment, however, was disputed at sentencing.

Jose Montes is another nominee owner of a medical supply company that billed Medicare \$4 million.⁴⁶ Mr. Montes received only \$10,000 for agreeing to be the nominee owner. The intended loss amount was calculated at \$3.2 million, and the actual amount paid by Medicare was \$2 million. The court denied Mr. Montes a minor role adjustment.

Our proposal that the Commission delete the word “substantially” from the commentary to §3B1.2 (*see* discussion *infra* on Cocaine Sentencing Policy), would help clarify that persons in the position of Ms. Yanes and Mr. Montes should receive a role adjustment. The Commission should also add an application note, which clarifies that nominee owners of fraudulent companies who receive little remuneration from the fraud are eligible for a minor or minimal role adjustment.

Existing confusion about the appropriate scope of “relevant conduct” adds to our concern with changes to the health care fraud guidelines. Health care fraud offenses often involve conspiracies with numerous agreements. One co-conspirator may know nothing about other co-conspirator agreements or the scope of the overall operations. We have commented in the past on the need to clarify the application of §1B1.3(a)(1)(B) governing cases of jointly undertaken

⁴⁴ *See Enforcement of the Criminal Laws Against Medicare and Medicaid Fraud: Hearing Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security*, 111th Cong. (March 4, 2010) (statement of Timothy Menke, Deputy Inspector General for Investigations, Office of the Inspector General, Department of Health & Human Services).

⁴⁵ *United States v. Mercedes Yanes*, No. 09-20316 (S.D. Fla. 2009).

⁴⁶ *United States v. Jose Montes*, No. 09-20330 (S.D. Fla. 2009).

activity so that it is clear that relevant conduct covers only reasonably foreseeable activity within the scope of the defendant's agreement.⁴⁷ With the directive for amount-driven changes to the health care fraud guidelines, the need to clarify and limit the scope of "relevant conduct" is heightened.

Another case example demonstrates this point. Ricardo Aguera, like several of his family members, operated a company that provided durable medical equipment to Medicare beneficiaries.⁴⁸ His company obtained prescriptions for aerosol medications for these beneficiaries, many of whom were using respiratory devices. A couple that operated two pharmacies, which were able to submit Medicare claims for aerosol prescriptions, paid kickbacks to Mr. Aguera in exchange for him referring the prescriptions to them. Fifty other DME owners were involved in a far-reaching scheme set up the couple. Although Mr. Aguera's company billed \$1.7 million in claims, the court held him responsible for the \$17 million in claims generated by all fifty businesses. The government argued that Mr. Aguera saw the names of the other business in a logbook he signed when he received his money from the masterminds of the scheme – the couple who owned the pharmacy. Based on that evidence, the government claimed, and the court found, that the activities of the other businesses were reasonably foreseeable to Mr. Aguera. The court imposed a sentence of 121 months. In an all too common cruel twist, the masterminds of the scheme received lighter sentences than Mr. Aguera because of the cooperation they provided against the fifty owners they directed.

Health care fraudulent schemes also vary in ways that make it difficult to accurately determine the loss amount. In some cases, the subjects engage in one hundred percent fraud. In more traditional health care fraud cases, however, the subjects of the investigation often provide some level of actual services. The Commission should ensure that only those amounts that the government can prove as fraudulently submitted be included as a loss. In other cases, an unsophisticated defendant may unsuccessfully submit a single claim multiple times, only to have it repeatedly denied. The sum total of the multiple submissions of this single claim reflects neither the intended loss, nor the culpability of this defendant. Application notes should provide examples and directions that ensure that loss amounts are not inflated and properly reflect a defendant's level of culpability. In this respect we recommend that the Commission expressly state that the amount of money received by an individual defendant as a result of his participation in the fraudulent scheme is indicative of the role played (*i.e.*, less money received, less culpable as a general rule).

Finally, the Commission should clarify that the congressionally required language establishing that fraudulent bills submitted to the Government health care program constitute *prima facie* evidence of the amount of intended loss does not shift the burden of proof in any way from the government and that such evidence is not conclusive or irrefutable. The government always retains the burden of proof regarding sentencing enhancements. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 330 (1999) ("The Government retains the burden of proving facts relevant to the crimes at the sentencing phase and cannot enlist the defendant in the process at the expense of the self-incrimination privilege.").

⁴⁷ *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable William K. Sessions, Chair, USSC (July 1, 2010).

⁴⁸ *United States v. Richard Aguera*, No. 06-20609 (S.D. Fla.2007).

Proposed Priority #5: Cocaine Sentencing Policy

The Commission has proposed as a priority continuation of its work on cocaine sentencing policy, including possible amendment of the drug quantity table. After the Commission published its notice of proposed priorities, Congress passed the Fair Sentencing Act of 2010 (“FSA”), which, among other things, changed the crack-powder ratio to 18:1 and directed the Commission to promulgate emergency amendments. Here, we set forth our preliminary concerns with implementation of FSA, encourage the Commission to drop the base offense levels for all drug types (just as it did with crack cocaine), and provide suggestions for amending the guidelines to ensure that low-level offenders involved in drug trafficking receive the mitigating role adjustments they deserve.

A. Implement the Fair Sentencing Act of 2010 By Keeping the Base Offense Levels for the Mandatory Minimum Triggering Quantities of Crack at 24 and 30; Reducing by Two Base Offense Levels the Quantity Thresholds for other Drugs; and Narrowly Construing Those Directives That Require Increases to Offense Levels

Congress’s decision in FSA to reduce the crack-powder ratio from 100:1 to 18:1, along with FSA’s emphasis on certain aggravating and mitigating factors, provides the Commission with a unique opportunity to continue the work it started when it reduced the guidelines for crack by two- levels in 2007 and set in place a mitigating role cap in 2002. We offer some initial thoughts on how the Commission might amend the guidelines to accommodate the new legislation and look forward to working with the Commission as it grapples with the myriad issues FSA raises.

Implementing the Ratio. In 2007, the Commission modified the drug quantity thresholds for crack cocaine so that the base offenses levels (24 and 30) corresponded to guideline ranges (51-63 and 97-121 months) that *included* the statutory mandatory minimum penalties (60 and 120 months). The guidelines had previously set the drug quantity thresholds so that the base offense levels corresponded to ranges that were *above* the statutory mandatory minimum. *See* USSG App. C, Amend. 706 (Nov. 1, 2007). For the seven other drug types subject to mandatory minimums, the drug quantity thresholds triggering mandatory minimums remained at base offense levels (26 and 32) corresponding to ranges above the statutory minimum.

In implementing FSA, the Commission should, at a minimum, modify the drug quantity thresholds for all eight drugs subject to mandatory minimum penalties⁴⁹ so that the base offense levels are at 24 and 30, while preserving the 18:1 crack-to-powder ratio in FSA. For example, at base offense levels 24 and 30, the new drug quantity table would look like this for cocaine powder and cocaine base.

⁴⁹21 U.S.C. § 841(b)(1) (setting forth mandatory minimum penalties for heroin, cocaine, cocaine base, PCP, LSD, fentanyl and its analogue, marijuana, and methamphetamine).

	Level 24
At least 500 G but less than 2 KG of Cocaine	
At least 28 G but less than 112 G of Cocaine Base	
	Level 30
At least 5 KG but less than 15 KG of Cocaine	
At least 280 G but less than 840 G of Cocaine Base	

The Commission may amend the guidelines in this manner without running afoul of the need for the guidelines to be consistent with other provisions of federal law. As the Commission acknowledged in its reason for amendments to the crack threshold and its report on child pornography, the way the drug guidelines currently account for mandatory minimum sentences is not required.⁵⁰ Instead, the guidelines may account for mandatory minimum statutes in a number of ways.⁵¹ The Commission may set the base offense level to include but not exceed the mandatory minimum, as it has done with crack offenses. It may set the base offense level below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum. If the guideline range still fails to reach the mandatory minimum, §5G1.1 (b) accommodates the mandatory minimum by trumping the guideline range.⁵²

⁵⁰ USSG App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* at 44-47 (October 2009); *see also Kimbrough v. United States*, 552 U.S. 85, 102- 105 (2007); *cf. Neal v. United States*, 516 U.S. 284 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute’s “mixture or substance” methodology); *see also* Statement of Jacqueline A. Johnson, Before the U.S. Sentencing Comm’n, Chicago, Illinois, at 17 (Sept. 10, 2009).

⁵¹ More than half of the judges surveyed (58%) believe that the sentencing guidelines should be “delinked” from the statutory mandatory minimum sentences. *Judges Survey*, Question 3.

⁵² In its June 28, 2010 letter to the Commission, DOJ stated the view that the guidelines should be tied to applicable mandatory minimum statutes and that the “Commission should generally choose a base offense level so that after accounting for regularly occurring aggravating and mitigating factors elsewhere in the guidelines manual, the low end of the guideline range for the final offense level is not generally below the mandatory minimum sentence.” Letter from Jonathan Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge Sessions, Chair, U.S. Sentencing Commission 6 (June 28, 2010). We have grave concerns about DOJ’s proposal. First, we do not believe there is a principled way to link the guidelines to mandatory minimums because the concept of empirically derived guidelines is fundamentally incompatible with mandatory minimum sentencing statutes. Second, because many defendants receive acceptance of responsibility reductions, DOJ’s proposal may well raise the base offense levels for the mandatory minimum triggering quantities. Third, DOJ’s proposal depends very much on the happenstance of which factors, be they mitigating or aggravating, “regularly occur.” Because the use of certain factors may change over time, *e.g.*, the use of safety valve or role adjustments, presumably the Commission would need to monitor their use and change the drug quantity thresholds accordingly.

In addition to promoting uniformity and implementing the 18:1 ratio, a two-level lowering of the quantity thresholds would further the purposes set forth in 18 U.S.C. § 3553(a)(2), 28 U.S.C. § 991(b). The drug guidelines are responsible for a sizable percentage of the prison population and contribute substantially to overcrowding without any real concomitant reduction in crime. For example, drug offenders comprise one third of the federal docket,⁵³ and half the federal prison population.⁵⁴ As put by one criminologist: “Lock up a rapist and there is one less rapist on the street. Lock up a drug dealer and you’ve created an employment opportunity for someone else.”⁵⁵

Implementing the Aggravating Role Directives. The FSA contains a number of directives for the Commission to increase or decrease the offense level based upon specific offense characteristics (SOC). We urge the Commission to construe narrowly any directive that requires the Commission to increase offense levels. Because many of the directives cover conduct already covered in the guidelines, we are especially concerned that the Commission avoid duplicative punishment for similar offense conduct.

Some of the problems with double counting are obvious, while others are not. For example, FSA directs the Commission to ensure an increase from the base offense level of at least two offense levels “if the defendant maintained an establishment for the manufacture or distribution of a controlled substances, as generally described in 21 U.S.C. § 856.” USSG §2D1.1(b)(5) already contains a two-level enhancement “[i]f the defendant is convicted under 21 USC § 856.”⁵⁶ Similarly, FSA directs the Commission to “ensure that the guidelines provide an

If the Commission wanted the mandatory minimums to apply to those who Congress had in mind – kingpins and mid-level managers – it could set the base offense level low enough that the guideline range encompassing the mandatory minimum is not reached unless the defendant receives a role enhancement under §3B1.1. For example, the base offense level for 28 grams of cocaine base, 500 grams of cocaine powder, 100 grams of heroin, *etc.* would be set at 22. A range that includes, or is higher than the sixty month mandatory minimum would be reached by application of the two to four-level aggravating role adjustments in §3B1.1.

⁵³ 2009 Sourcebook, fig.A .

⁵⁴ The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (2006), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf; The Sentencing Project, *Changing Racial Dynamics of the War on Drugs* 6 (2009) (in 2005, 95,211 federal inmates were drug offenders), available at http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

⁵⁵ Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980 – 1988*, 12 Fed. Sent. Rep. 12, 15 (1999) (quoting Alfred Blumstein).

⁵⁶ Where the specific offense characteristic set forth in the directive mirrors, or is similar to a federal statutory offense (*e.g.*, maintaining drug involved premises or obstruction of justice), we urge the Commission to require proof beyond a reasonable doubt before the court may apply the enhancement. This will ensure that a specific offense characteristic does not become a substitute for criminal prosecution. A higher standard of proof would also promote respect for the law by ensuring procedural protections. *Cf.* USSG §3A1.1(a) (applying beyond a reasonable doubt standard to finding under 3A1.1(a) (hate crime motivation)).

additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.” Such an enhancement may include conduct covered under such guidelines as §2D1.1(b)(1) (possession of dangerous weapon); 18 U.S.C. § 924(c); or §3C1.1 (Obstructing or Impeding the Administration of Justice).⁵⁷ Our main concern here is to urge the Commission to take great care in ensuring that FSA’s directives do not result in undue severity when combined with existing guideline provisions.

B. Clarify the Guideline Commentary to Encourage Mitigating Role Adjustments for Couriers and Other Low-Level Offenders

Because of the Commission’s original policy of tying the drug guidelines to mandatory minimums and focusing on quantity rather than role, the guidelines recommend substantial periods of imprisonment for low-level, non-violent defendants.⁵⁸ While the mitigating role adjustment at USSG §3B1.2 is meant to ameliorate the harsh effects of quantity-driven guidelines, the role adjustments are not having their intended effect and should be clarified so as to effectuate the Commission’s finding that “those who played a minor or minimal role” in drug trafficking should receive a lesser sentence than higher-level offenders.⁵⁹ Too few defendants receive mitigating role adjustments when their conduct is plainly less culpable than others involved.⁶⁰ Without clarification, some courts will continue to underutilize the mitigating role adjustment and contribute to unwarranted disparity.

The Commission last amended §3B1.2 in 2001. At that time, the Commission intended to make the mitigating role adjustment available to a drug courier whose base offense level was determined solely on the quantity personally handled by that defendant. To accomplish that end, the Commission adopted the approach articulated by the Eleventh Circuit in *United States v. Rodriguez De Varon*, 175 F.3d 930 (11th Cir. 1999). According to the Commission’s view of *De Varon*, a defendant is not automatically precluded from receiving a role adjustment “in a case in which the defendant is held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled.”

⁵⁷ These double-counting problems represent just the “tip of the iceberg” FSA’s directives raise numerous other double-counting issues that will have to be addressed.

⁵⁸ In 2005, the average length of imprisonment for a cocaine powder courier was 60 months. The average street-level crack dealer received 97 months imprisonment. USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 30 (May 2007) (*2007 Cocaine Report*).

⁵⁹ *2007 Cocaine Report*, at 7.

⁶⁰ *2009 Sourcebook*, Table 40 (19.7% of drug offenders received mitigating role adjustment). In the *2007 Cocaine Report*, the Commission reported that in 2005, 53.1% of powder cocaine offenders were low-level offenders (couriers, street-level dealers, renters, loaders, lookouts, users). Yet, that same year, only 20.3% of powder cocaine defendants received a mitigating role adjustment. USSC, *2005 Sourcebook of Federal Sentencing Statistics*, Table 40 (hereinafter *2005 Sourcebook*). For crack offenders, the numbers are even more dismal. While 55.4% were street-level dealers, *2007 Cocaine Report*, at 21, only 6.3% of all crack offenders received a mitigating role adjustment. *2005 Sourcebook*, Table 40.

Had the Commission stopped with that clarification, more drug couriers and other low-level participants may have received mitigating role adjustments. The Commission, however, either added or continued to include a number of provisions that diluted the intended effect of the 2001 amendment. It required that the defendant play “a part in committing the offense that makes him *substantially* less culpable than the average participant.” It retained the note stating that it intended for the minimal role adjustment to be “*used infrequently*.” And, it added a note discouraging the court from using the defendant’s statement to support the role adjustment. USSG §3B1.2, n. 3(C) (“the court, in weighing the totality of the circumstances, is not required to find based solely on the *defendant’s bare assertion*, that such a role adjustment is warranted”). USSG App. C, amend. 635. The Commission also discouraged use of the mitigating role adjustment for the very defendants it intended to include within the guideline (*i.e.*, those whose role in the offense was limited to such low-level functions as transporting or storing drugs even if the defendant was accountable only for the quantity personally transported or stored) when it stated in its reason for amendment that it did not mean to “suggest that a such a defendant can receive a reduction *based only on those facts*.” USSG App C, Amend. 635.

This unclear restrictive commentary language has contributed to a problem of hidden disparity, which arises from inconsistent application of the guideline. Because the rule lacks clarity, “[s]imilar offenders are likely to receive different sentences not because they are warranted by different facts, but because the same facts are interpreted in different ways by different decisionmakers.”⁶¹ Henry Bemporad, the Defender in the Western District of Texas, explained these problems in detail in his testimony at the Phoenix regional hearing.⁶²

In addition to the intradistrict disparity Mr. Bemporad described, regional differences exist in application of §3B1.1. For example, our colleagues report that in the Eastern District of New York and in California, couriers routinely receive role adjustments based on their account of their role in importing drugs, including large quantities, and even though no, or few, other participants are identified. Couriers in the Southern District of Florida may get the same benefit.⁶³

In contrast, district judges in the Middle District of Florida; apply the *DeVaron* decision to preclude couriers from receiving a minor role reduction even though everyone agrees they are mere mules. Those judges typically rule, based on *DeVaron*, that the large quantity of drugs transported precludes the defendant from obtaining a role reduction even when the defendant is unaware of the quantity of drugs involved. The judges also will compare the role of each crewmember, find that they are equally culpable, and refuse to apply the role reduction, even if the defendant was hired only to pretend to be a fisherman and had no role in offloading the

⁶¹ Barbara Vincent, *Informing a Discussion of Guideline Simplification*, 8 Fed. Sent’g. Rep. 36, 37 (Aug. 1995).

⁶² Statement of Henry Bemporad Before the U.S. Sentencing Comm’n, Phoenix, Arizona, at 4-7 (Jan. 21, 2010).

⁶³ See *United States v. Dorvil*, 784 F. Supp. 849 (S.D. Fla. 1991) (granting minimal role reduction to defendant involved in off-loading 227 kilograms of cocaine).

drugs. The obvious fact that these couriers are nothing but small, easily replaced, cogs in a much larger drug trafficking organization is irrelevant.⁶⁴

The disparate treatment of §3B1.1 and the need for the Commission to clarify its application is also apparent from a review of the case law. The Fifth Circuit has held that, to qualify for a *minor* role adjustment, it is not enough that a defendant was substantially less culpable than the average participant in the offense. Instead, the defendant's role must also have been "peripheral to the advancement of the illicit activity." *United States v. Armendariz*, 65 Fed. Appx. 510, 510 (5th Cir. 2003) (unpub).⁶⁵ By contrast, other circuits apply a "peripheral role" requirement for the *minimal*-role downward adjustment of §3B1.2(a). *See United States v. Teeter*, 257 F.3d 14, 30 (1st Cir. 2001) (to qualify as minimal participant, defendant must show she was, at most, a "peripheral player" in the crime); *United States v. Dumont*, 936 F.2d 292, 297 (7th Cir. 1991) (noting that defendant was not "the kind of peripheral figure for which the four-point adjustment is designated").

The Commission could fix USSG §3B1.2 in several ways:⁶⁶

- Remove from the commentary the language that the defendant must be "*substantially* less culpable than the average participant." While the commentary seeks to make clear that the adjustment is not precluded for one who transports or stores drugs, it has not had the intended effect. Indeed, the Tenth Circuit has upheld the denial of role adjustments for drug couriers because their services "were as indispensable to the completion of the criminal activity as those of the seller," going so far as to say that is "not productive" to argue that one participant in criminal activity is "more or less culpable" than another.⁶⁷

⁶⁴ The sentencing law is particularly harsh on these defendants because they are subject to mandatory minimum penalties but not eligible for relief under the safety-valve when prosecuted under 46 U.S.C. § 70503.

⁶⁵ The Ninth Circuit appears to have adopted this view. *See United States v. Ramirez*, 1994 WL 384310, *3 (9th Cir., Jul 22, 1994) (unpub.).

⁶⁶ We have heard it argued that more and better training of judges and probation officers may increase the use of the mitigating role adjustments. We believe that the case law and practice is too entrenched for training to make much of a difference. In the past, the Commission has promulgated clarifying amendments rather than rely on training to ensure that judges applied the guidelines in the manner in which they were intended. *See, e.g.*, USSG App. C, Amend. 78 (Nov. 1, 1989) (clarifying definition of conduct for which the defendant is "otherwise accountable" under USSG §1B1.3); USSG App. C, Amend. 83 (Nov. 1, 1989) (clarifying that a firearm is a type of dangerous weapon); USSG App. C, Amend. 91 (Nov. 1, 1989) (clarifying guideline commentary regarding use of force or threats); USSG App. C, Amend. 666 (Nov. 1, 2004) (adding application notes and illustrative examples to clarify meaning of "high-level decision-making or sensitive position" under USSG §2C1.1).

⁶⁷ *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992) (upholding denial of role reduction for driver of car who transported 42 pounds of marijuana); *see also United States v. Martinez*, 512 F.3d 1268, 1276 (10th Cir.) (citing *Carter* and concluding that defendant would receive a "windfall" if awarded a minor role reduction when he has "sentenced only for the amount of drugs he personally transported), *cert. denied*, 553 U.S. 1046 (2008).

- Amend the guideline commentary to make clear that paid-by-the trip couriers with limited knowledge deserve a lesser role, even if they are driving drugs across the border or performing some other “indispensable” or “integral” role in the offense.⁶⁸ Just recently, the Fifth Circuit affirmed the denial of a mitigating role adjustment for a defendant who did nothing more than pick up another person who was carrying marijuana in a backpack. The Court found that his participation was “essential, and not merely peripheral, to the advancement of the illicit activity,” and was “coextensive with the conduct for which he was held accountable.”⁶⁹
- Amend the guideline commentary to make clear that the amount of drugs involved or distance traveled has little bearing on the defendant’s role.⁷⁰
- Remove from application note 3(C) the following sentence: “As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.”

We agree as a matter of logic that a mitigating role adjustment should apply only when there is more than one participant, but judges should not be discouraged from making such a finding based upon the defendant’s uncorroborated statements. The guidelines do not discourage judges from making numerous upward adjustments based solely on a

⁶⁸ See, e.g., *United States v. Enny*, 34 Fed. Appx. 527, 529 (9th Cir. 2002) (defendant denied role adjustment because he provided “vital link” in operation); *United States v. Acevedo*, 326 Fed. Appx. 929, 932 (6th Cir. 2009) (“A defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme.”) (quoting *United States v. Salgado*, 250 F.3d 438, 458 (6th Cir. 2001)).

⁶⁹ *United States v. Zuniga*, 2010 WL 2930844, *2 (5th Cir. July 22, 2010) (unpub). The Fifth Circuit routinely upholds denials of mitigating role adjustments when the defendant’s participation was “coextensive with the conduct for which [the defendant] was held accountable.” *United States v. Delgado*, 236 Fed. Appx. 156, 156 (5th Cir. Aug. 21, 2007); see also *Martinez*, 512 F.3d at 1276. That law conflicts with the commentary in §3B1.2, which permits a role reduction even if the defendant is held “accountable only for the conduct in which the defendant was personally involved.” USSG §3B1.1, comment., n. 3(A). The Seventh Circuit, in contrast, took seriously the Commission’s 2001 amendment. See *United States v. Hill*, 563 F.3d 572, 578 (7th Cir.) (discussing 2001 amendment and how it changed circuit law so that defendant’s role not measured solely against conduct for which defendant was personally responsible), *cert. denied*, 130 S. Ct. 623 (2009).

⁷⁰ *Rodriguez De Varon*, 175 F.3d at 943 (en banc) (amount of drugs involved is material consideration and may be dispositive) (overruling panel decision holding that minor role reduction could not be denied on sole basis of quantity involved); *United States v. Bonilla-Ortiz*, 362 Fed. Appx. 63, 65 (11th Cir. 2010) (denying role reduction to crew member and finding that drug quantity is material consideration in role analysis and may be “dispositive”); *United States v. Carrillo*, 283 Fed. Appx. 307, 307 (5th Cir. 2008) (defendant properly denied role reduction where the defendant, a courier, was paid for services, traveled long distance, suspected he was transporting illegal narcotics, and transported large quantity of cocaine); *United States v. Rossi*, 309 Fed. Appx. 12, 13 (7th Cir. 2009) (defendant who transported many kilograms of methamphetamine a long distance not entitled to role reduction).

cooperating witness's bare assertions, and they should not do so for adjustments based on a defendant's statements. Courts are well equipped to determine the credibility of a defendant and are encouraged to base their finding on reliable information. This language merely chills the exercise of that discretion, signaling the Commission's skepticism about giving role adjustments based upon the defendant's statements regarding his or her role in the offense.

- Delete the last sentence in application note 4, which states: "It is intended that the downward adjustment for a minimal participant will be used infrequently." USSG §3B1.2. The Commission proposed to eliminate this language in 2001, but it chose not to over DOJ's objection that it would invite role reductions for drug couriers. *See* Letter from James K. Robinson, Assistant Attorney General to Chair, U.S. Sentencing Commission 4-5 (Jan 12, 2001). The language has had the effect of curtailing all role reductions – minimal and minor.⁷¹
- Clarify the distinction between minor and minimal role so that defendants who play a peripheral role obtain a four-level adjustment.⁷²
- Provide for a departure in the commentary to §2D1.1 or §3B1.2, which states that in some cases, the adjustment for mitigating role may not be adequate and the court may give an additional reduction.⁷³ Remove from §5K2.0(d)(3) and §5H1.7 the prohibitions on departures for role in the offense.

Proposed Priority #6 Child Pornography

The guideline governing the receipt and possession of child pornography, U.S.S.G. §2G2.2, is critically flawed and in need of immediate and substantial revision. This guideline, which is not based on reliable empirical or scientific underpinnings, produces sentences that are far too severe and fails to distinguish between offenders of differing levels of culpability. Because of these flaws, it has lost the respect of judges who now, in a majority of cases, impose a sentence lower than that called for by the guideline. This judicial rejection of the current guideline's severity finds empirical support in recent studies, which refute the notion that pornography offenders are especially likely to commit acts of molestation or sexual abuse. These studies suggest that these defendants do not present an elevated risk of either danger or

⁷¹ The "infrequently" language appears in the note discussing the adjustment for minimal role. The Fifth and Ninth Circuits, however, have applied it to all role adjustments under §3B1.2. *See United State v. Mitchell*, 31 F.3d 271, 278 (5th Cir. 1994); *United States v. Hernandez-Franco*, 189 F.3d 1151, 1160 (9th Cir. 1999) (citations omitted); *United States v. Gonzalez-Corona*, 2 Fed. Appx. 858, 858 (9th Cir. 2001) (denying role adjustment to driver of car that contained 60 pounds of marijuana); *United States v. Gomez-Valdes*, 273 Fed. Appx. 663, 665 (9th Cir. 2008).

⁷² Two-thirds of the judges surveyed agreed that the distinction between minor and minimal role should be explained more clearly. *Judges Survey*, Question 9.

⁷³ Close to one-half (46%) of judges surveyed thought that the guidelines should allow for role adjustments greater than four-levels.

recidivism. To restore the relevance and legitimacy of this guideline, the Commission must amend §2G2.2 in a manner that substantially lowers the length of sentences it produces.

A. The Child Pornography Guideline Is Seriously Flawed

The sentencing guidelines were typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices, and were intended to be revised as necessary based on empirical research and sentencing data.⁷⁴ “However the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties.”⁷⁵ Because directive-driven amendments are more often the product of passion and politics than reason, data and reflection, they do not promote rational and logically coherent guideline development. Indeed, the Commission itself has observed that such directives hinder the Commission’s ability to fulfill its characteristic role by “mak[ing] it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.”⁷⁶

For this reason, the Commission has opposed a number of these Congressional directives. On one occasion in response to a legislative proposal to alter the pornography guideline, the Chair of the Commission “wrote to the House of Representatives stating that the proposed Congressional action ‘would negate the Commission’s carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness, ‘and would instead ‘require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants.”⁷⁷ “In another instance, the Commission criticized the two-level computer enhancement (which is currently set forth at §2G2.2(b)(6) and was adopted pursuant to statutory directive) on the ground that it failed to distinguish serious commercial distributors of online pornography from more run-of-the-mill users.”⁷⁸ Unfortunately, the Commission’s objections have generally fallen on deaf ears to the great detriment of this guideline’s evolution. Indeed, after carefully reviewing the history of §2G2.2, the Second Circuit cautioned that sentencing courts must bear “in mind that they are

⁷⁴ *Rita v. United States*, 551 U.S. 338, 349-50 (2007) (citing USSG §1A1.1, ¶ 3); 28 U.S.C. § 991(b)(1)(C), (b)(2); 28 U.S.C. § 994(o)).

⁷⁵ *United States v. Dorvee*, ___ F. 3d ___, 2010 WL 3023799, *9 (2d Cir. Aug. 4, 2010) (citing USSC, *The History of the Child Pornography Guidelines* (Oct. 2009)).

⁷⁶ *Fifteen Year Review*, at 73.

⁷⁷ 137 Cong. Rec. H6736-02 (Sept. 1991); *Dorvee*, 2010 WL 3023799, *9 (citing Stabenow, S., *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, Jan. 1, 2009, at 4-9.

⁷⁸ *Dorvee*, 2010 WL 3023799, *9 (citing USSC, *Report to Congress: Sex Offenses Against Children Findings and Recommendations Regarding Federal Penalties 25-30* (June 1996)).

dealing with an eccentric Guideline of highly unusual provenance that, unless carefully applied, can easily generate unreasonable results.”⁷⁹

B. The Child Pornography Guideline Produces Sentences That Are Far Too Severe

The Second Circuit’s warning regarding the inequitable outcomes produced by §2G2.2 is borne out by the data. On average, sentences for child pornography are some of the highest to be found in the federal system. For 2009, the average term of imprisonment for a child pornography offense was 117.8 months. The mean median term was 78 months.⁸⁰ This was higher than the average and median sentences for sexual abuse (92.6 average, 57 median), robbery (80, 60), arson (58.2, 60), drug trafficking (77.9, 60), assault (37.2, 24) and manslaughter (66.6, 42).⁸¹ The only offense categories with higher average and median sentences were murder and kidnapping.⁸² If offense categories involving less than 100 cases are excluded, no category of offenses receives higher sentences than child pornography.

As a number of courts have noted, §2G2.2 tends to generate sentences at or near the statutory maximum in even the run-of-the-mill case.⁸³ Part of the reason for this is that a number of the guideline’s enhancement provisions apply in nearly every case and thus fail to distinguish between offenders with differing levels of culpability. The recent case of *United States v. Donaghy*⁸⁴ provides a good example of this phenomenon:

Defendant received four specific guideline enhancements in this case: 2 levels for possession of material involving children under age twelve, an enhancement applicable in 94.8% of sentences under §2G2.2 in fiscal year 2009; 4 levels for possession of material involving sadistic or violent conduct, applicable in 73.4% of cases in 2009; 2 levels for use of a computer, applicable 97.2% of the time; and for number of images, applicable in some form 96.6% of the time, with 63.1 % receiving a full 5 level increase. See *Dorvee*, 604 F.3d at 96; *United States*

⁷⁹ *Dorvee*, 2010 WL 3023799, *12.

⁸⁰ 2009 *Sourcebook*, Table 13 (note these figures include sentences for all child pornography offenders not only those sentenced under §2G2.2).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1041-43 (E.D. Wis. 2009); *United States v. Grober*, 595 F.Supp.2d 382, 397 (D. N.J. 2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F.Supp.2d 997, 1004 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 1298 (D. Colo. 2008); *United States v. Doktor*, 2008 WL 5334121*1 (M. D. Fla. 2008); *United States v. Ontiveros*, 2008 WL 2937539 *8 (E.D. Wis. 2008); *United States v. Hanson*, 561 F.Supp.2d 1004, 1008-09 (E. D. Wis. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); *United States v. Taylor*, 2008 WL 2332314 *8 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 *3 (D. Kan. April 21, 2008); *United States v. Baird*, 580 F. Supp.2d 889, 894 (D. Neb. 2008).

⁸⁴ 2010 WL 2605375, *3 (E.D.Wis. June 24, 2010).

Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2009* 36-37. As the Second Circuit recently explained, these enhancements produce a sentence approaching the statutory maximum, based solely on characteristics that are all but inherent to the crime of conviction, an approach fundamentally inconsistent with § 3553(a). *Dorvee*, 604 F.3d at 96.

Part of the task of sentencing is to discriminate between offenders and to punish aggravated offenders more severely than their less culpable counterparts. A guideline like §2G2.2 which indiscriminately pushes all offenders toward the statutory maximum is thus, in some fundamental sense, broken.

One of the cruel ironies of the Guidelines § 2G2.2 is that it punishes those who possess images of child sex abuse more severely than those who actually commit child sex abuse. Again, the Second Circuit's decision in *Dorvee* is instructive:

The irrationality in §2G2.2 is easily illustrated by two examples. Had *Dorvee* actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower. An adult who intentionally seeks out and contacts a twelve year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child, would qualify for a total offense level of 34, resulting in a Guidelines range of 151 to 188 months in prison for an offender with a criminal history category of I. *Dorvee*, who never had any contact with an actual minor, was sentenced by the district court to 233 months of incarceration.⁸⁵

This irony is compounded by the fact that one of the justifications for high child pornography sentences is the belief that these offenders present a high risk to commit contact sex offenses. Yet, as shown below, this intuition, while often stated, is not supported by the evidence.

C. The Most Recent Data Suggests That Child Pornography Offenders Do Not Possess A Serious Elevated Risk of Danger or Recidivism

Supporters of the notion that child pornography possessors represent a uniquely dangerous and incorrigible cohort of offenders have often cited⁸⁶ the work of Dr. Andres Hernandez who, in two research papers, asserted that a high percentage of child pornography offenders in the Sex Offense Treatment Program at FCI-Butner admitted having committed contact sex offenses.⁸⁷ Recently, however, Dr. Hernandez has stated that his work has been

⁸⁵ *Dorvee*, 2010 WL 3023799, *10.

⁸⁶ See Richard Wollert, Jacqueline Waggoner, & Jason Smith., *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate* will appear in the forthcoming book *The Sex Offender: Volume 7*, at 21 (collecting citations) (attached as appendix) (© Civic Research Institute).

⁸⁷ See Andres Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders* (poster session presented at the 19th Annual Research and Treatment Conference of the Association for the Sexual Abusers, San Diego, CA.); Michael Bourke and Andres Hernandez, *The 'Butner Study' Redux: A Report*

misinterpreted: “Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel that the argument that the majority of CP offenders **are** indeed contact sex offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence.”⁸⁸ Dr. Hernandez went on to state: “While I empathize with the emotional issues and moral dilemmas experienced by those who investigate and prosecute CP crimes, I believe we cannot prosecute or incarcerate our way out of this problem. The answer to complex problems requires complex and rational solutions.”⁸⁹

Dr. Hernandez’s cautions about the misuse of his work are well taken since other researchers have raised serious questions about the validity of his Butner studies.⁹⁰ A paper written by Dr. Richard Wollert⁹¹ and several colleagues found that, among other things, the Butner studies used an idiosyncratic definition of sex offense, created incentives for study participants to embellish their criminal histories, used a flawed variable to assess the risk of child molestation, and failed to properly collect recidivism data. This paper concluded that “the best explanation of Dr. Hernandez’s results about prior contact offenses by CPOs [child pornography offenders] is therefore they were artifacts of inadequate research design.”⁹² This conclusion was echoed by the judge in *United States v. Michael P. Johnson* who found “no error in (the) conclusion that the Butner Study... ‘doesn’t meet scientific standards for research, and is based upon, frankly, an incoherent design for a study.’”⁹³

In their study, Wollert, *et al*, reviewed the treatment and offense histories of 72 offenders who participated in a federally funded outpatient treatment program after they were charged with or convicted of possession, distribution or production of child pornography. The offenders were under supervision for an average of four years. During the four-year period of the study, only two offenders were taken into custody for possessing child pornography and another was

of the Incidence of Hands-on Child Victimization by Child Pornography Offenders, 24 J.Fam.Viol. 183-191 (2009).

⁸⁸ Andres Hernandez, *Position Paper: Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment 4* (2009) (emphasis in original) (presented at the Global Symposium: Examining The Relationship Between Online and Offline Offenses and Preventing The Sexual Exploitation Of Children,(UNC-Chapel Hill 4/5-7/09)), available at http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

⁸⁹ *Id.* at 5.

⁹⁰ Richard Wollert, Jacqueline Waggoner, & Jason Smith, *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*, *supra*.

⁹¹ Dr. Wollert is a noted clinical psychologist and expert in the treatment and evaluation of sex offenders.

⁹² *Id.* at 23.

⁹³ No. 4:07-cr-00127 (S.D. Iowa, December 3, 2008), at 18.

apprehended for the commission of a non-contact sex offense. None were arrested on charges of child molestation.⁹⁴ The authors of this study concluded that

This is the first report that, to our knowledge, has been compiled on the treatment performance and offense patterns of individuals referred to federally-funded outpatient treatment programs after being charged with or convicted of a child pornography offense. Whereas research by the U.S. Department of Justice indicates that over 3% of child molesters released to the community are rearrested for another contact sex crime against a child during a 3-year risk period, none of the CPOs in the present study were rearrested for this type of crime during a 4.0 year survival period that censored the data of offenders who died or were taken into custody for other offenses. Since survival analysis generates larger recidivism estimates than risk period analysis, *this finding indicates that CPOs differ from child molesters.*⁹⁵

The authors further noted that “it has been our experience that the great majority of offenders in this group *generally do quite well in treatment, supervision, and post-supervision*, and are able to conform their behavior to society’s expectations. Their responsivity to outpatient treatment, and thus the value of treatment, is reflected in the very low rate of contact sex offenses (0%) that were recorded in the study at hand.... Finally, having interacted on at least a weekly basis with most of our clients for years, our impression is *that very few – perhaps somewhere between 10 to 15 percent – meet the diagnostic criteria for Pedophilia.*”⁹⁶

These conclusions, while striking, are far from unique. While more research needs to be done, there is strong empirical support for the position that child pornography offenders without prior contact offenses have a very low risk of recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision.⁹⁷ Thus, to the extent that

⁹⁴ Richard Wollert, Jacqueline Waggoner, & Jason Smith, *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*, *supra*, at 25-26.

⁹⁵ *Id.* (citations omitted) (emphasis supplied).

⁹⁶ *Id.* (citations omitted) (emphasis supplied).

⁹⁷ See, e.g., Jerome Endrass, et. al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC Psychiatry 43 (July 14, 2009) (study of 231 suspected child pornography users found that “only 1% were known to have committed a past hands-on sex offense, and only 1% were charged with a subsequent hands-on sex offense in the 6 year follow-up. The consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample - at least not in those subjects without prior convictions for hands-on sex offenses”); L. Webb, et.al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters* (Nov. 16, 2007) (Study comparing internet and contact sex offenders found that “Internet offenders had only three formal failures: one was a general offense and two were new internet sex offenses. Otherwise, internet offenders appear to be extremely compliant with community treatment and supervision sessions. Internet offenders (14%) did engage in some sexually risky behavior, which mainly related to increased usage of adult pornography or gambling on the internet rather than specific child pornography use or ‘approach’ behaviors.”) (published online on behalf of the Association for the Treatment of Sexual Abusers), available at <http://sax.sagepub.com/cgi/content/abstract/19/4/449>.

the harsh sentences mandated for child pornography offenders are premised on the notion that these offenders are likely to be or to become contact sex offenders, that premise is simply not supported by the best available data.

D. The Current Guideline Has Lost the Support of Sentencing Judges

Because of the serious problems outlined above, sentencing judges increasingly ignore §2G2.2, recognizing that the sentences it produces are unjustifiably severe and bear little relationship to a particular defendant's culpability. In 2009, courts imposed below-guideline sentences in a majority (51.6%) of child pornography possession cases.⁹⁸ The average reduction in these cases was significant: about 40% below the bottom of the guideline range.⁹⁹ The Commission's most recent quarterly data tells a similar tale: courts imposed a below guideline sentence for reasons other than substantial assistance in 52.3% of cases sentenced under §2G2.2 with a median reduction of 52 months below the bottom of the range.¹⁰⁰ These figures suggest that district courts believe that, in most child pornography cases, the sentences called for by §2G2.2 are on average almost twice as high as they need to be.

Interestingly, the more courts are exposed to the pornography guideline, the more likely they are to reject it. Nationwide, from 2007 to 2009, the number of sentences imposed under this guideline almost doubled from 853 to 1546 and the percentage of below-guideline sentences increased from 30.8% to 51.6%. Similarly, the average percentage reduction increased from 36.3% in 2007 to 40.3% in 2009.

These results are reinforced and explained by the Commission's recent survey of judges, which revealed that 69-70% of judges believe the guidelines for receipt and possession of pornography are too high.¹⁰¹

This deep and pervasive judicial dissatisfaction is perhaps the clearest signal that §2G2.2 needs to be fundamentally revised. The framers of the Sentencing Reform Act believed that the evolution and improvement of the Guidelines would be driven by a dialogue between the Commission and the judiciary. The judges, through their actions, have spoken plainly and decisively: this guideline is flawed and must be amended.

⁹⁸ See Data presented by U.S.S.C. to Judge Gregory Presnell on sentences imposed under U.S.S.G. §2G2.2 2007-2009, available at <http://sentencing.typepad.com/files/circuit-data-on-ussg-2g2.2-with-tables.pdf> (note these figures for below guideline sentences do not include sentences resulting from substantial assistance or early disposition departures).

⁹⁹ *Id.*

¹⁰⁰ USSC, *Preliminary Quarterly Data Report, Second Quarter FY10*, available at http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_2nd.pdf. (note the median reduction figure includes all pornography offenders not just those sentenced under §2G2.2).

¹⁰¹ See 2010 Judicial Survey, Question 8.

E. Recommendations

In general, the Commission must take steps to rationalize §2G2.2. As shown above many of the flaws of the current guideline are the result of the eccentric manner in which it developed. Because the guideline was not formulated in accordance with the Commission's characteristic institutional role, it lacks a sound empirical and conceptual basis. The guideline does not incorporate the best data about the relative dangers and risks of recidivism posed by these offenders. Consequently, it produces sentences that are both arbitrary and overly severe.

Specifically, the Commission should revise the guideline to reflect more accurately the relative seriousness of the offense and the actual risks presented by those who commit it. The Commission should also make sure that the guideline's enhancement provisions do a much better job discriminating between aggravated and run-of-the-mill cases. Most importantly, §2G2.2 should be revised so that it does not produce sentences at or near the statutory maximum in the mine run case.

To this end, the Commission should:

- Lower the guideline's base offense level and eliminate the difference in the base offense level for possession and receipt of child pornography. There is no meaningful difference between these offenses and thus no reason to provide a higher base offense level for receipt of child pornography.
- Eliminate the enhancement for use of a computer during the course of the offense (U.S.S.G. §2G2.2(b)(6)). As shown above, this enhancement applies in nearly every case and bears no relevance to the severity of the offense or the relative culpability of the offender.¹⁰²
- Eliminate the enhancement if the offense involved an image of a prepubescent minor (U.S.S.G. §2G2.2(b)(2)). This enhancement applies in nearly every case and is essentially an inherent part of the offense in all but the most unusual cases.
- Eliminate or modify the enhancements based on the number of images possessed (U.S.S.G. §2G2.2(b)(7)). Given the ease by which large numbers of images may be acquired and the quasi-compulsive behavior of many offenders, this enhancement is a poor proxy for culpability, especially when the sentence increases for these enhancements are so large.¹⁰³

¹⁰² *Dorvee*, 2010 WL 3023799, *9 (noting Commission opposed computer enhancement "on the ground that it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users").

¹⁰³ *See Donaghy*, 2010 WL 2605375, *3 ("The number of images enhancement makes little sense because, as a result of internet swapping, defendants readily obtain the necessary number of images with minimal effort. Further, to the extent that number of images may serve as a proxy for harm, the guideline overstates that harm.")

- Modify the enhancement for possession of sadomasochistic images (U.S.S.G. §2G2.2(b)(4)) to include a requirement that the defendant intended to obtain such images. As one court has written, “To the extent that harsh punishment is necessary in these types of cases to reduce the demand for material that results in harm to children, a defendant who does not seek out the worst of that material should not receive the same sentence as someone who does.”¹⁰⁴

Proposed Priority #7: Departures and Offender Characteristics

We are pleased that the Commission has made a priority its continuing review of the departure provisions in Parts H and K of Chapter Five of the Guidelines Manual. The Commission has taken some positive steps with the recent amendments to the policy statements addressing age (USSG §5H1.1); mental and emotional conditions (USSG §5H1.3); physical condition, drug dependence and alcohol abuse (USSG §5H1.4); and military service (USSG §5H1.11), as well as the encouraged departure in order to treat substance abuse or mental disorders (USSG §5C1.1). We join the Commission in its hope that these changes will encourage judges to view the factors addressed by the amendments as relevant to departure. However, the general standard for departures based on these factors contains unnecessary restrictions and conditions that could limit their usefulness in too many cases. Indeed, the general standard for the factors now deemed “relevant” under §§ 5H1.1, 5H1.3, 5H1.3, and 5H1.11 is hard to distinguish from the standard governing departures based on factors deemed “not ordinarily relevant” under the pre-PROTECT Act version of the Guidelines. *Compare* 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) (“Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”) *with* USSG §5K2.0 (2002) (“[A]n offender characteristic or other circumstance that is, in the Commission’s view, ‘not ordinarily relevant’ in determining whether a sentence should be outside the applicable guideline range [such as mental and emotional conditions] may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the guidelines.”).¹⁰⁵

The changes to the Introductory Commentary to Chapter 5, Part H are also problematic. That commentary will now advise district courts in sweeping terms that, even though certain mitigating factors “may be relevant” to departure under certain conditions, “the most appropriate

¹⁰⁴ *Hanson*, 561 F.Supp.2d at 1009.

¹⁰⁵ Although we recommended during the previous amendment cycle that the Commission revise USSG §5K2.0 to return to the general pre-PROTECT Act standard for departures, we *also* recommended that it remove the last paragraph of that standard in order to conform to our recommendation that the Commission remove the language in Chapter 5, Part H stating that offender characteristics are “not ordinarily relevant” or “not a reason” to depart. *See* Letter from Jon M. Sands to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm’n, *Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010*, at 5-6 (Mar. 22, 1010).

use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table and various other aspects of an appropriate sentence.” *See* 75 Fed. Reg. 27,388, 27389 (May 14, 2010). It further instructs, in the interest of avoiding unwarranted disparity, that judges should not give specific offender characteristics “excessive weight.” *Id.* As written, this broad language refers to not only “departure” determinations, but also the determination whether to sentence outside the guideline range generally.

To the extent that this advice purports to extend beyond departure determinations, it flatly contradicts the obligation of district courts to consider the “history and characteristics” of every offender without restriction or limitation. *See* 18 U.S.C. §§ 3553(a)(1), 3661. It is also inconsistent with Supreme Court decisions making clear that district courts are and must be free to disregard the Commission’s restrictions and limitations regarding any given offender characteristic. *See Gall v. United States*, 552 U.S. 38, 50 & n.6, 51-52 (2007) (noting that § 3553(a)(1) is a “broad command to consider ‘the nature and circumstances of the offense and the history and characteristics of the defendant’” and upholding the district court’s consideration of mitigating factors that the Commission’s policy statements put off limits); *Rita v. United States*, 551 U.S. 338, 357 (2007) (judge may decide that the guidelines “reflect an unsound judgment, or, for example, that they do not generally treat certain characteristics in the proper way.”).

Even if it only applies to departures, this new language adds another restrictive layer to the analysis without sound basis. Although the Commission cites the need to avoid unwarranted disparity as its reason for advising judges to consider specific offender characteristics only for purposes of within-guideline sentences, it does not explain how departures based on factors that are clearly relevant to the purposes of sentencing can lead to *unwarranted* disparity. If the Commission’s goal is to encourage judges to use departures rather than variances,¹⁰⁶ the new Introductory Commentary is not consistent with that goal.

In continuing its review of the departure provisions of Parts H and K of Chapter 5, the Commission should revisit the Introductory Commentary and delete its suggestion that offender characteristics are not to be given excessive weight and are ordinarily relevant only to a within-guideline sentence. At the very least, the Commission should revise the Introduction to Chapter 5H to make clear that it and the policy statements therein apply only to a decision whether to “depart.”¹⁰⁷ And for all the reasons given in our previous testimony and public comment,¹⁰⁸ we urge the Commission to revisit its changes to §§ 5H1.1, 5H1.3, 5H1.4, and 5H1.11 to remove the

¹⁰⁶ *See* 75 Fed. Reg. 27,388, 27,391 (May 14, 2010) (explaining that the Commission undertook a review of departures due to the decreased use of departures in favor of variances under section 3553(a)).

¹⁰⁷ As the Commission recognizes in the new background commentary to §1B1.1, *see id.* at 27,392, “[d]eparture” is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.” *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008).

¹⁰⁸ Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm’n, at 54-79 (Mar. 17, 2010).

remaining conditions and restrictions, including those relating to factors that were not the subject of any amendment, such as gambling addiction, prior good works, and lack of guidance as a youth.¹⁰⁹ The Commission should simply state that the factors addressed by those policy statements “are relevant” or “may be relevant” to the question whether departure is warranted.

The Commission should do the same with respect to the mitigating factors listed in 28 U.S.C. § 994(e), and should also clarify that these factors should not be used to choose prison over probation or a longer prison sentence, but may be used to choose probation or an alternative to straight prison, or a shorter prison sentence. The plain language of § 994(e) and its legislative history mean that the Commission should not recommend that these factors, or the lack thereof, be used to choose prison over probation or to recommend a longer prison sentence, *i.e.*, they should not be used as aggravating factors, but each of these factors may be used as mitigating factors.

In section 994(e), Congress directed the Commission to “assure that the Guidelines in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.” 28 U.S.C. § 994(e). The purpose of this subsection was “to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.” S. Rep. No. 99-225, at 175 (1983). The Senate Judiciary Committee explained that the presence of one of these five factors, or the lack thereof, was not to be used to recommend imprisonment over probation or a longer prison term, but “each of these factors may play other roles in the sentencing decision.” *See id.* at 174. “[T]hey may, in an appropriate case, call for the use of a term of probation instead of imprisonment.” *Id.* at 174-75. In fact, the Senate Judiciary Committee gave several examples of how these factors, or the lack thereof, may be used to mitigate sentences.¹¹⁰ None of the examples indicates that these factors should aggravate sentences.

Commission staff recognized fourteen years ago that Congress intended an “asymmetrical reading of [§ 994(e)] – in other words, that these factors should not increase a defendant’s likelihood of being sentenced to prison but may increase a defendant’s likelihood of

¹⁰⁹ We have previously recommended that the Commission delete these provisions, as Congress has not *required* the Commission to consider their relevance under 28 U.S.C. § 994(d). *Id.* at 74, 76, 79. Our current recommendation is made with the understanding that the Commission is unlikely to delete these provisions.

¹¹⁰ *See* S. Rep. No. 98-225, at 172-73 (1983) (“need for an educational program might call for a sentence to probation”); *id.* at 173 (same regarding vocational skills); *id.* (same regarding employment); *id.* at 171 n. 531 (“if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training”); *id.* at 173 n.532 (“a defendant’s education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release”); *id.* at 174 (family ties and responsibilities may indicate, for example, that the defendant “should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family”).

being sentenced to probation.”¹¹¹ Through the “brute force of logic,” if these factors are appropriate considerations in choosing probation over prison, they are necessarily appropriate in choosing a lesser prison term than the guidelines recommend.¹¹²

This “asymmetrical approach” to the factors listed in section 994(e) is further supported by the current structure of the guideline rules (which are comprised primarily of aggravating factors), and feedback from judges and prosecutors in the form of data regarding departures.¹¹³ Indeed, all of the judges who addressed this issue in varying contexts at the regional hearings sought information about the purposes and evidentiary bases of *the guideline rules*, noting that the guideline rules are, if anything, too severe, and that they use their discretion after *Booker* to mitigate the harshness of the Guidelines.¹¹⁴

We emphasize that section 994(e) reflects a very narrow concern – that defendants not be sentenced to prison rather than probation or to a longer prison term *because* they lack education, employment, or stabilizing ties. *See* S. Rep. No. 98-225, at 175 (1983). The presence or absence of these factors *should* be considered, however, whenever “relevan[t] to the purposes of sentencing.” *Id.* Education, vocational skills, employment record, family ties and responsibilities, and community ties *are* relevant to the purposes of sentencing, as are the lack of those advantages. These factors are relevant in a host of ways, including predicting reduced

¹¹¹ *See* USSC, *Simplification Draft Paper, Departures and Offender Characteristics*, Part II(B)(2) & II(E)(3), available at <http://www.ussc.gov/SIMPLE/depart.htm>.

¹¹² *See Lussier v. Runyon*, 50 F.3d 1103, 1108 (1st Cir. 1995). This logic is illustrated by the history of §5H1.4. Legislative history suggested that health problems may call for a sentence of probation rather than prison. S. Rep. No. 98-225 at 173 (1983). The original version of USSG §5H1.4 stated that a physical impairment may be a reason for “a sentence other than imprisonment.” The courts of appeals declined to read this as “an all-or-nothing choice between an incarcerative sentence within the guideline range or imposing no prison sentence” because “the greater departure (no incarceration) necessarily included the lesser departure (a prison sentence below the bottom of the guideline sentencing range).” *United States v. O’Neil*, 11 F.3d 292, 297 (1st Cir. 1993); *see also United States v. Love*, 19 F.3d 415, 416 (8th Cir. 1994); *United States v. Slater*, 971 F.2d 626, 635 (7th Cir. 1992); *United States v. Hilton*, 946 F.2d 955, 958 (1st Cir. 1991); *United States v. Ghannam*, 899 F.2d 327, 329 (4th Cir. 1990). In 1991, the Commission amended USSG §5H1.4 to replace “a sentence other than imprisonment” with “a sentence below the guideline range.” USSG, App. C, Amend. 386 (Nov. 1991).

¹¹³ *See* Statement of Heather Williams Before the U.S. Sentencing Comm’n, Phoenix, Arizona, at 35, 39-40 (Jan. 21, 2010) (discussing in more detail and providing data); Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm’n, at 43-47 (Mar. 17, 2010) (same).

¹¹⁴ *See* Transcript of Public Hearing, Stanford, California, at 89-90, 133-36, 147-48 (May 27, 2009) (Judge Lasnik); *id.* at 95, 120, 123, 125-26 (Judge Mollway); *id.* at 139 (Judge Breyer); Transcript of Public Hearing, Stanford, California, at 46-47 (May 28, 2009) (Judge Walker); *id.* at 51, 92-93 (Judge Shea); 81-83, 85 (Judge Winmill); Transcript of Public Hearing, Chicago, Illinois, at 30-31, 33, 37 (Sept. 9-10, 2009) (Judge Carr); *id.* at 87, 91 (Judge McCalla); *id.* at 104-105, 113; Transcript of Public Hearing, Denver, Colorado, at 27-28 (Oct. 20, 2009) (Judge Hartz); *id.* at 63-64, 91-92 (Judge Marten); *id.* at 77, 80-81 (Judge Kane); *id.* at 281-83, 300-302 (Judge Ericksen); *id.* at 289-90, 298-300 (Judge Pratt); *id.* at 291-92 (Judge Gaitan); Transcript of Public Hearing, Austin, Texas (Jan. 21, 2010) (Judges Cauthron, Starrett, Zainey, Holmes).

recidivism, demonstrating reduced culpability, and indicating a need for and amenability to treatment or training in a non-prison setting.

Proposed Priority #8: Prior Crimes, the Categorical Approach, and Time Limits for Counting Priors under §2L1.2 (Unlawfully Entering or Remaining in the United States)

The Commission also proposes to continue its multi-year study of the statutory and guideline definitions of “crime of violence,” “aggravated felony,” “violent felony,” and “drug trafficking offense.” This year, the Commission proposes to (A) examine relevant circuit conflicts regarding whether any offense categorically fits any of the above definitions for purposes of triggering an enhanced sentence under certain federal statutes and guidelines, (B) possibly consider an alternative approach to the categorical method for determining the applicability of guideline enhancements, and (C) possibly consider an amendment to provide that the time period limitations in USSG § 4A1.2(e) apply for purposes of determining the enhancements of §2L1.2.

Apply §4A1.2(e)’s time period limitations to §2L1.2. We fully support the Commission’s proposal to make §4A1.2(e)’s time period limitations applicable to §2L1.2. Courts have found that the disparities caused by §2L1.2’s direction to enhance the offense level on the basis of stale convictions that are otherwise not counted under the guidelines can render the guideline sentence itself unreasonable.¹¹⁵ We agree – the divergent rules on whether or not a prior conviction counts to increase the guideline calculation make no sense. Luckily, the fix is simple. Any prior conviction used to increase the offense level under §2L1.2 should simply be subject to Chapter Four’s criminal history rules. This approach would better calibrate §2L1.2’s sentence recommendations to the purposes of sentencing by eliminating the use of prior convictions that reflect neither increased recidivism risk nor increased culpability.¹¹⁶

Simplify §2L1.2 by eliminating the 16- and 12-level increases instead of conducting yet another study of the categorical method. We understand that the Commission is interested in finding a way to address ongoing judicial frustration with §2L1.2’s approach to sentencing, which requires courts to engage in multiple analyses of a defendant’s prior convictions to determine which offense level increases they trigger under the guidelines. While the Defenders appreciate and support the Commission’s desire to simplify §2L1.2, spending limited resources

¹¹⁵ See, e.g., *United States v. Amezcua-Vazquez*, 567 F.3d 1050, 1054-55 (9th Cir.) (reversing within-guideline sentence as substantively unreasonable where defendant’s prior conviction increased his offense level by 16 levels even though it was too old to score for purposes of criminal history calculation and his subsequent history showed no other countable convictions), *rehearing en banc denied*, 586 F.3d 1176 (9th Cir. 2009); see also *United States v. Chavez-Suarez*, 597 F.3d 1137, 1138 (10th Cir. 2010) (agreeing with *Amezcua-Vazquez* that the staleness of a prior conviction may warrant rejection of the guideline range under §2L1.2 and as might cases where the prior conviction was relatively benign because “[w]e are convinced that the attempted distribution of marijuana is in itself not nearly as serious a crime as murder, human trafficking, child molestation, and other felonies triggering the sixteen-level enhancement”), *petition for cert. filed*, (July 7, 2010) (No. 10-5378).

¹¹⁶ See, e.g., USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 24 (Jan. 20, 2006); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004).

on studying whether to replace the categorical method is the wrong way to achieve that goal. Most glaringly, it won't work. Five years ago, the Commission conducted the very study it proposes now and concluded that "[a]ny offense for illegal reentry will inevitably involve [the] categorical analysis' approach, due to the fact that the court must determine if the defendant's prior conviction is an aggravated felony for purposes of selecting the appropriate statutory penalty."¹¹⁷ Because courts must apply the categorical method to illegal reentry cases whether the guidelines tell them to or not, studying this issue again is, quite frankly, a waste of the Commission's time.

What the Commission can do – quite easily – to eliminate the need for courts to conduct the categorical analysis under §2L1.2 multiple times, is streamline the guideline categories into which prior offenses can fall. Specifically, the Commission should delete the 16- and 12-level increases from §2L1.2, and recommend instead that all “aggravated felonies” as defined in 8 U.S.C. § 1101(a)(43) receive an 8-level increase.

Deleting §2L1.2's 16-level and 12-level increases is fully supported by empirical data, in marked contrast to the guideline in its present form. The 16-level increase was not justified by data or analysis when it was first incorporated in 1991, and it has not proven to be empirically necessary or desirable since.¹¹⁸ To the contrary, by 2001, public criticism of the disproportionate penalties recommended by the overly-broad 16-level increase had grown so loud that the Commission attempted to ameliorate it by adding graduated sentencing increases of 8 and 12 levels for offenses that qualified as “aggravated felonies” under the statute but were, in the Commission's opinion, less serious.¹¹⁹

Unfortunately, the Commission's attempt to better calibrate sentences under §2L1.2 has proven to be as empirically unsound as the 16-level increase itself. According to our review of the Commission's most recent data set, courts and the government continue to recommend sentences below the recommended guideline range for defendants who receive 16- and 12-level increases under §2L1.2.¹²⁰ Defendants in 2009 with 16-level increases received below-guideline

¹¹⁷ See USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 24 (Jan. 20, 2006).

¹¹⁸ See, e.g., Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent'g 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'g Rep. 264 (Mar./Apr.1996).

¹¹⁹ See USSC, App. C, Amend. 632 (Nov. 1, 2001) (reporting that the graduated offense levels were intended both to “respond[] to concerns raised by a number of judges, probation officers, and defense attorneys” that the 16-level increase is overly harsh, and to Commission observations that “the criminal justice system has been addressing this inequity on an ad hoc basis . . . by increased use of departures”).

¹²⁰ For purposes of this analysis, we analyzed the data for defendants convicted under 8 U.S.C. § 1326 for whom §2L1.2 served as the primary guideline. We assumed that those with an adjusted offense level of 24 had received a 16-level increase with a 3-level adjustment for acceptance of responsibility, those with an adjusted offense level of 20 received a 12-level increase with a 3-level acceptance adjustment, those with an adjusted offense level of 16 received an 8-level increase with a 3-level acceptance adjustment,

sentences 67.1% of the time, while defendants with 12-level increases received below-guideline sentences 64.9% of the time. These numbers show that departures from these guideline recommendations occur over one-third more frequently than the national below-guideline average of 41.2%.¹²¹ In contrast, the below-guideline rate for §2L1.2 defendants at lower offense levels was much closer to the national average; defendants with 8-level increases received below-guideline sentences 49.3% of the time, and defendants with 4-level increases received below-guideline sentences 41.7% of the time, almost identical to the national average of 41.2%.¹²²

These statistics show that, in practice, the government and the courts (and the Defenders) agree: §2L1.2's 16-level and 12-level increases result in sentences that are too harsh in a large majority of the cases in which they are recommended. Too often, defendants who reenter the country illegally but otherwise live law-abiding lives find themselves subjected to sentences years later that are far greater than necessary to satisfy any purpose of punishment, simply because of one prior conviction that was committed a decade or more ago.

Deleting the increases would directly respond to these "silent" criticisms, as well as the more vocal complaints the Commission received during last year's regional hearings and judicial survey.¹²³ It would also do away with the need for courts to engage in multiple categorical analyses beyond what is required by the statute, thereby addressing that separate body of criticism more effectively and efficiently than the Commission's proposed approach, which would involve not only repeating its prior study but also reviewing case law for the proverbial needle in a haystack. Because the categorical method depends upon the precise statute of conviction, direct conflicts (where one court finds that a conviction under that particular statute qualifies and another court finds that it does not) are extremely rare. Moreover, ferreting out those conflicts takes an extraordinary amount of research time because it literally requires comparing the offense of conviction used in any given case (as it existed at the time of the original conviction), the circumstances of the analysis (e.g., whether the modified categorical

those with an adjusted offense level of 12 received a 4-level increase with a 3-level acceptance adjustment and those with an adjusted offense level of 8 received no increase.

¹²¹ See 2009 *Sourcebook*, Table N.

¹²² See *id.* The same holds true for within-guideline and above-guideline sentence rates. Defendants with 16-level increases received within-guideline sentences only 32.5% of the time (compared to the national average of 56.8%) and above-guideline sentences 0.3% of the time (compared to the national average of 2%), and defendants with 12-level increases received within-guideline sentences only 34.2% of the time and above-guideline sentences 0.9% of the time. In contrast, defendants with 8-level increases received within-guideline sentences 47.9% of the time and above-guideline sentences 2.7% of the time, and defendants with 4-level increases received within-guideline sentences 56.2% of the time and above-guideline sentences 2.2% of the time, meaning that defendants with a 4-level increase under §2L1.2 received within- and above-guideline sentences at rates almost identical to the national average of 56.8% and 2%, respectively.

¹²³ *Judges Survey*, Question 8; Transcript of Public Hearing, Boulder, Colorado, at 101-02 (Oct. 20, 2009) (Chief Probation Officer Kevin Lowry); Transcript of Public Hearing, Atlanta, Georgia, at 134, 152 (Feb. 11, 2010) (Judge Gregory Presnell).

approach was used and, if so, the quality of the proof offered by the government), and the result reached.

The Commission should not waste its time and resources going back over reconnoitered ground. We firmly believe that studying our suggestion to streamline §2L1.2's categories would be a better use of the Commission's time, would better resolve complaints about inefficient processes under §2L1.2, and would result in an empirically better illegal reentry guideline.

Amend §4B1.2. Finally, we continue to urge the Commission to make those changes to the career offender guideline that we have been requesting for years.¹²⁴ In this amendment cycle, we recommend that the Commission focus on:

- Targeting the definition of “controlled substance offense” to more meaningfully distinguish between more and less serious drug offenders, reflect the data on recidivism risk, and alleviate the stark and unjustifiable racial disparity caused by the current definition;¹²⁵
- Clarifying that offenses committed prior to age eighteen but convicted and sentenced at or after age eighteen should not be counted as career offender predicates;¹²⁶ and
- Deleting from USSG §4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders, which is inconsistent with the Commission's own research showing that the criminal history category for career offenders is often several categories higher than their recidivism rate would justify.¹²⁷

¹²⁴ See, e.g., Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Acting Chair, U.S. Sentencing Guidelines Committee (Aug. 24, 2009); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 16, 2008); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 9, 2007); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 19, 2006).

¹²⁵ See *Fifteen Year Review*, at 133-34 (Nov. 2004); see also Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee at (July 9, 2007) .

¹²⁶ Compare USSG §4B1.2, comment. (n. 3); *United States v. Mason*, 284 F.3d 555, 558 (4th Cir. 2002) (“a juvenile conviction cannot be counted in determining whether a defendant is a career offender”); *United States v. Moorer*, 383 F.3d 164, 167 (3rd Cir. 2004) with *United States v. Torres*, 541 F.3d 48, 51-52 (1st Cir. 2008) (affirming career offender enhancement based on offenses committed at age seventeen because Application Note 3 to §4B1.2 states that “[t]he provisions of §4A1.2 are applicable to the counting of convictions under §4B1.1,” and therefore court finds that §4A1.2(d) applies to career offender calculations regardless of §4B1.2, comment. (n. 1)), *cert. denied*, 129 S. Ct. 1987 (2009).

¹²⁷ See *Fifteen Year Review*, at 134.

Proposed Priority #9: Reduction in Offense Level for Agreeing to a Stipulated Order of Deportation

We welcome the Commission's proposal to consider a reduction in offense level for deportable aliens who agree to a stipulated order of removal pursuant to 8 U.S.C. § 1228(c)(5) or otherwise consent to deportation.¹²⁸ We agree with John Morton, the Assistant Secretary of U.S. Immigration and Customs Enforcement, who testified at the Commission's regional hearing in support of such a reduction in offense level, but do not agree that those convicted of illegal reentry should be excluded or that the reduction should be limited to one-level.¹²⁹

We believe that a two-level specific offense level reduction would be appropriate for stipulated orders of removal. The benefits to the government of stipulated removals are significant. As the Supreme Court acknowledged not long ago in a related context:

From the Government's standpoint, the alien's agreement to leave voluntarily expedites the departure process and avoids the expense of deportation-including procuring necessary documents and detaining the alien pending deportation. The Government also eliminates some of the costs and burdens associated with litigation over the departure.¹³⁰

Given the volume of immigration cases, the associated costs to taxpayers of the additional time spent in custody and coming before an immigration judge, and the rights the defendant gives up to enter into the stipulation, a two-level adjustment may better represent the value of the quid pro quo.

We also urge the Commission to include a one-level adjustment for those defendants who consent to deportation even though the local U.S. Attorney's Office may have no program in place for stipulated orders of removal. Notwithstanding the discretion prosecutors currently have to enter into stipulated orders of removal and move for a downward departure, the practice occurs rarely. While an offense level reduction, along with ICE's stamp of approval, may result in some US Attorney Offices negotiating more stipulated removals, we fear that the process will not be uniform across the country. It may be more like the "fast track" departure, where some districts have it and others do not. In the past, when defendants have requested departures for consenting to deportation even though the government has declined to pursue a stipulated order

¹²⁸ Section 1228(c)(5) of Title 8 has long contained a provision permitting the U.S. Attorney to enter into a plea agreement with a deportable alien for the individual to "waive the right to notice and a hearing . . . and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both."

¹²⁹ Transcript of Public Hearing, Phoenix, Arizona, at 18 (Jan. 20, 2010) (John Morton, Ass't Secretary of U.S. Immigration and Customs Enforcement).

¹³⁰ *Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 2314 (2008).

of removal, most courts have found that the district judge cannot grant a departure without the government's consent.¹³¹

A specific offense adjustment also would help ameliorate the unfair disparity of illegal entry and reentry defendants typically not being eligible for a departure under §5K.1.³ Defendants charged with immigration offenses are typically remorseful and cooperative: 99.3% plead guilty and 98.8% are found to have accepted responsibility for their offense.¹³² At the same time, illegal reentry defendants typically cannot cooperate against other individuals in order to receive a substantial-assistance departure under policy statement §5K1.1, because they are involved in a single-defendant immigration crime, unrelated to any other federal offense.¹³³ As a result, cooperative illegal-reentry defendants are treated differently, and more harshly, than cooperative defendants charged with other (often more serious) offenses.

The suggested adjustment would not be likely to delay or increase the cost of handling these cases. Because a defendant's alienage and prior deportation are elements of the government's proof in an illegal-reentry prosecution, the prosecutor often provides substantial discovery regarding the defendant's immigration history, and defense counsel is required to conduct a thorough investigation into the defendant's immigration status, including whether he or she has any available defenses to deportation (such as a claim for acquired or derivative citizenship).¹³⁴ Accordingly, questions regarding the propriety of stipulation to deportation will usually be answered during the pretrial investigation of the case. This may not be the case with other types of offenses, in which the deportability of the defendant, and the consequences of the criminal conviction, may not be as clear.¹³⁵

Proposed Priority #10: Supervised Release, Part D of Chapter 5

We welcome and encourage the Commission's proposed priority regarding supervised release. The current provisions of Part D of Chapter 5 (as well as Chapter 7 – Violations of Probation and Supervised Release) are obsolete and inconsistent with the criminological research on “what works” in corrections. Here, we point out just a few of the areas worthy of the

¹³¹ See *United States v. Gomez-Sotelo*, 18 Fed. Appx. 690, 692 (10th Cir. 2001) (citing cases). *But see United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999) (defendant who consents to deportation even though he has colorable defense may be eligible for departure even when U.S. Attorney does not consent).

¹³² See *2009 Sourcebook*, Tbl 11 and 19.

¹³³ See Tony Plohetski, *Travis County leads nations in deporting 'noncriminal' immigrants, groups find*, Austin American- Statesman (Aug 11, 2010) (describing massive number of undocumented immigrants with little or no criminal history who are subject to removal), available at <http://www.statesman.com/news/local/travis-county-leads-nation-in-deporting-noncriminal-immigrants-852776.html>

¹³⁴ See 8 U.S.C. § 1409.

¹³⁵ ²See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

Commission’s attention and highlight the myriad ways that new evidence can inform the Commission’s decision making.

The Commission should build into the guidelines sufficient flexibility for the courts to consider the defendant’s risk of recidivism and unique rehabilitative needs in fashioning the term and condition of supervised release. Many subsections of Part D of Chapter 5 contain mandatory language, suggesting to the court that for a sentence to remain within the guidelines, the court must impose a certain term and conditions of supervised release. These restrictive provisions are not only inconsistent with pertinent federal statutes,¹³⁶ they are inconsistent with what we know about how offenders respond to supervision, which offenders should be targeted for more intensive supervision, and which may not need supervision at all.

One key principle that empirical data has proven over the last decade is that “offenders should be provided with supervision and treatment levels that are commensurate with their risk levels.”¹³⁷ The studies show that intense supervision of low risk offenders either has no effect, thereby wasting limited resources, or leads to increased recidivism for low-risk offenders.¹³⁸ The “risk principle” suggests that treatment is most effective when intensive services are reserved for higher risk offenders.¹³⁹

A recent study performed by the Office of Probation and Pretrial Services and reported to the Criminal Law Committee of the Judicial Conference demonstrates this point. Following revisions to *The Supervision of Federal Offenders Monograph 109*¹⁴⁰ in 2003 and again in 2004, which, inter alia, sets forth criteria to “help probation officers identify stable, low-risk offenders who may qualify for early termination of supervision,” the Administrative Office of the U.S

¹³⁶ Compare USSG §5D1.1 (“court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed) with 18 U.S.C. § 3583(a) (imposition of term of supervised release is left to judge’s discretion unless it is required by statute). Also compare USSG §5D1.2 (specifying minimum term of supervised release) with 18 U.S.C. § 3583 (providing only for maximum, not minimum, term of supervised release).

¹³⁷ Christopher T. Lowenkamp and Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections – 2004, at 3 (2004) (published by U.S. Dep’t of Justice, National Institute of Corrections), available at http://www.uc.edu/ccjr/Articles/ticc04_final_complete.pdf.

¹³⁸ *Id.*

¹³⁹ Brian Lovins, Christopher Lowenkamp, and Edward J. Latessa, *Applying the Risk Principle to Sex Offenders*, 89 *The Prison Journal* 344, 345 (2009). available at <http://www.uc.edu/ccjr/Articles/sextxtprisonjournal.pdf>.

¹⁴⁰ Available at <http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/RelevantFederalPretrialServicesDocuments/AOPretrialServicesMonographsAndGuide.aspx>.

Courts (“AO”) undertook a study of offender granted early termination of supervised release.¹⁴¹ The results of the study were startling and provide strong evidence that the guidelines’ “one-size fits all approach,” which is based on the classification of the offense rather than the recidivism risk and rehabilitative needs of the defendant is counter-productive. The study concluded:

Based on the charged data entered into PACTS by 70 of the 94 federal probation districts, it is clear that offenders granted early termination do not pose a greater safety risk to the communities in which they are released than offenders who complete a full term of supervision. In fact, *early term offenders in this study presented a lower risk of recidivism than their full term counterparts*. Not only were early term offenders charged with a new criminal offense at a lower rate than full term offenders, but when they were charged with a new crime it was generally for misdemeanor offenses. Early term offenders committed a lower percentage of felony offenses than did full term offenders.¹⁴²

Researchers hypothesize several reasons why more intensive and restrictive correctional interventions may increase the risk of recidivism for low risk offenders:

First, exposing lower risk offenders to higher risk offenders may enhance negative social learning, thereby reinforcing antisocial attitudes and beliefs. Second, placing lower risk offenders into intensive programs can disrupt prosocial network and opportunities.¹⁴³

This “risk principle” has numerous implications for the supervised release guidelines and how they affect an offender’s rehabilitative needs and protect public safety.¹⁴⁴ If supervised release lasts too long or conditions are too burdensome, the risk of recidivism may well increase.¹⁴⁵

¹⁴¹ Office of Probation and Pretrial Services, *Early Terminated Offenders: A Greater Risk to the Community*. (June 2010) (emphasis added), available from OPPS, James L Johnson/DCA/AO/USCOURTS (summary reported in OPPS, News and Views, January 18, 2010).

¹⁴² *Id.*

¹⁴³ *Applying the Risk Principle to Sex Offenders, supra*, at 345.

¹⁴⁴ Just to pose a few of the questions the “what works” literature raises for the Commission as it examines the guidelines governing the terms and conditions of supervised release: should the court always impose a term of supervised release; should the guidelines specify minimum terms of release as they currently do at §5D1.2; under what circumstances should a court impose special conditions, are all of the standard conditions necessary; should the court always impose a treatment condition on sex offenders?

¹⁴⁵ See generally Christopher Lowenkamp, Jennifer Pealer, Paula Smith, and Edward Latessa, *Adhering to the Risk and Needs Principle: Does it Matter for Supervision-Based Programs?*, 70 Federal Probation 3 (Dec. 2006), available at <http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/FederalProbationJournal.aspx>.

The current advisory guidelines fail to follow the “risk” principle. Terms of supervision are based upon the classification of the offense rather than the individual defendant’s risk of recidivism or rehabilitative needs.¹⁴⁶ “Congress intended supervised release to assist individuals in their transition to community life,”¹⁴⁷ but such assistance is not the driving force behind the current guidelines. Listed below are just a few of the problems with Part D of Chapter 5 that the Commission should take up with this proposed priority.

First, rather than providing for shorter terms of supervision or for termination of supervision when the defendant has successfully transitioned back into the community, the guidelines insist on minimum terms with standard conditions and provide no guidance to judges on when early termination might be appropriate. As a result, some judges are reluctant to end supervision even when a defendant has complied with all conditions, including payment of fines and restitution.

Take for example the case of Hal Hicks. Mr. Hicks asked the court to terminate his three-year period of supervised release because he had complied with all the terms of his supervision and wanted to work in the trucking industry, which would require travel outside the district. The judge refused to terminate his supervision, stating that courts “generally do not consider mere compliance with the terms of supervised release grounds for early termination.”¹⁴⁸ The court added: “Hick’s desire to work within a particular field that may require travel does not constitute the sort of changed circumstance that might induce the Court to grant a request for early termination in the interest of justice.” What the court missed is that keeping Mr. Hicks on supervision could well increase his chance of recidivism by depriving him of an employment opportunity and otherwise disrupting his pro-social thinking.

In the small percentage of cases where judges terminate supervision early (12% of all supervision cases), the offenders serve substantial periods of supervised release (an average of 26 months) before being terminated.¹⁴⁹ Under the risk principle, many of these offenders could have been terminated earlier with no increase in their risk of recidivism. The guidelines should encourage terms of release no longer than necessary to facilitate the defendant’s transition into the community and make it clear that early termination is in the “interest of justice” when the defendant presents a low risk of reoffending because his rehabilitative needs have been met and he no longer needs transitional services.

Second, the Commission should extinguish the term of supervision upon deportation. “Congress intended supervised release to assist individuals in their transition to community

¹⁴⁶ Indeed, one risk factor that the guidelines do consider elsewhere – criminal history – plays no role in the decision regarding supervised release. See USSC, *Federal Offenders Sentenced to Supervised Release* 56-58 (2010) (“Even though criminal history score is correlated with a higher risk of recidivism, there is no difference across criminal history scores in the average term of supervised release, indicating that there is no relation between length of term of supervision and risk of recidivism or need for rehabilitation”).

¹⁴⁷ *United States v. Johnson*, 529 U.S. 53, 59 (2000).

¹⁴⁸ *United States v. Hicks*, 2009 WL 1515203 (S.D. Ill. June 1, 2009).

¹⁴⁹ *Supervised Release Report*, at 62.

life.”¹⁵⁰ “It is not meant to be punitive.”¹⁵¹ Given that purpose, it makes no sense for defendants who will be deported to face terms of supervised release. As the Defender in the Western District of Texas explained at the Commission’s regional hearing in Phoenix:

“Supervised” release is a misnomer when it comes to deported defendants. They receive no supervision at all – no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment, or any of the other benefits regularly available to U.S. citizen releases as they attempt to reenter society. Deported defendants are simply dropped on the other side of the border and told not to return.¹⁵²

For these defendants, supervised release simply provides a means of additional punishment should they return. In addition to the draconian multiple counting of the prior reentry conviction in any new prosecution, the defendant will face a revocation of his supervised release term and a consecutive sentence of imprisonment under §7B1.3(f). To remedy the punitive nature of supervised release terms for deported defendants, we urge the Commission to amend §5D1.1 to recommend against automatic imposition of supervised release on defendants facing deportation.

Third, most conditions of supervision, even special conditions, are standardized rather than geared toward the individual’s needs. Many districts have their own standard conditions in addition to those set forth in §5D1.3.¹⁵³ When such conditions do nothing more than create additional obstacles to reentry by unnecessarily increasing the intensity of supervision, they violate the risk principle and should be abandoned.

Fourth, if the Commission were to revise the guidelines on supervised release consistent with evidence-based practices, and encourage judges to consider the individualized needs of the persons appearing before them when fashioning the term and conditions of supervised release, it would likely advance the Commission’s goal of encouraging alternatives to incarceration for those offenders who do not need to be incapacitated. Without such changes, the Commission is likely to see the kind of underutilization of sentencing options that are reported in the Commission’s recent publication on supervised release. According to that report,

Only a small proportion (3.3%) of offenders sentenced to imprisonment followed by supervised release were sentenced pursuant to USSG §5C1.1(d)(2), which authorizes a term of community confinement or home detention to be substituted as a condition of supervised release for some part of the guidelines’ range of imprisonment when an offender’s guideline range is in Zone B or Zone C of the Sentencing Table. The remaining 96.7 percent of federal offenders sentenced to prison and subsequent terms of supervised release were sentenced to prison terms

¹⁵⁰ *Supervised Release Report*, at 2 (citing *United States v. Johnson*, 529 U.S. 53, 59 (2009)).

¹⁵¹ *Supervised Release Report*, at 2 (citing *United States v. Granderson*, 511 U.S. 39, 60 (1994)).

¹⁵² Statement of Henry Bemporad Before the U.S. Sentencing Comm’n, Phoenix, Arizona (Jan. 21, 2010).

¹⁵³ *Supervised Release Report*, at 27.

as provided by USSG §5C1.1(f) such that the entire confinement term was served by imprisonment and no part of the supervised release term was substituted.¹⁵⁴

Fifth, the Commission should consider addressing procedural issues related to conditions, including notice of special conditions. The guidelines contain a lengthy list of potential special conditions, some of which involve significant restraints on liberty (*e.g.*, community confinement, home detention, intermittent confinement, and court ordered sex offender treatment, psychiatric treatment, and drug and alcohol abuse treatment). Under current practice, defense counsel receives little or no notice of special conditions.¹⁵⁵ Counsel should not be required to guess as to which of the myriad conditions set forth in the guidelines or otherwise contemplated by the court might be imposed. We believe that the presentence report should identify any special conditions of release, including those listed as special conditions in §5D1.3(d) and (4), so that the defense has a meaningful opportunity to explore the merits of the proposed condition and respond accordingly at the sentencing hearing.

These are just a few of the concerns we have regarding the terms and conditions of release. Should the Commission choose to make this a priority this year, we look forward to working with the Commission to further explore how the supervised release guidelines can be updated to reflect evidence-based practices and truly reflect Congress's intent for supervised release to facilitate an offender's reentry rather than serve as additional punishment. While the Commission has expressly identified Part D of Chapter 5 as a possible priority, we encourage it to take up Chapter 7 in coming amendment cycles so that those guidelines may be updated in light of the available "what works" literature and other empirical evidence.

Proposed Priority #11: Alternatives to Incarceration

We encourage the Commission to make alternatives to incarceration a top priority for the coming years. Last year, the Commission took a step toward expanding the availability of alternatives to incarceration for a narrow category of defendants. We acknowledge that this represented a critical shift in the Commission's view of alternatives and welcome the possibility for more.

The "what works" in corrections research is ever-evolving. More states are moving to reduce prison populations by implementing evidence-based alternatives to incarceration. Yet, the federal population continues to spiral out of control and too few sentencing options exist for federal defendants. The Commission has never implemented the directive that "[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." 28 U.S.C. § 994(g). It is time to do so by encouraging judges to impose alternatives to incarceration.

In recent years, the Federal Bureau of Prisons, which was once the model of a well-managed correctional system, has reported that it is 35 to 40 percent over capacity. This has

¹⁵⁴ *Supervised Release Report*, at 60-61.

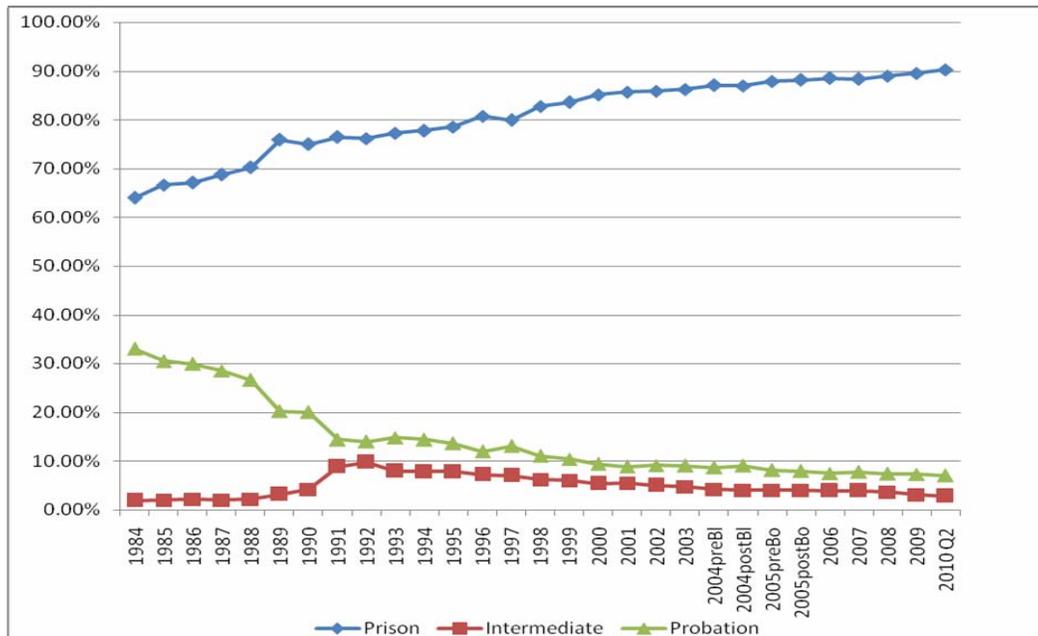
¹⁵⁵ *Supervised Release Report*, at 29.

created crowding and unsafe conditions, with staff to inmate ratios higher than in the largest state prison systems. In the words of the BOP Director:

We have not been able to build enough new facilities to keep up with the increase in the federal inmate population; tight budgets have also meant that we have not been able to increase our staffing to the level necessary to keep pace with the population growth. . . We are forced to double bunk nearly all of our high security inmates, many of whom are aggressive and violent and have various anti-social tendencies, and we are triple bunking nearly half of the remaining inmate population. None of our facilities were designed for triple bunking. With the inmate population expected to continue to increase by 7,000 inmates each year, we do not anticipate a reduction in the level of crowding in the near future.¹⁵⁶

The Commission’s data shows that imprisonment rates have steadily increased since 1984 while alternative sentences have declined. Figure 1¹⁵⁷ shows the percentages of three groups of offenders: 1) those who received a sentence involving some term of imprisonment, 2) those who received alternative confinement at home or in a community facility, and 3) those who received “simple” or “straight” probation without confinement conditions.

FIGURE 1: PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS TYPES OF SENTENCES All Felonies 1984 - 2010 2nd Quarter



¹⁵⁶ Statement of Harley G. Lappin, Director Federal Bureau of Prisons Before the U.S. Sentencing Comm’n, Austin, Texas (Nov. 20, 2009).

¹⁵⁷ Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2009 Annual Reports and Sourcebooks of Federal Sentencing Statistics, USSC Table 18.

We believe that the Commission can, and should, reverse this trend of over-incarceration. A sizable percentage of judges also believe that sentencing options should be more available for a range of offenses.¹⁵⁸ Last year, we offered a number of suggestions on how the Commission might expand the options for alternatives to incarceration. We stand ready to work with the Commission on this critical priority.

Proposed Priority #12: Circuit Conflicts

Defenders do not believe that the Commission should make the resolution of circuit conflicts a priority this year. The Commission has a full agenda this year: the need to respond to the new crack legislation and other congressional directives on mandatory minimums, the pressing need to overhaul often used guidelines like §2G2.2 (child pornography) and §2L1.2 (illegal reentry), and continuation of its work on alternatives to incarceration. The Commission can ill afford to spend valuable time and resources on resolving the esoteric circuit conflicts discussed in DOJ's June letter or responding to isolated court decisions that affect a handful of cases.

Conclusion

We were pleased last year to see that the Commission promulgated several amendments to the guidelines that should lower sentences for a small number of our clients. This year, we look forward to seeing the Commission's final priorities and working with the Commission toward revising the guidelines to better meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b)(1)(A).

Very truly yours,

/s/ Marjorie Meyers _____

Marjorie Meyers
Federal Public Defender

Chair, Federal Defender Sentencing
Guidelines Committee

¹⁵⁸ *Judges Survey*, Question 11.

cc: Hon. William K. Sessions III, Chair
Hon. Ruben Castillo, Vice Chair
William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel
Michael Courlander, Public Affairs Officer

X-Chapter X

Federal Internet Child Pornography Offenders (CPOs) Do Not Have Florida Offense Histories and Are Unlikely to Recidivate

by Richard Wollert, Ph.D., Jacqueline Waggoner, Ed.D., and Jason Smith, Psy.D.

Overview

Introduction

The United States Sentencing Commission

Proportionality, Reasonableness, and Federal Sentencing Guidelines.....

Limitations of the Federal Guidelines in Child Pornography Cases.....

Should the Guidelines for Sentencing CPOs be Less Punitive?.....

More Knowledge Is Needed To Make Guideline Decisions.....

A Review of Key Research Articles on CPOs.....

Variations in Research Designs Mediate the Validity of Research Results.....

Prior History and Recidivism Among Federal CPOs.....

 Background Information and Sample Characteristics

 Demographic Data and Past Patterns of Criminality

 Patterns of Recidivism Over A Four-Year Follow-up Period

Conclusions

Overview

A growing number of child pornography offenders (CPOs) are being sentenced under the United States Sentencing Guidelines. Many doubts about the guidelines have been raised, however, because the sentencing ranges they generate are often seen as too severe. An infusion of information about federal CPOs is needed to resolve this problem. This paper summarizes several key articles about CPOs and strongly questions the validity of one line of research (Bourke & Hernandez, 2009; Hernandez, 2000) that has been frequently cited. It also presents the first published study that details demographic, criminal history, and recidivism data for a representative sample of federal CPOs. This study found that few federal CPOs have any history of child molestation. Furthermore, none of the 72 CPOs who were monitored committed contact sex offenses against children.

Introduction

The great majority of offenders who are charged with a sex crime in the United States are prosecuted under state jurisdictions. A substantial number, however, are prosecuted by the federal government. At the present time, a minority of these offenders have been charged with crimes such as rape or child molestation while they were in the military or on Native-American tribal reservations. The majority have been charged with crimes in which they (a) crossed state lines to meet a minor for the purpose of molestation, (b) produced child pornography, or (c) most commonly, possessed, received, or distributed child pornography. Members of the last set of groups fall under federal jurisdiction because they have either physically traveled from one state to another or have sent or received pornography via the Internet or from another state or country via the U.S. Postal Service.

The United States Sentencing Commission

When a member of one of the foregoing groups is convicted of a sex offense, he or she is assigned a sentence for that offense based in part on the United States Sentencing Guidelines (USSGs) set forth by the United States Sentencing Commission (USSC), which Congress established as an independent entity under the judicial branch of government when it passed the Sentencing Reform Act (SRA) of 1984. Ideally, each guideline will point to a sentence that is *proportional* to the “the nature and circumstances of the offense” in question and other factors that federal jurists are required by section (§) 3353 of Title 18 of the United States Code to consider as part of the sentencing process, including “the history and characteristics of the defendant,” and “the need for the sentence ... to reflect the seriousness of the offense ... promote respect for the law ... provide just punishment ... afford adequate deterrence ... protect the

public ... and ... provide ... needed ... training, medical care, or other correctional treatment” (USSC, October 2009, pp. 2-3). Otherwise, according to the SRA, the respect in which the law is held may be undermined, and disciplinary problems among Federal prisoners may be exacerbated (USSC, October 2009, p. 2).

Toward these ends, the SRA directed the Commission to establish and periodically review and revise rational and proportional sentencing policies as part of a process that combined empiricism and initiative. For example, the Commission was instructed not only to rely on “past sentencing practices „as a starting point”” for drafting its initial guidelines but also to develop sentencing ranges that were “consistent with the purposes of [federal] sentencing” in cases where “average sentences” fell short of meeting this goal [USSC, October 2009, p.3; *Kimrough v. United States*, 552 U.S. 85, 96 (2007) (“In the main, the Commission developed Guidelines sentences using an empirical approach based on . . . 10,000 presentence investigation reports.”)].

The Commission was also required to adhere to a rigorous three-stage protocol in the course of discharging its mission. During a *review* stage it may solicit input from the public, advisory groups, and key informants associated with the federal criminal justice system before promulgating a guideline amendment. It also “studies relevant data, reports, and other information compiled by the Commission staff, which may include sentencing data, case-law analysis, literature reviews, surveys of state laws, and other relevant information” (USSC, October 2009, p. 5). During a *public comment* stage, it invites public comment on proposed amendments for a two-month period by publishing them in the *Federal Register* and holds at least one public hearing during this period. Then, during a *promulgation* stage, the input that is received in response to these procedures is used to refine the proposals after the end of the comment period, and a final

vote is held that determines which amendments will be promulgated and submitted to “Congress for its review.”

Although the promulgated amendments will take effect after a six-month period of *pendency* if Congress does not act on them, Congress has the authority to change or reject them (USSC, 2009, pp. 4-5). Congress may also enact directives to the Commission, which is then “obliged to implement the directive in a manner consistent with the legislation” (USSC, 2009, p. 6). Therefore, in spite of the espoused theory that the Commission is an agency within the Judicial Branch of the federal government that exercises “independent judgment,” it seems that the content of the Federal sentencing guidelines is dictated in practice by the legislative branch. The Commission itself acknowledged this problem in its 2004 Assessment of *Fifteen Years of Guidelines Sentencing*, observing that “the frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress” (p. 73).

Proportionality, Reasonableness, and the Federal Sentencing Guidelines

Proportionality in sentencing has rarely, if ever, been raised as a significant concern for rapists, molesters, or producers of child pornography because offenders in these groups either directly perpetrated a very harmful sex offense that is condemned by the community or were intent on doing so. Those whose sole conviction is for possessing, receiving, transporting, or trafficking child pornography have not directly perpetrated a contact sex offense against a child per their conviction, however. In addition, only a few studies have collected data that bear on the assumptions that federal child pornography offenders (CPOs) have probably committed “hands-on” sex offenses against children

prior to their pornography convictions or represent a high risk for doing so upon their release from custody (Hessick, in press).

Limitations of the Federal Guidelines in Child Pornography Cases

The foregoing considerations suggest that lack of proportionality and reasonableness hold the potential for becoming serious issues with respect to the great majority of federal CPOs, who are currently sentenced under §2G2.2 of the USSGs, if it should become apparent that the relevant guidelines are not based on adequate evidence and accurate analysis (Basbaum, 2010), or that they were crafted in the service of either the executive or legislative branch of government [Mistretta v. United States, 488 U.S. 361, 407-08 (1989)]. Stabenow (July 2008), drawing in part on Baron-Evans (May 11, 2008), has advanced a strong argument that this is the case for several interrelated reasons. The following points, with a few supplementary comments we have added on the basis of our review of the relevant literature, summarize his argument.

- Only 112 CPOs were sentenced under the USSGs from 1994 to 1995 per pages 3 and 29 of the Commission's 1996 Report to Congress on *Sex Offenses Against Children*. Table 1.2 of the 1993 *Compendium of Federal Justice Statistics* (Bureau of Justice, October 1996) indicates that federal prosecution was declined, however, in another 194 cases. Only the most dangerous offenders were therefore selected for prosecution. The dangerousness of this population is illustrated by the fact that it included a substantial percentage of producers of child pornography (e.g., 20% per page 29 of the Report) and other offenders who were bold enough to seek out child pornography through the mail and by contacting suppliers, buyers, or traders rather directly (e.g., only 31% of the cases "involved the use of a computer" per page 29). The Report also provided three examples of offenders who were sentenced under the guidelines, and

none of these examples mentioned the use of a computer. This is further evidence that the focus of federal prosecutions during this early stage of application fell on relatively dangerous offenders who did not use computers in the commission of their crimes. Nonetheless, page 33 of the Report indicated that only “13 percent of pornography defendants had a history of sexual misconduct.”

- Over time, as Figure 1 shows, the number of Federal prosecutions for child pornography offenses increased far more than the number of prosecutions for other sex offenses.

Insert Figure 1 about here

- Many less dangerous and more timid offenders were prosecuted as a result of the expansion in scope portrayed in Figure 1. According to Table 17 of the Commission’s 2008 and 2009 *Sourcebooks of Federal Sentencing Statistics*, for example, only 10% to 11% of all defendants in child pornography cases were sentenced for production. Furthermore, the 2007 Bureau of Justice Statistics Bulletin on *Federal Prosecution of Child Sex Exploitation Offenders, 2006* reported that 97% of those who were sentenced in child pornography cases used computers in the commission of their crimes (p. 2) and that only 20% of all CPOs had previously been convicted of any kind of felony (p. 5). Finally, whereas federal prosecutors declined to prosecute 63% of all cases they considered between 1994 and 1995, Table 2 of the Bulletin indicated their declination rate dropped to 40% by 2006.
- The USSGs have become ever more punitive in spite of their application to a population that is less dangerous now than the population to which they were initially applied. The 2003 “PROTECT Act,” for example, “created a five-year mandatory

minimum for trafficking and receipt, raised the statutory maximum for trafficking from 15 to 20 years and for possession from five to ten years” (USSC, October 2009, p. 38). Furthermore, as Table 1 indicates, the average sentence length for first time CPOs is now over three times what it was for both first time and recidivist CPOs in 1994.

Insert Table 1 about here

- The changes that have been made to the USSGs are due in large part to congressional intervention (exemplified in 1991 by Amendment 780 to House Resolution 2622, in 1995 by House Resolution 1240, and in 2003 by the “Feeney amendment” to the “PROTECT Act”), oversampling of the most dangerous CPOs by the Commission (exemplified in the Commission’s June 1996 *Report to Congress, Sex Offenses Against Children*), and some decisions (exemplified by Amendment 664 to the USSGs) by the Commission that apparently reflected more of a desire to implement the will of Congress than to exercise its independent judgment.
- The changes that have been made to the USSGs generate sentencing ranges that are unreasonable, because it may be shown that a “typical” child pornography defendant (one who has used a computer to trade several illegal movie clips and pictures and who has obtained a pornographic picture of an 11-year old and another picture depicting bondage) will fall in a guideline range (well over 200 months) that is much greater than the range (well under 200 months) for a “hands on” sex offender who has brutally raped a nine-year old over 100 times during a two-year period and has paid her mother to hold her down. As one Circuit Court has observed, “many of the § 2G.2.2 enhancements apply in nearly all cases . . . 94.8% involved an image of a

prepubescent minor ... 97.2% involved a computer ... 73.4% involved an image depicting sadistic or masochistic content or other forms of violence ... and 63.1% involved 600 or more images ... See United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2009*” (United States of America v. Dorvee, 2010, p. 18).

- The guidelines for sentencing CPOs lack credibility in many cases. The U.S Supreme Court has recognized that “not all ... guidelines are tied to ... empirical evidence” (Gall v. United States, 552 U.S. 38, 46 n.2 (2007)). The history of the CPO guidelines shows they are not the result of the “careful study based on extensive empirical evidence” (p. 46) that would support a presumption that they are reasonable (Rita v. United States, 551 U.S. 338, 351 (2007)). The “formerly mandatory” USSGs “now serve as one factor among several courts must consider in determining an appropriate sentence” (Kimbrough, 552 U.S. at 90), and, in the interest of imposing “„a sentence sufficient, but not greater than necessary, ’ to achieve the goals of sentencing’ (United States v. Booker, 543 U.S. 220 (2005); Kimbrough, 552 U.S. at 101), courts are free to disagree with a guideline that is not the product of empirical evidence and careful study (Rita, 551 U.S. at 351, 357).

Should The Guidelines For Sentencing CPOs Be Less Punitive?

Quantitative data and case-specific decisions point to the conclusion that a fair number of judges are concerned about the lack of proportionality and reasonableness of the USSGs with respect to CPOs. In fiscal year 2009, for example, 1,660 CPOs were sentenced in cases where §2G2.2 of the USSGs applied. Sentences that were below the guideline range were imposed in 860 (52%) of these cases while only 29 sentences (1.7%) fell above the range. Several instances in which judges assigned sentences below

the guidelines were also described in a 2009 article by Mark Hansen in the *American Bar Association Journal* (July 1, 2009). Very recently, a *New York Times* article (Sulzberger, May 21, 2010) recounted a decision by the United States Court of Appeals for the Second Circuit (United States of America v. Dorvee, 2010) that was highly critical of §2G2.2 along the general lines set forth by Stabenow and “vacated a 20-year child pornography sentence by ruling that the sentencing Guidelines ... „unless applied with great care, can lead to unreasonable sentences’ ... the decision noted that the recommended sentences for looking at pictures of children being sexually abused sometimes eclipse those for actually sexually abusing a child.” The same article reported that Judge Jack Weinstein of the U.S. District Court in Brooklyn has “gone to extraordinary lengths to challenge the ... five-year sentence faced by defendants charged with receiving child pornography ... „I don’t approve of child pornography, obviously,’ he said in an interview ... but, he also said, he does not believe that those who view the images, as opposed to producing or selling them, present a threat to children ... „we’re destroying lives unnecessarily,’ he said ... at most, they should be receiving treatment and supervision.”

In 2009 the Commission “established a review of the child pornography guidelines as a policy priority for the guidelines amendment cycle ending May 1, 2010” and compiled a *History of the Child Pornography Guidelines* (October 2009) as a “first step in the Commission’s work on this priority” (p. 1). Shortly after this, the commissioners took testimony on the guidelines, including the child pornography guidelines, in hearings across the United States (Cardona, November 29, 2009; Gomez, December 22, 2009). According to U.S. District Judge William Sessions, who chairs the Commission, these hearings have elicited two opposing views (Gomez, November 29, 2009). On the one hand, “judges have been nearly unanimous that the guidelines restrict

their ability to sentence convicts based on the specifics of each case and defendant.” On the other, “police and prosecutors want them intact as deterrents to crime, and to use possible sentence reductions as incentives to win defendants’ cooperation in investigations.”

Representing the latter side of the debate, Federal Prosecutor Alexandra Gelber (July 1, 2009) responded to the articles by Hansen (July 1, 2009) and Stabenow (July 3, 2008) by claiming that “there is some statistical evidence that consumers of child pornography may also be child contact offenders” and citing a congressional finding that “child pornography is often used by pedophiles and child sexual abusers to stimulate ... their own sexual appetites ... such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer” (pp. 4-5). That her position is widely accepted is evidenced by the fact that both former President George W. Bush and former Attorney General Alberto Gonzalez, among others (Allen, October 20, 2009; Heimbach, May 1, 2002), have hypothesized that “the compulsion to collect child pornography images may lead to a compulsion to molest children, or may be indicative of a propensity to molest children” (U.S. Department of Justice, May 2006, p. 10).

More Knowledge Is Needed To Make Guideline Decisions

In April of 2010, the Commission submitted its promulgated amendments to the USSGs to Congress (USSC, April 29, 2010). At this juncture the Commissioners left the child pornography guidelines unchanged. On May 18, 2010, however, the Commission announced that it would “hold a public hearing on statutory mandatory minimum penalties in the federal sentencing system ... and their effects in the federal sentencing system” on May 27, 2010. Attorney General Eric Holder, Jr., followed up on this by

disseminating a memorandum on May 19, 2010 to all federal prosecutors that they needed to pursue a line of sentencing advocacy that “given the advisory nature of the (sentencing) guidelines ... must ... follow from an individualized assessment of the facts and circumstances of each particular case.” This position was different than that of his predecessors, who indicated that it was “essential to ... ensure that all federal prosecutors adhere to the ... Sentencing Guidelines in their ... sentencing practices” (Ashcroft, September 22, 2003) and that prosecutors “must take all steps necessary to ensure adherence to the Sentencing Guidelines” (Comey, July 2, 2004; Comey, January 28, 2005). It has also been reiterated by U.S. Attorney Sally Yates who, representing the Justice Department’s views before the Commission (Yates, May 27, 2010), observed that “for ... some child exploitation offenses, sentences have become increasingly inconsistent” (p. 7) and indicated that “we ... recognize that mandatory minimum penalties should be used judiciously and only for serious offenses and should be set at severity levels that are not excessive” (p. 9).

As the foregoing events show, the sentencing guidelines are in a state of flux. Until they are clarified — and probably re-clarified — it is likely that federal prosecutors will face more ambiguity with respect to their charging and sentencing recommendations in child pornography cases, that federal defenders will continue to press for variances from the guidelines, and that federal judges will experience the sentencing process, already one of the most difficult “judicial responsibilities” there is (Graham v. Florida, pp. 26-27, 2010), as even more challenging.

Within this context, it would seem that an infusion of information about the current population of federal CPOs would be helpful for the purpose of decision-making by judges and policymakers. Do most CPOs have a history of molesting children? Are

most likely to again become involved with child pornography after their release? Are most likely to molest a child after their release? Are CPOs indistinguishable from child molesters and rapists?

A Review of Key Research Articles on CPOs

These questions should be answerable on the basis of sufficient data collection and analysis. Unfortunately, it was difficult to address them in the past because only a few quantified studies of substantial samples of CPOs were published in the behavioral sciences. Furthermore, none of these studies focused directly on the characteristics and recidivism rates of federal CPOs who were released to the community.

Additional studies that bear on the questions raised at the end of the previous section have been published recently, and under the following points we will briefly summarize nine quantified and published articles that are either frequently referenced or that we believe are particularly informative (Elliot, Beech, Mandeville-Nordent, & Hayes, 2009; Endrass, Urbaniok, Hammermeister, Benz, Elbert, Laubacher, & Rosseger, July 2009; Frei, Erenay, & Dittman, 2005; Hernandez and Bourke, 2009; Seto, Cantor, and Blanchard, 2006; Seto & Eke, 2005; Seto, Hanson, & Babchisin, in press; Webb, Craissati, & Keen, 2007; Wolak, Finkelhor, & Mitchell, 2005). This analysis does not include qualitative research, studies that did not report data for CPOs, and studies that focused on outcome measures that we felt were largely irrelevant to our concerns.

- Wolak and colleagues (2005), pursuant to a federal grant to the National Center for Missing and Exploited Children, sent letters to a representative sample of local, state, and federal law enforcement agencies in the United States to determine how many internet-related child pornography arrests they had made in fiscal year 2000. Then they interviewed detectives about the details of 429 of these cases. Only about 14% of

these cases were prosecuted in federal courts (p. 14). In general, however, 11% were known to have previously been arrested for having committed a sex offense against a minor (p. 11%). Only 3% were known to have been diagnosed with a sexual disorder. A follow-up study was not undertaken. Overall, the researchers acknowledged (p. 34) that “there is little information about the relationship between viewing child pornography and sexually victimizing children” but nonetheless concluded that “it is reasonable to view and treat child pornography possessors as at high risk for victimizing children.”

- Elliot and colleagues (2009) analyzed the Presentence Reports of 505 internet CPOs and 526 contact sex offenders from a convenience sample who were referred by British courts for counseling in the community. Although the researchers did not carry out a follow-up study, they administered a number of psychological tests to their subjects. Eleven percent of the CPOs were known to have one or more contact sex offenses while this was the case for 24% of the contact offenders (pp. 81 and 87). Regarding group differences, Elliot and colleagues observed (pp. 87–88) that

Contact offenders are characterized by a greater number of empathy distortions and cognitive distortions than Internet offenders and a greater bias toward favorable self-description ... the lower frequency of pro-offending attitudes and beliefs that serve to legitimize and maintain sexually abuse behavior ... displayed by Internet offenders suggests that they may be unlikely to represent persistent offenders or potentially progress to ... contact sexual offenses ... this ... may ... contribute positively to Internet offenders' achievement in therapeutic interventions.

- Seto and Eke (2005) identified 201 registrants in the Ontario (Canada) Sex Offender Registry who were previously convicted of a child pornography offense and followed up on the new crimes committed by members of this group for a 30-month period. Thirty-three percent of the CPOs were “adjudicated for other kinds of offenses at the time they were adjudicated for a child pornography offense” (pp. 205 – 206). Although the authors reported that “24% of the sample had prior contact sexual offenses” (p. 205), they did not indicate the percentage of these offenses that targeted children. They did indicate (p. 207), however, that those CPOs who had been convicted of contact sex offenses either prior to the index offense or at the same time committed more new contact sex offenses during the follow-up period (9.2%) than those whose who committed only child pornography offenses (1.3%) or child pornography offenses and nonsexual offenses (2.0%).
- Webb and colleagues (2007) compared 90 CPOs and 120 child molesters from three sex offender outpatient counseling programs in London on demographic variables, offense-related characteristics, and the results of psychological testing. They also followed-up on any new crimes that were committed by members of this group for 18 months. The authors reported that “one internet offender was convicted for a general offense, and two internet offenders (3%) were convicted for further internet sexual offences ... 3% (of the child molesters) were charged ... for further violent offenses, and 2% were charged ... for further contact sexual offenses ... the breach and recall rate ... for child molesters was 17% whereas for internet offenders it was none” (p. 459). They also reported that 4% of the CPOs had previous sex offense convictions involving a child whereas this was the case for 20% of the child molesters (p. 456).

Regarding group differences, it was concluded (pp. 462-463) that

The overall findings of the follow-up indicated that child molesters were more likely to fail in all areas compared to the internet sex offenders ... internet offenders appear to be extremely compliant with community treatment and supervision sessions ... by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism.

- Frei and colleagues (2005) analyzed the criminal histories and demographic characteristics of an exhaustive sample of 33 men in Lucerne, Switzerland, who were investigated on child pornography charges after user data apprehended from a pornographic web site in the U.S. were given to Swiss authorities. None of the subjects had any prior convictions for child molestation (p. 491) and “there were no hints for prior psychiatric treatment in the files” with the exception that “one offender, who according to interviews with his relatives ... seemed to be a pedophile” (p. 492). A follow-up study was not conducted. Regarding the characteristics of their subjects, the authors concluded that

Our sample with only one unemployed person and a third of the offenders holding a superior profession ... differed from convicted perpetrators of sex crimes who showed ... below average intelligence ... (and) an annual income of less than \$25,000 USD ... the number of single men in our study (15) is striking ... it seems that ... the Internet facilitates rather a new kind of crime, namely the possession and consumption of illegal pornography, (rather) than ... indicating a general deviant life style.

- In another study that was launched after Swiss authorities received the foregoing data, Endrass and colleagues (July 2009) analyzed the criminal histories and demographic characteristics of an exhaustive sample of 231 men in Zurich, Switzerland. They also

followed-up on any new crimes that were committed by members of this group for six years. During this period “nine (3.9%) of the subjects were investigated ... for hands-off sex offenses, all of which were due to illegal pornography possession ... two subjects (.8%) were ... investigated for ... child sexual abuse” (p. 4). Prior to being apprehended for downloading pornography from the U.S. web site, “two subjects (1%) had prior convictions for hands-on sex offenses involving child sexual abuse, (and) 3.5% (n=8) had prior convictions for ... illegal pornography” (p. 4). Regarding the characteristics of their subjects, the authors concluded (pp. 5-6) that

Descriptive analyses suggest that child pornography users are less likely to be married ... foreign nationals were underrepresented ... child pornography consumers are well-educated ... only 5% of the investigated sample held an unqualified job position ... our results suggest that users of child pornography are probably well-integrated into Swiss society ... the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample – at least in those subjects without prior convictions for hands-on sex offenses.

- Seto and colleagues (2006) analyzed the criminal histories and phallometric testing responses of 100 CPOs who were assessed at a Canadian agency that “provides comprehensive evaluations to males referred as a result of illegal or clinically significant sexual behaviors” (p. 611). The authors reported that “43% of the 100 child pornography offenders included in this study had been charged with a sexual offense involving a child victim” (p. 614). Finding that the CPOs responded to the test situation with “greater sexual arousal to children” than a group of child molesters and a group of rapists, they also concluded that “child pornography offending is a valid

diagnostic indicator of pedophilia” (p. 613). They did not, however, assess their subjects with the criteria that are customarily used to diagnose Pedophilia (American Psychiatric Association, 2000) or subdivide their CPO group into those who were internet offenders and those who were not. They also acknowledged that the group of CPOs they studied may have been selected in such a way that they were “less representative of child pornography users in general” (p. 614).

- Hernandez (2000) argued that users of child pornography “can be equally predatory and dangerous as extrafamilial offenders” after he found that a group of 54 CPOs who were treated at the Butner Federal Correctional Institution disclosed many more molestations in treatment than they did when they were interviewed by presentence investigators. Bourke and Hernandez (2009) conducted a second study following Hernandez’ earlier procedures. They assessed two dependent variables from a review of the records of 155 CPOs who voluntarily participated in the Butner program, which Hernandez directed. One variable reflected the number of adjudicated and self-reported molestations reported in the presentence investigation for each CPO. The other reflected the number of adjudicated and self-reported molestations disclosed by each CPO to staff members at Butner, who apparently expected all treatment participants to make new disclosures on an ongoing basis and to pass a polygraph indicating they had “fully disclosed” their sex offenses. Participants were also told they did not have to “reveal any identifying information when listing their victims” (p. 186).

Bourke and Hernandez estimated that 26% of their subjects had previously committed either an adjudicated or nonadjudicated molestation per their presentence reports, which described a total of 75 sex crimes. They also reported that the first

figure grew to 85% when treatment disclosures were added in while “the number of reported victims known at the end of treatment ... was 1,777” (p. 187). Assuming that disclosures made in treatment reflected the “true extent” (p. 188) of the sex offense histories of CPOs, it was suggested (p. 189) that the results of the Butner studies validated the theory that CPOs harbor “pervasive and enduring” pedophilic interests that cause them to access child pornography on the Internet and that this access reinforces the “paraphilic lifestyle” of CPOs and results in “behavioral disinhibition” that makes them likely to commit more child molestations. Bourke and Hernandez also asserted that “the findings of this study underscore the importance of prison-based sex offender treatment” (p. 188).

- Seto and his colleagues averaged the results of nine published and unpublished follow-up studies to estimate the recidivism patterns of CPOs. They also averaged the results of 22 published and unpublished studies to estimate the percentage of CPOs who had committed contact sex offenses prior to being convicted of a child pornography offense. Regarding the first issue, it was reported (p. 11) that “most of the follow-up times were under 4 years ... 3.4% ... of the online offenders recidivated with a contact sexual offense and 3.6% recidivated with a child pornography offense ... 4.2% recidivated with a violent offense.” Regarding the second, it was reported (p. 10) that “official records ... for 4,464 online sexual offenders” indicated that “12.3% ... had prior contact sex offenses.” The percentage of CPOs who had committed contact sex offenses against children was not enumerated. The authors found, however, that “the proportion of prior contact offenses was significantly lower when the estimates were based on official reports ... than self-report,” that “Bourke and Hernandez (2009) was ... identified as an outlier in the self-report data,” and that “removing this study

greatly improved the model” for estimating the proportion of CPOs with prior contact offenses (p. 10). Overall, they concluded that “our results suggest there is a distinct group of online offenders whose only sexual crimes involve illegal (most often child) pornography . . . online offenders rarely go on to commit contact sexual offenses” (p. 12).

Variations in Research Designs Mediate The Validity of Research Results

The foregoing review indicates that researchers have used a variety of methods and measures in studying CPOs. Some of the features of these “research designs” produce clear-cut and useful results. Other research designs produce misleading results that should never have been disseminated. Those who wish to consult behavioral science articles to evaluate the status of research on CPOs might find it useful to consider the content of the articles they read in relation to principles that typify “good research design.” The following items, exemplified in some of the articles we have described, enumerate these principles:

1. The populations and offense patterns that are of interest need to be carefully considered and precisely specified prior to undertaking a research project.
2. Samples of CPOs should be selected for study so that they are “representative” of the populations of interest; for example, an unbiased sample of all federal CPOs who are released to probation should be examined if the intent of a research project is to reach conclusions about federal CPOs who are released to probation.
3. Data collection efforts should revolve around dependent variables that are not artifacts of the research design in which they are embedded. Variables that derive their meaning directly from how they are defined and measured should be used over other

alternatives that can only be interpreted with the aid of a dubious series of assumptions.

4. Compiling prior and new conviction rates is obviously important, but such efforts will hold even richer implications for understanding these numbers if they are supplemented by the measurement of diagnostic, demographic, psychological, or physiological constructs.
5. Comparative studies of CPOs with other sex offender groups are important for putting the significance of a set of results on CPOs into perspective.
6. The implications of the results of a research project should not be extended to issues that are beyond its scope.

Weighting the various articles in our review by the adequacy with which they have been designed, some important hypotheses about CPOs have apparently been confirmed. Over time (from 1990 to 2010) and space (Switzerland, Canada, the U.S., the U.K. and other countries), the great majority of CPOs have not had problems with sexual contact crimes prior to being convicted of a child pornography offense, and the great majority will not have post-conviction problems with the commission of sexual contact crimes. It also seems to be the case that CPOs, although more limited in their intimate social relations than others, are compliant with supervision and able to draw on substantial personal resources to benefit from treatment and rebuild their lives.

What is missing, however, is an understanding as to how federal child pornography offenders fit into this picture. The development of an adequate perspective on this issue is hindered by three obstacles. One is that a study of a representative sample of federal CPOs has yet to be published. Another is that the only papers on federal CPOs – the “Butner Studies” by Hernandez (2000) and Bourke and Hernandez (2009) –

epitomize the class of articles, mentioned in the first paragraph of this section, that are inadequately designed and consequently misleading in their results. The last is that the results of Hernandez' endeavors have been cited repeatedly in support of governmental initiatives (Department of Justice, May 2006, p. 12), political positions (Allen, October, 2009, p. 5; Gelber, July 2009, p. 6), sentencing advocacy (United States of America v. Johnson, 2008, p. 5); and Congressional testimony (Heimbach, May 2002, pp. 2-3; Hernandez, September 2006, p. 5).

In light of the widespread citation of the Butner reports, the first step towards the development of a more adequate conceptualization of federal CPOs is to suppress the recitation of "sound bites" referring to these papers by explaining how their results were artifacts of a flawed research design. A number of different circumstances frame this explanation. For one thing, the context in which Hernandez "collected data" was one where the welfare of his "subjects" was dependent on their standing in the program he directed. From counseling some CPOs who previously participated in the Butner program we are also aware that they were motivated to avoid program termination because this would have resulted in their being placed in the general prisoner population, where they would be harassed as sex offenders. For another, as director, Hernandez could cast the definition of a sex offense in terms that were so "elastic" that it covered incidents – such as a college freshman dating a high school junior - that the average person might not think of as sex offenses. It was also impossible to verify the reliability of self-reports, because data that would identify victims were never collected. For still another, former Butner patients have told us that they were expected to disclose new offenses on an ongoing basis as part of their treatment participation and that they were also expected to pass the full disclosure polygraph that Bourke and Hernandez (2009) described in the

“Measures” section of their paper (p. 186). This is a significant feature, because a primary technique that is relied upon to pass this type of exam is to disclose many more sex offenses than have ever been perpetrated (Abrams, 1991).

So how, given the foregoing circumstances, were the Butner results produced as artifacts of Hernandez’ research design? The explanation revolves in large part around the fact that subjects in psychological experiments will act the way a researcher wants them to act if they know what he or she hopes to find. Aspects of the research situation that tip subjects off to these hopes are referred to as “demand characteristics” (Orne, 1962; Fillenbaum, 1966). In the Butner research, it was a simple matter for those in the treatment program to figure out what Hernandez wanted from them. This “demand” was reinforced by expecting participation in a polygraph examination where overdisclosure is generally encouraged and by an awareness that severe disadvantages might accrue to those who, for whatever reason, were terminated from the program. Overdisclosure was also encouraged by making it impossible to verify which reports were accurate and which were not.

Considering these circumstances, it seems obvious that almost any offender faced with the foregoing circumstances would generate numerous disclosures, even if the great majority were false. Hernandez had the opportunity to test whether this was the case by giving those who participated in his second study different instructions than he gave to his first sample. He could have, for example, told his second sample that they would not be placed in the general prison population under any circumstances, that they were not expected to make ongoing disclosures or pass a polygraph on their disclosures, that he only wanted them to be totally honest, and that he wanted to collect victim information to verify that this was the case. Had he achieved his original results after exercising some

of these options he could have claimed that his results were not due to demand characteristics. He did not do so, however, and he has not explained why he unnecessarily repeated the operations in his first study rather than varying them so that he could test the adequacy of his research design.

The best explanation of Hernandez' results about prior contact sex offenses by CPOs is therefore that they were artifacts of inadequate research design, which has led at least one judge to conclude that the "Court can find no error in (the) conclusion that the Butner Study ... „doesn't meet scientific standards for research, and is based upon, frankly, an incoherent design for a study'" (United States v. Johnson, p. 18).

It is also the case that the number of self-disclosed incidents of nonadjudicated sex crimes has never been regarded as an adequate standard for estimating the risk that sex offenders pose with respect to child molestation. That status is reserved for post-apprehension recidivism in the form of new arrests or convictions. In light of the importance of this measure, Bourke and Hernandez also did not adequately address the issue of dangerousness because they did not collect recidivism data, though they are well situated to do so.

After putting the inadequacies of the Butner studies in perspective, the second step towards developing a more adequate conceptualization of federal CPOs entails the collection of data on the demographic features, sex offense histories, and sexual recidivism rates of a representative sample of federal CPOs. The next section describes the characteristics of the samples that we studied for this purpose and presents the results we obtained. We also presented portions of this section at the 2009 meeting of the *Association for the Treatment of Sexual Abusers* (Wollert, Waggoner, & Smith, 2009, October).

Prior History and Recidivism Among Federal CPOs

Background Information and Sample Characteristics. Both the first and third members of our research team have provided outpatient treatment services to offenders on federal supervision pursuant to contracts with the federal government that each have held for many years. One of our programs served probationers who live in a large metropolitan area on the west coast while the other served a more rural population who live in the Midwest. Seventy-two men were referred to our programs during our tenure as federal contractors. Most of these clients were referred after they completed a period of incarceration for being convicted of a child pornography offense. Others were referred prior to being adjudicated on child pornography charges and were either placed on probation in the community or eventually sent to prison after a period of pretrial supervision that sometimes lasted from one to two years. Three of the referrals we received were convicted of producing child pornography and thus were sentenced under §2G2.1 of the USSGs. The rest were sentenced under §2G2.2.

Since almost all treatment expenses were covered under federal contract, very few referrals elected to seek out other providers. We therefore regard the cohorts that we studied as being representative of the larger population of federal CPOs. Although we also provided services to federal supervisees who were convicted of or charged with other sexual exploitation offenses, we did not include these men in our database. Our database was compiled in September of 2009 from presentence investigations, police records, charging documents, psychological evaluations, and treatment records.

Demographic Data and Past Patterns of Criminality. As the first step in our analysis, we compiled data on various risk factors that are included in Static-99, an actuarial test that is used in evaluations of contact sex offenders to estimate their chances

of sexually recidivating (Hanson & Thornton, 2000). We found that our clients, on the average, were 48 years old. None of our clients was convicted of a violent offense when sentenced on the child pornography charges. One was convicted of committing a violent offense prior to his pornography conviction, and two were sentenced on four or more separate occasions before their pornography convictions. Twenty-five of our clients had never lived with another person in a committed relationship for at least two years.

We also compiled information about seven additional patterns of sexual offending, presented in Table 2, from our records. Ten subjects had prior convictions for contact sex offenses. Two had a prior conviction for a child pornography offense. Three had previously been convicted of either public indecency, peeping, or both. Six were convicted of a contact sex offense when they were convicted of the index pornography offense. Only one, however, used the Internet to arrange a meeting with a minor female.

Seventy-two percent (52 offenders) of all supervisees were negative for patterns of sexual conduct problems beyond their child pornography convictions. Furthermore, the patterns in Table 2 suggest that the 28% of supervisees in this study who were positive for additional sexual conduct problems did not commit a broad range of sex offenses.

Insert Table 2 about here

Patterns of Recidivism Over A Four-Year Follow-up. As the second step in our analysis, we determined the number of months that each federal supervisee had “survived” in the community the last time (September 1, 2009) we updated our data base. This period ended whenever a supervisee absconded, died, was taken into custody for a supervision violation, was sentenced to prison, or was charged with a new sex offense.

Otherwise, it ended on the closing date. Table 3 breaks down the months that each

supervisee was at risk by his supervision performance and his recidivism status. Over an average span of 4.0 years, it was found that one out of 72 CPOs was taken into custody for possessing child pornography. Seven months after the closing date we learned that a second client had also been taken into custody for the same reason, so we modified Table 3 to reflect this event. Another CPO who was on active supervision was also apprehended for the commission of a non-contact sex offense other than the possession of child pornography. None of the CPOs were arrested on charges of child molestation, however, and no one who had successfully completed supervision was charged with either a contact or non-contact sex offense.

Insert Table 3 about here

Conclusion

This article was premised on the belief that more research needs to be carried out on CPOs in general and on federal CPOs in particular to adequately address problems associated with the USSGs. After reviewing a number of issues related to the USSGs we summarized several key articles about CPOs and argued that the results of the Butner studies that have been conducted on federal CPOs are harmful for the purpose of decision making on this issue. We also presented demographic, criminal history, and recidivism data for a representative sample of federal CPOs.

This is the first report that, to our knowledge, has been compiled on the treatment performance and offense patterns of individuals referred to federally-funded outpatient treatment programs after being charged with or convicted of a child pornography offense.

Whereas research by the U.S. Department of Justice (Langan, Schmitt, & Durose, 2003)

indicates that over 3% of child molesters released to the community are rearrested for another contact sex crime against a child during a 3-year risk period, none of the CPOs in the present study were rearrested for this type of crime during a 4.0 year survival period that censored the data of offenders who died or were taken into custody for other offenses. Since survival analysis generates larger recidivism estimates than risk period analysis (Prentky, Lee, Knight, & Cerce, 1997), this finding indicates that CPOs differ from child molesters.

The results of this study are also consistent with the results of other follow-up studies that show that CPOs do not represent a high risk of recidivism and do not have florid or violent criminal histories. Furthermore, consistent with other findings, it has been our experience that the great majority of offenders in this group generally do quite well in treatment, supervision, and post-supervision, and are able to conform their behavior to society's expectations. Their responsivity to outpatient treatment, and thus the value of treatment, is reflected in the very low rate of contact sex offenses (0%) that were recorded in the study at hand and in another follow-up study that recruited CPOs from three different outpatient treatment programs (Webb et al., 2007). Finally, having interacted on at least a weekly basis with most of our clients for years, our impression is that very few – perhaps somewhere between 10 to 15 percent – meet the diagnostic criteria for Pedophilia (American Psychiatric Association, 2000). We therefore believe it is precipitous to claim that the use of child pornography may be taken as an indicator of Pedophilia (Seto et al., 2006) in the absence of research on a representative sample of federal CPOs in which physiological and psychological testing are combined with true diagnostic assessment.

The present results confirm, however, that a relatively large proportion of CPOs have never been involved in a committed relationship. This, in turn, suggests that withdrawal, social isolation, or disrupted social relationships may be significantly related to the commission of child pornography offenses for many CPOs. Treatment of those supervisees who fall in this category might therefore place additional emphasis on the development of their social skills and on the implementation of plans for helping them effect a long-term integration with the larger community that is responsible, meaningful, and stable.

References

- Abrams, S. (1991). The use of polygraphy with sex offenders. *Annals of Sex Research, 4*, 239-263.
- Allen, E. (October 20, 2009). Written testimony to the United States Sentencing Commission. Retrieved from http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4144.
- American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed. -TR). Washington, D.C.: Author.
- Ashcroft, J. (2003, September 22). Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencings. Retrieved from <http://www.crimelynx.com/ashchargememo.html>
- Baron-Evans, A. (2008, May 11). Rita, Gall and Kimbrough: A Chance for Real Sentencing Improvements. Retrieved from http://www.fd.org/pdf_lib/Rita%20Gall%20Kimbrough%20Sentencing%20Strategies.5.11.08.pdf
- Basbaum, J. (2010). Inequitable sentencing for possession of child pornography: A failure to distinguish voyeurs from pederasts. *Hastings Law Journal, 61*, 1281-1306.
- Bourke, M. L. & Hernandez, A. E. (2009). The “Butner Study” redux: A report of the incidence of hands-on victimization by child pornography offenders. *Journal of Family Violence, 24*, 183-191.

Bureau of Justice Statistics. (October 1993). Compendium of Federal Justice Statistics, NCJ 160089.

Bureau of Justice Statistics (October 1996). Compendium of Federal Justice Statistics. Retrieved from <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=649>.

Bureau of Justice Statistics (December 2007). Federal Prosecution of Child Sex Exploitation Offenders. Retrieved from <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=886>.

Cardona, F. (November 29, 2009). Federal judges argue for reduced sentences for child-porn convicts. *The Denver Post*

Comey, J. B. (July 2, 2004). Departmental Legal Positions and Policies in Light of *Blakely v. Washington*. Memorandum to all Federal Prosecutors. Retrieved from www.aclu.org/cpredirect/40834_comey_July_2_2004

Comey, J. B. (January 28, 2005). Department Policies and Procedures Concerning Sentencing. Memorandum to all Federal Prosecutors. Retrieved from [http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/\\$FILE/DAGMemoonBooker1.pdf](http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/$FILE/DAGMemoonBooker1.pdf)

Elliott, I. A., Beech, A. R., Mandeville-Norden, R., & Hayes, E. (2009). Psychological profiles of internet sex offenders: Comparisons with contact sexual offenders. *Sexual Abuse: A Journal of Research and Treatment, 21*, 76-92.

Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., & Rossegger, A. (2009). The consumption of Internet child pornography and violent and sex offending. *BMC Psychiatry, 9*, 43-50. doi: 10.1186/1471-244X-9-43.

Faust, E., Renaud, C., & Bickart, W. (2009, October). *Predictors of re-offense among a sample of federally convicted child pornography offenders*. Paper presented at the 28th Annual Conference for the Association of the Treatment of Sexual Abusers, Dallas, Texas.

Fillenbaum, S. (1966). Prior deception and subsequent experimental performance: The "faithful" subject. *Journal of Personality and Social Psychology, 4*(5), 532-537.

Gall v. United States, 1287, S. Ct. 586 (2007).

Gelber, A. (2009, July). Response to "A Reluctant Rebellion". Open letter retrieved on September 1, 2009, from <http://www.usdoj.gov/criminal/ceos/ReluctantRebellionResponse.pdf>

Gomez, A. (December 22, 2009). Judges seek flexibility in child porn cases. *USA Today*.

Graham v. Florida, 560 U. S. ____ (2010).

Hansen, M. (2009, June). A reluctant rebellion. *American Bar Association Journal*, 95(6), 54-59.

Hanson, R. K., & Thornton, D. (2000). Improving risk assessments for sex offenders: A comparison of three actuarial scales. *Law and Human Behavior*, 24, 119-136.

Hernandez, A. (September 26, 2006). Statement Before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce United States house of Representatives Concerning "Sexual Exploitation of Children Over the Internet: The Face of a Child Predator and Other Issues." Retrieved from <http://www.ccoso.org/library%20articles/HernandezTestimonyCongress.pdf>

Hernandez, A. (2000, November). *Self-reported contact sexual offenses by participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet sex offenders*. Paper presented at the Annual Conference of the Association for the Treatment of Sexual Abusers, San Diego, CA.

Hessick, C. B. (in press). Disentangling child pornography from child sex abuse. *Washington University Law Review*. Retrieved from <http://ssrn.com/abstract=1577961>.

Howitt, D. (1995). Pornography and the paedophile: Is it criminogenic? *British Journal of Medical Psychology*, 68(15-27).

Internet Child Pornography: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives, 107th Cong. (2002) (testimony of Michael J. Heimbach). Retrieved from www.fbi.gov/congress/congress02/heimbach050102.htm

Kimbrough v. United States, 125 S. Ct. 558, 567 (2007).

Langan, P. A., Schmitt, E., & Durose, M. (2003). Recidivism of sex offenders released from prison in 1994. Washington, DC: U.S. Department of Justice Retrieved from (<http://www.ojp.usdoj.gov/bjs/>).

Mandatory Minimum Sentencing Statutes. (2010, May 27). Hearing Before the United States Sentencing Commission (Testimony of Sally Quillian Yates, United States Department of Justice). Retrieved from www.ussc.gov/AGENDAS/20100527/Testimony_Yates_DOJ.pdf

Mistretta v. United States, 488 U.S. 361, 407-408 (1989).

Orne, M. T. (1962). On the social psychology of the psychological experiment: With particular reference to demand characteristics and their implications. *American Psychologist*, 17, 776-783.

- Prentky, R. A., Lee, A., Knight, R., & Cerce, D. (1997). Recidivism rates among child molesters and rapists. *Law and Human Behavior, 21*, 635-659.
- Pro-secutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”), codified at 18 U.S.C. 3553(b)(2)(2004)..
- Quayle, E., & Taylor, M. (2001). Child seduction and self-representation on the Internet: A case study. *Cyber Psychology and Behavior, 4*(5), 597-609.
- Quayle, E., & Taylor, M. (2002). Child pornography and the internet: Perpetuating a cycle of abuse. *Deviant Behavior: An Interdisciplinary Journal, 23*, 331-361.
- Rita v. United States, 127 S. Ct. 2456 (2007).
- S. AMDT.780. Amends: H.R.2622.
- Sentencing Reform Act of 1984 (Pub. L. No. 98-473, 98 Stat. 1987 codified as amended in scattered sections of 18, 28, and 29 U.S.C).
- Seto, M. C., & Cantor, J. M., Blanchard, R. (2006). Child pornography offenses are a valid diagnostic indicator of pedophilia. *Journal of Abnormal Psychology, 115*(3), 610-615.
- Seto, M. C., & Eke, A. (2005). The criminal histories and later offending of child pornography offenders. *Sexual Abuse: A Journal of Research and Treatment, 17*, 201-210.
- Seto, M. C., Hanson, R. K., & Babchishin, K. M. (in press). Contact sexual offending by men with online sexual offenses. *Sexual Abuse*.
- Sex Crimes Against Children Prevention Act of 1995 (Pub. L. No. 104-72, (Dec. 23, 1995; 109 Stat. 774) S. 1465/Public Law 104-72.
- Stabenow, T. (July 3, 2008), Deconstructing the myth of careful study: A primer on the flawed progression of the Child Pornography Guidelines. Retrieved from <http://mow.fd.org/3%20July%202008%20Edit.pdf>
- Sulzberger, A. G. (2010, May 21). Defiant Judge Takes on Child Pornography Law. *The New York Times.com*. Retrieved www.nytimes.com/2010/05/22/nyregion/22judge.html
- United States Sentencing Commission (June 1996). Report to Congress: Sex Offenses Against Children, Findings and Recommendations Regarding Federal Penalties. Retrieved from http://www.ussc.gov/r_congress/SCAC.htm

United States Sentencing Commission (November 2004). Fifteen Years of Guidelines Sentencing. Retrieved from http://www.ussc.gov/15_year/15_year_study_full.pdf

United States Sentencing Commission (2008). Sourcebook of Federal Sentencing Statistics. Retrieved from <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>

United States Sentencing Commission (2009). Sourcebook of Federal Sentencing Statistics. Retrieved from <http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm>

United States Sentencing Commission (2009). 2009 Federal Sentencing Guidelines Manual. Retrieved from <http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm>

United States Sentencing Commission (2009). Sourcebook of Federal Sentencing Statistics, Table 28, <http://www.ussc.gov/ANNRPT/2009/Table28.pdf>

United States Sentencing Commission (October, 2009). History of the Child Pornography Guidelines. Retrieved http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf

United States Sentencing Commission (April, 2009). Sentencing Guidelines for the United States Courts. Retrieved www.ussc.gov.

United States Department of Justice (May, 2006). Project Safe Childhood. Retrieved www.projectsafefchildhood.gov/publications/introductionwcover.pdf

United States v. Booker, 543 U.S. 220 (2005).

United States v. Dorvee, Docket No. 09-0648-cr (2d Cir. May 11, 2010).

United States v. Michael Paul Johnson. No 4:07-cr-00127 (S.D., Iowa Central, December 3, 2008).

Yates, S. Q. (May 27, 2110). Testimony of the United States Department of Justice

Webb, L., Craissati, J., & Keen, S. (2007). Characteristics of Internet child pornography offenders: A comparison with child molesters. *Sexual Abuse: A Journal of Research and Treatment*, 19, 449-465.

Wolak, J., Finkelhor, D., & Mitchell, K. J. (2005). Child-pornography possessors arrested in Internet-related crimes. Findings from the Online Victimization Study. Retrieved from http://www.missingkids.com/en_US/publications/NC144.pdf

Wollert, R. W., Waggoner, J., & Smith, J. (2009, October). *Child pornography offenders do not have florid offense histories and are unlikely to recidivate*. Poster session presented at the annual meeting of the Association for the Treatment of Sexual Abusers, Dallas, TX.

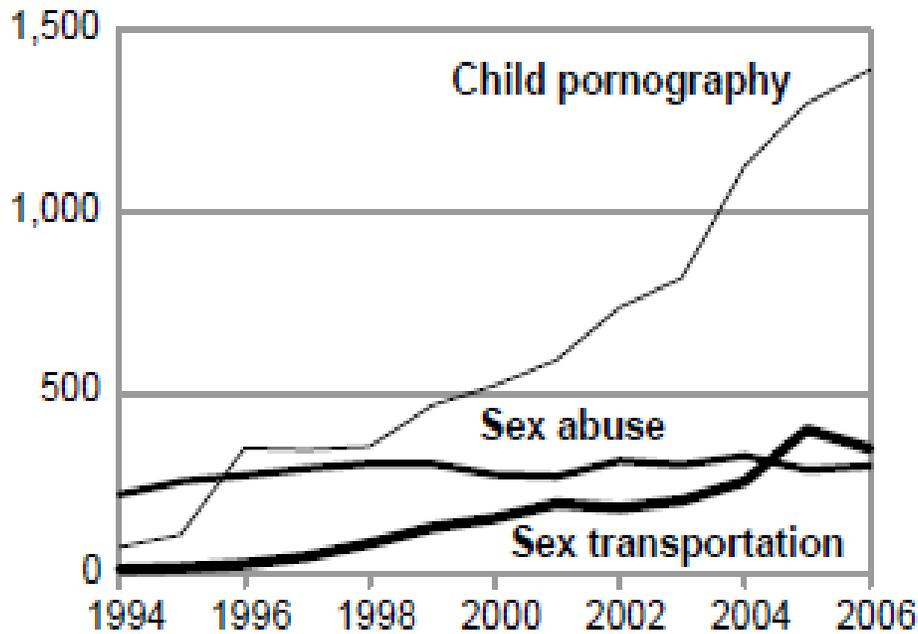


Figure 1. The number of federal prosecutions for child pornography offenses where matters with a child exploitation offense was the lead charge. Source: Executive Office for U. S. Attorney. National LIONS database, fiscal year 2006 as reported by Bureau of Justice Statistics Bulletin (December, 2007).

Table 1
Sentences for federal child pornography offenders in the mid-1990s versus 2008.

Year	Types of Child Pornography Offenses	<u>N</u>	Average # of months
1994 & 1995 ^a	Possession	22	15
1994 & 1995 ^a	Distribution	66	29
1994 & 1995 ^a	Production	24	79
1994 & 1995 ^a	For all child pornography offenders	112	36
2008 (FY) ^b	For first-time pornography recidivists	1,620	122
2008 (FY) ^b	By first-time offenders	1,295	112

^aUSSC, 1996 Table I. ^bUSSC, 2008 Table 14.

Table 2

Types of sex offenses committed by 72 federal child pornography offenders in addition to an index offense for child pornography

ID#	1. Prior sex contact crimes(#)	2. Prior PCP* crimes(#)	3. Prior exposure crimes(#)	4. Prior peeping crimes(#)	5. The index crime was for a contact sex crime & PCP*.	6. An attempt was made to meet with a minor.	7. The victim was a family member.
6				1			
7	1						No
8	1						No
14					Yes		Yes
22	1						Yes
23	2						Yes
31					Yes	Yes	No
32	1						Yes
35	1						Yes
37	1						No
41					Yes		No
45		1	1				No
48			1	1			No
54		1					No
57	1				Yes		No
62	1						Yes
65					Yes		Yes
66					Yes		No
70						Yes	
73	1						No

*PCP = Possession of child pornography or a more serious child pornography offense

Table 3

Summary of Recidivism Status and Supervision Performance of 72 Child Pornography Offenders Referred to Two Different Federally Funded Outpatient Treatment Programs

Months at risk		Abbreviations
0 – 12	x x x x x x x x x	x = no new contact or non-contact sex crimes
13 – 24	x x x x x x x x x B S A C	
25 – 36	x x x x x x x x C	S = taken into custody for personal safety (SV*)
37 – 48	x x x x x x x x x x x x x x x x	
49 – 60	x x x x x	A = had adult pornography (SV)
61 – 72	x x x x x x	B = had stories about sex with children (SV)
73 – 84	x x x	
85 – 96	x x x N	C = had child pornography
97 – 108	x x	
109-120	x	N = committed a noncontact sex offense
121-132	x	
133-144	x	
Over 144	x	

*SV = supervision violation.

Author Information

Dr. Richard Wollert is a Research Professor of Psychology at Washington State University Vancouver and a psychologist in independent practice. His e-mail address is rwwollert@aol.com and he may be contacted by telephone at 360.737.7712.

Dr. Jacqueline Waggoner is an Associate Professor of Education at the University of Portland. Her e-mail address is waggoner@up.edu and she may be contacted by telephone at 503.943.8012.

Dr. Jason Smith is the Director of the Iowa Sex Offender Civil Commitment Unit and a psychologist in independent practice. His e-mail address is jsmith4@dhs.state.ia.us and he may be reached by telephone at 712.225.6948.

For further information please contact Dr. Wollert.