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

Re: **Public Comment on Proposed Amendments for 2011**

Dear Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published by the Commission on January 19, 2011. At the public hearings on February 16, 2011 and March 17, 2011, we submitted written testimony on the proposals, copies of which are attached and incorporated as part of our public comment. We have also attached our follow-up letter on the fraud amendments as well as our October 2010 submission. We expand on that testimony as necessary here to both address issues raised during the hearings and to clarify further our position on the proposed amendments and issues for comment.

I. Drug Quantity Table

A. Lower the Base Offense Levels in the Drug Quantity Table by Two.

In previous submissions to the Commission in October 2010 and in written testimony submitted this year, the Defenders set forth in detail the problems associated with the current Drug Quantity Table. Put simply, it punishes defendants more severely than Congress intended in the Anti-Drug Abuse Act of 1986 and more harshly than necessary to serve the purposes of sentencing at 18 U.S.C. § 3553(a).

We urge the Commission to take the following two steps to address these issues. First, tie the base offense levels for the mandatory minimum quantities of crack cocaine (28 grams and 280 grams) to the 2007 offense levels – 24 and 30. The Commission may set the base offense levels for crack two levels lower because nothing in the Fair Sentencing Act ("FSA") requires an 18:1 ratio between crack and cocaine powder. Second, reduce by two the offense levels for all

other drugs.[1] Over the years, many of the factors for which drug quantity was a proxy[2] have been given independent weight with the addition of fourteen specific offense characteristics and aggravating role adjustments. The FSA adds even more enhancements that are given independent weight. When these factors are added to the drug quantity level, the net result is a disproportionate increase in prison time. Many cases will trigger application of one or more enhancements – *e.g.*, possession of a weapon, use of violence, maintaining an establishment – with the effect of further punishing the defendant for the same conduct for which drug quantity already serves as a proxy.

The net result of piling on aggravating factors without a concomitant decrease in the Drug Quantity Table is an excessive increase in sentences.[3] This result stands in direct contrast to the congressional intent of the Anti-Drug Abuse Act, as described in the legislative history and the Commission's reports. Congress intended for wholesalers and traffickers to be sentenced to five and ten year terms, respectively.[4] Such sentences, however, are routinely meted out to lower-level functionaries and retailers.

We also note our previous observation that the drug quantity thresholds were not anchored to offense levels 26 and 32 because the Commission made a considered judgment that those offense levels best represent the seriousness of the conduct.[5] According to the Commission, it set the base offense levels for first offenders "slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities." [6] As discussed in Mr. Skuthan's testimony, the data show that lowering the offense levels for crack cocaine in 2007 did not change the plea rates for crack cocaine offenses. Nor is there any evidence that the rate of substantial assistance departures was affected by the reduction in offense levels.[7] There is no reason to believe that the rate would

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[1] This amendment would keep the ratio at 18:1.

[2] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* vii (2002) ("current penalty structure accounts for certain assumed harmful acts in the quantity-based penalties").

[3] A similar point has been made with respect to the fraud guideline, which has sixteen specific offense characteristics in addition to loss. *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167, 170 (2008).

[4] See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* vii, 6-7 (2002).

[5] The Department baldy asserts that the drug quantity "*is* a valid *initial* measure of the seriousness of the criminal conduct." Statement of Laura E. Duffy Before the U.S. Sentencing Comm'n, Washington, D.C., at 17 (Mar. 17, 2011) [hereinafter Duffy Statement] (emphasis in original). It offers no support for this claim and does not acknowledge the Commission's own statement that the drug quantity table was set two levels higher than the mandatory minimum levels to induce defendants to plead guilty or otherwise cooperate. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

[6] USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

[7] USSC, Monitoring Dataset.

change for any drug type if the Commission were to lower by two all levels in the Drug Quantity Table.

The Department suggests that, before reducing the offense levels in the Drug Quantity Table by two levels, the Commission should "study the results" of last year's amendments, which slightly moved Zones B and C and made alternatives to incarceration more available for certain drug offenders.[8] We are puzzled by the Department's reasoning given that all of the available evidence shows that very few offenders sentence under §2D1.1 will benefit from those amendments. The vast majority of drug defendants receives, and will continue to receive, notwithstanding the amendments, sentences in Zone D.[9] As discussed above and in Mr. Skuthan's testimony, more than 50% receive sentences higher than required by mandatory minimum sentences. In 2009, only 3.2 percent of drug trafficking offenders (746 of 22,978 offenders) were in Zone C rather than D because of the recent expansion of the availability of split sentences or alternatives to imprisonment.[10] Over 90 percent of drug trafficking offenders continued to fall in Zone D, in which the guidelines recommend a sentence of imprisonment for the full minimum term. If the offense level for all drug quantities had been reduced by two levels in 2009, only 836 additional drug trafficking offenders would have fallen in Zone C.[11] And this is a conservative estimate that does not take account of changes in law enforcement or prosecution practices that are likely to increase the amount of drugs for which defendants are held accountable. Even marijuana offenders, who received the lowest sentences of all drug offenders, received an average prison term of 36.2 months, with median terms of 24 months – sentences all within Zone D. USSC, *2009 Sourcebook of Federal Sentencing Statistics*, fig. J (2009) [hereinafter *2009 Sourcebook*].

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[8] Duffy Statement at 18.

[9] In response to compelling testimony from Mary Price, Vice President and General Counsel for Families Against Mandatory Minimums, about women who are serving lengthy prison terms for drug trafficking, Judge Saris inquired whether any of the sentences were based solely on quantity. Defenders over the years have represented countless defendants – women and men – who have performed low-level drug trafficking functions, but still received long prison sentences because of the quantity of drugs involved in the offense. These include a woman who received a ten year sentence for merely pointing out to a courier, at a "friend's request," a suitcase full of 11 kilograms of cocaine; a nineteen-year-old Colombian woman who received a ten year sentence (with a minor role adjustment) after her aunt duped her into carrying a suitcase with 4.5 pounds of heroin; a 50-year-old mother who is serving a fifty-one month sentence (after safety-valve) for attempting to smuggle cocaine; and a severely emotionally disturbed woman with borderline intelligence who was sentenced to ninety months for being a passenger in car with 8.15 kgs of methamphetamine.

[10] USSC, FY2009 Data Monitoring Set (13 of these were still subject to mandatory minimum statutory sentences of greater than 12 months, absent application of the safety valve or a reduction for substantial assistance).

[11] *Id.* (47 of these would still have been subject to mandatory minimum statutory sentences of greater than 12 months, absent application of the safety valve or a reduction for substantial assistance).

B. Create a Role-Driven Guideline.

Judge Saris posed a question at the March 17 hearing about how the Commission might construct a guideline that was not so driven by drug quantity. We are eager to work with the Commission in formulating a proposal for a new drug guideline that more fully considers role in the offense and places less emphasis on drug quantity. However, we have not prepared a comprehensive proposal for such a reform because we did not understand it to be within the question for comment. As a start, we believe the Commission has already laid the groundwork for a drug guideline that reduces the importance of quantity and increases the emphasis on role.

The Commission has long used classifications of defendants "functional roles" in its research and analysis. In its 2002 and 2007 reports to Congress on cocaine sentencing,[12] the Commission identified twenty-one categories of trafficking functions, reviewed presentence reports, and categorized drug offenders according to their functional roles. In doing so, the Commission set forth multifaceted definitions to describe each function. For example, a wholesaler was defined as one who "sells more than retail/user-level quantities in a single transaction"; a street-level dealer was defined as one who "distributes quantities directly to the user"; a courier was one who "transports or carries drugs with the assistance of a vehicle or other equipment." [13] With these definitions, the quantity of drugs involved in a single transaction was far more relevant to the analysis than the aggregate drug quantities for which the defendant was held responsible under the relevant conduct rules of USSG §1B1.3. While more work would have to be done to create a role-based guideline, we believe the trafficking functions identified in the Commission's previous reports provide a good foundation for such a discussion.[14]

C. Deterrence Research Supports Lowering Base Offense Levels by Two.

Ex Officio Commissioner Wroblewski raised a question at the March 17 hearing regarding the work of Professor David Kennedy and the role severe federal penalties play in drug market interventions. The question seemed to suggest that maintaining the Drug Quantity Table at its current levels fit into strategies that have proven effective in reducing crime by forming community partnerships and engaging "stand-out offenders" with community interventions. In response, Marc Mauer, Executive Director of The Sentencing Project, described how the Kennedy model increases the certainty of punishment by making it clear that the violation will result in punishment.

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[12] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy*, tbl. C-1 (2002); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007). *See also* USSC, *Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); USSC, *Report of the Drug Working Group Case Review Project* (1992); USSC, *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).

[13] *Id*.

[14] A role-based drug guideline would account for mandatory minimum sentences through operation of USSG §5G1.1(b) (statutorily required minimum sentence trumps maximum of applicable guideline range).

A review of Professor Kennedy's testimony before the Commission shows that severe penalties for federal drug offenders are not necessary to achieve successful drug market interventions, and that federal penalties play a very small role in them. As Professor Kennedy described:

> It's not necessarily high-level sanction. There's usually a bit of federal enforcement in it, but it's mostly state. The point turns out to be, and this is sort of classic deterrence theory, if they know it's coming, if the know it's credible, if they believe it and if the sanction rises to a level that they care about, they're not going to do it. And it turns out in practice that knowing for a fact that you're going to get a low-level state conviction tomorrow if you do this thing means more than a three-strikes penalty five years from now.

Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 171 (Sept. 9, 2009) (David Kennedy).

Professor Kennedy also told the Commission, it "can lower the sentences without having different outcomes." *Id*. at 184. In other words, lower federal sentences are effective in successful drug market intervention strategies. Professor Kennedy's work is consistent with the deterrence literature discussed in the attached testimony of Mr. Welch. We strongly encourage the Commission to consider the deterrence research and reject the myth that more severe sanctions are necessary to deter. Severe sanctions should be reserved for those offenders who must be incapacitated to ensure public safety.

II. Mitigating Role

D. The Commission Should Revise the Mitigating Role Guideline.

At the March 17 hearing, Judge Hinojosa suggested that part of the explanation for the differences among judges in application of the mitigating role adjustment might be policy disagreements among judges about the appropriateness of the adjustment, not lack of clarity in the guideline commentary. Judge Hinojosa's comments appeared to suggest that since judges may disagree with a guideline as a matter of policy *after* correctly calculating it, then there is no problem with judges interpreting and applying a guideline in different ways (some incorrectly).

The Commission should not passively tolerate obvious differences in the way judges calculate the advisory guidelines under similar factual scenarios.[15] The Commission must make every effort to construct a clear guideline. Under the advisory guideline system, the guideline range is the starting point and the initial benchmark, *Gall v. United States*, 552 U.S. 38, 49 (2007), and the guideline range must be calculated correctly. *Id*. at 51. The proper functioning of the guideline system depends upon a meaningful dialogue between the Commission and judges. *See Rita v. United States*, 551 U.S. 338, 350 (2007); 28 U.S.C. § 994(o); USSG Ch. 1, Pt. A, Subpt. 2 ("Continuing Evolution and Role of the Guidelines"). Through departures and variances, judges provide the Commission with the feedback it needs to reexamine and modify

[15] Whether those judges would then impose the same sentence or agree that the correctly applied guideline was sound is an entirely different matter.

the guidelines to ensure that they achieve the purposes of sentencing. *See United States v. Booker*, 543 U.S. 220, 264 (2005); *Rita*, 551 U.S. at 358; *Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring). In turn, the Commission should provide judges advice, which is based on that judicial feedback and other sound empirical evidence. "[O]ngoing 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).

For the system to work, the Commission must be able to determine when judges decline to follow a guideline, and if they do so, whether it is because (1) the guideline lacks clarity; (2) circuit case law interprets the guideline incorrectly; or (3) the guideline "fails properly to reflect § 3553(a) considerations." *Rita*, 552 U.S. at 351. The Commission has no basis from which to conclude that judges decline to apply the mitigating role adjustment because of an unstated policy disagreement, which itself would be contrary to the requirements that judges correctly calculate the guideline range, *Gall*, 552 U.S. at 51, and openly state any policy disagreement with a guideline, *Spears v. United States*, 129 S. Ct. 840, 844 (2009). To the contrary, ample evidence exists that judges want greater clarification of the mitigating role guideline so they can better understand the circumstances where it applies.[16] Similarly, a review of case law shows that a number of courts have adopted a narrow interpretation of the guideline, which appears to be at odds with what the Commission intended.[17]

Consistent decisions regarding the proper application of the mitigating role adjustment are especially important because the quantity-based drug guidelines fail to properly target serious drug traffickers and instead treat low-level offenders as if they were wholesalers or kingpins.[18] Mitigating role adjustments are an important mechanism to ensure that persons who perform functions such as couriers, mules, off-loaders, lookouts, gophers, and other lower-level roles, are not punished at the level Congress intended for "major" or "serious" traffickers.[19]

The data reveal that the mitigating role adjustments are not operating as they were intended. Judges sentence many offenders who perform low-level functions, but few of those offenders receive mitigating role adjustments. In 2005, for example, couriers/mules (33.1%) and renter/loader/lookout/enablers/users (12.7%) combined to account for more than 45.8 % of

[16] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 9 (2010).

[17] Skuthan Testimony at 23-28.

[18] *Id*. at 11.

[19] The House Judiciary Subcommittee on Crime defined major and serous traffickers as follows. "Major traffickers" are the "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (2002). "Serious traffickers" are "the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities." *Id*.

powder cocaine offenders.[20] Yet, only 23% of cocaine powder offenders received an adjustment for mitigating role.[21]

The Commission should also ensure proper application of the mitigating role adjustment because it is integrally related to other provisions in the guidelines that are designed to mitigate the harsh effects of the Drug Quantity Table. The applicability of the mitigating role caps in §2D1.1(a)(5) and §2D1.11(a), and the new mitigating adjustment under §2D1.1(b)(15), depends upon whether the defendant receives an adjustment under §3B1.2 and whether the adjustment is for being a minor or minimal participant. The applicability of the specific offense characteristics for methamphetamine and amphetamine offenses under §2D1.1((b)(5) also turns on whether the defendant receives a §3B1.2 adjustment. The Commission should also provide clear and sound advice on how §3B1.2 applies because §5K2.0 expressly prohibits departures for mitigating role in the offense, USSG §5K2.0(d)(3) (stating that role "may be taken into account only under . . . §3B1.2").

E. Use of Examples

Mr. Skuthan described for the Commission at the March 17 hearing how offenders involved in offloading a shipment of drugs often received mitigating role adjustments before the Commission changed the commentary in 2001. In 2001, the Commission struck from the commentary to §3B1.1 language indicating that a minimal role adjustment "would be appropriate . . . for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment." USSG §3B1.1; USSG App. C, Amend. 635 (Nov. 1, 2001). Commissioner Howell asked whether adding an example to the commentary would be more helpful in encouraging its use.

We share the Commission's concerns that examples can sometimes send the wrong message to judges because they are often construed as limiting. If the case does not fit within the example, then the judge may conclude that the guideline does not apply. In this particular case, it might be useful if the example plainly states that it is just one example of many situations in which a role adjustment might apply and that it is not intended to be exhaustive. The Commission could also encourage mitigating role adjustments for couriers and defendants involved in offloading operations by simply stating that the quantity of drugs involved in the offense is not a dispositive consideration when deciding whether a defendant played a mitigating role in an offense and that the court should consider the totality of the circumstances about the offense and the functions typically performed in a drug trafficking enterprise. Mr. Skuthan's written testimony offers other suggestions on how the Commission could revise the commentary to §3B1.2.

III. Expansion of Safety Valve for Non-Aggravated Drug Trafficking Offenses

We were deeply disappointed to learn that the Department and the Probation Officer's Advisory Group (POAG) oppose expansion of the safety valve so that it applies to defendants who have more than one criminal history point, but otherwise meet all other safety valve criteria.

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[20] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 21 (2007).

[21] USSC, *Sourcebook of Federal Sentencing Statistics* tbl. 40 (2005).

The Department offered no real explanation for its opposition other than that the guideline safety valve should mirror the statute. [22]

Sound policy reasons support expansion of the safety valve beyond what the statute provides. In addition to helping to avoid overincarceration of low-level, non-dangerous offenders, the safety valve rectifies an inequity in the use of motions for substantial assistance under USSG §5K1.1 (and 18 U.S.C. § 3553(e)), where more culpable defendants who can provide the government with new or useful information about criminal activity receive reduced sentences, but lower-level offenders with less information obtain no relief.[23] Under the current guidelines, many defendants who cannot satisfy the terms of §5K1.1 (substantial assistance) or §5C1.2 (safety valve), but who are willing to provide truthful information concerning the offense, are left without a means to obtain a reduced sentence unless the court is willing to impose a below guideline sentence. Expansion of the safety valve would correct that inequity for a greater number of defendants.

The Commission can expand availability of the safety valve beyond those with one criminal history point without posing a risk to public safety. As a threshold matter, the second criterion of the safety valve (no use of violence or credible threats of violent or possession of a firearm or other dangerous weapon in connection with the offense), excludes most defendants who are likely to present a safety risk.[24] More importantly, no evidence supports POAG's suggestion that drug offenders in Criminal History Category II or even III are violent or present a significant risk of engaging in new criminal conduct.[25]

Indeed, the Commission's recidivism study shows that drug trafficking offenders are among "the least likely to recidivate," and "except in CHC I, drug trafficking offenders have the lowest, or second lowest, rate of recidivism across the CHCs." [26] It is also important to keep in mind that the higher recidivism rates typically associated with higher criminal history scores do not necessarily reflect new criminal conduct, much less violence or a risk to public safety. "Supervision violations are the largest type of recidivism behavior." [27] New convictions account for only 22% of recidivism across all criminal history categories.[28]

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[22] Duffy Statement at 20.

[23] *See generally United States v. Washman*, 128 F.3d 1305, 1307 (9th Cir. 1997) (discussing general purpose of safety valve).

[24] Other penalty provisions also help to ensure that offenders with violent criminal pasts or prior felony drug convictions receive longer sentences. *See, e.g.*, USSG §4B1.1 (career offender); 18 U.S.C. § 924(c); 18 U.S.C. § 924(e).

[25] In our experience, many defendants in Criminal History Category II are there because of probationary sentences for misdemeanors.

[26] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004).

[27] *Id*. at 7.

[28] *Id*.

In deciding whether to expand safety valve to persons in higher criminal history categories, the Commission should consider the vast literature on the criminogenic effects of prison and the tremendous obstacles released prisoners face upon reentry. Those effects are discussed in the attached testimony of Kyle Welch. The safety valve is one mechanism that the Commission can use to ameliorate the many negative consequences of lengthy prison terms.

We also urge the Commission to expand the safety valve to offenders with more than one criminal history point to help alleviate the adverse impact of the current criminal history restriction on black offenders. Black offenders represent only 30.6 % of all drug offenders, but they represent 79 % of crack cocaine offenders.[29] Crack cocaine offenders are the defendants least likely to qualify for the safety valve. Powder cocaine, methamphetamine, heroin, and marijuana offenders, who have less extensive criminal histories than crack cocaine offenders do,[30] tend to qualify for the safety value much more often. In FY 2009, 40.3% of powder cocaine offenders, 40.7% of heroin offenders, 33.6% of methamphetamine, and 61.5% of marijuana offenders received the safety valve reduction, compared to 12.3% of crack offenders.[31] Expansion of the safety valve to defendants who have more than 1 criminal history point but otherwise meet all safety valve criteria would help to reduce sentences for these offenders, many of whom are black.

IV. Firearms

A. Straw Purchasers

We are very concerned that current attention on the violence in the Southwest border region may cause the Commission to be pressured to quickly respond to a problem that is still not fully understood. We fear that as a result of this pressure, the Commission will make changes to the guidelines that negatively affect a large number of people who are not in any way connected with providing arms to drug trafficking organizations in Mexico, and that when this crisis has passed those unintended consequences will remain.[32] We urge the Commission to take additional time to examine the issues and formulate a measured response that is narrowly targeted and grounded in firm empirical evidence.

A more deliberative process is particularly important in light of feedback from the sentencing courts indicating that the current guidelines are too high. More often than not (57%),

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[29] *2009 Sourcebook* tbl. 44.

[30] *Id*., tbl. 37. The Commission reported in 2007 on the more extensive criminal histories of crack cocaine offenders compared to powder cocaine offenders, finding a "substantially lower rate of crack cocaine offenders (22.0%) in Criminal History Category I (containing offenders with little or no criminal history) compared to powder cocaine offenders (61.7%)." USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 44 (2007).

[31] *2009 Sourcebook* tbl. 44.

[32] As noted in the attached Testimony of Kyle Welch, in 2009, 74% of the convictions under the straw purchaser statutes occurred *outside* the Southwest border region. USSC, FY 2009 Monitoring Dataset. Concerns, based on inadequate information, about violence in the border region should not drive national policy decisions regarding straw purchasers.

sentencing courts nationally imposed below guideline sentences in cases in which defendants are convicted under the three statutes commonly used to prosecute straw purchasers.[33] In only 1% of cases did sentencing judges impose sentences above the applicable guideline range.[34] The feedback from the Southwest border region is similar, where sentencing judges imposed sentences below the guidelines in 54% of these cases.[35]

If the Commission is going to amend the guidelines in a way that is contrary to the feedback it has received from sentencing courts, the reason for doing so should be grounded in empirical evidence. At this time, there is simply no empirical evidence that guideline ranges need to be increased for straw purchasers in general, or for straw purchasers who intend for the firearms to cross the border. Based on the feedback from sentencing judges, and the absence of any other empirical evidence that higher ranges are necessary, it seems certain that increasing the guidelines, either by increasing the base offense levels or by adding a specific offense characteristic for offenses connected to any border crossing, will have the effect of increasing the number of below range sentences in these cases.

At the hearing on March 17, 2011, there was concern expressed that §2K2.1 needs to be changed to address a lack of uniformity between §2K2.1 and §2M5.2. In light of the operation of the specific offense characteristics in §2K2.1 whenever there is evidence that the offense conduct was similar to offenses referenced to §2M5.2, any purported lack of uniformity is best remedied by changing §2M5.2 rather than increasing the offense levels in §2K2.1. As with §2K2.1, the feedback from the sentencing judges is that the ranges produced by the offense levels in §2M5.2 are too high. In a majority of cases (62%), sentencing courts imposed sentences *below* the current §2M5.2 guideline ranges.[36] In only 3% of cases did sentencing judges go above the applicable guideline range. In addition, §2M5.2 has only two offense levels (14 and 26), which inadequately differentiate between a broad range of offenses that fall under that guideline. *See* Testimony of Kyle Welch at 9-10. In light of these circumstances, it makes far more sense to amend §2M5.2 than to increase the ranges under §2K2.1. To this end, we support the recommendation of the Practitioner's Advisory Group to refer all offenses involving non-fully automatic firearms currently sentenced under §2M5.2 to §2K2.1, and oppose any increases in §2K2.1.

The current levels and specific offense characteristics in §2K2.1 are more than sufficient to handle the variety of cases that fall under this guideline – from the less culpable women who violate the law under pressure from intimate, and sometimes abusive, relationships, to more serious offenders running large numbers of guns across the border with the intent to arm the drug cartels. Lower level offenders, most often first time offenders, appropriately do not, and should

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[33] USSC, FY 2009 Monitoring Dataset. The data also supports that prosecutors are able to gain cooperation from defendants under the current guideline levels, and file §5K1.1 motions in straw purchaser cases at almost double the rate for other offenses (25% in straw purchaser cases compared with 13% for all offenses). *Id*; *2009 Sourcebook* tbl. N.

[34] USSC, FY 2009 Monitoring Dataset.

[35] USSC, FY 2009 Monitoring Dataset.

[36] *2009 Sourcebook* tbl. 28.

not, fall within Zone D. It should not be forgotten that probation alone is punitive and carries long-lasting consequences. *See, e.g.*, *Gall v. United States,* 552 U.S. 38, 48-49 & n.4 (2007) ("Offenders on probation are . . . subject to several standard conditions that substantially restrict their liberty."); *see also* Testimony of Kyle Welch at 6-7 (discussing consequences of incarceration). We were interested to learn at the March 17 hearing that a significant number of prosecutions of straw purchasers (10-12%) involve close family relationships.[37] That a sizable number of prosecutions of straw purchasers involve less culpable individuals supports our position that the current base offense level – already two times what it was when the guidelines were first enacted – is more than adequate. Increasing the base offense level would only further increase the number of sentences below the guideline range.

In the more serious cases, the current guidelines also allow sentencing courts to impose appropriate sentences. As addressed in Mr. Welch's testimony, the trafficking enhancement, requested by the Department of Justice only a few years ago, addresses the very problem the Department now asks be addressed by yet another specific offense characteristic related to border crossing. *See* Testimony of Kyle Welch at 21-22.[38] Similarly, the enhancements for three of more firearms, and for stolen firearms allow ample room to punish the more serious offenders under the current guidelines. *Id.* at 17-18, 22. And in the exceptional cases, where the guidelines are too low, the sentencing courts depart. *See United States v. Hernandez*, 2011 WL 438828 (5th Cir. Feb. 9, 2011) (affirming an above-guideline sentence where the defendant, who was described as one of the most prolific purchasers for an organization involved in illegal firearms trafficking, had purchased himself at least 23 firearms and could reasonably foresee they would arm Mexican drug cartels).

An interesting example of how the current guidelines are already more than adequate was provided by United States Attorney Laura E. Duffy in her March 17 testimony before the Commission. In *United States v. Paul Giovanni de la Rosa*, No. 09-cr-00376 (D. Minn.), the government calculated a base offense level of 28 for Mr. de la Rosa, who was involved in smuggling more than 100 guns into Mexico from the United States. The government acknowledged that Mr. de la Rosa was eligible for a 3-level reduction because he had accepted responsibility, and recommended a 71-month sentence, at the high end of the range for an adjusted base offense level of 25. The sentencing judge, despite the availability of a lengthy term at offense level 25, determined in January of this year that a prison term of 36 months was appropriate in this case. Thus any complaint the government might have about the length of the sentence for Mr. de la Rosa is not a product of the guidelines, but a disagreement with the sentencing judge about whether a within guideline sentence was appropriate in this particular case.

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[37] We would be interested in learning more about the characteristics of defendants prosecuted as straw purchasers, and would welcome the opportunity to review any statistics the Commission has gathered in this regard.

[38] In addition, the Fifth Circuit recently determined that §2K2.1(b)(6) applies when the other felony offense is another firearms possession or trafficking offense. *See United States v. Juarez*, 626 F.3d 246 (5th Cir. 2010). We believe this decision relies on a clerical error in the commentary and request the Commission amend the commentary to make clear that subsection (b)(6) does *not* apply in such circumstances. *See* Testimony of Kyle Welch at 24-26.

Finally, no evidence supports the conclusion that increasing penalties for straw purchasers will reduce firearm violence at the border or anywhere else. Straw purchasers are only one source of guns for criminals. According to the "Don't Lie for the Other Guy" website – a national campaign to prevent straw purchases – "40 percent of criminals obtain their firearms from friends or family and another 40 percent obtain their firearms from illegal sources on the street. Less than 8.5 percent of criminals obtain their firearms from straw purchases."[39] Whatever the percentage of criminals that obtain firearms from straw purchases, the straw purchasers themselves are by definition either first-time offenders or offenders with nothing more than misdemeanor convictions. To deter them, certainty of punishment is far more critical than severity of punishment.[40]

Studies also show that strategies unrelated to increased federal penalties for straw purchasers will better decrease firearm trafficking. Mayors Against Illegal Guns recently released a report examining data on the illegal trafficking of firearms. The report identifies several methods to reduce gun trafficking. These methods include (1) enacting state laws to prohibit straw purchases and to prohibit dealers from violating background check laws;[41] (2) requiring purchase permits for all handgun sales; (3) requiring background checks for all handgun sales at gun shows; (4) requiring the reporting of lost or stolen guns to law enforcement; (5) allowing local control of firearm regulations; and (6) allowing state inspection of gun dealers. Each of these strategies is more effective than increasing federal sentences for straw purchasers.[42]

B. USSG §2M5.2

We believe the proposed amendments are unduly punitive for lower-level defendants with a small number of non-fully automatic small arms and ammunition. The proposed amendments will have the effect of grouping too many different degrees of harm under a single base offense level of 26. Accordingly, we support the Practitioner Advisory Group's suggestion to exclude non-fully automatic small arms from §2M5.2 and refer such offenses instead to §2K2.1. Consolidating firearms smuggling offenses under 2K2.1 would allow for more gradation of the harms associated with arms smuggling. It would also address the concern raised by some at the March 17 hearing about uniformity between §2K2.1 and §2M5.2. With this

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[39] *See* http://www.dontlie.org/FAQ.cfm ("Don't Lie for the Other Guy" is a national campaign to prevent and discourage illegal straw purchases by the National Shooting Sports Foundation, in coordination with the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Department of Justice and Office of Justice Programs); *see also* Bureau of Justice Statistics, *Firearm Use by Offenders* (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf.

[40] *See* Testimony of Kyle Welch at 5-6.

[41] The availability of state and federal enforcement mechanisms increases the certainty of punishment for those engaged in straw purchasers because it does not depend solely on the efforts of federal law enforcement authorities.

[42] *See* Mayors Against Illegal Guns, *The Link Between Gun Laws and Interstate Gun Trafficking* (2010), http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_the_guns_report.pdf.

reference to §2K2.1 for offenses involving non-fully automatic firearms, we would also urge the addition of an application note to §2K2.1 such as the following:

> *Downward Departure Consideration. – There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

As for ammunition, we believe the proposed amendment limiting application of the lower base offense level to [200]-[500] rounds of ammunition for personal use, is an inadequate solution to the problem with this guideline. The problem with this guideline is that it addresses with only two offense levels a broad range of offenses, including exporting a single pair of night vision goggles, small amounts of ammunition as well as missile components and nuclear weapons.[43] The number of rounds of ammunition in the proposed amendment is simply too low to capture many, if any, of the ammunition offenses sentenced under §2M5.2, leaving a single base offense level to punish offenses involving only ammunition as well as those involving biological weapons.

Hunting websites show that hunters shoot much more ammunition than the number or rounds set forth in the proposed amendments. These sites advertise hunting trips where the daily use would easily exceed the proposed numbers. One such site says: "Bring plenty of ammunition and guns! Our average hunter shoots 500 to 1500 rounds a day! Packages start at $200."[44] In addition, addressing the severity of ammunition offenses based on the quantity of rounds involved would have the strange effect of punishing both less potent ammunition and more innocuous purposes. One of the least potent calibers available, .22 Long Rifle, is packaged in the greatest quantities at the lowest cost. One can buy a Value Pack online containing 2,100 rounds of .22 Long Rifle ammunition for only $75.99.[45] In this example, the quantity is a function of small caliber and low cost, not of intent or danger to society. This example also underscores a crucial point: in the case of .22 Long Rifle and larger calibers, possession of larger quantities may often correspond with innocuous intent. Bulk rounds, often remanufactured and employing simple projectiles and materials, are frequently designed and sold not for lethality or reliability, but for cheaply supplying the high-volume activities of "plinking"[46] and target practice at shooting ranges. Persons using thousands of rounds of ammunition tend to be hobbyists.

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[43] We also encourage the Commission to consider setting a lower base offense level for offenses involving night vision goggles.

[44] http://www.dakotahuntingtrips.com/prairiedogandcoyotehunts.html

[45] *See, e.g.*, http://www.cabelas.com/catalog/product.jsp?productId=735145&categoryId=0&parentCategoryId=0&subCategoryId=0&indexId=0&productVariantId=1381374&quantity=1&itemGUID=d58c1112ac1070551f29f4e2af059c31&WTz_l=SBC%3Bcat104792580%3Bcat104691780%3Bcat104536080&destination=/checkout/item_added_to_cart.jsp

[46] "Plinking refers to informal target shooting done at non-traditional targets such as tin cans, glass bottles, and balloons filled with water." http://en.wikipedia.org/wiki/Plinking

For these reasons and those set forth in the testimony of Mr. Welch, we encourage the Commission to consider expanding the lower base offense level to include ammunition in any quantity. We believe the egregious cases can be addressed with an application note inviting departures when the offense involves a quantity or type of these items typically used by a criminal enterprise where the defendant intended they be transferred to an organized criminal enterprise.

V. Child Support

The Commission proposes amending Application Note 2 to §2J1.1 to resolve a circuit split regarding whether the 2-level enhancement in §2B1.1(b)(8)(C) should apply to a defendant who violates a court order to pay child support. Subsection (b)(8)(C) provides for a 2-level enhancement where an offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines." USSG §2B1.1(b)(8)(C). Two circuits have held that this enhancement applies to defendants convicted of failing to pay court-ordered child support. *See United States v. Phillips*, 363 F.3d 1167 (11th Cir. 2004); *United States v. Maloney*, 406 F.3d 149 (2d Cir. 2005). One circuit has held it does not. *See United States v. Bell*, 598 F.3d 366 (7th Cir. 2010). The Commission proposes inserting a sentence in Application Note 2 to §2J1.1 that would provide: "In such a case, [apply] [do not apply] §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order)."

We urge the Commission to amend the Application Note to make clear that §2B1.1(b)(8)(C) does *not* apply when a defendant violates an order to pay child support.

The primary reason for our position is that subsection (b)(8)(C) applies only to *fraud* offenses committed in violation of court orders, and the failure to pay court-ordered child support is not a fraud. When the Commission promulgated this specific offense characteristic in §2B1.1(b)(8)(C) in 2001, it also explained in Application Note 7 that the specific offense characteristic "provides an enhancement if the defendant commits *a fraud* in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action." (Emphasis added.) Violation of an order to pay child support is not a fraud because it does not involve a material falsehood – an essential element of a fraud offense.[47] Subsection (b)(8)(C), therefore, does not and should not apply to a failure to pay court-ordered child support.

None of the three courts of appeals to consider whether subsection (b)(8)(C) applies to a failure to pay court-ordered child support have addressed this clear language in the Application Note or its historical pedigree. *See Phillips*, 363 F.3d 1167; *Maloney*, 406 F.3d 149; *Bell*, 598 F.3d 366.

The language of Application Note 7(C) in §2B1.1 – limiting application of subsection (b)(8) to fraud offenses – is consistent with the history of the guideline. Following the enactment of the Child Support Recovery Act of 1992 (codified at 18 U.S.C. § 228), the Commission amended §2J1.1 to specify that §2B1.1 is the most analogous guideline for violations of § 228.

[47] *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999).

USSG App. C, Amend. 496 (Nov. 1, 1993). At that time, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) set a base offense level of 4 and did not provide for any enhancements based on violations of judicial orders. USSG §2B1.1 (1993).

The enhancement at issue here, regarding violations of court orders, did not appear in §2B1.1 until 2001. As part of the "Economic Crime Package," the Commission consolidated the theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1) guidelines into a single guideline at §2B1.1. USSG App. C, Amend. 617 (Nov. 1, 2001).[48] Before the consolidation, the enhancement that now appears in §2B1.1(b)(8)(C) was part of the fraud guideline in §2F1.1.[49] Thus, the enhancement has always been associated exclusively with fraud offenses. Nothing in the text of the amended guideline, or the Reason for Amendment, indicates the Commission intended to broaden the scope of the enhancement when it consolidated the guidelines in 2001. Indeed, to the contrary, the Commission retained the language limiting application of this enhancement to fraud offenses, even captioning the application note: "*Fraud* in Contravention of Prior Judicial Order." USSG §2B1.1 comment (n. 7(C)) (emphasis added). Similarly, neither the text nor the Reason for Amendment mentions offenses for failing to pay child support at all, let alone specifically provides that they be treated as if they were fraud offenses and subject to the enhancement in subsection (b)(8)(C).

If subsection (b)(8)(C) were to apply to those who fail to pay court-ordered child support, it would mean that during that single amendment cycle in 2001, the Commission more than doubled the offense level in every case (since the offense of failing to pay child support necessarily involves violation of a court order), without any indication that the Commission considered this implication of the amendment or thought it necessary for the offense of failing to pay court-ordered child support.

In addition, we agree with the Seventh Circuit that application of the enhancement in such cases is improper double counting. As that Court ably reasoned: "[T]here is no reason to believe conduct that *always* inflicts multiple distinct harms may validly receive a punishment enhanced on account of one of the harms." *Bell*, 598 F.3d at 373. The offense at issue here is "failure to pay legal child support obligations." 18 U.S.C. § 228. For a violation to occur, an individual must have "willfully fail[ed] to pay a support obligation." *Id.* And "a support obligation" is defined as "any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe." *Id.* Thus, each and every offense for "failure to pay legal child support obligations" involves a violation of a court

[48] As part of this extensive amendment in 2001, the Commission also increased the base offense level in §2B1.1 from 4 to 6. USSG App. C, Amend. 617 (Nov. 1, 2001).

[49] Before this consolidation, the fraud guideline, §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), included a 2-level enhancement, and floor of 10, for fraud offenses that involved "a violation of any prior specific judicial or administrative order." USSG §2F1.1(b)(4) (2000). The relevant application note to this subsection of §2F1.1 provided: "Subsection (b)(4)(C) provides an enhancement if the defendant commits a *fraud* in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action." USSG §2F1.1 comment (n.6) (2000) (emphasis added).

order. In sum, because violating a court order is an element of the offense, it is by definition the encompassed in the base offense level. Such a factor – violation of a court order – cannot be found to "aggravate" an offense that could not occur without the presence of the factor.

For these reasons, we strongly urge the Commission to clarify that for offenses related to failure to pay court-ordered child support, §2B1.1(b)(8)(C) should not apply.

VI. Conclusion

We were pleased that the Commission invited the Director of the Bureau of Prisons to testify about the state of affairs within BOP institutions. Director Lappin's testimony before the Commission and before Congress shows that the ever-growing inmate population poses "substantial ongoing challenges" to BOP in providing for "safe inmate incarceration, and care for the safety of BOP staff and surrounding communities." [50] While BOP has been able in the past to deal with the challenges presented by overcrowding, it has, according to Director Lappin, "reached a threshhold . . . and [is] facing serious problems with inmate crowding." [51] Put simply, BOP is becoming increasingly dangerous because of severe overcrowding and lack of adequate funding.

The Commission could take a step toward reducing prison overcrowding with no increased threat to public safety by (1) lowering the base offense levels in the Drug Quantity Table;[52] (2) encouraging the increased use of mitigating role adjustments; (3) providing for additional downward adjustments for certain drug offenders; (4) more narrowly tailoring its proposed changes to §2K2.1 and §2M5.2; (5) modifying the use of stale convictions in §2L1.2; and (6) carefully implementing the directives in the Patient Protection and Affordable Care Act as well as providing for adjustments so that those who play lesser roles in health care fraud are not disproportionately punished. As outlined in the testimony of Jane McClellan, we also support proposals that would give judges greater discretion in imposing terms of supervised release.

[50] Statement of Harley Lappin, Director of the Federal Bureau of Prisons Before the H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies at 3, 4-6 (Mar. 15. 2011).

[51] *Id*. at 5.

[52] Over half of the inmates in BOP prison facilities are serving sentences for drug trafficking offenses. *Id*. at 4.

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

Very truly yours,

/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures
cc (w/encl.): William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
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March 29, 2011

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Re: Supplement to Public Comment on Proposed Amendments for 2011

Dear Judge Saris:

We write to provide the Commission with additional information that has recently come to our attention regarding the extent to which violence in Mexico is spilling over into the Southwest border region. At the March 17th hearing, Laura Duffy, the United States Attorney for the Southern District of California, told the Commission about violent crimes from Mexican drug cartels occurring in the United States. This testimony was offered in support of the Department's request for increased offense levels for straw purchasers and firearms smuggling under USSG §2K2.1 and §2M5.2. We fear that Ms. Duffy's description may have left the Commission with a mistaken impression about violence in the Southwest border region.

Last Thursday, at the Bridge of The Americas border crossing, U.S. Secretary of Homeland Security Janet Napolitano explained there is a disconnect between perception and reality regarding violence in the Southwest border region. *See* Juan Carlos Lorca, *Napolitano: US Border Towns with Mexico are Safe*, Associated Press, March 24, 2011.[1] She stated that the "perception that the border is worse now than it ever has been . . . is wrong," and that "[t]he border is better now than it ever has been." *Id.* The Mayor of El Paso, John Cook, echoed this: "The lie about border cities being dangerous has been told so many times that people are starting to believe it." *Id.* But as Secretary Napolitano has explained, "Some of American's safest

[1]http://m.apnews.com/ap/db_16029/contentdetail.htm;jsessionid=70F17FF0F78CE58ED5789202F13DD262?full=true&contentguid=l06ijgzu&detailindex=#display

communities are in the Southwest border region, with border city crime rates staying steady or dropping over the decade." Janet Napolitano, *The Southwest Border is Open for Business*, The Blog @ Homeland Security (March 24, 2011).[2]

Reiterating our previous submissions, we urge the Commission not to make changes to the firearms and smuggling guidelines based on political rhetoric without any empirical evidence that such changes are necessary. The proposed amendments sweep broadly and will result in the over-incarceration of first time offenders.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

cc: William B. Carr, Jr., Vice Chair
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[2] http://blog.dhs.gov/2011/03/southwest-border-is-open-for-business.html

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Re: Public Comment on Proposed Amendment: Fair Sentencing Act of 2010

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 emergency amendment implementing the Fair Sentencing Act of 2010 (FSA).

We strongly encourage the Commission to build upon the work it started in 2007 by adopting the level 24 option for setting the drug quantity thresholds that correspond to the statutory mandatory minimum penalties. We are gravely concerned for the number of crack cocaine offenders who would receive no benefit from the Fair Sentencing Act should the Commission adopt the level 26 option. In addition, because quantity-based guidelines and their linkage to mandatory minimums are unsound, we think it unwise for the Commission to take a step backward rather than forward in crafting a guideline that seeks to meet the purposes of sentencing in 18 U.S.C. § 3553(a)(2).

We also urge the Commission to construe narrowly the directives in sections 5 and 6 of the FSA that require the Commission to "provide an additional penalty increase" or an "additional increase of at least 2 levels" for various aggravating factors. Sections 5 and 6, read together with other provisions of the Act, provide the Commission with ample authority to avoid double-counting and "factor creep" that would have an exponential impact on sentence length and undercut the purposes of sentencing set forth at 18 U.S.C. § 3553(a)(2).

Unfortunately, much of the language defining the enhancements in the FSA is ambiguous, which as the Commission knows, creates application issues for judges, attorneys, and probation officers. Here, we offer several suggestions to limit the reach of some of the enhancements so they do not apply too broadly and to clarify definitions. Our chief concerns focus on the definition of violence, what it means to maintain an establishment for distribution of manufacture of controlled substances, and the scope of the vulnerable victim enhancement.

CHANGES TO STATUTORY TERMS OF IMPRISONMENT FOR CRACK COCAINE

Level 24 Option versus Level 26 Option

Section 2 of the FSA increases the quantity thresholds associated with five- and ten-year mandatory minimum penalties for crack cocaine to 28 and 280 grams, respectively. The Commission seeks comment on what guideline amendments should be promulgated in response to this change, particularly changes to the Drug Quantity Table in §2D1.1. We urge the Commission to adopt the level 24 option during the emergency amendment cycle, with an eye toward lowering the base offense levels for all other drugs by two levels during the regular amendment cycle. Amendment of the drug trafficking guideline is long overdue and this need for revision should inform how the Commission implements the emergency amendment under the FSA. The emergency amendment should move the guidelines as close as possible to recommending sentences that are "sufficient, but not greater than necessary" to achieve the purposes of sentencing. Here, we briefly recap some of the longstanding problems with the drug trafficking guideline to provide context for our position on why the Commission should adopt the level 24 option.

The drug trafficking guideline needs revision. We, along with others, have urged the Commission to review the guidelines for offenses with mandatory minimums and to set drug guideline offense levels based on data and research rather than drug quantities contained in the statutes.[1] The quantity thresholds and penalties in the mandatory minimum statutes are the

[1] *See, e.g.*, Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Public Hearing Before the United States Sentencing Comm'n, *Mandatory Minimum Sentencing Provisions Under Federal Law*, at 4, 26 (May 27, 2010); Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Public Hearing Before The United States Sentencing Comm'n, *The Sentencing Reform Act of 1984: 25 Years Later*, Austin, Texas, at 14-15 (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Public Hearing Before the United States Sentencing Comm'n, *The Sentencing Reform Act of 1984: 25 Years Later*, Denver, Colorado, at 21-25 (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

Others urging a de-linking of the drug guidelines from the quantity thresholds in the mandatory minimum statutes have included the Judicial Conference of the United States, *see* Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n (Mar. 16, 2007), available at http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf, and numerous witnesses at the Commission's Regional Hearings, *see* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Atlanta, Georgia, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Stanford, California, at 6-22 (May 27, 2009) (Judge Walker); Transcript of Public

primary cause of the severe over-crowding the Bureau of Prisons now faces and have resulted in lengthy incarceration of many tens of thousands of non-violent, low-level drug offenders with little or no criminal history.[2] The Commission's choice to create 17gradations of drug quantity and to extrapolate below, between, and above the two thresholds in the statutes contributed substantially to the tripling of average time served for drug offenses following implementation of the guidelines.[3]

The current drug trafficking guideline does not generally recommend sentences that are "sufficient, but not greater than necessary" to comply with the statutory purposes of sentencing at 18 U.S.C. § 3553(a)(2). The present guideline does not reliably categorize offenders according to their culpability and functional roles; many low-level offenders receive sentences appropriate only for managers or kingpins.[4] Higher offense levels for drug traffickers are not correlated with increased risk of recidivism or a need for incapacitation.[5] Marginal increases in punishment do not increase any deterrent effects of incarceration.[6] And the offense levels provided in the

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Hearing Before the U.S. Sentencing Comm'n, Chicago, Illinois, 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, New York, New York, at 92, 139-41 (July 9-10, 2009) (Judge Newman). More than half of the judges surveyed (58%) believe that the sentencing guidelines should be "delinked" from the statutory mandatory minimum sentences. USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010).

[2] The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (2006), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf; Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent'g Rep. 26 (1990).

[3] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 53-54 (2004) [hereinafter *Fifteen Year Review*].

[4] *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id*. at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness); *Fifteen Year Review* at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (Drug quantity "is not significantly correlated with role in the offense.").

[5] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (demonstrating "no apparent relationship between the sentencing guideline final offense level and recidivism risk"); Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders* (Nov. 4, 2009) (paper presented at the American Society of Criminology's annual meeting in Philadelphia), abstract available at http://www.allacademic.com/meta/p372733_index.html.

[6] *See* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006).

Quantity Table, which often result in guideline ranges falling within Zone D of the sentencing table, do not meet, "in the most effective manner," the treatment and training needs of defendants. 18 U.S.C. § 3553(a)(2)(D).[7]

The links between the Drug Quantity Table and the mandatory minimum quantity thresholds have been defended as assuring a rough "proportionality" in sentencing. However, this linkage assures only that offenses involving larger amounts *of a particular mixture or substance containing a detectable amount of drug* are punished more severely than smaller amounts of that same mixture or substance. It does not achieve proportionality among *all* offenses, or among all drug offenses, or even among offenses involving the same type of drug, which often involve mixtures of dramatically different purity.[8] The current thresholds and associated penalties do not properly track the harmfulness of various types of drugs, differences among drugs in the typical dosage size, or variations in the presence of adulterants. The severity of punishment for various types of drugs does not accurately reflect their objective harms, even though empirical data to rank these harms is available.[9]

Given these problems, courts have often rejected the guidelines' recommendations.[10] The Supreme Court made clear in *Kimbrough*, *Spears*, and *Nelson* that guideline

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[7] BOP has strict eligibility criteria for the residential abuse treatment program. U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement 5330.11, ch. 2 (Mar. 16, 2009). And although BOP offers drug education to a greater number of inmates, those programs do not at all meet the needs of offenders with chronic substance abuse disorders. *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations* (Mar. 10, 2009) (statement of Faye Taxman, Professor, Administration of Justice Department, George Mason University). Research from the National Center on Addiction and Substance Abuse (CASA) shows that only 15.7% of federal prison inmates with substance abuse disorders received professional treatment after admission into the BOP. Nat'l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Population*, at 40, tbl. 5-1 (2010). Community residential treatment programs for offenders who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.

[8] Office of Nat'l Drug Control Policy, *The Price and Purity of Illicit Drugs* (2004), available at http://www.ncjrs.gov/ondcppubs/publications/pdf/price_purity_tech_rpt.pdf (showing broad ranges of purity and little relation between purity and total amount).

[9] *See, e.g.*, David Nutt *et al*., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 The Lancet 1047 (Mar. 24, 2007).

[10] The courts have frequently disagreed with the crack guideline, and some have adopted a 1:1 ratio. *See United States v. Williams*, 2010 U.S. Dist. LEXIS 30810 (S.D. Ill. Mar. 30, 2010); *United States v. Greer*, 2010 U.S. Dist. LEXIS 30887 (E.D. Tex. Mar. 30, 2010); *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009); *United States v. Lewis*, 623 F. Supp. 2d 42, 46 (D.D.C. 2009); *United States v. Medina*, 2009 U.S. Dist. LEXIS 82900 (S.D. Cal. Sept. 11, 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 70722, 2009 WL 2485842 (W.D. Pa. Aug. 12, 2009); *United States v. Luck*, 2009 U.S. Dist. LEXIS 71237, 2009 WL 2462192 (W.D. Va. Aug. 10, 2009); *United States v. Carter*, 2009 U.S. Dist. LEXIS 73094 (W.D. Va. Aug. 18, 2009); *Henderson v. United States*, 2009 U.S. Dist. LEXIS 83208 (E.D. La. Sept. 10, 2009). Courts have disagreed with the powder cocaine guideline as well. *See United States v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009) (imposing below-guideline sentence for

recommendations cannot be presumed to comply with § 3553(a)(2), and this applies with special force to guidelines, like the drug guidelines, that track mandatory minimum statutes and are not based on empirical data or national experience.

The Commission may account for mandatory minimums in a variety of ways. As the Commission has previously explained, statutory mandatory minimums and sentencing guidelines are unquestionably "policies in conflict."[11] The statutes hamper the Commission's ability to design guidelines that take account of the myriad of factors relevant to the purposes of sentencing. The statutes create "tariff" and "cliff" effects and are a major source of unwarranted disparity. In theory, statutory minimum penalties could be incorporated into the guideline structure without creating disproportionality and disparity, but only if the statutory penalties were targeted at the *least serious* offense that can arise under a statute and corresponding guideline. The full range of mitigating adjustments could then operate without the statutory penalties trumping the guideline range and requiring imposition of sentences more severe than necessary given the complete circumstances of the case.

In reality, however, mandatory penalties take into account only one or two facts and are set at levels appropriate not for the most mitigated offense but for typical, or even aggravated, offenses. Mandatory minimums are often enacted in reaction to sensational crimes and result from political competition.[12] They are used to convey that Congress is tough on a general type of crime, not what punishment would be appropriate for the *least* serious instance of that crime.

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attempted distribution of powder cocaine because the Sentencing Commission "departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes," and "sentences in drug cases have since increased far above pre-guideline practice"); *United States v. Urbina*, 2009 WL 565485, *3 (E.D. Wis. Mar. 5, 2009) (following *Thomas* in conspiracy to distribute powder cocaine case); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (disagreeing with over-emphasis on drug quantity, under-emphasis on minimal role). Courts have also disagreed with the methamphetamine guidelines. *See, e.g.*, *United States v. Santillanes*, 274 Fed. App'x 718, 718-19 (10th Cir. 2008) (remanding for resentencing because government conceded that it was error for court to refuse to address defendant's argument that it should reject the guidelines' policy of treating mixed methamphetamine differently from pure methamphetamine); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1016 (D. Neb. 2008) (finding in conspiracy to manufacture methamphetamine case that "[a] variance is appropriate in view of the fact that the Guidelines at issue were developed pursuant to statutory directive and not based on empirical evidence"); *United States v. McCormick*, 2008 WL 268441, *10 (D. Neb. Jan. 29, 2008) (same for possession of precursor chemicals because those guidelines, "were, like the drug-trafficking Guidelines, determined with reference to statutory directives and not grounded in empirical data").

[11] USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991). "Policies in Conflict" is the title of Chapter 4 of the Report.

[12] As Justice Rehnquist noted in 1993: "Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole." William H. Rehnquist, Luncheon Address (June 18, 1993), *in* USSC, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993).

Justice Breyer concluded in 1999 that "statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. . . [T]heir existence then prevents the Commission from . . . writ[ing] a sentence that makes sense."[13]

As the Commission describes in its 2007 Reason for Amendment to the crack threshold and its report on child pornography, the Commission has a variety of options for accounting for mandatory minimums within the guideline structure.[14] The Commission "may abandon its old methods in favor of what it has deemed a more desirable approach."[15] It may set the base offense level (the BOL) to include, but not exceed, the mandatory minimum, as it has currently done with crack. It may set the BOL below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum in appropriate cases. The Commission may also "select a new (or maintain an existing) base offense level without regard to a newly adopted (or increased) mandatory minimum."[16] In the latter two approaches, in cases in which the guideline calculation fails to reach the mandatory minimum, the mandatory minimum would apply through §5G1.1(b).

The Commission's typical approach to incorporating the drug quantity thresholds into the guidelines has been particularly unfortunate. As noted in Issue for Comment 1, until 2007 the Commission generally—though not always[17]—incorporated the five- and ten-year quantity thresholds from the statutes into the Drug Quantity Table at levels 26 and 32. This made the guideline range linked to the BOL for most drugs ***exceed*** the mandatory minimum penalties, even for first offenders receiving no aggravating enhancements and involved with quantities just above the threshold amounts. Greater drug amounts or criminal history or other aggravating factors pushed the guideline ranges still further above the statutory requirements. The relatively few mitigating adjustments found in the guidelines could lower ranges for some offenders, but many thousands received penalties far above the statutory requirements due to the Commission's approach.

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[13] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985, *8 (Feb. 1, 1999) [hereinafter Breyer, *Guidelines Revisited*].

[14] USSG, App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* 44-47 (2009).

[15] *Neal v. United States*, 516 U.S. 284, 295 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute's "mixture or substance" methodology).

[16] *Id.* at 46.

[17] For LSD and marijuana plants, the Commission correctly recognized that tying penalties to the weight of filler substances or to the number of plants, regardless of size, would lead to arbitrary variations in punishment unrelated to the seriousness of the offense. Although 21 U.S.C. § 841(a) requires a mandatory minimum of ten years for 1000 marijuana plants, and five years for 100 plants, the base offense levels are set at 26, and 16, significantly lower than what is required to reach the mandatory minimum.

In recognition that the statutory thresholds for crack cocaine undermined the objectives of the Sentencing Reform Act,[18] the Commission amended the Drug Quantity Table in 2007. Following this amendment, the five- and ten-year mandatory penalties fell within, rather than below, the guideline range associated with the BOL for first offenders receiving no aggravating enhancements with drug amounts at or just above the statutory thresholds. This amendment provided much-needed relief for thousands of defendants who were subject to unnecessarily severe penalties. It ameliorated some of the added unfairness caused by the Commission's decision to peg the statutory thresholds to BOLs and guideline ranges above the level required by statute, and to extrapolate these flawed threshold quantities to additional gradations below, between, and above the two statutory levels.

Flawed quantity ratios have dominated the debate, unnecessarily complicated guideline calculations, and resulted in "false precision." Unfortunately, the debate over drug sentencing, and crack cocaine in particular, has too often been cast as a search for the correct quantity ratio between crack and powder cocaine and between cocaine and other drugs. The focus on ratios is particularly misplaced given that drug mixture quantity has long been recognized as a very imperfect proxy for the seriousness of the offense.[19] Factors that determine the quantity of the mixture or substance containing a detectable amount of a drug involved in a case are often arbitrary[20] and are sometimes even manipulated.[21] The debate over ratios has turned what should be a substantive debate over how best to achieve the purposes of sentencing into a quasi-mathematical and pseudo-scientific exercise. There are no "correct" ratios in light of 18 U.S.C. § 3553(a)(2).

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[18] USSG, App. C, Amend. 706 (Nov. 1, 2007).

[19] Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U. S. Sentencing Commission* 2 (1995) ("[T]the Judicial Conference . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved."); General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); Reuter & Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: "The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.").

[20] Estimates of quantities that were not actually seized, that were under negotiation, *etc.*, inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as "relevant conduct" lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center, Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (July/August 1997); *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007).

[21] 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); Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187.

The "false precision"[22] created by over-reliance on drug quantity and consistent ratios is especially problematic since neither Congress nor the Commission has explained how drug quantity is intended to track offense seriousness or achieve other purposes of sentencing. Without this understanding, judges have no basis for determining if a guideline is working as intended in a particular case. The measurement of quantity becomes an end in itself rather than a means of determining the sentence likely to comply with the statutory purposes.

Commission reports have described the relevance of quantity in several ways, but none of these make clear why 17 quantity levels with consistent ratios among drug mixtures are needed.[23] For example, quantity might be conceived as a measure of the amount of harm caused by the drug mixture involved in an offense. But this neglects culpability—an important component of offense seriousness—because under the relevant conduct rules persons with limited responsibility, for example, persons whose sole job is to transport or off-load a shipment organized and owned by others, are attributed with the same amounts as persons who manufactured, owned, or profited from the shipment. Alternatively, quantity has been alleged to reflect defendants' roles within drug trafficking enterprises and their relative culpability. The limited legislative history of the Anti-Drug Abuse Act of 1986 appeared to establish three tiers of culpability for "major traffickers" (manufacturers or the heads of organizations), "serious traffickers" (managers of the retail level traffic) and lower-level offenders.[24] But no legislative history or empirical data have suggested that 17 quantity levels with consistent ratios are needed to properly track role or culpability. Indeed, the Commission's own data show that the current quantities and ratios regularly fail to do so.[25]

The Commission was correct in its 2007 crack amendment to disregard any false constraint that the ratios found at the two thresholds specified in the statute must be mimicked throughout the 17 levels of the Quantity Table. That amendment to the crack guideline resulted in thresholds at various offense levels that did not reflect fixed ratios between mixtures and substances containing crack and powder cocaine. Although mathematical anomalies arose when

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[22] Breyer, *Guidelines Revisited*, at *11.

[23] *Fifteen Year Review* at 47-52; *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (noting that "the Sentencing Commission has never explained how drug quantity is meant to measure offense seriousness, and significantly, how it correlates with the purposes of sentencing under 18 U.S.C. § 3553(a)," and that "apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or [the Commission's own] 1996 Task Force and others, recommended").

[24] USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 119-21 (1995).

[25] *See supra* note 4. The Commission has sponsored several Working Groups and Task Forces that have found that quantity regularly fails to properly track role and culpability. *See Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); *Report of the Drug Working Group Case Review Project* (1992); *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).

combining different types of drugs, those anomalies were successfully addressed through a special application note to the Drug Quantity Table.[26]

The critical point is that substantive justice must take priority over abstract mathematical consistency. Elsewhere in the guidelines, the Commission has acknowledged that attempts to quantify harm may result in over-punishment, but the Commission has not recognized the widespread problems with drug quantity. For example, the fraud guideline, USSG §2B1.1, is driven to a large extent by the "loss" involved in the offense. The attempt to quantify loss greatly complicates guideline determinations and has required numerous special rules to account for special circumstances. With loss, however, the Commission has recognized that attempts at quantification are inherently imperfect by inviting downward departures where the offense level "overstates the seriousness of the offense."[27] No such downward departures are invited where drug quantity overstates the seriousness of the offense, despite the Commission's own evidence that this frequently occurs.

Given all of these problems, we believe the guidelines should be revised in light of the FSA to yield recommendations that comport as closely as possible with the principles of 18 U.S.C. § 3553(a). Punishment should not be dictated by abstract considerations of ratio consistency or ease of calculation of drug equivalencies. As Justice Breyer aptly stated, sentencing is ultimately a "blunderbuss."[28] Attempts at exactness of measurement or consistency in ratios among inherently rough dimensions like drug quantity cannot eliminate this fact.

The emergency amendment should continue to peg the statutory quantities for crack to base offense levels 24 and 30. The Commission should continue the approach of the 2007 crack amendment that made the mandatory minimum penalty fall ***within***, rather than ***below***, the guideline ranges for first offenders with no aggravating circumstances and with quantities at, or just above, the statutory thresholds. This helps ameliorate some of the unfortunate effects of the original Commission's decision to extrapolate below, between, and above the statutory levels in the Drug Quantity Table. The crack quantity would result in unnecessarily high guideline ranges in fewer cases. Aggravating and mitigating factors, including the new adjustments directed by the Act, would receive greater weight in relation to quantity, which is an over-arching purpose of the FSA. The gap in average sentences between crack offenders and other drug offenders, and between African American and other defendants, would be reduced.

Most important, maintaining the current correspondence between the statutory thresholds for crack and the Drug Quantity Table *is necessary to give full effect to the FSA*. If the Commission were to peg the new statutory quantities to the old BOLs, many offenders would receive no benefit from the legislation. For example, the request for comment shows that if the Commission adopted the level 26 option, offenders with quantities of 28 to 112 grams would receive a BOL of 26. Under today's guidelines, quantities of 20 to 35 grams receive a BOL of 26. Thus, offenders to whom 28 to 35 grams were attributed would receive the same

[26] USSG §2D1.1 comment. (n.10(D)).

[27] USSG §2B1.1 comment. (n.19(C)).

[28] Breyer, *Guidelines Revisited*, at *11.

recommended sentence under guidelines amended under the level 26 option that they receive today, rendering the threshold changes in the FSA a nullity for those offenders. Similarly, those defendants whose offenses involved between 280 and 499 grams of crack would remain at offense level 32. Those defendants whose offense involved between 840 grams and 1.49 kilograms would remain at level 34. Moreover, some of these offenders may qualify for new enhancements directed by the FSA. For these offenders, the cumulative effect of the FSA—which was, after all, enacted primarily to address the unfair severity of crack sentencing—would be to *increase* sentences above the lengthy prison terms the guidelines recommended at the time of the legislation.

With the "level 24 option," some defendants who would otherwise qualify for certain downward adjustments may not benefit from them because the mandatory minimum would truncate or trump their guideline range. (Only some deserving offenders benefit from safety valve relief under 18 U.S.C. § 3553(f), or substantial assistance motions under § 3553(e) or Rule 35(b). We hope that the Commission and Congress will expand safety valve relief in the near future.) This trumping and truncating means that some less culpable defenders may be treated the same as more culpable ones.[29] This unwarranted uniformity is an inevitable consequence of mandatory minimums, however. The entire guideline structure should not be ratcheted upward only to partially accommodate the interaction between guideline adjustments and mandatory minimum statutes, particularly when the mandatory minimums are fundamentally incompatible with the guidelines, as described above. No defendants should be denied the benefit of the Fair Sentencing Act to correct a flaw that lies with the statutes any more than Congress should have lowered the triggering quantities for cocaine powder rather than raise the quantity for crack.[30]

Recent experience has alleviated the concern that drove the original Commission to link the statutory thresholds to the guidelines in the manner that it did. The Commission reported in 1995 that it set the base offense levels for first offenders "slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities." [31] In other words, the range was set higher than necessary to ensure that defendants would plead guilty or otherwise cooperate. Even assuming that this was a legitimate reason, the 2007 amendment of the crack guidelines provides an empirical test of this concern. The data show that the plea rate in crack cocaine offenses did not fall after the amendment.[32] Moreover, defendants who provide assistance in the prosecution of other persons may still get sentences below the mandatory minimum by operation of 18 U.S.C. § 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. In any event, the guidelines should not be

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[29] *Fifteen Year Review* at 49 ("'[T]rumping' of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones . . . .").

[30] *See* Statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Comm'n Before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, at 16 (May 21, 2009).

[31] *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

[32] *See* USSC, *Sourcebook of Federal Sentencing Statistics*, tbl. 38 (93.9% plea rate in crack cases in FY2009; 95.1% in 2008; 93% in 2007: 93.7% in 2006; and 91.8% in 2005).

designed to recommend sentences greater than necessary to achieve the purposes of sentencing merely to provide room for the partial operation of guideline adjustments intended to reward cooperation. This, in effect, punishes non-cooperation, which is against the Commission's express policy.[33] Creating incentives for plea bargaining or cooperation is *not* a purpose that sentencing judges, or the Commission, must consider under 18 U.S.C. § 3553(a)(2).

The trumping of guideline ranges by mandatory minimums is an unfortunate consequence of the incompatibility of the mandatory minimum statutes and the guidelines, but it is also an important reminder of the Congressional role in sentencing. If a statute overrides the judgment of the Commission as to the appropriate sentencing range, responsibility for the policy should be clear. The policy judgment of the political branches should not be cloaked as the work of the Commission, particularly if those judgments fail to meet the standards of § 3553(a)(2).

As under the current guideline, adopting the level 24 option would not establish a consistent ratio between crack cocaine and other drugs. But we do not believe this is a compelling consideration upon which to base sentencing policy. If the Commission believes consistent ratios are preferable, the way to achieve them is to link the quantities for other drugs to the Drug Quantity Table in the same manner that is now used for crack, *i.e.*, adopt the level 24 option for all drug types. We understand that this is beyond the scope of the Commission's emergency amendment authority. But, the case for linking the new statutory thresholds to the current BOLs for crack is compelling and provides a first step toward later revision of the BOLs for other drugs. For the reasons stated in previous comment and in the testimony of Federal Public Defenders at the regional and mandatory minimum Public Hearings, reduction of all BOLs by two levels would be a useful step toward improvement of the drug trafficking guidelines.

The Department of Justice's suggestions are unwise and unworkable. We emphatically disagree with the views in the Department's letter to the Commission dated June 28, 2010. The Department stated that tying the guidelines to applicable mandatory minimums is the "correct policy." It suggested that for drug offenses 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."[34] While much depends on the meaning of "generally" and "regularly occurring" in the Department's proposal, as a guide to guideline drafting this proposal appears both unworkable and profoundly unwise.

The Department's proposal would, of course, compound the many problems created by linkage of the guidelines to the statutes, as described above. On its face, the proposal would appear to require major amendment of the *current* guidelines, resulting in significant *increases* in

[33] *See* USSG §5K1.2, p.s. ("A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.").

[34] Letter from Jonathan Wroblewski, Dep't of Justice Office of Policy and Legislation, to Hon. William K. Sessions, III, Chair, United States Sentencing Comm'n, at 6 (June 28, 2010).

drug sentences for all types of drugs. The guidelines already recommend imprisonment ranges with a low end below the mandatory minimum level in many thousands of cases each year.[35]

By requiring a linkage between *final* offense levels, after all other Chapter Two and Three adjustments are applied, rather than *base* offense levels, the Department's proposal would greatly handicap any future Commission's ability to amend the guideline structure. The proposal requires that base offense levels be *increased* whenever the Commission adds a mitigating adjustment intended to *decrease* sentences for appropriate defendants. Under the current guidelines, if a new mitigating adjustment would be "regularly occurring" it would lower final offense levels below the statutory minimum in many cases. To comply with the Department's proposal, base offense levels would need to be increased to prevent this from occurring. This would mean that adding mitigating adjustments would actually have the effect of maintaining sentence lengths for those defendants subject to the adjustment while *increasing* sentences for everyone else.

Such a policy is particularly inapt in light of the FSA, which itself added new mitigating (as well as aggravating) factors. The intent of the act was "increased emphasis on defendant's role," not increased base offense levels, and sentences, for all drug offenders based on drug quantity alone.

Elimination of Mandatory Minimum for Simple Possession of Crack Cocaine

The Commission proposes to strike from §2D2.1(b)(1) the cross-reference to §2D1.1 in cases where the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base. We believe this change is necessary because Congress eliminated the mandatory minimum penalty for simple possession of crack cocaine.

ENHANCEMENTS AND ADJUSTMENTS

The directive does not require that the Commission promulgate enhancements cumulatively. Before addressing the Commission's specific proposals regarding each of the adjustments, we here set out our analysis of the FSA and why it does not require the Commission to provide for the enhancements to apply cumulatively. Under a plain reading of the FSA, the Commission must "review and amend the Federal sentencing guidelines" to ensure that they call for a 2-level increase for certain aggravating factors. Nothing in the FSA, however, requires that those increases be in "addition" to existing enhancements or, for those in section 6, to each other. This reading of the FSA is consistent with how the Commission has construed similar directives in the past.

Sections 4, 5, and 6 of the FSA provide for increased penalties for drug traffickers. These sections must be read in pari materia. Section 4 is entitled "Increased Penalties for Major

[35] *See* Testimony of Michael Nachmanoff, *supra* note 1, at 5 (showing that in FY2009 cases with a mandatory minimum conviction, the minimum was within the guideline range in 16.1% of cases (3,254 of 20,127), was lower than the range in 42.7% of cases (8,581 of 20,127), and was higher than the range in 41.3% of cases (8,292 of 20,127)).

Drug Traffickers." It contains two subsections that increase financial penalties: one subsection sets forth "increased penalties" under 21 U.S.C. § 841(b); the other subsection sets forth "increased penalties" under 21 U.S.C. § 960(b). Section 5 sets forth a directive for the Commission to "review and amend the Federal sentencing guidelines to provide ***an additional penalty increase*** of at least 2 offense levels" for certain acts of violence. Given the "increased penalties" language in section 4, the phrase "additional penalty" in section 5 should be read as "in addition to the penalty increases called for in section 4."

Section 6 then directs the Commission to "review and amend the Federal sentencing guidelines to ensure an ***additional increase*** of at least 2 offense levels." Under canons of statutory construction, the term "additional" in section 6 refers back to the immediate antecedent, ***i.e.***, the increase in section 5. Norman J. Singer & J.D. Shambie Singer, 2A ***Sutherland Statutory Construction*** § 47:33 (7th ed. 2010) ("[r]eferential and qualifying words and phrases, where no contrary intention appears, refers solely to the last antecedent").

Read this way, the FSA does not require the enhancements in section 6 to apply cumulatively to each other or for the enhancements in sections 5 and 6 to apply cumulatively to existing guideline provisions. It requires only that the Commission provide for the violence enhancement to apply cumulatively with the enhancements set forth in section 6.

This construction of the FSA is consistent with how the Commission has treated similar directives. Specifically, the Commission has read the term "additional" in other directives as meaning "in addition to other increases called for in the directive," not as "in addition to other specific offense characteristics" or "in addition to existing guideline provisions." Two examples demonstrate this point.

Telemarketing Fraud Prevention Act of 1998. In June 1998, Congress directed the Commission to increase penalties for certain telemarketing offenses. ***See*** Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 6 (June 23, 1998). In subsection (b)(1) of the directive, Congress instructed the Commission "to provide for substantially increased penalties for persons convicted of" certain telemarketing offenses. ***Id.*** In subsection(c)(1), Congress directed that the "guidelines and policy statements . . . reflect the serious nature of the offenses." ***Id.*** Subsection (c)(2) then directed that the Commission shall "provide **an additional appropriate sentencing enhancement,** if the offense involved sophisticated means, including but not limited to sophisticated concealment." ***Id.***

In this context, the term "additional" meant "in addition to the requirement that the Commission provide for substantially increased penalties under (b)(1) and that they reflect the seriousness of the crime, as required by subsection (c)(1)." The Commission did not interpret it to mean, "in addition to already existing guidelines." When Congress passed the Telemarketing Fraud Prevention Act of 1998, the Commission had already sent to Congress an amendment to the fraud guideline that would increase penalties for mass-marketing, including telemarketing, and for "sophisticated concealment." USSG, App. C, Amend. 577 (Nov. 1, 1998). Instead, of increasing the enhancement in the "sophisticated concealment" amendment it had already submitted to Congress, the Commission merely broadened it to cover all "sophisticated means." ***See*** USSG, App. C, Amend. 587 (Nov. 1, 1998).

Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In § 211(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress directed the Commission to increase sentences for certain specified offenses involving immigration documents. *See* IIRIRA, Pub. L. No. 104-208, § 211(b)(2)(A)-(B) (Sept. 30, 1996). It also directed the Commission to "impose an appropriate sentencing enhancement" for an offender with one prior felony conviction involving the same or similar conduct, *id.* § 211(b)(2)(C), and to "impose an **additional appropriate sentencing enhancement**" for an offender with two or more such prior felony convictions. The term "additional" in this context clearly means "in addition to the enhancement for one prior conviction" also specified in the directive. In response to this language, the Commission added a specific offense characteristic to both §§ 2L2.1 and 2L2.2 that provides for a 2-level increase for one prior felony conviction, and a 4-level increase for two or more such convictions. USSG, App. C, Amend. 544 (May 1, 1997).

Just as it did not read the telemarketing fraud or immigration reform directives to require enhancements in addition to those already existing in the guidelines, the Commission should not so interpret the FSA. Nothing in the plain language of the FSA requires that the Commission amend the guidelines so that the enhancements required under the Act apply cumulatively to existing enhancements. The directive for the Commission to "review and amend to ensure an additional penalty increase" or "additional increase" of at least 2-levels should be given a natural, common-sense meaning. With that language, Congress expressed its desire that the guideline range for certain drug trafficking offenders should be greater [at least 2-levels] than the range for quantity alone. Congress, however, left it up to the Commission to review the guidelines and amend them to make sure they provided for such penalty increases.

Violence Enhancement. Section 5 of the Act directs the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an 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."

The Commission requests comment on several matters related to this directive: (1) whether it should "provide a single level of enhancement for any conduct covered by the violence enhancement" or assign different levels to the different categories of conduct; (2) whether the violence enhancement and the enhancement for weapon possession should be applied cumulatively; and (3) whether the term "violence" should be defined, and if so, how the definition should "interact with other provisions in the Manual where the term is not defined."

We believe that the Commission should implement this directive by amending §2D1.1(b)(1) as follows:

> If a dangerous weapon (including a firearm) was possessed ***or the defendant used violence, made a credible threat to use violence, or directed the use of violence in connection the offense***, increase by 2 levels.[36]

[36] The Commission should make clear that the violence must be done in connection with or to facilitate the offense rather than merely occur at the same time as the drug trafficking offense. Otherwise, the guideline may well reach acts of violence that have nothing to do with the defendant's drug trafficking, *e.g.*, an assault wholly unrelated to the defendant's drug activities.

By adding the violence enhancement to the existing enhancement for possession of a dangerous weapon, the Commission would implement the additional penalty increase as contemplated by the directive. It also would maintain symmetry with §5C1.2(a)(2), which treats the use of violence, threats of violence, and possession of a weapon in connection with the offense, as equivalent.

The violence enhancement and the weapon enhancement should not apply cumulatively.[37] Nothing in the guidelines or the legislative history of the FSA supports the notion that weapon possession is a distinct harm from the use or threatened use of violence, which must be punished separately or cumulatively. Indeed, "[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons." USSG §2D1.1, comment. (n.3). The congressional hearings surrounding passage of the FSA also reflect the view that weapon possession is a proxy for the presence of violence, not a separate harm unto itself. No witness suggested that weapon possession was to be treated as a harm independent of the risk of violence. [38]

Provide for a single level enhancement. We do not believe that the Commission should provide for increased offense levels according to whether the defendant used violence or threatened it. The essential harm is the same unless bodily injury occurs. In those cases where actual bodily injury does occur, the guidelines encourage an upward departure. USSG §5K2.2 (Physical Injury). The Commission should not unduly complicate the guidelines by adding graduated enhancements depending upon the nature of violent conduct.

Define violence. We believe that some definition of "violence" may be necessary to avoid the enhancement reaching unintentional conduct, damage or threats to damage property, and legally justifiable conduct (self-defense).

We note that the Commission drafted a revised proposed amendment for field-testing that equates violence with "physical force against the person [or property] of another." [39] While framing the "violence" inquiry with reference to "physical force against the person" is a good start, we do not believe it goes far enough in removing ambiguity, getting at the conduct

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[37] We agree with the Commission's Second Revised Proposed Amendment, which clarifies that a use of force enhancement (also known as the violence enhancement) does not apply when the defendant also has been convicted under 18 U.S.C. § 924(c).

[38] *See generally Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives*, 111th Congress (May 21, 2009); *id.* at 6 (statement of Rep. Lamar Smith. R. Texas); *id*. at 28 (testimony of Lanny A. Breuer, Assistant Attorney General, U.S. Dep't of Justice) (supporting increased penalties to address "concerns about violence and guns used to commit drug offenses); *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity, Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Congress 23 (April 29, 2009) (weapon enhancement used to judge level of violence associated with crack distribution).

[39] The Commission's Second Revised Proposed Amendment was provided to the federal defenders in connection with field-testing conducted at the Commission on October 7, 2010.

Congress contemplated under the enhancement, and ensuring proportionality. Hence, we propose the following language:

> *Violence means physical force that is intended to cause and capable of causing serious bodily injury to another person. "Serious bodily injury" has the meaning given to that term in Application Note 1 of the Commentary to §1B1.1. An act of self-defense is not the use of violence for purposes of this section.*

Our proposal builds on the field-tested proposed amendment in several ways. First, we think it important that the use of physical force be defined by reference *to intent to do bodily harm*. Such intent is embodied within the meaning of "violence." Black's Law Dictionary (8th ed. 2004) (defining violence as "the use of physical force, usually accompanied by fury, vehemence, or outrage, especially physical force unlawfully exercised with *the intent to harm*").[40]

The Commission should not expand the common and ordinary meaning of "violence" to include acts against property. Had Congress intended such an expansive definition, it could have easily said so. Congress more likely had in mind the kind of violence identified as aggravating conduct in the Commission's 2007 report, *i.e.*, conduct causing actual physical harm to another person.[41] Defining violence by reference to physical force against the person of another is consistent with the Department of Justice's position at the Congressional hearing, which called for enhancements for those "who injure or kill someone in relation to a drug trafficking offense."[42] Defining violence as the use of physical force against another also tracks the definition of violence set forth in USSG §4B1.2(a)(1) and §2L1.2, comment. (n.1(B)(iii)). If the Commission were to expand the reach of the enhancement to the use of physical force against property, any number of acts that might occur during the course of drug trafficking would be considered aggravating, including acts of vandalism, such as the slashing of tires and keying of cars of rival dealers.

Second, to avoid confusion caused by multiple definitions of the term, we encourage the Commission to define the term "physical force" in a way that is consistent with the Supreme Court's analysis in *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010), *i.e.*, "*force capable of causing physical pain or injury to another person*."

Third, we recommend adding to the *Johnson* definition the requirement of "serious" injury to ensure proportionality between the new 2-level enhancement under §2D1.1 and other guideline provisions that contain 2-level increases for serious bodily injury.[43]

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[40] *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (term "use" does not mean accidental).

[41] USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 37 (2007).

[42] *See Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?, Hearing Before the House Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary,* 111th Cong. 28 (2009) (statement of Lanny Breuer, Ass't Attorney General).

[43] *See* USSG §§2A2.1(b), 2A4.1(b)(2), 2B1.1(13), 2B5.3(b)(5), 2L1.1(b)(6).

We also think it appropriate to make clear that this enhancement is limited to those acts of the defendant for which he would be accountable under §1B1.3(a)(1)(A). To promote such clarity, the Commission could include language like that in Application Note 4 to USSG §5C1.1: *"Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subsection [cite violence enhancement subsection], limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured or willfully caused."* One of the driving forces behind the FSA was the recognition that guidelines with specific enhancements that target an individual offender's role in the offense promote sentencing proportionality better than blanket application of quantity-based guidelines to a broader number of defendants. Holding defendants accountable for their own conduct, or that which they aided or abetted or willfully caused, is consistent with this renewed focus on the defendant's actual role in the offense.[44]

Bribery Enhancement. Section 6 of the Act directs the Commission to "ensure an additional increase of at least 2 levels if the defendant bribed a Federal, State, or local law enforcement official in connection with a drug trafficking offense." The Commission requests comment on how this provision should interact with other provisions, such as §3C1.1 (Obstructing or Impeding the Administration of Justice). "In particular, should they be applied cumulatively, or should they not be applied cumulatively?"

With this directive, it appears that Congress was concerned with ensuring increased penalties for those rare cases that fall outside of §3C1.1 because the bribery of the officer did not occur with respect to the investigation, prosecution, or sentencing of the instant offense of conviction (*e.g.*, a case where a defendant offers a law enforcement agent money to overlook drug trafficking activity when no federal investigation is pending).[45]

We encourage the Commission to ensure that the provision does not cumulate with §3C1.1 unless the defendant obstructed the investigation or trial of the instant offense by engaging in conduct other than the bribery of a law enforcement officer. In circumstances where the offense guideline already accounts for the obstructive conduct, the guidelines do not apply cumulatively. *See* USSG §2J1.3, comment (n.2) (instructing that§3C1.1 does not apply to offenses covered under §2J1.3 (perjury or bribery of a witness) unless the defendant obstructed the investigation or trial of the perjury count); *id.* §2J1.9, comment (n.1) (instructing that §3C1.1 does not apply to offenses covered under §2J1.9 (payment to witness) unless defendant obstructed the investigation or trial of the payment to witness count). No evidence suggests that a different rule should apply here. It would be unduly harsh and not serve any purpose of sentencing set forth in 18 U.S.C. § 3553(a)(2) to allow conduct identical to that giving rise to the enhancement under §2D1.1 to also support the obstruction enhancement under §3C1.1.

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[44] Other guideline provisions contain the same limitation. *See, e.g.*, USSG §2K1.1, comment. (n.13(B)); §2K2.6, comment. (n.1(A)) (use of body armor in connection with another felony offense); §3B1.5, comment. (n.2) (use of body armor); §3C1.1, comment (n.9) (obstructing or impeding administration of justice).

[45] *See United States v. Jenkins*, 275 F.3d 283, 291 (3d Cir. 2001) (requiring nexus between defendant's conduct and investigation, prosecution or sentencing of the federal offense; interference with state prosecution insufficient to warrant application of §3C1.1).

The Commission should add an application note to §3C1.1, such as the following, to address the interplay between the new §2D1.1 enhancement and §3C1.1:

> *Inapplicability of Adjustment in Certain Cases under §2D1.1.—If the adjustment from §2D1.1(b)(11) applies, this adjustment is not to be applied to the offense level for that offense unless a significant further obstruction occurred during the investigation, prosecution, or sentencing of the instant offense itself (e.g., if the defendant threatened a witness during the course of the prosecution).*[46]

For the same reasons, we agree with the Commission's proposal in the Second Revised Proposed Amendment at Application Note 27 to §2D1.1 instructing that the enhancement for bribery of a law enforcement officer does not apply if the new super-aggravating factor for obstructing justice applies.

We also urge the Commission to limit application of the enhancement to the defendant's acts and omissions covered under §1B.3(a)(1)(A). Such a limitation would be consistent with Application Note 9 to § 3C1.1, which makes the defendant accountable only for "his own conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."

Enhancement for Maintaining an Establishment. Section 6 of the Act directs the Commission to "ensure an additional increase of at least 2 levels if the defendant *maintained* an establishment for the *manufacture or distribution* of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. § 856)." The Commission requests comment on whether "this enhancement should apply more broadly, ***e.g.***, if the defendant "committed an offense described in 21 U.S.C. 856?" The Commission also asks if it should "raise the alternative base offense level 26 in §2D1.9 to [28] [30]?" Our answer to both of these questions is "no" for the reasons discussed below.

As a threshold matter, we suggest that the Commission implement this directive by simply adding to the existing specific offense characteristic (SOC) at §2D1.1(b)(5) for those convicted under 21 U.S.C. § 856 rather than setting forth a separate SOC. Language such as the following would more clearly eliminate any questions about double-counting of separate SOCs.

> *If the defendant is convicted under 21 U.S.C. § 865* ***or maintained an establishment for the purpose of manufacturing or distributing a controlled substance****, increase by 2 levels.*

(New language in bold.)

Should the Commission choose instead to provide for a new SOC, it should make clear that it does not apply if the defendant was convicted of an offense under 21 U.S.C. § 856. In such cases, only the current §2D1.1(b)(5) should apply.

The enhancement for maintaining an establishment for the manufacture or distribution of a controlled substance should not apply to other conduct covered under 21 U.SC. § 856. Subsection (a) of § 856 sets forth, in two separate paragraphs, a series of

[46] This language is adapted from USSG §3C1.2, comment. (n.6).

prohibited acts. Paragraph (1) makes it unlawful to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance." Paragraph (2) makes it unlawful to "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully, manufacturing, storing, distributing, or using a controlled substance." These two provisions do not proscribe the same conduct. Paragraph (1) requires the person with the interest in the premises to have the express purpose of doing so for engaging in drug related activity. For that reason, a person cannot be convicted under (1) on the basis of willful blindness. Paragraph (2), in contrast, contains a lesser mens rea, requiring only that the person knowingly and intentionally allow it for the purpose of manufacturing, storing, or distributing.[47]

In contrast to the multitude of ways in which a person may commit an offense under 21 U.S.C. § 856, the FSA directive singles out two: (1) *maintaining an establishment for the manufacture of a controlled substance*; or (2) *maintaining an establishment for the distribution of a controlled substance*. If Congress had meant for the Commission to add an enhancement for a defendant who commits *any* of the acts described in § 856, it knew how to say so.

Here, a narrow reading of the directive is especially warranted because a new enhancement for maintaining an establishment for manufacture or distribution would free the government of the burden of proving the conduct beyond a reasonable doubt as required under existing USSG §2D1.1(b)(5) (2-level increase if "defendant is convicted under 21 U.S.C. § 856"). Under these circumstances, it would erode respect for law, contrary to 18 U.S.C. § 3553(a)(2)(A), if the Commission was to broaden application of the enhancement to all of the conduct described in § 856.

The alternative base offense level 26 in §2D1.8 should remain the same. For related reasons, we object to any proposal that would raise the alternative base offense 26 in §2D1.8 to 28 or 30. Some defendants convicted under 21 U.S.C. § 856 will be sentenced under §2D1.1, with its 2-level increase for the § 856 conviction. USSG §2D1.1(5). Defendants most likely to benefit from the alternative base offense level in §2D1.8 are those who do nothing more than allow use of premises that the defendant "initially leased rented, purchased, or otherwise acquired a possessory interest in . . . for a legitimate purpose." USSG §2D1.8. comment. (n.1). Such persons are hardly the people Congress intended to punish more harshly because of their aggravating role in the offense and are unlikely to be responsible for maintaining an establishment for the manufacture or distribution of controlled substances.[48] These individuals are more likely to have been convicted under 21 U.S.C. § 856(a)(2), which contains a lesser mens rea requirement than 21 U.S.C. § 856(a)(1).

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[47] *See, e.g.*, *United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007) (discussing different mens rea requirements of the two sections); *United States v. Soto-Silva*, 129 F.3d 340, 344 (5th Cir. 1997) (deliberate ignorance instruction inappropriate in prosecution under § 856(a)(1); defendant must "have the purpose of engaging in illegal drug activities").

[48] In FY 2008, 33 defendants sentenced under §2D1.8 had a base offense level of 26 (the alternative offense level under §2D1.8(a)(2)). Twenty-five (75.8% were female). Source: BJS FY2008 (Offenders Sentenced, tables), available at http://bjs.ojp.usdoj.gov/fjsrc.

Absent a clear and unambiguous statement of congressional intent, the Commission should not use the directive in the FSA to ratchet up sentences for defendants who "had no participation in the underlying controlled substance offense other than allowing use of the premises." USSG §2D1.8(a)(2). Less than ten years ago, the Commission increased the alternative offense level 61.5% (from level 16 to level 26) "in response to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders." USSG, App. C, Amend. 640 (Nov. 1, 2002). No testimony presented at the congressional hearings or any evidence suggests that the penalties are too low for these offenders.

As a more general proposition, nothing in the FSA purports to require the Commission to add aggravating factors to guidelines that cover narrowly tailored drug offenses like 21 U.S.C. § 856. The directives for additional penalties in the FSA apply to only two types of offenses – distribution-related offenses under 21 U.S.C. § 841 and importation offense under 21 U.S.C. § 960(b). As previously discussed, section 4 of the Act sets forth the additional penalties for those offenses. Sections 5 and 6 then provide for an "additional penalty increase" or "additional increase" for those offenses. The FSA does not speak to any of the other offenses covered under title 21.

The proposed application note on maintaining an establishment for distribution or manufacture of a controlled substance should be modified to avoid ambiguity. The Commission has prepared a Second Revised Proposed Amendment, which adds an application note that seeks to instruct the court on the meaning of "maintaining an establishment for the manufacture or distribution of a controlled substance." While we think it advisable to define what it means to "maintain an establishment for the manufacture or distribution of a controlled substance," we fear that the proposed application note sweeps too broadly and may confuse matters. We suggest the following changes to the provision so that it clearly addresses the two essential elements of the enhancement: (1) maintaining an establishment; (2) for the purpose of manufacture or distribution of a controlled substance.

> *Subsection (b)(12) applies to a defendant who knowingly maintains an establishment premises (i.e., a "building, room or enclosure," see USSG §2D1.8, comment. (backg'd), for the purpose of manufacturing or distributing a controlled substance.*
>
> *Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises, (B) the amount of time the defendant was present at the premises, (C) the defendant's activities at the premises (such as activities to furnish, repair, protect, or supply the premises) and (D) the extent to which the defendant controlled access to, or activities at, the premises.*
>
> ***If the court concludes that the defendant "maintained" the premises, it must also determine whether the defendant did so for the purpose of manufacturing or distributing, not storing or using, a controlled substance. For the enhancement to apply****, manufacturing or distributing a controlled substance* ~~*need not be the sole purpose for which the premises were was used, but*~~ *must be for more than a collateral purpose of*

the premises, it must be a ***a*** ~~*one of the*~~ *primary or principal uses*~~*s*~~ (italics in original, bolded language is new). [49]

We propose that the Commission make clear that the purpose not be for storing or using a controlled substance. Whereas § 856 prohibits manufacturing, distributing, using, or storing, the FSA limits the enhancement to manufacture and distribution. The Commission should also include language that manufacture or distribution must be for more than a collateral purpose and must be a primary use of the premises. Such language would better target the harms with which Congress was concerned in 21 U.S.C. § 856. Section 856 is at bottom a "crack house" statute, which was designed to "outlaw operation of houses or buildings, so-called 'crack houses,' where 'crack,' cocaine and other drugs are manufactured and used." H.R. 5484, 99th Cong., 2d Sess., 132 Cong. Rec. S13779 (Sept. 26, 1986).[50]

Implementation of the Super-Aggravators. The Commission has requested comment regarding how it should implement the directive in section 6(3) of the Act, which directs the Commission to "ensure an additional increase of at least 2 levels" if the defendant "is an organizer, leader, manager or supervisor" subject to an aggravating role enhancement and if the offense involved one or more the "super-aggravating" factors listed in the directive. In particular, the Commission requests comment regarding whether it should implement this directive in Chapter 3 (Issue for Comment 6); whether it should distinguish among the various factors by assigning different levels to each or providing for a higher total adjustment if more than one applies; (Issue for Comment 7); how it should interact with other provisions in the guideline manual, particularly whether the factors should apply cumulatively (Issue for Comment 8); and how should the directive interact with other directives set forth in section 6 of FSA (Issue for Comment 9).

We encourage the Commission to implement this directive by amending §2D1.1 and combining into a single offense characteristic the super-aggravating role enhancement, the enhancement for bribery of a law enforcement officer, and the enhancement for maintenance of an establishment for the purpose of manufacturing or distributing a controlled substance. Specifically, the Commission should establish a new subsection under §2D1.1(b), which contains three subparts: (1) the bribery of a law enforcement office enhancement; (2) the maintenance of an establishment for the purpose of manufacturing or distributing a controlled substance offense; and (3) the super-aggravating role enhancement. These enhancements would not apply cumulatively. A single enhancement with multiple subparts is consistent with the language of section 6 of the Act, which sets out the aggravating factors in the alternative and does not state that they should apply cumulatively.

A single multi-part enhancement would provide for aggravating factors set forth in section 6, while recognizing that at some point the piling on of enhancements accomplishes no sentencing purpose and creates an "inherently unstable" system because of "continual factor

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[49] *See United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992) (statute does not reach drug activity that is "incidental" to purpose of maintaining house as a residence).

[50] *See, e.g.*, *id.* at 1252 (defendant maintained house for the regular sale and use of crack; on repeated occasions, agents found twenty or more people in house along with drugs and drug paraphernalia).

creep." [51] The Commission itself has recognized the phenomenon of "factor creep," observing, that "as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness." [52] Sound policy reasons exist for avoiding the phenomenon of "factor creep" by consolidating these factors into a single multi-part offense characteristic that does not apply cumulatively.

First, §2D1.1 already contains eleven different specific offense characteristics. The addition of five more, with each one having the potential to increase substantially the length of a term of imprisonment, would complicate the sentencing process—making it harder and longer for probation officers, prosecutors, defense attorneys, and judges. [53] The more decision points there are in a guideline calculation, the less reliable the result. [54]

Second, the guideline table's logarithmic structure ensures that the size of the sentence increase associated with even a 1-level change is significantly greater at higher total offense levels than lower ones. Take for example, a defendant in Criminal History Category I who starts out at a base offense level of 32—the base offense level most often used for powder and crack cocaine offenders.[55] His guideline range would start at 121-151 months. If he then receives a 2-level role adjustment, a 2-level adjustment for maintaining an establishment for the purpose of distribution, a 2-level adjustment for distributing to a 65 year old, and a 3-level reduction for acceptance of responsibility, his final range jumps to 168-210 months—nearly ***four to five years longer***. If, however, the defendant started at the next most frequent base offense level for cocaine and crack offenders, level 26,[56] his starting range would be 63-78 months. With the same upward and downward adjustments, his final range would jump to 87-108 months—***two to two and one-half years longer***. This gaping disparity in the amount of prison time added on as a result of "factor creep" is disproportionate, unjustifiable and unfair.

Third, the gross disparities that result from the accumulation of aggravating factors encourage prosecutors to manipulate the factual basis upon which the guidelines are calculated to

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[51] R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001) [hereinafter Ruback & Wroblewski, *Reasons for Simplification*].

[52] *Fifteen Year Review* at 137 (citing Ruback & Wroblewski, *Reasons for Simplification*). As an example of factor creep, the Commission uses the "countless circumstances" that one can imagine would make a drug offense more serious. *Id.*

[53] Ruback & Wroblewski, *Reasons for Simplification*, at 752.

[54] *Id*. at 765 (citing P.B. Lawrence & P.J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guidelines*, 4 Fed. Sent'g Rep. 330 (1992)).

[55] USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 25 (2007).

[56] *Id*.

arrive at a particular result. Such manipulation then injects yet another layer of unwarranted disparity into the process. [57]

In similar situations where the Commission has sought to account for numerous circumstances that might make an offense more serious, it has set forth alternative specific offense characteristic in a non-cumulative manner. For example, §2D1.1(10), which was promulgated in response to the "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. No. 106-878, sets forth enhancements for a variety of harms, such as discharge of a toxic substance, transportation or storage of hazardous waste, distribution of methamphetamine on premises where a minor is present or resides, manufacture of methamphetamine where a minor is present or resides, and manufacture of methamphetamine creating a substantial risk of harm. Those enhancements do not apply cumulatively.

Section 2G2.2(b)(3) likewise sets forth six separates enhancements for distribution of child pornography for pecuniary gain, distribution for receipt or expectation of receipt of a thing of value, distribution to a minor, distribution to a minor that was intended to induce participation in illegal activity, distribution to a minor that was intended to induce the minor to travel for sexual conduct, and distribution for other reasons. Those enhancements do not apply cumulatively.

In sum, we strongly encourage the Commission to provide for a maximum 2-level increase regardless of whether or not the offense involved one or all of the aggravating factors set forth in section 6 of the Act. No evidence suggests that the drug guidelines are too low and that cumulative aggravating factors are necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). For cases in which more than one factor is present, the court may, and undoubtedly will, consider those factors in deciding whether to sentence at the low, middle, or high-end of the applicable guideline range.

For the same reasons discussed above, we encourage the Commission to avoid cumulative application where other guideline provisions address the harm targeted by the section 6 aggravating factors. We note that the Commission's Second Revised Proposed Amendment precludes such cumulative application in the commentary discussing application of proposed subsection (b)(14). *See* Second Revised Proposed Amendment USSG §2D1.1, comment. (n.29(A)(ii)-(iii), (C)). We agree that such limiting language is appropriate and necessary.

We also support the language set forth in the Second Revised Proposed Amendment's commentary that clarifies application of the "super-aggravating" vulnerable victim enhancement, importation of a controlled substance, and pattern of criminal conduct engaged in as a livelihood. *Id*. comment. (n.29(A)(i), (B), (D)). We offer here several additional suggestions for application notes.

First, the Commission should make clear that a person is not "particularly susceptible to the criminal conduct" by virtue of his economic condition. The phrase "particularly susceptible" is vague and subject to widely varying interpretations. Some might consider a poor person "particularly susceptible" to criminal conduct, but there is no evidence that Congress intended such persons to be within the class of persons covered by the enhancement.

[57] Ruback & Wroblewski, *Reasons for Simplification*, at 752.

Second, for the obstruction super-aggravating factor, the Second Revised Proposed Amendment omits language from the directive, which states that the conduct must be "*in connection with the investigation or prosecution of the offense [of conviction]*." We believe that such limiting language is necessary to avoid having the enhancement apply to situations beyond what Congress intended.

Third, because each of the super-aggravating factors applies only to the defendant, we strongly urge the Commission to provide a general application note, which makes clear that those provisions apply only if the "defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance." USSG §1B1.3. While the Commission has included such language for the importation super-aggravating factor, there is no reason not to bring the same clarity to the other provisions.

Fourth, we are concerned about one other area where the proposed enhancements may overlap with existing enhancements and result in disproportionate penalty increases even though they may be targeted at more discrete harms. Subsection 6(B) of the FSA contains an aggravating factors targeted at several categories of protected individuals, including persons under 18 and individuals who were unusually vulnerable due to physical or mental condition or who were particularly susceptible to criminal conduct. Section 2D1.1(b)(10) contains an enhancement targeted at protecting minors and incompetents in certain methamphetamine offenses. Because all of these enhancements are targeted toward minors and vulnerable individuals, we encourage the Commission to provide that they not apply cumulatively. To the extent the factors may address slightly different harms to minors or incompetents, the need to avoid "factor creep" and false precision counsels against providing for the factors to apply cumulatively.

Possible Changes to other Chapter Two Drug Guidelines. In Issue for Comment 10, the Commission asks "[w]hat, if any, changes should the Commission make to other Chapter Two offense guidelines involving drug trafficking to ensure consistency and proportionality?" The Commission expressly asks about whether it should establish similar offense characteristics in §§2D1.2, 2D1.5, and 2D1.11.

We do not believe the Commission should amend these provisions. First, when Congress enacted the FSA, it was targeting offenses punishable under 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b), not the myriad offenses set forth in chapter 13, title 21 of the United States Code. The only "drug trafficking" offenses mentioned in the FSA are 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b).[58] Thus, when the FSA directs the Commission to increase the emphasis on certain aggravating factors associated with "drug trafficking offenses" it must refer to the major trafficking statutes—21 U.S.C. § 841(b) and 21 U.S.C. § 960(b)—which are specifically mentioned in the FSA and sentenced under USSG §2D1.1.

Second, §§2D1.2, 2D1.5, and 2D1.11 are all crafted to cover distinct offenses with discrete harms not covered by the major drug trafficking provisions at § 841(b) and § 960(b). No evidence suggests that the guideline ranges provided under those provisions are inadequate. Section 2D1.2 is directed at protected locations and protected individuals. It deliberately omits from its application the specific offense characteristics set forth in §2D1.1(b), incorporating only

[58] The only other provision mentioned in the FSA is 21 U.S.C. § 844(a), the simple possession statute.

the quantity-based provisions in §2D1.2(a)(1) and (2). If the Commission were to start adding offense characteristics to that guideline, it would need to revisit the original reason for the base offense levels under §2D1.2. The same is true for USSG §2D1.11. While §2D1.11 contains some of the same specific offense characteristics as set forth in §2D1.1, it does not contain all of them. To suddenly add enhancements to that provision without any evidence of need would be unsound policy. As to §2D1.5, the minimum base offense level that applies to a defendant sentenced under that provision is 38. USSG § 2D1.5(a)(2). That high base offense level already accounts for the fact that defendants convicted under 21 U.S.C. § 848 have been involved in "one of the most serious types of ongoing criminal activity." USSG §2D1.5, comment. (backg'd). In other words, it presupposes the existence of many aggravating factors. It also has a mandatory minimum term of twenty years.

Conclusion

We appreciate this opportunity to comment on the Commission's exercise of its emergency amendment authority. The FSA presents unique and difficult implementation challenges. We encourage the Commission to proceed cautiously so that the many amendments required under the FSA do not have unintended consequences.

Very truly yours,

/s/ *Marjorie Meyers*

Marjorie Meyers
Federal Public Defender

Chair, Federal 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

Written Statement of James Skuthan

Chief Assistant Federal Public Defender
for the Middle District of Florida

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2011

Re: Proposed Amendments: Drugs

March 17, 2011

Testimony of James T. Skuthan
Chief Assistant Federal Public Defender for the Middle District of Florida

Before the United States Sentencing Commission
Public Hearing on Proposed Drug Amendments

March 17, 2011

My name is Jim Skuthan and I am the Chief Assistant Federal Defender in the Middle District of Florida. I work in the Orlando Division. I would like to thank the Commission for holding this hearing and giving me an opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments for drug trafficking offenses.

Let me briefly summarize our major positions here. First, Defenders strongly encourage the Commission to drop the quantity thresholds for all drugs so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30. The current quantity table serves as a poor proxy for offense seriousness and is not grounded in empirical evidence. A two level decrease would bring the drug guideline a step closer to fulfilling the statutory purposes of sentencing. Second, while retroactivity of the amendments under the Fair Sentencing Act is not yet ripe for comment, we look forward to working with the Commission on how it can provide relief to the many offenders who have been over punished. Third, Defenders support any amendments that reduce excessive offense levels for drug trafficking offenders, but we believe the severity of the drug quantity table should be addressed more directly. As to the "safety-valve," we have long advocated for its expansion and urge the Commission to make it more widely available and to increase the amount of the reduction. Fourth, we believe that the Commission can make several changes to the commentary governing adjustments for mitigating role, which would encourage courts to apply such adjustments in appropriate cases. It can also make a modest change to the aggravating role guideline so that it does not apply to those defendants who receive an enhancement under USSG §2D1.1(b)(3)(C) (captain, pilot, navigator, flight officer or other operation officer). Lastly, the Commission should implement the directive in the Secure and Responsible Drug Disposable Act of 2010 by simply suggesting to the court that it consider in such cases the applicability of the adjustment under §3B1.3 (Abuse of Position of Trust) rather than by advising its application in all such cases.

I. Repromulgation of the Emergency Amendments under the Fair Sentencing Act and Changes to the Drug Quantity Table.

Defenders welcomed several parts of the emergency amendment, including elimination of the mandatory minimum penalty for simple possession of crack cocaine and increases in the threshold amounts linked to various offense levels in the Drug Quantity Table for crack cocaine.

Several other parts of the amendment were unwelcome but unambiguously directed by Congress. We understand that unambiguous directives bound the Commission to amend the guidelines in the specified manner, and now require it to re-promulgate parts of the emergency amendment without change, regardless of whether the directive represents sound policy, is

consistent with empirical data and national experience, or complies with the purposes of sentencing and other factors that judges must consider at sentencing.[1] We have previously expressed concern that Congressional micro-management of guideline development threatens to widen the gulf between sentences the guidelines recommend and sentences the primary sentencing statute, 18 U.S.C. §3553(a), requires judges to impose.[2] This gulf undermines confidence in the soundness of the guidelines' recommendations.

Defenders also viewed other parts of the amendment, which were discretionary on the part of the Commission, as unsound. Those views are expressed in our comment on the emergency amendment.[3] We appreciate the Commission's invitation with these Issues for Comment to revisit these latter decisions. We believe the Commission should re-promulgate a revised and improved guideline.

A. Recommendations for Changes to the Drug Quantity Table.

The base offense levels (BOLs) for crack offenses should be lowered by two levels throughout the Drug Quantity Table, to restore them to the levels in effect at the time the FSA was enacted. In addition, the Commission should take this unique opportunity to do what it could not do as part of the emergency amendment: lower the BOLs for all drugs to track those for crack and to ensure that mandatory minimum penalties are *within*, rather than *below*, the guideline ranges corresponding to these BOLs for first offenders. Because the aggravating adjustments in the FSA applied to all drug offenders and increased average penalties above what they would have been prior to the Act, an offsetting downward adjustment in the quantity-based BOLs is needed to achieve the FSA's goal of reducing the emphasis on drug quantity and better target the most dangerous and culpable offenders. This change should be made now as part of final integration of the FSA aggravating adjustments into the guidelines. It should not be delayed until a later time when the new aggravating factors, which give independent weight to factors for which drug quantity served as a proxy, have been forgotten or when new aggravating factors are demanded.

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[1] *See* Letter from Jon Sands, Chair of the Federal Defender Guideline Committee, to U.S. Sentencing Commissioners (April 9, 2009) (discussing the role of empirical evidence and congressional directives in guideline development and amendment).

[2] Statement of Alan Dubois and Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, GA, at 7-15 (February 10, 2009).

[3] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n (October 8, 2010). As more fully discussed in our October 2010 submission, we are concerned about the absence of a definition of violence and would prefer that it be defined as "physical force that is intended to cause and capable of causing serious bodily injury to another person." *Id*. at 15. We also believe that the Commission can implement the directive without allowing cumulative application of the adjustments for super-aggravating role, bribery, and maintaining an establishment. *Id*. at 12-14, 21. In addition, the commentary should make clear that an individual is not "otherwise particularly susceptible" under §2D1.1(b)(14)(B) by virtue of his or her economic condition. *Id*. at 23.

Naturally, some of the reasons in favor of revising the amendment in this manner track reasons and evidence in the comment we provided on the emergency amendment. Along with new analyses, we reiterate some previous arguments here for the consideration of the newly appointed Chair and for the convenience of all Commissioners.

1. The current drug guideline does not advance the purposes of sentencing.

We and others have long urged the Commission to review the guidelines linked to mandatory minimums, and the drug guidelines in particular.[4] Nearly two-thirds (58%) of judges recently surveyed by the Commission believe that the sentencing guidelines should be "delinked" from statutory mandatory minimum sentences. USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010).

The current drug guideline generally recommends sentences far greater than necessary to comply with the purposes of sentencing. The Supreme Court has made clear that guideline recommendations may not be presumed to comply with 18 U.S.C. § 3553(a),[5] and that neither the Commission nor judges are legally bound to conform to unsound Congressional policies underlying mandatory minimum statutes.[6] Judges may reasonably find that sentences recommended by guidelines or policy statements based on unsound policies fail to conform to § 3553(a), even in typical or mine run cases.[7] The drug guidelines were based on unsound quantity thresholds and ratios in mandatory minimum statutes rather than on data of past

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[4] *See, e.g.*, Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Before the U.S. Sentencing Comm'n, Washington, D.C. (May 27, 2010); Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Before the U.S. Sentencing Comm'n, Austin, Tex. (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Before the U.S. Sentencing Comm'n, Denver, Col. (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

Others urging a de-linking of the drug guidelines from the quantity thresholds in the mandatory minimum statutes have included the Judicial Conference of the United States, *see* Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n (Mar. 16, 2007), http://www.usc.gov/hearings/03/20/07/walton-testimony.pdf., and numerous witnesses at the Commission's Regional Hearings. S*ee* Transcript of Hearing Before the U.S. Sentencing Comm'n, Atlanta, GA, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Hearing Before the U.S. Sentencing Comm'n, Stanford, Cal., at 6-22 (May 27, 2009) (Judge Walker); Transcript of Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, NY, at 92, 139-41 (July 9-10, 2009) (Judge Newman).

[5] *Rita v. United States*, 551 U.S. 338, 351 (2007); *Nelson v. United States*, 129 S. Ct. 890, 892 (2009).

[6] *Kimbrough v. United States*, 552 U.S. 85, 91, 101-05 (2007); *Spears v. United States*, 129 S. Ct. 890 (2009).

[7] *Kimbrough*, 552 U.S. at 110; *Pepper v. United States*, 2011 WL 709543, *15 (March 2, 2011).

sentencing practices or other empirical research, and were not developed by the Commission exercising its characteristic institutional role.[8]

The present guideline does not properly "reflect the seriousness of the offense" because it does not reliably categorize offenders according to their culpability as reflected in their functional roles. As the Commission's research has shown, many low-level offenders receive sentences that Congress intended only for managers or kingpins.[9] The present guideline requires punishments greater than necessary to "afford adequate deterrence," 18 U.S.C. § 3553(a), because marginal increases in punishment do not increase any deterrent effects of imprisonment, and many drug crimes, driven by addiction or economic circumstances, are particularly immune to deterrence.[10]

The present guideline also does not track the need to "protect the public from further crimes of the defendant." *Id*. Drug offenders have lower than average rates of recidivism and higher offense levels are not correlated with increased risk of recidivism.[11] Moreover, drug offenses, which are driven by user demand, are not prevented by incarceration of any particular drug trafficker, who is readily replaced in the lucrative drug market.[12] Finally, the offense levels

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[8] Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 Crim. Law Bull. 50 (1990) (describing Commission's abandonment of guideline development research upon passage of the Anti-Drug Abuse Act of 1986); USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 47-55 (2004) [hereinafter "*Fifteen Year Review*"].

[9] *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id*. at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness); *Fifteen Year Review*, at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (Drug quantity "is not significantly correlated with role in the offense.").

[10] *See* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006).

[11] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) ("Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%) are overall the least likely to recidivate"; "no apparent relationship between the sentencing guideline final offense level and recidivism risk."); Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders,* (Nov. 4, 2009) (paper presented at the American Society of Criminology's annual meeting in Philadelphia), abstract available at http://www.allacademic.com/meta/p372733_index.html.

provided in the Quantity Table, which often result in guideline ranges falling within Zone D of the sentencing table, do not meet "in the most effective manner," the treatment and training needs of defendants. 18 U.S.C. § 3553(a)(2)(D).[13]

2. The current drug trafficking guideline greatly increased correctional costs without any offsetting benefit.

Changes in drug sentencing policy at the time of guideline implementation were the primary cause of the dramatic growth in the federal prison population at the beginning of the guideline era and led to the severe over-crowding the Bureau of Prisons now faces.[14] The Commission's choice to create 17 gradations of drug quantity and to extrapolate below, between, and above the two flawed thresholds in the statutes contributed substantially to the tripling of average time served for drug offenses following implementation of the guidelines. The *Fifteen Year Review* reported that 25 percent of the average length for drug sentences in FY 2001 was the result of the Commission's discretionary choice to link the statutory thresholds to the guidelines in the manner that it did.[15]

The dramatic increase in lengthy incarceration of drug traffickers has come at great cost. The budget of the Federal Bureau of Prisons has grown to over $6 billion a year,[16] with another

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[12] USSC, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

[13] The Bureau of Prisons has strict eligibility criteria for the residential abuse treatment program. U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement 5330.11, ch. 2 (Mar. 16, 2009). And although BOP offers drug education to a greater number of inmates, those programs do not at all meet the needs of offenders with chronic substance abuse disorders. *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the Senate Committee on Appropriations* (Mar. 10, 2009) (statement of Faye Taxman, Professor, Administration of Justice Department, George Mason University). Research from the National Center on Addiction and Substance Abuse (CASA) shows that only 15.7% of federal prison inmates with substance abuse disorders received professional treatment after admission into the BOP. Nat'l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Population*, at 40, tbl. 5-1 (2010). Community residential treatment programs for offenders who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.

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

[15] *Fifteen Year Review* at 54. The report notes: "no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline . . . in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." *Id*. at 49.

$1.4 billion spent on the Office of the Federal Detention Trustee. State sentencing commissions have analyzed sentencing along with other crime control policies to identify those that maximize the amount of crime control achieved for each taxpayer dollar.[17] The Commission, however, has not undertaken cost-benefit analyses of federal sentencing policies.[18] Outside economic analyses have shown that the dramatic increase in the imprisonment of drug offenders in the United States since the 1980s is unlikely to have been cost-effective.[19]

3. Excessive emphasis on drug quantity is the most significant problem with the drug guideline.

Judges and scholars have long cited as the guideline's chief flaw the excessive weight given drug quantity.[20] The Commission based the quantity thresholds in the guidelines on

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[16] U.S. Dep't of Justice, Budget and Accountability Summary, Federal Prison Systems (BOP), at 142, available at http://www.justice.gov/jmd/2010summary/pdf/bop-bud-summary.pdf.

[17] *See* Brian J. Ostrom *et al.*, Nat'l Ctr. for State Courts, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (2002), http://www.vcsc.state.va.us/risk_off_rpt.pdf; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006), http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf. *See generally* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 771-90 (2005) (sentencing commissions in North Carolina, Minnesota, and Washington have used data and empirical research to control the prison population, shift the use of prison to more serious offenders, and institute effective alternatives for others).

[18] Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1011 (2001) (noting that "the Commission has yet to address that task [of measuring the guidelines effectiveness] in any way"); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev 1017, 1039 (2004) (reviewing cost- benefit analysis of state systems and noting that "no comprehensive assessment of federal sentences has been performed").

[19] Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) ("it is unlikely that the dramatic increase in drug imprisonment was cost-effective.").

[20] Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission* 2 (1995) ("[T]he Judicial Conference: . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved."); General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); Reuter and Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: "The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.").

quantities contained in the statutes, which were hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions. Eric Sterling was Counsel to the U.S. House Judiciary Committee responsible for drug law enforcement at the time the law was enacted. In 2007, he testified:

> The Subcommittee's approach in 1986 was to tie the punishment to the offenders' role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to specify and prove and „is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.' [H.R. Rep. 99-845, pt. 1, at 11-12 (1986)] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.

Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong., 1st Sess., at 166, 169-70 (June 26, 2007) (statement of Eric Sterling).[21]

Moreover, unlike the Parole Commission, which based its recommendations on the pure weight of the drugs involved in a crime, the guidelines followed the mandatory minimum penalty statutes in defining the relevant weight as any "mixture or substance containing a detectable amount" of a drug. This added an additional arbitrary element to weight determinations and had the perverse effect of increasing punishments for persons lower in the distribution chain, where dilution of drugs is more common. Determinations of drug quantity are often capricious or estimated from hearsay or other unreliable evidence,[22] are easily manipulated by law enforcement agents and confidential informants,[23] and result in a "false precision."[24]

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[21] Mr. Sterling described the legislative process as "like an auction house . . . . It was this frenzied, panic atmosphere – I'll see you five years and raise your five years. It was the crassest political poker game." Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, Wash. Post, Nov. 4, 1990, at C1, C2 (quoting Sterling).

[22] Estimates of quantities that were not actually seized, that were under negotiation, etc., inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as "relevant conduct" lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center, Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (July/August 1997); *United States. v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007).

[23] 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); Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187 (1993).

The prison terms mandated for many types of drugs under the penalty statutes were chosen in part based on aggravating factors thought to be associated with those drugs, such as violence (crack), or use by role models such as athletes (anabolic steroids), or marketing to youth (ecstasy). Through the years, however, many aggravating upward offense level adjustments were added to the guideline to reflect these harms, and a variety of other factors, without any reduction in the quantity-based base offense level. The piling on of specific offense characteristics and other adjustments resulted in "factor creep" and double counting.[25] Similarly, quantities were chosen in part as markers of different defendants' aggravated roles in drug distribution schemes, such as sellers of large amounts to retail dealers (wholesalers), or heads of large organizations (kingpins). These defendants, however, are subject to upward adjustments under the aggravating role guidelines, as well as the lengthier base offense levels already chosen to reflect their increased culpability.

The focus on quantity has led to fruitless debates over the proper ratios between various drugs, instead of analysis of what sentences are needed to achieve the statutory purposes of sentencing. The debate over the FSA well illustrates the confusion surrounding the relevance of drug quantity at sentencing and its distortion of rational policy analysis. The abstract numbers and ratios took on different meanings for different persons. We heard political rhetoric that characterized the ratio between powder and crack cocaine as a measure of "how racist" the sentencing law would continue to be. Some Commissioners expressed the view that the quantity ratios had significance in themselves and represented an important aspect of legislative intent, which the Commission should follow even in the absence of a specific directive.[26] Others – including the Chairs of the House Committee on the Judiciary and the Sub-Committee on Crime, Terrorism and Homeland Security, and the chief sponsor of the Act in the Senate – concluded that the ratios were mere "shorthand," and that only the statutory threshold amounts had significance and then only as a rough proxy for the role an offender played in a drug distribution system.[27]

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[24] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180 (Feb. 1999).

[25] Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (The guidelines embody "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.").

[26] *See, e.g.,* United States Sentencing Commission Public Meeting Minutes, at 5 (October 15, 2010) (remarks of Commissioner Howell reporting conclusion that "provisions of the Act and the congressional statements that surround its passage reflect the sentencing policy judgments of Congress that crack offenses generally should be punished eighteen times more severely than powder cocaine offenses based upon drug quantity").

[27] Letter from the Honorable John Conyers, Chairman, Committee on the Judiciary, and the Honorable Robert C. "Bobby" Scott, Chair, Subcommittee on Crime, Terrorism and Homeland Security, U.S. House of Representatives, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n (October 8, 2010); Letter from Richard J. Durbin, U.S. Senator, to the Honorable William K. Sessions, III, Chair,

4. Empirical data and national experience show that the current linkage between drug quantity and base offense levels is unsound for crack offenders and other drug offenders.

The Commission's typical approach of setting the offense levels for offenders involved with statutory threshold amounts at 26 and 32 has been particularly unfortunate. This made the guideline recommendation for most drug offenders *exceed* the mandatory minimum penalties, even for first offenders receiving no aggravating enhancements and involved with quantities at or just above the threshold amounts. Greater drug amounts or criminal history – or other aggravating factors already considered in setting penalties for those amounts – pushed the guideline ranges still further above the statutory requirements. The relatively few mitigating adjustments found in the guidelines could lower ranges for some offenders, but many thousands received penalties far above the statutory requirements because of the Commission's approach. In 2009 alone, due to these discretionary decisions of the Commission, *over half of drug defendants (51.5%, or 12,221 offenders) were sentenced to longer terms of imprisonment than required by statute for the drug quantity for which they were held accountable*.[28]

Commission reports have described the relevance of drug quantity in several ways, but none show that the current quantity thresholds are sound policy.[29] Indeed, the Commission's own research shows that the current quantity thresholds are *un*sound.

The best understanding of how the guideline was meant to track offense seriousness has been described in legislative history and in the Commission's own reports.[30] In 1995, the

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U.S. Sentencing Comm'n 2-3 (October 8, 2010) (noting text of FSA does not refer to ratios, that some Senators used ratios as mere "shorthand," and that the primary concern of Congress was the threshold amounts under the statute needed to target wholesalers for five-year minimum sentences).

[28] Source: USSC FY2009 Monitoring Dataset.

[29] *Fifteen Year Review* at 47-52; *see also United States v. Cabrera*, 567 F. Supp. 2d 271, 276, 277 n.5 (D. Mass. 2008) (noting that "the Sentencing Commission has never explained how drug quantity is meant to measure offense seriousness, and significantly, how it correlates with the purposes of sentencing under 18 U.S.C. § 3553(a)," and "apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or [the Commission's own] 1996 Task Force and others, recommended.").

[30] Other theories are possible and some legislators may have held different understandings. But evaluation of a guideline must be grounded in some consistent, enduring understanding of how the guideline was meant to operate. If the fact that some legislators may have held different, unspecified, understandings, which might support the current structure, is sufficient to defeat any criticism of a guideline, rational analysis and rule-making are impossible. A consistent understanding is needed to guide analysis, resolve conflicts among competing theories, prevent ad hoc rule making, and consistently define unwarranted disparity. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003).

Commission described how the congressional record of debates surrounding the Anti-Drug Abuse Act of 1986 appeared to establish three tiers of culpability for "major traffickers" (manufacturers or the heads of organizations), "serious traffickers" (managers of the retail level traffic), and lower-level offenders, for whom prison terms of ten, five, or fewer years would be appropriate, respectively.[31] This tiered approach was recently reiterated by the chief sponsor of the FSA in the Senate, Senator Richard Durbin, who wrote to the Commission to explain that quantity was intended as a marker for role. He wrote that Congress chose 28 grams for the five-year threshold because a Commission report was taken to reflect the Commission's determination that this amount is typical of wholesalers, for whom Congress intended five-year minimum sentences.[32]

Unfortunately, Congress misread the Commission's report defining "wholesalers" and overlooked how drug quantity is actually calculated under the current guidelines. The Commission's 2007 report defines a wholesaler as an offender who "[s]ells more than retail/user level quantities (more than one ounce) *in a single transaction,* or possesses *two ounces or more on a single occasion*." (emphasis added). [33] The report does not classify as a wholesaler a person who sells user level quantities over a period of time. The guidelines, however, require that the court aggregate drug quantities involved in multiple transactions when they are part of the "same course of conduct or common scheme or plan as the offense of conviction." [34] Hence, a street seller who distributes 1 gram of crack to twenty-eight customers over the course of several weeks is held accountable for 28 grams of crack.

The empirical data in the 2007 report actually shows, as have previous Commission reports and working group findings,[35] that the quantity thresholds – even the thresholds for crack

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[31] USSC, *Cocaine and Federal Sentencing Policy* 119-21 (1995) (discussing limited legislative history).

[32] Letter from Senator Durbin, *supra* n. 27 ("Congress selected 28 grams as the trigger for five-year mandatory minimums because the Commission and other experts have concluded that less than one ounce is a retail/user quantity, while more than one ounce is the quantity sold by wholesalers). *See e.g.* , USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007).

[33] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007).

[34] USSG §1B1.3(a)(2) (Relevant Conduct). The Commission has previously considered, but not adopted, guideline amendments that would limit quantity to amounts involved in a "snapshot" of time or a single transaction. *See* Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing, 60 Fed. Reg. 2430, 2451-52 (Jan. 9, 1995). In some cases, like those involving street-level dealers, such "snapshots" would provide a better indicator of functional role and culpability. In other cases, like those involving couriers, such "snaphots" of quantity would need to be combined with the surrounding circumstances to determine functional role.

[35] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track role and other important facets of offense seriousness); USSC, *Fifteen Year Review* at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines). The Commission has sponsored several Working Groups and Task Forces that have found

as revised by the FSA – are too low and result in many mid-level and low-level offenders being treated like wholesalers or even kingpins.

In the 2007 report, 20 percent of powder cocaine street level dealers were attributed with amounts qualifying them for five-year mandatory minimums and 12 percent qualified for penalties of 10 years or more.[36] The powder cocaine thresholds in effect for these offenders were the same that remain in the Drug Quantity Table today. Findings for other low-level powder cocaine offenders were even more striking. Only 19 percent of couriers or mules had amounts below the five-year level, while 27 percent had amounts exposing them to five-year minimums and 54 percent had amounts exposing them to ten years or more. Among renters, loaders, lookouts, enablers, users, and the other lowest level offenders, only 25 percent were below the five-year threshold, 14 percent were between five and ten years, and *61 percent were attributed with amounts at the ten-year level or higher*. In other words, the current linkage between drug quantity and BOLs assigns these low-level offenders to the wrong severity level more often than the correct one, under Congress's own rationale for quantity-based drug sentencing.[37]

The report also shows that even the increased quantity thresholds under the FSA and the emergency amendment remain too low to prevent many crack offenders from being subject to penalties more severe than necessary or than Congress intended. For example, 28 percent of street-level dealers, 31 percent of couriers or mules, and 45 percent of loaders, lookouts, users, and other low-level offenders were held accountable for *more than 50 grams*. Even under the emergency amendment, these amounts would subject these offenders to BOLs of at least 26 with guideline ranges for first offenders of at least 63 months – the sentence length intended for wholesalers, not low-level offenders.[38] Some of these offenders might earn reductions through

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that quantity regularly fails to properly track role and culpability. *See* USSC, *Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); USSC, *Report of the Drug Working Group Case Review Project* (1992); USSC, *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).

[36] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30, Fig. 2-12 (2007).

[37] Some of these offenders were exempted from the mandatory penalty by the safety-valve and received downward adjustments for the safety-valve, acceptance of responsibility, or role. But many continued to be sentenced far above the level Congress deemed appropriate. Figure 2-14 in the 2007 cocaine report shows the average length of imprisonment for powder and crack offenders after guideline adjustments, departures, and reductions for cooperation. Unfortunately it is not possible from averages to determine the number or percentage of offenders who receive sentences more severe than Congress intended. The data show, however, that the average sentence imposed on powder cocaine couriers was 60 months (the sentence intended for wholesalers), while the average sentence for renters, loaders, etc. was *93 months*. To obtain these *averages* many offenders were necessarily sentenced far above the levels Congress intended for their roles. These sentences were obtained under the same Drug Quantity Table threshold amounts currently in effect.

[38] *Id.* Fig 2-13.

pleading guilty, or cooperating, or the safety-valve. A few might win mitigating adjustments for playing a mitigating role, though that is far from certain, as discussed below in this testimony. But some would also be subject to upward adjustments.

The fact is that the Commission and outside researchers have repeatedly found that drug quantity fails to reliably track offender culpability.[39] Nor does it reasonably advance any other principle of proportionate sentencing.[40] The Drug Quantity Table misallocates punishment instead of tailoring it.

5. The quantity thresholds for crack offenders should be lowered.

In the emergency amendment, the Commission reverted to its problematic approach of exceeding the statutorily required prison terms. We viewed this as particularly unfortunate because it effectively denied some defendants any benefit from passage of the FSA. Pegging the new thresholds – 28 and 280 grams – to BOL 26 and 32 rather than 24 and 30, denied hundreds of offenders any benefit of the legislation intended to redress the unfairness of crack sentencing.[41] For example, offenders with quantities of 28 to 35 grams of crack receive the same guideline range under the emergency amendment that they received prior to the amendment, rendering the threshold changes in the FSA a nullity. Similarly, defendants whose offenses involve between 280 and 499 grams remain at offense level 32 after the emergency amendment,

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[39] *See supra* note 34; Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (Drug quantity "is not significantly correlated with role in the offense.").

[40] The Drug Quantity Table has sometimes been defended as assuring a rough "proportionality" in sentencing. On close inspection, however, this "proportionality" proves illusory. Quantity as currently defined certainly does not achieve proportionality among *all* types of offenses, nor among all *drug* offenses, nor even among offenses involving the same type of drug, which often involve mixtures of dramatically different purity. Office of Nat'l Drug Control Policy, *The Price and Purity of Illicit Drugs* (2004) (showing broad ranges of purity and little relation between purity and total amount), http://www.ncjrs.gov/ondcppubs/publications/pdf/price_purity_tech_rpt.pdf. The linkage assures only that offenses involving larger amounts of a particular mixture or substance containing a detectable amount of drug are punished more severely than smaller amounts of that same mixture or substance. But the current thresholds do not properly track differences among drugs in the typical dosage size, nor variations in the presence of adulterants, nor the harmfulness of various types of drugs. The failure of the current guidelines to account for these differences is especially troublesome in light of availability of empirical data to rank these harms. *See, e.g.*, David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 The Lancet 1047 (Mar. 24, 2007).

[41] We understand from the public record that the Commission's own estimate was that hundreds of offenders would receive the same sentence. *See* United States Sentencing Commission Public Meeting Minutes, at 4 (October 15, 2010) (remarks of Commissioner Reuben Castillo) ("100 to 500 individuals are expected to be sentenced from November 1, 2010, when the emergency amendment becomes effective, to November 1, 2011, when the permanent amendment would become effective, who will be unaffected by the proposed amendment because of the decision to set the base offense levels at 26 and 32 to account for the new mandatory minimum gradations.").

the same as prior to the amendment. Defendants whose offense involved between 840 grams and 1.49 kilograms remain at level 34. Moreover, some of these offenders may qualify for new enhancements directed by the FSA, meaning that for them, the cumulative effect of the FSA was to *increase* sentences above the lengthy prison terms the guidelines recommended at the time of the legislation.

By failing to reduce offense levels for all quantities of crack cocaine while increasing sentences for some offenders, we believe the Commission missed an opportunity to thoroughly redress the long-standing unfairness of crack sentencing. The Commission received correspondence from members of Congress indicating that the intention of the FSA was to address the unfair severity of crack sentencing and that no increase in the BOLs corresponding to the statutory thresholds was expected or needed.[42] We believe the permanent amendment should address this problem by lowering the BOL levels for crack to the levels in effect at the time the FSA was enacted.

One criticism of the Commission's 2007 amendment was that it did not require that quantity ratios among different drugs be consistent across the entire 17-level quantity table. We believe that matching punishment to culpability, not complying with abstract ratios that appear nowhere in the legislation, is the key to advancing Congress's goals.[43] As explained in our Comment to the FSA amendment, we believe the debate over ratios has turned what should be a substantive debate over how best to achieve the purposes of sentencing into a quasi-mathematical and pseudo-scientific exercise. There are no "correct" ratios in light of 18 U.S.C. § 3553(a). Although mathematical anomalies arose when combining different types of drugs under the 2007 amendment, those anomalies were successfully addressed through an application note to the Drug Quantity Table.[44]

The critical point is that substantive justice must take priority over abstract mathematical consistency. The guidelines should be revised to yield recommendations that comport as closely as possible with the principles of 18 U.S.C. § 3553(a).[45] Punishment should not be dictated by abstract considerations of ratio consistency or ease of calculation of drug equivalencies. As Justice Breyer aptly stated, sentencing is ultimately a "blunderbuss."[46] Attempts at exactness of

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[42] Letter from Senator Durbin, *supra* note 27.

[43] *Id.*

[44] USSG § 2D1.1 comment. (n.10 (D)).

[45] It should be noted that some judges have used their discretion under *Booker*, *Kimbrough*, and *Spears* to continue to sentence under a 1:1 ratio instead of the 18:1 ratio established by Congress under its mistaken reading of the Commission's 2007 report, as described above. By lowering the threshold for crack by two levels, the ratio between crack and powder would be much closer to the levels these judges find consistent with 18 U.S.C. § 3553(a).

[46] Breyer, *Guidelines Revisited*, *supra* note 24.

measurement or consistency in ratios among inherently rough dimensions like drug quantity cannot eliminate this fact.

6. Sound policy and practical considerations compel the reduction of offense levels for all drugs.

The Commission should re-link thresholds in the Drug Quantity Table for all drugs, so that mandatory statutory penalties fall within, rather than below, the guideline ranges associated with base offense levels for first offenders. This would help ameliorate some of the unfortunate effects of the original Commission's decision to extrapolate below, between, and above the statutory levels in the Drug Quantity Table. Aggravating and mitigating factors, including the new adjustments directed by the Act, would receive greater weight in relation to quantity, which is an over-arching purpose of the FSA. Most important, as described above, lowering base offense levels would reduce the number of offenders who perform low-level functions for whom the guidelines recommend sentences that were intended only for wholesalers or kingpins.

The sentence enhancements in the FSA were not limited to crack cocaine offenders but applied to *all* drug offenders. Thus, the Act exacerbated problems with the drug guideline by piling additional enhancements on top of severe and largely arbitrary quantity-based BOLs. The effect is a net increase in average guideline ranges above the already excessive and unnecessarily severe levels prior to the FSA,[47] without any corresponding decrease in the quantity-based portion of the sentence. Instead of conserving and targeting imprisonment on the most serious and dangerous offenders, the net effect is an unjustified further upward ratcheting of drug trafficking sentences for non-crack offenders.

We believe final revision of the amendment implementing the FSA is a unique opportunity for the Commission to do what it did not, and arguably could not, do as part of the emergency amendment: lower the BOLs for *all* drugs to track those for crack and to ensure that mandatory minimum penalties are *within*, rather than *below*, the guideline ranges corresponding to these BOLs for first offenders. Because the aggravating adjustments in the FSA applied to *all* drug offenders, an offsetting downward adjustment in the quantity-based BOLs is needed to achieve the FSA's goal of reducing the emphasis on drug quantity and better target the most dangerous and culpable offenders. This change should be made now as part of final integration of the FSA aggravating adjustments into the guidelines. It should not be delayed until a later time when either no offsetting aggravators will be available or new ones will be demanded.

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[47] The FSA did include downward adjustments applicable to all drug offenders, such as a cap on base offense levels for minimal participants, §2D1.1(a)(5), and a two-level decrease for certain minimal participants who were motivated by intimate or familial relationship, or by threats or fear, who received no monetary compensation, and had minimal knowledge of the enterprise, §2D1.1(b)(15). These downward adjustments are much narrower in scope than the new aggravating increases. As a result, although empirical analysis from the Commission is not yet available, there seems little doubt that the result of the FSA amendments for non-crack offenders will be an increase in average guideline ranges over what they would have been prior to the amendment.

7. The Commission is not required to link the drug guideline to the quantity thresholds in the statute.

As the Commission has previously explained, statutory mandatory minimums and sentencing guidelines are "policies in conflict."[48] It is impossible to rationally integrate the few facts and "tariff" penalties in mandatory minimum statutes into more finely grained guidelines, whether mandatory or advisory. The statutes create "cliff" effects and are a major source of unwarranted disparity in both of its guises: unwarranted uniformity – similar treatment of different offenders – as well as different treatment of similar offenders, depending on the charging whims of the prosecution. The mandatory minimum penalties are set at levels appropriate not for the most *mitigated* offense that can arise under a statute – which is the only way they could avoid injustices – but for relatively serious and aggravated offenses. Mandatory minimums are often enacted in reaction to sensational crimes and result from political competition.[49] As Justice Breyer concluded in 1999, "statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. . . [T]heir existence then prevents the Commission from . . . writ[ing] a sentence that makes sense."[50]

As the Commission said in its 2007 Reason for Amendment to the crack threshold and its report on child pornography, the Commission has a variety of options for accounting for mandatory minimums within the guideline structure.[51] The Commission "may abandon its old methods in favor of what it has deemed a more desirable approach."[52] It may set the BOL to include, but not exceed, the mandatory minimum, as it did with crack in 2007. It may set the BOL below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum in appropriate cases. The Commission may also "select a new (or maintain an existing) base offense level without regard to a newly adopted (or increased) mandatory minimum."[53] Under the latter two approaches, defendants whose guideline

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[48] USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991). "Policies in Conflict" is the title of Chapter 4 of the Report.

[49] As Justice Rehnquist noted in 1993: "Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‚get tough on crime.' Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole." William H. Rehnquist, Luncheon Address (June 18, 1993), in USSC*, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993); *see also* Sterling, *supra* page 7.

[50] *Guidelines Revisited*, supra n. 24.

[51] USSG, App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* 44-47 (2009).

[52] *Neal v. United States*, 516 U.S. 284, 295 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute's "mixture or substance" methodology).

[53] USSC, *The History of the Child Pornography Guidelines* 46 (2009).

calculation fails to reach the mandatory minimum receive the mandatory minimum as a guideline sentence through operation of §5G1.1(b).

For many years, the Commission has recognized that tying penalties to the weight of LSD or the number of marijuana plants, regardless of size, would lead to arbitrary variations in punishment unrelated to the seriousness of the offense.[54] In 2007, in recognition that the statutory thresholds undermined the objectives of the Sentencing Reform Act, the Commission modestly amended the Drug Quantity Table for crack cocaine offenses so that the minimum prison terms required by the statutes fell within, rather than below, the guideline ranges associated the statutory quantities (for first offenders receiving no aggravating enhancements with quantities at or just above the statutory thresholds).[55] This amendment provided much-needed relief for thousands of crack defendants who were subject to unnecessarily severe penalties. But the fact is, tying the length of prison terms to the quantity of a mixture or substance containing a detectable amount of a drug is arbitrary and excessively severe for *all* kinds of drugs and drug offenders. The Commission should therefore reduce the BOL for all drug offenses by two levels.

8. Lowering offense levels for all drugs would create no significant problems.

A consequence of reducing the base offense level by two is that some defendants who would otherwise qualify for certain downward adjustments may not benefit from them because the mandatory minimum will truncate or trump their guideline range. This trumping and truncating means that some less culpable defenders may be treated the same as ones that are more culpable.[56] This unwarranted uniformity is an inevitable consequence of mandatory minimums, however. The entire guideline structure should not be ratcheted upward only to partially accommodate the interaction between guideline adjustments and mandatory minimum statutes, particularly when the mandatory minimums are fundamentally incompatible with the guidelines, as described above.

Recent experience has alleviated the concern that drove the original Commission to link the statutory thresholds to the guidelines in the manner that it did. The Commission reported in 1995 that it set the base offense levels for first offenders "slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or

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[54] Although 21 U.S.C. § 841(a) requires a mandatory minimum of ten years for 1000 marijuana plants, and five years for 100 plants, the base offense levels are set at 26, and 16, significantly lower than what is required to reach the mandatory minimum.

[55] USSG, App. C, Amend. 706 (Nov. 1, 2007).

[56] *Fifteen Year Review* at 49 ("‚[T]rumping' of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones . . . .").

otherwise cooperate with authorities."[57] In other words, the range was set higher than necessary to ensure that defendants would plead guilty or otherwise cooperate. Even assuming that this was a legitimate reason, the 2007 amendment of the crack guidelines provides an empirical test of this concern, and the data show that the plea rate in crack cocaine offenses did not fall after the amendment.[58] Moreover, defendants who provide assistance in the prosecution of other persons may still receive sentences below the mandatory minimum by operation of 18 U.S.C. § 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. We do not believe the guidelines should be designed to recommend sentences greater than necessary to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a) merely to provide room for the partial operation of guideline adjustments intended to induce guilty pleas or reward cooperation. This, in effect, punishes non-cooperation, which is against the Commission's express policy.[59]

The trumping of guideline ranges by mandatory minimums is an unfortunate consequence of the incompatibility of mandatory minimum statutes and guidelines, but it is also an important reminder of the Congressional role in sentencing. If a statute overrides the judgment of the Commission as to the appropriate sentencing range, responsibility for the policy should be clear. The policy judgment of the political branches should not be cloaked as the work of the Commission, particularly if those judgments fail to meet the standards of § 3553(a).

II. Retroactivity of the Fair Sentencing Act Amendments.

Although the Commission initially requested comment on whether it should make retroactive the permanent amendments implementing the Fair Sentencing Act,[60] we understand from Commission staff that the Commission will not yet consider the question of retroactivity, and that it will request formal input at a later date. We look forward to providing our views on this important issue at that time. Meanwhile, we have examined the Commission's analysis on the impact of two proposed options for amending the Drug Quantity Table.[61] As in 2007 regarding the two-level reduction implemented by Amendment 706, we find the current impact analysis to be extremely helpful in formulating our thoughts on retroactivity as it relates to reductions in the Drug Quantity Table. Because the Commission has also asked whether other aspects of the amendment should be made retroactive (i.e., the mitigating changes, the entire proposed amendment including enhancements), we hope the Commission will also provide an

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[57] *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

[58] *See* USSC, *Sourcebook of Federal Sentencing Statistics*, tbl. 38 (2009) (93.9% plea rate in crack cases in FY2009; 95.1% in 2008; 93% in 2007: 93.7% in 2006; and 91.8% in 2005).

[59] *See* USSG § 5K1.2, p.s. ("A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.").

[60] 76 Fed. Reg. 3193, 3195-96 (Jan. 19, 2011).

[61] USSC, *Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses Made by the Fair Sentencing Act of 2010 and Corresponding Proposed Permanent Guideline Amendment if the Guideline Amendment Were Applied Retroactively* (Jan. 28, 2011).

impact analysis regarding the other proposed permanent changes to § 2D1.1 that can be readily measured, such as the new minimal role cap at § 2D1.1(a)(5).

III. Expansion of the Safety-Valve and Other Downward Adjustment for Defendants Who Do Not Receive Aggravating Adjustments.

The Commission requests comment on three proposals that would make a 2-level downward adjustment available for defendants in drug trafficking cases. One proposal would provide a 2-level downward adjustment in cases where there are no aggravating circumstances involved in the case. Another would expand the safety-valve at §2D1.1(b)(16) to defendants who have more than 1 criminal history point. The third proposal would provide a "similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense." It is not clear from the issues for comment whether any of these proposals is meant to be in lieu of changes to the base offense levels in the Drug Quantity Table, or instead whether they are meant to be additional reductions. Nor is it clear whether these proposals are meant to be alternatives to each other.

Defenders support amendments that reduce sentences for defendants convicted of drug offenses and move the guidelines' recommendations closer toward serving the purposes of sentencing under 18 U.S.C. § 3553(a). We want to make clear that we do not support any of these alternatives as a *substitute* for fixing the Drug Quantity Table and other aspects of the drug guideline. From the standpoints of simplicity and consistency, the guidelines should attempt to properly assess offense seriousness in the first place. To that end, we urge the Commission to begin by reducing the base offense levels for all drugs by two levels, and to take further steps in the near future to delink the drug guidelines from mandatory minimums, to reduce the impact of drug quantity and relevant conduct, and to avoid double counting and multiple upward adjustments for what often amount to the same harms.

A. Two-level downward adjustment for defendants whose cases do not involve aggravating circumstances.

The Commission seeks comment on a proposal to add a two-level downward adjustment in drug trafficking cases for defendants whose guideline calculations do not include aggravating circumstances leading to alternative base offense levels for death or serious bodily injury under §2D1.1(a)(1)-(4), any enhancement under §2D1.1(b), or any Chapter Three upward adjustments.[62] As discussed above, we do not believe this should be a substitute for a two-level reduction in base offense levels or a more comprehensive fix to the drug guidelines in the near future. It would, however, be a welcome addition at this time to reflect the lesser culpability and lesser need for incapacitation of defendants convicted of drug offenses that do not involve aggravating factors.

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[62] It would be helpful in commenting on this proposal to know the number of defendants who would benefit from it. While the Commission's dataset is publicly available, we do not have the capacity to conduct the kind of sophisticated mainframe analysis necessary to identify the defendants who would meet the criteria set forth in the proposal.

We encourage the Commission to more finely tune the adjustment so that an offender whose offense level is increased under §2D1.1(b) based on comparatively less serious conduct than others may obtain the benefit of a downward adjustment. Section 2D1.1(b) contains fourteen 2-level upward adjustments ranging from distribution of an anabolic steroid to an athlete, distribution of an anabolic steroid and a masking agent, distribution of a controlled substance through mass-marketing, to possession of a dangerous weapon and use of violence. Not all of these adjustments reflect the same degree of culpability or offense seriousness. The Commission should consider identifying those that are less serious and permitting a 2-level downward adjustment in those cases as well.

B. Expanding the Safety-Valve.

1. Brief history of the safety-valve.

We have long encouraged expansion of the safety-valve. Early in the Clinton administration, Attorney General Janet Reno called for review of mandatory minimum statutes and repeal of some of those statutes applicable to non-violent offenders.[63] The concept of a "safety-valve" was soon introduced by the Sentencing Commission and staff of the Judicial Conference. As originally proposed by the Chair of the Commission, the proposed legislation would have amended § 3553 to provide an "override" provision to allow the applicable guideline range or any appropriate downward departures to "trump" the mandatory minimum penalty.[64] The prospects for repeal of some mandatory minimums soon foundered in the tough-on-crime political environment in Congress, however. And, as the safety-valve legislation worked toward passage, successively more restrictive conditions were placed on its application. The safety-valve ultimately enacted was a far narrower version than the Commission's original proposal and provided relief from mandatory minimums for a too limited class of drug trafficking defendants.[65] In the words of Justice Breyer, the safety-valve "is a small, tentative step in the

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[63] *See* http://www.ontheissues.org/Governor/Janet_Reno_Crime.htm. Attorney General Reno told the Judicial Conference of the Third Circuit that "we are not going to solve our crime problem by passing minimum mandatories[.]" Don DeBenedictis, *How Long is too Long?,* 79 A.B.A. J. 74, 75 (1993) . A product of the Department's review was the study, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 4, 1994), available at http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf. This study found that 20% of the federal prison population at the time could be classified as low-level drug offenders, and that these low-level offenders had an average sentence imposed of 81 months and were serving an average prison term of over five years, 150% longer than past practice, when many such offenders would have received probation. The study proved instrumental in the creation of the "safety-valve."

[64] Paul J. Hofer, *Mandatory Penalty Reform: The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 Fed. Sent'g Rep. 63 (1993) (describing Judge Wilkins' proposal).

[65] Pub. L. No. 103-322, § 80001, 108 Stat 1796, 1985 (1994), *codified at* 18 U.S.C. § 3553(f); *see* 139 Cong. Rec. S14,536 (daily ed. Oct. 27, 1993) (remarks of Senator Kennedy) (describing the bill as "a small but important step in the effort to recapture the goals of sentencing reform"); 140 Cong. Rec.

right direction. A more complete solution would be to abolish mandatory minimums altogether."[66]

The Commission incorporated the safety-valve into the guidelines, along with its restrictive statutory criteria. Because of a limitation contained in the law, defendants who are otherwise subject to a five-year mandatory minimum receive an offense level not less than 17, corresponding to a minimum guideline range of 24-30 months. USSG §2D1.1(b)(11), §5C1.2. The Commission eventually also reduced by two levels the offense level of any drug defendant who satisfied the statutory criteria, regardless of whether they were subject to mandatory minimums.

These steps have provided some relief for a substantial number of defendants. In FY 2009, of 8,296 defendants who were not subject to a mandatory minimum, 3,332 (40%) received the two-level decrease under the guidelines. Of 15,532 defendants who were subject to a mandatory minimum, 5,447 (35%) benefited from the safety-valve.[67]

2. The safety-valve should be expanded to include more offenders.[68]

Many non-dangerous, low-level offenders still do not qualify for the safety-valve. In FY 2009, 83.2% of all drug trafficking offenses involved no weapon, 51.4% of all drug trafficking offenders had 0-1 criminal history points, another 11.7% had just 2-3 criminal history points, 94.1% had no role adjustment or a mitigating role adjustment, and 93.7% accepted responsibility.[69] But only 36.9% of defendants convicted of a drug offense received safety-valve relief under the guidelines or from a mandatory minimum.[70]

The Commission's 2010 survey of judges found that most believe the safety-valve should be expanded to allow additional types of offenders to qualify. Two thirds of judges believe offenders in Criminal History Category II should be eligible, and 69% believe it should be

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S14,716 (daily ed. Oct. 7, 1994) (remarks of Senator Kennedy) (recognizing Judge Wilkins for his leadership in producing the Commission's 1991 report on mandatory minimums and developing a proposal that would later become the safety-valve).

[66] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985 (1999).

[67] USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbl. 44.

[68] In addition to expanding the safety-valve under the guideline, the Commission should encourage Congress to expand the statutory safety-valve.

[69] *Id*., tbls. 37, 39, 40, 41.

[70] *Id*., tbl. 44.

expanded to cover offenders subject to all types of mandatory minimums.[71] Many other commentators have called for changes to the exclusionary criteria. For example, it has been noted that the criteria "do not necessarily distinguish between high-level and low-level drug offenders," but instead "in many cases they simply serve to make distinctions among the culpabilities of low-level offenders," "providing lenient sentences for those low-level defendants meeting the safety-valve's stringent criteria, while subjecting those low-level defendants whose characteristics may be only mildly different (i.e., one criminal history point) to the full mandatory penalties."[72]

As a beginning, the safety-valve should be made available to offenders who have more than one criminal history point, preferably all offenders in Criminal History Category III, but at least Criminal History Category II. African-American defendants have a higher risk of arrest and therefore more criminal history points than similarly situated white defendants, and thus are excluded from safety-valve relief when similarly situated white defendants are not.[73] And while the number may be small, 260 people were excluded from safety-valve relief in FY 2009 merely because of an offense the Commission classifies as "minor," presumably traffic offenses.[74]

In *United States v. Feaster*, 259 F.R.D. 44, 51 (E.D.N.Y. 2009), Judge Weinstein provided this analysis of the arbitrariness of the requirement that a defendant have "more than 1 criminal history point" in order to be eligible for safety-valve relief:

> The inequity flowing from this obscure – and substantively dubious – guidelines criterion for safety-valve eligibility may, as the Commission's report states, be infrequent. But it is no less real and no less unfair for the few ill-fated defendants falling into what can only be considered a "pothole on the road to justice." It also violates the fundamental statutory requirement to consider in sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553 (a)(6); *see also Booker*, 543 U.S. at 253-54. To take away years of a young man's life based on bureaucratic rigidity under the banner of "criminal justice" is an intolerable cruelty.

Id. The Commission should fix the injustice resulting from the limitation to one criminal history point.

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[71] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.2 (2010)

[72] Jane L. Froyd, *Comment: Safety-valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines,* 94 Nw. U. L. Rev. 1471, 1498-99 (2000). The requirement of providing truthful information to the government "has no bearing on the defendant's status as a low-level offender or on traditional factors that have been considered in assessing a defendant's threat to society." *Id*. at 1499.

[73] USSC *Fifteen Year Review* at 134.

[74] USSC, *Impact of Prior Minor Offenses on Eligibility for Safety-valve* (2009).

In addition, the Commission should expand the safety-valve to include all drug offenses. Many of our clients are excluded from safety-valve relief because it is limited to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960 and 963. In some districts where substantial portions of towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. § 860 for the purpose of preventing safety-valve relief for low-level offenders with little or no criminal history who would otherwise qualify.[75] Our clients prosecuted in the Middle District of Florida under the Maritime Drug Law Enforcement statutes, 46 U.S.C. § 70501 – 70508, also do not fall within the express terms of USSG §5C1.2, although their offenses are no different in any relevant way than the specified title 21 offenses. The safety-valve should be expanded to cover all drug offenders.

We also believe that the extent of the reduction available under the safety-valve should be increased. The current two-level reduction is often inadequate to counteract the overpunishment resulting from linking base offense levels to mandatory minimums, drug quantity, relevant conduct, and/or multiple upward adjustments.

3. A downward adjustment for defendants who provide information to the government concerning the offense.

In the same question for comment asking whether the Commission should expand the safety-valve to defendants who have more than 1 criminal history point, the Commission also requests comment on whether it should consider "providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense." [76]

The Defenders welcome any effort to reduce excessive penalties for drug traffickers. We are concerned, however, that encouraging defendants to provide information concerning their offenses may expose some defendants to greater penalties than they might otherwise receive and may be subject to abuse. A defendant who provides such information receives no protection against use of the information in determining his sentence. *See* USSG § 5C1.2, n.7 (information disclosed may be considered in determining guideline range unless restricted under § 1B1.8); USSG § 1B1.8, comment. (n.6) (limitation on use of information does not apply to defendant who details the extent of his own unlawful activities). Nor is the defendant protected against use of the information in a state prosecution or subsequent federal prosecution. The lack of such

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[75] In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. *See United States v. Koons*, 300 F.3d 985, 993 (8th Cir. 2002); Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 8 (Oct. 21, 2009).

[76] We are not sure what the question for comment means by "similar downward adjustment" -- similar to the current safety-valve, similar to the expanded downward adjustment for defendants with more than 1 criminal history point, or similar to something else.

protections creates the potential for greater sentencing exposure as well as unwarranted disparity depending on the practices of the particular U.S. Attorney's Office[77] or the skills of the defense attorney in advising the client.

We would be happy to work with the Commission and its staff to craft amendments that may help alleviate these concerns.

IV. Role Adjustments

The Commission requests comment on "what changes, if any, should be made to USSG §3B1.1 (Aggravating Role) and USSG §3B1.2 (Mitigating Role) as they apply to drug trafficking cases." We welcome this request for comment because we have long advocated for revisions to the guideline commentary that would remove some of the obstacles to judges granting mitigating role adjustments for individuals who play lesser roles in drug trafficking.

A. The Commentary in the Mitigating Role Adjustment Discourages Its Application.

Because of the Commission's original policy of tying the drug guidelines to the mandatory minimum quantities and focusing on aggregated quantity rather than role, the guidelines recommend substantial periods of imprisonment for low-level, non-violent defendants, as described above. While the mitigating role adjustment at USSG §3B1.2 is meant to ameliorate the harsh effects of quantity-driven guidelines and the relevant conduct rules, the role adjustments are not having their intended effect and should be amended to effectuate Congress's finding that "those who played a minor or minimal role" in drug trafficking should receive a lesser sentence than higher-level offenders.[78] Too few defendants receive mitigating role adjustments when their conduct is plainly less culpable than that of others.[79] Without amendment, some courts will continue to underuse the mitigating role adjustment and contribute to unwarranted disparity.

The Application Notes for the aggravating and mitigating role guidelines appear to exacerbate problems, rather than clarify sensible application of these adjustments. As discussed more fully below, the general thrust of the Application Notes under §3B1.2 seems intended to

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[77] We have previously expressed our concerns about the disparate use of USSG §1B1.8. *See* Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 9-10 (Oct. 21, 2009).
[78] *2007 Cocaine Report*, at 7 n. 25.

[79] *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.

narrow its application. The narrow language in the Notes to §3B1.2 contrasts strikingly with the expansive Application Notes for aggravating role. For example, Application Note 3(A) for mitigating role requires a defendant to be "substantially less culpable than the average participant." No parallel requirement applies in the aggravating role guideline commentary. Application Note 4 for aggravating role encourages courts to consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." The absence of many of these considerations can indicate a defendant's mitigating role, but Application Note 4 of §3B1.2 mentions only "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and the activities of others." Application Note 4 of §3B1.2 expressly discourages use of the minimal participant adjustment, stating *a priori* that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." The actual data reviewed in the previous section shows that, at least in drug cases, quantity often drives the offense level for low-level offenders so high that it overstates the seriousness of the offense and the defendant's culpability. Hence, minimal role should apply *frequently.*

Perhaps most striking is the contrast in treatment of others involved in the criminal enterprise, which has created perhaps the greatest inconsistencies in application of mitigating role. Drug manufacture and distribution is an extensive, often international, enterprise. Many drug defendants, however, are hired to play limited, often isolated roles such as couriers, boat hands, or other minor functionaries. While they play the "major" role in that particular, isolated, illegal activity, no one could believe they are major, or even significant, players in the overall criminal enterprise. Yet the commentary to §3B1.2, in contrast to §3B1.1, seems to ignore this very point. In determining whether an organization is "otherwise extensive," Note 3 of the guideline for aggravating role advises the court to consider "all persons involved during the course of the entire offense." It then gives as an example of an "extensive" organization, a fraud offense that "used the unknowing services of many outsiders." Certainly, drug trafficking enterprises are extensive organizations that routinely involve many participants unknown to law enforcement or the defendants charged. Yet the commentary in §3B1.2 places a difficult burden on a defendant who was the only one caught, typically a courier, to establish that the offense involved "multiple participants."

B. The Commentary for Mitigating Role Should Be Amended to Encourage Use of the Adjustment in Appropriate Cases.

1. Previous efforts at clarification have not succeeded.

When the Commission amended §3B1.2 in 2001, it 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 that end, the Commission adopted the approach articulated by the Eleventh Circuit in *United States v. Rodriquez DeVaron*, 175 F.3d 930 (11th Cir. 1999). According to the Commission's view of *DeVaron*, 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." USSG App. C, Amend. 635 (Nov. 1, 2001) (Reason for Amendment).[80]

Had the Commission stopped with that clarification, more drug couriers and other low-level participants may have received mitigating role adjustments. The Commission, however, added 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." §3B1.2, comment. n. (3) (emphasis added). 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 (Nov. 1, 2007) (emphasis added).

This latter note is grossly unfair and makes it exceedingly difficult for those offenders who are the only ones caught (*e.g.*, couriers) to prove that there were other participants as required under §3B1.2, comment. (n.2) (Requirement of Multiple Participants), and to then prove they were "less culpable than most other participants," §3B1.2, comment. (n.5), or "the least culpable of those involved in the conduct of a group." §3B1.1, comment. (n.4). Judges should not be discouraged from relying upon a defendant's uncorroborated statements or the surrounding circumstances to find that the offense involved other participants, and to determine the defendant's culpability in relationship to those participants. Courts are well equipped to determine the credibility of any witness, including a defendant, and are encouraged to base their fact-findings on reliable information. USSG §6A1.3(c). The commentary in application note 3(C) creates an unbalanced bias against the judge exercising his or her ability to do so, and creates a high bar for defendants in cases where the only way to prove that there were other participants is through the defendant's own statements.[81]

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

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[80] The application of *DeVaron* in the Eleventh Circuit has proven to be quite restrictive. *See, e.g.*, *United States v. Torres-Arreaga*, 358 Fed. Appx. 120, 121 (11th Cir. 2009) (district court did not err in denying courier minor role when "conduct for which he was held accountable at sentencing was the same as his actual conduct"); *United States v. Villegas-Tello*, 319 Fed. Appx. 871, 879 (11th Cir. 2009) (court may only consider participants involved in relevant conduct attributed to defendant); *United States v. Medina-Gutierrez*, 279 Fed. Appx. 919, 921 (11th Cir. 2008) (crew member on vessel properly denied minor role because court only held him "responsible for the amount of the drugs he was personally involved in smuggling," and activity of others in larger conspiracy was irrelevant because he was not charged with larger conspiracy).

[81] A woman arrested for carrying heroin in her suitcase after arriving on a flight from Africa cannot offer any corroboration other than the reasonable inferences from the surrounding circumstances – she did not grow the poppies, refine them into heroin, package the heroin, decide where to deliver it in the United States, or arrange for payment by the buyer. All the woman may be able to offer is a simple statement: "A man handed me a bag and promised to pay me $500."

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 comment sends a signal to judges that a defendant must show more to obtain a role reduction.

2. Restrictive commentary has resulted in disparate application.

The restrictive commentary in §3B1.2 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." [82]

Henry Bemporad, the Defender in the Western District of Texas, explained these problems in detail in his testimony at the Phoenix regional hearing.[83] 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.[84]

In contrast, 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 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 drugs. The obvious fact that these couriers are nothing but small, easily replaced cogs in a much larger drug trafficking organization is not viewed as mitigating, but as a reason to deny a mitigating role adjustment.[85]

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[82] Barbara Vincent, *Informing a Discussion of Guideline Simplification*, 8 Fed. Sent'g. Rep. 36, 37 (Aug. 1995).

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

[84] *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).

[85] 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.

3. Appellate decisions have unduly restricted application of mitigating role adjustments.

Many appellate courts have a cramped view of what defendants must prove to obtain role adjustments and have set forth stricter standards for application of the role adjustment than the commentary itself. Discussed below are some of the ways that appellate courts have constructed rules that limit application of the mitigating role adjustments.

a. The "critical," "indispensable," or "essential" nature of a low-level offender's role is often used to deny a mitigating role adjustment.

Many appeals courts have ruled that low-level, easily replaceable offenders do not qualify for a minor role adjustment because they are an "indispensable" part of the drug-dealing network, or played a "critical role." *United States v. Feliz-Ramirez*, 391 Fed. Appx. 17, 19 (2d Cir. 2010) ("couriers are indispensable to the smuggling and delivery of drugs and their proceeds") (quoting *United State v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990)); *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); *United States v. Pruneda*, 518 F.3d 597, 606 (8th Cir. 2008); *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. Martinez*, 512 F.3d 1268, 1275-76 (10th Cir. 2008) (mitigating role adjustment not applied because defendant who transported two pounds of methamphetamine played critical role in trafficking operation); *United States v. Boyd*, 291 F.3d 1274, 1276-78 (11th Cir. 2002) (mitigating role adjustment not applied because defendant who transported 2,874 grams of cocaine in his luggage from Haiti to Miami played critical role in drug importing operation). The Tenth Circuit has gone so far to say that it is "not productive" to argue that one participant in criminal activity is "more or less culpable" than another. *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).

These cases establish what amounts to a per se rule against application of the mitigating role adjustment for couriers. Couriers by definition are a necessary and essential component of the drug trade, just as Federal Express drivers are a necessary part of a legitimate retail trade, or an armored car driver is a necessary part of the banking industry. No one would say, however, that any of those lower-level functionaries, when compared to corporate CEOs, bank presidents, accountants, and even store managers, play anything but minor roles in the retail and banking business.

b. The defendant's role as a non-peripheral player is used to deny the adjustment for minor role.

The Fifth Circuit has held that for a defendant to qualify for a *minor* role adjustment, it is not enough that he or she 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.);

United States v. Aquilera-Suarez, 2011 WL 661691, *1 (5th Cir. Feb. 23, 2011) (driver of truck hauling marijuana to Houston denied minor role because he was not "peripheral player").

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").

No circuit sets forth a clear definition of "peripheral." Whatever its meaning, "non-peripheral" players in one circuit may obtain a minor role adjustment but not those in another. This split creates unwarranted disparity.

c. If the defendant's participation was "co-extensive" with the conduct for which the defendant was held accountable, courts often deny a role adjustment.

The Fifth Circuit routinely upholds the district courts' denial of a mitigating role adjustment 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. 2007); *see also Martinez*, 512 F.3d at 1276; *United States v. Zuniga*, 387 Fed. Appx. 514, 515 (5th Cir. 2010) (unpub.) (denying adjustment to defendant who did nothing more than pick up person who was carrying marijuana in backpack because his participation was "coextensive with the conduct for which he was held accountable"). 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).[86]

d. The quantity of drugs involved and the distance the courier traveled are often dispositive considerations in denying a role adjustment.

Appellate courts across the country discourage district courts from granting role reductions when the offense involved a large quantity of drugs or the courier traveled a great distance. *See, e.g.*, *Rodriguez De Varon*, 175 F.3d at 943 (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*,

[86] 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).

309 Fed. Appx. 12, 13 (7th Cir. 2009) (defendant who transported many kilograms of methamphetamine a long distance not entitled to role reduction).

C. Recommendations for Amendment

The Commission could fix USSG §3B1.2 in several ways:[87]

- 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.

- Amend the guideline commentary to make clear that paid-by-the trip couriers with limited knowledge are generally eligible for a lesser role, even if their role is an "indispensable" or "integral" part of the offense.

- Amend the guideline commentary to make clear that the amount of drugs involved or distance traveled has little bearing on the defendant's role.

- Amend application note 2 to state that the court may find that more than one participant was involved in the offense based on the defendant's statements or the surrounding circumstances.

- 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."

- 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 do so apparently because of 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.

[87] 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).

Sentencing Comm'n 4-5 (Jan 12, 2001). The language has had the effect of curtailing all role reductions – minimal and minor.[88]

- Add commentary that among the factors the court should consider in deciding whether to apply the adjustment for mitigating role is the absence of the factors set forth in §3B1.1, comment. (n.4), i.e., the absence of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in the planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

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

- Remove from §5K2.0(d)(3) and §5H1.7 the prohibitions on departures for role in the offense**.**

D. Prohibit double counting of USSG §2D1.1(b)(2)(C) with §3B1.1.

We encourage the Commission to correct a double-counting issue that results in a disproportionate penalty increase based upon the same conduct. Panels in the Eleventh Circuit have held that a defendant who receives an adjustment under §2D1.1(b)(2)(C) ("defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance"), may also receive an adjustment for aggravating role even though both adjustments are based on the defendant's status as a leader of a crew. *See, e.g., United States v. Ramirez*, 426 F.3d 1344, 1356 (11th Cir. 2005); *United States v. Rendon*, 354 F.3d 1320, 1332 (11th Cir. 2003); *United States v. Chisholm*, 142 Fed. Appx. 378, 381 (11th Cir. 2005).

One method of fixing the double-counting problem is to add an application note to §3B1.1, which states: "Do not apply any adjustment under this section where the defendant has received an adjustment under USSG §2D1.1(b)(2)(C)."

V. The Secure and Responsible Drug Disposal Act of 2010

Section 4 of the Secure and Responsible Drug Disposal Act of 2010 directs the Commission to "*review and, if appropriate*, amend" the guidelines to ensure that persons

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[88] 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 States 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).

convicted of a drug offense resulting from the person's authority to receive scheduled substances from ultimate users or long-term care facilities receive "an appropriate penalty increase of *up to 2 offense levels*" greater than the sentence otherwise applicable under Part D of the *Guidelines Manual*. (emphasis supplied).

The Commission proposes to amend Application Note 8 to §2D1.1 to provide that the 2-level adjustment under §3B1.3 for abuse of a position of trust applies in such a case. We believe the Commission's proposal, which would require a 2-level increase in *all* such cases, adopts the most severe reading of the congressional directive, even though the Commission lacks sufficient information about the nature and scope of these cases to determine that such an increase is warranted. Application note 8 of §2D1.1 already calls the court's attention to those defendants who use a special position or skill to facilitate drug trafficking. We think it unwarranted by the directive or any evidence to single out one small category of those individuals, i.e., persons authorized to receive drugs under the Secure and Responsible Drug Disposal Act, and require that the court apply §3B1.3 when in other cases, the application note merely states that §3B1.3 "may apply."

Defenders believe the Commission should implement the directive by amending the second sentence in Application Note 8 to §2D1.1, as follows:

> These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, *and persons authorized to receive scheduled substances from an ultimate user or long term care facility, see 21 U.S.C. § 822(g)*, and others whose special skill trade, profession, or position may be used to significantly facilitate commission of a drug offense.

VI. Conclusion

We would be happy to discuss any modifications to the guidelines that would advance the goal of simplicity and fidelity to 18 U.S.C. § 3553(a). Thank you for providing us an opportunity to testify and for considering our comments. As always, we look forward to working with the Commission on these and other issues.

Written Statement of Kyle Welch

Assistant Federal Public Defender
Southern District of Texas

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2011

Re: Proposed Amendments: Firearms

March 17, 2011

Testimony of Kyle Welch
Assistant Federal Public Defender for the Southern District of Texas

Before the United States Sentencing Commission
Public Hearing on Proposed Firearm Amendments

March 17, 2011

My name is Kyle Welch and I am an Assistant Federal Public Defender in the Southern District of Texas (McAllen). I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments for firearms.

I. Introduction

Defenders understand the Commission's desire to take steps to curb violence in Mexico by stopping the flow of firearms across the border. The level of violence is disturbing and carries with it important implications for U.S. foreign and domestic policy. The deadly shootings of Special Agent Jaime Jorge Zapa this year and of Border Patrol Agent Brian Terry in December 2010 are tragic examples of the violence in Mexico and its connection to the United States. Experience teaches us, however, that high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects.[1]

Policy decisions made in the midst of an emerging controversy and congressional investigation into the "Fast and Furious" strategy of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") are particularly unsound.[2] We urge the Commission to steer clear of the controversy until the Department of Justice, ATF, and Congress can decide on a comprehensive strategy for combating illegal firearms transactions. One-size-fits-all solutions that further complicate the guidelines should be avoided, especially in the midst of ongoing congressional investigations into ATF's handling of gun trafficking cases involving straw purchasers,

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[1] At least two notoriously harsh sentencing laws have emerged from tragedies. One is 18 U.S.C. § 924(c), which was enacted shortly after the shooting of Martin Luther King, Jr., and then amended after the assassination of Robert F. Kennedy. Another is the crack penalties set forth in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, which followed the death of basketball star Len Bias. As the Commission well knows, it took over two decades to begin to ameliorate the harsh and devastating consequences of the severe sentences meted out to crack offenders.

[2] *See* John Solomon, David Heath, & Gordon Witkin, The Center for Public Integrity, *ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Gunrunners* (Mar. 3, 2011), http://www.publicintegrity.org/articles/entry/2976; *see also* Letter from Senator Charles Grassley to Attorney General Eric Holder and Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives Kenneth Melson (Mar. 3, 2011) (hereinafter *Grassley Letter*), http://grassley.senate.gov/about/upload/Judiciary-03-03-11-letter-to-Holder-Melson-ATF-SW-Border.pdf.

"incomplete" information about Southwest border gun trafficking,[3] and the heated political debate about the nature of the problem and how it should be solved.

Defenders fear that the Commission's proposed amendments to USSG §§2M5.2 and 2K2.1 are not narrowly tailored to carry out the purposes of sentencing and bring with them the significant risk of incarcerating low-level, first-time offenders for a length of time that is not only greater than necessary, but detrimental to public safety. Further, the Commission's broad and far-reaching issues for comment on §2K2.1 suggest the Commission is quickly – too quickly from our perspective – considering amendments that will adversely impact hundreds of individuals across the country as well as the community at large. We believe that instead of reacting to the problems of gun violence – within or outside our borders – by quickly proposing and promulgating amendments targeting straw purchasers and those involved in firearms crossing the border or export offenses involving small arms and ammunition, the Commission, as an independent expert body, should engage in a more searching inquiry that carefully sifts through the data surrounding the issues before deciding to amend the guidelines.

At this point, the Commission lacks the information necessary to draw a sound conclusion about the role the guidelines should play in these cases. ATF cannot even provide reliable data on straw purchasers, trafficking by unlicensed sellers, and gun shows because "the agency does not systematically track this information." Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges* 39-40 (2009). Without such information, it is difficult to "understand the nature of the problem and to help plan and assess ways to address it." *Id*. at 38. Because the Commission does not have adequate information and ATF's plan to combat the problem is unclear, we believe it premature for the Commission to amend the guidelines related to these offenses.

The Commission's proposal to amend the guidelines for firearms crossing the border also comes too soon because no consensus has been reached about whether efforts to control guns in the United States will curb the violence in Mexico. Key players in the highly politicized debate about violence in Mexico disagree on the nature of the problem, including the extent to which firearms crossing the border contribute to cartel violence.[4] According to some reports, much of

[3] Vivian Chu & William Krouse, Congressional Research Service, *Gun Trafficking and Southwest Border* 26 (2009).

[4] Senator Jeff Sessions' remarks highlight the hot debate about the chief causes of the violence in Mexico and the extent to which gun control efforts will help lessen it. Senator Sessions observed: "[I]f [the Mexican drug cartels] do not get guns from the United States, they will get them from the military. They will steal them for other countries. They will buy them on the markets out there. The problem really is not the guns. It is a part of it. But the real problem is that this group is attempting to conduct an illegal operation in Mexico, and they will intimidate and kill people who try to stop them." *Law Enforcement Reponses to Mexican Drug Cartels: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm.*

the violence is related to the use of "military-grade weapons, including hand grenades, grenade launchers, armor-piercing ammunitions and antitank rockets" that are not available in the United States much less available to a straw purchaser at a gun store in Texas. *See* Ken Ellingwood & Tracy Wilkinson, *Mexico Under Siege: Drug Cartels' New Weaponry Means War*, L.A. Times, Mar. 15, 2009. While U.S. authorities focus on the smuggling of more conventional weapons purchased in the U.S. and smuggled across the border, the facts on the ground seem to indicate that drug cartels are smuggling more sophisticated and lethal weapons from "Central American countries or by sea." *Id*.[5]

What empirical information is available, including the Commission's own data, does not support the need for higher sentences for any of the defendants targeted in the proposed amendments. The Commission's FY 2009 dataset reveals that a majority of defendants convicted under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A) receive below guideline sentences, either through government sponsorship (29%) or otherwise (28%). Very few (1%) receive above range sentences.[6] These data suggest that the guideline ranges for these offenses are too high, not too low. The Commission should not ignore empirical data in favor of unsubstantiated claims that higher sentences are necessary.

Lengthier Sentences are Not Necessary to Induce Cooperation and the Strategy of Encouraging Prosecutors to Seek Lengthier Sentences for Straw Purchasers is Unsound and Counter-productive.

As a threshold matter, inducing cooperation should not be a factor the Commission considers in deciding where to set a guideline range. It is one thing for the Commission to reward those who cooperate; it is another to set penalties higher so that those who fail to cooperate are punished more harshly. *See* USSG §5K1.2, p.s. (defendant's refusal to assist authorities may not be considered aggravating factor). That said, the empirical evidence refutes the claims of some AUSAs and ATF agents that "lesser penalties" for straw purchasers

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on the Judiciary and the S. Caucus on International Narcotics Control United States Senate, 111th Cong. 44 (2009) (statement of Senator Jeff Sessions) (hereinafter *Responses to Mexican Drug Cartels*).

[5] Some gun control advocates and politicians contend that 90% of guns seized from the cartels are from the United States. *Responses to Mexican Drug Cartels, supra* note 4, at 3 (statement of Senator Richard Durbin); *id*. at 5 (statement of Senator Dianne Feinstein). Others call this the "90 percent myth." *See* National Rifle Association, *The Ongoing Mexico Crisis – Blaming American Gun Owners*, (2009), http://www.nraila.org/Legislation/Federal/Read.aspx?id=463; *see also Combating Border Violence: The Role of Interagency Coordination in Investigations: Hearing Before the Subcomm. on Border, Maritime, and Global Terrorism of the Comm. on Homeland Security, House of Representatives*, 111th Cong. 33 (2009) (statement of Congressmen Mike Rogers) ("90 percent is really misleading if you look at the overall stockpile of weapons they have there").

[6] USSC, FY 2009 Monitoring Dataset.

"reduce[s] their ability to use the threat of prosecution to induce suspects to cooperate and provide evidence against their co-conspirators." U.S. Dep't of Justice, Office of Inspector General, *Review of ATF's Project Gunrunner* 65 (2010) (hereinafter *OIG Review of Gunrunner*); *see also id*. at 66. As discussed more fully below, straw purchasers have shown no reluctance to cooperate with law enforcement officials and do so at a higher rate than many other defendants.[7] Twenty-six percent of defendants convicted of straw purchasing under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) received a §5K1.1 departure for substantial assistance.[8]

Rather than have a meaningful impact on illegal firearms transactions, increased penalties for lower-level offenders in gun trafficking are more likely to encourage prosecutors[9] to go after the "low hanging" fruit to increase conviction rates and aggregate punishment rather than pursue more intense investigations aimed at bringing down the higher level gun traffickers.[10] Multiple press releases boasting about the convictions and sentences of persons involved in the purchase of firearms may be part of a public relations campaign in response to President Calderon's claims that the U.S. is responsible for the violence in Mexico. The convictions and sentences boasted about in those releases, however, would not do anything to actually combat gun trafficking, much less curb the violence in Mexico.[11] The simple fact of the matter is that straw purchasers, like drug mules, often have little information about the organizations they serve. Moreover, they are easily replaced.

Even if increased penalties could help stem purchases from federally licensed dealers, such purchasers are only one source of firearms for gun traffickers or others in search of

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[7] The documents obtained by Senator Grassley regarding ATF's "Fast and Furious" program show that straw purchasers were cooperating with authorities as they sought to investigate persons higher up in the operation. *See Grassley Letter* (Attachment 1, ATF Report of Investigation).

[8] USSC, FY 2009 Monitoring Dataset.

[9] The Department argued in 2006 that if the Commission did not add a "trafficking enhancement" to §2K1.1, "cases may simply not be prosecuted because the relatively low existing penalties may not merit the expenditure of scare prosecutorial resources." *See* Written Testimony of Richard Hertling, Dep't of Justice, Before the U.S. Sent'g Comm'n, at 3-4 (Mar. 15, 2006). The Department got what it wanted in 2006. Five years later, it has returned with new unsupported claims that even higher penalties are required for cases involving illegal firearms transactions. The Commission should view these claims with great skepticism.

[10] *See generally* Todd Lochner, National Center for State Courts, *Strategic Behaviors and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and their Assistants*, 23 Just. Sys. J. 271, 286 (2002) (interviewees in U.S. Attorney's offices "suggested that many career assistants will seek the easiest types of cases that require the least work"); *id.* at 291 (discussing how some U.S. Attorney's use media attention as a reward incentive).

[11] We do not here suggest in any way that ATF should turn a "blind eye" to straw purchases. The ATF's "Fast and Furious" program shows the dangers associated with such a strategy.

firearms. Other sources include thefts from interstate shipments, burglaries, and purchases at gun shows.[12] Gun shows and flea markets – legal in Texas, Arizona, New Mexico, and elsewhere – are largely unregulated. Sales at such shows are not subject to the same recordkeeping requirements as sales from gun shops. The purchaser need only present a driver's license showing residence in the same state as the point of sale. *See generally* Chu & Krouse, *supra* note 3, at 11.[13] Sellers have been known to bypass even this minimal requirement. As a result, weapons, including semi-automatic firearms, such as the AR-15 and AK-47, can be purchased for cash with no paper trail that permits tracing of the firearm to the seller or purchaser. *See* Brady Campaign to Prevent Gun Violence, *Undercover Video Exposes Irresponsible Dealings at Gun Shows*.[14]

Because stiffer penalties on straw purchasers could have unintended consequences that interfere with the overall goal of reducing gun trafficking and that are incompatible with the purposes of sentencing set forth in 18 U.S.C. § 3553(a), we believe the Commission should move cautiously before increasing penalties for straw purchasers or those who transfer firearms to a prohibited person.

No Sound Evidence Exists that the Severity of a Sentence Serves as a Deterrent.

Much of the Department's push for longer and longer sentences stems from a myth that more severe sentences serve as a general deterrent to crime. This theory is premised on the view that offenders are rational actors who weigh the costs and benefits of engaging in crime before doing so, and that they perceive that severity before committing a crime. Research, however, refutes that theory. Indeed, there is "no real evidence of a deterrent effect for severity." Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 817 (2010). Lengthy sentences do not provide meaningful deterrence because most offenders do not think about the criminal consequences of their actions.

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[12] *Commerce, Justice, Science, and Related Agencies Appropriations for 2011: Hearing Before a Subcomm. of the Comm. on Appropriations, House of Representatives*, 111th Cong. 289 (2010) (statement of Kenneth Melson, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives).

[13] *See also Money, Guns, and Drugs: Are U.S. Inputs Fueling Violence on the U.S./Mexico Border?: Hearing Before the Subcomm. on National Security and Foreign Affairs of the Comm. on Oversight and Government Reform, House of Representatives*, 111th Cong. 48 (2009) (statement of Tom Diaz, Senior Policy Analyst, Violence Policy Center).

[14] Available at http://www.youtube.com/watch?v=baPgr_tw79Q&feature=channel (video documentary of gun show purchases of various assault style rifles without background check, identification, or paperwork).

See Anthony N. Doob & Cheryl Marie Webster, 30 Crime & Just. 143, 182-83 (2003).[15] To the extent that offenders weigh the perceived costs and benefits, "in virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity." Pasternoster, *supra*, at 812; Doob & Webster, *supra* at 189 ("no consistent and plausible evidence that harsher sentences deter crime").

With regard to gun crimes, some studies show that increased penalties for gun violations "have produced little in the way of deterrence for arrestees, who continue to obtain and use firearms with ease." Scott Decker, Susan Pennell, & Ami Caldwell, National Institute of Justice, *Illegal Firearms*, *Access and Use by Arrestees* 4 (1997). Other data show that stepped up enforcement, tighter controls on gun show sales, background checks for all handgun sales at gun shows, purchase permits, and required reporting of lost or stolen firearms will have a greater impact on trafficking than sentence severity. *See generally* Mayors Against Illegal Guns, *The Movement of Illegal Guns in America: The Link between Gun Laws and Interstate Gun Trafficking* (2008) (discussing how local control of firearms regulations, and state inspections of gun dealers have a significant impact on illegal gun trafficking).

We encourage the Commission to carefully consider the existing research on deterrence theory and reject the bare assertion that more severe sentences will deter illegal firearm purchases and transfers or otherwise serve any of the purposes of sentencing.

Increased Prison Sentences for First-Time Offenders May Well Increase the Risk of Recidivism.

We are also gravely concerned about the consequences of sending first-time offenders to prison,[16] where they will learn new anti-social skills,[17] and then returning them to society, where they will face numerous barriers to reentry and long-lasting collateral consequences. *See, e.g.*, Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 Utah L. Rev. 205, 207-42. The consequences of incarceration cannot be overstated. Scholars have identified numerous "criminogenic" effects of incarceration, including how prison

[15] *See generally* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 Geo. L. J. 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Legal Stud. 1, 4-7 (1999).

[16] These are mostly persons with no felony record. In FY 2009, 73% of the defendants convicted under 18 U.S.C. §§ 922(d), 924(a)(1)(A) or 922(a)(6) fell within Criminal History Category I. USSC, FY 2009 Monitoring Dataset.

[17] Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recividism?*, 3 U. St. Thomas L. J. 521, 522 & n.2 (2006) (discussing how prison exposes lower risk offenders to "anti-social behavior" and disrupts "pro-social networks," such as "school, employment, family").

serves as a school for criminals; severs ties to family and community; diminishes employment options upon release; and reduces rather than increases the inmate's willingness or ability to conform to social norms.[18]

The Supreme Court itself freely acknowledged: "[p]risons are dangerous places." *Johnson v. California*, 543 U.S. 499, 515 (2005). The more crowded they are, the more dangerous they become. By the end of FY 2011, "[t]he system-wide crowding level in BOP facilities is estimated to climb to 43 percent above rated capacity," a 7% increase from last year. *See* U.S. Dep't of Justice*, Federal Prison System FY 2011 Performance Budget*, at 3. As a result of this crowding, "as of May 2009, 18,630 (93 percent) high security inmates were double bunked, and 14,180 (26 percent) of medium security inmates and almost 35,000 (81 percent) of low security inmates were triple bunked." *Id*. at 2.

In addition to the very real physical dangers of prison life, there are numerous psychological risks. As one prominent psychologist puts it: "The adaptation to imprisonment is almost always difficult and, at times, creates habits of thinking and acting that can be dysfunctional in periods of post-prison adjustment . . . . [F]ew people are completely unchanged or unscathed by the experience."[19] The psychological consequences of imprisonment "may represent significant impediments to post-prison adjustment. They may interfere with the transition from prison to home, impede an ex-convict's successful re-integration into a social network and employment setting, and may compromise an incarcerated parent's ability to resume his or her role with family and children."[20]

Given the risks of recidivism associated with prison sentences and the other detrimental consequences of imprisonment, including the fiscal impact on taxpayers, we think it unwise to promulgate guidelines that would advise judges to impose longer prison sentences for persons who are typically first-time offenders.

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[18] *See generally* Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); 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, 614-16 (2007); *see also* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious offenders, disruption of legal employment, and weakening of family ties).

[19] Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 4 (2001), http://aspe.hhs.gov/hsp/prison2home02/haney.pdf.

[20] *Id*.

II. Proposed Amendments to §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License)

The proposed amendments to §2M5.2 (1) narrow the scope of the alternative base offense level of 14 for offenses involving small arms, by reducing the maximum number of small arms from no more than ten to [two]-[five], and further requiring that the arms be "possessed solely for personal use"; and (2) specifically address ammunition, on which the current guideline is silent, by providing that small quantities ([200]-[500] rounds for small arms) possessed solely for personal use receive the alternative base offense level of 14.

Section 2M5.2 has only 2 possible base offense levels, 26 or 14, and contains no specific offense characteristics. The proposed changes to § 2M5.2 would have the effect of both raising the guideline range for low-level offenders currently subject to a base offense level 14, and expanding even further the wide range of culpability that is punished under base offense level 26.

We oppose these amendments because there is not sufficient empirical evidence that higher sentences are necessary or appropriate for this class of offenders, and the amendments will increase sentencing disparity by applying a single base offense level to an even broader group of quite different defendants. As one judge has already noted: "It is clear by the divergent set of materials included within and the history and justification for the amendments that the sentencing commission did not act within its „characteristic institutional role' when it established the current guidelines under §2M5.2. It would be logical for there to be a sliding scale (such as exists for different drug types and weights) based on the lethal nature or technical sophistication of different munitions: no such scale exists, however." *United States v. Oldani*, 2009 WL 1770116, *16 (S.D. W.Va. June 16, 2009).[21] When one considers the genesis and evolution of §2M5.2 it becomes apparent that the proposed amendment only moves the guideline further away from its original intent.

A. The Current Guideline Provides for Sentences That Are Sufficiently Long.

The current guideline provides more than adequate punishment and deterrence. The Commission's data confirm this. The statistics from 2009 show that United States District Court Judges believe the current guideline is at least sufficiently punitive, if not too punitive. Of the 63 cases sentenced under §2M5.2 in 2009, the majority (62%) received sentences *below* the current guideline range. USSC, *2009 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2009) (hereinafter *2009 Sourcebook*). In 46% of the cases, judges imposed sentences below the

[21] Instead of a sliding scale that would complicate the guideline by adding more finely tuned base offense levels, as discussed below, we propose adding departure language to the Commentary.

guideline range when the below guideline sentence was not sponsored by the government. *Id.*[22] In contrast, judges imposed above guideline sentences in only 2 of the 63 cases (3%). *Id.* They imposed within guideline sentences in 35% of cases. *Id.* While this data would support a *reduction* in guideline ranges for many offenders subject to §2M5.2, the Commission's proposed amendments would *increase* the guideline range to a level 26 for a number of defendants currently subject to a level 14. There is no need to increase sentences for lower level offenses involving no more than ten non-fully automatic small arms.

B. The Proposed Amendment Would Serve to Increase Disparity Within a Guideline that Already Lumps Together Very Different Offenses and Defendants Under a Single Base Offense Level.

By further limiting the applicability of level 14 to very small quantities of small arms, and/or ammunition for small arms only when they are for personal use, the proposed amendments would have the effect of putting the vast majority of cases, with widely different degrees of culpability, at a much higher base offense level 26.

The current guidelines already treat different defendants the same by grouping a wide variety of offenses under a single base offense level of 26. U.S. Immigration and Customs Enforcement ("ICE") commented on this at a regional hearing: "right now, the main base offense level treats ten firearms the same as it would 150 hand grenades or highly sensitive technology."[23] ICE informed the Commission that it "would like to see [§2M5.2] amended to better differentiate the various type of weapons and again the numbers smuggled. . . . And while the base offense level is fairly strong, there is no differentiation between quite, quite different offenses and levels of seriousness." *Id.*; *see also Oldani*, 2009 WL 1770116 at *16 (noting it would be "logical" to punish the "the divergent set of materials" included within the guideline on a sliding scale, rather than group them together under a single base offense level).

The range of offenses that fall within the higher base offense level of 26 has expanded over the years. Originally, §2M5.2 provided for a base offense level of 22, if sophisticated weaponry was involved; or if not, a base offense level of 14. USSG §2M5.2 (1987). In 1990, the guideline was amended to expand the level 22 base offense level beyond "sophisticated weaponry" to include *all* offenses except that level 14 would apply in a very narrow class of cases where the offense "involved only fully-automatic small arms (rifles, handguns, or

[22] Both rates are significantly higher than the rates for below guideline sentences across all offenses: In 2009, judges imposed sentences below the guideline range in 41% of the cases, and non-government sponsored below guideline sentences in 16% of the cases. *Id.*, tbl. N.

[23] Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Phoenix, Ariz., at 16 (Jan. 20, 2010) (John T. Morton, Assistant Secretary of Homeland Security for the United States Immigrations and Customs Enforcement (ICE)).

shotguns), and the number of weapons did not exceed ten." USSG App. C, Amend. 337 (Nov. 1, 1990). Then in 2001, when Congress expressed concern about inadequate penalties for weapons of mass destruction (nuclear, chemical, and biological weapons), "[r]ather than adopting some specific offense characteristics (such as the number of articles exported, their technical sophistication, the capability to cause harm, etc.)," *Oldani,* 2009 WL 1770116 at *16, the Commission simply raised the base offense level for *all* offenses from 22 to 26, excepting only the narrow class of defendants it had already defined as subject to the lower level 14. USSG App. C, Amend. 633 (Nov. 1, 2001).

As a result, we see a wide range of culpability among these defendants, but the guidelines punish them identically at a level 26. With the exception of the small number of items covered under offense level 14, offense level 26 covers a wide range of items on the United States Munitions List, including materials for chemical, biological, and nuclear weapons; bombs; rockets; torpedoes; flame throwers; warships; tanks, military aircraft; fully automatic firearms; rifle scopes; silencers; and optical equipment like night vision goggles. *See* 22 C.F.R. § 121.1 (2009). Because of the variety of items on the munitions list, offenses falling under level 26 range from lower-level offenses such as those involving small numbers of night vision goggles to much more serious munitions and quantities. *See, e.g.*, *United States v. Garcia-Nevarez,* No. 09-cr-03418 (W.D. Tex. 2009) (a courier case involving four night vision goggles, where 54-year old courier with no criminal history refused to carry ammunition, and the charged conduct occurred when his wife was sick and required financial support); *United States v. Oldani*, 2009 WL 1770116 (S.D. W.Va. June 16, 2009) (defendant, a Marine Corps veteran suffering from Post Traumatic Stress Disorder and mild traumatic brain injury, involved in shipping stolen night vision optics to Taiwan, Japan and Hong Kong); *United States v. Carter*, 550 F. Supp. 2d 148 (D. Me. 2008) (defendant purchased eighteen non-fully automatic firearms for a Canadian citizen he knew would bring the firearms from the United States to Canada); *United States v. Tostado-Gonzalez*, No. 09-cr-01339 (W.D. Tex.) (defendant involved in attempting to purchase almost two million dollars worth of various makes, models, and calibers of firearms and ammunition, including high caliber rifles); *United States v. Tsai*, 954 F.2d 155 (3d Cir. 1992) (defendant involved in exporting to Taiwan parts for guidance of infra-red military missile systems such as the Sidewinder missile or the Maverick missile); *United States v. Pedrioli*, 978 F.2d 457 (9th Cir. 1992) (involving smuggling of 800 handguns to the Philippines); *United States v. Hendron*, 43 F.3d 24, 25 (2d Cir. 1994) (involving attempt to illegally sell 100 AK-47's to Iraq).

Further narrowing the class of cases subject to level 14, by reducing the threshold number of guns from 10 to [two]-[five] would only further expand the range of culpability under base offense level of 26. By grouping dissimilarly situated offenses into one category, the proposed guideline would only add to unwarranted disparity.

Similarly, the addition of a personal use requirement to be eligible for level 14 further restricts the number of cases that fall under the lower base offense level and increases not only the number of cases subject to the higher base offense level of 26, but also the range of culpability subject to that level. There are defendants involved in illegally exporting firearms and ammunition who may be more culpable than those who export solely for personal use, but are significantly less culpable than those who illegally export weapons to arm drug trafficking organizations. For example, sometimes firearms and ammunition are intended for hunting or sport, and sometimes for local police, who are typically armed with nothing more than old revolvers and a few rounds of ammunition.[24] Additionally, firearms and ammunition are sometimes smuggled into Mexico for sale not to drug cartels, but to individual Mexican citizens who want guns in calibers that are illegal in Mexico to use for self-defense.[25] Under the current structure, and the proposed amended structure, less culpable offenders are treated the same as those who seek to illegally export millions of dollars of weapons for the drug cartels, or even weapons of mass destruction.

While we would prefer that the Commission not include the personal use limitation, if it decides to promulgate this amendment, we propose that it at least omit one of the proposed criteria for determining personal use: "the extent to which possession was restricted by local law." First, assuming local law refers to local law in the United States where the defendant was apprehended, it would preclude every prohibited person from establishing that the firearms and ammunition were for personal use. Take, for example, the situation of a Mexican national who is in the United States illegally, smuggling a single small handgun from the United States to Mexico to use for self-defense. That individual's possession of that weapon – which is restricted by local law in the United States under 18 U.S.C. § 922(g)(5) – could preclude a finding of personal use, and thus subject the individual to the higher base offense level. Second, if "local law" means the place to which the weapons were being exported, in almost every case where the firearms and ammunition are being exported to Mexico, the defendant will not qualify for the personal use criteria because Mexican gun laws are so restrictive. *90 Percent Myth, supra*.

Finally, the Commission's proposal to specify that small amounts of ammunition for small arms will be subject to level 14 instead of level 26 does not help the disparity problem created by this guideline because this category of ammunition cases exists in theory only. We have not been able to locate a single defendant who would meet the extremely narrow

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[24] Colby Goodman and Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges* 21 (2010).

[25] STRATFOR, *Mexico's Gun Supply and the 90 Percent Myth* (Feb. 10, 2011), http://www.stratfor.com/print/183871 (hereinafter *90 Percent Myth*) ("[T]here is an entire cottage industry that has developed to smuggle such weapons, and not all the customers are cartel hit men. There are many Mexican citizens who own guns in calibers such as .45, 9 mm, .40 and .44 magnum for self-defense – even though such guns are illegal in Mexico.").

ammunition exception set forth in the proposed amendments. Accordingly, the proposed amendment leaves if not all, almost all, defendants exporting only ammunition in the same base offense level as those exporting the chemical, biological, and nuclear weapons originally targeted by offense level 26 in §2M5.2(a)(1).

We oppose the proposed amendments to §2M5.2 because they essentially eliminate the lower base offense level, and group the vast majority of cases under a single base offense level regardless of whether the defendant was exporting weapons of mass destruction, or five handguns to help his neighbors protect themselves.

C. The Proposed Amendments Would Also Increase Inter-Guideline Disparity.

In addition to treating differently situated defendants the same under §2M5.2 itself, the proposed amendments would also increase disparity across guidelines, such that defendants with very different levels of culpability would be subject to the same base offense level. For example, under the proposed amendments, a defendant who illegally exported from the United States to Canada a single small firearm with 520 rounds of small ammunition would be subject to base offense level 26, the same as someone who committed a robbery where the victim received permanent or life-threatening bodily injury, and almost the same as someone convicted of attempted second degree murder. *See* USSG §2B3.1(b)(3)(C); *id.* §2A2.1. It also would treat such a defendant more harshly than one convicted of transferring biological weapons under 18 U.S.C. 175 or 175b. *See* USSG §2M6.1(a)(3) (offense level 22) or §2B6.1(a)(4) (offense level 20). When different degrees of culpability are treated similarly, that disparity creates disrespect for law and should be avoided whenever possible. The proposed amendments are a step in the wrong direction in this regard.

D. An Alternative Amendment

In light of the history of §2M5.2, feedback from sentencing judges that the guideline is already set too high for many offenders, and the criticism that it does not adequately differentiate between quite different offenses and degrees of seriousness, we encourage the Commission to consider a different change to §2M5.2.

Specifically, we suggest the Commission leave the threshold number of small arms for level 14 at ten, and not add a personal use requirement. In addition, we suggest that the Commission specifically address ammunition by including it, in any quantity, in the lower base offense level 14. This would remove some of the least culpable defendants currently subject to level 26. We suggest that under this approach, the more serious ammunition cases could be addressed by adding an Application Note that invites a departure for a particularly egregious offense.

(a)(2) **14**, if the offense involved (A) only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten, or (B) only ammunition, or (C) both.

Application Notes

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3. In some cases where section (a)(2) applies, the court may find that the resulting base offense level does not adequately reflect the seriousness of the offense (e.g., the offense involved firearms or ammunition in a quantity or type typically used by a criminal enterprise, and the defendant knew or intended that the firearm or ammunition would be transferred to an organized criminal enterprise). In such cases, an upward departure may be warranted.

We believe this alternative amendment is more consistent with the purpose of §2M5.2, and provides better differentiation between the wide range of offenses that fall under this guideline.

III. Proposed Amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)

A. Straw Purchasers

In its request for comment, the Commission asks first whether the guidelines are adequate as they apply to straw purchasers. If not, the Commission asks if it should provide higher penalties by (a) raising the alternative base offense levels for straw purchasers by 2 levels, and (b) increasing alternative base offense levels for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) where there is a preponderance of the evidence that the offense was committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person, even though the person was not convicted of violating 18 U.S.C. § 922(d), which specifically addresses that situation.

In the Staff Preliminary Discussion Draft of the Proposed Amendments provided to defenders on February 24, 2011, specific changes to §2K2.1 to increase the guidelines for straw purchasers are proposed. These proposed amendments have not been published in the federal register. The first change raises by two levels the base offense levels for defendants convicted under the three different statutes commonly used to prosecute straw purchasers: 18 U.S.C. § 922(d), 18 U.S.C. § 922(a)(6) and 18 U.S.C. §924(a)(1)(A).[26]

[26] Section 922(d) prohibits a person from selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is a prohibited person. The other two statutes prohibit making false statements in connection with the purchase of a firearm.

For those convicted under § 922(d), the proposed two-level increase would raise the base offense level from 14 to 16. For those convicted under the two false statement statutes, the two-level increase would raise the base offense level from 12 to 14. The second change would further increase the guideline range from the proposed new level 14 to a level 16 for those individuals convicted under the false statement statutes, "but who engaged in the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of the firearm to a prohibited person."

We oppose the proposed changes. Defendants convicted under these three statutes are overwhelmingly first time, non-violent offenders for whom prison should be "generally" inappropriate. 28 U.S.C. § 944(j). In 2009, 73% of the defendants convicted of violating these statutes fell within criminal history category one.[27] And, although women comprise only 3.4% of the defendants convicted of firearm offenses generally, they are 13% of the defendants convicted under these three statutes.[28] These cases often involve the purchase of firearms for a spouse, partner or other family member, for no remuneration, motivated by an intimate relationship or fear. For example, in one 2009 case from the Eastern District of Pennsylvania, a twenty-year-old woman was charged with violating § 924(a)(1)(A) when she purchased six firearms for her then-boyfriend and two others. Her boyfriend, who was ten years older, was violent, and she was intimidated by him. She had been repeatedly raped at the age of twelve by her mother's boyfriend, and believed her mother knew about and tolerated the rape. She then stayed with different relatives and dropped out of school. She never enrolled in high school. Before she purchased the guns for her boyfriend, she had never engaged in any criminal activity. *See also 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"); *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. App'x 187, 190 (4th Cir. 2003) (wife sentenced to 15 months imprisonment for purchasing two firearms for her husband).

Specifically, § 922(a)(6) provides it is unlawful for a person in connection with the acquisition or attempted acquisition of any firearm or ammunition from licensed importers, manufacturers, dealer or collectors, "knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive . . . with respect to any fact material to the lawfulness of the sale." Similar, but not identical, is § 924(a)(1)(A) which prohibits a person from knowingly making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter."

[27] USSC, FY 2009 Monitoring Dataset.

[28] *Compare* USSC, FY 2009 Monitoring Dataset with *2009 Sourcebook* tbl. 5. The percentage of women convicted of violating § 922(d) is even higher, at 16%. USSC, FY 2009 Monitoring Dataset.

In addition, the proposed changes are not narrowly targeted at the border problem, though the Department of Justice asked the Commission to raise penalties for straw purchasers to address that problem.[29] A significant number of these cases occur far away from the Southwest border region.[30] In 2009, 74% of the convictions under these statutes occurred *outside* the Southwest border region, and while the Southern District of Texas did have a relatively high concentration of cases (15%), so did the Eastern District of Pennsylvania (11%).[31]

1. There is No Need to Raise Sentences Recommended by the Current Guideline.

As discussed above, raising sentences for straw purchasers would be a politically expedient measure, without any basis in empirical evidence that it is necessary. This guideline already demonstrates a relentless march toward increasing severity without an empirical basis for doing so, and the Commission should not compound the problem.

That the current guideline is more than adequate is borne out by (a) the Commission's data showing the high rate at which judges impose sentences below the current guideline range for offenses under the three statutes; (b) the history of the guideline; and (c) the plethora of enhancements, cross-references and invited departures which amply provide for severe sentences for the most culpable.

a. The Data

In 2009, judges imposed sentences below the guidelines for defendants convicted under the three straw purchaser statutes more often than not (57%).[32] The government sponsored below guideline sentences in 29% of cases, a higher rate than for all offenses nationally (25%).[33] Similarly, for these offenses, judges imposed non-government sponsored below guideline

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[29] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 8-9 (June 28, 2010).

[30] ATF defines the Southwest border region to include all of Texas, New Mexico and Arizona and the southern part of California. *OIG Review of Gunrunner, supra*, at 3. Accordingly, we here use the term to include all of the federal districts of Texas, the District of Arizona, the District of New Mexico and the Southern District of California.

[31] USSC, FY 2009 Monitoring Dataset.

[32] USSC, FY 2009 Monitoring Dataset.

[33] *Compare* USSC FY 2009 Monitoring Dataset with *2009 Sourcebook* tbl. N.

sentences in 28% of cases, compared with a much lower rate of 16% for all offenses nationally.[34] Above guideline sentences were imposed in only 1% of the cases.[35]

And, although it is not a consideration relevant to the statutory purposes of sentencing, the current guidelines do not hinder law enforcement efforts to gain cooperation from defendants to assist in investigating other cases. The government filed §5K1.1 motions in 25% of these straw purchaser cases, a rate almost double the national rate for all offenses (13%).[36]

The guidelines for violations of these statutes appear to be sufficiently high even in the Southwest border region. In 27% of cases, the government sponsored a below guideline sentence.[37] In another 26% of cases judges imposed non-government sponsored below guideline sentences.[38]

Sentences for those convicted under §§ 922(a)(6) or 924(a)(1)(A) are also adequate and do not need to be enhanced, as the Commission proposes, when there is evidence they "engaged in the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of the firearm to a prohibited person." First, if there really is sufficient evidence of such conduct, the Government can seek a conviction under § 922(d) which carries a higher base offense level.[39] Second, defendants convicted under those two statutes are given government sponsored below guideline sentences in 31% of cases, and other below guideline sentence in 26% of cases, with above guideline sentences imposed in only .6% of cases.[40]

This data shows, at minimum, that there is no need to increase guideline ranges for these offenses. *See* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003) ("departures serve as an important mechanism by which the

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[34] *Compare* USSC FY 2009 Monitoring Dataset with *2009 Sourcebook* tbl. N.

[35] USSC, FY 2009 Monitoring Dataset.

[36] *Compare* USSC, FY 2009 Monitoring Dataset with *2009 Sourcebook* tbl. N.

[37] USSC, FY 2009 Monitoring Dataset.

[38] USSC, FY 2009 Monitoring Dataset.

[39] For this reason, the proposed enhancement for these convictions is a perfect example of what one judge has referred to as "criminaliz[ing] activity „on the cheap.'" *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Rendell, J., concurring) (criticizing how "we continue to allow sentencing judges, once a jury has found beyond a reasonable doubt that a defendant has committed *one* crime, then to find him guilty by a preponderance of the evidence of *other* crimes for which he was *not* tried-or worse, tried and acquitted-and to sentence him as if he had been convicted of *them* as well").

[40] USSC, FY 2009 Monitoring Dataset.

Commission could receive and consider feedback from courts regarding the operation of the guidelines"). [41]

b. The History

The guidelines for straw purchasers are already significantly higher than they were when the guidelines were enacted. Originally the guidelines for firearm offenses were based on the Commission's study of past practices.[42] When first enacted, those who "knew or had reason to believe that a purchaser was a person prohibited by federal law from owning a firearm" were assigned an offense level 8, and other straw purchasers were subject to a base offense level of 6. USSG §2K2.3 (1987). Quickly and without any stated empirical basis for doing so, the Commission made major revisions which "resulted in significant severity increases over historic levels."[43] In 1991, the Commission doubled the base offense level from 6 to 12 for many firearm offenses, including § 922(a)(1). USSG App. C, Amend. 374 (Nov. 1, 1991). That same year the Commission also increased the offense level for those convicted under § 922(d) from 12 to 14, having only two years earlier increased it from 8 to 12. *Id.*; USSG App. C, Amend. 189 (Nov. 1, 1989).

c. Enhancements, Cross-References, and Invited Departures

The ample number of enhancements, cross-references and invited departures under the current guideline to address more serious straw purchaser offenders demonstrates that the current guideline is adequate. For example:

- §2K2.1(b)(1) raises offense levels by 2 to 10 levels based on the number of firearms involved.
- §2K2.1(b)(4) increases the offense level by 2 for stolen firearms, and by 4 for altered or obliterated serial numbers, with no *mens rea* requirement.
- §2K2.1(b)(5), added in 2006, increases the offense level by 4 for trafficking in firearms, defined as transferring or receiving with intent to transfer two or more firearms regardless of whether anything of value was exchanged, with knowledge

[41] "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. . . . The Commission will collect and examine" sentencing data and judges' stated reasons for sentences outside the guideline range and "can revise the Guidelines accordingly." *Rita v. United States*, 551 U.S. 338, 350 (2007); *see also Pepper v. United States*, 2011 WL 709543, *23 (Mar. 2, 2011) (Breyer, J. concurring).

[42] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 66 (2004) (hereinafter *Fifteen Year Review*).

[43] *Fifteen Year Review* at 66.

or reason to believe that the transferee's possession would be unlawful or the transferee intended to use or dispose of the firearm unlawfully.

- §2K2.1(b)(6) increases the offense level by 4, and sets a floor of 18 if the defendant used or possessed any firearm or ammunition in connection with another felony, or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used in connection with another felony offense.

- §2K2.1(c) contains a cross-reference that may be applied to violations of the export laws. Under the expansive smuggling statute passed five years ago, 18 U.S.C. § 554, the government can prosecute those who facilitate the transportation, concealment or sale of an item, including a firearm, knowing it would be illegally transferred to a foreign country. Violations of this statute are sentenced under USSG §2M5.2.

- §2K2.1, cmt. n.11 invites upward departures for offenses involving (A) a large number of firearms, (B) military type assault rifles, (C) large quantities of armor-piercing ammunition, or (D) a substantial risk of death or bodily injury to multiple individuals.

These provisions provide a wide variety of ways to secure severe penalties for the most culpable straw purchasers, while leaving some room for the less culpable to receive appropriately less severe sentences. For example, a defendant who lied on a form when purchasing three handguns, and provided them to someone she had reason to believe intended to export them illegally, would already find herself at an offense level 18, or even a 22 if the court applied the 4-level enhancement for trafficking and the 4-level enhancement for transfer with reason to believe it would be possessed in connection with another felony offense.[44] This is a higher offense level than what she would receive if prosecuted under the smuggling statute and sentenced under §2M5.2. The offense level under §2K2.1 would rapidly increase with additional weapons and/or obliterated serial numbers. A serious trafficker who purchased 100 or more weapons that he then transferred to someone he had reason to believe would export them illegally, where any one of the firearms had an obliterated serial number, would reach offense level 28. In contrast, a woman suffering from battered women's syndrome who was threatened or otherwise cajoled into purchasing a firearm for her partner who did not want his name associated with the transaction would remain, appropriately so, at level 12.

[44] As discussed in Section IV, *infra*, the Fifth Circuit recently determined that subsection (b)(6) applies where the other felony offense is another firearms possession or trafficking offense. We believe this decision relies on a clerical error in the Commentary and request the Commission amend the Commentary to make clear that (b)(6) does *not* apply in such circumstances.

Raising the base offense level, as the Commission proposes to do, will dramatically impact the least culpable of the straw purchasers in every corner of this country. It will punish these often first time offenders with sentences far longer than necessary, at great cost to them, the Bureau of Prisons, and society at large.

2. Increasing Base Offense Levels Would Increase Disparity, Not Reduce It.

Further increasing the base offense levels for these non-violent offenses, committed most frequently by individuals with little to no criminal history, would result in defendants with very different levels of culpability being treated similarly. For example, a defendant with no criminal history who bought a gun for a husband or boyfriend would be subject to the same base offense level 14 as someone who committed an aggravated assault or criminal sexual abuse of a ward. *See* USSG §§2A2.2, 2A3.3.

The Commission asserts that its proposed increases would bring the firearms guideline into greater conformity with the explosives guideline, §2K1.3. While that is true, the severity of the explosives guideline provides no basis for ratcheting up the firearms guideline. First, explosives and firearms are quite different: explosives are inherently dangerous and can be severely harmful to a large number of people even if only because they are stored improperly. Firearms, while also dangerous, are categorically less so.[45] Second, the Commission's data indicate that the explosives guideline is much too high. The government sponsored below guideline rate, for reasons other than USSG §5K, is 22%, more than five times the rate for such departures nationally across all offenses (4%).[46] Similarly, judges impose non-government sponsored below guideline sentences in 26% of cases under §2K1.3, compared with 16% nationally across all offenses.

Finally, the Department of Justice urges the Commission to compare the sentence the guidelines provide for a violation of § 922(a)(6) by someone in criminal history category one with the statutory maximum sentence for that offense.[47] There are several reasons that

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[45] While we do not believe politically derived mandatory minimums and maximums provide particularly meaningful information about culpability, those who find that information relevant should note that under 18 U.S.C. § 844(h)(2), anyone who "carries an explosive during the commission of any [federal] felony" is subject to a ten-year mandatory minimum sentence, while the parallel statute for firearms, 18 U.S.C. §924(c), requires a five-year mandatory minimum sentence.

[46] *2009 Sourcebook* tbls. N and 28. Similarly, the rate of below guideline sentences for explosives was significantly higher than for drug trafficking, which was much closer to the national numbers across all offenses. For drug trafficking the rate of government sponsored below guideline sentences for reasons other than §5K is 4%, and the rate of non-government below guideline sentences is 17%. *Id.* tbl. 27.

[47] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 8-9 (June 28, 2010).

comparison is not instructive. Statutory maximum penalties are a poor proxy for the seriousness of an offense because they are driven by politics rather than empirical data or proportionality. At best, a statutory maximum reflects the appropriate punishment for the most serious offense committed by the most dangerous offender that could arise under the statute. The ten-year statutory maximum for § 922(a)(6), set forth 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 machine gun. Of those, straw purchasers who make false statements during the purchase of a firearm are the least culpable and should receive a sentence well below the statutory maximum penalty. Moreover, those with little to no criminal history need to be sentenced far below the statutory maximum to allow room for more serious offenders, with more extensive criminal history to be proportionately sentenced.[48] Finally, while the Department points specifically to this straw purchaser statute in connection with addressing violence in the Southwest border region, that region actually obtains far more convictions for the similar violation under § 924(a)(1)(A), which has a much lower five-year statutory maximum. Specifically, in 2009, there were 30 convictions under § 922(a)(6) in the Southwest border region (out of 166 nationally), and more than double that (68) under § 924(a)(1)(A) (out of 154 nationally).[49]

B. Firearms Crossing the Border

The Commission also seeks comment on (1) whether the crossing of a border should be incorporated as a factor in §2K2.1, and if so (2) whether the Commission should provide for a new enhancement of [two]-[five] levels "if the defendant possessed any firearm or ammunition while crossing or attempting to cross the border or otherwise departing or attempting to depart the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out the United States."

In the more recent Staff Preliminary Discussion Draft of the Proposed Amendments, there are two proposed options for addressing offenses involving firearms crossing the border or otherwise leaving the United States. These proposed amendments have not been published in the federal register. Option 1 would create a new [2]-level enhancement if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent or reason to believe that it would be transported out of the United States. Option 2 includes identical language, but would

[48] Although the vast majority of straw purchasers fall into criminal history category one, in 2009, 27% of defendants convicted of at least one of these statutes fell in criminal history categories two through six. USSC, FY 2009 Monitoring Dataset.

[49] USSC, FY 2009 Monitoring Dataset.

direct that the existing 4-level enhancement for using or possessing a firearm in connection with another felony offense applies.

We oppose both of the options the Commission proposes because we believe the guideline already adequately addresses the Commission's concerns.[50] Adding specific language about offenses involving border crossings would only add unnecessary complexity to the guideline. Such an amendment typifies the danger of "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[51]

1. The Current Guidelines Adequately Address the Issue of Firearms Crossing the Border.

We do not believe the proposed changes are necessary because the government already has ample tools to obtain lengthy sentences for offenses related to firearms and ammunition crossing the border. As ICE has informed Congress: "I think that we have the laws we need. We just need to more effectively and more aggressively pursue them." *Responses to Mexican Drug Cartels, supra* note 4, at 21 (statement of Kumar C. Kibble, Deputy Director, Office of Investigations, Immigration and Customs Enforcement).

Significantly, §2K2.1 was amended in 2006 to add a significant 4-level enhancement for firearm trafficking. This factor already addresses the core of the conduct the proposed amendment seeks to address: trafficking in firearms, which the guideline defines quite broadly to apply to the transfer of as few as two firearms, even when nothing of value is exchanged, where the defendant simply has reason to believe the transfer will be to someone whose possession of the firearms is illegal, or whose intended use is unlawful. Cases applying this 4-level enhancement are routinely affirmed. *See, e.g.*, *United States v. Juarez*, 626 F.3d 246 (5th Cir. 2010) (affirming application of §2K2.1(b)(5) in sentence for violation of 18 U.S.C. § 924(a)(1)(A) based on evidence that defendant purchased and delivered over two dozen

[50] As with straw purchasers, we strongly urge the Commission to take a deliberative approach based on empirical evidence in deciding whether to amend the guidelines to specifically address firearms and ammunition crossing the border. We believe that at the moment there is simply too much confusion, and inadequate information, about the nature of the problem and the actions necessary to stop the violence. Accordingly, we believe the Commission should wait to address this issue until a later time. Rash steps now, we caution, will result in bad sentencing policy for years to come at a real cost to the lives and liberty interests of our clients

[51] *Fifteen Year Review* at 137 (citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (Complexity of Guidelines has created a "façade of precision" which "undermines the goals of sentencing.")).

weapons, most of which were military-style assault rifles to a man she knew only by a nickname who showed he was unwilling to purchase the guns himself and paid defendant $200 above retail for each firearm); *United States v. Marceau*, 554 F.3d 24 (1st Cir. 2009) (affirming application of §2K2.1(b)(5) in sentence for stealing guns from a Maine firearms dealer based on (a) defendant's pre- robbery statements of his intent to steal firearms, remove serial numbers and exchange them for money to buy drugs, (b) sentencing court's finding that defendant "probably obliterated the serial numbers from the guns that he transferred to the individual he would not name"); *United States v. Mena*, 342 Fed. App'x 656 (2d Cir. 2009) (affirming application of §2K2.1(b)(5) in sentence for unlawfully dealing in firearms where evidence that defendant twice delivered guns in plastic bag in exchange for cash on a street in Manhattan established by a preponderance of the evidence that defendant knew or had reason to believe delivered firearms to someone intended to use or dispose of them unlawfully).

The guideline also already contains a cross-reference that may be applied to violations of export laws, which carry serious penalties under §2M5.2. *See* USSG §2K2.1(c).

In addition, other enhancements may apply in border cases which, in combination, drive the guideline range higher than necessary. For example, as discussed above, enhancements as high as 10 levels apply where large quantities of firearms are at issue, and 2- and 4-level increases apply to stolen firearms and obliterated serial numbers, respectively. *See* USSG §2K2.1(b)(1), (b)(4).

Relevant-conduct rules also have the effect of significantly increasing sentences under the current guidelines. Sometimes the number of firearms is based, not on the number of firearms the defendant purchased, but on the number of weapons purchased by others as part of a much broader operation in which the defendant played only a small part, as the defendant's "relevant conduct." Probation then uses this number to apply number-driven enhancements such as §2K2.1(b)(1) and (b)(5).

In addition to these adjustments, invited upward departures under Application Notes 11 and 13(C) have been used in unusually serious border smuggling cases. *See, e.g.*, *United States v. Hernandez*, 2011 WL 438828 (5th Cir. Feb. 9, 2011) (affirming above-guideline sentence: defendant described as one of the most prolific purchasers for an organization involved in illegal firearms trafficking that had purchased at least 328 firearms, with defendant himself having purchased at least 23 firearms that were "military in style and utility," and evidence that defendant could reasonably foresee he was arming Mexican drug cartels).

Finally, but significantly, there is one additional enhancement in §2K2.1 that has recently been interpreted to address the same conduct the Commission seeks to address through this proposed amendment. Subsection (b)(6) requires a 4-level enhancement, and a floor offense level of 18, when a defendant used or possessed a firearm or ammunition in connection with

another felony." In *United States v. Juarez*, the Fifth Circuit decided that "another felony" can be an offense involving firearms trafficking, including firearms smuggling. 626 F.3d 246, 253-55 (5th Cir. 2010). What that meant for Ms. Juarez is that the same conduct was used for a 4-level enhancement under subsection (b)(6) *and* another 4-level enhancement under the trafficking provision in subsection (b)(5). For reasons discussed in detail below, we believe the case was wrongly decided, and ask the Commission to correct what we believe was a clerical error that led the Fifth Circuit to its conclusion.

2. The Commission's Proposed Options Are Too Broad and Would Inject the Guideline With Additional and Unnecessary Complexity and Disparity.

A new enhancement – under either of the proposed options – would apply when even a single firearm or a handful of bullets crosses the border, or is transferred to someone else with reason to believe it would cross the border, any border, for any reason. It is not at all clear that even the 2-level enhancement contemplated by Option One is appropriate in all such situations. There is no evidence, for example, that higher penalties are warranted when a straw purchaser at a gun show in Flint, Michigan takes the shortest path to her boyfriend's home in Rochester, New York, simply because she passed through Canada. Indeed, in light of the confusion over the source of, and solution for, the violence in the Southwest border region, it would be a mistake to assume we know it is always a worse offense when a gun crosses our border with Mexico. And so, once again, we urge the Commission to exercise restraint and caution. Both options would make an already complex guideline even more so. And with either option there are questions about how the amendment would interact with existing enhancements. With Option One, can the 2-level enhancement be stacked with the 4-level enhancement for trafficking, leading to a 6-level increase for conduct that in most cases already falls within the definition of trafficking? And, in light of the Fifth Circuit's decision in *Juarez*, *supra*, could Option One be stacked not only with §2K2.1(b)(5), but also §2K2.1(b)(6), leading to a 10-level increase for conduct that in most cases has been adequately addressed by the trafficking enhancement alone?

Similarly, Option Two would present myriad problems with proportionality and inject unwarranted disparity. Is a 4-level increase appropriate for someone who crossed the border with a single gun? Is that person really as culpable as someone who traffics in firearms? Or as culpable as someone who transfers a gun with the knowledge it will be used in connection with another felony? If the person instead has three firearms, will he receive enhancements under Option Two *and* subsection (b)(5), as well as subsection (b)(1), for a total of a 10-level increase?

Given these and other permutations presented by the possible addition of another specific offense characteristic in §2K21.1, it is entirely possible that the Commission's proposal would have an unintended effect of ratcheting up sentences for low-level, first-time offenders far beyond what is sufficient to satisfy the statutory purposes of sentencing. There is no evidence

that this already complicated guideline needs to be made more so, or that its already long sentences need to be lengthened further. The current guideline is adequate.

3. Of the Commission's Two Specific Proposals, the First Option is the Least Detrimental, But Only with Changes to the Application Notes.

While we believe neither of the Commission's proposed options is appropriate or necessary, if asked to choose the lesser of two evils, we prefer Option One (adding a 2-level increase as part of a new special offense characteristic that addresses border crossing), but only if it is accompanied with an amendment to Application Note 13(D) and an amendment to Application Note 14(C). Because we believe conduct targeted by the Commission's first Option is already addressed in most cases by the trafficking enhancement in §2K2.1(b)(5), if the Commission decides to proceed with Option One, we ask that it amend Application Note 13(D) to specify that if the trafficking enhancement in current §2K2.1(b)(5) is applied, the new border crossing enhancement should not also be applied. In addition, for the reasons set forth in Part IV, *infra*, we ask that Application Note 14(C) also be amended to replace the word "the" with the word "an" to make clear that the current §2K2.1(b)(6) does not apply when the other felony offense, or other offense, is an explosive or firearms possession or trafficking offense.

IV. The Definition of "Another Felony Offense" in Application Note 14(C)

As mentioned above, the Fifth Circuit recently determined that subsection (b)(6), which provides a 4-level increase and a floor offense level of 18 where a "defendant used or possessed any firearm or ammunition in connection with another felony offense," applied where the other felony offense was another "firearms possession or trafficking offense." *United States v. Juarez*, 626 F.3d 246, 253-55 (5th Cir. 2010). The Court reached this conclusion based on the presence of the word "the" in Application Note 14(C) which defines "another felony offense," *id*. at 255, as "any federal, state, or local offense, other than *the* explosive or firearms possession or trafficking offense." USSG §2K2.1, comment. (n.14(C)) (emphasis added). The Fifth Circuit's interpretation of the word "the" has a serious impact on our clients by providing a substantial guideline increase for something we do not believe the Commission intended (and rightly so, since there is no justification for such an enhancement). The impact is particularly serious for defendants such as Ms. Juarez, who in addition to receiving an unintended 4-level increase pursuant to subsection (b)(6), received an additional 4-level enhancement for trafficking under subsection (b)(5). Before other defendants are sentenced under an unintended and unwarranted guideline range, we ask the Commission address the problem by changing the word "the" to "an"

in Application Note 14(C) so it reads "other than *an* explosive or firearms possession or trafficking offense."[52]

Application Note 14(C) was added to the guideline in 2006 as part of an amendment that among other things modified four base offense levels and added a new specific offense characteristic that required renumbering of §2K2.1(b) and related application notes. USSG App. C, Amend. 691 (Nov. 1, 2006). Prior to this amendment, the definition of "another felony offense" was located in Application Note 15. *Id.* It provided:

> As used in subsections (b)(5) and (c)(1), *'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses*. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

Id. (emphasis added).[53] As part of the 2006 amendments, the Commission separated the definitions "another felony offense" and "another offense" and as a result the relevant sentence switched from plural references to singular. USSG App. C, Amend. 691 (Nov. 1, 2006). As amended, the definitions now read:

> „Another felony offense', for purposes of subsection (b)(6), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.
>
> „Another offense', for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

Id.

[52] While this discussion focuses on the definition of "another felony offense," the analysis applies with equal force to the definition of "another offense" and we ask that in both definitions, the Commission substitute the word "an" for "the."

[53] This definition was first provided in 1992 as Application Note 18. USSG App. C, Amend. 471 (Nov. 1, 1992).

Before the 2006 amendment, courts routinely interpreted the definition of "another felony offense" to exclude *any* other firearms possession or trafficking offenses, not just the one charged. *See, e.g.*, *United States v. Valenzuela*, 495 F.3d 1127, 1133-34 (9th Cir. 2007); *United States v. Harper*, 466 F.3d 634, 650 (8th Cir. 2006); *United States v. Lloyd*, 361 F.3d 197, 201 (3d Cir. 2004); *United States v. Boumelhem*, 339 F.3d 414, 427-28 (6th Cir. 2003); *United States v. Garnett*, 243 F.3d 824, 827 (4th Cir. 2001). Indeed, the Fifth Circuit in *Juarez* acknowledged these decisions, but concluded that the "addition of the word 'the' in the amendment indicates the Sentencing Commission's intention to no longer exclude all explosives or firearms possession or trafficking offenses from the definition of 'another felony offense'." *Juarez*, 626 F.3d at 255.

The conclusion that the use of the word "the" in Application Note 14(C) evidenced the Commission's intentional effort to change the definition of "another felony offense" that had been in use for over a decade is not consistent with other information available from that amendment cycle. First, the reasons for amendment do not discuss this definition. *See* USSG App. C, Amend. 691 (Nov. 1, 2006). If the Commission had really intended this single word to make such a substantive change to the definition, it would undoubtedly have provided an explanation for the change.

Second, during that same amendment cycle, the Commission added new Application Note 13(D), which specifies how the then-new trafficking enhancement in subsection (b)(5) should interact with other subsections and includes language that is consistent with the long-standing definition of "another felony offense" as excluding all other firearm possession or trafficking offenses. *See* USSG App. C, Amend. 691 (Nov. 1, 2006). That note provides:

> In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than *a* firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

Id. (emphasis added). If the Commission had intended to make a substantive change without explanation, one would at least expect the two new provisions to be the same.

The better interpretation of what happened in 2006 is that the Commission did not intend to change the definition of "another felony offense," and use of the word "the" was a clerical error. Following the *Juarez* decision, this single word clerical error is of great consequence to our clients. We strongly urge the Commission to replace the word "the" with the word "an" in the definitions of "another felony offense" and "another offense" in Application Note 14(D).

V. CONCLUSION

We understand that the current political situation may lead the Commission to feel pressure to "do something" about the violence in Mexico. We urge it to stand back, let the political rhetoric surrounding the situation in Mexico settle down, and collect all the facts before deciding to increase guideline ranges for hundreds of defendants. The Commission has the duty to revise the guidelines "[b]y collecting trial courts' reasons for departure (or variance), by examining appellate court reactions, by developing statistical and other empirical information, [and] by considering the views of expert penologists and others." *Pepper v. United States*, 2011 WL 709543, at *23 (Mar. 2, 2011) (Breyer, J., concurring). It should not truncate or set aside these procedures on such an important national issue.

Testimony of Hector Dopico
Supervisory Assistant Federal Public Defender for the Southern District of Florida

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Fraud Amendments

February 16, 2011

My name is Hector Dopico, and I am a Supervisory Assistant Federal Public Defender in the Southern District of Florida (Miami). I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding implementation of the proposed amendments for health care fraud involving Government health care programs, securities fraud, bank fraud, and frauds relating to financial institutions.

I. PROPOSED AMENDMENTS UNDER THE PATIENT PROTECTION ACT (PPA)

The Commission proposes (1) a multi-tiered enhancement for Federal health care offenses involving Government health care programs where the loss amounts exceed 1 million dollars; and (2) a special rule for calculating loss in "Federal health care offenses involving a Government health care program," which provides 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, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted." The Commission also seeks comment on the appropriate definition of a "Government health care program," including whether certain Federal or State programs or private health care programs should be included.

As a threshold matter, we strongly urge the Commission, in its unique role as an expert body, to take the necessary time and resources to implement fully the mandate of the directives in the PPA. While the PPA contains two specific directives regarding the calculation of loss in health care frauds involving Government health care programs and multi-tiered enhancements for losses more than $1 million, which we understand the Commission intends to carry out this amendment cycle, the PPA contains other directives that the Commission should carefully consider before implementing those two provisions. In the very same section where it provided for multi-tiered enhancements, Congress directed the Commission to "if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs." Pub. L. No. 111-148, § 10606(a)(2)(C)(iv), 124 Stat. 1007. It then expressly directed the Commission to "account for any aggravating or mitigating circumstances that *might justify exceptions*, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment

of this Act, provide sentencing enhancements," *id*. at § 10606(a)(3)(D)(emphasis added), and it instructed the Commission to "ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing." *Id*. at § 10606(a)(3)(F).

Given the complexity of the fraud guidelines, and the wide variety of circumstances involving frauds on Government health care programs, we believe that the Commission should undertake a comprehensive review of the fraud guideline in general and health care fraud offenses specifically. Nothing in the language of the PPA requires the Commission to act immediately. Indeed, by directing the Commission to consider possible exceptions to the tiered enhancements and intended loss directives, it clearly contemplated a more comprehensive review of the guidelines as they apply to health care fraud offenses. Because we believe that there are a number of mitigating circumstances that might justify exceptions to the tiered-enhancement and loss rules, we encourage the Commission to study the issue more thoroughly before promulgating amendments to §2B1.1 as they relate to health care fraud offenses involving Government health care programs.

If, however, the Commission decides to promulgate the tiered-enhancements and the intended loss rule this cycle, it should state in its Reason for Amendment that the Commission has insufficient empirical data to conclude that the current guidelines, including the multitude of enhancements for specific offense characteristics under USSG §2B1.1 and the provisions of Chapter 3, do not "reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement actions to prevent such fraud," or showing that the guidelines do not otherwise provide severe enough penalties for persons convicted of health care offenses to "ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing." Pub. L No. 111-148, § 10606(a)(3), 124 Stat. 1007. Under current law, defendants convicted of health care fraud, many of whom are first time, non-violent offenders, are sent to prison for lengthy periods of time. According to the Department of Justice, in FY 2010, its Medicare Strike Force prosecution teams obtained convictions for health care fraud against 240 defendants. Nearly two-thirds of those defendants (146) were sent to prison, "averaging more than 40 months of incarceration." [1]

In addition to providing for significant retributive periods of incarceration, existing law gives prosecutors powerful tools to deter fraud. Indeed, stepped-up law enforcement efforts have had "a significant deterrent effect" on the number of Medicare claims for durable medical equipment even under existing guidelines. *See, e.g*., *Reducing Fraud, Waste, and Abuse in Medicare, Hearing before the Subcomm. on Health and Subcomm. on Oversight of the H. Comm.*

[1] Health and Human Services News Release, *Health care prevention and enforcement efforts recover record $4 Billion Dollars; new Affordable Care Act tools will help fight fraud*, available at http://www.hhs.gov/news/press/2011pres/01/20110124a.html.

on Ways and Means (June 15, 2010) (written statement of Edward N. Siskel, Associate Deputy Attorney General, U.S. Dep't of Justice).[2]

In short, no empirical evidence supports the need for higher sentences in health care fraud case involving Government health care programs and the Commission should so state in its Reason for Amendment. Courts should know that the increases were not the result of the Commission's expert research, but instead another example of "signal sending" by Congress. *See* USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004) (hereinafter *Fifteen Year Review*).

A. Special Rule on Calculating Loss for Health Care Fraud Involving Government Health Care Programs

We appreciate the Commission's efforts to ensure that the special rule on calculating loss in federal health care offenses involving Government health care programs is rebuttable. We encourage the Commission to do more, however, in ensuring that loss amounts are not inflated because of the rule.

The Commission should more fully incorporate into the application note existing case law on calculating intended loss. Consistent with the proposed amendment on calculating loss, most circuits hold that the amount billed is prima facie evidence of the amount of intended loss.[3] Courts, however, also acknowledge that where a defendant presents evidence that he was "knowledgeable regarding the government's fee schedules and the differences between what is billed to Medicare and what is reimbursed, the loss calculation should be determined based on the paid amount. This loss amount more accurately reflects the loss a defendant intended to cause through his fraudulent scheme." *United States v. Semrau*, 2011 WL 9258, *4 (W.D. Tenn. 2011) (citing *United States v. Singh*, 390 F.3d 168, 193-94 (2d Cir. 2004) and *Miller*, 316 F.3d at 504)). We encourage the Commission to include such language in the new application note on calculating loss in cases involving Government health care programs.

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[2] Available at http://www.justice.gov/ola/testimony/111-2/06-15-10-siskel-reducing-fraud-waste-abuse-in-medicare.pdf. And while the Department supported increased sentences for health care fraud offenses involving $1 million or more in losses, no empirical evidence supported the need for such increases, particularly given the claimed deterrent effects of enforcement actions under existing law.

[3] *See, e.g., United States v. Mikos*, 539 F.3d 706, 714 (7th Cir. 2008); *United States v. Miller*, 316 F.3d 495, 504-05 (4th Cir. 2003); *United States v. Serrano*, 234 Fed. App'x 685, 687 (9th Cir. 2007); *United States v. Cruz-Natal*, 150 Fed. App'x 961, 964 (11th Cir. 2005); *United States v. McLemore*, 200 Fed. App'x 342, 344 (5th Cir. 2006).

B. The Commission Should Amend the Guidelines to Account for Mitigating Circumstances that Justify an Exception to the Loss Calculation and Enhancement Rules.

The PPA directs the Commission to "account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements," and if appropriate, "otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs." Pub L. No. 111-148, § 10606(a)(3)(D), 124 Stat. 1007.

Health care fraud involves a variety of defendants, from major corporations and institutions, to doctors and nurses, to receptionists and secretaries, to "straw" or nominee owners[4] and middlemen, to recruiters, and finally to purported beneficiaries who are often recruited at soup kitchens, senior centers and even skid row.[5] Many of the "lower-level" defendants reap minimal financial benefit from their role in the offense and may have little or no knowledge of the scope of the fraudulent scheme. 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 demonstrate our point and how the current guidelines do not adequately account for mitigating circumstances.

- Jose Montes is a nominee owner of a medical supply company that billed Medicare $4 million.[6] 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.

[4] A "nominee owner" is one recruited and paid by the true owner to be the owner of record of a company, open bank accounts, submit bills, and cash checks in order to disguise the true owner. *See Combating Health Care Fraud, Hearing Before the Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the H. Comm. on Appropriations* 2 (March 4, 2010) (written statement of Omar Perez, Special Agent, Office of Inspector General, U.S. Dep't of Health and Human Services), available at http://oig.hhs.gov/testimony/docs/2010/3-4-10PerezHAppropsSub.pdf. Typically, a nominee owner is paid $10,000 to $20,000 for his or her role. *Id*. at 4.

[5] *See generally Criminal Enforcement Against Against Medicare and Medicaid Fraud, Hearing Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security* 4 (March 4, 2010) (written statement of Timothy Menke, Deputy Inspector General for Investigations, Office of the Inspector General, Department of Health & Human Services), available at http://judiciary.house.gov/hearings/pdf/Menke100304.pdf.

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

- Sandra Mateos was a nurse at a clinic that defrauded Medicare by submitting bills for unnecessary treatments of a drug used to treat HIV patients.[7] The masterminds of the scheme enlisted the help of two brothers to set up clinics that would bill Medicare for services. The brothers recruited Mateos to work as an infusionist and to pay kickbacks to patients to receive unnecessary treatments. Over the course of just five months, the clinic billed Medicare for about $11 million. Medicare paid more than $8 million of those claims. The brothers received sixty percent of the profits and the masterminds split the remainder. Mateos was paid approximately $500 per week (about $10,000 over the course of the fraud). At sentencing, the district court held Mateos accountable for the entire intended loss (more than $9 million), sentencing her to 7 years imprisonment.[8] The masterminds of the scheme were initially sentenced to 30 months and 70 months imprisonment. The court later reduced their sentences to 24 months based on the government's Rule 35(b) motion.

- Over the course of 16 months, Genna Yates was a patient recruiter, who recruited approximately 117 Medicare beneficiaries to obtain unnecessary medical services at two medical clinics.[9] The leaders of the scheme would pay Yates $100-150 per patient. Yates would keep half that amount and pay half to the patient. The clinics then fraudulently billed Medicare approximately $840,565 in services rendered to those patients. Medicare paid approximately $630,506 in claims. Yates, however, made no more than $8,000 to $12,000 dollars for her role in the scheme. Because the loss amount was based on the amount of intended loss, however, Yates's guideline range was calculated at 24 – 30 months imprisonment even though she was a first-time offender.

We here propose a number of ways in which the Commission could carve out appropriate exceptions to the loss rules and the multi-tiered enhancements for health care fraud offenses involving Government health care programs.

Apply the multi-tiered enhancements only to those defendants with aggravating roles. Congress plainly wanted to provide longer periods of imprisonment for persons convicted of health care fraud offenses involving Government health care programs, apparently believing that stiffer penalties would assist law enforcement efforts to prevent such fraud. Any meaningful

[7] *United States v. Sandra Mateos*, 623 F.3d 1350 (11th Cir. 2010).

[8] A doctor involved in the scheme was sentenced to 30 years imprisonment.

[9] *United States v. Genna Yates*, No. 09-CR-20579 (E.D. Mich. 2010); *see also* Office of Public Affairs, Dep't of Justice, *Clinic Owners and Patient Recruiters Plead Guilty In Detroit-area Diagnostic Testing Fraud Scheme* (Oct. 27, 2010), available at www.justice.gov/opa/pr/2010/October/10-crm-1210.html.

prevention effort, including one based upon the unsupported view that severe punishments deter,[10] should be aimed at those who plan and organize fraudulent schemes rather than on easily replaced lower-level offenders.

The problem with using loss amounts as a proxy for culpability is that it results in severe punishments for lower-level offenders, who may be held accountable under the loss rules for amounts over $1 million, but who do not set-up the scheme, exercise little decision-making authority, and reap a much smaller share of the profits of the crime than those who organized or planned the scheme.

To better accomplish what Congress set out to do in the PPA, the Commission should carve out an exception for the multi-tiered enhancement, pursuant to its authority under Pub. L. No. 111-148, § 10606(a)(3)(D), 124 Stat. 1007. Similar to the super-aggravating role enhancements in USSG §2D1.1(b)(14), the Commission should limit application of the new proposed enhancement as follows:

If the defendant receives an adjustment under §3B1.1 (Aggravating Role), and if the defendant was convicted of a Federal health care offense involving a Government health care program and the loss under subsection (b)(1) was (A) more than $1,000,000 increase by 2 levels; (B) more than 7,000,000 increase by 3 levels; or (C) more than $20,000,000 increase by 4 levels.

Modify USSG §3B1.2. Our prior proposals that the Commission delete the word "substantially" from the commentary to §3B1.2 would help clarify that low-level defendants should receive a role adjustment.[11] The Commission should also add an application note, which clarifies that nominee owners of fraudulent companies and other low-level defendants who receive little remuneration from the fraud are eligible for a minor or minimal role adjustment regardless of the amount of loss involved in the fraud. *See United States v. Escoto*, 377 Fed. App'x. 867 (11th Cir. 2010) (court declined to give nominee owner role adjustment because of amount of loss); *United States v. Lugo*, 393 Fed. App'x. 598, 599 (11th Cir. 2010) (amount of loss cited as a reason for not giving mitigating role adjustment to nominee owner).

Clarify operation of the relevant conduct rules. 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

[10] *See, e.g.*, Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice 28-29 (2006).

[11] Letter from Marjorie A. Meyers, Chair, Federal Defender Guideline Committee to Hon. William K. Sessions, III, Chair, United States Sentencing Comm'n, at 20 (Aug. 18, 2010).

application of §1B1.3 (a)(1)(B), governing cases of jointly undertaken activity, so that it is clear that relevant conduct covers only reasonably foreseeable activity within the scope of the defendant's agreement.[12] 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.

A case example demonstrates the need for clarification in the relevant conduct rules. Ricardo Aguera, like several of his family members, operated a company that provided durable medical equipment ("DME") to Medicare beneficiaries.[13] His company obtained prescriptions for aerosol medications for these beneficiaries, many of whom were using respiratory devices. A couple who 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 by 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.

Add an application note that mitigates the effects of the intended loss rule. Application notes should provide examples and directions that ensure that loss amounts are not inflated and properly reflect a defendant's level of culpability. We recommend that the Commission expressly state that the amount of money received by an individual defendant because of his participation in the fraudulent scheme indicates the role the defendant played in the scheme and the defendant's overall level of culpability (*i.e.,* less money received, less culpable as a general rule). In such cases, the application note should state that if intended loss greatly overstates the defendant's culpability then the base offense level should be based on the actual loss or the defendant's gain.

Another case example shows the dramatic difference between the so-called intended loss, the actual loss, and the defendant's personal gain.

- Reinel Pulido was a nominee owner of a DME company, Soroa Medical.[14] The company submitted over $15.6 million in fraudulent claims, but was only

[12] *See, e.g.,* Letter from Marjorie A. Meyers, Chair, Federal Defender Guideline Committee to Hon. William K. Sessions, III, Chair, United States Sentencing Comm'n (July 1, 2010).

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

[14] *United States v. Reinel Pulido*, No. 07-20921 (S.D. Fla. 2008).

reimbursed $1,565,410. Pulido admitted being recruited to place his name on all the documents related to Soroa Medical. He was paid approximately $50,000 for becoming the nominee owner.

Add a "safety-valve" for low-level fraud offenders. Just as Congress and the Commission crafted the safety valve to mitigate the harsh effects of using drug quantity as the measure of culpability in drug cases, *Fifteen Year Review*, *supra,* at 51, the Commission could amend the guidelines to better account for the mitigating factors present in fraud cases. Such a "safety-valve" could apply to low-level defendants who disclose to the government the names of the true owners and other participants of the scheme in exchange for a reduction in their offense level. The language of such a safety-valve could track the provisions of USSG §5C1.2(a)(5).

Without appropriate guideline adjustments for low-level offenders in these cases, the resulting guideline sentences will be unjust and unfair, will violate 18 U.S.C. § 3553(a), and will decrease confidence in the criminal justice system and the guidelines. If the Commission were to promulgate guidelines that treat all defendants the same, based on intended loss 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). As the foregoing discussion of case-related examples reveals, individuals convicted of health care fraud offenses range from low-income women who act as patient recruiters, to recent immigrants who are recruited to act as nominee owners, to low-level clinic personnel who reap minimal financial benefit, and to fraudsters. Lengthy prison sentences for all of these individuals are unnecessary to accomplish the purposes of sentencing and undermine respect for the criminal justice system.

C. The Tiered Enhancements and Special Loss Calculation Rules Should be Limited to the Narrow Government Health Care Programs Targeted By Congress.

The Commission requests comment on how "Government health care program" should be defined. We encourage the Commission to read the phrase "Government health care program" in pari materia with other provisions of the PPA, which are designed to prevent fraud, waste, and abuse in Medicare, Medicaid, and the Children's Health Insurance Program ("CHIP").

The phrase "Government health care program" is nowhere defined in the PPA. Nor is it defined elsewhere in the U.S. Code or regulations. It is clear, however, that when Congress limited the directives in sections 10606(a)(2)(B) and (C) to "Government health care programs," it had in mind a particular subset of health care programs. Because subtitle E of the PPA indicates that Congress was especially concerned with fraud in three key Government health care programs – Medicare, Medicaid, and CHIP – we encourage the Commission to define "Government health care program" by reference to those three programs.

Subtitle E, titled "Medicare, Medicaid, and CHIP Program Integrity Provisions," contains extensive directives to executive agencies, which are focused on strengthening the regulatory process to prevent and detect fraud. For example, section 6401 of the PPA directs the Secretary of the Department of Health and Human Services in consultation with the Inspector General of that department, to promulgate regulations governing the screening of providers who participate in the Medicare, Medicaid, and CHIP programs. Pub. L. No. 111-148, § 6401, 124 Stat. 747. It also amends 42 U.S.C. § 1395(c)(c) to require providers under those programs to establish compliance programs. Another provision of section 6401 requires Medicare to share with state agencies charged with administering Medicaid and CHIP programs information about providers who have been terminated from the Medicare program.

Section 6402(a) of the PPA established "Enhanced Medicare and Medicaid Program Integrity Provisions." That section directs HHS to set up a data sharing and matching program "for the purpose of identifying potential fraud, waste, and abuse under the programs under titles XVIII [Medicare] and XIX [Medicaid]." It also contains new provisions that give authority to the Inspector General of the Department of Health and Human Services to obtain information for "purposes of protecting the integrity of the programs under titles XVIII and XIX." And, it provides HHS the authority to impose administrative penalties on Medicare, Medicaid, and CHIP beneficiaries who knowingly participate in a Federal health care offense."

Defining the term "Government health care program" by reference to Medicare, Medicaid, and CHIP is also consistent with the Administration's efforts to combat health care fraud. In 2009, the Administration created the Health Care Fraud Prevention and Enforcement Action Team (HEAT) to "prevent waste, fraud and abuse in the Medicare and Medicaid programs."[15] More recently, DOJ, working with HSS has expanded its Medicare Fraud Strike Force teams, which focus on "'hot spots' of unexplained high billing" in the Medicare program.[16] The Government has focused other efforts on Medicare Fraud, setting up such independent websites at www.stopmedicarefraud.gov, and ww.smpresource.org, and launching programs designed to help prevent, detect, and report health care fraud involving Medicare and Medicaid fraud.

Given provisions of the PPA that target fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs, as well as the Administration's enforcement efforts targeted at

[15] Dep't of Justice Press Release, *Health Care Fraud Prevention and Enforcement Efforts Recover $4 Billion: New Affordable Care Act Tolls Will Help Fight Fraud*, available at http://www.justice.gov/opa/pr/2011/January/11-asg-094.html.

[16] Dep't of Justice Press Release, *Associate Attorney General Tom Perelli Speaks at the Department of Justice – Health and Human Services Health Care Fraud Press Conference*, available at http://www.justice.gov/iso/opa/asg/speeches/2011/asg-speech-110124.html; *see also* Jerry Markon, *Justice Department Charges 94 People with Health-Care Fraud*, The Wash. Post, July 16, 2010.

those programs, any amendment to the guidelines that increases sentences for "Government health care programs" should focus on those three programs, and no more.

In any event, the term Government health care program should not include state health care programs or private insurers. First, the ordinary meaning of "Government" with a capital "G" refers to federal programs. Webster's Third New International Dictionary 982 (2002). Second, if Congress wanted to provide greater enhancements for all insurers, it could have merely directed the Commission to provide increases for "any defendant convicted of a Federal health care offense" rather than "any defendant convicted of a Federal health care offense involving a Government health care program." That it did not shows that it wanted persons who defraud Government health care programs punished more severely than others. Congress could reasonably conclude that the enormous effects that Medicare and Medicaid fraud have on the public treasury warrant such enhancements. In addition, the Medicare and Medicaid programs constitute the largest single purchaser of health care in the United States, making it a prime target for fraud and abuse.[17]

Focusing the enhancements on the major federal Government health care programs is also no different from the myriad circumstances where Congress and the Commission have imposed greater liability when a federal interest is at stake. *See, e.g.*, USSG §2J1.4 (impersonating a federal officer, agent, or employee); 2J1.9 (payment to witnesses in federal proceedings); 2K2.5(b)(A) (providing for 2-level enhancement for possession of a firearm or dangerous weapon in a federal court facility); 3A1.2, comment, n.3 (providing for upward departure for exceptionally high-level officials "due to the potential disruption of the governmental function).

Third, the Commission should not be concerned with creating complexity in a guideline that focuses on losses involving certain specific programs. As a practical matter, the overwhelming majority of these schemes involve Medicare and Medicaid. The Centers for Medicare and Medicaid Services at HHS maintain an extensive data base of Medicare, Medicaid, and CHIP claims.[18] In those schemes that involve other insurers, the court, with the help of insurers, case agents, and probation officers, uses spreadsheets and other data management systems to trace the amount of loss to specified programs. Such analysis assists the court in determining loss amounts and in fashioning restitution orders.

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[17] *See A Closer Look: The Inspectors General Address Waste, Fraud, and Abuse in Federal Mandatory Programs, Hearing Before the H. Comm. on the Budget*, 108th Cong. 82 (July 9, 2003) (statement of Dara Corrigan, Acting Principal Deputy Inspector Gen., Dep't of Health and Human Servs.).

[18] *See generally* Centers for Medicare and Medicaid Services: *Research, Statistics, Data & Systems*, available at http://www.cms.gov/home/rsds.asp.

II. PROPOSED AMENDMENTS UNDER THE DODD-FRANK ACT

The Commission also asks how it should respond to the directives in the Dodd-Frank Wall Street Reform and Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act) regarding securities fraud, bank fraud, and other frauds relating to financial institutions. Those directives require the Commission to amend the guidelines only after "review" and only "if appropriate." Pub. L. No. 111-203, § 1079A(1)(1)(A), 124 Stat. 2078. Recognizing that the guidelines contain a multitude of enhancements that apply to securities fraud and frauds related to financial institutions, the Commission is considering conducting a more comprehensive multi-year review of §2B1.1 and related guidelines.

The Defenders agree with the Commission's observation that a comprehensive multi-year review of the fraud guidelines is in order. We encourage the Commission to undertake such a review rather than amend the guidelines or commentary this year. We are not alone in our view that the fraud guidelines need to be revisited. Just recently, the former Commissioner and General Counsel John Steer, along with Alan Ellis and Mark Allenbaough, published an article outlining many of the flaws in the fraud guidelines and concluding that the Commission needs to undertake a "substantive reevaluation of the role of loss in calculating guideline sentences for economic offenses, and indeed, section 2B1.1 overall." Alan Ellis, John R. Steer, and Mark H. Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 WTR Crim. Just. 34, 35 (Winter 2011).[19]

During our regional hearing testimony, we offered several comments about operation of the fraud guideline, USSG §2B1.1, and how it can easily produce sentences that are greater than necessary to satisfy the purposes of sentencing. *See generally* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, GA, at 30 (Feb 10, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm'n,, Austin, TX, at 22 (Nov 19, 2009); Statement of Nicholas T. Drees Before the U.S. Sentencing Comm'n, Denver, CO, at 16 (Oct 21, 2009). First, it "place[s] undue weight on the amount of loss involved in the fraud," which in many cases "is a kind of accident" and thus "a relatively weak indicator of the moral seriousness of the offense or the need for deterrence."[20] Because loss often is not the best indicator of culpability, a guideline driven by loss treats different offenders the same. Second, §2B1.1 imposes cumulative enhancements for many closely related factors, which can make the

[19] *See also* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167, 169 (Feb. 2008); James E. Felman, *Change in Federal Criminal Justice: Views from the Defense and Policy Advocacy Communities: The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent'g. Rep. 138 (2010).

[20] *United States v. Emmenegger*, 329 F.Supp. 2d 416, 427-28 (S.D.N.Y. 2004).

recommended sentence in a run- of- the- mill case as much as life.[21] Approximately forty specific offense characteristics replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3.[22] This exemplifies "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[23]

As to the Commission's specific request for comment about whether the guidelines adequately account for "the potential and actual harm to the public and the financial markets" from securities fraud, bank fraud, mortgage fraud and other frauds related to financial institutions, we believe they do. Indeed, feedback from the judiciary indicates that the guidelines for major frauds are too high. As one commentator put it:

> [S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in corporate fraud cases] and the fundamental requirement of Section 3553(a) that judges impose sentences „sufficient, but not greater than necessary' to comply with its objectives.[24]

In short, none of the available evidence suggests that the fraud guidelines produce sentences that are too low to satisfy the purposes of sentencing. In the absence of such evidence,

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[21] Constitution Project's Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006); *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004); *United States v. Parris*, 573 F.Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F.Supp. 2d 506 (S.D.N.Y. 2006).

[22] To give just one example, USSG §2B1.1(b)(9)(C) provides for a 2-level increase if the offense "otherwise involved sophisticated means"; §2B1.1(b)(10) calls for a 2-level increase if the offense involved "the possession or use of," among other things, "device-making equipment." Courts apply both enhancements based on the same conduct. *See, e.g.*, *United States v. Abulyan*, 380 Fed. App'x. 409, 411-412 (5th Cir. 2010) (credit card swiper). Other enhancements, like "sophisticated means," are overbroad and apply in uncomplicated fraud schemes. *See, e.g.*, *United States v. Conner*, 537 F.3d 480, 492 (5th Cir. 2008) (use of fake identification across multiple states to obtain goods that were sold on eBay); *United States v. Jackson*, 346 F.3d 22, 25-26 (2d Cir. 2003) (use of hotels and courier services to take delivery of fraudulently obtained goods, use of prepaid phone cards to prevent tracking of activities, and manipulations of victims' credit lines and billing addresses justified enhancement).

[23] *Fifteen Year Review, supra,* at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (Complexity of Guidelines has created a "façade of precision" which "undermines the goals of sentencing.").

[24] Bowman, *supra* note 19, at 169.

the Commission should proceed with great caution and carefully review the guidelines before adding additional aggravating enhancements or inviting upward departures.

III. CONCLUSION

We would be happy to discuss with the Commission any modifications to the guidelines that would advance the purposes of sentencing under 18 U.S.C. § 3553(a). We urge the Commission to undertake a comprehensive review of the fraud guidelines before adding to the complexity of USSG §2B1.1.

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February 23, 2011

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Re: Supplemental Written Testimony on Proposed Fraud Amendments

Dear Judge Saris:

I am writing to follow up on some questions that arose during my testimony before the Commission on February 16, 2011.

The Definition of "Government health care program" Should Be Limited to Medicare, Medicaid, and CHIP.

My written testimony set forth a limited definition of "government health care program," which defenders believe remains true to the language of the directive and the other provisions of the Patient Protection and Affordable Care Act. When questioned about how the term "Government health care program" should be defined, I indicated that prosecutors were certainly free to bring to the court's attention any losses to private insurers.

With that answer, I did not intend to make it appear that I was abandoning the position stated in my written testimony. I was simply acknowledging that under the current guidelines, losses to Medicare, other government programs, and private insurers are added together for purposes of determining the amount of loss under USSG §2B1.1(b). *See, e.g.*, *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1344 (11th Cir. 2009) (losses sustained by private insurance companies and patients considered as part of relevant conduct in Medicare fraud scheme). Under the new proposed tiered enhancement for health care fraud offenses involving Government health care programs, only the loss amount for the fraud involving

a Government health care program should trigger the multi-tiered enhancement. If the Commission were to provide for a more inclusive enhancement, it would be contrary to the plain language of the directive, which speaks only to Government health care programs.

Another question focused on whether excluding private insurers from the loss calculation for purpose of the multi-tiered enhancement and special loss calculation rule would complicate the measure of loss. My answer, which spoke generally to the complicated nature of calculating loss in fraud cases, did not fully address the question. While I have not personally handled a case that involved insurers other than Medicare, my colleagues have handled many. Based upon defender experience in these cases, it would not complicate the process any further to separate out losses involving specified Government health care programs from other insurers. Loss amounts are already separated for purposes of restitution. In all health care fraud cases, the Mandatory Victim and Restitution Act requires the court to calculate the amount of the actual loss suffered by *each* victim and order payment accordingly. 18 U.S.C. § 3663A©. Thus, as a matter of course, probation officers and the court must determine the loss suffered by each separate insurer and enter an order of restitution that separates out the losses. To do this, the fraudulent bills for each insurer must be identified and the amount paid out as a result of the fraud must be calculated. The amount due to each insurer is not aggregated. An example from a presentence report in a health care fraud cases shows how the billed amount and paid amounts can be disaggregated:

MEDICAL INSURER	BILLED AMOUNT	PAID AMOUNT
Blue Cross Blue Shield - Georgia	$3,329,175.00	$2,450,363.85
Blue Cross Blue Shield - Tennessee	$54,102.12	$29,240.76
CIGNA	$239,360.00	$151,781.76
United Health Group	$66,880.00	$17,449.48
Blue Cross Blue Shield - Illinois	$392,480.00	$326,843.28
TRICARE	$10,120.00	$5,665.20
AETNA	$87,120.00	$46,746.56
TOTAL:	**$4,179,237.12**	**$3,028,090.89**

Another case example showing how a court separates out loss amounts is *United States v. Osuju*, 2011 WL 195552 (4th Cir. Jan 21, 2011). The government's brief on appeal described the process as follows:

> In this case, Defendants Varnado and Osuji, with their co-conspirators, submitted approximately fraudulent [sic] 313 claims requesting $2,312,702.44 as reimbursement for motorized wheelchairs with dates of service between August 2, 2003 and November 21, 2003. This number represented the intended loss amount. Medicare paid $1,259,455.80 based on these claims, and private pay insurers paid an

additional $30,541.06.

* * *

> The court also found the exact amount which Medicare and private pay insurers lost, making these restitution amounts part of the judgments. While Medicare paid $1,259,455.80 based on the false and fraudulent claims, the restitution amount owed to Medicare accounted for recoupments, meaning Medicare was owed $1,192,982.30 in restitution, as was reflected on the judgment. The judgment also noted that BCBS of Texas was due $4,232.52, Aetna due $571.53, and BCBS of Alabama due $10,470.18 in restitution.
>
> *United States v. Osuji*, 2009 WL 4927189 (4th Cir. Dec/ 21, 2009) (Brief for the United States).

Similar examples abound. *See United States v. Hunt*, 2007 WL 4451913, *22 (6th Cir. Aug. 20, 2007) (First Final Brief of Appellant Hunt) (court designated restitution amounts payable to Cigna and BC/BS.); *United States v. Rosin*, 263 Fed. Appx. 16, 23 n.1 (11th Cir. 2008) (ordering separate restitution amounts for Medicare and Aetna, a private insurer).

Because probation and the court must disaggregate the amount of loss for each insurer, it would not further complicate the process by disaggregating those losses for purposes of determining the extent of the enhancement under the new multi-tiered enhancement for Government health care programs.

The Invited Downward Departure in USSG §2B1.1 is of Limited Use.

A question was posed about the use of application note 19© in §2B1.1, which states that a downward departure may be warranted in "cases in which the offense level determined under this guideline substantially overstate the seriousness of the offense." This provision, however, has not historically been used to acknowledge a defendant's lesser culpability in a scheme to defraud. Some courts view it as embodying the "economic reality" principle, which allows correction of the disparity between the actual loss and intended loss in cases where the defendant has "devise[d] an ambitious scheme obviously doomed to fail and which causes little or no academic loss." *See generally United States v. Jordan*, 544 F.3d 656, 672 (6th Cir. 2008); *see also United States v. Parris*, 573 F. Supp. 2d 744, 750 (E.D.N.Y. 2008) (departure approved only "where an intended loss calculated under the Guidelines was 'almost certain not to occur.'). Other courts view "lack of personal profit" as not ordinarily a ground for departure. *See United States v. Broderson*, 67 F.3d 452, 459 (2d Cir. 1995). In light of this case law, cases where courts apply the departure because the loss amounts the defendant's culpability are few and far between and limited to a small number of courts. *See United States v. Desmond*, 2008 WL 686779, *2 (N.D. Ill. 2008) (granting departure

to defendant who played limited role in fraud); *United States v. Forchette*, 220 F. Supp. 2d 914, 929 (E.D. Wis. 2002) (granting departure where defendant did not devise scheme, did not steal or draft checks, his gain was disproportionate to loss, and he was unaware of nature and scope of scheme).

If the Commission intends for that departure language to also cover those situations where the amount of intended loss overstates the defendant's culpability, then it should amend the application note to make that clear.

Thank you again for the opportunity to appear before the Commission and share the views of the Federal Public and Community Defenders on the proposed health care fraud amendments.

Very truly yours,

Hector Dopico
Supervisory Assistant Federal Public Defender

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

Testimony of Jane McClellan
Assistant Federal Public Defender for the District of Arizona

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to USSG §§2L1.2, 5D1.1 and 5D1.2

February 16, 2011

My name is Jane McClellan, and I am an Assistant Federal Public Defender in the District of Arizona. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the illegal reentry guideline at USSG §2L1.2 and supervised release guidelines at USSG §§5D1.1 and 5D1.2.

I. A STALE CONVICTION SHOULD ONLY BE COUNTED UNDER USSG §2L1.2 FOR PURPOSES OF THE AGGRAVATED FELONY OR FELONY ENHANCEMENT.

We were pleased that the Commission has proposed adjustments to §2L1.2 that would shorten sentences for some illegal reentry defendants with old convictions. The proposed amendment to §2L1.2 would reduce the 16- and 12-level enhancements when a prior conviction is too old to qualify for criminal history points, but it nonetheless would require an 8- level increase if the conviction would otherwise qualify for the 16- or 12-level enhancement. We encourage the Commission to strike from the proposed §§2L1.2(b)(A) and (B) amendments the last clause: *"or by 8 levels if the conviction does not receive criminal history points."* Under our proposed revision to the amendments, if the prior felony conviction under §§2L2.1(B)(1)(A) or (B) does not count under the criminal history rules, then it would receive an additional 8-level increase if it is an aggravated felony, and a 4-level increase if it is a non-aggravated felony.

The Commission's proposed amendment recognizes that stale convictions should not be given the same weight as recent convictions that count under Chapter Four.[1]

[1] A defendant with an old conviction deserves a lower sentence than one with a more recent conviction because he or she poses a lower risk to the community based on the age of the conviction and may have returned to the United States many years after sustaining the conviction. For example, a defendant who pled guilty to a drug trafficking offense when he was only 18 years old, served a short prison sentence, left the United States, and did not return until he was 40 years old does not present the same danger as a defendant who immediately returns to the United States after being deported. Likewise, a defendant who tries to follow the law and remains outside the United States for years before returning -- usually because of the need to reunite with family members or some other compelling reason -- should not be punished the same as the defendant who returns immediately and whose prior conviction still counts under Chapter

Our proposed revision, however, makes §2L1.2 more consistent with other sections of the guidelines, which recognize that stale convictions should not be used to enhance the base offense level. *See, e.g*., USSG §2K2.1 (firearms) and USSG §4B1.1 (career offender). At the same time, our suggestion recognizes that some additional punishment may be warranted in light of 8 U.S.C. §§ 1326(b)(1) and (b)(2), which impose greater penalties for defendants who illegally reenter after sustaining convictions for felonies and aggravated felonies.[2] Under the Federal Public and Community Defenders' proposal, a defendant with an aggravated felony conviction always will be subject to a longer advisory guideline sentence than one with a non-aggravated felony conviction, and a defendant with a felony conviction will be subject to a longer advisory guideline sentence than a defendant without one, regardless of the age of the aggravated or non-aggravated felony conviction.

By still requiring an enhancement if the conviction would otherwise count under §§2L1.2(b)(A) or (B), the proposed amendment unduly complicates the sentencing process. It would force the court, probation, and the parties to determine whether a given felony would otherwise qualify for the 16-level enhancement under (A) or the 12-level enhancement under (B), even for an offense that does not count under the criminal history rules of Chapter Four. With the current proposal, the court and probation will have to perform multiple categorical analyses for these stale offenses. One analysis will entail whether the offense qualifies as an aggravated felony for purposes of selecting the correct statutory penalty. This analysis must be performed in any illegal reentry case because it controls the statutory maximum penalty that may be imposed, regardless of the age of the offense. USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 24 (2006) [hereinafter *Interim Staff Report*]. Additionally, the court and probation will have to determine whether the stale offense falls within any of the enumerated offenses in §2L1.2 (b)(1)(A) and then whether it falls within §2L1.2(b)(1)(B). This is because, even if the offense is not an aggravated felony, it could still receive an 8-level increase under §§2L1.2(b)(1)(A) or (B) if it qualifies, rather than the 4-level increase under §2L1.2(b)(1)(C). As the Commission is aware, the statutory definition of "crime of violence" for purposes of determining whether a conviction is an "aggravated felony" is different than the §2L1.2 definition of "crime of violence." *See generally id*. at 25 (explaining difference); *see also* USSG §2L1.2, comment. (n.7) (authorizing departure when offense qualifies for enhancement under subsection (b)(1)(A), even though it does not qualify as an aggravated felony).

The most common examples we see where the definition matters are cases where the defendant was convicted of an offense that meets the definition of a crime of violence, but

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Four.

[2] We continue to believe that stale convictions should not be counted at all, but we acknowledge that the statutory framework of 8 U.S.C. § 1326(b) contains no exception for stale convictions.

received a sentence of probation. Such a conviction currently would qualify for the 16-level enhancement, but would not count as an "aggravated felony." *See United States v. Gonzalez-Coronado*, 419 F.3d 1090, 1095 (10th Cir. 2005) (defendant received 16-level crime of violence enhancement for prior conviction for attempted aggravated assault even though he received probation; "unlike 8 U.S.C.§ 1326(b)(2)'s requirement that an aggravated felony must result in a sentence of at least one year, U.S.S.G. §2L1.2(b)(1)(A)(ii) does not require that, to be a ‚crime of violence,' a prior conviction result in a sentence of any particular length"). The problem also arises for some enumerated, non-forcible or non-intentional offenses that are included in the 16-level definition of crime of violence, but are not included within the aggravated felony definition, which requires an element of (typically intentional) use of force or a risk of use of force.

If the Commission were to permit the use of remote convictions only in determining whether the defendant is eligible for an 8-level increase because the conviction is an aggravated felony or a 4-level increase because it is a felony, the inquiry would still be complicated, but much simpler. If the conviction did not count as criminal history, the only analysis would be that already required by statute: whether it is a felony or an aggravated felony. If the conviction is neither a felony nor aggravated, the inquiry ends. We encourage the Commission to take a small step in alleviating the complexity of the guideline calculation by requiring only one analysis of whether a stale conviction meets the definition of aggravated felony. A single analysis also would save time for probation officers who must find the criminal history documents necessary to conduct the analysis required under §§2L1.2(b)(1)(A) and (B).

In the synopsis of the proposed amendment, the Commission relies on *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir.), *reh'g en banc denied*, 586 F.3d 1176 (9th Cir. 2009), to justify an 8-level enhancement for a stale conviction even if it does not qualify as an aggravated felony. The Ninth Circuit held in *Amezcua-Vasquez* that it "may be reasonable to take *some* account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country." *Id*. at 1055 (emphasis in original). Our proposal does just that. An aggravated felony, even if stale, would receive an 8-level enhancement under §2L1.2(b)(1)(C); a felony, even if stale, would receive a 4-level enhancement. Both are sizable increases over the base offense level of 8 at §2L1.2(a).

If the Commission were to adopt our proposal on counting stale convictions, the language in proposed application note 1(C) would have to be modified. We suggest the following change to the language of the application note:

> Prior Convictions. – In determining the amount of an enhancement under subsection (b)(1), note that the ~~amounts~~ *enhancements* in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while the

enhancements ~~amounts~~ in subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

We also suggest deleting the last sentence in the application note because it seems unnecessary.

~~A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points under Chapter Four.~~

II. PROPOSED AMENDMENTS TO USSG §§5D1.1 and 5D1.2 – IMPOSITION OF SUPERVISED RELEASE

We applaud the Commission's efforts to revise the supervised release guidelines in a way that begins to recognize the principles of evidence-based practices and helps focus limited supervision resources on offenders who need it. As the Commission's data show, sentencing courts impose terms of supervised release as a matter of course. *See* USSC, *Federal Offenders Sentenced to Supervised Release* 4 (2010) [hereinafter *Federal Offenders Sentenced to Supervised Release*] (supervised release imposed in 99.1 percent of cases where it was not statutorily required). The reason for such a high rate of imposition of supervised release does not necessarily reflect judicial belief that such terms are necessary in every case. The high rate of imposition may well turn on the fact that supervised release rarely gets any attention at sentencing hearings from the court, probation, or the parties.[3] When supervised release is the subject of discussion at sentencing, it is usually when the court seeks to impose unusual or onerous conditions. We urge the Commission to take even further advantage of this unique opportunity to focus the court's attention on the defendant's reentry needs and to fashion sentences that are sufficient, but not greater than necessary, to meet those needs by implementing the suggestions set forth below.

A. Supervised Release Terms Should not Ordinarily Be Required for Deportable Aliens Unless Required by Statute.

We support the Commission's proposed amendment regarding deportable aliens, which would advise courts that they "ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner." Proposed Amendment Option 1A, §5D1.1 (c) and Proposed Amendment Option 1B, comment. (n. 4).

[3] As one witness explained at the Commission's regional hearing in Chicago, supervised release is not an issue on which clients focus very much. "It's really one of secondary importance if that, because they're really concerned about am I going to prison, and if so, for what period of time." Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 345 (Sept. 10, 2009) (Thomas W. Cranmer).

As Henry Bemporad, the Federal Defender for the Western District of Texas discussed 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 releasees as they attempt to re-enter society. Deported defendants are simply dropped on the other side of the border and told not to return -- even if, as Judge Cardone and Judge Alvarez noted, they have spent virtually their entire lives in the United States, and their family, friends, and coworkers are all in this country. Given the lack of support, the imposition of supervised release in these cases does nothing but establish a basis for additional punishment.
>
> The threat of additional punishment is not necessary for its potential deterrent effect. Many other punishment threats already perform this purpose. A defendant who returns to the United States after a prior reentry offense faces an increase in the maximum statutory penalty from 2 to 10 years. He faces a significantly increased offense level under §2L1.2(b)(1), and an increased criminal history score.

Statement of Henry Bemporad Before the U.S. Sentencing Comm'n, Phoenix, Ariz, at 17 (Jan. 20, 2010).

Cases where defendants return illegally to the United States after being sentenced to supervised release also present an administrative nightmare. Take for example a defendant who was placed on supervised release in the Southern District of California following his illegal entry into the country, but then deported after serving his term of imprisonment. Authorities later arrest him in the District of Arizona and charge him with illegal reentry into the United States through Arizona. Only the District of Arizona has jurisdiction over the new illegal reentry charge. The parties in Arizona can seek to have the California petition to revoke supervised release transferred to Arizona. This is a complicated process and requires coordination between the probation offices in California and Arizona. This is usually advantageous to the defendant, because he can enter into a plea agreement in the District of Arizona that will resolve both the new charge of reentry of a removed alien and the pending supervised release case. While most judges impose consecutive sentences for the new charge and the supervised release violation, consolidating the cases nonetheless gives the defendant the opportunity for concurrent sentences, and he is saved the stress of being transported in custody from one district to another. The transfer process, however, may take several months. Further, some districts are amenable to transfer whereas others are not. If the petition to revoke supervised release is not transferred, then the defendant will most likely serve out his sentence for the new charge that is imposed in the District of Arizona and then be transferred to the Southern District of California for further proceedings to resolve the pending supervised release violation. These transfers in custody are costly and time consuming.

Another example of unnecessary administrative and bureaucratic expense involves a defendant who was on supervised release in Utah following a conviction for reentry of a removed alien, pursuant to 8 U.S.C. §§ 1326(a) and (b)(2). The defendant was arrested in

Arizona on state charges. While the state court proceedings were pending, the District of Utah filed a petition to revoke his supervised release. A federal detainer was placed on him in state custody. After the state matter was dismissed, he was brought to federal court in Arizona for proceedings pursuant to Fed. R. Crim. P. 40. He waived his hearing and went to the District of Utah for adjudication of the pending supervised release matter, and he was sentenced to eight months of imprisonment followed by twenty-eight more months of supervised release. After he served the eight-month sentence, the District of Arizona filed new charges of reentry of a removed alien and now he is back in Arizona facing this new charge. This process of bouncing the defendant back and forth from one jurisdiction to another wastes government resources. Discouraging courts from imposing supervised released on deportable aliens would help alleviate these problems and allow for more efficient case processing should the defendant return to the United States after deportation.

As to the specific language of an amendment addressing supervised release for deportable aliens, we prefer that the guideline rather than commentary address the issue. We encourage the Commission to adopt the language from Option 1A, USSG § 5D1.1(c) and Option 1A application note 5. Those provisions state directly in the guideline that the court ordinarily should not impose supervised release for deportable aliens and then emphasize the point with an application note that explains why supervised release is unnecessary in such cases. In contrast to the language in Option 1A, Option 1B combines in a single application note the text of proposed §5D1.1(c) and application note 5. Because the proposed amendment regarding supervision of deportable aliens represents a significant policy shift, it deserves emphasis in a guideline, followed by explanation in the commentary.

B. Courts Should Be Given Guidance in Exercising Their Discretion to Terminate Supervised Release Early.

The next section of this testimony addresses the various proposed amendments to USSG § 5D1.1 and 5D1.2. As an initial matter though, we strongly advocate that the Commission include in §5D1.2 proposed application notes 4 and 5, which set forth the factors a court should consider when imposing supervised release and the appropriateness of early termination of supervised release.

Data from the Office of Probation and Pretrial Services show that defendants can be terminated from supervision early without jeopardizing public safety.

> 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.[4]

[4] Office of Probation and Pretrial Services, *Early Terminated Offenders: A Greater Risk to the*

Because the guidelines insist on minimum terms of supervised release and provide no guidance on when early termination might be appropriate, judges often 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."[5] The court added: "Hicks' 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 attempt to get his life back on track.

Judges are not alone in their reluctance to exercise the authority to terminate supervision early. Some probation offices view supervision as a "punitive sentence designed in part to serve the interests of retribution in general."[6] Hence, such offices take the position that "the mere fact that a defendant has adjusted well and has complied with the terms and conditions of [supervision] affords no justification for early termination." *Id*. Instead, "some special hardship should be shown" that justifies early termination. *Id*.

Viewing supervision as a retributive punishment is clearly contrary to the provisions of the Sentencing Reform Act. Both in imposing supervised release, and in deciding to terminate a period of supervised release, the court must consider a wide variety of factors set forth in 18 U.S.C. § 3553(a). *See* 18 U.S.C. §§ 3583(c) and (e). The statute excludes from consideration the need for the sentence imposed to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *Id*. (omitting 18 U.S.C. § 3553(a)(2)(A) as a relevant factor). *See* Guide to Judiciary Policy, *Vol. 8: Probation and Pretrial Services, Part E: Supervision of Federal Offenders* (Monograph 109) § 160.10.20 (c) [hereinafter *Monograph 109*] ("punishment is not a purpose to be considered in the imposition of a discretionary term or of the condition of any term of supervised release").

Consistent with the statutory purposes of supervised release and the risk principles (discussed more fully below), it is essential that the guidelines 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

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Community? (June 2010) [hereinafter *Early Terminated Offenders*] (emphasis added) (prepared for Criminal Law Committee of the U.S. Judicial Conference), available from OPPS, James L. Johnson/DCA/AO/USCOURTS (summary reported in OPPS, News and Views, January 18, 2010).

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

[6] U.S. Probation and Pretrial Services Office District of Rhode Island, *Frequently Asked Questions*, http://www.rip.uscourts.gov (last visited Feb. 9, 2011).

of reoffending because his or her rehabilitative needs have been met and he or she no longer needs transitional services. Toward that end, we would encourage the Commission to add additional language to application note 5, which states the following:

> *The court should consider early termination of supervised release if the defendant has no rehabilitative needs that can be met with supervision, no longer needs transitional services, or otherwise presents a low risk of reoffending.*

C. In Cases Where Supervised Release is Not Statutorily Required, The Guidelines Should Advise Courts to Exercise Their Discretion In Whether to Impose a Term of Supervised Release and the Length of the Term.

Of the two proposed options for revising USSG §5D1.1, we encourage the Commission to adopt Option 1B, but as we discuss above, add to it the proposed language from Option 1A §5D1.1(c) and application note 5 regarding the supervision of deportable aliens. Of the proposed options for amending §5D1.2, we believe the Commission should adopt Option 2B and eliminate the minimum terms of supervised release.

Option 1B in §5D1.1 and Option 2B in §5D1.2 maximize a judge's flexibility to impose supervised release unless required by statute. We do not believe that courts should be advised to automatically impose supervised release when some minimum term of imprisonment is imposed -- be it 15 months or more as in Option 1A or some greater term of imprisonment.

A one-size-fits-all approach is especially inappropriate in the context of supervised release, where the individual offender's reentry needs should be paramount. As noted in the Commission's recent report, "Congress intended supervised release to assist individuals in their transition to community life." *Federal Offenders Sentenced to Supervised Release*, at 2 (quoting *Johnson v. United States*, 529 U.S. 53, 59 (2000)); *see also id*. at 9 (legislative history of 18 U.S.C. § 3583(c) indicates that "primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than to punish them"). Supervised release should only be imposed when it is necessary to accomplish a specific purpose related to the defendant's rehabilitative needs.

According to U.S. Probation and Parole, "[t]wo goals of post-conviction supervision are (1) to protect the community by reducing the risk that an offender will commit future crimes, and (2) to bring about long-term positive change in individuals under supervision." *Early Terminated Offenders*, at 8 (June 2010); *see also*, *Monograph 109*, § 150. If the defendant is at low risk of committing future crimes and does not have rehabilitative needs that supervision can meaningfully meet, then imposition of a term of supervised release is a greater than necessary sentence. If a defendant has no history of violence, poses no identifiable risk to public safety, and is likely to have a place to live, financial support, transportation, and access to any necessary treatment, then there is no real need for supervision. *Cf. Monograph 109*, § 380.10 (setting forth standards of early termination of supervised release).

Nor is supervised release automatically necessary to help an inmate prepare for reentry and adjust to life on the outside. While prison itself does little to prepare a person for reentry, mechanisms other than supervised release are designed to facilitate reentry. By statute, inmates may serve a portion (not to exceed 12 months) of their remaining term of imprisonment in a

community correctional facility or home confinement. 18 U.S.C. §§ 3624(c)(1) and (3). These statutory provisions are expressly designed to facilitate release planning, and the United States Probation Office is statutorily mandated to "offer assistance to a prisoner during prerelease custody." 18 U.S.C. § 3624(c)(3). That mandated assistance is not dependent upon whether the inmate is subject to a term of supervised release.

Permitting a court to forego sentencing a defendant to a term of supervised release or to impose a lesser term of supervised release is consistent with evidence-based practices. Low risk offenders with stable family, employment, and housing should not be required to undergo intense supervision. *See generally* The PEW Center on the States, Public Safety Performance Project, *Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry* 2 (2008) ("By limiting supervision and services for low-risk offenders and focusing on those who present greater risk, parole and probation agencies can devote limited treatment and supervision resources where they will provide the most benefit to public safety."). Studies show that intense supervision of low risk offenders either has no effect, thereby wasting limited resources, or leads to increased recidivism. *Id.*[7]

Treatment is most effective when intensive services are reserved for higher risk offenders.[8] To successfully address the needs of higher risk offenders, probation officers need smaller caseloads and "well-developed case plans." Jesse Jannetta, et. al., The Urban Institute, *An Evolving Field: Findings from the 2008 Parole Practices Survey* 24 (2009) [hereinafter *An Evolving Field*]. Permitting a court to exercise discretion in imposing a term of supervision, and the length of such term, will free up resources for probation officers to concentrate on high-risk offenders. *Johnson v. United States*, 529 U.S. 694, 709 (2000) (courts should be encouraged to use their "discretionary judgment to allocate supervision to those releasee who need[] it most").[9]

D. The Maximum Term of Supervised Release Under USSG §5D1.2(a)(1) Should Not Be More than Three Years.

We strongly encourage the Commission to lower the maximum terms of supervision set forth in §5D1.2(a)(1) from five to three years. Three years would be consistent with the average term of supervised release currently imposed for persons not subject to statutorily mandated supervised release. *Federal Offenders Sentenced to Supervised Release*, at 52.

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[7] *See also* 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); *Monograph 109*, at § 310.10.

[8] *See generally* 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.

[9] Unfortunately, current data show that supervised release is not reserved for those most in need. the Commission's data from Fiscal Year 2005 to 2009 show that a sizable percentage, 96.5%, of offenders in CHC I received a term of supervised release. *Federal Offenders Sentenced to Supervised Release*, at 56, n. 249. And, on average, CHC I defendants received the same average supervised release term (41) as defendants in CHC II-V. Id. Yet, "the success rate for offenders in CHC I is nearly twice that for offenders in CHC VI." *Id*. at 66.

The length of supervision, like other components of the sentence, should be sufficient, but not greater than necessary, to satisfy the purposes of sentencing. 18 U.S.C. § 3583(c) (directing courts to consider various factors under § 3553(a)). As discussed above, supervision should be based on the defendant's rehabilitative needs and not as a further means of punishment. Most offenders who fail in supervision do so early on. Many fail during the first six months. *Monograph 109* § 330(a). Other data show that "[w]ithin the first three years after release, nearly two-thirds of inmate recidivism occurs within the first year, indicating that monitoring and support will achieve the most crime reduction during this period." Justice Center, The Council of State Governments, *The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 7 (2011) [hereinafter *Justice Reinvestment*]*; see id*. at 20 (citing New Hampshire study, which showed that "half of all people released on parole who reoffend or violate conditions and are returned to prison do so within the first eight months of their release); *see also Federal Offenders Sentenced to Supervised Release,* at 63 ("Violations of conditions of supervised release that result in revocation on average occur early in the supervision process.").

Imposing shorter supervised release terms will also encourage the front-loading of supervision resources. Research shows that for individuals released from prison, the "first few hours, days, and weeks . . . are especially critical to [the supervisee's] success." *An Evolving Field,* at 25; *Justice Reinvestment*, at 57 ("[s]upervision strategies should address the risk of early recidivism and better align resources during the period after release when individuals are most likely to commit new crimes or violate their conditions of supervision"). If USPPO front-loads resources to focus on the supervisee's immediate needs, it can more effectively reduce the risk of recidivism. Once needs are met, there is no need to continue the person on supervision.

Shorter periods of supervision can also provide powerful incentives for supervisees to participate in treatment, stay sober, keep a job, and satisfy financial obligations. *An Evolving Field*, at 26 (discussing incentives that can be built-in to supervision process, including elimination of conditions of supervision and early discharge). Supervisees will know that if they comply, they will regain their liberty and if they do not comply, they will likely face revocation and an extension of the term of supervision. 18 U.S.C. § 3583(e).

III. CONCLUSION

We would be happy to discuss with the Commission any of the issues addressed here, as well as any other modifications to the guidelines that would advance the purposes of sentencing under 18 U.S.C. § 3553(a). We are especially pleased that the Commission has proposed amendments that would help ameliorate the harsh effects of §2L1.2 for a discrete segment of defendants, reduce the practice of placing deportable aliens on "non-supervised" release, and that would provide judges with greater flexibility and guidance in deciding whether to impose a term of supervised release and the length of any such term.