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July 23, 2012

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

Attention: Public Affairs – Priorities Comment

Re: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2013

Dear Judge Saris:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's Proposed Priorities for the 2013 amendment cycle. In this letter, we also encourage the Commission to revisit the Career Offender guideline, abolish the use of acquitted conduct in calculating the guideline range and eliminate or reduce the impact of uncharged conduct, and recommend to Congress that it amend the Sentencing Reform Act to provide for a representative of the Federal Public and Community Defenders to serve as an *ex officio* Commissioner.

I. Proposed Priorities #1 and 3: Mandatory Minimum Sentences and Child Pornography Report

The Commission has proposed continuing its work on mandatory minimum penalties, studying the effect of *Booker*, and reviewing child pornography offenses. We have previously offered extensive comment on each of these issues, which we will not repeat here. We offer the following additional information for the Commission's consideration.

The Commission's latest data release shows continued widespread dissatisfaction with the child pornography guideline. For those defendants for whom USSG §2G2.2 served as the primary offense guideline, 46.8% received a non-government sponsored sentence below the

guideline range.[1] Another 13.7% received a non-5K government-sponsored below range sentence.[2] By comparison, only 17.2% of all defendants received a non-government sponsored below guideline range sentence, and only 4.9% received a non-5K government sponsored below range sentence.[3]

Since the Commission's hearing on child pornography in February 2012, more judges have discussed the flaws with the child pornography guidelines. Judge Zouhary of the N.D. Ohio recently commented on the child pornography guidelines and how "[e]xcessive prison terms not only raise concerns regarding the expenditure of public monies and other resources, but they also compromise fundamental notions of fairness and justice." *United States v. Marshall*, __ F. Supp. 2d __, 2012 WL 2510845, *1 (N.D. Ohio June 29, 2012). Judge Zouhary went on to reject the presumption in the guidelines that "those who view child pornography are indistinguishable from those who actually abuse children," finding instead that the "[e]mpirical data strongly suggests that viewing child porn does not equate to child molestation." *Id*. at *2.

Judge Black in the District of New Mexico reached a similar conclusion, rejecting the government's suggestion that a higher sentence for receipt of child pornography was in order "because of the chance that [the defendant] will molest children in the future, or that he has in the past." *United States v. Kelly*, __ F. Supp. 2d __, 2012 WL 2367084 *5 (D.N.M. June 20, 2012). The court concluded that "[a]ny Guideline based on unsupported fears, rather than actual evidence, is far more likely to render unreasonable sentences." *Id*. The court also criticized the guideline for enhancing sentences based upon factors that are inherent in the crime, including use of a computer, number of images, depictions of sadistic or masochistic conduct, and images of children under the age of twelve. *Id*. at *7.

We also note that some members of Congress believe that because judges impose below-range sentences in child pornography cases at a high rate, these offenders are not being substantially punished.[4] But sentence length in these cases has continued to grow every quarter. Average sentence length in child pornography cases has skyrocketed from 29.1 months in 1996 (including production cases) to 134 months as of the second quarter of 2012 (not including

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[1] USSC, *Preliminary Quarterly Data Report: 2d Quarter Release, Preliminary Fiscal Year 2012 Data Through March 31, 2012* tbl. 1 (2012) (hereinafter *2d Quarter Release*).

[2] *Id*.

[3] *Id*., tbl. 1.

[4] At the Commission conference in June, the Staff Director and Chief Counsel for the majority of the House Judiciary Committee stated that members of Congress would be "surprised to know" that sentences for child pornography have continued to grow and are still concerned that sentences in these cases are too low.

production cases).[5] Given the volatile nature of this issue, we urge the Commission to ensure that Congress understands the facts.

II. Proposed Priority #2: Booker Report and Data Collection and Dissemination

A. Booker Report

We have provided exhaustive comments and evidence regarding how the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and later Supreme Court decisions have affected federal sentencing practices, appellate review, and the role of the guidelines. The evidence does not justify legislation that would constrain judicial discretion, transfer sentencing power to prosecutors, create unwarranted and hidden disparities, and stifle the feedback from judges that has been so useful to the Commission in recent years. The Commission should devote its energy and expertise to fixing guidelines that are clearly broken rather than promoting constitutionally suspect legislation that would lead to disruptive litigation and undermine confidence in the Commission. We hope that the Commission carefully considers the comments that we and many others have provided when it makes recommendations to Congress and considers guideline amendments.

At the Commission's hearing in February, Commissioners and many witnesses acknowledged the significant constitutional problems with the Commission's proposals and the extensive and costly litigation they would engender, and were unable to identify any benefit that would outweigh these problems.[6] Judge Sessions offered no evidence that his proposal is necessary, acknowledging instead that there has been "no dramatic change" and that judges had accepted the guidelines across the country.[7] He provided no assurance that his proposal would not create serious problems.[8]

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[5] *See* U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 13 (1996-2009 versions), *2d Quarter Release*, tbl. 19.

[6] *See, e.g.*, Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 62 (Feb 16, 2012) (Judge Barbadoro); *id*. at 88-89, 95 (Associate Deputy Attorney General Matthew Axelrod); *id*. at 94-95 (Commissioner Friedrich); *id*. at 108-09, 167-69 (Professor Klein); *id*. at 166-67 (Judge Howell); *id*. at 169-71 (Judge Lynch); *id*. at 171 (Judge Davis); *id*. at 116-20, 171-73 (Federal Defender Henry Bemporad); *id*. at 363-72 (David Debold, Chair, Practitioners' Advisory Group); *id*. at 380-93 (James Felman, American Bar Association); Statement of Chief United States Circuit Judge Theodore McKee on Behalf of the Judicial Conference Before the U.S. Sent'g Comm'n, Washington, D.C., at 6-19 (Feb. 16, 2012).

[7] *Id*. at 227.

[8] Neither Judge Sessions nor Professor Bowman has offered any credible safeguard against a one-way upward ratchet if the guidelines were made mandatory. Congressional staff from both parties at the

The fact remains that there is no "radical undermining" of sentencing policy.[9] The rate of non-government sponsored below range sentences for the first two quarters of 2012 combined is 17.2%, down from 17.4% in 2011.[10] The rate of below range sentences for the second quarter is 16.9%, the lowest since the first quarter of 2010.[11] This alone refutes the notion that a *Booker* "fix" is needed. Instead, it should inspire confidence that the feedback loop made possible by *Booker* works: As the Commission fixes broken guidelines, judges follow them more often.

We note that the rate of government-sponsored below-range sentences has reached an all-time high in the most recent quarter, at 27.9%.[12] If the Commission is concerned that judges sentence below the guidelines for reasons grounded in the sentencing statute in only 17% of cases, we fail to see why it is not cause for concern that prosecutors seek below-range sentences in nearly 28% of cases.[13]

As to the notion that the judicial discretion allowed under *Booker* has caused racial disparity, important new studies further undermine that claim. Studies from the University of Virginia and the University of Michigan show that if disparity remains after *Booker*, it is because of prosecutorial charging decisions and the fact that mandatory minimums are applied more frequently to black offenders than white offenders, thus preventing judges from reducing the sentences of black offenders more often than they otherwise would.[14] Racial minorities are

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Commission's conference in New Orleans agreed that Judge Sessions' hope that his proposal would somehow result in reduced sentences is unfounded. For a full discussion of the problems with Judge Sessions' proposal, *see* Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Penn. L. Rev. 1631, 1713-29 (2012).

[9] *Id*. at 169-170 (Judge Lynch).

[10] USSC, 2011 Sourcebook of Federal Sentencing Statistics; *2d Quarter Release*, tbl. 1.

[11] *Id*., tbl. 4.

[12] *Id*.

[13] The answer cannot be that government-sponsored departures are part of the guidelines framework. First, the Commission could have encouraged downward departures based on the mitigating factors judges consider in imposing variances. Second, nearly 5% of government-sponsored below range sentences are for reasons other than cooperation or fast track.

[14] *See* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities, Judicial Discretion, and the United States Sentencing Guidelines* 3 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 2012-02, 2012), http://ssrn.com/abstract=1636419; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences* (Univ. of Mich. Law & Econ. Working Paper No. 12-002, 2012), http://ssrn.com/abstract=1985377.

treated more fairly as a result of *Booker*. Making the guidelines more mandatory would harm racial minorities.

Much has been made of differences in rates of judicial below-guideline sentences among districts but the Commission has not yet made an effort to understand or explain these differences. Further, although the difference between the highest and lowest rates of government sponsored below-range sentences by district has been consistently higher than the difference between the highest and lowest non-government sponsored rates by district, the Commission has made no mention of this fact. We urge the Commission to look closely at the reasons for differences in rates among districts, taking into account the kinds of cases and the severity of the guideline ranges, the lengths of sentences imposed, and the interaction between government and judicial practices in different districts. Charging and other prosecutorial practices interact with judicial sentencing practices and drive differences among districts. Further, inter-district variation in sentence lengths is likely to be a more relevant measure than inter-district variation in rates of whether there really has been any significant growth in differences among districts. Thus far, the Commission's presentation to Congress has focused narrowly on rates of below-guideline sentences imposed by judges, and has neglected other important parts of the picture, including sentence lengths, extent of variances and departures, reasons for judicial variances and departures, and rates and reasons for government-sponsored departures and variances.

We also urge the Commission not to pursue a stricter standard of review that is likely to be struck down as unconstitutional based on the notion that appellate judges are "frustrated" by the current standard of review.[15] First, the appellate judges who have spoken or testified at the Commission's hearings and conferences do not support a stricter standard of review.[16] Second,

[15] Remarks of Commissioner Friedrich, New Orleans, June 2012.

[16] Appellate judges speaking in New Orleans expressed no frustration with the appellate standard of review and did not encourage the Commission to seek a stricter standard of review. Appellate judges at the February hearing advised the Commission not to seek a stricter standard of review. *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C. at 170-71 (Feb 16, 2012) (Judge Lynch) ("[I]n going from the district court to the court of appeals, my sense of the desirability of more appellate review of sentences has drooped . . . because now I see it also from that perspective, and I see that we don't have the same degree of information, the same of feel for the case. I think appellate judges are very reluctant to get pushed into this. . . . But it's going to be a tough sell to appellate judges to get them to scrutinize any but outlier sentences."); *id*. at 171(Judge Davis) ("I really agree with Judge Lynch, and . . . we really have settled into a comfort level I think in the Fourth Circuit. It ain't broke. . . . And I think the court is really quite comfortable with where we are."); Letter from Hon. Myron H. Bright, U.S. Circuit Judge, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n (Jan. 10, 2012). Appellate judges testifying at the regional hearings did not support statutory change when pressed to agree with such a proposal, and recognized that sentencing judges are more competent than they are to impose sentences and most often get it right. *See* Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sentencing Comm'n, Washington, D.C., at 53-58 (Feb. 16, 2012) (quoting and discussing testimony of appellate judges at regional hearings).

courts of appeals have no trouble reversing sentences that are out of bounds while exercising appropriate restraint given the superior vantage point and experience of district court judges. Third, even if some appellate judges would like to return to enforcing the guidelines, that is not an option. We therefore urge the Commission not to recommend legislation that is constitutionally suspect based on the notion that some appellate judges are frustrated.

Finally, there appears to be no political will by either party to enact a *Booker* "fix," in part because the crime rate is at an all-time low, in part because there is no evidence that such legislation is actually needed and substantial evidence that *Booker* has improved sentencing, and in part because such legislation would be difficult to enact and lead to disruptive litigation.[17] The Commission can best maintain the support of Congress and all other stakeholders by acting as the neutral expert body Congress created it to be, in recognition that Congress itself lacked those attributes.[18]

B. Data Collection and Dissemination

We welcome the Commission's proposal to "work with the judicial branch and other interested parties to develop enhanced methods for collecting and disseminating information and data about the use of variances and the specific reasons for imposition of such sentences under 18 U.S.C. § 3553(a)." We have previously commented on the need for the Commission to better capture and report the reasons judges give for the sentences they impose, and have explained how the current statement of reasons form fails to elicit relevant information.[19] Our concerns have not changed.

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[17] At the Commission's conference in June, on a panel moderated by Commissioner Jackson, the Staff Director and Chief Counsel to the majority of the House Judiciary Committee said that there was no political will for significant change because the crime rate is at an all-time low. The minority continues to oppose a *Booker* "fix" because *Booker* has improved federal sentencing and there is no credible countervailing evidence that a "fix" is needed. *See, e.g.*, Robert C. "Bobby" Scott, *Booker* Is the Fix, 24 Fed. Sent. Rep. 340 (June 2012).

[18] *See* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 Wake Forest L. Rev. 291, 297 (1993) (Special Counsel to the Senate Judiciary Committee from 1975 through 1980 explaining that considerations that "commanded" the decision to delegate promulgation of guidelines to a sentencing commission were that Congress lacked the time, expertise, and political neutrality for the task).

[19] Statement of Nicole Kaplan & Alan Dubois Before the U.S. Sentencing Comm'n, Atlanta, Ga., at 13 (Feb. 10, 2009); Statement of Thomas Hillier & Davina Chen Before the U.S. Sentencing Comm'n, Stanford, Cal., at 41-47 (May 27, 2009); Statement of Henry Bemporad, Federal Public Defender for the Western District of Texas, Before the U.S. Sentencing Comm'n, Washington, D.C., at 18 (Feb. 16, 2012);

As it begins to work with "the judicial branch and other interested parties," we encourage the Commission to establish a task force that includes representatives of the Defender community, the Department of Justice, academicians, researchers, and the private defense bar. A task force that includes a cross-section of organizations and individuals who use the Commission's data will help ensure that this important issue and possible solutions are examined from all sides.[20] We look forward to working with the Commission in the coming months as it takes up this priority.

III. Proposed Priority #4: Economic Crimes

Defenders commend the Commission for including in its list of proposed priorities a multi-year study of §2B1.1 and related guidelines. We are pleased this study will include an examination of the loss table and the definition of loss. Defenders have recently submitted lengthy comments on why we believe it is important for the Commission to address the definition of loss and the loss table.[21] We will not repeat those comments here. Instead, we raise the concern that the problems with the current guidelines for economic crimes are not limited to the loss table and the definition of loss. Because the problems run deep, we urge the Commission to start over, and write on a clean slate, rather than continue to tinker with the current guideline structure for economic offenses.[22] We understand a wholesale reworking of the guidelines for economic crimes is a major project, and we stand ready to help in whatever way we can. For now, however, to illustrate the need to start anew, we briefly highlight some of the problems with the current guidelines for economic crimes.

One of Defenders' primary concerns with the current fraud guideline is that it includes numerous specific offense characteristics that replicate or overlap with loss, with one another,

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[20] Close to three dozen researchers and scholars suggested a similar task force in an *Open Letter to the United States Sentencing Commission from Scholars and Researchers Who Study Federal Sentencing*, April 20, 2009, http://sentencing.typepad.com/files/open_letter_to_ussc_april_20.pdf.

[21] Statement of Kathryn N. Nester, Federal Public Defender for the District of Utah, Before the U.S. Sentencing Comm'n, Washington, D.C., at 3-16 (Mar. 14, 2012).

[22] Last year we urged the Commission to "resist unnecessary tinkering with a guideline that is 'rapidly becoming a mess,' and instead conduct a multi-year comprehensive review of what is arguably 'the most complex of all the sentencing guidelines." Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2 (Aug. 26, 2011) (quoting Allan Ellis, John R. Steer, & Mark H. Allenbaugh, *At a 'Loss' for Justice: Federal Sentencing for Economic Offenses*, 25-WTR Crim. Just. 34, 34-35 (Winter 2011)). Unfortunately, last year, the Commission did tinker with the guidelines, making five additions to the commentary to §2B1.1, and adding to §2B1.4 a new specific offense characteristic (SOC) with a corresponding application note directing courts to consider a non-exhaustive list of eight factors in deciding whether to apply the SOC, and another addition to the commentary, all serving only to unnecessarily increase the complexity of the fraud guidelines.

and with upward adjustments that appear elsewhere in the guidelines. The first fraud guideline, §2F1.1, included two specific offense characteristics in addition to loss. In contrast, the current fraud guideline, §2B1.1, includes seventeen cumulative specific offense characteristics in addition to loss, many with multiple alternatives. *See* USSG §2B1.1 (2011). With this proliferation of specific offense characteristics, "what the Guidelines have done over time is to tease out many of the factors for which loss served as a rough proxy and to give them independent weight in the offense-level calculus." [23] "The result is that many factors for which loss was already a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table where sentencing ranges are wide. . . ."[24] Section 2B1.1 has thus become an unfortunate example of "factor creep," where "more and more adjustments are added" to account for some discrete harm thereby making it "increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[25]

Courts have taken note of this phenomenon and have voiced strong criticism of the current fraud guideline. One court concluded the fraud guidelines have "so run amok that they are patently absurd on their face."[26] This court was specifically concerned with the addition of 20 points for adjustments and enhancements the government sought above and beyond the 28 points the government sought for loss, noting it was the "kind of 'piling-on' of points for which the guidelines have frequently been criticized."[27] Another court, two years later, noted the

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[23] Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167, 170 (Feb. 2008); *see also*, Ellis, et al., *supra* note 23, at 37 (noting that in addition to the problem of a loss table which "often overstates the harm suffered by the victim" the fraud guideline suffers from "[m]ultiple, overlapping enhancements [that] have the effect of 'double counting' in some cases," as well as failing "to take into account important mitigating offense and offender characteristics"); James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent'g Rep. 138, 141 (Dec. 2010) (noting the "multiple upward adjustments that, either singly or in combination, produce a piling-on effect beyond their underlying rationale and often smack of double counting").

[24] Bowman, *supra* note 24, at 170.

[25] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 137 (2004) (hereinafter *Fifteen Year Review*) (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 the guidelines has created a "façade of precision" which "undermines the goals of sentencing.")).

[26] *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006).

[27] *Id.* at 510.

same.[28] Even before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), courts held that a departure was warranted to avoid the problem of multiple overlapping enhancements in the fraud guideline.[29]

Significantly, "the overkill of the current economic crime guidelines is not limited to the most culpable offenders in the most exceptional cases."[30] As Professor Bowman has explained, "[t]he over-quantification of closely correlated factors is so extreme that a corporate officer, stockbroker, or commodities trader engaged in a stock fraud causing a loss as low as $2.5 million could be subject to a guidelines sentence of life imprisonment."[31] Defenders see the harsh effects of cumulative enhancements for similar conduct in our representation of the indigent. For example, a defendant who uses a magnetic credit card swiper to commit fraud can be subject to the two-level increase for sophisticated means under §2B1.1(b)(9)(C) and the two-level increase for possession or use of device-making equipment under §2B1.1(b)(10), based on the same conduct.[32]

Another area of concern for the Defenders is that many of the amendments to the guideline are not supported by empirical evidence. For example, in 2009, the Commission amended the commentary to §2B1.1 to count as a victim "any individual whose means of identification was used unlawfully or without authority."[33] This amendment expanded application of the victim table to cover persons who suffered no actual loss. At the time, the "Commission determined that such an individual should be considered a 'victim' for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must *often spend significant time* resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines."[34]

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[28] *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (guidelines in security fraud cases "are patently absurd on their face" due to the "piling on of points" under §2B1.1).

[29] *See, e.g.*, *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of "substantially overlapping enhancements" that result in "a large increase in the sentencing range minimum at the higher end of the sentencing table").

[30] Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines §2B1*, 18 Fed. Sent'g Rep. 330, 334 (2006).

[31] *Id.*

[32] *See, e.g.*, *United States v. Podio*, 432 Fed. Appx. 308 (5th Cir. 2011); *United States v. Abulyan*, 380 Fed. Appx. 409, 412 (5th Cir. 2010).

[33] USSG §2B1.1 cmt. (n. 4(E)).

[34] USSG App. C, Amend. 726, Reason for Amendment (Nov. 1, 2011) (emphasis added).

Research released after the Commission's 2009 amendment reveals that the assumptions underlying the Commission's conclusions were wrong. The majority of victims of identity theft do not spend significant time resolving credit problems. According to the Department of Justice National Victimization Survey, "[f]or each type of identity theft, the greatest percentage of victims resolved the problem in a day or less."[35] Only about 20% spent more than a month trying to clear up problems.[36]

Wholesale revision of guidelines for economic offenses is particularly appropriate because of the shaky ground on which they were created. The original structure was based on the false assumption that "the definite prospect of prison, though the term is short, will act as a deterrent to many of these crimes."[37] The evidence, however, is that there is no difference in the deterrent effects of probation and imprisonment for white collar offenders.[38] It is in the certainty of getting caught and punished, not the severity of punishment, that a deterrent effect lies.[39] A 2010 review of deterrence research concluded that there is "no real evidence of a deterrent effect for severity."[40] Not only does a lengthy prison sentence fail to deter, as we will discuss in more detail below, the evidence also shows it is an ineffective and even counterproductive way to reduce recidivism.

IV. Proposed Priority #5: Crimes of Violence

The Commission requests comment on whether it should place among its priorities a continued study of the statutory and guideline definitions of "crime of violence." While we

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[35] Lynn Langton & Michael Planty, Dep't of Justice, *Victims of Identify Theft, 2008* 5 (2010).

[36] *Id*.

[37] USSG, ch. 1, intro., pt. 4(d) (1987); *see also Fifteen Year Review*, at 56 (2004) (Commission sought to ensure that white collar offenders faced "short but definite period[s] of confinement").

[38] See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007).

[39] *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 Criminology & Pub. Pol'y 13, 37 (2011) ("The key empirical conclusions of our literature review are that at prevailing levels of certainty and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police."), http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2010.00680.x/pdf.

[40] Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 818 (2010). "[I]n virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity." *Id.* at 817.

believe that the Commission should continue to pursue this important subject, we are concerned that the Commission appears to have dropped last year's priority of also studying the definitions of "aggravated felony, "violent felony," and "drug trafficking offense." As we discussed last year, all of these definitions are exceedingly complex, lead to significant litigation, often fail to track the statutes they were meant to implement, lack empirical basis, produce arbitrary distinctions, and too often result in grossly unjust sentences that contribute to over-incarceration.[41] We encourage the Commission to examine all of these definitions rather than single out for study the term "crime of violence."

If, however, the Commission chooses to start with "crime of violence," it should focus on three main goals: (1) narrowing the category of violent crimes to focus on truly violent offenders who should be subject to enhanced sentencing; (2) crafting a uniform standard that is easily applied under the categorical analysis; and (3) providing sufficient flexibility in sentencing to account for the inevitable fact that any general definition will be both over- and under-inclusive. We look forward to working with the Commission over the coming months as it continues to look at the complex issues surrounding the definition of violent crimes. Here, we offer a few comments to encourage the Commission to step back and take a broader view of the issues.

A. Recidivist Sentencing Enhancements Should Be Based on Current Empirical Research Rather than Outdated Assumptions about Crime.

The definitions of "crime of violence" in 18 U.S.C. § 16, "violent felony" in 18 U.S.C. § 924(e), and the related definitions in the guidelines should be reexamined in light of current empirical research. Empirical research casts doubt on the assumptions underlying the legislation that brought us the definitions of "crime of violence" in section 16 and "violent felony" in section 924(e). In light of this research, advances in data collection, and feedback the Commission has received about the categorization of violent crimes, we believe the assumptions underlying recidivist sentencing provisions for "violent" offenders (*e.g.,* Armed Career Criminal Act, Career Offender, illegal reentry) need to be revisited and that the various definitions of violent crimes used throughout the guidelines and criminal code need to be narrowly tailored to capture truly violent offenders.

Here we offer a few observations about the need for the definition to be narrowed.

[41] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti Saris, Chair, U.S. Sentencing Comm'n, at 16-19, 24 (August 26, 2011).

1. The Current Definitions of "Crime of Violence" and "Violent Felony" Were Built Upon Limited Data from Decades Ago.

A brief historical review of the definition of "violent felony" at 18 U.S.C. § 924(e), "crime of violence" at 18 U.S.C. § 16, the inclusion of "crimes of violence" as an "aggravated felony" in 1990,[42] and how various guidelines define violent predicate offenses, helps to demonstrate why the Commission should critically analyze whether judgments made decades ago withstand empirical analysis and whether past sentencing policies are fundamentally sound.

The analysis starts with the Armed Career Criminal Act of 1984 (ACCA) and the Comprehensive Crime Control Act of 1984 (CCCA), both part of Public L. 98-473.[43] The ACCA and CCCA are critical starting points because later legislation, as well as the guidelines, were built upon the framework established in 1984.

The ACCA of 1984 established enhanced penalties for persons in possession of a firearm who had previously been convicted of three felonies for robberies or burglaries. According to the accompanying House Report, Congress initially focused on robberies and burglaries because they occurred with great frequency, affected many people, and caused great loss.[44] The Report concluded that "a high percentage of robberies and burglaries are committed by a limited number of repeated offenders" who also commit those offenses "interchangeably."[45] As to burglary, the Senate Report stated: "[w]hile burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises."[46] While the Report cites studies discussing the frequency of burglary and certain characteristics of the offenders, the history contains no data on how often burglaries involved violence or a threat of violence.

The CCCA of 1984 took a broader view of violent crimes than the ACCA, defining crime of violence for purposes of Title 18[47] as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; and (b) any

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[42] Crimes of violence were included as aggravated felonies for purposes of immigration law in 1990. *See* Immigration Act of 1990, § 501, 104 Stat. 5048.

[43] Armed Career Criminal Act of 1984, Pub. L. 98-473, § 1801, 98 Stat. 1837 (1984); Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 1001, 98 Stat. 1837 (1984).

[44] H. Rep. No. 98-1073, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3663.

[45] *Id*.

[46] S. Rep. No. 98-190, at 4 (1983). *See also Taylor v. United States*, 495 U.S. 575, 581 (1990).

[47] For an overview of the numerous places in Title 18 where Congress used the phrase "crime of violence," *see Leocal v. Ashcroft*, 543 U.S. 1, 6-7 & n.4 (2004).

other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.[48] The legislative history of the CCCA states that the definition was taken from S. 1630, 97th Cong. (1981) (Criminal Code Reform Act of 1981).[49] Neither it nor the report accompanying the Criminal Code Reform Act of 1981[50] explain, or provide empirical evidence, as to why Congress defined "crime of violence" by reference to property crimes or crimes that merely involve a substantial risk that physical force against a person or property will be used in the course of committing them.

Just two years after passage of the ACCA and CCCA, Congress expanded the predicate offenses under 18 U.S.C. § 924(e). The House sponsors of the l986 legislation sought to eliminate burglary as a predicate, but proposed including offenses other than robbery, by expanding the definition of a violent crime to "any State or federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." H.R. 4768. (1986). That amendment was rejected in favor of even more expansive language supported by the Senate, which defined "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Career Criminals Amendment Act of 1986, Pub. L. No. 99–570, § 1402, 100 Stat. 3207 (1986). Like the ACCA and CCCA, the legislative history

[48] Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 1001(a), 98 Stat. 1837 (1985). The same definition, along with a list of other enumerated offenses, appears in the bail provisions of the CCCA at 18 U.S.C. § 3156. Before 1984, the term "crime of violence" appeared in the Federal Firearms Act of 1938 to define the class of persons prohibited from possessing a firearm in interstate commerce. 15 U.S.C. §§ 901 and 902(f) (Supp. 1938). The 1938 Act defined "crime of violence" as "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." *Id*. The 1938 Act followed on the heels of the violent tactics of Prohibition Era criminals, the attempted assassination of President-elect Franklin D. Roosevelt in 1933, and unsubstantiated claims by the Attorney General that "America was being terrorized by half a million armed thugs, a force larger than the contemporary United States Army." David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 589 (1986).

[49] S. Rep. No. 98-225, at 308 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3486.

[50] *See* S. Rep. No. 97-307, at 888 n. 42 (1981); S. 1630, 97th Congress (1981). The definition of "crime of violence" set forth in the CCCA also appeared in the Criminal Code Reform Act passed by the Senate in 1977, S. 1437, 95th Cong. § 111 (1977), but that stalled in the House. The original source of the definition is unclear. It did not appear in the Proposed New Federal Criminal Code (1971). National Commission on Reform of Federal Criminal Laws, Final Report (1971).

of the 1986 amendment sets forth no evidence about the nature of violence associated with the broad swath of crimes considered "violent."

In 1990, Congress imported into immigration law the "crime of violence" definition set forth in 18 U.S.C. § 16 when it amended the definition of "aggravated felony" to include "any crime of violence (as defined in section 16 of Title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." Immigration Act of 1990, Pub. L. 101–649, § 501, 104 Stat. 4978 (1990).

The definitions of violent crime set forth in the CCCA, the Career Criminal Amendment Act of 1986, and the Immigration Act of 1990, greatly influenced the guidelines. Many guidelines turn on the definition of "crime of violence." For example, the original guidelines used the definition from 18 U.S.C. § 16 to define "crime of violence" for purposes of §4B1, but then expanded it to include: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson or robbery. Burglary of dwellings was covered as well, but not burglary of other structures. USSG §4B1.2, cmt. (n. 1) (Nov. 1, 1987). Two years later, the Commission deleted §16 as the definition of "crime of violence" and adopted the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B), excepting all burglaries but burglary of a dwelling. USSG §4B1.2(1) (Nov. 1, 1989). The Commission also has enumerated in commentary specific offenses that are considered crimes of violence. USSG §4B1.2, cmt. (n. 1). The "crime of violence" definition at §4B1.2 applies to a number of guidelines, including those for career offender, §4B1.2; armed career criminal, §4B1.4; explosives, §2K1.3; firearms, §2K2.1; money laundering, §2S1.1; criminal history, §4A1.1; upward departures for certain semiautomatic firearms, §5K2.17; and classification of probation and supervised release violations, §7B1.1. Under each guideline, predicate convictions for a "crime of violence" have the effect of increasing the otherwise applicable advisory guideline range.

The illegal reentry guideline at USSG §2L1.2(b) also contains sentencing enhancements for "crimes of violence." Section 2L1.2 captures "crimes of violence" in two ways. First, the guideline provides for an 8-level enhancement if the defendant was previously convicted of an "aggravated felony." "Aggravated felony" includes any offense that would be a "crime of violence" under 18 U.S.C. § 16 (with the exception of a "purely political offense"). Second, the guideline contains a 16-level enhancement if the defendant was previously deported, or unlawfully remained in the United States, after a conviction for a "crime of violence." The commentary lists a series of offenses that qualify as a "crime of violence" and also includes any other offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG §2L1.2, cmt. (n. 1) (B)(iii).

This short history shows the enormous effect that the ACCA of 1984, the CCCA of 1984, the Armed Career Criminal Amendments of 1986, and the Immigration Act of 1990 have had on

recidivist sentencing provisions. By defining "violence" by reference to the risk of physical force against the property of another and the serious potential risk of physical injury to another, sections 16 and 924(e) of Title 18 represent an unprecedented expansion in the concept of violence.[51] Rather than focus on actual violence, or even threats of violence, the analysis turns on the risk of violence. The net result has been an explosion in the crimes that qualify as "violent,"[52] which in turn fuels the growth in the prison population.[53]

2. Current Empirical Evidence Undermines the Original Assumptions Underlying the Definitions of Violent Crimes.

The above discussion of the legislative history of the definition of "crime of violence" and "violent felony" reveals that Congress lacked sufficient data on the nature of the violence or the risk of violence associated with certain crimes when it chose to expand the definition of violence from actual violence, to the threat of violence, to the potential risk of violence. Instead, Congress, like the Supreme Court, resorted to "casual empiricism," *i.e*, personal experience, intuition, and belief.[54]

The decision to characterize burglary as a violent crime, even though it historically has been considered a property crime, provides an example of how commonly held beliefs about crime can be wrong. Burglary was originally classified as a "crime of violence" and "violent felony" because of the view that it could "change rapidly" from a non-violent crime to a violent one "depending on the fortuitous presence of the occupants of the home."[55] Hence, the violent aspect of burglary consists not in the act of burglary, but in the potential for a startling,

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[51] *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALLR 571 (2011).

[52] The focus on "risk" rather than actual force or threats of force in the violent crimes analysis has resulted in numerous state crimes being used to enhance federal sentences that would not be considered "violent" under any common sense use of the term. *See, e.g.*, *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008) (homicide by negligent operation of motor vehicle)*; United States v. Alderman*, 601 F.3d 949 (9th Cir. 2010) (Washington first degree theft aka "pick-pocketing"); *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994) (pickpocketing under District of Columbia statute)*; Sykes v. United States*, 131 S. Ct. 2267 (2011) (fleeing a police officer by vehicle); *United States v. Alfaro-Gramajo*, 283 Fed. Appx. 677 (11th Cir. 2008) (burglary of a vehicle); *United States v. Lopez-DeLeon*, 513 F.3d 472 (5th Cir. 2008) (statutory rape).

[53] A single crime of violence predicate for a defendant convicted of possession of a firearm after having been convicted of a felony increases the offense level from 14 to 20 under §2K2.1. At a criminal history II, that is a 105 to 155% increase in prison time. For a defendant subject to the career offender guideline, the results are even more draconian.

[54] *Jonathan Nash, The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U.L. Rev. 171, 176 (2012).

[55] S. Rep. No. 98-190, at 4 (1983).

unexpected confrontation between the burglar and another person. *See Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011); *James* v. *United States*, 550 U.S. 192, 203 (2007) (noting that the "main risk of burglary arises ... from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate"). Congress also believed that burglary was a crime most frequently committed by a "very small percentage" of career criminals, *Taylor v. United States*, 495 U.S. 575, 581 (1990), who committed robberies and burglaries "interchangeably"[56] and were "responsible for the bulk of the violent crime."[57]

More recent evidence, not available to Congress in 1984, shows that burglary does not typically put third parties at risk of any bodily harm First, most burglars "tak[e] great care to avoid" "occupied homes" [58] and usually do not encounter people at home. In 72.4% of household burglaries between 2003 and 2007, no one was home.[59] Second, violence is rare. In only 7.2% of burglaries was a person a victim of violence.[60] Serious violence is even rarer. Of the small percentage of household burglaries that were violent, only 8.5% involved serious injury.[61] Between 2003 and 2007, household burglaries ending in homicide made up only 0.0004% of all burglaries.[62] Third, unlike offenders who commit robbery, persons who commit burglary do not typically arm themselves. Only 1 in 25 offenders serving a state sentence for burglary possessed a firearm during the offense.[63] In contrast, 1 in 3 state inmates convicted of

[56] H. Rep. No. 98-1073, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3663.

[57] 128 Cong. Rec. 26,518 (Sept. 30, 1982) (statement of Sen. Edward Kennedy).

[58] Deborah Weisel, U.S. Dep't of Justice, Office of Community Oriented Policing Services, *Burglary of Single Family Homes* 8 (2002), http://www.cops.usdoj.gov/pdf/e07021611.pdf.

[59] Shannan Catalano, U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglary* 1 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/vdhb.pdf

[60] *Id*. at 9.

[61] *Id*. at 10. In the small percentage of violent household burglaries, almost a third of the perpetrators were known to the victim. *Id*. at 8.

[62] *Id*.

[63] Caroline Harlowe, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities* 3, tbl. 4 (2001).

robbery possessed a firearm.[64] Even perpetrators of violent household burglaries did not typically arm themselves with firearms. Only 12.4% possessed a firearm.[65]

In short, the available empirical evidence demonstrates that burglary is not an act that "shows[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 146 (2008). In the absence of such evidence, burglary should not be categorized as a "crime of violence." Instead, it should be classified as a property crime that presents minimal risk of physical injury to another.

If the Commission were to declassify burglary as a "crime of violence" in the guidelines, and recommend to Congress that it no longer be characterized as a "violent" offense for recidivist sentencing provisions, it would not be alone. Before 1994, Maryland included burglary, as well as daytime housebreaking as a crime of violence for purposes of mandatory sentencing provisions. Md. Code Ann. 1957 Art. 27, § 643B(a) (1993). In 1994, the Maryland General Assembly changed the law to exclude burglary and housebreaking from the definition of "crime of violence." As the Committee explained: "This is a substantive change that is intended to enhance the fairness and uniformity of sentencing practices in the State. The Committee believes that the mandatory minimum sentences established in this section should be applicable only to crimes against persons or crimes that directly involve a threat to human life." 1994 Md. Laws Ch. 712 (Oct. 1, 1994).

B. The Residual Clause Provides an Unworkable Formulation.

Section 4B1.2 of the guidelines, as well as 18 U.S.C. §§ 16 and 924(e), include what is known as a "residual clause."[66] The residual clause is a "drafting failure" that leads to endless litigation, consumes substantial judicial resources, and needs to be abandoned. *Sykes*, 131 S. Ct. at 2284, 2287 (Scalia, J., dissenting). *See also Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J. dissenting from denial of certiorari) (arguing that residual clause should be declared unconstitutionally vague and that Court should "ring down the curtain on the ACCA farce playing in federal courts throughout the Nation"). Justice Scalia has been the most outspoken critic of the residual clause, but he is not alone in his criticism. *See, e.g., United*

[64] *Id*.

[65] Catalano, *supra* note 60, at 8.

[66] *See* USSG §4B1.2(a)(2) ("burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); 18 U.S.C. § 924(e) ("burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); 18 U.S.C. § 16 (b) ("any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

States v. Chitwood, 676 F.3d 971, 977 n. 3 (11th Cir. 2012) (noting logic of Justice Scalia's view and how "appealing the result of that logic might be to courts with caseloads enhanced by residual clause enhancement issues"), *petition for cert. filed*, (July 3, 2012) (No. 12-5074); *United States v. Kearney*, 675 F.3d 571, 577 n. 6 (6th Cir. 2012) (noting "chorus of criticisms swelling around" the residual clause); *United States v. Vann*, 660 F.3d 771, 801 (4th Cir. 2011) (en banc) (Wilkinson, J., concurring in the judgment) (highlighting the difficulties the Fourth Circuit has experienced in applying ACCA's residual clause); *id*. at 787 (Agee, J., concurring); *United States v. Doss*, 825 F. Supp. 2d 726, 730 (W.D.Va. 2011) ("proper interpretation of the language of the residual clause is 'ever-evolving'"); *United States v. Morales*, 2012 WL 113512, *6 (E.D. Pa. Jan 13, 2012) (" I agree with Justice Scalia's observations in *Sykes* that the various tests employed in the four Supreme Court cases on this issue have 'not made the statute's application clear and predictable.'"); *United States v. Lowery*, 599 F. Supp. 2d 1299, 1303 (M.D. Ala. 2009) (determining "degree of risk posed has proven conceptually difficult for judges").

One of the many problems with the residual clause is that it depends on probabilistic determinations of the level of risk involved in a particular offense even though in the vast majority of cases the government presents no evidence about the rates of physical injury or force associated with the offense. *Sykes*, 131 S. Ct. at 2275. Probabilistic risk assessment should be based on a scientific method used to predict the likelihood of a given outcome related to certain activity. That, however, is not the case with application of the residual clause. Instead of relying on empirical evidence of risk, most courts use nothing more than general intuition and experience. *Sykes*, 131 S. Ct. at 2291 (Kagan, J., dissenting) (referring to "majority's intuition that dangerous flights outstrip mere failures to stop—that the aggravated form of the activity is also the ordinary form" and noting how it "seems consistent with common sense and experience"); *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009) (noting how with "lesser crimes, courts, without empirical evidence, are left to rely on their own intuition about whether certain kinds of behavior pose serious potential risks of physical injury"), *abrogated on other grounds*, *Sykes*, 131 S. Ct. 2267.

"This business of adjudicating 'levels of risk' by 'intuition' is problematic." *Vann*, 660 F.3d at 797 (Davis, J., concurring). While intuition may have a place in the law, it should not be used to decide whether to take away years of a defendant's liberty. *See United States v. Oliveira*, 798 F. Supp. 2d 319, 325 (D. Mass. 2011) (Gertner, J.) ("It is surely troubling that substantial punishment enhancement should turn on as ambiguous a category as the "residual" clause of the ACCA.").

The best solution to the problems caused by the residual clause is to abandon it altogether and focus the analysis on whether the offense has as an element the use, attempted use, or threatened use of physical force against the person of another.

C. The Enumerated Offenses Should Be Removed From the "Crime of Violence" Definition.

The commentary to USSG §§4B1.2 and 2L1.2 enumerate certain offenses that are considered "crimes of violence." In determining whether a particular offense fits within the definition, a court must determine the generic, contemporary meaning of a host of undefined, enumerated offenses.[67] The result has been protracted litigation and appeal, with the propriety of a massive enhancement often turning on esoteric questions of state law that have little to do with the defendant or his instant offense.[68] Some such litigation is inevitable as long as the guideline uses the complex aggravated-felony definition for enhancement purposes under §2L1.2. But there is no reason to add to this complexity in setting rules for determining the appropriate sentence under §2L1.2, §4B1.2, or other guideline provisions that depend upon the definition of "crime of violence." Instead of setting out a list of enumerated offenses, the "crime of violence" definition should be limited to a subset of particularly serious felony crimes of violence: crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another. This definition is already used in the commentary to §2L1.2,[69] and it is consistent with (though narrower than) the statutory definition used for the 8 U.S.C. § 1326(b)(2) enhancement. It also tracks the career-offender definition in §4B1.2(a)(1), and the statutory definition of violent felony in the Armed Career Criminal Act.[70] By using this single definition, confusing references to other offenses or definitions could be eliminated.

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[67] *See, e.g.*, *United States v Marquez-Lobos*, __ F.3d __, 2012 WL 2307529*4 (9th Cir. June 19, 2012) (determining contemporary meaning of kidnapping); *United States v. Najera-Mendoza*, ___ F.3d __, 2012 WL 2054937*3 (5th Cir. June 8, 2012) (extensive analysis of state law required to determine if Oklahoma offense fit generic meaning of kidnapping); *United States v. Ramirez-Garcia*, 646 F.3d 778, 782-84 (11th Cir.) (relitigating contemporary generic meaning of "sexual abuse of a minor" found in §2L1.2), *cert. denied*, 132 S.Ct. 595 (2011); *United States v. Hernandez-Rojas*, 426 Fed. Appx. 67, 70 (3d Cir.) (examining whether Pennsylvania involuntary manslaughter conviction falls within contemporary meaning of manslaughter as enumerated in §2L1.2), *cert. denied*, 132 S.Ct. 337 (2011). *See also United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009); *United States v. Aguila-Montes*, 553 F.3d 1229, 1233 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 326–27 (5th Cir. 2006).

[68] *See, e.g.*, *Fierro-Reyna*, 466 F.3d at 326–30; *United States v. Cervantes-Blanco*, 504 F.3d 576, 578–87 (5th Cir. 2007).

[69] *See* USSG. §2L1.2, cmt. (n.1(B)(iii)) (using this definition, but also adding a list of twelve other specific offenses).

[70] *See* 18 U.S.C. § 924(e)(2)(B)(i).

D. Recommendations on Statutory Changes and Development of Guideline Amendments that May be Appropriate in Response to Any Related Legislation

The Commission seeks comment on whether it should make "recommendations to Congress on any statutory changes" that may be appropriate in light of its study of the statutory and guideline definitions of "crime of violence" and develop "guideline amendments that may be appropriate in response to any related legislation." We think it premature for the Commission to consider making recommendations to Congress about changes to the definition of "crime of violence" or "violent felony." A comprehensive analysis of the various definitions governing recidivist-sentencing enhancements for violent crimes, followed by consolidation and clarification of the guideline definitions, should be a priority. Once the Commission implements new guideline definitions, it will be better situated to determine what, if any, specific recommendations to make to Congress.

V. Proposed Priority #6: Recidivism Study

We are pleased that the Commission intends to undertake a comprehensive, multi-year study of recidivism, including an examination of circumstances that correlate with increased or reduced recidivism. As federal prison populations, like those in states across the country, have swollen beyond capacity, and the economy has forced a reexamination of what is actually gained in public safety for every dollar spent on imprisonment, recidivism is an area that warrants careful attention. [71] In recent years, the research about recidivism has grown exponentially. We encourage the Commission to review that research and further contribute to it through this multi-year study.

A. The Prison Population Has Exploded

The Federal Bureau of Prisons has been over-capacity for years and will continue to be so in the foreseeable future.[72] As long ago as 1985, "the Bureau of Prisons reported that its

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[71] *See, e.g.*, Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* 1 (Apr. 2011) ("Now, however, as the nation's slumping economy continues to force states to do more with less, policy makers are asking tougher questions about corrections outcomes. One key element of that analysis is measuring recidivism."), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf.

[72] Dep't of Justice, *FY 2011 Performance and Accountability Report* II-39 (2011) (system-wide crowding has been anywhere from 33% to 41% over the past decade). In 2007, the Department set a target of reducing crowding to 28% by 2012. Dep't of Justice, *FY 2007 Performance and Accountability Report* II-26. It has fallen far short of that goal. *See also* General Accounting Office, *Federal Prison Expansion: Overcrowding Reduced but Inmate Population Growth May Raise Issue Again* (1993) (discussing challenges of rising prison population).

facilities were substantially overcrowded, which is a danger to inmates, staff, and the surrounding communities."[73] In 1998, federal prisons were 26% overcrowded.[74] For the past decade, the federal inmate population has exceeded the rated capacity by at least 30%.[75] The projections on prison crowding are dire. Even with the building of new prisons and the expansion of existing facilities, the Department states that the "over-crowding rate for fiscal year 2012 is projected to be 43 percent."[76]

The overcrowding is relentless because each year the inmate population grows. The number of persons under the jurisdiction of BOP increased 799% from 1980 to 2012.[77] Since 2000 alone, it has increased by 50%.[78]

As the chart below shows and as BOP Director Samuels stated, "the current trajectory is not a good one."[79]

[73] Dep't of Justice, *FY1998 Annual Accountability Report*, Ch. 5, http://www.justice.gov/archive/ag/annualreports/ar98/ag_ar98_chap5.pdf.

[74] *Id*.

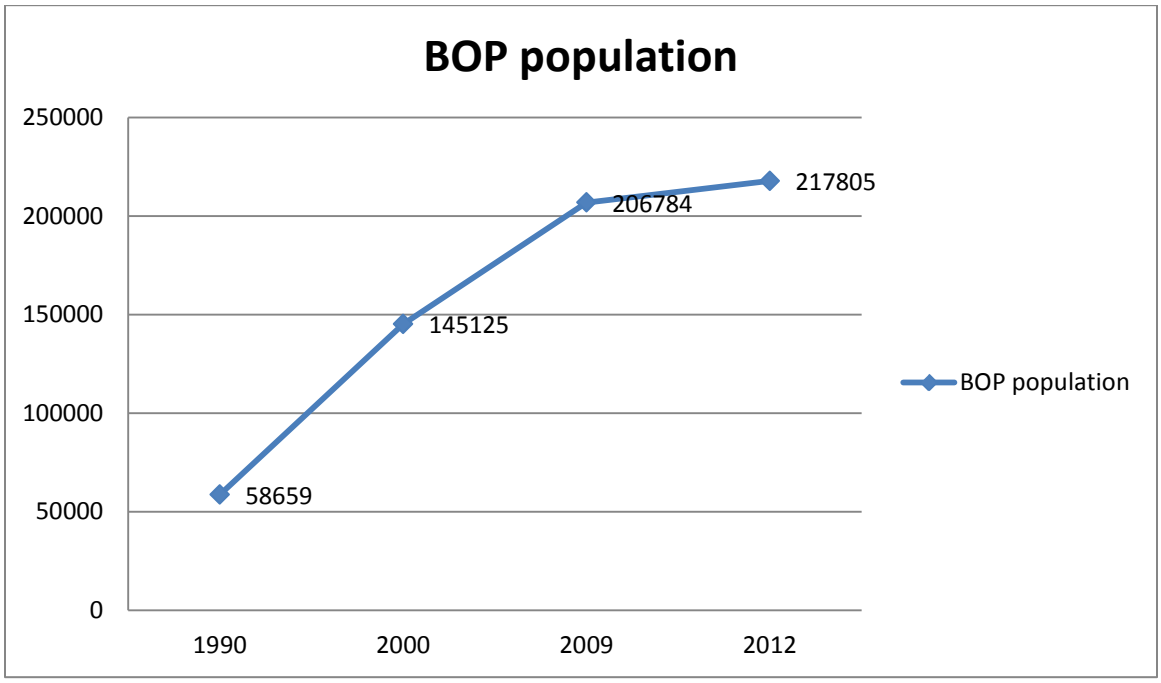
[75] Dep't of Justice, *FY 2011 Performance and Accountability Report* I-24 (2011).

[76] *Id*.

[77] The Sentencing Project, *The Expanding Federal Prison Population* (2012) (BOP population in 1980 was 24,252), http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf); U.S. Dep't of Justice, Federal Bureau of Prisons, *Weekly Population Report* (July 19, 2012) (population of 218, 128), http://www.bop.gov/locations/weekly_report.jsp.

[78] Sourcebook of Criminal Justice Statistics Online, (BOP population in 2000 was 145,125), http://www.albany.edu/sourcebook/pdf/t600222011.pdf.

[79] Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm'n, Washington, D.C., at 4 (Feb. 16, 2012).



The rate of growth per 100,000 resident population is perhaps even a more striking indicator of the federal criminal justice system's over-dependence on mass incarceration. In 1980, 9 in 100,000 residents were under federal correctional jurisdiction. By 2010, the rate rose to 61 per 100,000 residents.[80]

With this growth comes enormous cost. From fiscal year 2000 to fiscal year 2012, the budget for the Federal Bureau of Prisons rose from 3.7 billion dollars to 6.6 billion dollars – greater than the $5.6 billion budget for the entire state of Mississippi.[81]

As we have previously noted, *Booker* has helped slow the growth of the prison population.[82] But judges stick close to the guidelines as to both sentence length and kind of sentence. Thus, the Commission plays an important role in taking more steps to reverse the

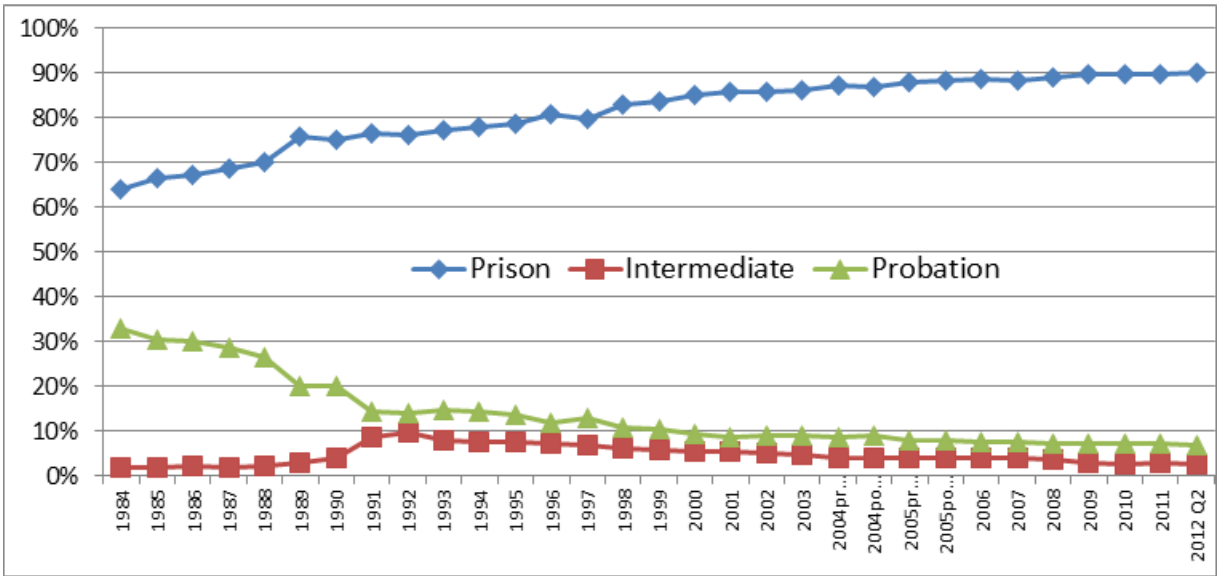
[80] Sourcebook of Criminal Justices Statistics Online, http://www.albany.edu/sourcebook/pdf/t6292010.pdf.

[81] Associated Press, *Mississippi budget negotiators set details of $5.6B plan*, Gulflive.com, April 27, 2012, http://blog.gulflive.com/mississippi-press-news/2012/04/mississippi_budget_negotiators.html. Mississippi has a population of close to 3 million. U.S. Census Bureau, *State and County Quick Facts, Mississippi* (2011), http://quickfacts.census.gov/qfd/states/28000.html.

[82] Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sentencing Comm'n, Washington, D.C., at 13-14 (Feb. 16, 2012).

trends of the last three decades. As the Commission has acknowledged, "[t]he changes in sentencing policy occurring since the mid-1980s – both the increasing proportion of offenders receiving prison time and the average length of time served – have been a dominant factor contributing to the growth in the federal prison population."[83] The Commission's data show that imprisonment rates have steadily increased since 1984 while alternative sentences have declined. The graph below[84] shows the percentage of three groups of offenders: (1) those who received a sentence involving some term of imprisonment, (2) those who received alternative confinement at home or in a community facility, and (3) those who received "simple" or "straight" probation without confinement conditions.

PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS TYPES OF SENTENCES
All Felonies 1984 - 2012 2nd Quarter



Prison sentences have also become more severe. The Commission has reported that "[t]he data clearly demonstrate that, on average, federal offenders receive substantially more severe sentences under the guidelines than they did in the preguidelines era. . . . By 1992, the average time in prison had more than doubled."[85] And, despite "a slight and gradual decline in

[83] *Fifteen Year Review*, at 97.

[84] Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2011 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in USSC, 2011 Sourcebook, tbl. 18.

[85] *Fifteen Year Review*, at 67.

average prison time" [86] in recent years, federal offenders today still spend significantly more time in prison than did offenders sentenced before passage of the Sentencing Reform Act.[87]

The heavy use of imprisonment is incompatible with several provisions in the Sentencing Reform Act. The Commission has never implemented the directive that "[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." 28 U.S.C. § 994(g). Nor has the Commission fulfilled its purpose of establishing "sentencing policies and practices" that assure defendants are provided with "needed educational or vocational training, medical care, or other correctional treatment in the most effective matter." *See* 28 U.S.C. § 991 (b)(1)(A) (one of the Commission's purposes is to "assure the meeting of the purposes of sentencing set forth in section 3553(a)(2) of title 18"); 18 U.S. C. § 3553(a)(2)(C), (D).[88] The guidelines do not adequately ensure that defendants' rehabilitative needs are met. A study of the "circumstances that correlate with increased or reduced recidivism," along with guideline amendments that guide courts in how to consider information about recidivism in fashioning sentences, would help the Commission fulfill these two statutory mandates.

To reduce recidivism, the Commission must look to programs beyond prison. Section 994(k) of Title 28 directs that the "Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." A similar instruction at 18 U.S.C. § 3582(a) prohibits courts from considering rehabilitation as a justification for a prison term. *See Tapia v. United States*, 131 S. Ct. 2382, 2389-90 (2011).[89] As discussed below, the prohibition against using imprisonment for rehabilitation rests on a firm empirical foundation.

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[86] *Id.*

[87] 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2011 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in USSC, 2011 Sourcebook, tbl. 14.

[88] The Commission has steadfastly refused to recommend that courts consider offender characteristics such as employment, education, vocational skills, and family ties, or the lack thereof, in deciding to impose a non-prison sentence even though the research unequivocally shows that those factors are highly relevant to a defendant's rehabilitative needs and risk of recidivism.

[89] Even if a court could sentence a defendant to term of imprisonment for the purpose of rehabilitation, the BOP's ability to furnish appropriate programs is severely strained. As Director Samuels testified before the Commission in February 2012: "the levels of crowding and an increasing number of inmates with limited resources makes far more difficult the delivery of effective recidivism-reducing programming." Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing

B. Research on Recidivism

Fortunately, the Commission need not reinvent the wheel in fashioning a sentencing policy aimed at reducing recidivism and that is not dependent upon prison programming. Because of the volume of research, we do not attempt to provide a comprehensive summary here. Instead, we highlight what we believe are some of the more important and interesting findings.

Most importantly, the empirical research shows that imprisonment is not an effective method for reducing recidivism.[90] As Judge Roger Warren, President Emeritus of the National Center for State Courts, stated in 2007: "The research evidence is unequivocal that incarceration does not reduce offender recidivism."[91] Instead, "[i]ncarceration actually results in slightly increased rates of offender recidivism."[92] In other words, "across the offender population,

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Comm'n, Washington, D.C., at 3-5 (Feb. 16, 2012). The Federal Prison Industries, for example, has a goal of employing 25 percent of work-eligible inmates, but in FY 2011, it employed only 9 percent. Dep't of Justice, *FY 2011 Performance and Accountability Report* IV-19. Similarly, BOP needs to expand the capacity of its residential drug assessment program (RDAP). Dep't of Justice, *Federal Prison System: FY 2013 Budget Request at a Glance*, http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf.

[90] *See, e.g.*, Tina L. Freiburger & Brian M. Iannacchione, *An Examination of the Effect of Imprisonment on Recidivism*, 24 Crim. Just. Stud. 369, 377 (Dec. 2011) ("The results indicate that incarceration did not affect either offenders' likelihood of recidivating or the severity of recidivism. The only factors found relevant to sentencing decisions that also affected the likelihood of recidivism were age and marriage. The finding that age reduced the likelihood of committing subsequent offenses is consistent with the body of research that finds that offenders 'age out' of crime. The finding that marriage has a significant effect on recidivism also is consistent with other research which has found that marriage is associated with lower crime rates."); Howard E. Barbaree, et al., *Canadian Psychological Association Submission to the Senate Standing Senate Committee on Legal and Constitutional Affairs* 6 (Jan. 2012) ("Psychology researchers have identified effective methods, or 'what works', to reduce crime – the overwhelming consensus of the literature is that treatment works, incarceration does not."), http://www.cpa.ca/docs/file/Government%20Relations/SenateCommitteeSubmission_January302012.pdf.

[91] Roger Warren, National Center for State Courts, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* 11 (2007), http://nicic.gov/library/files/023358.pdf.

[92] *Id. See also* Mark W. Lipsey and Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 Ann. Rev. L. Soc. Sci. 297, 302 (2007), ("[R]esearch does not show that the aversive experience of receiving correctional sanctions greatly inhibits subsequent criminal behavior. Moreover, a significant portion of the evidence points in the opposite direction – such sanctions may increase the likelihood of recidivism. The theory of specific deterrence inherent in the politically popular and intuitively appealing view that harsher treatment of offenders dissuades them from further criminal behavior is thus not consistent with the preponderance of available evidence."). A recent Missouri study shows "that recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations." Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart

imprisonment does not have special powers in persuading the wayward to go straight. To the extent that prisons are used because of the belief that they reduce reoffending more than other penalty options, then this policy is unjustified."[93]

As for why this is so, scholars have identified numerous "criminogenic" effects of incarceration, including how prison 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.[94]

In addition to the research showing prison is not an effective way to reduce recidivism, in recent years there have been extensive studies and reports regarding the impact of a wide variety of other common criminal justice practices on recidivism. Much, if not all, of it provides further support for a federal sentencing scheme that relies more on alternatives to incarceration, and shorter prison sentences. A small sampling from this research includes evidence that:

- *Community based treatment is more effective in reducing recidivism than that provided in prison*. "In general, community-based programs have a greater impact on recidivism rates than those based in prisons."[95] According to a study by the Washington State Institute of Public Policy, "the latter reduced recidivism rates by an average of 5 to 10 percent, whereas intensive supervision with community-based services reduced recidivism rates by 18 percent."[96] The research also shows that

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Sentencing 1 (June 2009), http://www.courts.mo.gov/file.jsp?id=45429. On a three-year follow up from the start of probation or release from prison, first or second-time offenders on probation were incarcerated at a significantly lower rate (36%) than those who had been sent to prison (55%). *Id*.

[93] Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011) ("[H]aving pulled together the best available evidence, we have been persuaded that *prisons do not reduce recidivism more than noncustodial sanctions*.").

[94] *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).

[95] Marshall Clement, et al., *The National Summit of Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 26 (Jan. 2011) (hereinafter *Reinvestment Summit*), http://www.justicereinvestment.org/summit/report.

[96] *Id. See also* Kimberly Wiebrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations* 8 (2008) ("The research. . . states that treatment interventions

"[d]rug treatment in the community is more effective than drug treatment in prison. Community-based treatment yields an 8.3-percent reduction in recidivism rates, whereas prison-based treatment (either therapeutic communities or outpatient) also reduces recidivism, but by a lesser 6.4 percent."[97]

- *Specialized courts reduce recidivism.* One recent statewide study of drug courts in Minnesota, where drug court participants entered the programs both post-adjudication and pre-plea, found that "Drug court is a statistically significant factor in reducing new charges and convictions for participants in all time intervals analyzed (through 2 ½ years) after a participant's start date. At the end of 2 ½ years the Drug Court Cohort shows a 37% reduction in new charges and 47% reduction in new convictions as compared to the Comparison Group."[98] Another recent study by the Urban Institute, examining drug courts in multiple sites, again with participants entering both post-adjudication and pre-plea, found that "drug court participants were significantly less likely to report committing any crime at both the six- and 18-month follow-up interviews. Also, of those who reported criminal activity at the 18-month follow-up, drug court participants reported about half as many criminal acts (43.0 vs. 88.2), on average, in the year prior."[99] Looking at the effect of the point of entry in the programs, the study found that when participants entered pre-plea courts, the average number of crimes prevented per month was 4.6, compared with 3.6 when participants entered post-plea courts.[100] Significantly, the study also examined whether the type of offense affected recidivism rates and concluded that "offenders

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are more effective when provided to defendants while they are in the community rather than in an institutional setting."), http://nicic.gov/library/files/023356.pdf.

[97] *Reinvestment Summit*, at 26. The Bureau of Prison's RDAP is the only prison-based program that is shown to reduce recidivism by as much as 16 percent. Eligibility for RDAP is extremely limited. Alan Ellis and Todd Bussert, *Looking at the BOP's Amended RDAP Rules*, 26 Crim. Justice 37 (2011).

[98] Minnesota State Court Administrator's Office, *Minnesota Statewide Adult Drug Court Evaluation* 44 (June 2012), http://www.mncourts.gov/Documents/0/Public/Drug_Court/2012%20Statewide%20Evaluation/MN_Statewide_Drug_Court_Evaluation_Report_-_Final_Public.pdf.

[99] Shelli Rossman, et al., *The Multi-Site Adult Drug Court Evaluation: Executive Summary* 5 (Nov. 2011), http://www.urban.org/uploadedpdf/412353-multi-site-adult-drug-court.pdf.

[100] Shelli Rossman, et al., *The Multi-Site Adult Drug Court Evaluation: Volume Four* 183 (Nov. 2011), http://www.urban.org/UploadedPDF/412357-MADCE-The-Impact-of-Drug-Courts.pdf. Courts that combined both pre-plea and post-adjudication participants had the least success, preventing on average .8 crimes per month. *Id.*

with violent histories showed a greater reduction in crime than others at follow-up."[101]

- *Targeting a greater number of "criminogenic needs" has a greater effect on recidivism*. Research has shown that recidivism can be reduced where policies are designed to target the greatest number of "criminogenic needs" in a manner that considers individual characteristics when matching offenders to services. Services that target only one to three needs have been shown to increase recidivism, whereas those that target four to six needs significantly reduce recidivism. Additionally, services that match treatment to the individual's culture, gender, motivational stage, and learning style are more likely to reduce recidivism than "cookie-cutter" or "one-size-fits-all" programs.[102]

There has also been significant research on how supervision affects recidivism. Specifically, the research shows that intensive supervision should be limited to high risk offenders because it actually increases recidivism rates for low risk offenders. Indeed "[t]he . . . least understood threat to public safety is when low risk offenders are subject to unnecessary levels of supervision or 'dosages' of treatment. Not only are valuable and increasingly scarce resources being diverted from those who truly need them, several studies have shown that exposing low risk offenders to treatment actually increases their recidivism rates."[103]

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[101] *Id.* at 7.

[102] *See generally* National Institute of Corrections, U.S. Dep't of Justice, *Implementing Evidence-Based Policy and Practice in Community Corrections* 14 (2d ed. 2009); Edward Latessa, *What Works and What Doesn't in Reducing Recidivism: Apply the Principles of Effective Intervention to Offender Reentry*, http://www.familyimpactseminars.org/s_wifis26ppt_el.pdf.

[103] James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 Fed. Sent'g Rep. 194 (2004). *See also* Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L. J. 521, 522-23 (2006) ("[R]esearch has clearly demonstrated that when we place low-risk offenders in our more intense programs, we often increase their failure rates."); Christopher T. Lowenkamp, Jennifer Pealer, Paula Smith, & Edward J. Latessa, *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?*, 70 Fed. Probation 3 (2006) ("The risk principle states that programming should be matched to the risk level of the offenders, and higher-risk offenders should receive more intensive programming for longer periods of time to reduce their risk of re-offending. Moreover, and equally important, applying intensive treatment to low-risk offenders may actually serve to increase their risk of recidivism.") (internal citations omitted), http://www.uc.edu/ccjr/Articles/ cca_article_federal_prob.pdf.

C. Implementation by the States

For several years, many of the states have been looking at this evidence and taking steps to respond to it with the goal of decreasing both costs and recidivism.[104] While perhaps initially motivated to examine incarceration policies and recidivism due to fiscal concerns, many states are learning that reducing their reliance on incarceration can have a positive effect not only on the pocketbook, but on public safety.[105] As the Honorable Sue Bell Cobb, Chief Justice of the Alabama Supreme Court recently stated: "We now know there has been an overreliance on incarceration of nonviolent offenders. Unfortunately, research has demonstrated that it has not necessarily made us safer."[106] And there is public support for the changes the states have made. The Pew Center on the States reports that "[v]oters overwhelmingly prioritize preventing recidivism over requiring non-violent offenders to serve longer prison terms."[107]

Although some of these states have explored using actuarial risk assessments as part of the sentencing process, we caution against such a change in the federal system. It simply is not possible to have a single risk assessment that is valid for the entire federal population. Even the strongest advocates for the use of actuarial risk assessments at sentencing have counseled that "[g]iven the purpose for and potential judicial consequences of using assessment information at sentencing, research must provide evidentiary support that the tool can effectively categorize all types of offenders *in the local population* on which the instrument will be used into groups with

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[104] *See, e.g.*, *Reinvestment Summit* at 55-67; National Governor's Association Center for Best Practices, *State Efforts in Sentencing and Corrections Reform* (Oct. 2011), http://www.nga.org/cms/home/nga-center-for-best-practices/center-publications/page-hsps-publications/col2-content/main-content-list/state-efforts-in-sentencing-and.html. *See generally* Pew Center on the States, *Recidivism* (website listing the Center's latest publications on recidivism), http://www.pewstates.org/issues/recidivism-328303; Council of State Governments Justice Center, *Work in the States* (website providing information on the states with whom the Center is working to implement justice reinvestment strategies), http://justicereinvestment.org/states.

[105] *See, e.g.*, *Reinvestment Summit*, at 4 ("Not only are states finding that a crime-fighting strategy that focuses so heavily on incarceration is fiscally not sustainable, evidence from the states demonstrates that policymakers should not assume that simply incapacitating more people will have a corresponding increase in public safety."). "For example, from 2000 to 2007, Florida has increased its incarceration rate 16 percent, whereas New York State's incarceration rate went in the opposite direction, decreasing 16 percent. Despite this contrast, New York's drop in crime rate over the same period was double Florida's decrease in crime. In short, although New York invested considerably less money in prisons than did Florida, New York delivered greater public safety to its residents." *Id.*

[106] Honorable Sue Bell Cobb, *The Power of Fixing People Rather than Filling Prisons*, *in* Book of the States (2011), http://knowledgecenter.csg.org/drupal/content/power-fixing-people-rather-filling-prisons.

[107] Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 5 (June 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf.

different probabilities of recidivating."[108] Due to different local laws and policies in different parts of the country, and different target populations, validity must be established on a local level.[109] In other words, "what works in downtown Los Angeles may not work in Napa Valley."[110] Researchers have noted that predictive validity can suffer when a single tool is used even for an entire state (let alone the entire country): "it is highly unlikely for any single tool, applied unilaterally, to demonstrate universally high predictive validity."[111]

VI. Proposed Priority #8: Setser

In *Setser v. United States*, 132 S. Ct. 1463 (2012), the Court held that a federal court retains the authority to order that a federal sentence run consecutive or concurrent with an anticipated state sentence that has not yet been imposed. The Court made clear that the Bureau of Prisons has no authority in this regard. In cases where the court fails to specify whether the sentence should be run concurrent or consecutive, the default rule is that the federal sentence runs consecutive to the state sentence.

Section 5G1.3 of the guidelines currently does not address whether a judge should impose a sentence concurrent or consecutive to an anticipated but not yet imposed state sentence. We see no need for it to do so. Amending §5G1.3 would only add complexity to the guideline.

VII. Other Issues: (A) Career Offender, (B) Relevant Conduct, (C) Defender Ex Officio

The Commission also requests comment on other issues that might warrant the Commission's attention. Here, we include significant issues that we believe the Commission should take up: (A) amend key definitions in the career offender guideline; (B) amend the relevant conduct rules; and (C) recommend to Congress that it amend the Sentencing Reform Act to allow a Federal Defender to serve as an *ex officio* member of the Commission.

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[108] National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing* 40 (2011), http://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx

[109] *Id.* at 30-31.

[110] *Id.* at 32.

[111] *Id.*

A. Amend the Guideline Definitions of "Controlled Substance Offense" and "Prior Felony Conviction."

Several of the key definitions the guidelines use are broader than what Congress required. Here, we discuss two of particular importance to Defender clients: the definitions of "controlled substance offense" and "prior felony conviction" in §4B1.2.

Section 994(h) directed the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the" statutory maximum for a defendant convicted of a "felony" that is a "crime of violence" or one of several enumerated federal drug trafficking offenses. Rather than follow the directive, the Commission substantially expanded the class of persons subject to the career offender provisions by including state drug offenses, which are often minor offenses involving small quantities for personal use or small sales to support drug use.

As the Commission acknowledged in its *Fifteen Year Review*, the use of these prior drug trafficking convictions to define career offenders has a significant adverse impact on African-American offenders. And it does so without clearly promoting an important purpose of sentencing. The Commission's study showed that the recidivism rate of offenders qualifying on the basis of prior drug offenses was substantially lower than the rate for those qualifying on the basis of prior violent offenses, and more closely resembled the recidivism rate of defendants in the criminal history category that would have otherwise applied. *Fifteen Year Review* 131, 133-34.

The guidelines also define "prior felony conviction" in broad terms. The commentary to §4B1.2 defines a "prior felony conviction" as a "prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specially designated as a felony and regardless of the actual sentence imposed."[112] This definition is broader than that set forth in 21 U.S.C. § 802(13), which defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." The guidelines definition classifies many defendants as career offenders even though they are actually convicted of state misdemeanors and receive insignificant jail terms or no jail at all. *See United States v. Colon*, 2007 WL 4246470, *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (imposing 64 month sentence after downwardly departing from career offender guideline; defendant classified as career offender based on state misdemeanor convictions for which he served no time in a state correctional facility). Because these offenses are considered less serious and do not carry with them the significant collateral consequences of a felony conviction, the state courts and litigants do not treat them with the same level of scrutiny as they would a felony.

[112] USSG §4A1.2(o) sets forth a similar definition of "felony."

Yet, under §4B1.2's definition of "felony," these are treated the same as serious felonies, resulting in unwarranted uniformity among dissimilarly situated defendants. [113]

The guideline definition of "felony" even sweeps in state misdemeanors, like resisting arrest, even though they are otherwise considered minor offenses under the guidelines. *Compare United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (state misdemeanor of resisting arrest counts as career offender predicate) *with* USSG §4A1.2(c)(1) (resisting arrest counts in criminal history score only if sentence was term of probation of more than one year or term of imprisonment of at least thirty days, or was similar to instant offense).

In a different context, the Commission noted that the broad definition of "felony drug offense" in 21 U.S.C. § 802(44), results in "inconsistent application" because of the various ways that states punish certain drug offenses.[114] It recommended that Congress "consider incorporating the particular state's classification of an offense as a "felony" or misdemeanor" to better reflect the state's judgment concerning the seriousness of the prior offense."[115] The Commission should follow its own advice and more "finely tailor" the reach of the career offender guideline,[116] consistent with the statutory definition of the term "felony" used in in 28 U.S.C. § 994(h).[117]

Until the Commission narrows the definition of "felony" and controlled substance offense, courts will continue to express their disagreement with the over-inclusiveness of the guidelines through departures and variances.

In combination with significant and consistent narrowing of the recidivist definitions, we encourage the Commission to include a more general and flexible departure provision that gives courts latitude to determine whether a defendant's categorization under a recidivist sentencing

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[113] The same is true for what counts as a "conviction" for career offender purposes. In states that use diversionary dispositions that do not result in convictions as defined under state law, the guideline nonetheless counts them as career offender predicates. *See United States v. Fraser*, 388 F.3d 371, 375 (1st Cir. 2004); *United States v. Curet*, 670 F.3d 296, 305 (1st Cir. 2012). In contrast, such dispositions do not count under the Armed Career Criminal Act. *See* 18 U.S.C. § 921(a)(20) ("W]hat constitutes a conviction of such crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.").

[114] USSC, Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System* 356 (2011).

[115] *Id*. at 356

[116] *Id.*

[117] Congress used the term "felony" in 28 U.S.C. § 994(h), which is defined in 21 U.S.C. § 802(13) as "any Federal or State offense classified by applicable Federal or State law as a felony."

provision understates, or overstates, the seriousness of the prior offense and the impact it rightfully ought to have on the sentencing decision. In this way, the Commission will further its purpose of avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. 28 U.S.C § 991(b)(1)(B).

B. Relevant and Acquitted Conduct

We also encourage the Commission to consider a comprehensive review of relevant conduct under USSG §1B1.3. The Commission has been aware of problems with the relevant conduct guidelines for many years. In 1996, the Commission announced as a priority for the 1996-97 amendment cycle "developing options to limit the use of acquitted conduct at sentencing," and for future amendment cycles, "[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."[118] Commission staff began to "investigate ways of incorporating state practices; *e.g.*, using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range."[119] Proposals to abolish the use of acquitted conduct were published for comment at various times.[120] But the Commission has declined to act. We urge the Commission to address this long-standing, well-known problem.

As the Commission knows, a sizable majority of judges believe that it is not appropriate to consider dismissed conduct (69% of judges), uncharged conduct not presented at trial or admitted by the defendant (68%), or acquitted conduct (84%).[121] These views are not surprising.

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[118] *See* 61 Fed. Reg. 34,465 (July 2, 1996).

[119] *See* Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995); s*ee also* USSC, Guidelines Simplification Draft Report on Relevant Conduct (Nov. 1996).

[120] S*ee* 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

[121] *See* USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010). Both district and appellate court judges have issued sharply worded opinions criticizing the use of acquitted conduct. *See, e.g.*, *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("the unfairness perpetuated by the use of "acquitted conduct" at sentencing in federal district courts is uniquely malevolent"); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found

This opposition is well-placed because the "relevant conduct" rules work great mischief at sentencing: they contribute to unwarranted disparity, undue severity, and disrespect for the law.[122] They create hidden disparities because of their complexity and inconsistent application among prosecutors, courts and probation officers.[123]

The relevant conduct rules give prosecutors "indecent power"[124] over sentencing and enormous leverage during plea negotiations, allowing them to inflate guideline ranges with the use of uncharged, dismissed, and acquitted conduct.[125] Prosecutors need only provide information about uncharged or acquitted conduct to a probation officer to include in the

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he did not commit is a Kafka-esque result."), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic."). *See also State v. Cote*, 530 A.2d 775, 784 (N.H. 1987) ("disingenuous at best to uphold the presumption of innocence . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome").

[122] The relevant conduct rules conflict with an essential provision of the Sentencing Reform Act, which directed the Commission to take into account "the circumstances under which the *offense was committed*," the "nature and degree of the harm caused by the *offense*." 28 U.S.C. § 994(c)(2), (3) (emphasis added). It was also to provide "certainty and fairness" and "avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B) (emphasis added).

[123] *See Fifteen Year Review* 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement's role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent'g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) ("interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant" resulting in manipulation of guidelines; "judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases"). *See also United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned different offense levels based upon counting of relevant conduct).

[124] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

[125] American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 524-54 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 524 (1993); Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 Fed. Sent'g. Rep. 334 (May/June 1992).

presentence report. In *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007), for example, "[a]fter a two day trial, a jury acquitted Mark Hurn of possession of cocaine base with intent to distribute, but found him guilty of possession of powder cocaine with intent to distribute." *Id*. at 785. Probation, however, "advised the district court to consider Hurn's possession of cocaine base when determining Hurn's relevant conduct" pursuant to USSG §1B1.3, and, accordingly, calculated the guideline range to be 188-235 months. *Id.* at 786. The sentencing court imposed a sentence of 210 months imprisonment. *Id.* "Had the PSR not included Hurn's [acquitted conduct] in its relevant conduct calculation, Hurn's recommended Guidelines range would have been 27–33 months." *Id.*[126]

The relevant conduct rules also deprives defendants of their Sixth Amendment right to a jury trial[127] and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), for example, the defendant was sent to prison for 14 additional years for three crimes the jury in its verdict said he did not commit. The enhancement more than doubled the sentence to 22 years. *White*, 551 F.3d at 386 (Merritt, J., dissenting). Cross-references based upon acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental constitutional rights. Under USSG §2K2.1(c)(1)(B), a defendant convicted of nothing more than possessing a firearm after being convicted of a felony can be sentenced as a murderer even when he had a strong defense to a murder charge had he been charged and tried for that offense.[128]

John Steer, former General Counsel and Vice-Chair of the Commission, has called for the Commission to exclude "acquitted conduct" from the guidelines and permit its use only as a

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[126] Probation officers can also arrive at different guideline conclusions based on uncharged conduct. *See United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

[127] Although appellate courts have generally upheld the use of acquitted conduct after *United States v. Booker*, 543 U.S. 220 (2005), serious questions remain about whether it violates the Sixth Amendment to sentence a defendant on the basis of such conduct. The Court in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and "[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White's Sixth Amendment rights." *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting).

[128] *See* Statement of Alan DuBois Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 24 (Feb 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

discretionary factor.[129] In addition to the disparity created by the use of acquitted conduct, Mr. Steer noted that the "federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range."[130] Mr. Steer also noted that uncharged conduct was the aspect of the relevant conduct guideline that was the most difficult to defend and recommended that the Commission "decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.13(a)(2) and (3)."[131]

We agree that the Commission should prohibit the use of acquitted conduct. Its use undermines respect for the law in many quarters.[132] We also encourage the Commission to either eliminate the use of uncharged and dismissed conduct or significantly limit its impact on the guideline range.

C. Defender Ex Officio

The Defenders continue to believe that the Commission's mission would be better served if a federal defender was given an *ex officio* seat on the Commission. In 2004, the Judicial Conference of the United States, upon recommendation of the Committee on Criminal Law, voted to recommend legislation authorizing the Conference to appoint a federal defender to serve as an *ex officio* member of the Commission.[133] We encourage the Commission to add to its priorities a recommendation to Congress to adopt legislation authorizing a defender ex officio.

The absence of a defender *ex officio* deprives the Commission of advice and input at crucial stages in the process. Defenders offer comments and hearing testimony that the Commission has repeatedly acknowledged is valuable. Yet, we do not have a voice at critical times during the Commission's internal discussions and debates. Compounding this disadvantage is that when comment is provided, it is without the benefit of the information that is

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[129] *An Interview with John R. Steer*, 32 Champion 40, 42 (2008).

[130] *Id.*

[131] *Id.*

[132] *See, e.g., United States v. Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008) (noting that the defendant's sentiment ("I just feel as though, you know, that that's not right. That I should get punished for something that the jury and my peers, the found me not guilty.") was similar to that of "[m]any judges and commentators" who have "argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system")*; United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (defendant "might well be excused for thinking that there is something amiss" with using acquitted conduct to increase his sentence by 43 months); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they are acquitted"), *vacated and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008).

[133] *See Report of the Proceedings of the Judicial Conference of the United States* 11 (March 16, 2004).

often central to the Commission's ultimate decision. For example, Defenders are not privy to staff briefings nor do they see staff reports, memos, results of special coding projects, or the amendment-related data analyses. We do not see drafts of Commission reports and thus are unable, unlike the Department of Justice, to offer comments and encourage revisions. We do not see proposed amendments before they are published. And we do not see proposed final amendments before the Commission reads them aloud in public during its vote, all of which clearly follows deliberations closed to the public and to us.

The absence of a defender *ex officio* also creates at least the appearance that the Commission is unduly influenced by the Department of Justice. Moreover, the Commission is out-of step with other sentencing commissions, most of which require a member of the defense bar to serve on the commission and none of which preclude it.[134] As in the states, a Defender member would allow for a more productive and comprehensive discussion of the issues, which would result in a more effective process and outcomes.

A representative of the Federal Defender would bring unparalleled breadth and experience to the work of the Commission. The Federal Defender system – which includes 80 offices nationwide serving 90 of the 94 judicial districts – includes among its ranks lawyers who have devoted their entire professional careers to indigent defense work. They possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system – judges, probation officers, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders. Defender representatives already serve as voting members on the Advisory Committee on Evidence Rules and the Advisory Committee on Criminal Rules. Their role is to bring extensive experience to inform the development of federal criminal policy and practice. There is no reasonable or fair basis for excluding a Defender representative from the Commission.

We encourage the Sentencing Commission to support a Defender *Ex Officio* because it would enrich the quality of the Commission's deliberations and would efficiently avoid misunderstandings and inaccuracies. In so doing, the voting Commissioners would be assured

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[134] *See* National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (July 2008). Fourteen out of the twenty-one states studied require that defense counsel serve on their sentencing commissions: Alabama, Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Ohio, Pennsylvania, Utah, and Washington. All except Alabama, Louisiana, Pennsylvania, and Washington explicitly require a representative from the state public defender system, and no state disallows public defenders from serving. *Id*. *See also* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 Judicature 173, 174 (1995) (noting that most state sentencing commissions include defense attorneys and other interested parties, "making these panels much more broadly representative than the federal commission").

the broadest possible understanding of the ramifications of their decisions, which can only serve to advance the Commission's work.

VIII. Conclusion

As the Commission pursues its priorities for the 2012-2013 amendment cycle, we remain hopeful that it will take steps to formulate guidelines based upon judicial feedback and sound empirical research, and that reflect advances in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 991(b)(1)(C). The Commission has the institutional capacity and authority to fashion a workable advisory guideline system that results in fair and just sentences. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

Very truly yours,

/s/ *Miriam Conrad*
Miriam Conrad
Federal Public Defender
Vice-Chair, Federal Defender Sentencing Guidelines Committee

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

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