



Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 29, 2014

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comment on Proposed Priorities

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we respectfully submit this letter in response to the Commission's request for comments on possible proposed priorities for the amendment cycle ending May 1, 2015. In this letter, we address the following priorities identified in the Commission's public announcement: (1) continuation of the multi-year work on the fraud guidelines; (2) study of the mitigating role provision; (3) recidivism; (4) sentencing violations of probation and supervised release; (5) implementation of recommendations regarding child pornography offenses; and (6) reduction in term of imprisonment under Section 1B1.13. In addition, the PAG proposes two additional priorities: (a) deferred adjudication and the collateral consequences of conviction, and (b) excluding non-criminal marijuana possession from criminal history.

Priority 2: Continuation of the Multi-Year Work on the Fraud Guideline

The Practitioners Advisory Group (the "PAG") urges the Commission to make substantial and real change to USSG § 2B1.1. We believe that rather than simply making adjustments within the existing framework, the Commission should fundamentally revise the structure of the guideline in a manner that enables judges to consider the wide variations among fraud cases and fraud offenders. Particularly in light of empirical experience with this guideline, we do not believe that minor adjustments to the current version adequately account for these variations, nor would small corrections enable judges to take into account the interplay among culpability factors. The PAG submits that these considerations can only be addressed through a structural change to the guideline.

As a first measure, the PAG urges the Commission to evaluate whether to substantially curtail USSG § 2B1.1's reliance on loss. While loss can be an appropriate measure of harm in some cases, in many cases it is not appropriate and leads to overly harsh or light, disparate, and otherwise improper sentences. Accordingly, the PAG requests that the Commission not make minor adjustments to § 2B1.1, but instead reassess § 2B1.1 completely to determine whether

there is a more appropriate basis for courts to sentence defendants for conduct that falls within USSG § 2B1.1.

As courts have recognized, § 2B1.1's over-reliance on loss frequently fails to properly weigh the harm that a defendant has caused. Indeed, courts have identified a number of situations in which § 2B1.1 produces sentencing ranges that are too high. For instance, courts have found that such sentences are too high when other sources also contributed materially to the amount of loss. Such sources can include an economic downturn, a market collapse, or negligence by the victims. *See, e.g., United States v. Forchette*, 220 F. Supp. 2d 914, 924 (E.D. Wis. 2002) (citing *United States v. Rostoff*, 53 F.3d 398, 406-08 (1st Cir. 1995); *United States v. Morris*, 80 F.3d 1151, 1172-74 (7th Cir. 1996); *United States v. Miller*, 962 F.2d 739, 744 (7th Cir. 1992); *United States v. Kopp*, 951 F.2d 521, 531 (3d Cir. 1991); *United States v. Carey*, 895 F.2d 318, 322 (7th Cir. 1990)).

Similarly, courts have found that § 2B1.1 produces sentences that are too high when the defendant plays a limited role in the scheme that bore little relationship to the amount of loss determined under the guideline. *Id.* at 925 (citing *United States v. Brennick*, 134 F.3d 10, 13 (1st Cir. 1998); *Morris*, 80 F.3d at 1172-74; *United States v. Broderson*, 67 F.3d 452, 459 (2d Cir. 1995); *United States v. Monaco*, 23 F.3d 793, 799 (3d Cir. 1994); *United States v. Stuart*, 22 F.3d 76, 82 (3d Cir. 1994); *United States v. Nachamie*, 121 F. Supp. 2d 285, 295-97 (S.D.N.Y. 2000), *aff'd*, 5 F. App'x 95 (2d Cir. 2001); *United States v. Costello*, 16 F. Supp. 2d 36, 39-40 (D. Mass. 1998); *United States v. Jackson*, 798 F. Supp. 556, 557 (D. Minn. 1992)).

Courts have further noted that § 2B1.1 produces sentences that are too high when the defendant has made substantial efforts to remedy his misconduct – for example, where he makes extraordinary restitution or where he had sufficient unpledged assets to cover the loss. *United States v. Oligmueller*, 198 F.3d 669, 671-72 (8th Cir. 1999), *abrogated on other grounds by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012); *United States v. Bean*, 18 F.3d 1367, 1369 (7th Cir. 1994); *Carey*, 895 F.2d at 323. In this situation, courts will often use intended loss under § 2B1.1 to calculate the sentence.

With respect to intended loss, in many cases, it may be unfair to sentence a defendant using this amount. For example, it may be unfair to do so where the defendant devised a scheme that was destined to fail, and caused little or no actual loss. In similar circumstances, courts have recognized that § 2B1.1 is deficient and have sentenced below the guidelines. *See, e.g., United States v. Stockheimer*, 157 F.3d 1082, 1089 (7th Cir. 1998) (stating that the court should evaluate the “economic reality” of a scheme in considering a downward departure); *United States v. Coffman*, 94 F.3d 330, 336-37 (7th Cir. 1996) (stating that “the place for mitigation on the basis of a large discrepancy between intended and probable loss is, under the guidelines, in the decision whether to depart downward”); *United States v. Roen*, 279 F. Supp. 2d 986, 990-91 (E.D. Wis. 2003).

Furthermore, just as § 2B1.1 can produce sentences that are too high, its reliance on loss can also produce sentences that are too low.

Statistical evidence further supports a reevaluation of USSG § 2B1.1. According to the Commission's own study, as the loss amount increases, judges sentence within the guidelines range increasingly less frequently: 84.1% within the guidelines where the loss is \$5,000 or less to less than 35% of the time where loss is greater than \$1 million but less than \$2.5 million.¹ Further, in 2013, judges imposed sentences within the § 2B1.1 guideline range less than half of the time (49.5%) regardless of loss amount.² During that same period, in cases where § 2B1.1 was the primary sentencing guideline, judges imposed sentences below the guideline range in 23.2% of cases, and above the guideline range in only 1.6% of cases.³ This trend suggests that trial judges—those most steeped in the facts of the case and best positioned to determine a fair sentence—frequently find that USSG § 2B1.1 is out of step with what is appropriate. According to one commentator who undertook a comprehensive review of Commission loss and sentencing data, “judges increasingly appear to reject loss as an appropriate measure of the sentence that is ‘sufficient but not greater than necessary’ to achieve the purposes of sentencing.”⁴

Furthermore, USSG § 2B1.1's reliance on loss can unnecessarily contribute to federal prison overcrowding. Filling prisons with non-violent men and women serving bloated sentences for minor offenses is expensive and complicates the ability of prisons to provide appropriate space for violent offenders who should be in jail—another reason why the United States has the highest prison population in the world.⁵

In sum, the PAG submits that the problems outlined here are substantial and will only be corrected through a major re-envisioning of USSG § 2B1.1.

Priority 5: Study of the Mitigating Role Provision

The Commission's proposed priorities include a “[s]tudy of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual (e.g., the ‘mitigating role cap’ in §2D1.1(a)(5)), and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.”

¹ See U.S. Sentencing Comm'n, *Sentencing and Guideline Application Information for §2B1.1 Offenders* at Figure 8 (2013), http://www.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sentencing_Guideline_Application_Info.pdf.

² U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics* at Table 28 [hereinafter *2013 Sourcebook*].

³ *Id.*

⁴ Mark H. Allenbaugh, “*Drawn from Nowhere*”: A Review of the U.S. Sentencing Commission's *White-Collar Sentencing Guidelines and Loss Data*, 26 Fed. Sent'g Rep. 19, 25-26 (2013).

⁵ International Centre for Prison Studies, *Highest to Lowest – Prison Population Total*, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited July 23, 2014).

The PAG supports the study of the operation of Section 3B1.2. The Mitigating Role downward adjustment is rarely applied. According to the Commission's fiscal year 2013 analysis, 92.7% of the defendants seeking such an adjustment received none; 5.4% received a minor participant adjustment; 1.4% received a minimal participant adjustment; and 0.5% received the less-than-minor-but-not-minimal adjustment.⁶ *2013 Sourcebook, supra*, at Table 18.

The Application Notes pin application of the mitigating role adjustment on proof that a defendant is "substantially less culpable than the average participant." USSG § 3B1.1 application note 3(A). This is a confusing standard, and courts do not agree on its application or meaning. Our experience is that differences among the Circuits in how to assess an "average participant," and a more general reluctance to scrutinize the specific characteristics of the particular criminal conduct and the defendant before the court, contribute to the under-utilization of this adjustment. In some Circuits, the average participant is measured against a typical offender who commits the crime in question; in others, it is measured against the defendant's co-conspirators. Compare *United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) and *United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004) with *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999).

In addition, in our experience, courts reject the application of the mitigating role adjustment based on the seriousness of the crime, the amount of money involved in the overall scheme, and other factors that do not specifically address the actual role played by the defendant in the crime.

Finally, in our experience, courts will often deny a mitigating role adjustment if a defendant's base level is negotiated to reflect only the defendant's own conduct and not the conduct of co-conspirators. This is contrary to how aggravating role adjustments are often applied.

All of these factors can result in differential application of the mitigating and aggravating role adjustments and cause a disparity in sentencing because those defendants who play a lesser role often do not receive the benefit of a downward adjustment based on mitigating factors; yet, in our experience, those who play a greater role are more routinely punished more harshly based on aggravating factors. By under-utilizing the mitigating role adjustment, defendants who play lesser roles in the offense are sentenced in the same manner as defendants who play a more significant role in the offense.

Indeed, in one instance, the Commission recognized that "[c]ourts have sometimes inconsistently applied § 3B1.2 to defendants who were couriers and mules." U.S. Sentencing Comm'n, *Aggravating and Mitigating Role Adjustments Primer* 12 (2013).

Similarly, the mitigating role cap found at USSG § 2D1.1(a)(5) merits further study. As Judge Gleeson recently noted:

⁶ *2013 Sourcebook, supra*, at Table 18.

The mitigating role cap helps very few defendants. Roughly 13% of those convicted of drug trafficking offenses in Fiscal Year 2011 received a mitigating role adjustment to begin with, and not all of them qualified for the cap. In Fiscal Year 2011, only approximately 7% of all drug trafficking offenders received the cap. Furthermore, like safety valve relief, the cap does little to significantly lower a qualifying defendant's sentencing range below the mandatory minimum. The cap, which is pegged to the defendant's original base level, can go no lower than level 30, which corresponds to a sentencing range of 97-121 months (8 to 10 years). Finally, the super-minimal-role adjustment benefits even fewer defendants, who must meet ever-more stringent criteria to qualify. In Fiscal Year 2011, only 0.2% of total drug trafficking offenders received this adjustment.

United States v. Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *7 (E.D.N.Y. Jan. 28, 2013) (footnotes omitted).

Unfortunately, the treatment of the mitigating-role downward adjustment is fairly consistent among the Circuits – it is infrequently applied and is subject to an intensely fact-specific analysis. A study of the operations of Sections 3B1.2 and 2D1.1(a)(5) is necessary. The PAG encourages the Commission to study the application of the 3B1.2 and the mitigating role cap to ensure that adjustments for role in the offense—aggravating and mitigating—are fairly applied.

Priority 7: Recidivism

The Commission's proposed priorities include a "continuation of its comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study." The PAG continues to support this essential priority, which will provide valuable data and opportunities to reduce the human and financial costs associated with the overuse of incarceration and the impact of that overuse on recidivism.

Recent data from the Administrative Office of the United States Courts demonstrates that the annual cost of imprisonment is \$29,291.62 per inmate, versus \$3,162.03 for probation supervision per offender per year.⁷ The Bureau of Prisons ("BOP") now houses 220,000 inmates

⁷ Matthew G. Rowland, Admin. Office of the U.S. Courts, *Cost of Incarceration and Supervision* (2014) (charting costs for fiscal year 2013), [website URL].

– “more than the civilian population in 15 of the country’s largest 100 cities.”⁸ Prison facilities are overcrowded to 38% beyond capacity and “the overcrowding is causing excessive wear and tear on prison infrastructure and contributing to the \$6.8 billion cost of operating the BOP.”⁹ Against this backdrop, the Commission’s study of recidivism should include ways to reduce the use of incarceration for offenders who present a low risk of recidivism.

The Commission is well positioned to continue to study this important issue and use the data derived from the study to implement reforms that will help reduce overcrowding and the overuse of incarceration. Building off the Commission’s 2004 recidivism report,¹⁰ data from the decade since that study should be used to reinforce and emphasize what the prior study suggested might be resulting from the overuse of incarceration, including increased recidivism when straight incarceration is the punishment imposed and decreased recidivism when alternatives to incarceration are employed instead, such as probation or probation mixed with less confinement.¹¹ If the data supports the notion that incarceration may increase the likelihood of recidivism or that supervision instead of incarceration may reduce the risk of recidivism, the Commission should recommend alternatives to incarceration to attempt to reduce the rate of recidivism.

Indeed, as the Commission itself has recognized, “the appeal of alternatives to incarceration has continued to increase in the wake of reports of the ever-growing prison population.”¹² In recent years, criminal justice stakeholders from across the federal system – judges, prosecutors, defenders, pretrial services officers, and probation officers – have collaborated to identify factors that correlate with recidivism and have worked together to develop and expand alternatives to incarceration that are premised, in part, on reduced likelihood of recidivism. It is the PAG’s hope that the Commission will study the effectiveness of these programs and make recommendations that the most effective should be used more frequently for appropriate offenders. Some of these programs exist at the “front-end” of the process: after

⁸ Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, Fed. Probation, Sept. 2013, at 4 (citing BOP data from 2013).

⁹ *Id.*

¹⁰ U.S. Sentencing Comm’n, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines* (2004) [hereinafter *Measuring Recidivism*’], http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

¹¹ *Id.* at 13 (noting that offenders given straight prison sentences recidivated 25.6% of the time, while those sentenced to probation mixed with confinement recidivated 16.7% of the time and those with probation only sentences 15.1%).

¹² See U.S. Sentencing Comm’n, *Alternative Sentencing in the Federal Criminal Justice System* (2009) (hereinafter *Alternative Sentencing*), http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf. The Commission’s past work in analyzing alternatives to incarceration makes the Commission well suited to study different options for different offenders.

pleading guilty to certain less serious offenses, certain eligible offenders may avoid jail time by completing programs that involve counseling in the areas of substance abuse, anger management, and employment opportunities. After successfully completing these programs, graduating defendants may be permitted to withdraw their guilty pleas and avoid serving a prison sentence. Other programs exist at the “back-end,” such as allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment. The Commission’s study can help identify the most effective front-end and back-end programs and lead to their increased use nationally, to reduce recidivism, prison overcrowding, and expense.

Ideally, the Commission’s ongoing study will generate helpful guidance to criminal justice stakeholders as they design and implement both types of programs: so-called “diversion” programs and reentry programs. If the Commission is able to analyze empirical data measuring the efficacy of the various design features of these programs that data will prove especially helpful. Data that measures the most effective design features of these programs will allow participants in the criminal justice system to design the best programs, including those with the most appropriate eligibility criteria for offenders; the optimal mix of sanctions; and the optimal type and level of involvement of court personnel, probation officers, and treatment providers. The PAG also continues to encourage the Commission to study and report on federal and state¹³ programs already in place that provide for pretrial diversion or deferred adjudication, especially those that have proven most effective at reducing recidivism. One example is the “Federal First Offender Act,” 18 U.S.C. § 3607, which authorizes a disposition of pre-judgment probation for misdemeanor drug possessors who have no prior drug convictions. The Commission’s study will assist in determining whether Congress should expand the authority in § 3607(a) to additional offenses, and it will inform the design of other deferred adjudication programs around the country. Similarly effective state programs can serve as useful models to be applied to federal offenders.

The PAG also encourages the Commission to consider the impact of collateral consequences on recidivism. Although several states have recently pioneered methods of relief from collateral consequences,¹⁴ the federal system continues to lack judicial mechanisms for post-conviction relief, such as expungement, sealing, or reducing absolute barriers to employment. The Commission’s study should consider these state mechanisms that lessen the

¹³ See Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication As a Way of Avoiding Collateral Consequences*, 22 Fed. Sent’g. Rep. 6, 8 & nn. 21-22 (2009) (twenty states authorize expungement or sealing of the entire case record following successful completion of probation where judgment has been deferred, and another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing). Since this article was written, several more states have implemented deferred adjudication mechanisms.

¹⁴ See Nat’l Emp’t Law Project, *State Reforms Promoting Employment of People With Criminal Records: 2010-2011 Legislative Round-Up* (2011), <http://www.nelp.org/page/-/SCLP/2011/PromotingEmploymentofPeoplewithCriminalRecords.pdf?nocdn=1>.

negative impact of collateral consequences that increase the risk of recidivism. In the PAG's experience, access to employment and housing are the best predictors of successful reentry, and unemployment and homelessness, especially following a lengthy prison sentence, dramatically increase the likelihood of a return to crime. The PAG therefore urges the Commission to study and report on post-sentence relief mechanisms that would be most effective in the federal system.

The Commission can lead these efforts, just as it is a leader in other sentencing reform efforts. Judges rely heavily upon the guidelines in determining the appropriate sentence. In this regard, the Commission might consider guideline amendments to encourage judges to give non-custodial sentences when appropriate, especially within Zones A and B. As the PAG has noted in various submissions to the Commission, alternatives to incarceration are effective only when viewed as actual alternatives in fact. In the past, the Commission has noted that a significant percentage of offenders in Zones A and B do not receive the non-custodial sentences for which they are eligible.¹⁵ The PAG anticipates that the recidivism study will support the conclusion that needless use of incarceration for offenders within Zone A and Zone B contributes to recidivism, prison overcrowding, and increased cost. We encourage the Commission to address the overuse of incarceration for offenders in Zone A and Zone B by updating its prior research¹⁶ on the use of alternatives to incarceration. This study should account for the disparate outcomes correlated with citizenship status, as well as the effect of offense type, offender characteristics, and criminal history. In the PAG's experience, district judges are not always aware of the many options available to them when sentencing Zone A and Zone B offenders, or do not regard those options as meaningful alternatives or as punishment. The Commission ought to consider options to address the underuse of incarceration alternatives where appropriate, including language in the Guideline Manual that would remind and educate sentencing judges about the availability of programs and the circumstances in which non-custodial sentences for Zone A and B offenders are appropriate. Commentary reminding judges that non-custodial sentences for those in Zones A and B may often be "sufficient, but not greater than necessary" to achieve the purposes of punishment would constitute a simple and effective step toward reducing federal prison overcrowding and wasteful incarceration of offenders for whom incarceration increases the risk of recidivism.

Priority 8: Sentencing Violations of Probation and Supervised Release

The PAG believes that the Commission should prioritize addressing issues involving not only supervised release revocation, but the implementation, conditions and monitoring of offenders sentenced to terms of supervised release generally.

¹⁵ See *Alternative Sentencing, supra*, at 3 (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

¹⁶ See generally *id.*

As noted in the introduction to Chapter Seven of the Guidelines, when first promulgating guidance regarding violations of probation and supervised release, the Commission made two major policy decisions: first, to create policy statements--as opposed to guidelines--in order to provide "greater flexibility" to the courts and Commission for evaluating the evolution of these types of sanctions; second, to draft the policy statements regarding revocation as a "sanction primarily [for] the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." USSG Ch. 7, Pt. A(3)(a, b), intro. comment.

Four years ago, the Commission published *Federal Offenders Sentenced to Supervised Release* (2010) [hereinafter *Supervised Release*] noting therein that "[s]ince supervised release was first instituted in the late 1980s, nearly one million federal offenders have been sentenced to terms of supervised release." *Id.* at 3 (footnotes omitted). At that time, there were more than 100,000 offenders on supervised release. *Id.* at 69. That number undoubtedly has increased.

Yet, in light of the large and growing volume of offenders that have been sentenced to and are currently serving terms of supervised release, little research has been done on issues involving probation and supervised release and revocation. As one commentator recently opined,

Federal supervised release is a serious punishment that is imposed on tens of thousands of people each year, almost as many as are sentenced to prison, and far more than are sentenced to probation. Yet it continues to be largely ignored by scholars and practitioners who instead focus on the problems of incarceration. This is a mistake: As long as federal sentences remain unjustifiably severe, defense attorneys will be tempted to treat supervised release as a footnote in the long chapter on sentencing. Unfortunately, our clients' battles continue long after incarceration. It is time for supervised release sentencing to come out of the shadows of prison sentencing.

Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 229 (2013) (internal quotation marks and footnote omitted).

Unfortunately, despite having collected data at least on the frequency and terms of supervised release imposed, the Commission currently does not include any analysis of the same in either its Sourcebooks or its Annual Reports. Further, the data the Commission does collect is limited to precisely two variables out of the thousands it otherwise collects and codes with respect to every offender sentenced, namely, SUPREL (indicating number of months' imposed) and SUPRDUM (whether a term of supervised release was imposed at all). See U.S. Sentencing Comm'n, *Variable Codebook for Individual Offenders* 44, 45 (2013). "At this time, information about specific conditions of supervised release imposed by the courts and revocation and termination information are not available in the Commission's datasets." *Supervised Release*,

supra, at 49. Thus, revocation of supervised release is not merely in the shadows, but a black hole.

“Congress intended supervised release to assist individuals in their transition to community life”; therefore, “supervised release fulfills rehabilitative ends, distinct from those served by incarceration.” *United States v. Johnson*, 529 U.S. 53, 59 (2000) (as quoted in *Supervised Release*, *supra*, at 2). Yet, the success or failures of supervised release cannot now be measured in any meaningful way. This is so inasmuch as supervised release often is being imposed, pursuant to Chapter Seven’s policy statements, in an uncritical, “virtually automatic” fashion with almost no deviation from the policy statements—policy statements without any empirical support whatsoever. Scott-Hayward, *supra*, at 214.

The PAG, therefore, is of the firm conviction that this enormously important area of sentencing policy and practice has been neglected for far too long – immediate Commission action is required. While the 2010 Report was an excellent start, more needs to be done starting with collecting more robust data on the imposition of supervised release, as well as collecting data on probation and supervised release revocations. Indeed, making a priority of probation and supervised release revocation data, practice and policy now is even more pertinent in light of the Commission’s unanimous vote on July 18, 2014 to make retroactive the two-level reduction to the drug table at USSG § 2D1.1. The Commission there decided to delay the effective date of the retroactive amendment until November 1, 2015, in order to ensure *inter alia* the “effective supervision of offenders upon release, and allow[] for effective reentry plans.” Press Release, U.S. Sentencing Comm’n, *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences 1* (July 18, 2014). Neither of these ends can be achieved without the Commission collecting and analyzing all pertinent data regarding both the implementation and revocation of terms of probation and supervised release.

Priority 10: Implementation of Recommendations Regarding Child Pornography Offenses

The PAG takes this opportunity to build upon our comments set forth during the last amendment cycle in our letter dated July 15, 2013. As before, the PAG recommends that the Commission seek emergency amendment authority from Congress to delete USSG § 2G2.2 until that time the Commission is able to promulgate a new guideline consistent with the findings of the *Federal Child Pornography Offenses* Report to Congress. Such a procedure is consistent with prior Commission action when recommending fundamental changes to a particular guideline. See, e.g., U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* at 9 (2007) (seeking “emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines” that the Commission had recommended to Congress).

In its report to Congress, the Commission found in particular:

Potential amendments to the guideline would update specific offense characteristics in §2G2.2(b) in order to reflect:

- recent changes in typical offense behavior (e.g., revisions of the enhancements in §2G2.2(b)(2), (4), and (7) related to the types and volume of images possessed to better reflect the current spectrum of offender culpability);
- recent changes in technology (e.g., revisions of the enhancements in §2G2.2(b)(3) and (6), which concern distribution and use of a computer, to reflect offenders' use of modern computer and Internet technologies such as P2P file-sharing programs); and
- emerging knowledge about offenders' histories and behaviors gained from social science research (e.g., modifying the "pattern of activity" enhancement §2G2.2(b)(5) to better account for offenders' sexually dangerous behavior and possibly creating a new enhancement for offenders' involvement in child pornography "communities").

U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* xviii-xix (2012).

The PAG agrees with the Commission that the specific offense characteristics set forth at USSG § 2G2.1(b)(2)-(7) are in need of revision. For the past several years there has been "widespread inconsistent application" of USSG § 2G2.2 with the median sentence for child pornography offenses imposed now 40.0% below the guideline range.¹⁷

The Commission has made clear its intent to substantively revise USSG §2G2.2, and courts already are disregarding selected portions of USSG §2G2.2 or that guideline entirely. *See, e.g., United States v. Abraham*, 944 F. Supp. 723, 731-35 (D. Neb. 2013) (imposing a modified Section 2G2.2 framework based upon the Report: holding that for all future cases, the presumptive base offense level will be 20, the enhancement for use of a computer will never be applied and the enhancement for number of images will be "recalibrate[d] . . . to the realities of the day").

Of course, many other courts continue to criticize USSG § 2G2.2:

"[U]njust and sometimes bizarre results will follow if § 2G2.2 is applied by district courts without a special awareness of the Guideline's anomalous history." *United States v. Henderson*,

¹⁷ U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report, 2nd Quarter Release, Preliminary Fiscal Year 2014 Data* at Table 12.

649 F.3d 955, 964 (9th Cir. 2011); *id.* at 963 n.4 (holding that this Circuit now has joined the First, Second, Third and Seventh Circuits that sentencing judges may vary from USSG §2G2.2 based upon policy grounds).

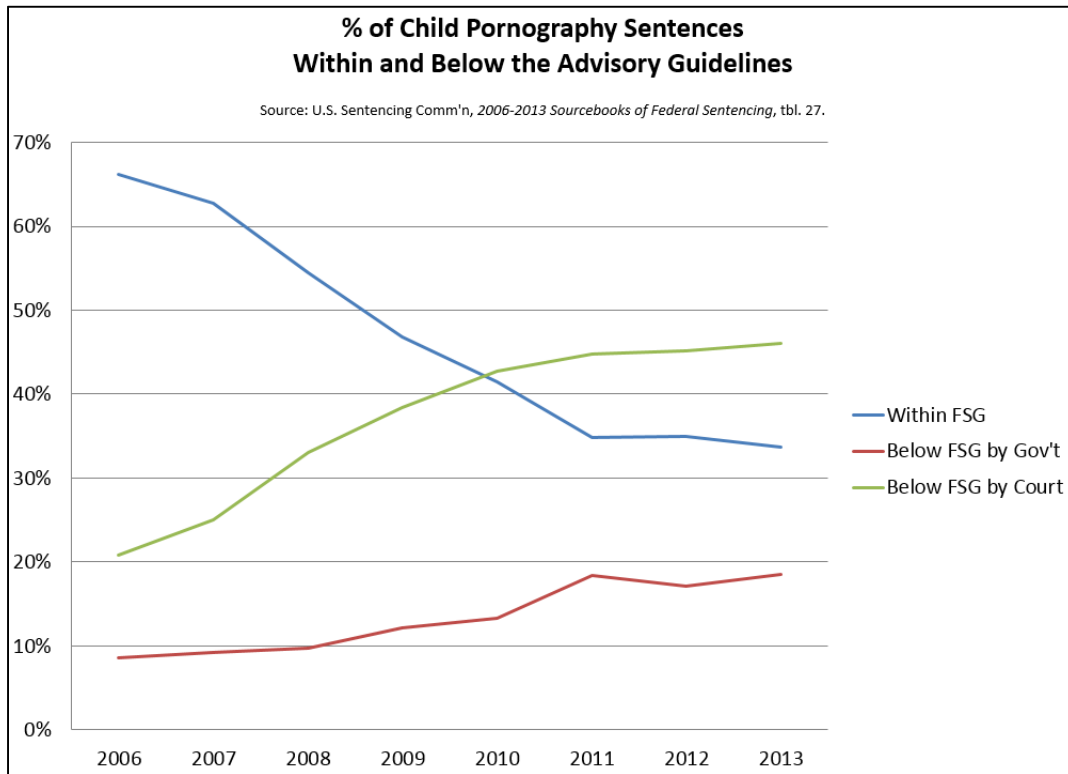
Likewise, several district courts not only have recognized that USSG §2G2.2 should be accorded little deference, but expressly have declined to follow its advice. *See, e.g., United States v. Price*, No. 09-CR-30107, 2012 WL 966971, at *10 (C.D. Ill. Mar. 21, 2012) (“this Court joins numerous other courts in expressing concern with the overly harsh sentences that result from the application of the child pornography sentencing guidelines”); *United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 WL 4537907, at *5-7 (N.D. Ind. Sept. 29, 2011) (declining to give USSG § 2G2.2 enhancements deference); *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. 2008). And, of course, “[r]ecognizing the flaws in this guideline, judges across the country have declined to impose sentence within the range it recommends.” *United States v. Diaz*, 720 F.Supp.2d 1039, 1041-42 (E.D. Wis. 2010) (collecting numerous cases). There is, in other words, a growing and “substantial number of reported opinions that find that the Guidelines for child pornography sentences are fundamentally flawed.” *United States v. Irey*, 746 F. Supp. 2d 1232, 1244 (M.D. Fla. 2010).

The Department of Justice has likewise requested the Commission to revise USSG §2 G2.2, noting in a recent letter to the Commission, “[t]he Department has repeatedly called for reform of the sentencing guidelines for non-production child pornography crimes.” Letter from Jonathan Wroblewski, Dir., Dep’t of Just. Off. of Pol’y and Legis., to the U.S. Sent’g Comm’n 11 (July 11, 2013).

Despite the need for revision of the child pornography guidelines, the number of prosecutions is increasing and the average sentence length is rising, despite increasing variances.

As of the end of fiscal year 2013, federal courts on their own initiative (*i.e.*, excluding government-sponsored departure for USSG § 5K1.1 motions and the like) imposed below guideline sentences 46.1% of the time in child pornography cases, while they imposed within guideline sentences only 33.7% of the time. *2013 Sourcebook, supra*, at Table 27. And this has been a consistent, continuing trend since 2006.

% of Child Pornography Sentences Within and Below Guidelines



Also noteworthy is that sex offenders now reflect the fourth largest offender group incarcerated by the Bureau of Prisons. See Fed. Bureau of Prisons, *Inmate Statistics: Offenses*, available at http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (reporting as of June 28, 2014 that drug offenders constitute 49.7% of inmates; weapons offenders constitute 15.7%; immigration offenders 10.4%; sex offenders 6.3%; and fraud offenders 5.5%).

Since the Commission recognizes that the enhancements are outdated and no longer useful, the PAG believes that immediate action is required. Thus, the PAG believes the most prudent approach is for the Commission to provide definitive guidance to the Courts by removing Section 2G2.2 in its current iteration as soon as practicable via emergency amendment authority. Such an action will make it clear to the courts and practitioners that Section 2G2.2 is in the process of being overhauled, and that the (current) iteration of that guideline no longer is in effect. See, e.g., U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 9 (2007) (“Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.”).

In the interim, courts will be able to sentence child pornography offenses as if no such guideline existed pursuant to Section 2X5.1. This approach, after all, is most consistent with the very purpose of the Report inasmuch as “most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously outmoded.”

U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses*, *supra*, at iii.

In order to properly revise Section 2G2.2, the PAG encourages the Commission to hold regional hearings on child pornography offenses and sentencing considerations. Live testimony from stakeholders in various regions of the country will greatly assist the Commission in obtaining the most useful evidence and commentary as it continues its important work in revising and re-promulgating a new guideline for non-production child pornography offenses.

Finally, with respect to victim restitution, the PAG believes that the Commission should undertake a study of possible restitution guidelines in light of the U.S. Supreme Court's recent decision in *Paroline v. United States*, 134 S. Ct. 1710 (2014), and the unique problems confronting victims seeking restitution in such cases.

Priority 11: Reduction in Term of Imprisonment under Section 1B1.13

The PAG urges the Commission to adopt as a priority the consideration of potential amendments to USSG § 1B1.13 ("Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons") in order to provide further guidance to courts and the Bureau of Prisons in evaluating prisoner requests for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

It is clear that Congress wanted the Sentencing Commission to have the paramount role in defining what circumstances are sufficiently "extraordinary and compelling" to justify a reduction in sentence. The Sentencing Reform Act of 1984 specifically tasks the Commission with the duty to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). In addition, in describing a court's authority to reduce a sentence, the Act requires a court to find both the existence of "extraordinary and compelling reasons that [warrant a] reduction," and that a reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

The Commission's policy statement implementing § 994(t) was issued in 2006 and revised in 2007. *See* USSG § 1B1.13. Until recently, however, BOP's policy on what it terms "compassionate release" under § 3582(c)(1)(A)(i) was considerably more restrictive than the Commission's policy statement on sentence reduction under that same provision, providing for a motion to the court only in cases of imminent death or near-total disability.¹⁸ A 2012 GAO report on sentence reduction mechanisms requested by the Chairman of the Senate Judiciary Committee noted that, as of the end of 2011, "BOP had not revised its written policy to explicitly

¹⁸ *See, e.g.*, Letter from Michael Elston, U.S. Dep't of Just., to Ricardo Hinojosa, Chair, U.S. Sent'g Comm'n (July 14, 2006).

include all of the circumstances noted in the USSC guidance”¹⁹ In August 2013, BOP issued a substantially amended program statement for reduction of sentence, incorporating both the medical and non-medical criteria specified in § 1B1.13. *See* U.S. Dep’t of Just., Fed. Bureau of Prisons, Program Statement 5050.49 (Aug. 13, 2013).

The PAG believes that this new BOP program statement is an important step in the right direction. However, it remains to be seen how it will be implemented in practice. The number of sentence reduction motions filed in the first year of experience under the new policy does not appear to be meaningfully different from numbers filed under the previous policy,²⁰ and we have no information on the particular reasons the past years’ motions were filed. The most that can be said at this point about the new policy’s impact is that it appears to be incremental.

More important, the 2013 BOP program statement still appears to impose a higher bar to agency action than the Commission policy sets for judicial action. Moreover, it involves correctional officials in making decisions that are either institutionally inappropriate or unwarranted by the terms of the statute, decisions that the PAG believes are properly made by a court.²¹ We doubt that Congress intended judges to apply the Commission’s policy statement in reviewing motions, but at the same time leave BOP free to withhold from judicial review certain

¹⁹ *See* U.S. Gov’t Accountability Off., *Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates’ Time in Prison* 25 (2012), available at <http://www.gao.gov/assets/590/588284.pdf>. *See also* Off. of the Inspector Gen., U.S. Dep’t of Just., *The Federal Bureau of Prisons’ Compassionate Release Program* iv (2013) (BOP should consider “expanding the use of the compassionate release program . . . to cover both medical and non-medical conditions for inmates who do not present a threat to the community and who present a minimal risk of recidivism”).

²⁰ Based on data provided to the PAG by BOP, the agency filed 29 motions in 2011, 39 in 2012, 61 in 2013, and 40 through the first half of 2014.

²¹ Here are just a few of the ways in which the BOP policy is more restrictive than the Commission’s, imposing unwarranted restrictions on the types of cases that BOP will bring before courts:

- BOP permits a motion to be brought only if the particular reason for it “could not reasonably have been foreseen by the court at the time of sentencing,” a criterion that could be broadly interpreted to render ineligible many cases where illness and aging were present in an attenuated form at the time of sentencing.
- BOP’s policy requires elderly prisoners with medical conditions to have served at least 50% of their sentence.
- BOP’s policy requires a prison warden to determine whether releasing a prisoner to care for a child is in the best interest of the child, a matter within the institutional competence of a court but not of a correctional official.
- BOP policy requires correctional officials to factor into every one of its sentence reduction decisions considerations that seem more properly the province of the sentencing court under § 3553(a), such as the prisoner’s offense of conviction, his criminal and personal history, comments from victims, and “[w]hether release would minimize the severity of the offense.”

types of cases that fall within the Commission's policy formulated pursuant to the mandate of 28 U.S.C. § 994(t).

We note that some have sought to diminish the importance of the Commission's role in providing applicable policy statements by claiming that the BOP, as necessary movant for a reduction in sentence motion, must have the authority to define what reasons are sufficiently extraordinary and compelling. The PAG believes that such a view is neither an accurate description of the allocation of roles between the courts and the Executive under the Sentencing Reform Act, nor is it a valid reason for the Commission to relinquish its congressionally-delegated role. The Act envisions that the Commission will articulate standards and considerations for determining what reasons for release are sufficiently extraordinary and compelling to warrant a reduction in sentence within the meaning of § 3582(c)(1)(A), and that BOP will be responsible for identifying prisoners eligible for release under the Commission's standards and considerations, and for bringing those prisoners to the attention of the courts. The PAG believes that the statutory scheme is best understood in this bifurcated fashion, as opposed to one potentially involving a conflict of policy-making roles between the Executive and Judicial branches. As with the Sentencing Guidelines themselves, the Commission is responsible for developing policy and the Justice Department is responsible for carrying it out, in a manner that does not frustrate the Act's goals or encroach on the role of courts.

It has been seven years – the better part of a decade – since the Commission last addressed § 1B1.13. Even if BOP's criteria for bringing cases to court were entirely consistent with the Commission's policy for deciding cases when they get there, the PAG believes that the time is right for the Commission to consider whether § 1B1.13 may warrant clarification if not expansion. By evaluating and updating § 1B1.13, the Commission can provide critically important guidance to both BOP and the courts regarding how to evaluate potentially extraordinary and compelling reasons warranting sentence reduction.²²

In addition, renewed consideration of § 1B1.13 by the Commission can both permit and encourage continued public debate on the proper role of this statute in achieving reductions in sentences that have otherwise become final – a subject that has been of evident concern to the Department of Justice in connection with its clemency initiative. Moreover, in the past decade the law reform community has taken up the task of reconciling a perceived need for mid-course sentence corrections with principles of determinate sentencing.²³ The PAG believes the time is right for the Commission to make this a priority on its own agenda.

²² For example, the 2013 BOP program statement makes no mention of the provision in § 994(t), incorporated into § 1B1.13, that “rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason [warranting sentence reduction].”

²³ See Model Penal Code: Sentencing, §§ 305.1, 305.6, 305.7, Tentative Draft No. 2 (Mar. 25, 2011); see also Margaret Colgate Love & Cecelia Klingele, *First Thoughts About “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. Tol. L. Rev. 859 (2011).

Additional Proposed Priority: Deferred Adjudication and the Collateral Consequences of Conviction

A. Deferred Adjudication

The PAG encourages the Commission to consider expanding opportunities for case dispositions that avoid a conviction record and the burdensome collateral consequences that conviction entails. Almost half the states have laws offering less serious offenders the possibility of avoiding conviction through deferred adjudication leading to dismissal of charges and expungement, and it is our understanding that these dispositions may offer some practical advantages that pure diversion does not. Because of the requirement of a guilty plea or admission of facts, prosecutors have a degree of leverage that encourages successful completion of probation. Because of the prospect of avoiding a criminal record, offenders have a greater incentive to comply with the terms of probation. Finally, an offender who successfully completes a deferred adjudication program has no conviction that would discourage a potential employer from giving him a job. The American Law Institute has recently approved provisions on diversion and deferred adjudication for inclusion in the Model Penal Code: Sentencing. Because collateral consequences increasingly tend to be triggered by a guilty plea, the MPC draft provides for conditioning eligibility on “an admission of facts by the accused.” What data exists suggests that these types of post-charge dispositions have improved case outcomes for certain individuals who would otherwise be convicted and sentenced to probation.

The only authority in the federal system for deferred adjudication is the “prejudgment probation” disposition authorized by 18 U.S.C. § 3607(a) for misdemeanor drug possessors who have no prior drug convictions. The PAG urges the Commission to study how frequently the “Federal First Offender Act” is used, and how successful it has been in providing incentives to less serious offenders, and thus reducing recidivism. The Commission would then have a basis on which to determine whether to recommend to Congress that the authority in § 3607(a) be expanded to additional offenses, and to the Department of Justice that it be used more generously. We understand that some federal districts have been successfully experimenting with deferred adjudication on an informal basis, but we are confident that it would encourage greater use of post-charge non-conviction dispositions if courts’ authority to implement them was regularized. An increased use of diversionary dispositions is already an important part of the Attorney General’s “Smart on Crime” agenda announced last summer, and we believe such dispositions are likely to be recommended by prosecutors and accepted by courts more frequently, and in a broader range of cases, with the type of formal structure provided in § 3607(a).

B. Post-Sentence Relief from Collateral Consequences

The collateral consequences of conviction are frequently more severe than the sentence imposed by the court, and they have become a leading contributor to recidivism in limiting access to employment, housing, and many other benefits and opportunities. In the PAG’s experience, finding a job and a place to live are the surest predictors of successful reentry, and unemployment and homelessness can lead directly to new criminal conduct. While recidivism

can be addressed by avoiding conviction at the front end of a criminal case, it is even more important to mitigate the effects of conviction at the back end to offer those who have been convicted a decent chance to live a law-abiding and productive life.

In recent years barriers to employment based on conviction have multiplied in formal codes and rules and in informal policies, and the judicial and executive mechanisms for overcoming these barriers have atrophied. Until a few years ago, only a handful of states had effective ways of avoiding or mitigating collateral consequences, but the growing need has begun to manifest itself in new laws and policies to afford rehabilitated offenders a second chance. For example, Ohio and North Carolina and Indiana have recently joined New York in giving their trial courts authority to remove absolute barriers to employment. The American Law Institute and the Uniform Law Commission have both proposed that the courts assume a greater role in relieving collateral consequences. The ALI's Model Penal Code: Sentencing draft, approved in May 2014, also contemplates a role for the sentencing commissions in compiling collateral consequences, and in providing guidance to courts in relieving them.

In the federal system the only way of avoiding or mitigating collateral consequences is presidential pardon, which has become a less and less reliable form of relief with each passing year. While judicial relief mechanisms are becoming the preferred way of managing the adverse effects of a criminal record in the states, the federal courts have never played much of a role in helping federal offenders deal with the lingering effects of a criminal record. We therefore encourage the Commission to begin its own inquiry into post-sentence relief mechanisms, to determine what might work best in the federal system.

Additional Proposed Priority: Excluding Non-Criminal Marijuana Possession from Criminal History

The PAG urges the Commission to consider amendments to USSG § 4A1.2(c) that would ensure non-criminal cases relating to marijuana possession are not counted towards a defendant's criminal history category. Consistent with the nationwide trend towards decriminalization, many states now penalize possessing small amounts of marijuana by way of money fines, sometimes coupled with mandatory drug education.²⁴ Typically, these statutes do not authorize any prison sentence, at least for the first offense.

Violations of these laws are usually considered non-criminal under applicable state law and specifically excluded from an individual's criminal record. *See, e.g.*, Ohio Rev. Code § 2925.11(3)(a) ("minor misdemeanor" for under 100 grams of marijuana not part of criminal record). Nevertheless, federal courts have counted these cases as convictions under USSG

²⁴ *See, e.g.*, Cal. Health & Safety Code § 11357; Conn. Gen. Stat. § 21a-279a; Me. Rev. Stat. Ann. 22 § 2383; Mass. Gen. Laws ch. 94C § 32L-N; Minn. Stat. § 152.027(4); Miss. Code. Ann. § 41-29-139(c)(2)(A); Neb. Rev. Stat. § 28-416(13); Nev. Rev. Stat. § 453-336; N.J. Stat. § 2C:35-10(a)(4); N.Y. Penal Law § 221.05; N.C. Gen. Stat. § 90-95(d)(4); Ohio Rev. Code § 2925.11; Or. Rev. Stat. § 475.864; Vt. Stat. Ann. 18 § 4230

§§ 4A1.1(c) and 4A1.2(a), explicitly rejecting arguments that marijuana possession is “similar to” either “public intoxication” or “minor traffic offenses” under § 4A1.2(c)(2). *See, e.g., United States v. Foote*, 705 F.3d 305 (8th Cir. 2013) (defendant’s petty misdemeanor conviction for possession of marijuana under Minnesota law counted towards criminal history so as to render him ineligible for safety valve, even though it was not a “crime” under Minnesota law and defendant had only been fined). *See also id.* at 308-09 (collecting cases); *United States v. Russell*, 564 F.3d 200, 206 (3d Cir. 2009) (“[N]either common sense, nor an appropriate weighing of the relevant factors, supports a finding that marijuana possession is similar to public intoxication.”); *United States v. Johns*, 347 F. App’x 240, 242 (7th Cir. 2009) (order) (marijuana possession not similar to listed excludable offenses); *United States v. Muse*, 311 F. App’x 394, 397 (2d Cir. 2009) (summary order) (marijuana possession not similar to traffic infractions or public intoxication).

Assigning criminal history points for possessing small quantities of marijuana can subject an individual to a substantially longer prison sentence. It is not just that an increase in a defendant’s criminal history category increases his or her recommended guidelines range, which standing alone merits careful examination by the Commission. But as the cases make clear, if a defendant has even one additional criminal history point, a prior marijuana possession case can render a defendant ineligible for the safety valve and thereby subject him or her to a mandatory minimum sentence. *See, e.g., Foote*, 705 F.3d 305; *United States v. Hatch*, 94 F. App’x 427 (8th Cir. 2004) (unpublished). Even now that DOJ has instructed United States Attorney’s Offices to charge the mandatory minimum only in certain cases, ineligibility for the safety valve still deprives a defendant of the opportunity for a two-point reduction in the offense level under § 2D1.1(b)(16). Given the Commission’s acknowledgment of the urgent need to “reduce costs of incarceration and overcapacity of prisons, without endangering public safety,”²⁵ it makes no sense to substantially increase recommended prison sentences based on marijuana possession convictions that are considered non-criminal under state law and carry no jail sentences themselves. Accordingly, we urge the Commission to include this issue among its priorities for the 2014-15 amendment cycle.

²⁵ Remarks of Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 1-3 (Apr. 10, 2014).

Honorable Patti B. Saris, Chair

July 29, 2014

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Conclusion

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input on the proposed priorities for the upcoming amendment cycle. We look forward to an opportunity for further discussion over the coming months.

Sincerely,



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