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July 27, 2015

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on Proposed Priorities for 2015-2016

Dear Judge Saris:

This letter comments on the Commission's proposed priorities for the 2015-2016 amendment cycle -- many of which focus on legislative changes and multi-year studies. While some of the listed priorities are worthy of the Commission's time, we think that the Commission should focus on guidelines that unnecessarily call for long periods of incarceration and that are inconsistent with a fair adversarial process. Accordingly, we encourage the Commission to consider the priorities we set forth in our May letter, which is attached.

As to the Commission's proposed priority to make possible recommendations to Congress and guideline amendments to the definitions of certain prior convictions, including crimes of violence, we believe that the Commission should strike the residual clause from the guidelines in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (June 26, 2015). To avoid confusion with what Congress may do in response to *Johnson*, we urge the Commission to strike the residual clause from the guidelines, but refrain from any additional amendments at this time.

As the Commission is aware, in *Johnson*, the Supreme Court held that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act "does not comport with the Constitution's guarantee of due process."[1] This is because the "indeterminacy

[1] 135 S. Ct. at 2560.

of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."[2]

Following its decision in *Johnson*, the Court issued orders remanding other cases to the courts of appeals for "further consideration in light of *Johnson v. United States*."[3] Eight of those orders were in cases involving the residual clause in USSG §4B1.2.[4] This is not surprising because the residual clause in §4B1.2 is identical to the residual clause at issue in *Johnson*, and courts have uniformly applied Supreme Court decisions regarding the residual clause of the ACCA, to the career offender guideline.[5]

The Commission should acknowledge the constitutional problems with the residual clause and strike it from the guidelines. Even if the Commission is not inclined to take a position on the constitutionality of the provision, it should nonetheless strike the residual clause because the "hopeless indeterminacy"[6] of the inquiry "invites arbitrary enforcement by judges."[7] As the Court noted in *Johnson*, there is "pervasive disagreement" among the lower courts "about the nature of the inquiry one is supposed to conduct and the kinds of factors one is to consider."[8] The current inquiry does not provide consistent and appropriate guidance and invites

[2] *Id.* at 2557.

[3] *See* Supreme Court Order List, June 30, 2015 (remanding over 40 cases in light of *Johnson*), http://www.supremecourt.gov/orders/courtorders/063015zr_pnk0.pdf

[4] *See, e.g.*, *Maldonado v. United States*, 2015 WL 2473524 (June 30, 2015); *Jones v. United States*, 2015 WL 1970390 (June 30, 2015); *Smith v. United States*, 2015 WL 2473526 (June 30, 2015); *Wynn v. United States*, 2015 WL 209562 (June 30, 2015); *Beckles v. United States*, 2015 WL 2473527 (June 30, 2015); *Denson v. United States*, 2015 WL 2473521 (June 30, 2015). ; *see also Talmore v. United States*, 2015 WL 917361(June 30, 2015)); *Cooper v. United States*, 2015 WL 1228957 (June 30, 2015).

[5] *See United States v. Coronado*, 603 F.3d 706 (9thCir. 2010) (concluding Supreme Court's analysis of the residual clause in *Begay v. United States*, 553 U.S. 137 (2008), controls the analysis of USSG §4B1.2, citing agreement on this issue from every circuit that had reached the issue). *See also, e.g.*, *United States v. Polk*, 577 F.3d 515, 519 n.1 (3d Cir. 2009 *See also* Order, *United States v. Darden*, No. 14-5537 (6th Cir. July 6, 2015) (vacating judgment and remanding for reconsideration in light of *Johnson v. United States* on issue of whether a previous conviction "qualifies as a 'crime of violence' under the residual clause of § 4B1.2(a)(2)"; Order, *United States v. Harbin*, No. 14-3956/3964 (6th Cir. July 20, 2015) (same).

[6] *Johnson*, 135 S. Ct. at 2558.

[7] *Id.* at 2557.

[8] *Id.* at 2560.

unwarranted disparity. Leaving this "shapeless… provision"[9] in the guidelines would thus be a mistake.

While we encourage the Commission to strike the residual clause from the guidelines, we urge the Commission to refrain from any other amendments to the definition of crimes of violence because of the risk it will increase confusion and unwarranted disparity. Because *Johnson* struck a statutory provision and Congress is currently undertaking a comprehensive review of various statutes as part of its efforts at bipartisan criminal justice reform, it is likely to respond to the *Johnson* decision. Should the Commission amend the guidelines, only to have Congress propose a different fix to the statutory definition of "violent felony" in the Armed Career Criminal Act, it would create significant confusion. Consistent definitions for examining prior convictions to determine whether they qualify as a "crime of violence" or "violent felony" will lessen confusion.

Deleting the residual clause, and relying on the currently enumerated offenses and the elements clause, does not pose a risk to public safety. Even without the residual clause, §4B1.2 covers most offenses normally considered crimes of violence, either through the already lengthy list of enumerated offenses and the inclusion of offenses that have as an element the use, attempted used, or threatened use of physical force. To the extent a lengthy sentence is warranted in a particular case that might have fallen within the residual clause, but not the other provisions, the guidelines recommend sentences up to the statutory maximum where a "defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history." USSG §4A1.3(a).

As we stated at the outset, the Commission should not be focused on amendments that will increase sentences, but on correcting the faulty premises upon which decades of guideline amendments have been based. Lengthy sentences are responsible for prison overcrowding, have marginal deterrent effect, and are destroying our communities.[10] We remain hopeful that the Commission will work to correct the unnecessarily lengthy sentences called for under many guidelines and amend the guidelines to encourage a fair process.

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[9] *Id.*

[10] *See generally* National Academy of Sciences, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 3 (2014); Brennan Center for Justice, What Caused the Crime Decline (2015).

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

Cc: Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel E. Barkow, Commissioner
Hon. William H. Pryor, Commissioner
Jonathan J. Wroblewski, Commissioner *Ex Officio*
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June 15, 2015

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Re: Proposed Priorities for 2015-2016

Dear Judge Saris:

Pursuant to 28 U.S.C. § 994(o), this letter identifies priorities for the upcoming amendment cycle and elaborates on some of the suggested guideline changes that we discussed at our meeting in May, which was a much appreciated first step in improving communications with Defenders. Here, we also request that the Commission revise its internal protocols for communicating with the Federal Public Defenders to ensure the Commission has a more balanced and fair decision-making process, and to allow Defenders to more fully satisfy our statutory obligation to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission" and "otherwise assess[ ] the Commission's work."[1] We also urge the Commission to encourage Congress to correct the current imbalance, where a representative of DOJ, but not the Defenders, has a voice in all Commission meetings and hearings.

Over the past several years, the Commission has taken steps to address problems with the guidelines. Moving forward, we encourage it to carefully examine feedback from judges about the operation of the guidelines and to work on amending the guidelines so that they reflect advances in knowledge about human behavior and correctional practices.[2] Although two Commissioners in March stated that they would prefer presumptive guidelines, and one of them suggested that a presumptive guideline system could result in less severe penalties, we think that pursuing such a legislative change is a mistake. We will not reiterate at length our longstanding

[1] 28 U.S.C. § 994(o).

[2] 28 U.S.C. § 991(B)(1)(c).

opposition to presumptive guidelines or explain why the post-*Booker* system is preferable to any mandatory system, but here remind the Commission of the significant constitutional barriers, the lack of support from many in the judiciary, and the flaws in such a system that were identified by witnesses at the Commission's "*Booker* hearing."[3] Mandatory guidelines are one significant cause of the problems associated with mass incarceration and federal prison overcrowding that we face today.[4] The guidelines created an overly harsh and inflexible system that placed far too many people in prison for far too long, with devastating consequences to families and communities. We believe that the Commission's time and resources are better spent on improving the advisory system rather than getting immersed in a debate about presumptive guidelines.

With the "drugs minus 2" reduction, the Commission took a modest step toward improving the advisory guideline system and addressing the problem of over-incarceration. Notwithstanding those efforts, and "despite a decrease in the total number of federal inmates in FY 2014," DOJ still projects increased costs, significant overcrowding, and continued safety and security issues.[5] The Commission is statutorily obligated to continue to address this problem. It can do so by placing fair and strict limitations on when it will increase penalties or add enhancements for any offense, such as requiring a substantial and compelling reason to do so and evidence that it is necessary to protect public safety. It can also revisit many current guideline provisions that call for long periods of incarceration, are greater than necessary to satisfy the purposes of punishment, and detract from a meaningful and fair adversarial process. Some recommended changes to the guidelines include:

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[3] *See* Amy Baron-Evans and Kate Stith, *Booker Rules*, 160 U. Penn. L. Rev. 1631, 1718-19 (2012) (in addition to running into numerous constitutional roadblocks, among the flaws of a mandatory system with wider ranges is a greater variation in sentences than exist under the advisory guideline system); Transcript of Public Hearing Before the U.S. Sentencing Comm'n on Federal Sentencing Options After *Booker*, Washington, D.C. (Feb. 16, 2012).

[4] The Honorable Lynn Adelman, U.S. District Judge for the District of Wisconsin, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & Law 295, 296 (2013) (discussing how the Sentencing Reform Act and mandatory minimum penalties contributed to "unremitting growth of the federal prison population"); Mark Osler & Judge Mark W. Bennett, *A Holocaust in Slow Motion? America's Mass Incarceration and the Role of Discretion*, DePaul J. Soc. Just. 118, 123 (2014) (discussing how the "guidelines, coupled with mandatory minimums, propelled a federal prison population increase of 761% from 1980 to 2010, growing from 24,5252 to a staggering 209,771").

[5] Statement of Michael Horowitz, Inspector General, U.S. Dep't of Justice before the U.S. Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies concerning Hearing to Review the Fiscal Year 2016 Funding Request and Budget Justification for the U.S. Department of Justice, at 7 (May 7, 2015), https://oig.justice.gov/testimony/t150507.pdf. *See also* U.S. Dep't of Justice, Office of the Insp. General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 54 (2015).

1) change the state drug offenses that qualify as career offender predicates and permit persons subject to the career offender guideline to receive a reduction in offense level if an adjustment under § 3B1.2 (Mitigating Role) applies;

2) heighten the mens rea required for jointly undertaken activity under the relevant conduct guideline;

3) amend the rules on acceptance of responsibility so that persons who contest relevant conduct are not penalized with the loss of acceptance points;

4) widen the range of mitigating role adjustments, lower the mitigating role cap in §2B1.1, and establish a mitigating role cap in §2D1.1;

5) revisit the compassionate release guideline and expand the eligibility criteria under 18 U.S.C. § 3582(c)(1); and

6) eliminate the zones in the sentencing table or expand them so that there are more options for alternatives to incarceration.

In addition to these changes to the guidelines, we encourage the Commission to take two steps to ensure that it has balanced decision-making procedures as contemplated by the Sentencing Reform Act: (1) allow Defenders to more fully satisfy our statutory obligation to "assess[ ] the Commission's work" by giving the statutorily authorized representative of the Federal Public Defenders access to that work and recognize that our obligation to submit to the Commission "questions pertinent to the work of the Commission whenever we believe such communication would be useful," carries with it a reciprocal obligation of the Commission to provide us with information so that we can ask intelligent questions and then to answer our questions ; and (2) encourage Congress to enact legislation that would place a Defender ex officio on the Commission.

I. Narrow the Offenses that Qualify as Career Offender Predicates and Provide for a Reduced Offense Level under the Career Offender Guideline if the Defendant Otherwise Qualifies for a Mitigating Role Adjustment.

Both conservative and progressive organizations are concerned about the problems of over-incarceration, including how it "contributes to a cycle of poverty that traps individuals, families, and entire communities for generations."[6] In light of this broad-based interest in

[6] The Coalition for Public Safety, Advancing Criminal Justice Reform, The Importance of Action, http://www.coalitionforpublicsafety.org/#our-vision.

reducing over-reliance on incarceration, the time is ripe for the Commission to narrow the reach of the career offender guideline, which is significantly broader than required under the Sentencing Reform Act. This guideline enhances sentences based on a wide range of state court drug convictions, including both less and more serious drug offenses, and in so doing, the guideline dramatically overstates the risk of recidivism of many of the persons who qualify based on prior drug convictions. It also has an adverse impact on black defendants.

The career offender guideline contributes to over-incarceration in at least two ways. First, it calls for sentence lengths far in excess of what they would be without the career offender guideline. As the Commission has recognized, career offender status more than doubled the sentence length for more than 83.3% of persons subject to §4B1.1 in FY 2012.[7] Second, the Commission's decision to exclude career offenders from retroactive amendments to the drug guidelines deprives low-level participants in drug trafficking the benefit of sentencing reductions intended to correct the crack cocaine disparity and reduce prison crowding.

Although Congress, in 28 USC § 994(h)(2(B), intended that the Commission only count specific federal drug offenses as predicate convictions, the Commission expanded the reach of the career offender guideline to include numerous other state and federal "controlled substance offenses." *See* USSG §4B1.2(b). Congress directed the Commission to specify sentences near the maximum term authorized for certain categories of defendants. Among those were persons convicted of specific offenses who were previously convicted of:

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

When it chose not to follow this specific directive and to broaden the reach of the career offender guideline, the Commission claimed that it modified the definition "to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.'" USSG § 4B1.1, comment. (backg'd.). Whatever the merits of this approach when the Commission first adopted it, current

[7] USSC, *Quick Facts: Career Offender* (Mar. 2014) (noting impact of career offender status; for 51.5% of persons with career offender status, the average guideline range increased from 77-96 months (OL 24, CH IV) to 188-235 months (OL 31, CH VI); for 31.8% of persons with career offender status, the average guideline increased from 92-115 months (OL 23, CH VI) to 188-235 months (OL 31, CH VI)).

empirical evidence shows it "make[s] no sense"[8] and actually leads to unwarranted disparity because it fails to recognize real differences in the conduct of persons convicted of drug offenses.

First, research shows that many persons sentenced under the career offender guideline pose no greater risk of recidivism than if they had been sentenced based upon standard criminal history rules.[9] Second, the severe sentences called for under the career offender guideline have caused more and more courts to reject it. In FY 2014, 27.5% of persons subject to the career offender guideline received a within range sentence; 45.6% received a government- sponsored below guideline range sentence; and 25.9% received a non-government sponsored below range sentence.[10] Third, defendants with significantly different records are subject to the same punishment because the guideline places all persons with priors from a broad range of controlled substance offenses into the same category. Defendants who are convicted of a state misdemeanor and sentenced to no prison time are treated the same as someone convicted of a felony with a lengthy prison term.[11] Fourth, by treating crimes of violence and controlled substance offenses the same, the guideline calls for the same period of imprisonment for a person convicted of multiple nonviolent drug offenses as it does for a person convicted of multiple violent offenses.[12] It also recommends the same sentence for a person who previously possessed with intent to sell one gram of LSD to support a drug habit as it does for a person in a drug cartel who sold large quantities of drugs even though "the public requires less 'protection' from drug offenders feeding their habit than from violent offenders or cartel dealers."[13]

The overinclusiveness of the career offender guideline also has a disproportionate impact on black people involved in the federal criminal justice system. In 2014, 20.3% of persons

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[8] *See United States v. Ennis*, 468 F. Supp. 2d 228, 238 (D. Mass. 2006) (concluding that career offender guidelines "make no sense in terms of the purposes of punishment" when applied to people involved in drug trafficking).

[9] USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

[10] USSC, FY2014 Monitoring Dataset.

[11] USSC, *Quick Facts: Career Offenders* (noting that in several states, offenses classified as a misdemeanor may be considered a felony). *See* also S.C. Code Ann. §46-44-50 (2014) (three year misdemeanor for manufacturing, distributing, dispensing, delivering marijuana on property used for industrial hemp production or for conspiracy or aiding and abetting).

[12] *United States v. Valdez*, ___ F. Supp. 3d ___, 2014 WL 7473803, *27 (D.N.M., Dec. 15, 2014) (noting that the career offender guideline "creates an unwarranted uniformity in sentencing among dissimilar defendants" because it provides no distinction "between a career offender with six relatively serious violent felonies and a defendant with two relatively innocuous drug felonies").

[13] *Id*. at *28.

sentenced under the guidelines were black, but a significantly larger percentage of persons – 59.7% – subject to the career offender guideline were black. [14]

The Commission could take immediate steps to remediate the problems with the career offender guideline by:

(1) requiring that a predicate conviction be classified as a felony under the law of the convicting jurisdiction and that the sentence imposed [exceeded one year] [was at least one year and one month];[15]

(2) defining controlled substance offense in §4B1.2(b) by reference to the definition of "serious drug offense" in 18 U.S.C. § 924(e)(2)(B), which would include state drug offenses punishable by a term of imprisonment of ten years or more, and would ensure that only serious state drug offenses comparable to the federal offenses Congress included in the career offender directive would be counted; and

(3) adding language in §4B1.1 advising the court to decrease the offense level by the number of levels corresponding to an applicable adjustment for mitigating role.

These changes would preclude application of the career offender guideline to people previously convicted of offenses states have chosen to classify as misdemeanors even when they are punishable by more than one year imprisonment, and would ensure that the predicate offense was actually serious enough to warrant a term of imprisonment longer than one year. The third suggested change would give effect to the mitigating role adjustment, just as §4B1.1 provides for a decrease in the offense level for acceptance of responsibility. USSG §4B1.1(b).[16] Under the current operation of the guidelines, a person who plays a minor or minimal role in the current federal offense, but who has prior convictions that qualify him as a career offender, receives the same sentence as the person who plays a greater role in the offense if the career offender guideline is higher than the guideline would be without application of §4B1.1. Such an outcome results in unwarranted disparity by treating dissimilarly situated defendants the same.

[14] USSC, FY2014 Monitoring Dataset.

[15] The one year and one month requirement matches USSG §4A1.1(a), which adds 3 points for each prior sentence of imprisonment exceeding one year and one month.

[16] The process set forth in §1B1.1, which requires the court to apply Chapter Three adjustments before determining Chapter 4 has been interpreted to preclude application of the mitigating role adjustments to career offenders. *See, e.g.*, *United States v. Rodriguez*, 485 F. App'x 548 (3d Cir. 2012); *United States v. Perez*, 328 F.3d 96, 98 (2d Cir. 2003).

II. Heighten the Mens Rea Required for Jointly Undertaken Activity Under the Relevant Conduct Guideline.

Last year, the Commission requested comment on whether the guidelines should be changed to require a higher state of mind than reasonable foreseeability before a person's sentence may be based on jointly undertaken criminal activity. Defenders supported such a change because it is consistent with the evidence regarding crime control purposes and better reflects the seriousness of the offense, the need to promote respect for the law, and to provide just punishment. We were disappointed that the Commission did not take up the issue last year (and offered no explanation for failing to do so). As set forth in our March 18, 2015 letter, ample reasons exist to heighten the mens rea requirement.[17]

The Supreme Court's observations about reasonable foreseeability in *Elonis v. United States*, 2015 WL 2464051 (June 1, 2015), provide additional reasons for heightening the mens rea requirement. In *Elonis*, the defendant was charged with communicating a threat to injure another person. The district court instructed the jury that it could find the defendant guilty "if a reasonable person would foresee that his statements would be interpreted as a threat." *Id*. at *6. The court reversed the conviction, finding that a "reasonable person standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct – awareness of some wrongdoing.'" *Id*. at *9. The Court confirmed, as it has in the past, that the "reasonable person" standard "reduces culpability" to "negligence." *Id*.

We fail to see how any of the purposes of sentencing can be served by holding a defendant responsible for the acts of another merely because he was negligent in not understanding what the other person might do and the consequences of the other person's actions. Indeed, using a negligence standard to increase a person's term of imprisonment undercuts the purposes of just deserts, destroys proportionality, and undermines respect for the law. Accordingly, the Commission should heighten the mens rea required for relevant conduct.

III. Amend the Guideline on Acceptance of Responsibility so That Persons Who Contest Relevant Conduct are not Penalized with Loss of Acceptance Points.

The relevant conduct guideline can drive up a sentence dramatically on the basis of a simple unsubstantiated allegation in a presentence report. Even though many defendants have good reason to contest the veracity of the information in the presentence report or proffered by the government, they may not do so because of the risk of losing acceptance of responsibility points. The commentary to §3E1.1 provides that a defendant "may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a

[17] Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 2-5 (Mar. 18, 2015).

reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." USSG §3E1.1, comment. (n.1(A)). In practice, the commentary encourages a court to deny a reduction in sentence when the defendant unsuccessfully challenges the factual basis for relevant conduct. For example, in *United States v. Burns*, 781 F.3d 688 (4th Cir. 2015), *petition for cert. filed* (May 15, 2015) (No. 14-9808), the defendant pled guilty to being a felon in possession of a firearm. He also admitted to discharging the firearm into an occupied vehicle. He disputed the recommendation in the presentence report that the cross-reference to attempted murder should apply, arguing that the evidence did not show he had the required mens rea for attempted murder and that the cross-reference to aggravated assault should apply. The court disagreed, and even though Burns did not testify at the hearing, the court declined to give him a three-level reduction for acceptance of responsibility. On appeal, the Fourth Circuit affirmed the district court's decision, finding that "[b]y disputing that he possessed the mental state necessary to commit the cross-referenced (but uncharged) offense of attempted murder," the appellant disputed relevant conduct and the court properly denied him credit for acceptance of responsibility. The court opined in a footnote that the only way a defendant could challenge the "application of a cross reference without jeopardizing a reduction for acceptance" would be to "admit to conduct underlying a cross reference, but dispute [] its legal significance." *Id.* at n. 4.[18]

Such a result flies in the face of fundamental principles of due process. Relevant conduct already raises due process concerns because it need only be proven by a preponderance of the evidence and without affording the defendant the protections of the Federal Rules of Evidence or the discovery provisions of the Federal Rules of Criminal Procedure. To then deprive a defendant of a reduction for acceptance of responsibility even though he pleads guilty and accepts responsibility for the offense of conviction, but contests relevant conduct, undermines the core components of our system of justice, promotes disrespect for the law, and leads to unfairly higher sentences. Preservation of the adversarial system demands, at a minimum, that a

[18] *Burns* is just one of many examples of the manner in which the commentary in §3E1.1 works to penalize a defendant for challenging relevant conduct. *See, e.g.*, *United States v. Delarosa*, 539 F. App'x 625 (5th Cir. 2013) (defendant objected to the presentence report's inclusion of a 4-level enhancement under §2K21.1(b)(6) (possession of firearm with "knowledge, intent, or reason to believe that it would be transported out of the United States") and district court denied the defendant acceptance of responsibility because he declined during the presentence interview to answer questions about the destination of firearms and the surveillance video showed that the defendant either "knew or should have known that the firearms were destined to Mexico"); *United States v. Villicana*, 539 F. App'x 524, 527 (5th Cir. 2013) (defendant who merely contested reliability of information presented in presentence report on drug quantity amounts was denied acceptance of responsibility); *United States v. Reed*, 13 F. App'x 762, 765 (10th Cir. 2001) (defendant who originally objected to five-level increase for relevant conduct, but then withdrew objection, denied acceptance of responsibility because his objection created "unnecessary work for the court and government").

defendant be afforded the opportunity to object to a presentence report's recommendation on relevant conduct without risking an increased sentence.

Because relevant conduct is often a driving force behind lengthy sentences, the Commission should encourage fair adversarial hearings on the scope of the defendant's accountability for the acts of others. The current commentary, however, has a chilling effect on the defendant's exercise of a right to point out the flaws in the reliability or veracity of the government's "evidence," which may be nothing more than a hearsay statement in a presentence report.[19] To ensure a more fair process and greater accuracy in the use of relevant conduct, the Commission should remove the commentary in §3E1.1 and require only that the defendant admit to the conduct to which he plead guilty or was convicted.[20]

IV. Increase the Range of Adjustments Available for Mitigating Role.

In the past several years, the Commission has taken small steps to ameliorate the harsh effects of the drug quantity table, but because the framework still relies heavily on drug quantity it "leave[s] low-level offenders facing prison terms suitable for a drug boss." *United States v. Diaz*, 2013 WL 322243, *7 (E.D.N.Y. 2013). The loss table for economic crimes suffers the same flaws, leaving persons who play lesser roles in such crimes subject to the same penalties as many others who play greater roles. To help address this unwarranted disparity and disproportionality, the Commission should provide a wider range of adjustments for mitigating role under §3B1.2,[21] lower the offense level caps in §2D1.1, and add an offense level cap in §2B1.1.

Our suggestion for the Commission to provide for a wider range of adjustments under the mitigating role guideline mirrors the views of almost half the judges surveyed in 2010 who believed that the "range of adjustments based on role in the offense should be increased (i.e. allow adjustments for role in the offense greater than 4 levels)"[22] Providing for greater than a 4-level reduction would also respond to judicial feedback about the adequacy of the 4-level

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[19] *See, e.g., United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (court properly relied upon hearsay statements in presentence report to enhance defendant's sentence and deny reduction for acceptance of responsibility).

[20] Removing the commentary would not leave the court without a means for punishing a defendant who goes so far as to suborn perjury or provide materially false information. In such cases, the sentence may be increased for obstruction of justice under §3C1.1, or the person appropriately prosecuted.

[21] This could be done by retaining the current 2, 3, and 4 level adjustments, but then adding several adjustments greater than 4 levels.

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

minimal participant reduction. In FY 2013, nearly one-third of the persons convicted of drug trafficking who received a reduction for minimal role also received a non-government sponsored below range sentence.[23] Accordingly, both the survey data and available statistics provide sound support for a wider range of role reductions.

A wider range of mitigating role adjustments would also encourage courts to more closely examine the role the individual played in the drug offense and to better differentiate among the various roles. In FY 2014, few persons sentenced under USSG Chapter Two, part D received any role adjustment: 19.2% received a mitigating role adjustment; 7.1% received an aggravating role adjustment; and 73.8% received no role adjustment. These are startling figures given the wide range of roles that exist in drug trafficking and the failure of drug quantity to bear any close relationship to the "offender's function in the offense."[24] When the Commission undertook its special coding project of "offender function" in 2010, it assigned each person to one of 21 separate functions: importer/high-level supplier; organizer/leader; grower/manufacturer; financier/money launderer; aircraft pilot/vessel captain; wholesaler; manager; bodyguard/strongman/debt collector; chemist/cook/chemical supplier; supervisor; street-level dealer; broker/steerer/go-between; courier; mule; renter/storer; money runner; off-loader/loader; gopher/lookout/deckhand/worker/employee; enabler; user; other; missing/indeterminable. [25] The Commission could take a small step to better capture the level of individual culpability represented by these various roles and begin to alleviate the unwarranted disparity from treating dissimilarly situated defendants the same, by increasing the range of adjustments available for mitigating role.

In addition to widening the range of adjustments available for mitigating role, the super minimal role adjustment of six levels at §2D1.1(b)(16) should be increased and the criteria for eligibility expanded. As it stands now, it benefits few defendants. In FY 2013, the super minimal role adjustment applied to 41 people or .2% of persons sentenced under §2D1.1.[26]

The existence of the role cap in §2D1.1 does not justify ignoring the failure of the guidelines to adequately capture the various roles in drug trafficking offenses. The role cap is only available for defendants whose drug quantity calculations come in at the upper end of the table. It helps only a few defendants. In FY2014, roughly 1% of persons sentenced under

[23] USSC, FY2013 Monitoring Dataset.

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

[25] *Id*. at 165, App. H, Tbl. H-1.

[26] USSC, *Use of Guidelines and Specific Offense Characteristics: Offender Based, FY2013*, at 28.

§2D1.1 qualified for the role cap.[27] As Judge Gleeson has observed: "like safety valve relief, the cap does little to significantly lower a qualifying defendant's sentencing range below the mandatory minimum."[28] The cap can go no lower than offense level 30, which is a range of 97-121 months for a person with no criminal history. And for those whose base offense level is greater than 32, but who qualify for a 4-level minimal participant reduction, the cap goes no lower than 32, which corresponds to a range of 121-151 months. For a person with no prior criminal history who plays a minor or minimal role in a drug transaction that happens to involve a large quantity of drugs – e.g., by introducing one person to another or dropping a friend off at a stash house – a 7 to 12½ year sentence is a sizable amount of time that can easily destroy the person's family, employment, and other opportunities.

Like the drug guidelines, the economic crime guidelines rely heavily on quantity (in the form of monetary loss), but unlike the drug guideline, §2B1.1 contains no role cap. A person performing a very low level function in an economic crimes case – such as delivering packages – may be subject to a high loss amount as a result of the relevant conduct rules, but receive no meaningful relief from a severe sentence. This problem can be remedied with an appropriate role cap in §2B1.1.

We have previously suggested the following change to §2B1.1 and again encourage the Commission to prioritize the issue:

- Impose an offense level cap of 10 and encourage courts to consider alternatives to incarceration for individuals within Criminal History Category I, where mitigating circumstances exist. Common mitigating factors include (but are not limited to):
    - Mitigating role (with suggested revisions to §3B1.2);
    - Defendant received little personal gain relative to loss;
    - Defendant's motive was to retain a job and/or defendant gained nothing other than a salary;
    - Defendant committed the offense to supplement a meager income and/or to meet basic needs;
    - Defendant did not actively participate in fraudulent misrepresentations;
    - Defendant began with good intentions, such as a real investment plan, or an intent to repay the loan;

[27] USSC, FY2014 Monitoring Dataset.

[28] *United States v. Diaz*, 2013 WL 322243, *7 (E.D.N.Y. 2013).

- Defendant's conduct was anomalous, and followed a stressful life event;
- Defendant's conduct was due to mental health problems and/or addiction;
- Defendant was coerced or under duress;
- External factors, such as market forces significantly increased loss;
- Victim was negligent or otherwise significantly contributed to the loss amount;
- Defendant has taken steps to mitigate the harm and/or has stopped participating in the offense;
- Intended loss greatly exceeds actual loss
- Defendant's conduct was so obviously fraudulent, no one would have seriously considered it real, and/or the intended loss would have been impossible to obtain

- Specify in Application Note 19(C) that, whether or not the defendant qualifies for the offense level cap, mitigating factors like those listed for the cap, may warrant a downward departure.

V. Recommend More Alternatives to Incarceration by Either Eliminating or at Least Expanding the Zones in the Sentencing Table and Amending Chapter 5 to Encourage the Use of Non-Prison Sentences.

As Deputy Attorney General Sally Yates recently stated: "It is simply not sustainable for us to continue at the present rates that we are now of our incarceration levels."[29] This is because the federal government "spends $7 billion a year to incarcerate about 200,000 inmates," which is money that "could pay for more FBI agents and local police."[30] While mandatory minimum sentences play a significant role in prison overcrowding and the costs of incarceration, other sentencing policies do so as well. Among them is the guidelines sentencing table that calls for a period of imprisonment for a sizable number of cases regardless of whether the offense is "nonviolent" or the individual sentenced has no or a limited criminal history.

[29] Carrie Johnson, *No. 2 at Justice Warns Growing Prison Budget Detracts from Public Safety*, National Public Radio (June 1, 2015), http://www.npr.org/2015/06/01/411119414/no-2-at-justice-warns-growing-prison-budget-detracts-from-public-safety.

[30] *Id.*

By eliminating, or at least expanding the zones, in the Sentencing Table to call for more alternatives to incarceration, the Commission could take significant steps to reduce the number of people being sent to prison and protect public safety at the same time. For years, the Commission has been aware of research that shows how community-based sanctions are effective crime control strategies that can meet the purposes of sentencing.[31] To reflect those advances in knowledge, the Commission should amend the guidelines to encourage greater use of community-based sanctions and affirmatively acknowledge that the restrictions that conditions of supervision place upon a person's liberty interests are substantial and punitive.[32] We favor elimination of the zones altogether because a "one-size-fits-all" approach to sentencing cannot possibly satisfy all the purposes of sentencing, particularly the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(1)(D). If the Commission rejects that idea, a simple first step would be to expand Zone C or collapse Zones B and C so that the guidelines recommend community and home confinement for more persons.

The cost-savings of sending less people to prison would be significant. The average cost of incarceration for a federal inmate in FY 2013 was $29,291.62.[33] In contrast, it cost on average $26,612.76 to confine a person in a Residential Re-entry Center and $3,162.03 for supervision by a probation officer. In FY 2014, the cost of imprisonment grew even larger. The average cost of incarceration was over $30,000 per inmate per year ($30,619.85) and the average annual cost to confine a person in a Residential Re-entry Center was $28,999.25.[34]

Should the Commission be interested in expanding the availability of alternatives to incarceration, it can begin by looking at proposals that have been made over the years. In addition to past recommendations of the Judicial Conference, the Commission should consider

[31] *See, e.g.*, USSC, *Symposium on Alternatives to Incarceration* (2008); USSC, Transcripts of Regional Public Hearings, 2009-2010.

[32] *Gall v. United States*, 128 S. Ct. 586, 595-6 (2007).

[33] Memorandum of Matthew Rowland, *Costs of Incarceration and Supervision*, June 24, 2014, http://jnet.ao.dcn/court-services/probation-pretrial-services/cost-incarceration-and-supervision-7.

[34] BOP, *Annual Determination of Average Cost of Incarceration* (Mar. 2015), www.federalregister.gov/articles/2015/03/09/2015-05437/annual-determination-of-average-cost-of-incarceration.

the suggestions Defenders submitted in 2009.[35] The Commission could also consider the proposal set forth by the American Bar Association to increase the use of alternatives.[36]

The available data show that Commission recommendations on the use of alternatives matters to judges, and thus amendments calling for greater use of alternatives would likely have an effect on sentences imposed. The data reported in Table 16 of the Sourcebook may leave someone with a misimpression about judicial interest in alternatives even where the Commission recommends their use. For example, Table 16 shows that only 29.7% of defendants in Zone A were sentenced to a probation only sentence.[37] If, however, non-citizens, resident aliens, and persons sentenced to time-served are removed from the query, a much larger proportion – 69.4% – are sentenced to probation only.[38] And as the table below shows, a significant number of U.S. Citizens in each zone received probation only or probation with a condition of community confinement.

Type of Sentence Imposed on Persons Sentenced in Each Zone
(Excluding Non-Citizens, Resident Aliens, and those sentenced to time-served)[39]

Sentencing Zone	TOTAL	Prison Only	Prison/Community Split Sentence	Probation and Community Confinement	Probation Only
A	2079	25.1% (522)	1.1% (22)	4.4% (92)	69.4% (1443)
B	2579	40.4% (1042)	8.8% (226)	24.4% (628)	26.5% (683)
C	3215	45.5% (1463)	18% (578)	15.6% (500)	21% (674)
D	35756	91.4% (32697)	3.5% (1238)	2.1% (753)	3% (1068)
TOTAL	43629	81.9% (35724)	4.7% (2064)	4.5% (1973)	8.9% (3868)

[35] *See* Statement of Margy Meyers, Incoming Chair, Federal Defender Sentencing Guidelines Committee and Marianne Mariano, Federal Public Defender for the Western District of New York, at 1-39 (Mar. 17, 2010).

[36] J.P. Hanlon, et al., American Bar Ass'n, *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, 24 Crim. Just. 26 (2010).

[37] USSC, *FY2014 Sourcebook of Federal Sentencing Statistics*, Tbl. 16.

[38] USSC, FY2014 Monitoring Dataset.

[39] USSC, FY2014 Monitoring Dataset.

VI. Revise USSG §1B1.13 Regarding Compassionate Release and Other Reductions.

Congress directed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction," 28 U.S.C. § 994(t), pursuant to the compassionate release provisions of 18 U.S.C. § 3582(c)(1)(A). The Commission should revise §1B1.13 to encourage humane sentencing outcomes. Although BOP changed its compassionate release policy in 2013 so that inmates aged 65 or over could be eligible for release for medical and nonmedical reasons,[40] since then, under the nonmedical provisions, only two incarcerated persons have been released. The revised provisions require that, initially the inmate be age 65 or older and have served the greater of 10 years or 75 percent of the sentence, and then that the balance of thirteen other factors favors release.[41] A recent report from the Justice Department's Office of the Inspector General recommends that the BOP revise the eligibility requirements. Among the recommendations is that the age of eligibility be lowered from 65 to 50, and that BOP consider eliminating the ten year minimum time served requirement. Relevant findings in the study show the need for a policy that permits more aging and ill inmates to be released into the community:

- "[I]nmates age 50 and older were the fastest growing segments of [the BOP] inmate population, increasing 25 percent" from FY 2009 to FY 2013.[42]

- "Aging inmates on average cost 8 percent more per inmate to incarcerate than inmates age 49 and younger."[43] "[T]his cost differential is driven by increased medical needs, including the cost of medication, for aging inmates."[44]

- BOP is not equipped to handle the aging inmate population because it "lack[s] appropriate staffing levels" and "provide[s] limited training for" helping aging inmates.[45] Indeed, institutional staff is not even responsible for ensuring that persons confined

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[40] BOP, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g), Program Statement 5050.49* (2013).

[41] U.S. Dep't of Justice, Office of the Insp. General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 42-44 (2015).

[42] *Id.* at i.

[43] *Id.*

[44] *Id.* at ii.

[45] *Id.*

within prison can carry on activities of daily living, including dressing, toileting, and moving around.[46] Because of crowding, lower bunk spaces and handicap accessible cells are limited and the design of prison facilities makes it difficult, if not impossible, for some older inmates to move around.[47]

- BOP medical care is inadequate because of limited medical staff and not enough individuals to transport patients to see medical specialists.[48]

- BOP offers no special programs for older inmates and does not address their unique reentry needs, including finding health care providers, collecting Social Security benefits, and finding assisted living communities.[49]

- Older inmates commit fewer infractions and are less likely to be rearrested upon release. Just 15 percent of aging inmates were arrested for a new crime within three years of release, compared to 41 percent for all federal inmates.[50]

The evidence is compelling that there is a growing need for increased use of compassionate release. We strongly urge the Commission to address this important issue this year.

In addition to increasing the availability of compassionate release for aging and ill inmates, the Commission also should consider amending §1B1.13 to encourage BOP to seek a sentence reduction for a person who would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive. Such a provision would include inmates sentenced before the Fair Sentencing Act and who did not get the full relief of the Act under the retroactive amendment to the drug guidelines.

VII. Support a Defender Ex Officio and Revise the Commission's Internal Protocols so that Federal Defenders Can Fulfill the Statutory Mandate to Assess the Work of the Commission.

Last year, Defenders asked that the Commission both support the addition of a Defender ex officio member of the Commission, and give Federal Defenders a seat at the table during the

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at iii.

Commission's internal working sessions and the same access to information the Commission gives the Department of Justice's ex officio member.[51] In support of these requests, we cited numerous provisions in the Sentencing Reform Act that would permit Defenders and the Commission to work together more closely. In response, the Commission stated that it "has long abstained from taking a position on its membership," expressed concern that allowing Defenders to have "ex parte communications with the Commission during the amendment cycle would not be consistent with recognized best practices for rule-making agencies" and suggested that communications during the amendment cycle be limited to working with "staff during the fact-gathering stage."[52] Here, we briefly respond to those points.

First, good reasons exist for the current Commission to break with the past and take an affirmative and inclusive position on adding a Defender ex officio member of the Commission. Bipartisan efforts at sentencing reform are the new norm. Previous Commissions that abstained from a position on including a Defender ex officio, focused on abiding by the demands of Congress and the Department of Justice to be tough on crime. We are now in a new age where the focus has shifted to being smart on criminal justice policy. For the Commission to be smart about sentencing policy, it needs a Defender voice. Without one, the Commission deprives itself of valuable information that only Defenders can bring to the table. The continued imbalance on the Commission also perpetuates the appearance of unfairness, leading to a lack of credibility, and fostering an image of Commission as unduly influenced by a single stakeholder – the Department of Justice.

Second, the Commission's reliance on the best practices of rule-making agencies is misplaced. Many executive agencies engage in ex parte communications with stakeholders outside the notice and comment period. In fact, an executive order expressly encourages agencies to communicate with stakeholders before issuing a notice of proposed rulemaking.[53]

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[51] Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent'g Comm'n (Dec. 2014).

[52] Letter from the Honorable Patti B. Saris, U.S. Sent'g Comm'n, to Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee (Feb. 2015).

[53] Executive Order 13563, section 2(c), 76 Fed. Reg. 3821, 3822, (Jan. 18, 2011) ("Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking."). If the Commission wanted to follow the best-practices of executive agencies engaged in informal rulemaking, it would seek the views of Defenders on proposed amendments rather than simply gather facts from Defenders before the notice and comment period as suggested in the Chair's February letter. In this way, the Commission could refine its proposed amendments and issues for comment before publication.

But even if such communications were discouraged, Congress expressly authorized Defenders to have ex parte communications with the Commission when it directed Defenders to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission *whenever* they believe such communication would be useful." 28 U.S.C. § 944(o) (emphasis added). Congress also directed Defenders to "assess[] the work of the Commission." *Id*. These provisions go hand-in-hand. For Defenders to "assess[] the work of the Commission," we need to ask questions about the Commission's work. To ask intelligent questions and meaningfully assess the work of the Commission, Defenders need to understand what the Commission is doing. By keeping Defenders in the dark about much of the Commission's work (e.g., special coding projects, staff memos on possible proposals, and the subject matter of internal Commission meetings), and not answering basic questions about what the Commission is contemplating, the Commission hinders our ability to assess its work. The Commission's concern about ex parte communications also ignores its own mandate: "In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 18 U.S.C. § 994(o).

Accordingly, we encourage the Commission to affirmatively support a Defender ex officio member of the Commission and to open communication and information sharing so that Defenders can better fulfill the statutory mandate in 29 U.S.C. 994(o).

VIII. Conclusion

We remain hopeful that the Commission will closely examine our comments, place these issues on its priorities list, support a Defender ex officio member, and open up communications with Defenders. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

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

If the Commission is interested in following the "best practices" of executive agency rulemaking it could follow the practices outlined in the Government in the Sunshine Act of 1976, 5 U.S.C. § 552b, which generally requires agencies to have "every portion of every meeting . . . open to public observation." 5 U.S.C. § 552b(b).

Cc: Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel E. Barkow, Commissioner
Hon. William H. Pryor, Commissioner
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel