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October 10, 2017

Honorable William H. Pryor, Jr.
Acting 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 2017 Holdover Amendments

Dear Judge Pryor:

Defenders are pleased to provide comments on the proposed 2017 holdover amendments. Because many of these proposed amendments are similar to those the Commission proposed during the 2017 amendment cycle, Defender comments below are similar to those we submitted in February 2017,[1] but also include some updated information.

I. Proposed Amendment #1: Bipartisan Budget Act

The Commission proposes amending the guidelines to address changes made by the Bipartisan Budget Act of 2015 to three existing statutes[2] addressing fraudulent claims under certain Social Security programs. Defenders have no objection to the Commission's proposal in Part A to respond to the addition of new conspiracy prohibitions by amending Appendix A to reference the three statutory provisions to §2X1.1 in addition to §2B1.1. Defenders, however, oppose the Commission's proposal in Part B to respond to a new 10-year statutory maximum sentence for a subgroup of people convicted of violating these three statutes by adding yet another specific offense characteristic to the already unwieldy §2B1.1 guideline. The current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to guide courts toward sufficiently (and

[1] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Feb. 20, 2017) (*Meyers Letter Feb. 2017*) (commenting on proposed amendments for 2017).

[2] 42 U.S.C. §§ 408, 1011, & 1383a.

often unduly) severe penalties for a broad range of offenses, including those addressed in the Act. [3]

No evidence shows that the current guidelines are inadequate to guide courts on appropriate punishments for the subgroup of people who are convicted under these three statutes and subject to the new 10-year statutory maximum.[4] First, in the past decade, no one has even been convicted of violating 42 U.S.C. § 1011.[5] Second, neither the government nor sentencing courts have indicated that the guidelines are too low in cases prosecuted under 42 U.S.C. §§ 408 or 1383a. In the last three years almost 60% of the 703 defendants sentenced for a conviction under 42 U.S.C. § 408 received sentences within the guideline recommended range, with only 1.6% of defendants sentenced above the guideline recommended range.[6] Similarly, of the 96 defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1 in the last three years, 39.6% received sentences within the guideline recommended range and only 2.2% received a sentence above the guideline recommended range.[7]

The proposed amendment would add the 20th specific offense characteristic to §2B1.1. It would add unnecessary complexity to a guideline that already covers more than 5 pages, with more than a dozen pages of commentary full of complicated rules for calculating loss and applying the current 19 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and can require lengthy sentencing hearings. The proposed

[3] The Commission first addressed this Act in its proposed amendments for 2016, by proposing simply amending Appendix A to reference §2X1.1 in addition to §2B1.1. 81 Fed. Reg. 2295, 2299. The Commission did not propose adding a new specific offense characteristic or any other changes to Chapters Two or Three of the guidelines manual. *Id.* Following comment by members of Congress, the Justice Department and the Inspector General of the Social Security Administration, the Commission deferred action on the Act. *See* Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Washington, D.C., Apr. 15, 2016.

[4] The Bipartisan Budget Act of 2015 increased the maximum penalties under 42 U.S.C. §§ 408, 1011, and 1383a for certain persons: "a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination."

[5] USSC, *FY 2007-2016 Monitoring Dataset.*

[6] USSC, *FY 2014-2016 Monitoring Dataset*.

[7] *Id.*

amendment is a paradigm example of "factor creep,"[8] and is not necessary given the range of sentences already provided for in §2B1.1 combined with the adjustments in Chapter Three.

If the Commission is not convinced that the current guidelines provide adequate guidance on sentences for certain people under these three statutes, a better solution is the one the Commission identifies in the issues for comment: "provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply."[9] The Commission took a similar approach in §2D1.1, comment. (n.23), describing situations where §3B1.3 "ordinarily would apply." This invitation to use existing portions of the guidelines manual in certain cases is simpler than a new specific offense characteristic with set enhancement levels and floors. It also better accommodates the wide range of defendants who may fall under the new statutory maximum, from physicians who were instrumental in the fraud to translators who may have been paid a small fee for limited services.

If, despite these reasons against it, the Commission persists in its proposal to add the 20th specific offense characteristic to §2B1.1, Defenders urge the Commission to: (a) limit the enhancement to two levels without a floor; (b) specify that §3B1.3 does not apply; and (c) require, as proposed, that the defendant be convicted of one of the three statutory provisions identified in the Act and the statutory maximum term of ten years' imprisonment applies.[10]

(a.) Limit the enhancement to two levels without a floor. A two-level enhancement is more than adequate to address the offenses identified in the Act. Previously, the Department of Justice asked why the Commission was not recommending an enhancement "similar" to the two-level enhancement for Federal health care offenses at §2B1.1(7).[11] That 2-level enhancement applies only to Federal health care offenses with large loss amounts, between $1-7 million.[12] The current

[8] R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001) ("In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.").

[9] 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017).

[10] The Commission's proposed amendments include several bracketed items, including whether the enhancement should be 2 or 4 levels, whether the floor should be 12 or 14, and whether the commentary should advise courts not to apply §3B1.3 or indicate that courts are "not preclude[d]" from applying §3B1.3. 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017).

[11] Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 37 (Mar. 14, 2016).

[12] *See* §2B1.1(b)(7).

proposed amendment would apply to all convictions subject to the 10-year statutory maximum, regardless of the scale of the offense.

The proposed floors would result in guideline-recommended sentences that are disproportionately high for these non-violent offenses. Even the lower of the two bracketed floor options—12—is disproportionately high to other guideline-recommended sentences. For example, §2A2.3 provides an offense level of 7 for an assault where physical contact is made, or use of a dangerous weapon is threatened. The offense level is 9 for assault where the victim sustained bodily injury. §2A2.3(b). And 12 is the same offense level that applies to someone who has obstructed an officer where the victim sustained bodily injury. §2A2.4. A floor also fails to acknowledge the wide range of defendants—and degrees of culpability—that fall within the subgroup of people identified in the Act. A better solution is to let the current guidelines do their work. And, if a court determines in a particular case that the guideline recommended offense level understates the seriousness of the offense, the court is free to depart under §2B1.1, comment. (n.20(A)).

(b.) Specify §3B1.3 does not apply. Where a factor addressed in a Chapter Two enhancement significantly overlaps with a factor addressed in a Chapter Three adjustment, the guidelines routinely advise against double counting by specifying not to apply both.[13] Because the new proposed specific offense characteristic would significantly overlap with the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill), if the Commission adopts the proposed 20th specific offense characteristic, it should advise against double counting by specifying that if the enhancement applies, do not apply §3B1.3.

(c.) Require that the defendant was convicted under the statutes identified in the Act, and that the statutory maximum of ten years' imprisonment applies. The Commission's conviction-based approach to the proposed enhancement (enhancement applies when defendant was convicted under § 408(a), § 1011(a) or § 1383(a), and the statutory maximum term of ten years' imprisonment applies) is better than the relevant-conduct-based approach identified in the Issues for Comment (enhancement applies based on conduct described in the statutes). As Defenders have indicated in the past, sentencing based on relevant conduct presents numerous

[13] *See, e.g.*, §2A3.1, comment. (n.3(B)) ("do not apply §3B1.3 (Abuse of Position of Trust of Use of Special Skill)" if related Chapter Two enhancement applies); §2A3.2, comment. (n.2(B)) (same); §2A3.4, comment. (n.4(B)) (same); §2B1.1, comment. (n.7) (same); §2B1.1, comment. (n.15) (same); §2G1.3, comment. (n.2(B)) (same); §2G2.6, comment. (n.2(B)) (same). The guidelines take a similar approach with other Chapter Three adjustments that overlap with Chapter Two enhancements. *See, e.g.*, §2G2.1, comment. (n.4) ("If subsection (b)(4)(B) applies, do not apply §3A1.1(b)."); §2G2.2, comment. (n.4) (same); §2K2.6, comment. (n.2) ("If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence)."); §2L1.1. comment. (n.5) ("If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).").

problems.[14] It provides prosecutors with "indecent power,"[15] and contributes to unwarranted disparity, undue severity, and disrespect for the law. Defenders oppose expanding the use of relevant conduct here.

II. Proposed Amendment #2: Tribal Issues

Defenders commend the Commission for convening the Tribal Issues Advisory Group (TIAG) and for proposing amendments based on some of the recommendations in the TIAG's 2016 Report. In addition to supporting the proposed amendments, Defenders encourage the Commission to consider amendments responsive to the TIAG's recommendation that the guidelines make changes to better address young people who are prosecuted in federal court. Federal jurisdiction over Indian young people presents important issues and is too frequently overlooked.[16] We encourage the Commission to follow the recommendations of TIAG to both amend §5H1.1 (Age), and add a departure to Chapter 5, Part K "concerning juvenile and youthful offenders."[17]

A. Tribal Court Convictions

In response to the TIAG's recommendations, the Commission proposes amending the Commentary to §4A1.3 to add a non-exhaustive list of factors courts may consider when deciding "whether, or to what extent, an upward departure based on a tribal court conviction is appropriate." Defenders support the proposed amendment as a good effort to resolve a complicated situation. While we continue to have concerns about the practices in sentencing Native defendants in federal court, at this point, the TIAG recommendation seems like a workable approach.

In response to the Commission's issues for comment about how the proposed factors should interact with one another, Defenders support the TIAG's recommended approach. Due to the complex issues involved in considering tribal convictions for purposes of federal sentencing,

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[14] *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-31 (May 17, 2013).

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

[16] *See, e.g.*, Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. Rev. 37 (2011) ("Historically, the federal juvenile population has been predominantly Native American males. A 2000 study found that seventy-nine percent of all juveniles in federal custody are Native American."); Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: A Report to the President and Congress of the United States* 157 (Nov. 2013) ("Between 1999-2008, for example, 43-60 percent of juveniles held in Federal custody were American Indian.").

[17] USSC, *Report of the Tribal Issues Advisory Group* 1, 33-34 (May 16, 2016).

including the wide variety of practices among the hundreds of different tribes across the country, we support the TIAG's recommendations that the factors identified in the departure commentary be non-exhaustive, and that no one factor be weighted more heavily than any other.

Finally, in response to the request for comment on whether the Commission should amend §4A1.2(i), Defenders emphatically answer, "no." Consistent with the TIAG,[18] Defenders oppose, as we have since the inception of the guidelines, counting tribal convictions in the criminal history calculation.[19]

B. Court Protection Orders

Also in response to the TIAG's recommendations, the Commission proposes amending §1B1.1 to define "court protection order," to mean "'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)." Defenders support this proposed amendment.

III. Proposed Amendment #3: First Offenders / Alternatives to Incarceration

Defenders are pleased that the Commission proposes amending the guidelines to encourage alternatives to incarceration for "first offenders" and consolidating Zones B and C of the Sentencing Table so that the guidelines recommend probationary sentences for a few more individuals. We discuss the proposed amendments below. We also offer suggestions for additional changes to further encourage alternatives to incarceration that will meet the purposes of sentencing better than imprisonment-only sentences. Our comments are summarized here:

- The Commission proposed two options for defining "first offender." Defenders support Option 1, which defines "first offender" as a person who "did not receive any criminal history points from Chapter Four, Part A." This definition is fair and simple to apply.

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[18] *Id.* at 12 ("The TIAG recommends that tribal convictions not be counted under U.S.S.G. §4A1.2."); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28-29 (Judge Lange) ("it was unanimous among the five federal judges [on the TIAG] that [tribal convictions] ought not to be automatically counted"); *id*. at 27 (Judge Erickson) ("amongst the majority there was a concern that if we just said all tribal convictions should score … it would exacerbate the disparity that already exists in Indian country sentencing). *See also* USSC, *Report of the Native American Advisory Group* 13 (Nov. 4, 2003) (declining to recommend counting tribal convictions in the criminal history score and reporting that "discussion among the Ad Hoc Advisory Group members revealed that there was some concern that such an amendment would raise significant constitutional and logistical problems").

[19] *See* Summary of Testimony of Tova Indritz, Federal Public Defender for the District of New Mexico Before the U.S. Sentencing Comm'n, Denver, Colo. 9-10 (Nov. 5, 1986) (urging the Commission not to count tribal court convictions). *See also*, Jon M. Sands & Jane L. McClellan, *Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 Fed. Sent'g Rep. 215 (2005) (opposing the counting of tribal sentences in defendants' criminal history); Creel, *supra* note 67, at 39 (opposing counting tribal court convictions in federal sentencing).

Option 2, on the other hand, creates several problems, by too narrowly defining "first offender" as limited to those with "no prior conviction of any kind."

- The Commission proposed two options for a decrease in offense level for a "first offender." Defenders believe Option 2, which would call for a 2-level decrease if the final offense level is less than 16 and a 1-level decrease if the final offense level is 16 or greater, rather than Option 1, which calls only for a 1-level decrease across all final offense levels, is more likely to encourage alternatives to incarceration. We also suggest that the Commission adopt a 3-level reduction for "first offenders" with final offense levels of 16 or less and a 2-level reduction for "first offenders" with offense levels greater than 16. The Commission also should include an invited downward departure for nonviolent "first offenders" (e.g., drug trafficking and fraud) who fall within Zones C or D to better encourage courts to consider the need for the sentence imposed to provide the defendant with the most effective correctional treatment.[20]

- Defenders support the proposed application note to §5C1.1 (Imposition of a Term of Imprisonment), which provides for a rebuttable presumption of probation for certain "first offenders," as a way to encourage alternatives to incarceration. Of the two options for exclusion [instant offense of conviction is not a crime of violence] [the defendant did not use violent or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], Defenders prefer the first option. An even better solution is to exclude from the presumption of probation only those "first offenders" whose instant offense of conviction resulted in serious bodily injury or whose offense involved substantial harm to the victim.

A. Alternatives to Incarceration are an Important Mechanism to Promote Public Safety and Meet the Purposes of Sentencing.

Encouraging alternatives to incarceration for "first offenders" and other individuals who need not be incapacitated to protect the public is a critically important goal of the guidelines. Research shows a "weak relationship between incarceration and crime reduction, and highlights proven strategies for improving public safety that are more effective and less expensive than incarceration."[21] The best way to promote public safety and ensure that convicted persons can lead law-abiding lives is through broad use of non-incarceration sentences, especially since "incarceration does little to change a person's behavior" and persons sentenced to prison have

[20] 18 U.S.C. § 3553(a)(2)(D).

[21] Vera Institute of Justice, *Overview of The Prison Paradox: More Incarceration Will Not Make Us Safer* (July 2017), https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer.

higher recidivism rates than those sentenced to community corrections.[22] Alternatives to incarceration are far more likely than prison to meet a person's rehabilitative needs and strengthen the communities in which they reside. A recent report from the Harvard Kennedy School and the National Institute of Justice notes that a conviction, combined with a prison sentence, has devastating collateral consequences.[23] Such consequences include the loss of employment prospects, an increased likelihood of health problems, increased poverty rates and behavioral problems for children of incarcerated parents, and increased racial disparities.[24]

Probation, when compared to imprisonment, is perceived by a majority of the public as a more effective punishment.[25] As a result, more alternatives to incarceration will promote greater respect for the law.

Encouraging greater use of alternatives to incarceration also will help fulfill the Commission's obligation to formulate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[26] Despite the decline in the federal prison population over the past few years, BOP is still overcrowded (14% with a projected FY 2018 increase of 2%) and understaffed. The current inmate to staff ratio is 4.1-to-1.[27] In

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[22] Nat'l Inst. of Corrs., *Myths & Facts - Why Incarceration Is Not the Best Way to Keep Communities Safe* 1, 4 (2016), https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf.

[23] Wendy Still et al., *Building Trust and Legitimacy Within Community Corrections*, Harvard Kennedy School and Nat'l Inst. of Just. 13-18 (2016), https://www.hks.harvard.edu/content/download/82224/1844712/version/2/file/building_trust_and_legitimacy_within_community_corrections_rev_final_20161208.pdf.

[24] *Id*.

[25] *See, e.g.*, *Myths and Facts, supra* note 22 , at 8. (discussing research, which shows that the "majority of the American public favors alternatives to incarceration"); Pew Charitable Trusts, *State Reforms Reverse Decades of Incarceration Growth* 11 (2017) (Sixty-nine percent of persons responding to bipartisan polling supported the view that "[t]here are more effective, less expensive alternatives to prison for nonviolent offenders, and expanding those alternatives is the best way to reduce the crime rate." Seventy-eight percent found it acceptable that "instead of mandatory minimums, judges have the flexibility to determine sentences based on the facts of each case."), http://www.pewtrusts.org/~/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf; Alliance for Safety and Justice, *Crime Survivors Speak: The First Ever National Survey of Victims' Views on Safety and Justice* 4 (2016) ("Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails"). https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf.

[26] 28 U.S.C. § 994(g).

[27] Federal Bureau of Prisons, *Federal Bureau of Prisons Program Fact Sheet* (Sept. 2017), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170920.pdf.

2015, then Director of the BOP, Charles Samuels, told Congress that a 4.4-to-1 ratio "negatively impacts BOP's ability to effectively supervise inmates and provide inmate programs."[28] One of the devastating consequences of prison overcrowding and lack of correctional staff is that other staff, including "teachers, psychologists, case managers, reentry coordinators, chaplains, etc., [ ] are pulled away periodically from their duties of providing offenders with programs and services."[29] To help resolve these problems and ensure that individuals get the services they need to lead a productive life, the Commission should maximize the use of alternatives to incarceration.

Greater use of alternatives to incarceration are also consistent with the Commission's statutory mandate to construct guidelines aimed at meeting all the purposes of sentencing,[30] including meeting the rehabilitative needs of the defendant through means other than a sentence of imprisonment,[31] and that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[32]

Since the passage of the Sentencing Reform Act, substantial evidence has emerged about human behavior as it relates to the criminal justice process and the purposes of sentencing. For several years, U.S. Probation has "expanded its training programs pertaining to evidence-based supervision practices."[33] In addition to using actuarial risk assessment instruments to help determine appropriate levels of supervision and assess a person's rehabilitative needs, many probation officers are now using STARR (Staff Training Aimed at Reducing Re-Arrest) skills. "STARR skills include specific strategies for active listening; role clarification; effective use of authority, disapproval, reinforcement, and punishment; problem solving; and teaching, applying, and reviewing the cognitive model."[34] A study published in December 2015 shows that "[m]easurable decreases in federal recidivism coincide with concerted efforts to bring to life

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[28] *Oversight of the Bureau of Prisons: First-Hand Accounts of Challenges Facing the Federal Prison System , Hearing before the U.S. Senate Committee on Homeland Security & Governmental Affairs*, 114th Cong. 3 (Aug. 4, 2015) (statement of Charles E. Samuels, Jr., Dir., Federal Bureau of Prisons, U.S. Dep't of Justice).

[29] *Id*. at 4.

[30] 28 U.S.C. § 994(a)(2).

[31] 28 U.S.C. § 994(k).

[32] 28 U.S.C. § 991(b)(C).

[33] Matthew Rowland, Chief, Prob. and Pretrial Services Office, Admin. Office of the U.S. Courts, *Introduction* to Laura Baber, *Inroads to Reducing Federal Recidivism*, 79 Fed. Prob. J. 3, 3 (Dec. 2015).

[34] Probation and Pretrial Services-Annual Report 2015, http://www.uscourts.gov/statistics-reports/probation-and-pretrial-services-annual-report-2015.

state-of-the-art evidence-based supervision practices into the federal system, including the development and wide-scale implementation of a dynamic risk assessment instrument, emphasis on targeting person-specific criminogenic needs and barriers to success, and training on core correctional practices."[35] As the report states: "despite the increase in risk of the federal post-conviction supervision population and several years of austere budgets, probation officers are improving their abilities to manage risk and provide rehabilitative interventions."[36]

B. First Offenders

1. Definition of First Offender

The Commission requests comment on its two proposed definitions of "first offender," and on whether any other definition is more appropriate. Defenders support Option 1, which defines "first offender" to mean someone who "did not receive any criminal history points from Chapter Four, Part A." This definition is both fair and simple to apply.[37] Option 2, limiting the definition of first offender to those with "no prior conviction of any kind," is unduly narrow, risks exacerbating racial disparity, will impact the poor, and raises due process concerns. If the Commission rejects Option 1, at minimum, it should broaden the definition in Option 2, as suggested in the Issues for Comment, to include defendants with "prior convictions that are not counted under §4A1.2 for a reason other than being too remote in time." The Commission also should include within the definition of "first offender" a defendant who has only prior juvenile adjudications or convictions for offenses committed before the age of 18.

Data on recidivism rates indicates Option 2 too narrowly defines "first offender" by excluding persons convicted of minor offenses. Although the Commission's recent data analysis did not compare the recidivism rates for individuals with no prior convictions to those with prior convictions for offenses listed in §4A1.2(c), a 2004 report of the Commission showed that individuals who had convictions under §4A1.2(c) only had a reconviction recidivism rate of 2.9%, which was substantially similar to the 2.5% rate for individuals with no prior

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[35] Laura Baber, Chief, Nat'l Program Dev. Div., Prob. and Pretrial Services, Admin. Office of the U.S. Courts, *Inroads to Reducing Federal Recidivism,* 79 Fed. Probation J. 3, 3 (Dec. 2015).

[36] *Id*. at 8.

[37] As part of its recent effort to simplify §2L1.2 (Unlawfully Entering or Remaining in the United States), the Commission opted to track the rules of Chapter Four, Part A, for purposes of measuring prior convictions. *See* §2L1.2, comment. (n.3) ("For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c)."); USSG App. C, Amend 802 (Nov. 1, 2016) (explaining the Commission is "adopt[ing] a much simpler sentence-imposed model for determining the applicability of predicate convictions").

convictions.[38] In short, the available evidence shows that public safety is not undermined by including in the definition of "first offender" individuals with these types of prior convictions.

Option 2, by depriving individuals with minor misdemeanors from the benefits of "first offender" status, would exacerbate racial disparity and impact the poor. Commission data shows that if it limits the definition of "first offender" to those with no prior conviction of any kind, fewer Black individuals than White individuals will benefit.[39] This is consistent with research by Professor Alexandra Natapoff, who has identified the numerous "systemic implications" of misdemeanor prosecutions, including how "misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal justice system (in other words, criminalized) with little or no regard for their actual guilt."[40] The history of misdemeanor prosecutions shows that they have been "social and economic governance tools" used predominantly in urban areas to "manage various disadvantaged populations."[41] Many minor offenses have significant impact on people of color and the poor. "Police use loitering, trespassing, and disorderly conduct arrests to establish their authority over young black men, particularly in high crime areas, and to confer criminal records on low-income populations of color."[42] The over-policing of poor neighborhoods of color caused by the use of "zero-tolerance" policies often results in disproportionate convictions for loitering, trespassing, and disorderly conduct.[43] In addition, driving on a suspended license, which constitutes a sizable portion of local misdemeanor dockets, is an offense that has a disproportionate impact on the poor. Such offenses criminalize poverty because suspensions often occur when a low-income person cannot afford to pay the fine for a simple traffic violation.[44]

Option 2 also raises due process concerns due to its exclusion of individuals with convictions for minor offenses. Many individuals charged with misdemeanor offenses have a greater incentive to plead guilty so they can get out of jail and often do so without defense counsel or with counsel

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[38] USSC, *Recidivism and the "First Offender": A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* 14, nn.27 & 28 (2004).

[39] USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 14 (2016).

[40] Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1313 (2012).

[41] Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, Oxford Handbooks Online 3 (2016).

[42] *Id*. at 5.

[43] *See generally* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Leg. Ethics 285, 286 (2014).

[44] Natapoff, *Criminal Misdemeanor Theory and Practice*, *supra* note 41, at 4.

that only have minutes to handle a case.[45] Consequently, the frequency of wrongful convictions for such offenses is troubling.[46]

Finally, if the Commission adopts Option 1 or broadens Option 2 as Defenders suggest above, Defenders request it also include an invited downward departure for persons who would qualify for "first offender" status but for a conviction in a jurisdiction where minor offenses listed in §4A1.2(c) carry a prison term of over 1 year. For example, a person convicted of a state offense classified as a misdemeanor and punishable by more than one year imprisonment, such as leaving the scene of an accident[47] should not be deprived of the benefit of "first offender" status merely because of the state in which he or she was convicted. The arbitrariness of how some state criminal codes have more severe punishments for minor offenses also should discourage the Commission from adopting the definition included in the issues for comment: defining "first offender" as a "defendant who did not receive any criminal history points from Chapter Four, Part A and has no prior felony convictions."

2. Offense Level Decrease for First Offenders

Of the Commission's proposed options on the offense level reduction for "first offenders," Option 2 (a 2-level decrease if the offense level is less than 16 and a 1-level decrease if the

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[45] *See generally* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL Fordham Urb. L. J. 101, 147 (2013) (discussing how "a young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind, whether he commits any criminal acts or not"); Natapoff, *Misdemeanors*, *supra* note 40, at 1348 ("bulk urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction"); Robert Boruchowitz, et al., Nat'l Assoc. of Crim. Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009); Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, Slate, Apr. 17, 2012 (discussing major consequences of misdemeanors), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Courts*, 34 Cardozo L. Rev.1751, 1754, 1803-1810 (2013) (discussing incentives for persons charged with misdemeanors to plead guilty so that they can return to their families and jobs rather than remain in jail pending a trial and elevated risk of noncitizens pleading guilty to misdemeanor offenses).

[46] *See* Natapoff, *Misdemeanors*, *supra* note 40, at 135-38, 143; *Cade*, *supra* note 45, at 1793 n.251 (discussing how pretrial detention leads to more wrongful convictions).

[47] *See* Mass. Gen. Laws Ann. ch. 90, § 24 (a 1/2) (1) (West 2017) (maximum term of imprisonment for failing to stop at a car accident is 2 years). Massachusetts has many offenses that are classified as misdemeanors, but have maximum terms of imprisonment over one year. *See* Massachusetts Sentencing Commission, *Felony and Misdemeanor Master Crime List* (*e.g.*, hazardous waste; incinerator violations; collection, transportation, or storage of hazardous waste; cheating and swindling less than $1,000; racing a motor vehicle), http://www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf.

offense level is 16 or greater) is more likely than Option 1 (a 1-level decrease no matter the offense level) to encourage the use of alternatives to incarceration. Defenders believe, however, that the Commission can go one step further by providing for a 3-level reduction in offense level for people with a final offense level of 16 or less and a 2-level reduction for individuals with a final offense level greater than 16. If the purpose of the amendment is for the guidelines to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,"[48] then that purpose would be better served if more people moved from Zone B into Zone A, and from Zone D into Zone C (or the consolidated Zones B and C if that proposed amendment is promulgated). For example, a 3-level decrease would permit a person with an offense level of 13 under Chapters 2 and 3, to move from Zone B into Zone A and have the option of a probationary sentence. Similarly, a 3-level decrease would permit a person with an offense level of 16 to move from Zone D into current Zone C or proposed Zone B. Compared to Option 2 of the Commission's proposed amendment, which would only decrease the Zones for 24.3% of "first offenders" in the FY 2014 data sample,[49] Defenders' proposal would decrease the Zone for 27.5% percent of "first offenders."

The Commission requests comment on whether it should "limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels" and if it should identify other "limitations or requirements." Defenders encourage the Commission to make the decrease in offense level available to all "first offenders" regardless of their offense level determined under Chapters Two and Three.

Making the adjustment available no matter the offense level would treat "first offenders" more fairly. The Commission's data analysis shows that a vast majority of "first offenders" fell within Zone D and have offense levels of 16 or greater. And a sizable number—46.3 percent—of "first offenders" with final offense levels of 16 or higher were convicted of drug trafficking.[50] These are precisely the people who should receive lesser sentences. As the Honorable Patti Saris, former Chair of the Commission, wrote:

> [M]ass incarceration of drug offenders has had a particularly severe impact on some communities in the past thirty years. Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in

[48] 28 U.S.C. § 994(j).

[49] USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 12.

[50] *Id*. at Slide 15.

> federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing. In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

The Honorable Patti Saris, *A Generational Shift for Federal Drug Sentences*, 52 American L. Rev. 1, 10-11 (2015).

While the Commission lowered the offense levels for many drug cases, it did not do so for all, and it has taken no steps to acknowledge the different levels of culpability and lower risk of recidivism for "first offenders." For the Commission to exclude such persons from the benefit of a reduction in offense level would serve no purpose of sentencing. First, offense level is not correlated with recidivism.[51] Second, the notion that higher offense levels serve as a general deterrent[52] has long been debunked.[53] Third, a lengthier term of imprisonment is not necessary to promote just punishment. The Supreme Court acknowledged in *Gall* that the standard conditions of probation by themselves substantially restrict a person's liberty.[54] Fourth, as previously discussed, longer terms of imprisonment do not promote rehabilitation. Fifth, the available data shows that the rise in imprisonment for federal drug offenses has resulted in high costs and low returns.[55]

If the Commission wants to make an evidence-based decision, it should lower sentences for "first offenders," no matter their final offense level, so that they do not spend much time in prison

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[51] USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* ("*Recidivism Report*") 20 (2016).

[52] The Commission's recidivism report notes that the "offense levels in the federal sentence guidelines were intended to reflect multiple purposes of punishment, including just punishment and general deterrence." *Id.* at 20.

[53] Nat'l Inst. of Justice, *Five Things About Deterrence* 1 (2016) ("The certainty of being caught is a vastly more powerful deterrent than the punishment"; "Sending an individual convicted of crime to prison isn't a very effective way to deter crime"; "Increasing the severity of punishment does little to deter crime."), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.

[54] *Gall v. United States*, 552 U.S. 38, 48-49 (2007).

[55] Letter from Adam Gelb, Director, *Public Safety Performance Project of The Pew Charitable Trusts, to the Honorable Chris Christie, President's Commission on Combating Drug Addiction and the Opioid Crisis*, at 2 (June 19, 2017), http://www.pewtrusts.org/~/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf. *See also* The PEW Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return* (2015).

learning "more effective crime strategies from each other" and getting desensitized "to the threat of future imprisonment."[56]

3. Presumption of a Non-incarceration Sentence

The Commission's proposed amendment to §5C1.1(g) suggests a presumption of probation either for a "first offender" whose "instant offense of conviction is not a crime of violence" or who did not "use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense." The latter option, which would exclude a broader range of individuals, including those who did not commit any violent act but "possess[ed] a firearm or dangerous weapon in connection with the offense," is not consistent with the congressional directive at 28 U.S.C. § 994(j), which excludes from the benefits of a probationary sentence only "first offenders" convicted of "a crime of violence or an otherwise serious offense." Merely because a person possessed a firearm or dangerous weapon "in connection with the offense" does not mean the person was convicted of an "otherwise serious offense." First, possession is broadly defined to include not only "actual possession," but "constructive possession."[57] Second, the presence of a firearm or weapon in the same place or near where an offense occurred, even if the individual does not use it in the offense, has been held sufficient to show that the weapon had a sufficient "connection to the offense."[58] For example, in a recent drug trafficking case, law enforcement officials found drugs and drug proceeds in the defendant's garage. They also found a gun stored in a different location on the premises. Although there was no evidence the defendant used a gun during trafficking, the Fifth Circuit affirmed application of the §2D1.1(b)(1) enhancement.[59]

Excluding from a presumption of probation a person who "possessed a firearm or other dangerous weapon in connection with the offense" also would exacerbate a circuit split. As the Commission is aware, a circuit split exists on whether an enhancement under §2D1.1(b)(1) ("if a dangerous weapon (including a firearm) was possessed, increase by 2 levels") precludes safety valve relief under §5C1.2(a)(2) ("the defendant did not use violence or credible threats of violence

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[56] *Five Things About Deterrence*, *supra* note 53, at 1.

[57] *Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015) ("Constructive possession is established when a person, though lacking [] physical custody, still has the power and intent to exercise control over the object").

[58] *See, e.g., United States v. Vongdeuane*, 2017 WL 3970745, *3 (D.S.C. Sept. 8, 2017) (defendant in a drug case given an enhancement for gun found in a bed underneath a pillow in the house where she resided with her husband, a coconspirator); *United States v. Grimes*, 2017 WL 3668936, *2 (11th Cir.. 2017) ("proximity between drugs and guns, without more, is sufficient to meet the government's initial burden and create the presumption of a connection between the weapon and the offense").

[59] *United States v. Carillo*, 689 Fed. App'x 334 (5th Cir. 2017).

or possess a firearm or other dangerous weapon (or induce another participant do so (in connection with the offense")).[60] Courts are also split on whether constructive possession disqualifies a defendant from safety valve relief. [61] Given the circuit split, the Commission's proposal regarding a defendant's possession of a firearm would promote disparity in application of the guideline.

And given the current Guideline definition of "crime of violence," which is not limited to an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another," and which includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses,[62] Defenders believe it better to only exclude from the presumption of probation a "first offender" convicted of an offense that resulted in serious bodily injury or whose offense involved substantial harm to the victim.

The Commission requests comment on whether it should exclude other offenses, such as white collar crimes, from the presumption of a non-incarceration sentence. Defenders strongly oppose any such exclusion. Sentences of imprisonment severely limit the defendant's ability to pay restitution, which is often ordered in white collar cases,[63]and do not achieve "penal objectives such as deterrence, rehabilitation, or retribution."[64]

Moreover, the notion that all "first offenders" convicted of white-collar offenses should not get the benefit of a presumption of probation is ill-founded. Our polling of Defenders revealed

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[60] *Compare United States v. Carillo-Ayala*, 713 F.3d 82, 89-91 (11th Cir. 2013) (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief) *with United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

[61] *See, e.g., United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (per curiam); *United States v. Matias*, 465 F.3d 169, 173-74 (5th Cir. 2006); *United States v. Herrera*, 446 F.3d 283, 287 (2d Cir. 2006); U*nited States v. Gomez*, 431 F.3d 818, 820-22 (D.C. Cir. 2005); *United States v. McLean*, 409 F.3d 492, 501 (1st Cir. 2005); *United States v. Stewart*, 306 F.3d 295, 327 n.19 (6th Cir. 2002); *Sealed Case*, 105 F.3d at 1463-65 (D.C. Cir. 1997). The Tenth Circuit, in contrast, has held that the scope of activity covered by §2D1.1(b)(1) is broader than that covered by §5C1.2, and that constructive possession does not preclude safety valve relief. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1188 (10th Cir. 2004).

[62] USSG §§4B1.2(a) & comment. (n.1).

[63] The Mandatory Victim Restitution Act applies to an offense against property, including those committed by fraud or deceit. 18 U.S.C. § 3663A. Accordingly, defendants must compensate victims for the loss suffered. In FY 2016, restitution was ordered in 68.2% of fraud cases, with an average payment of $1,431,017 and a median payment of $125,750. USSC, *2016 Sourcebook of Federal Sentencing Statistics*, tbl. 15.

[64] *United States v. Cloud*, 872 F.2d 846, 854 (9th Cir. 1989).

numerous clients who were "first offenders" who got involved in an economic crime out of desperation and efforts to support themselves or their family. They often stole to survive or were manipulated by others who took advantage of their desperate plight. They are not likely to reoffend, and for many, incarceration is a punishment greater than necessary to meet the purposes of sentencing under 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could cost society more than the original crimes because of the substantial cost of incarceration and the cost associated with removing the defendant from his or her family. Exempting persons who commit basic economic offenses sentenced under §2B1.1 would also deprive many people of color of alternatives to incarceration.[65]

Three examples from the many cases involving "first time offenders" who faced terms of imprisonment under the guidelines, but who received probationary sentences, demonstrate our point. The first case involved a 54-year-old middle-school teacher, twice divorced, who suffered trauma and physical health issues and helped take care of her older sister with a serious chronic medical illness and in need of money to help meet basic needs and pay for medical expenses. She lost her mother and grandmother within a year of each other. The Veteran's Administration's (VA) benefits that her mother received following her father's death continued to be paid into a joint account that the client held with her mother. She suffered from depression, had a period of unemployment, and failed to inform the VA of her mother's death. Approximately $1,400 a month was deposited into the account for almost 8 years, resulting in an overpayment of $142,494. She managed to repay $3,000 after the VA contacted her about the overpayments and before any criminal charges were brought.

The second case involved a 62-year-old former military member and disabled plumber who wrote bad checks and made fraudulent bank transfers mainly to benefit his girlfriend who suffered from cancer and to be able to pay off his creditors. The loss amount under the guidelines was $192,299.36, but the actual loss was $20,634.53.

The third case involved a loan processor with minor children who suffered from extensive physical and sexual abuse in her personal life and persistent mental illness that made her vulnerable to exploitation by her boss who led a scheme to inflate real estate appraisals to obtain mortgage loans that were substantially more than the actual cost of the house. She was ordered to pay restitution in the amount of $42,676,269.14.

Defenders also have concerns about the proposed application note for §5C1.1(g). If the Commission chooses to exclude from the presumption of probation individuals who have "used violence or credible threats of violence or possessed a firearm or other dangerous weapon in

[65] USSC, *Interactive Sourcebook*, Race of Offenders in Selected Primary Sentencing Guidelines, FY 2016 (56.3% of persons sentenced primarily under §2B1.1 were Black, Hispanic, Native Americans, Alaskan Natives, Asian or Pacific Islanders, Multi-Racial, or an other non-white race).

connection with the offense," including proposed note 10(C) is redundant. And if the Commission does not exclude such individuals from the presumption of probation, then the proposed note undercuts the presumption and potentially creates an interpretive problem about which party bears the burden of proof on whether the court should or should not impose a non-incarceration sentence. The best course of action would be to allow the presumption of an alternative to apply and let the government rebut the presumption by showing that the individual should be sentenced to a term of imprisonment.

4. Conforming Changes

The Commission requests comment on what conforming changes, if any, it should make if it were to promulgate Part A of the proposed amendment for "First Offenders." While the complicated nature of the guidelines makes it difficult to anticipate all the conforming changes that should be made, one change is apparent. In addition to amending §5C1.1, the Commission should amend §5B1.1 (Imposition of a Term of Probation) to be consistent with §5C1.1's presumption of an alternative sentence language. Simply adding subsection (c) to §5B1.1, with the exact language included in §5C1.1 would ensure that the presumption of an alternative sentence does not get overlooked for individuals who fall within Zones A and B of the guidelines. In addition, Defenders suggest that the Commission change the language in §5B1.1 to call for a presumption of probation.[66]

C. Consolidation of Zones B and C

1. Zones B and C Should be Consolidated with Zone B Expanded to the Range of 18-24 Months.

Defenders are pleased that the Commission is considering consolidating Zones B and C to encourage greater use of alternative sentencing options. In addition to consolidating Zones B and C, the Commission should expand Zone B by 2 levels to an 18-24 month range. Such an expansion would increase the number of individuals likely to benefit from Zone B Sentencing Options, without jeopardizing public safety.[67]

The Commission's 2015 report, *Alternative Sentencing in the Federal Criminal Justice System*, concluded that the low rate of alternatives to incarceration was "primarily [] due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in

[66] Defender public comment last year includes suggestions on how the language of §5B1.1 should be changed. *See Meyers Letter Feb.* 2017.

[67] In FY 2016, there were 4866 individuals with a guideline range of 15-21 or 18-24 months. *2016 Sourcebook*, tbl. 23 (2016).

which the guidelines provide for a term of imprisonment."[68] Notwithstanding that conclusion, individuals falling within Zone D are receiving alternatives to incarceration. For example, individuals convicted of drug offenses were almost as common among individuals sentenced to alternatives (29%) as those sentenced to imprisonment (31.6%).[69]

And as the Commission's data analysis on "Zone C Offenders" likely to benefit from Zone B sentencing options shows, only 420 people sentenced in FY 2015 would have benefited from consolidation of the zones. A slight expansion of the new Zone B would increase those numbers without jeopardizing public safety because a large number of individuals falling within Zone D are convicted of non-violent offenses such as drug trafficking, money laundering, and fraud.[70] Moreover, an expansion of proposed Zone B to the 18-24 month range would likely have the most significant impact on individuals in criminal history category I. Data from FY 2016 show that 358 individuals with a criminal history category I had an offense level of 14 (15-21 months) and 1,377 had an offense level of 15 (18-24 months).[71]

Data from the Commission's study shows that expanding Zone B to the 18-24 month range will not impact public safety. The reconviction rate for persons imprisoned from 12 to 23 months was 33.9%, just slightly above the 31.9% rate for those imprisoned 6 to 11 months.[72] At the same time, individuals with a probation only sentence had a recidivism rate of 21.6%.[73] Those rates combined with data from U.S. Probation,[74] show that encouraging greater use of alternatives to incarceration will likely decrease recidivism rates.

In conclusion, the Commission's own data, combined with other points discussed earlier in these comments about how alternatives to incarceration are retributive and more likely to meet a person's rehabilitative needs and strengthen the communities in which they reside, show that

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[68] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015).

[69] *Id*. at 18, Fig. 14.

[70] In FY 2015, 93.5% of persons convicted of drug trafficking, 53% of persons convicted of fraud, and 79% person of persons convicted of money laundering fell within Zone D. USSC, *FY 2015 Monitoring Dataset.*

[71] USSC, *Interactive Sourcebook*, tbl. 21 FY 2013-FY 2016.

[72] *Recidivism Report*, *supra* note 51, at App. A-2.

[73] *Id*.

[74] Baber, *supra* note 35, at 3 (discussing how "probation officers are improving their abilities to manage risk and provide rehabilitative interventions," and how evidence based supervision practices coincide with "[m]easurable decreases in federal recidivism").

making alternatives to incarceration available for more people will better serve all the purposes of sentencing.

2. The Zone Changes Should Apply to All Categories of Offense and Criminal History.

The Commission requests comment on whether the Zone changes should apply to all offenses or only certain categories of offense. It asks specifically about whether public corruption, tax, and white-collar offenses should be exempt. Because the Commission deems all cases falling within current Zones B and C as not serious enough to warrant a complete term of imprisonment, it would be odd to exclude an offense from the zone expansion.

Defenders also encourage the Commission to delete §5C1.1, comment. (n.7), which discourages the use of substitutes for imprisonment for those in criminal history category III or above even if the individual falls within Zone B and C. Not all individuals who fall within Zones B and C and have higher criminal history categories should be imprisoned, particularly those in need of treatment or who suffer from mental disorders, such as trauma, that would grow worse in a prison setting. And discouraging the use of alternatives for individuals with a criminal history category of III who fall within Zones B and C contributes to prison crowding.[75]

3. Modify the Invited Departure for Persons Who Abuse Controlled Substances and Alcohol or Suffer from a Mental Illness.

As part of its consolidation of Zones B and C, the Commission proposes deleting the invited departure provision at §5C1.1, comment. (n.6), which acknowledges that a departure may be appropriate for certain persons in Zone C. Rather than delete the application note, the Commission should modify it to encourage alternatives to incarceration for individuals in Zone D who have not been convicted of a crime of violence and who abuse controlled substances or alcohol, or suffer from a mental illness, particularly those convicted of a drug offense. Drug quantity often drives lower-level drug traffickers into Zone D, which has resulted in long prison sentences.[76] Many of these individuals would do much better in a therapeutic community than a prison setting, particularly given the prevalence of mental health and substance dependence or abuse in the BOP population and the lack of meaningful mental health care for those in need.[77]

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[75] In FY 2016, 2,860 individuals had a criminal history category of III and fell within Zones B and C. *2016 Sourcebook*, tbl. 21.

[76] Gelb Letter, *supra* note 55, at 2-3.

[77] *See, e.g.*, BJS Special Report, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006) (finding that 45% of federal prisoners had a mental health problem within the last 12 months of the survey and 40% had symptoms of a mental health disorder based upon DSM criteria; 14% had a history of mental health problems; 49.5% suffered from alcohol or drug abuse or dependence),

Notwithstanding that about half of BOP inmates suffer from a mental health or substance abuse or dependence problem, and about 15.2% of newly committed inmates may require mental health services,[78] only 5% of BOP's population receives mental health care.[79] And the Residential Drug Abuse Program does not meet the needs of all inmates with drug abuse disorders.[80]

4. Home Detention

Defenders have no objection the amendment to §5F1.2 regarding home detention.

IV. Proposed Amendment #4: Acceptance of Responsibility

We are pleased that the Commission has proposed amendments that respond to concerns about how some courts interpret commentary in §3E1.1 to deny a reduction in sentence for acceptance of responsibility when a defendant pleads guilty, accepts responsibility for the offense of conviction, but unsuccessfully challenges relevant conduct.[81] Of the two options the Commission proposes, Option 2 ("a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact") is significantly more likely to resolve the problem rather than Option 1 ("a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction").

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https://www.bjs.gov/content/pub/pdf/mhppji.pdf. *See also* U.S. Dep't of Justice: *Federal Prison System, FY2018 Performance Budget: Congressional Submission, Salaries and Expenses* 30-31 (2017) ("[a]pproximately 40 percent of federal inmates have a diagnosed drug use disorder;" only 38,916 inmates were projected to participate in drug abuse treatment in FY 2017).

[78] Philip Magaletta, et al., *Estimating the Mental Illness Component of Service Needed in Corrections: Results from the Mental Health Prevalence Project*, 36 Crim. Just. & Behav. 229, 239 (2009) (research completed by Federal Bureau of Prisons staff and a professor of the mental health needs of federal prison inmates; acknowledging the study results led to a "conservative estimate").

[79] *See* Federal Bureau of Prisons, *Program Fact Sheet* (Sept. 2017) (95% of the population are placed in Care Level I facilities, which do not provide significant mental health care), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170920.pdf. That care level is not a reliable estimate of the individuals in need of treatment. *See* Magaletta et al., *supra* note 78, at 240 ("only measuring service utilization may under represent those who have a diagnosable and potentially treatable mental health condition") (quoting Magaletta et al., *The Mental Health of Federal Offenders: A Summative Review of the Prevalence Literature*, 33 Admin. & Pol. in Mental Health and Mental Health Services Research 253, 261 (2006)).

[80] Federal Bureau of Prisons, *FY2018 Performance Budget: Congressional Submission: Salaries and Expenses* 30 (2017) (reporting that "[a]pproximately 40 percent of federal inmates have a diagnosed drug use disorder," but estimating that only 16.971 inmates were projected to participate in RDAP in FY 2017 while others participated in drug abuse education or nonresidential treatment).

[81] The right to challenge the scope of relevant conduct under §1B1.3 is acknowledged in §6A1.3 and Federal Rule of Criminal Procedure 32(i), but undermined by the current commentary in §3E1.1.

If the Commission proceeds with Option 2, Defenders also support, as suggested in the issue for comment, that the Commission provide additional guidance and specifically state that "the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis in either law or fact." An even better solution, however, than either of the two options is for the Commission to remove from §3E1.1 all references to relevant conduct.

A. The Commission Should Remove from §3E1.1 All References to Relevant Conduct and Reference Only the Offense of Conviction.

The Commission requests comment on whether it should "remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense." Defenders strongly support such an approach because looking to relevant conduct when assessing acceptance of responsibility undermines a fair and just resolution of disputed sentencing factors without serving legitimate sentencing purposes.

Defenders recommend the following changes to the commentary in §3E1.1, notes 1(A), 3, and 4:

> 1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
>
> (A) truthfully admitting the elements of the ~~conduct comprising~~ the offense(s) of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a 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~~.
>
> 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the elements of ~~conduct comprising~~ the offense of conviction~~,~~ ~~and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A))~~, generally will constitute ~~significant evidence~~ of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. Arguing that the government has not carried its burden of proving relevant conduct or other enhancements by a preponderance of the evidence or that the evidence does not meet the legal definition of those provisions is not inconsistent with acceptance of responsibility. ~~A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right~~.

> 4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be ~~extraordinary~~ cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

The reference to relevant conduct in §3E1.1 should be removed because it does not serve the purposes the Commission originally contemplated when it promulgated the guidelines and undermines a fair and accurate sentencing proceeding. When the guidelines were first created, the Commission believed that a defendant's acceptance of responsibility was a "sound indicator of rehabilitative potential" that should be rewarded with a reduced sentence.[82] The Commission's recent recidivism report, however, reveals that the acceptance of responsibility provision has not proven to be a "sound indicator of rehabilitative potential."[83] The report concluded that an adjustment for acceptance of responsibility "was not associated with lower recidivism rates."[84]

The Commission included relevant conduct in the sentencing guidelines as a compromise between real and charged offense sentencing to prevent prosecutors from being able to "influence sentences by increasing or decreasing the number of counts in an indictment." *See* USSG Ch. 1, Pt. A, 4(a). This presumably was to promote one purpose of the guidelines—reducting unwarranted disparity. But the reference to relevant conduct in §3E1.1 undermines a defendant's ability to challenge allegations at sentencing that often have a significant impact on the guideline calculation.

The guidelines already allow an increase in sentence based on relevant conduct under the lowest standard of proof and with a low threshold of reliable evidence.[85] Thus, a prosecutor may choose

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[82] USSC, *Preliminary Draft of Sentencing Guidelines*, Ch. Three: Offender Characteristics: Post-Offense Conduct, Acceptance of Responsibility §B321, comment. (1986). *See also United States v. Garrasteguy*, 559 F.3d 34, 39 (1st Cir. 2009) (noting that acceptance of responsibility recognizes "increased potential for rehabilitation"); *United States v. Belgard*, 694. F. Supp. 1488, 1497 (D. Ore. 1988) (reduction for acceptance of responsibility recognizes "increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct"), *aff'd sub nom, United States. v. Summers*, 895 F.2d 615 (9th Cir. 1990).

[83] USSC, *Recidivism Report*, *supra* note 51, at 21. *See also id*. at App. A-1, A-2, and A-3 (defendants who received no adjustment for acceptance of responsibility had lower rearrest, reconviction, and incarceration rates than those who received a 2- or 3-level adjustment).

[84] *Id*. at 21.

[85] *See, e.g.*, *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) ("[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.") (citing *United States v. Clark*, 583 F.3d 803, 813 (7th Cir. 2008)).

to charge a defendant with a lesser offense only to seek a significant enhancement at sentencing based upon relevant conduct established through a de minimis form of proof.[86] For example, prosecutors often present uncorroborated hearsay evidence to probation officers that greatly increases the drug quantity for which defendants are held responsible,[87] and probation officers typically include it in the report without further investigation into its accuracy. Even when the information in the presentence report is objectively unreliable, the defense must object[88] to the government's version of the conduct and, in some circuits, the defense bears the burden of "articulat[ing] the reasons why the facts contained therein are untrue or inaccurate."[89] Due process requires an opportunity to be heard on these allegations but inclusion of relevant conduct in §3E1.1 chills that opportunity.

Including relevant conduct in §3E1.1 gives prosecutors excessive control over the plea bargaining and sentencing process by giving them a tool to discourage the defendant from challenging the government's version of the offense conduct.[90] If the defense fails to carry the

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[86] *See United States v. Miller*, 910 F.2d 1321, 1331 (6th Cir. 1990) (Merritt, J., dissenting) ("The Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.").

[87] *See generally* Claudia Catalan, *Admissibility of Testimony at Sentencing, Within Meaning of USSG § 6A1.3, Which Requires Such Information be Relevant and Have "Sufficient Indicia of Reliability to Support its Probable Accuracy,*" 45 A.L.R. Fed. 2d 457 (originally published in 2010).

[88] *See* Fed. R. Crim. P. 32(i)(3)(A) (permitting court to "accept any undisputed portion of the presentence report as a finding of fact"); USSG §6A1.3 (governing opportunity of parties to object to a factor important to the sentencing determination); *United States v. McCully*, 407 F.3d 931, 933 (9th Cir. 2005) (no plain error for imposing upward enhancements for drug quantity, possession of a weapon, and obstruction of justice where presentence report set forth facts supporting enhancements and defendant did not object); *United State v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) ("failure to object to allegations of fact in a PSI admits those facts for sentencing purposes").

[89] *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990). *See also*, *United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) ("where a defendant's objections to a presentence investigation report are wholly conclusory and unsupported by countervailing evidence, the sentencing court is entitled to rely on the facts set forth in the presentence report"); *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997) (even though defendant objected to certain facts in the presentence report, he "did not provide the sentencing court with evidence to rebut the factual assertions" so the "court was justified in relying on the contested facts"); *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988) (approving district court's decision to accept "controverted matters in the report unless the defendant presented [contrary] evidence"). *But see United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Wilken*, 498 F.3d 1160, 1169-70 (10th Cir. 2007).

[90] The National Association of Criminal Defense Lawyers pointed out fifteen years ago that the relevant conduct provisions give "the government an opportunity to enter into plea agreements without having to carry the burden of reasonable doubt standards for the enhancement of relevant conduct issues." NACDL Sentencing and Post-Conviction Comm., Written Testimony 24-25 (Feb. 25, 1992) (Concerning United

burden of proving that the government's allegations are untrue or inaccurate and the court finds defense counsel's argument frivolous solely because the challenge was unsuccessful, the court can deny the reduction for acceptance of responsibility. The Commission should not further ease the government's burden of proof by requiring a defendant to either admit relevant conduct or take the risk of having an objection found "frivolous."

A provision that permits a court to deny a 2-level reduction because it considers a defendant's challenge to be frivolous undermines the principles of real offense sentencing. If defense counsel must make a strategic decision on whether a judge will consider a challenge frivolous and chooses not to make the challenge out of fear that the court will deny the client acceptance of responsibility, then the defendant may have to serve a sentence that does not accurately account for real offense conduct.[91]

Including relevant conduct also results in unwarranted disparity because courts take radically different approaches to applying the rule. This is most apparent in the disparity arising from the different interpretations of what is a "frivolous" challenge. A survey of Defenders throughout the country shows vastly different judicial views on whether a defendant's unsuccessful challenge to relevant conduct should result in a denial of the adjustment for acceptance of responsibility. Some judges do not penalize the defense for holding the government to its burden of proof on relevant conduct, whether the challenge is successful or not. Other judges, however, view an unsuccessful challenge as justifying a denial of the reduction. For example, the Seventh Circuit concluded:

> Contesting the veracity of the alleged relevant conduct is no doubt permissible and often perfectly appropriate. However, if a defendant denies the conduct and

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States Sentencing Commission's Proposed Amendments to Sentencing Guidelines and Policy Statements).

[91] Take, for example, a defendant in criminal history category I who pleads guilty to possession of marijuana with intent to distribute. He has a base offense level of 10, but faces a 2-level enhancement for possession of a dangerous weapon under §2D1.1(b)(1). If he does not contest the enhancement and is given a 2-level reduction for acceptance of responsibility, his final offense level is 10, with a range of 6-12 months in Zone B and the possibility of a probationary sentence with home confinement. If, however, defense counsel challenges the enhancement but loses, and the defendant is denied acceptance, the final offense level is 12 and in Zone C where the guidelines recommend imprisonment. Under this scenario, a defendant may forego contesting the enhancement to increase the possibility of a probationary sentence. If the facts, however, actually show that the weapon was not connected to the offense, then the sentence would not truly reflect the real offense.

Cf. Alexa Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. Ch. L. Rev. 1467, 1494 (2013) (discussing how government control over the additional 1-level reduction under §3E1.1(b) may result in an increased sentence because it creates a disincentive for the defendant to challenge relevant conduct).

> the court determines it to be true, the defendant cannot then claim that he has accepted responsibility for his actions.

United States v. Cedano-Rojas, 999 F.2d 1175, 1182 (7th Cir. 1993).[92] Even an unsuccessful challenge to the credibility of a witness has been deemed sufficient to deny a defendant credit for acceptance of responsibility.[93] The varying view among courts[94] as to what constitutes a "frivolous" challenge is directly contrary to the Commission's goal of promoting the uniform application of the Guidelines.

Some appellate courts have upheld the denial based upon the district court's disagreement with the lawyer's argument even if the defendant stands silent. For example, in *United States v. Purchess*, 107 F.3d 1261, 1266-69 (7th Cir. 1997), defense counsel contested relevant conduct without proffering any evidence and the defendant exercised his right to remain silent. The

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[92] The defendant in *Cedano-Rojas* challenged the previous requirement that a defendant admit relevant conduct to receive the acceptance reduction, but the Guideline was amended pending his appeal to permit acceptance as long as there was no false or frivolous denial. *Cedano-Rojas*, 999 F.2d at 1181-82. Subsequent cases reaffirm the principle that a defendant who denies relevant conduct has not accepted responsibility. *See, e.g., United States v. Brown*, 47 F.3d 198, (7th Cir. 1995) ("If a defendant denies relevant conduct and the court determines such conduct occurred, the defendant cannot claim to have accepted responsibility for his actions."); *United States v. Sandidge*, 784 F.3d 1055, 1064 (7th Cir. 2015) (affirming denial of acceptance of responsibility adjustment simply because court rejected defendant's factual challenge to applicability of cross-reference). *See also United States v. Ratliff*, 376 F. App'x 830, 843 (10th Cir. 2010) (quoting *Brown* to uphold court's denial of acceptance of responsibility adjustment for defendant who challenged extent of the fraud committed); *United States v. Skorniak*, 59 F.3d 750, 757 (8th Cir. 1995) ("a defendant who denies relevant conduct that the court later determines to have occurred has acted in a manner inconsistent with clearly accepting responsibility"); *Elliott v. United States*, 332 F.3d 753, 766 (4th Cir. 2003) ("a denial of relevant conduct is 'inconsistent with acceptance of responsibility'"); *United States v. Burns*, 781 F.3d 688, 690, 693 (4th Cir.), *cert. denied*, 135 S. Ct. 2872 (2015) (defendant who pled guilty to a firearm offense argued that cross-reference to aggravated assault rather than attempted murder should apply because of insufficient evidence of mens rea; even though the defendant did not testify, the court affirmed denial of acceptance of responsibility merely because he "falsely denied" relevant conduct). *See generally* Kimberly Winbush, Annotation, *Downward Adjustment for Acceptance of Responsibility under USSG § 3E1.1—Drug Offenses*, 17 A.L.R. Fed. 2d 193 (2007 & Supp. 2016) (citing numerous cases where the defendant was denied a reduction for acceptance of responsibility because he or she contested relevant conduct).

[93] *See, e.g., United States v. Berthiaume*, 233 F.3d 1000, 1004 (7th Cir. 2000) (upholding district court's decision that defendant "frivolously" contested drug quantity calculation because court rejected the challenge to the reliability of the government's witnesses); *United States v. Jones*, 539 F.3d 895, 897-98 (8th Cir. 2008) (defendant's unsuccessful challenge to credibility of cooperating witness was sufficient to deny acceptance of responsibility adjustment even though appellate court acknowledged that the witness was "not a strong witness" and his "testimony as to drug transactions amounts and frequency was confusing and often internally inconsistent").

[94] *See* discussion *infra* pp. 29-30 (citing case law that shows differing judicial views on meaning of "frivolously contest").

Seventh Circuit concluded that the "defendant and his attorney appear to have been attempting to manipulate the Guidelines" and suggested that whether the attorney proffers evidence or not, "the court can alternatively question the otherwise silent defendant to determine if the defendant understands and adopts the attorney's statements challenging facts underlying possibly relevant conduct. . . . If the defendant does understand and agrees with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction." *Id*. at 1267, 1269.[95] The Eleventh Circuit has encouraged denial of an acceptance of responsibility reduction when the defendant's lawyer contested the significance of the facts set forth in the presentence report[96] or challenged the constitutionality of his convictions even after pleading guilty.[97]

In sum, denying an acceptance of responsibility reduction merely because a defendant has contested relevant conduct and lost gives prosecutors undue power, undermines the concept of real offense sentencing, and creates unwarranted disparity, without adding to the assessment of a defendant's potential for rehabilitation. Therefore, the Commission should delete from §3E1.1 any reference to relevant conduct and amend the guideline to focus on the offense of conviction.

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[95] *See also United States v. Lister*, 432 F.3d 754, 759-60 (7th Cir. 2005) (following *Purchess* and denying acceptance of responsibility reduction to a defendant whose attorney challenged the chronology of events presented in the PSR; when the court questioned Lister about whether he agreed with the challenges, Lister stated that he relied on his attorney—an answer that the appellate court characterized as "legal hair-splitting, ultimately frustrating the court's determination"); *United States v. Dong Jin Chen*, 497 F.3d 718, 720-21 (7th Cir. 2007) (following *Purchess* and denying acceptance of responsibility reduction based on the defendant contesting facts contained in the PSR that were established at sentencing hearing; rejecting argument that the defendant did not have sufficient command of the English language to be excused from his conduct); *United States v. Booker*, 248 F.3d 683, 690 (7th Cir. 2001) (affirming denial of acceptance reduction because defendant's denial of relevant conduct was "meritless").

[96] *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (even though district court reduced defendant's offense level for acceptance of responsibility, the en banc court opined that the defendant's challenge to whether evidence in the PSR established fraudulent intent was "factual", not "legal" and would have justified denial of the reduction for acceptance of responsibility).

[97] *United States v. Wright*, 133 F.3d 1412, 1413-14 (11th Cir. 1998) ("even if the district court's conclusion rested *exclusively* on Wright's challenges to the constitutionality of his convictions, the district court's refusal to reduce Wright's offense level was permissible").

B. Whether a Defendant is Entitled to an Adjustment for Acceptance of Responsibility Should Depend on Whether the Challenge has Either an Arguable Basis in Law or Fact, Rather Than the Court's Assessment of Whether the Challenge Is "Frivolous" or "Non-frivolous," Particularly Given the Chilling Effect Such an Assessment Has on a Lawyer's Ethical Responsibilities.

If the Commission chooses to maintain the reference to relevant conduct in §3E1.1, Defenders strongly encourage the Commission to adopt Option 2 because a defendant's eligibility for a reduction for acceptance of responsibility should not depend upon a court's subjective assessment of frivolity.

Option 1 of the Commission's proposed amendment to §3E1.1 does not resolve the myriad problems associated with the current wording of the guideline. The proposed language merely converts an affirmative statement about how a frivolous denial of relevant conduct is inconsistent with acceptance of responsibility into a negative statement that a non-frivolous denial does not preclude relief. The term "non-frivolous" is as subjective as the term "frivolous."[98] Under either wording, a defendant who makes a challenge that the court deems "frivolous" is likely to be denied acceptance of responsibility. Consequently, the continued risk of losing one of the few available reductions in the length of a term of imprisonment will deter defense lawyers from "making reasonable arguments in defense of their clients."[99]

Reasonable lawyers can disagree about the legal and factual scope of relevant conduct, including disputes about whether the government's allegations are based upon sufficiently reliable evidence, and whether the evidence presented to support an enhancement satisfies the preponderance of the evidence standard. Instructing a court to decide whether to penalize a defendant for challenging relevant conduct based upon the court's view of whether the challenge is frivolous raises due process concerns and chills the rights of defendants to put the government to its burden of proof – a right which is recognized in §6A1.2 (allowing objections to presentence reports) and §6A1.3 (resolution of disputed sentencing factors).[100] And, as discussed above, it also results in unwarranted disparity.

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[98] As Justice Douglas recognized, the "frivolity standard" is "elusive." *See* Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 Hous. L. Rev. 747, 757 (2008) (quoting *Cruz v. Hasck*, 404 U.S. 559, 65 (1971) (Douglas, J., concurring)). The problem results from the "fine line 'between the tenuously arguable and the frivolous.'" Further, there is a distinction between factual and legal frivolity. *Id.* (quoting *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993)) (other citations omitted).

[99] *United States v. Edwards*, 635 F. App'x 186, 197 (6th Cir. 2015) (Merritt, J., dissenting).

[100] The first Commissioners opined that "[t]he guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing." William

The lack of a definition of frivolity has resulted in inconsistent application of the acceptance of responsibility reduction. As previously discussed, some courts consider "frivolous" to mean any unsuccessful challenge to relevant conduct.[101] Other courts, however, have taken a more refined approach to the meaning of frivolous by focusing on whether the challenge "lacks an arguable basis in law or fact" or is "based on an 'indisputably meritless legal theory."[102] The Fifth Circuit distinguishes between a legal and a factual challenge, opining that "merely pointing out that the evidence does not support a particular upward adjustment or other sentencing calculation, does not strike us as a legitimate ground for ruling that the defendant has not accepted responsibility."[103]

Even judges within the same circuit court do not agree on the meaning of "frivolously contest." The Sixth Circuit's decision in *United States v. Edwards*, 635 F. App'x. 186, 188-89 (6th Cir. 2015), demonstrates the ambiguity of the term "frivolous" and explains the dilemma attorneys face in deciding whether to challenge an adjustment. Edwards pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine and 28 grams or more of cocaine base. The final PSR stated that "Edwards should receive a four-level increase under USSG §3B1.1(a) for being an organizer or leader of criminal activity that involved five or more participants, because Edwards had directed the activities of others and recruited participants for the offense." *Id*. at 189. It also recommended a three-level reduction for acceptance of responsibility. Edwards objected to the §3B1.1 enhancement, arguing that he did not play an aggravating role and the offense did not involve five or more participants. The court disagreed and increased Edwards' offense level by four points, pursuant to §3B1.1(a). The court also concluded that, in contesting the leadership-role enhancement, Edwards had frivolously denied relevant conduct, and therefore refused to grant Edwards a reduction for acceptance of responsibility. A panel majority on the Sixth Circuit affirmed the district court's decision.

Judge Merritt dissented, noting that the application of the role enhancement was "debatable," and that the lengthier sentence imposed "deter[s] defense lawyers from making reasonable arguments in defense of their clients":

W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990).

[101] *See supra* note 92.

[102] *See United States v. Santos*, 537 F. App'x 369, 375 (5th Cir. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) and *Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995)).

[103] *Id.* at 375 (*citing United States v. Nguyen*, 190 F.3d 656, 659 (5th Cir. 1999) and finding that court erred in denying acceptance of responsibility simply because defendant objected to sufficiency of evidence supporting importation enhancement). *See also United States v. Patino-Cardnas*, 85 F.3d 1133, 1136 (5th Cir. 1996) (court improperly denied reduction for acceptance of responsibility because defendant "objected to the legal characterization of leadership role given his actions").

> The court upholds a 15-year drug sentence for a first-time offender. It does so by affirming a debatable "organizer or leader" enhancement that added many years to the sentence and then added more years by denying Edwards an "acceptance of responsibility" deduction—all because at sentencing his lawyer contested the applicability of the enhancement. The 15-year sentence is much longer than necessary to deter this first-time offender from further violations but does deter defense lawyers from making reasonable arguments in defense of their clients.
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> ***
>
> I do not believe that a criminal defendant's choice to object to the "organizer/leader" enhancement—when it was in dispute by various parties throughout the pendency of the case—is "frivolous." A reduction for accepting responsibility is supposed to be accorded to a criminal defendant who enters a guilty plea and "truthfully admits the conduct compromising the offense." U.S.S.G. § 3E1.1, app. n.3. At the sentencing hearing, defense counsel objected to and argued against the 4-level "organizer or leader" enhancement, but Edwards had consistently admitted the offense conduct. He admitted having contacts with the other conspirators. His counsel only disputed that those contacts demonstrated that he was an organizer or leader. Counsel did not deny any conduct. He only argued that Edwards' conduct did not suggest a leadership role.
>
> The evidence regarding the significance and extent of those contacts was somewhat equivocal and should have been open for debate without being deemed a "frivolous objection" to relevant conduct. Simply put, Edwards did not deny any conduct. He only denied that his conduct should be characterized as a "leadership role."

United States v. Edwards, 635 F. App'x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting).

Judge Merritt's acknowledgment of the deterrent effect of the court's ruling on defense counsel's willingness to raise arguments on behalf of a client is noteworthy. Permitting a court to deny acceptance of responsibility to a defendant based upon the court's belief that the defense attorney presented a frivolous challenge to relevant conduct merely because the defense loses gives the court extensive power to control litigation and impinge on the lawyer's ethical responsibilities to zealously represent his or her clients.[104]

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[104] *See* Margareth Etiene, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2165 (2003) (discussing how the acceptance of responsibility provision in the guidelines "is the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients"). *See also* Hadar Aviram et al., *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 Hastings Const. L.Q. 775, 822-23 (2014) (noting how judges may "extend defendant's sentence in response" to an attorney's "adversarial tactics that judges deem unnecessary").

The manner in which some courts consider any unsuccessful challenge to relevant conduct as "frivolous," makes defense attorneys face a "Hobson's choice"[105]: if they challenge relevant conduct, they run the risk that their client will be denied a reduction in sentence. But if they do not raise the challenge, they run the risk of being ineffective advocates.

Option 2, which eliminates variations of the term "frivolous" is better suited than Option 1 to address the problems identified above. To better ensure Option 2 remedies the problems addressed above, Defenders also encourage the Commission, as suggested in its Issue for Comment, to "state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lack an arguable basis either in law or in fact." Because some courts have previously determined lack of success disqualifies a defendant from an acceptance of responsibility adjustment, it would be helpful to include explicit language making clear that lack of success is not determinative.

C. The Commission Should Not Include in §3E1.1 Any Reference to Departures/Variances or Informal Challenges to Relevant Conduct.

The Commission requests comment on whether it should reference "informal challenges" to relevant conduct or "broaden the proposed provision to include other sentencing considerations, such as departures or variances." Defenders believe that the Commission should refrain from adding more ambiguity, further complicating the guideline, and hindering a defendant's due process rights to contest factual and legal allegations relevant to the court's final sentencing decision. Mentioning in §3E1.1 informal challenges to relevant conduct, departures, or variances would suggest to the court that it may deny acceptance of responsibility if the defendant objects to a sentence toward the high end of the guideline range or an upward departure or variance and the court finds the objection has no arguable basis under Option 2 or is frivolous under Option 1. If the government alleges facts to call for a sentence at the high end of the guideline range, to refute a request for a downward departure or variance, or seeks an upward departure or variance, the defendant should have an absolute right to contest it without fear that the court may use an unsuccessful challenge to further penalize him or her by denying a reduction for acceptance of responsibility.

V. Proposed Amendment #5: Miscellaneous

A. Parts A-C

Defenders have no objection to the miscellaneous amendments in response to the Transnational Drug Trafficking Act of 2015, International Megan's Law, and the Chemical Safety Act.

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[105] *Cf.* Newton, *supra* note 98, at 752 (discussing Hobson's choice lawyers must make in raising *Almendarez-Torres* claims).

In the future, the Commission should revisit the 6-and 8-level enhancements under §2A3.5(b)(1), which apply "[i]f, while in failure to register status, the defendant committed" "a sex offense against someone other than a minor," "a felony offense against a minor not otherwise covered by subdivision (C)," or "a sex offense against a minor." Those enhancements apply when the court finds by a preponderance of evidence, and with evidence that need not comply with the Federal Rules of Evidence, that the defendant committed a specified offense.[106] To ensure greater due process protections for enhancements that can result in a 310% increase in sentence, the enhancement should be limited to individuals who were actually convicted of committing a specific offense while in failure to register status.

B. Part D: Computer Enhancement at §2G1.3

The Commission proposes amending the commentary regarding the computer enhancement at §2G1.3(b)(3) to specify that commentary note 4 applies only to subpart (A) of the computer enhancement (using a computer to "persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct"), and not to subpart (B) (using a computer to "entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor"). Defenders propose a different approach to this issue, and encourage the Commission to eliminate the computer enhancement at §2G1.3(b)(3) and related commentary entirely, or at least eliminate the enhancement in subpart (B) regarding solicitation.

We recommend eliminating or shrinking the scope of the computer enhancement because it fails to distinguish among defendants. As the Commission has noted in the context of a different guideline, changes in computer and Internet technologies used by typical defendants can affect whether a sentencing scheme adequately distinguishes among defendants.[107] The computer enhancement at §2G1.3(b)(3), similar to the computer enhancement at §2G2.2(b)(6) because it applies to so many defendants, fails to "differentiate among offenders in terms of their culpability."[108] Last year, the computer enhancement at §2G1.3(b)(3) (either subpart (A) or (B)) was applied to 81.3% of defendants sentenced under §2G1.3.[109] The rate for subpart (B) alone was 48.8%.[110] At the same time, the rate of within guideline sentences for this guideline fell to 41.1% with more than half (53.6%) of defendants sentenced below the guideline recommended

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[106] *See United States v. Lott*, 750 F.3d 214, 220-21 (2d Cir. 2014) (guideline does not require a conviction for enhancement to apply); *United States v. Romeo*, 385 F. App'x 45, 49 (2d Cir. 2010) (relying on allegations in presentence report to uphold enhancement by a preponderance of the evidence).

[107] USSC, *Report to Congress: Federal Child Pornography Offenses* ii (Dec. 2012).

[108] *Id.* at iii.

[109] USSC, *Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2016.*

[110] *Id.*

range.[111] Computer enhancements, particularly for solicitation, are out-of-date in this digital era, and fail to adequately distinguish among defendants.

VI. Proposed Amendment #6: Marihuana Equivalency

Defenders do not object to the Commission's proposal to change the term "marihuana equivalency" to "converted drug weight" or the name of the "Drug Equivalency Tables" to "Drug Conversion Tables." We believe, however, that the Commission should amend the guideline commentary to explain the change. The term of art – "marihuana equivalency" – has been used in the guidelines, and case law interpreting the guidelines, since 1991 when the Commission opted to "simplif[y] the application of the Drug Equivalency Table by referencing the conversions to one substance (marihuana) rather to four substances." USSG App. C, Amend. 396, Reason for Amendment (Nov. 1. 1991). To facilitate future legal research, it would be helpful for the Commission to explain the change in the commentary on Use of Drug Conversion Tables in addition to the Reason for Amendment. We recommend explanations in both places based on our experience that many practitioners are not as familiar with Appendix C to the guidelines, and are more likely to read the commentary and notice changes made to the manual itself. While such repetition may not be necessary with every amendment, because of the long reliance on this term of art in a heavily used and litigated guideline, we recommend it in this instance.[112]

Specifically, Defenders suggest that the Commission add an explanation for the change at the beginning of §2D1.1, comment. (n. 8) – Use of Drug ~~Equivalency~~ Conversion Tables:

> Background: The Drug Conversion Table was previously named the Drug Equivalency Table. The base offense levels for drugs that were not listed in the Drug Quantity Tables were originally determined by using the Drug Equivalency Table to convert the quantity of the controlled substance involved to its marihuana, heroin, and cocaine equivalency. In 1991, the Commission amended the guidelines to use a single conversion factor – "marihuana equivalency," which was meant to simplify application of the guidelines. USSG App. C, Amend. 396 (Nov. 1, 1991). In 2017 the Commission replaced the term "marihuana equivalency" with a more generic term: "converted drug weight." USSG App. C, Amend. ___ (Nov. 1, 2018).

VII. Proposed Amendment #7: Technical

Defenders have no objections to most of the technical amendments proposed by the Commission. We do, however, question the Commission's proposed clerical changes to the commentary to Ch.

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[111] USSC, *2016 Sourcebook of Federal Sentencing Statistics* tbl. 28.

[112] A Westlaw search of the terms "(marijuana marihuana) /1 equivalen! & guideline" identified 1,223 cases and 71 secondary sources (search conducted Oct. 2, 2017).

2 guidelines captioned "Statutory Provisions." The guideline commentary for each Chapter 2 offense does not consistently refer to all statutes referenced to a particular guideline in the statutory index. And some commentary adds a reference to Appendix A for additional statutory provisions whereas others do not. To simplify the guidelines, and lessen the commentary, the statutory references need only appear in Appendix A. Accordingly, Parts C (4), (5), (6), and (7) of the Technical Amendments are not necessary. The better course of action is to delete the reference to "Statutory Provisions" from all of the Chapter 2 commentary.

VIII. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission's proposed amendments. 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

Enclosures

cc (w/encl.): Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary Bolitho, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel