

Testimony of

Alan Dubois
Senior Appellate Attorney, Eastern District of North Carolina
and
Nicole Kaplan
Staff Attorney, Northern District of Georgia

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We thank the Commission for holding this hearing and for inviting us to testify regarding how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted, and what changes should be made to improve it.

I. The Sentencing Reform Act of 1984 Held Enormous Promise.

The vision of sentencing reform was that the Guideline system would fairly, efficiently and effectively satisfy all of the purposes of sentencing. The guidelines would allow individualized sentences and would avoid unwarranted disparities. Sentencing would be more transparent and predictable. The guidelines would encourage the use of effective non-prison alternatives particularly for non-violent first offenders, and the guidelines would be formulated to minimize prison overcrowding. The Commission would continually measure whether these goals were being met, and would revise the guidelines and policy statements if they were not. This continuing evolution would be based on judicial sentencing decisions, consultation with experts and all stakeholders in the criminal justice system, empirical research, and developing knowledge of human behavior.¹

Judges were to play an essential role in the guidelines’ continuing evolution: “[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures,” the “courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons,” and “the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.”² The Commission would not “second-guess[] individual judicial sentencing actions either at the trial or appellate level,” but instead would learn “whether the guidelines are being effectively implemented and revise

¹ 28 U.S.C. §§ 991(b), 994(f), 994(g), 994(m), 994(o), 995(a)(12)-(16).

² *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, J.).

them if for some reason they fail to achieve their purposes.”³ In this way, the Guideline system would “reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation.”⁴

II. That Promise Was Not Fulfilled.

Judicial feedback was suppressed by the Commission’s many prohibitions and restrictions on acceptable grounds for departure, the near complete limitation on departures to those allowed by the Commission, and overbearing appellate review. Judges were forbidden from considering whether the guidelines accomplished sentencing purposes, avoided unwarranted disparities, or appropriately took account of individual circumstances, and were required to impose sentences they believed were unfair and ineffective.⁵

Instead of evolving through a dialogue between judges and the Commission, consultation with all stakeholders, and expert research, the guidelines were overwhelmingly driven by the wishes of the Department of Justice (DOJ) and its allies in Congress.⁶ DOJ actively lobbied the Commission and Congress for lengthier sentences on the theory that heavy penalties were needed to coerce cooperation and guilty pleas,⁷ or

³ S. Rep. No. 98-225 at 178 (1983).

⁴ *Id.*

⁵ See *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) (“To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines.”); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) (“Disproportionality does not, in itself, provide an appropriate basis for a downward departure.”); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court’s reliance on defendant’s family ties and responsibilities, majority “pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant’s life will be frustrated by this court.”).

⁶ “In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission.” USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at xvii (Nov. 2004) (hereinafter “Fifteen Year Review”). “To date the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that are also mentioned in the SRA.” *Id.* at 77.

⁷ See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (Feb. 2005) (“prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power,” and listing numerous examples of the Department requesting more stringent sentencing laws and guidelines because it would make prosecutors’ jobs easier).

to sufficiently motivate prosecutors.⁸ Congress, to express disapproval of crimes in the news, enacted mandatory minimums, increased statutory maximums, and issued directives to the Commission. Thus, the guidelines for the vast majority of defendants sentenced in federal court were based on congressional actions, guideline amendments initiated by DOJ, and concerns about what would be acceptable to DOJ and its advocates in Congress.⁹ Guideline sentences thus became increasingly severe, but failed to reflect the purposes of sentencing.¹⁰ Rather than minimizing the likelihood of prison overcrowding, the guidelines contributed, at a much greater rate than the states, to the problem of over-incarceration today.¹¹ The United States has the highest rate of

⁸ For example, DOJ claimed that the prospect of a sentence without imprisonment was insufficient to motivate AUSAs to bring intellectual property cases. In support of a “trafficking” enhancement in § 2K2.1 based on two firearms, DOJ argued that firearms “traffickers” traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to “merit” the expenditure of resources to prosecute them.

⁹ See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005); Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

¹⁰ In 1999, Commission staff reported that average time served had doubled since the guidelines’ inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

¹¹ See Barkow, *supra* note 7, at 766 (“Political pressures might explain [the fact that] the Commission did not make much of this provision [§ 994(g)] and developed guidelines with no concern for their effect on prison population.”); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol’y Rev. 93, 109 (1999) (“The Commission has never allowed considerations of existing prison capacities to limit decisions to lengthen sentences, and as a result federal prisons have been operating at over 150 percent capacity throughout the Guidelines era.”); Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S.*, *Overcrowded Times*, Dec. 1999, at 1, 12 (in the first ten years of the guidelines’ existence, the federal incarceration rate increased 119 percent, a rate 25% greater than the average increase in the incarceration rate in the nation as a whole); Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, *Prison & Jail inmates at Midyear 2004* at 2-4 & tables I-2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf> (between 1995 and 2004, the federal prison population increased annually by an average of 7.8% while the states added 2.7% inmates per year). By 2002, the guidelines alone (independent of mandatory minimum laws) accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession, see *Fifteen Year Review* at 53-54, 64, 67, 139, and “[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums.” *Id.* at 138.

imprisonment in the world,¹² the Bureau of Prisons is the largest prison system in the nation,¹³ and it is filled with non-violent first offenders.

Despite its façade of precision and equal treatment, the mandatory guideline system created, and hid, massive unwarranted disparities and unwarranted uniformity. The guidelines themselves incorporate unwarranted disparity, including racial disparity.¹⁴ Neutral judges were nonetheless required to follow them, and to treat offenders with widely varying culpability, risks of recidivism, dangerousness, and need for treatment or training all the same.¹⁵ Partisan prosecutors, however, were given “indecent power” over sentencing through their ability to threaten punishment to the full extent of the “applicable” guideline range,¹⁶ including uncharged and even acquitted conduct, based on information that may or may not be reliable, and guideline interpretations that may or may not be “correct” or consistent among cases.¹⁷ Prosecutors determined precisely what the sentence would be, through charge bargaining, fact bargaining, downward departure motions in their sole discretion, and even manipulation of the type or quantity of drug for which the defendant would be sentenced.¹⁸ This created unwarranted disparity.¹⁹

¹² International Centre for Prison Studies, King’s College London, World Prison List (seventh edition)(January 2007) available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> (last viewed Dec 10, 2008).

¹³ See Bureau of Justice Statistics, *Prisoners in 2007* (December, 2008). The federal prison population is now four and half times what it was when the SRA was enacted. It was 44,408 in 1986, 48,300 in 1987, see Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988*, tbl. 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is 201,280 today. See <http://www.bop.gov/news/quick.jsp#1>. It has increased at least three times the rate of state prisons since 1995, Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf, is 37% overcapacity. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>, and costs the taxpayers over \$5 billion per year, *Costs of Incarceration and Supervised Release* (\$24,922 per inmate in FY 2007), available at <http://www.uscourts.gov/newsroom/2008/costs.cfm>.

¹⁴ Fifteen Year Review at 116-17, 133-35.

¹⁵ See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992).

¹⁶ “[T]he decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors’ ability to threaten full application of the severe Sentencing Guidelines.” Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (May 2008).

¹⁷ Fifteen Year Review at 50, 87.

¹⁸ See Fifteen Year Review at 50, 86, 92; Constitution Project’s Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005); Federal Courts Study

Further, because the guidelines are so complicated and time-consuming, probation officers became dependent on prosecutors and agents for the “facts,” and applied the guideline rules in different ways from case to case.²⁰ Nonetheless, judicial compliance with the guideline sentence or the sentence advocated by the prosecutor was said to constitute “uniformity.”

III. *The Supreme Court’s Modification of the Sentencing Reform Act Once Again Holds Enormous Promise.*

Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission’s mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the Guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the Guidelines, and “occurs in a context that forecloses oversight and obscures accountability”).

¹⁹ Frank Bowman et al., *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 Fed. Sent. Rep. 165, 170 (2003); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wisc. L. Rev. 187 (1993); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 So. Methodist U. Dedman School of Law 211 (2004); USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

²⁰ This can almost never be exposed. However, in one case, two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant. See *United States v. Quinn*, 472 F. Supp. 2d 104 (D. Mass. 2007). The judge found: “The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines’ manner of addressing ‘relevant conduct.’ Moreover, because the ‘relevant conduct’ inquiry is adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of ‘relevant conduct’ on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant’s past illegal activities. . . . The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.” *Id.* at 111.

As the remedy for the Sixth Amendment violation embodied in the mandatory guidelines, the Supreme Court gave judges the power to impose fair and effective sentences in individual cases, to reject guidelines that are not based on empirical data and national experience, and to serve their function in the constructive evolution of responsible guidelines. See *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The ability of judges to openly disagree with the guideline sentence based on policy considerations even in a factually ordinary case is necessary to avoid a Sixth Amendment violation. See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007). It also gives the Commission the feedback it needs to revise the guidelines. Judges are now providing the Commission with valuable feedback, in the form of data and sentencing opinions, on a wide variety of guidelines.²¹ The courts of appeals are upholding this approach.²² To the extent a few have continued to enforce *de facto* presumptive or mandatory guidelines, the Supreme Court has made clear that this must cease. See *Spears v. United States*, ___ S. Ct. ___, 2009 WL 129044 (Jan. 21, 2009); *Nelson v. United States*, ___ S. Ct. ___, 2009 WL 160585 (Jan. 26, 2009).

The system promises to be much healthier. Judges must attend to sentencing purposes in every case, considering all relevant offense and offender characteristics in determining what sentence will fairly and effectively satisfy the purposes of sentencing. They can treat people differently as needed, and only as needed, depending on culpability, risk of recidivism, dangerousness, and rehabilitation needs. They can correct

²¹ See, e.g., *United States v. Grober*, ___ F.Supp.2d ___, 2008 WL 5395768 (D. N.J. Dec. 22, 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M.D. Fla. Dec. 19, 2008); *United States v. Stern*, 2008 U.S. Dist. LEXIS 102071 (N.D. Ohio, Dec. 17, 2008); *United States v. Horn*, ___ F. Supp. 2d ___, 2008 WL *7-9 (M.D. Tenn. Dec. 16, 2008); *United States v. Johnson*, ___ F.Supp.2d ___, 2008 WL 5115047 (S.D. Iowa Dec. 4, 2008); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 2008 WL 3411819 (D. Colo. Aug. 13, 2008); *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008).

²² See, e.g., *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Tankersley*, 537 F.3d 1100 (9th Cir. 2008); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008).

for excessive severity and unwarranted disparity inherent in a given guideline. Shifting sentencing power from prosecutors to judges brings with it great structural advantages, which promote transparency and reduce bias. Judges are no longer required to impose the sentence chosen by the prosecutor – often behind closed doors -- but may exercise neutral and informed discretion in open court. While the Commission’s own studies have found significant bias in prosecutorial decisions and policies,²³ there is no evidence that bias impacts the exercise of judicial discretion.²⁴

Sentencing is now more transparent. Under the mandatory guidelines, judges, prosecutors and defense lawyers, alone or together, sometimes circumvented the guidelines in order to reach a sentence that was more just.²⁵ This kind of “institutionalized subterfuge” is no longer necessary. *See Spears, supra*, at *3. The only lack of certainty is whether the guideline sentence, whatever it may be, will be imposed, as the parties are no longer precluded from demonstrating, or the judge from finding, that the guideline sentence is greater than necessary, or insufficient, to satisfy legitimate, congressionally mandated, sentencing purposes.²⁶

The reasonableness standard of appellate review is far more sensible and constructive in placing sentencing firmly with the district court judge, who can best assess what sentence will be most fair and effective in satisfying the statutory purposes, and is in the best position to provide meaningful feedback to the Commission.

To the extent there has been any loss in “uniformity,” this means that more judges are using their power to impose more fair and effective sentences. The Commission can avoid excessive disparities through “ongoing revision of the Guidelines in response to sentencing practices.” *See Kimbrough*, 128 S. Ct. at 573-74; *Booker*, 543 U.S. at 263.

IV. The Forces Are Now Aligned to Allow the Commission to Do its Job.

²³ Factors including race, gender, ethnicity and citizenship are “statistically significant in explaining §5K1.1 departures,” while factors such as the type or benefit of cooperation, defendant culpability and offense type “generally were found to be inadequate in explaining §5K1.1 departures.” USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998). “Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.” USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003).

²⁴ Fifteen Year Review at 125-27.

²⁵ *Id.* at 32, 82, 87, 141-42.

²⁶ For many reasons, the mandatory guideline system did not provide certainty, including the complexity and ambiguity of many of the guideline rules, the lack of evidentiary reliability, and uneven practices by prosecutors and probation officers.

The Supreme Court has now given the Commission the opportunity to fulfill the promise of the SRA. The Court repeatedly recognized the Commission's capacity to base the guidelines on careful study, research and consultation, and invited the Commission to cooperate with the courts in exercising that characteristic institutional role:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 127 S. Ct. at 2464.

The leadership in Congress is sending the same message. The Chair of the House Subcommittee on Crime, Terrorism and Homeland Security believes that "*Booker* is the fix,"²⁷ recognizes that Congress is largely to blame for the broken system,²⁸ and has urged the Commission to now fulfill the mandates of the SRA that it could not fulfill before:

With a congress that is inclined to trust the Commission and not so inclined to tamper with the guidelines, this may be a good time for the Commission to take a look at them relative to how far off track they may be with respect to the original Sentencing Reform Act principles and recommend appropriate adjustments. As the Supreme Court pointed out in *Kimbrough vs. U.S.*, not all guidelines are based on empirical evidence. While many are, many are based on congressional directives and mandatory minimum statutes. This distinction is important. . . . The Sentencing Commission has the authority and is best equipped to take a long hard look at whether these "congressionally-driven" guidelines are appropriate. I encourage it to do so and to report its results to Congress, just as it did for the drug quantity and crack cocaine guidelines.²⁹

²⁷ *Plenary Speech by Mr. Robert C. "Bobby" Scott* at 11, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section, October 24, 2008.

²⁸ *Id.* at 11.

²⁹ *Id.* at 12-13.

The Judicial Conference has taken the same position, urging the Commission to assess and adjust the guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums. Mandatory minimums “interfere with the operation of the Sentencing Reform Act,” and “may, in fact, create unwarranted sentencing disparity.” Thus, guidelines that are based on mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply, and the Commission is therefore “obligated to make an independent assessment of what the appropriate sentence should be.”³⁰

While the policies of the new DOJ have not yet been announced, President Obama has pledged to completely eliminate the disparity in sentencing between crack and powder cocaine offenders, and to give first-time non-violent offenders a chance to serve their sentences in drug rehabilitation programs that are more effective than prison.³¹

In 2007, the Commission, after exposing the disparity in sentencing between crack and powder cocaine offenders for over a decade, took the first step toward eliminating it. In 2008, the Commission held a symposium on alternatives to incarceration. The Commission has published a number of useful research reports, including the Report on Federal Escape Offenses, upon which the Court relied in *Chambers v. United States*, 129 S. Ct. 687 (2009).

There is broad consensus that the level of over-incarceration is a national disgrace, and that the SRA’s goals of fair, effective and efficient punishment should now be pursued. The Commission can now substantially reduce the guidelines’ recommended punishments to a level that is truly sufficient but not greater than necessary.

V. *How the Commission Can Make Sentencing Reform Work* .

The Commission should embrace the policy procedures and mandates of the SRA and re-affirm its role as an independent expert agency in the judicial branch.

A. *Review and Revise All Congressionally Driven Guidelines and Seek Overarching Directives to Implement 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(g).*

The Commission should proceed quickly with Mr. Scott’s invitation to exercise its expert capacity by taking “a long hard look at whether these ‘congressionally-driven’ guidelines are appropriate.” These are the major culprits in the unwarranted severity, unwarranted disparity, and over-incarceration caused by the guidelines, though the

³⁰ See Comments of the Criminal Law Committee of the Judicial Conference 3, 4, 5 (March 16, 2007), http://www.uscc.gov/hearings/03_20_07/walton-testimony.pdf.

³¹ See http://www.whitehouse.gov/agenda/civil_rights/.

Commission has often gone further than Congress required.³² Reporting the results to Congress, however, is not enough. The guidelines must actually be revised if the goal of a fair, efficient and effective system is to be achieved. The Commission should therefore seek legislation along these lines:

Notwithstanding any other provision of law, the United States Sentencing Commission shall review and revise as necessary the federal sentencing guidelines to assure that they comply with the purposes set forth at 18 U.S.C. 3553(a) in as fair and effective a manner as possible.

It also seems that political influences are responsible for the fact that the Commission has not carried out the directive in the SRA to minimize prison overcrowding.³³ To underscore Congress's commitment to allow and encourage the Commission to act independently to reduce severity, the Commission should seek or support revision of the last sentence of 28 U.S.C. § 994(g) along the following lines:

The sentencing guidelines shall be revised to reduce the Federal prison population to its rated capacity in [three to five years] and maintain the population at or below this capacity at all times in the future.

B. Reduce Unwarranted Disparity By Reducing Unwarranted Severity.

The sentences recommended by many of the guidelines are too severe, including those for relevant conduct, drugs, immigration, child pornography, fraud, firearms, and career offenders.

Yet the national statistics on below-guideline sentences have not changed much in the four years since *Booker* was decided. The rate of judicial sentencing below the guideline range is still only about 13%, about half that of the government's 25.4% rate.³⁴ At first blush, these statistics present a dismal picture of sentencing reform. Prosecutors continue to take advantage of guideline severity to extract cooperation and quickly move cases. Prosecutors are also more likely to exercise their discretion based on legally irrelevant factors. Judges, however, who are the best source of transparent feedback to improve the guidelines, often remain wedded to them.

³² In addition to keying the drug guidelines at all quantity levels to the two mandatory minimum levels, the Commission has often reacted to legislation by increasing punishment in ways that Congress did not require. See Congressional Directives to Sentencing Commission, 1988-2008, [http://www.fd.org/pdf lib/SRC Directives Table Nov 2008.pdf](http://www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf).

³³ See Barkow, *supra* note 7, at 766 (“Political pressures might explain [the fact that] the Commission did not make much of this provision [28 U.S.C. § 994(g)] and developed guidelines with no concern for their effect on prison population.”)

³⁴ USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, Fiscal Year 2008, Table 1.

The picture is not quite as dismal as it seems. On a national level, the below-guideline rate for judges, the government, or both is much higher than average in cases in which the guidelines are too severe, as shown in the table in the footnote.³⁵ While judicial feedback is more transparent and unbiased, a high rate for the government indicates that prosecutors believe the guideline sentence is more severe than strictly necessary (other than to serve its cooperation and case management purposes), and obviates the need for judges to sentence below the guideline range in more cases.

The problem is that only some defendants, and not others, get relief from guideline sentences that are too harsh. In both of our districts, for example, the number of illegal re-entry cases is growing but there is no authorized fast track program for illegal re-entry cases. The law of our circuits, unlike some other circuits, prohibits judges from varying based on fast track disparity. In the Northern District of Georgia, defendants are held pretrial by the marshals in a private contract facility where prisoners in transit to and from other districts are also housed, so they know what sentences are being imposed elsewhere. Our clients know, when they are being sentenced, that they are receiving higher sentences than their counterparts in other districts. This is impossible to explain and does nothing to promote respect for the law. The answer is for the Commission to reduce the severity of the illegal re-entry guideline, which is not, as it stands, based on empirical data and national experience.

Another problem is that some judges steadfastly refuse to follow *Booker* and its progeny in almost any case. In the Eastern District of North Carolina, the judicial rate of below-guideline sentences is only 6.9%.³⁶ Judges in this district continue to impose guideline sentences even in crack cases, despite the universal consensus among the Commission, the Supreme Court, the President, and the leadership in Congress that crack penalties are simply wrong.³⁷ *Spears* and *Nelson* may make a difference. The Commission could make a difference by encouraging judges to follow the law and provide the feedback it needs. Ultimately, the best solution is to reduce the severity of the guidelines.

³⁵

	Judicial	Government	Total
Drugs, § 2D1.1	13.8%	33.2%	47%
Immigration, § 2L1.2	8.9%	29.7%	38.6%
Fraud, § 2F1.1	23%	45%	68%
Child Pornography, § 2G2.2	37.3%	9.5%	46.8%
Firearms, § 2K2.1	17.6%	12.9%	30.5%

Source: USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, tbl. 4

³⁶ USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, tbl. 2.

³⁷ While this district does have an unusually high rate of above-guideline sentences at 7.8%, *id.*, the vast majority of these appear to come from one judge.

Courts are recognizing that the harshness of certain guidelines creates the wide disparities in sentences in cases involving those guidelines.³⁸ They are looking for sensible guidance from the Commission. As one judge explained:

[I]t is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance. My search for more relevant guidance, therefore, had to proceed in other directions, although I would have much preferred a sensible guidelines range to give me some semblance of real guidance.³⁹

“Uniformity” for its own sake -- by forcing courts to follow the guidelines -- was never a good idea and is no longer an option. Instead, the Commission, as contemplated by the SRA and recognized by the Supreme Court, “can help to avoid excessive disparities” through “ongoing revision of the Guidelines in response to sentencing practices.” *Kimbrough*, 128 S. Ct. at 574; *Booker*, 543 U.S. at 264.

C. Encourage Judges to Follow § 3553(a).

The Commission should encourage judges to exercise informed discretion, not only because that is what the Supreme Court’s decisions require, but because that is the mechanism through which the Commission can learn which guidelines are unfair or ineffective, and revise them accordingly. Too many judges cling to the view, formerly championed by the government, that the guidelines are presumed reasonable at sentencing and may not be disagreed with on policy grounds. The Commission should take leadership to dispel these notions.

I. Guidelines Manual. The Commission should revise the Guidelines Manual to fully and accurately describe the sentencing procedures and standards set forth in the sentencing statute and the Supreme Court’s cases. The Manual is peppered with references to the now-excised § 3553(b). It continues to prohibit or discourage consideration of a host of factors that judges must consider under § 3553(a)(1). The new commentary entitled “Continuing Evolution and Role of the Guidelines,” suggests that the guidelines and departure policy statements have special weight in sentencing, and fails to mention at all that judges must be permitted to disagree with the guidelines based solely on policy considerations. As such, it is inaccurate and misleading and likely to discourage judges from following the law and participating in the evolution of the guidelines. The substantial problems with this commentary and our suggested solutions are detailed in the Appendix, Part I.

³⁸ See, e.g., *United States v. Stern*, ___ F. Supp. 2d ___, 2008 WL 5273714 (N.D. Ohio Dec. 19, 2008); *United States v. Grober*, ___ F. Supp. 2d ___, 2008 WL 5395768 ** 14-16 (D. N. J. Dec. 22, 2008).

³⁹ *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (Block, J.).

2. **District Trainings.** The Commission should emphasize in its trainings that the Commission welcomes and encourages feedback on the guidelines, whether positive or negative. All judges should understand that this is a vital part of their role in the new system. The Commission should include judges, probation officers, defense counsel and prosecutors together in its trainings. This would make it possible to have a transparent dialogue that would foster understanding through open debate.

3. **Pre-Sentence Report.** The Commission should encourage revision of the pre-sentence report to reflect U.S. Probation's Monograph 107. The Monograph sets forth § 3553(a) in its entirety, then states that "[a]ny sentence recommended must be 'sufficient, but not greater than necessary, to comply with' the statutory sentencing purposes," then lists a variety of questions to consider in relation to each sentencing purpose. See Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

4. **Statement of Reasons Form.** The Commission should advocate substantial revision of the Statement of Reasons form, and a requirement that either a transcript or written decision be attached.

First, the form suffers from the same problems as the new commentary in Chapter One of the Guidelines Manual. It gives great attention to the guidelines and departure policy statements ("the advisory guideline system"), says nothing about the parsimony clause, and treats the purposes of sentencing and the factors other than the guidelines and policy statements as an afterthought at best ("sentence outside the advisory guideline system"). The inescapable suggestion is that the guidelines and policy statements are presumptive and that the governing statute is suspect, which the Court has forbidden in *Rita*, *Gall* and once again in *Nelson*. The form has a section for explaining "the facts justifying a sentence outside the guideline system," but no section for explaining a policy disagreement with the guidelines. As the Supreme Court has repeatedly (in *Cunningham* and *Kimbrough*), and now adamantly (in *Spears*), made clear, judges must be permitted to vary from the guidelines based solely on a policy disagreements in the absence of any special "facts."

Second, the checkboxes, with bare citations to policy statements and subsections of § 3553(a), are inadequate as a means to collect or disseminate useful information, which may explain why the reasons the Commission reports are not meaningful. Judges should be required to attach either the transcript or a written decision, so that the Commission can study and disseminate real reasons. The checkboxes not only fail to capture meaningful reasons for the sentence, but they invite cursory treatment and therefore inaccuracy. We have come across numerous instances in which the reason checked on the form is not the reason upon which the judge relied.

D. Assist the Courts in Choosing the Appropriate Sentence, Within or Outside the Guideline Range.

After *Booker* and its progeny, sentencing can be a cooperative endeavor. The Commission can promulgate and amend guidelines based on empirical research. Judges can give feedback to the Commission through their sentencing decisions that the Commission can use in its research. The Commission can collect, study, and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. Judges, in turn, can use that information in sentencing. The Commission can continually measure whether the purposes of sentencing are being met, and if not, it can revise the guidelines.

Judges must calculate and consider the guideline range but are required to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing in light of all of the relevant facts of the case and the defendant's life. To inform their judgment, judges have relied on Commission research that is not reflected in the guidelines, other empirical and policy research, sentencing data, sentences in similar cases and dissimilar cases compiled by the judge or the parties, and judicial decisions in other cases.

The Guidelines. The Commission can assist judges in choosing the appropriate sentence, first, by revising the guidelines based on empirical data and national experience. The guidelines should give sensible and evidence-based advice,⁴⁰ and should provide reasons that invite judges to follow them. To that end, each guideline should explain what purpose or purposes it is intended to serve, how the guideline is intended to comply with 18 U.S.C. § 3553(a), and on what basis the Commission concluded that the guideline would be effective. The guidelines should also direct judges to the full range of sentencing options permitted by statute and explain in what circumstances different sentencing options are likely to serve the relevant purposes of sentencing.

Research. The Commission should continue to conduct and publish research on dangerousness and recidivism. Of all of the purposes of sentencing, the need to protect the public from further crimes of the defendant is the one of greatest practical concern, and also seems the most capable of being measured.

Data. The Commission should collect and disseminate data in a form that judges, probation officers, and the parties can use. One of the Commission's important missions is to systematically collect, study, and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. See 28 U.S.C. § 995(a)(12)-(16). Currently, the Commission publishes reasons that are too general to be meaningful (such as "criminal history issues," "general guideline adequacy issues," "circumstances not considered by

⁴⁰ See Judge Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, Feb. 20, 2008 ("I suggest we re-brand our central concept and call it evidence-based sentencing, for that is what it is: sentences by judges who have considered the evidence that informs their discretion."), http://www.brennancenter.org/content/pages/wolff_at_the_14th_annual_justice_brennan_lecture_on_state_courts_social_jus.

guidelines,” “18 U.S.C. § 3553(a)”; the number and rate of such reasons in all cases, but not by guideline or offense type, *see* USSC Sourcebook, tpls. 24-25B; the number of outside-guideline sentences by guideline, but without reasons, *id.* tbl. 28; and the median sentence and median decrease (or increase) by offense type but not the associated reasons. *See* USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, tpls. 5-15A. The Commission should report (1) the reasons for outside-guideline sentences in a more specific and meaningful way, (2) the number, rate and reasons for departures and variances for each offense guideline and for each offense type where the guideline covers different offense types, and (3) the average and median sentence length and decrease (or increase) associated with each reason.⁴¹ Given the serious issues with the career offender guideline, the Commission should also publish the number of defendants sentenced under it, what their qualifying instant and prior convictions were, the mean and median sentence length, and the rate of and reasons for outside-guideline sentences.

Sentencing Purposes. The Commission should consider including in the Guidelines Manual something along the lines of U.S. Probation’s Monograph 107. As noted above, it sets forth § 3553(a) in its entirety, states that “[a]ny sentence recommended must be ‘sufficient, but not greater than necessary, to comply with’ the statutory sentencing purposes,” and suggests a variety of questions to consider in relation to each sentencing purpose. *See* Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

E. Encourage the Use of Probation and Evidence-Based Alternatives.

We thank the Commission for holding a symposium on alternatives to incarceration last summer so that the federal system could learn from the states how to reduce costs and protect the public through non-prison alternatives. Although the Commission’s proposed amendments and issues for comment for this cycle unfortunately do not include alternatives to incarceration, the Commission just issued a report which states:

Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.⁴²

⁴¹ In *United States v. Cole*, 256 Fed. Appx. 510 (3d Cir. Nov. 29, 2007), the Third Circuit rejected the defendant’s argument that the district court erred by failing to consider average sentences for bribery in the nation or in the district because he did not explain how his case compared to that of the average bribery defendant in either jurisdiction.

⁴² USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009).

At the same time, the report confirms that non-prison alternatives are not part of the culture of sentencing in federal court. While judges must now consider all of the kinds of sentences available by statute, here in the Northern District of Georgia, there has been only a small increase in split sentences and probation with home confinement for defendants who would not qualify under the guidelines' zone system, and no change in the Eastern District of North Carolina. For many of our clients who are non-violent first offenders, pretrial diversion or probation with drug treatment would be the appropriate sentence, but we have had very little success in convincing judges or probation officers to agree to this solution.

The reason for the under-use of probation appears to be that the Guidelines Manual does not direct attention to the "in/out" question, but rather directs it to the "how long" question reflected in the guidelines' zone system. This is unfortunate because Congress expected that the threshold question in most cases would be whether probation was sufficient or whether prison was required. Moreover, Congress expected that probation would be the presumptive sentence 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," that some term of imprisonment would be generally appropriate for "a person convicted of a crime of violence that results in serious bodily injury," and that between these poles, non-prison sentences would suffice in many cases.

In particular, Congress sought to guard against the use of incarceration to warehouse defendants who lacked the advantages of education, employment, and stabilizing ties, and intended that probation would be used to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing. But, according to the Commission's data, the federal prison population consists overwhelmingly of people of color who are poor and uneducated, and whose crimes were not violent. With the exception of crack offenders (who are mostly African American and have a higher risk of arrest and prosecution than similarly situated Whites), drug offenders are usually first offenders. This is totally inconsistent with Congress's intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders.

Resources are being wasted on imprisoning people who do not need to be in prison. Many offenders would be much less likely to recidivate if those resources were spent on treatment, education, and job training instead of prison. As explained in more detail in the Appendix, Part II, we therefore propose that the Commission:

- Ensure that the first question is whether prison is appropriate at all, not how long the defendant should be imprisoned, by revising Chapter 5 to state at the beginning that probation is a sentence in and of itself, is permissible in every case in which prison is not statutorily required, and that the court should address at the outset in every case in which probation is statutorily allowed whether prison is actually necessary to satisfy any purpose set forth in § 3553(a)(1), (2) or (3).

- Provide evidence-based research on alternatives to incarceration in order to give guidance to judges, probation officers, and the parties.
- Expand the availability of alternatives to all offenders who are statutorily eligible without regard to the zone system.
- Amend Chapter Five to add a “first offender safety valve.”
- Amend Chapter Five to encourage specific alternative sanctions and programs that have been proven to decrease the risk of recidivism.
- Amend Chapter Seven to recognize and encourage a defendant’s participation in reentry programs.
- Recommend that the Bureau of Prisons revise its policies to address the problem of over-incarceration.

F. Eliminate Policy Statements that Restrict Consideration of Characteristics of the Offender and Circumstances of the Offense.

The Commission’s policy statements prohibiting, discouraging, limiting, and attempting to define a broad range of offender characteristics and certain offense characteristics are inconsistent with § 3553(a) and Supreme Court law. *See Gall v. United States*, 128 S. Ct. 586 (2007). Sentencing is needlessly complicated if the court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions. The rate of “departures” is shrinking as more courts recognize that imposing an appropriate sentence based on the purposes of sentencing in light of the characteristics of the offender and the circumstances of the offense is not only what they are required to do, but is more meaningful. Indeed, many of the factors which are deemed never or not ordinarily relevant are highly relevant in predicting reduced recidivism, demonstrating reduced culpability, or indicating a need for treatment or training in a non-prison setting. A more serious problem, however, is that some courts continue to believe that these restrictions take precedence over their duty to follow § 3553(a)(1).

As explained and set forth in more detail in the Appendix, Part III, the Commission should:

- Delete Chapter 5, Part H (Specific Offender Characteristics) and Part K.2 (Other Grounds for Departure) and move them to a historical note.
- Revise USSG § 1B1.4 to state that the court may not determine the kind or length of the defendant’s sentence “because of” race, sex, national origin, creed, religion or socioeconomic status.
- Retain encouraged “departures” in the Chapter 2 and Chapter 4 guidelines.
- Delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders.
- Revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of “an appropriate sentence . . . within the applicable guideline range, or outside that range,” rather than “within the guideline range, or whether a departure from the guidelines is warranted.”

- Revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice.

G. Simplify the Guidelines.

There is a firm sense in our offices and in Defender offices across the country that the aggravating enhancements in the offense guidelines and the criminal history rules are much too complicated. There are too many of them, they are duplicative and cumulative, and the instructions are abstract and confusing. Judges, probation officers, and the parties are forced to focus on meaningless minutiae while the important questions are ignored. Judges are well-situated to determine whether an offense is particularly serious or not particularly serious based on the totality of the circumstances, without being required to add up points for every possible detail of the offense.⁴³

By focusing on minutiae and cumulating discrete harms, many guidelines do exactly what the original Commission said they should not. “[T]he relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.” USSG § 1A1.1, Pt. 1(3), The Basic Approach, p.s. One of the rare exceptions to the guidelines’ general neglect of reduced personal culpability, role in the offense, is dwarfed by both the size of quantity-based aggravating factors and, particularly in fraud cases, the large number of cumulative and duplicative additional upward adjustments.

The complexity of the guidelines has a number of negative effects. First, it is often difficult to provide a client with a clear forecast of the guideline calculation, which is at least the “starting point” and is still the ending point in most cases. Second, there are too many traps for the unwary, particularly panel attorneys who do not deal with the guidelines on a constant basis. We commonly get calls from panel attorneys who do not properly take into account (or understand) potential cross-references, career offender enhancements or relevant conduct exposure. These attorneys often overestimate the value of pleas that dismiss particular counts, not realizing that it will all come back in as relevant conduct or be made irrelevant through some recidivist enhancement. Many attorneys have difficulty calculating criminal history.

Third, the complexity creates too much reliance by judges on probation officers. Judges in the Eastern District of North Carolina, for example, rely heavily on probation officers on the assumption that they are the only ones who can understand the arcane guideline rules. But the ability, time, and attention of probation officers are uneven at

⁴³ Justice Breyer has **Error! Main Document Only.** criticized the “false precision” of the guidelines, and called upon the Commission to “act[] forcefully to diminish significantly the number of offense characteristics,” to “broaden[] the scope of certain offense characteristics, such as ‘role in the offense,’” and to move in the direction of “greater judicial discretion” in order to provide “fairness and equity in the individual case.” Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *10-11 (Jan./Feb. 1999).

best. Fourth, applying the guidelines takes too much time. This means that all other aspects of the sentencing decision are neglected. It makes errors more likely. And probation officers become dependent on summaries and reports from case agents because they do not have the time for independent analysis. Probation officers generally are given the same amount of time to write a report for a complicated fraud case as for an illegal re-entry or felon-in-possession case.

Fifth, the guidelines' complexity creates unwarranted disparity, as the original Commission recognized it would: "The greater the number of decisions required and the greater the complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." USSG § 1A1.1, Pt. 1(3), The Basic Approach, p.s.

Sixth, it appears that the guidelines' complexity is responsible for the government's insistence on appeal waivers. Because "the Department of Justice is concerned about the resources expended in guideline application, particularly the number of criminal appeals," the response "has been to reduce appellate caseloads by forcing defendants to waive their right to appeal in order to accept a plea bargain."⁴⁴ These waivers are not only unconscionable and unfair, but stunt the development of the law regarding guideline application and a broader common law of sentencing, and stifle feedback to the Commission.

The Commission should not approach simplification in a piecemeal fashion. Instead, it should conduct or review empirical studies to determine what aggravating offense circumstances actually correlate to one or more purposes of sentencing. If the Commission does that, we are confident that it will find that the complicated structure that has been erected does not correlate to the purposes of sentencing. One possible consequence of a truly empirical review would be a determination that the advisory guideline ranges should be broadened. This may require repeal of the "25% rule" in 28 U.S.C. § 994(b)(2). With simplified, advisory ranges, the rule may no longer be necessary.

H. Recommend Reliable and Fair Factfinding.

I. USSG § 6A1.3. This policy statement encourages unreliable factfinding, is outdated and in many ways incorrect, and therefore should be substantially revised. While it may be that judges and probation officers in some districts require the facts to be proved based on some quantum of reliable evidence, this is not always the case in the Eastern District of North Carolina. Probation officers frequently include third-hand, uncorroborated information from unreliable informants to double or triple the guideline range. This information is all but impossible to defend against because judges, applying the (inadequate) preponderance and "probable accuracy" standards recommended by the

⁴⁴ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 763 (2001).

guidelines, do not rigorously insist on adequate indicia of evidentiary reliability. Instead, in many cases, it appears as if the alleged information is accepted as fact unless the defendant can disprove it. A typical example is a pre-sentence report stating that the agent stated that the informant stated that the defendant sold him 10 grams of crack every week for two years. In one such case, the defendant was in jail for two months during which he allegedly sold crack to the informant every week. Rather than concluding that the informant must be fabricating, as a jury likely would, the judge deducted two months worth of alleged crack sales from the grand total. This is consistent with, and does not violate, the Commission's policy statement. The policy statement therefore should be revised to ensure fair and accurate resolution of factual disputes, consistent with current Supreme Court decisions, rules of criminal procedure, and statutes. Our specific proposals are contained in the Appendix, Part IV.

2. Fed. R. Crim. P. 32.

Documentary Information. In some districts, including the Eastern District of North Carolina and the Northern District of Georgia, probation officers include in the pre-sentence report factual assertions based on documents obtained from the government or from a non-party, such as law enforcement reports or letters from victims, which defense counsel is unable to obtain and therefore unable to effectively rebut. In other districts, disclosure is either standard practice or required by local rules. This has improved fairness and efficiency and has caused no problems. Disclosure should be required in every case, in order to ensure that every defendant has the ability to address the reliability of the information upon which he is being sentenced and to avoid hidden and unwarranted disparity. The Federal Public and Community Defenders therefore support, and ask the Commission to support, a change to Fed. R. Crim. P. 32 as follows:

1. Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.
2. Where documentary information is submitted by a non-party to the probation officer in connection with a pre-sentence investigation, the officer shall, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties.

Probation Officer's Recommendation. Rule 32(e)(3) should be revised to require that the probation officer's recommendation be disclosed in every case, absent good cause shown. As amended in 1994, the Rule establishes a "presumption that a probation officer's sentencing recommendation be disclosed to the parties," *see* 154 F.R.D. 433, 461 (1994), but it still permits the court to direct the probation officer, by local rule or by order in a case, not to disclose the recommendation to anyone other than the court. *See* Fed. R. Crim. P. 32(e)(3). The recommendation contains facts, law, and subjective opinions, to which defendants in only some districts, but not others, have the

opportunity to respond. There appears to be no justification for not requiring disclosure in all cases. The policy against disclosure originated in concerns that the supervisory relationship would be strained if the defendant knew what the officer recommended. That concern no longer exists, as the pre-sentence writer and the supervising officer are no longer the same.

The recommendation is not disclosed in the Northern District of Georgia or the Eastern District of North Carolina, yet it is disclosed in the Middle District of North Carolina. Many districts disclose it, and this has been beneficial and caused no problems. In the District of Arizona, the recommendation is disclosed with both the draft and final pre-sentence report, and this has not been a problem, despite the heavy caseload. This should be the rule for all cases.

These proposals, as well as certain proposals that we believe should *not* be adopted, are explained in the Appendix, Part V.

I. Support Legislation to Include a Defender Ex Officio.

The Commission should affirmatively support legislation that would include a representative of the Federal Public Defenders as a nonvoting member of the Commission. The Judicial Conference has supported this change for several years and has proposed legislation to that effect. The Department of Justice, which invariably presses for harsher sentences to make its job easier, has two *ex officio* non-voting representatives. Defense lawyers, who are concerned with the human costs and benefits of sentencing policy, have none. There does not appear to be any legitimate reason for excluding defense interests. It is imbalanced and unfair, deprives the Commission of defense expertise and knowledge, and harms the legitimacy of the Commission and its work. Indeed, the most successful state sentencing commissions include defense lawyers.⁴⁵

J. Recommend Abolition of Mandatory Minimums.

Seventeen years ago, the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.⁴⁶ Since then, only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated.⁴⁷ Further, several judges and

⁴⁵ Barkow, *supra* note 7, at 800. Minnesota's commission includes a public defender, Washington's includes two defense lawyers, and North Carolina's includes a defense lawyer. *See id.* at 772, 778, 783. *See also* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995).

⁴⁶ *See USSC, Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991).

appeals courts recently have found mandatory minimums to be cruel and irrational even if not unusual by Eighth Amendment standards. These decisions have highlighted the related problems of undue severity, unfettered prosecutorial power, and unwarranted disparity. See *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006).

In its Fifteen Year Review, the Commission detailed many of these problems with support from many sources, including a study by the Department of Justice, showing “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders.”⁴⁸ By virtue of mandatory minimums, sentences for similarly situated offenders vary dramatically depending on the disparate charging and plea bargaining decisions of individual prosecutors,⁴⁹ and such decisions “disproportionately disadvantage minorities.”⁵⁰ “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁵¹

The Commission should prepare an updated report on mandatory minimums and recommend to Congress that they be abolished. There is now a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, Justice Kennedy and

⁴⁷ *Fifteen Year Review* at 135; Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

⁴⁸ See *Fifteen Year Review* at 51 (citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994)).

⁴⁹ *Fifteen Year Review* at 84-85, 89-91, 102-04, 106, 141-42; see also Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm’n Before the ABA Justice Kennedy Comm’n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

⁵⁰ *Fifteen Year Review* at 91.

⁵¹ *Id.* at 135.

the ABA's Justice Kennedy Commission, and the Constitution Project's Sentencing Initiative.⁵²

K. *Eliminate the Crack/Powder Disparity.*

We strongly support the Commission in continuing to work with Congress to eliminate the unwarranted disparity between sentences for crack and cocaine powder offenders. We agree with the Commission that the mandatory minimum for simple possession of crack cocaine should be repealed, and that sentences for powder cocaine should not be raised. We understand that the Commission takes no position on the exact ratio other than that it should not exceed 20:1. We urge the Commission to recommend that penalties for the same quantity of crack and powder cocaine be equalized, as in most of the bills introduced earlier this year, for all of the reasons identified in the Commission's reports. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with other drug types.

An additional reason to recommend a 1:1 ratio is that any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.⁵³ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and a very small increase in the quantity of crack results in a very large increase in the sentence.⁵⁴

⁵² See U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006); Statement of Paul G. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee, Hearing on Mandatory Minimum Sentencing Laws (June 26, 2007), <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf>; Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 59-65 (March 16, 2006); Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994).

⁵³ Fifteen Year Review at 50, 82.

⁵⁴ See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover

Finally, the Commission should recommend a 1:1 ratio because it would eliminate mathematical problems which create disparate ratios between crack and powder cocaine. The current variances in the relationship between crack and powder cocaine, which occur both within guideline ranges and between offense levels, create unwarranted disparity among persons convicted of crack cocaine offenses.

L. Revise the Guidelines Based on Feedback, Empirical Data, and Research.

Relevant Conduct. For years, the Defenders, PAG, judges and academics have been urging the Commission to eliminate uncharged and acquitted offenses, including cross-references to more serious offenses, from the guidelines. It is fundamentally unfair to sentence a defendant convicted of one offense based on another offense that was never charged, or of which he was acquitted. This creates disrespect for law. Indeed, attempts to explain the expansive, almost unlimited, reach of relevant conduct to clients (or indeed to any non-lawyer or any lawyer who does not practice federal criminal law) are almost invariably met with shock, incomprehension and disbelief.

The government should not be able to obtain the same sentence as if it had charged and proved the crime when it has failed even to obtain an indictment, or when a jury has rejected the charge. No state guideline system uses uncharged or acquitted crimes. The idea behind its use in the federal guidelines was to avoid transferring sentencing power to prosecutors, but it has done just that, providing prosecutors with a potent and unjust tool to coerce cooperation and guilty pleas, *i.e.*, a drastic sentencing increase based on a mere preponderance of the probably accurate information. Former Commissioner John Steer recently said that acquitted conduct should be removed from the guideline calculation, and that the use of “unconvicted counts” in the same course of conduct or common scheme under § 1B1.3 (a)(2) and (3) “is the aspect of the guideline that [he] find[s] most difficult to defend.”⁵⁵

Cross-references are a particular problem in the Eastern District of North Carolina. Probation officers use them whenever possible. For example, we recently had a case in which the defendant pled guilty to two felon-in-possession counts. The probation officer cross-referenced to the murder guideline and the defendant was sentenced to the statutory maximum of twenty years. Had the defendant actually been charged with murder, he would have had an excellent jury argument for self-defense which may well have resulted in acquittal. Instead, he made the argument to a judge in a hearing with no rules of evidence under a preponderance standard. The judge ignored the argument and sentenced the defendant as a murderer.

sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

⁵⁵ See *An Interview with John Steer, Former Vice Chair of the U.S. Sentencing Commission*, *The Champion* at 42, September 2008.

In another case, the defendant and his girlfriend had a domestic dispute in the midst of which he left the scene. The girlfriend's brother then drove to the defendant's house to confront him. After words were exchanged, shots were fired at the car by the defendant and others and the brother sustained a minor, superficial injury. The defendant was charged and convicted in state court with assault with intent to kill. Later, he was charged in federal court under § 922(g). Probation cross-referenced not to aggravated assault, but to attempted first degree murder under §2A2.1(a)(1), even though the state never charged the defendant with attempted murder, much less attempted first degree murder. At most, the defendant should have been cross-referenced to § 2A2.1(a)(2). The probation officer's decision to cross-reference to a crime more serious than that for which the defendant was charged and convicted in state court made a difference in the guideline range of at least six levels.

Another client was apprehended with a gun, but no drugs, and charged under § 922(g). In a statement to an ATF agent, he said he had obtained the firearm about five years earlier in exchange for \$20 worth of crack (.1 gram), and that he had sold substantial quantities of cocaine before obtaining the firearm. Based on this statement, the probation officer cross-referenced to § 2D1.1, which, based on the drug quantity admitted, would have resulted in a guideline range well in excess of the statutory maximum. The probation officer eventually relented, but only when the prosecutor agreed that the cross-reference should not apply.

In the Northern District of Georgia, the probation officers include the entire drug quantity or dollar amount from the moment the defendant joined the conspiracy as "jointly undertaken activity." This is included on the basis that it was "foreseeable," which is interpreted to mean "should have known." In 1992, the commentary to § 1B1.3 was amended to attempt to clarify that the defendant is accountable for the acts and omissions of others only if such acts or omissions were both reasonably foreseeable and within the scope of the defendant's agreement. Probation officers in the Northern District of Georgia operate on the assumption that the conduct was within the scope of the agreement, and shift the burden to the defendant to show that it was not. Sometimes the probation officer will amend the report in response to our interpretation, but whether or not we succeed often depends on whether the probation officer has enough time to even consider the argument. If the probation officer does not fix the problem, some of our judges accept the probation version wholesale.

This is a longstanding problem and remains unremedied by the commentary.⁵⁶ The concepts are just too esoteric. Any concept that requires eight single-spaced pages of

⁵⁶ See U.S. Sentencing Commission, Staff Discussion Paper, *Relevant Conduct* at 10-11 & n.10 (1996) (recommending narrowing the scope of relevant conduct, including accomplice and conspiratorial liability for the conduct of others, as a way of decreasing complexity and unfairness, and reducing the prosecutor's power in the plea process); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997) (in a sample test administered by Commission researchers for the Federal Judicial Center in 1997,

examples to explain it must be hopelessly unclear. Instead of using abstract terms like “reasonably foreseeable” and “scope of the specific conduct and its objectives embraced by the defendant’s agreement,” the Commission should try something simpler and more direct. For example:

In order for the defendant to be accountable for the acts or omissions of another person, the government must prove through concrete evidence that the defendant directly conspired with or aided and abetted that person, and knew about, intended and agreed to that person’s acts or omissions.

In addition, the Commission should (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of “relevant conduct”; (2) significantly lessen the impact of charged counts that are dismissed as part of a plea agreement by limiting their impact on the guideline range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction as determined under § 1B1.3(a)(1); and (3) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3.

Drugs. The drug guidelines are too severe, and should be amended to reflect empirical data and national experience. If the Commission still feels bound by the mandatory minimums, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels. *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007). This is true of all of the drug guidelines, and should be addressed.

Career Offender. The career offender guideline, promulgated in response to 28 U.S.C. § 994(h) and then broadened beyond the statutory terms, is contrary to empirical evidence and national experience, as shown by the Commission’s own research, the sentencing data, and judicial decisions. The guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies, *i.e.*, those involving prior drug convictions, and has a disproportionate impact on African Americans.⁵⁷ Exacerbating these problems, the Commission’s definitions of predicate offenses are broader than § 994(h) requires.

The Commission should present its findings to Congress with a recommendation that § 994(h) be repealed. In the meantime, the Commission should narrow the guideline

probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant).

⁵⁷ Fifteen Year Review at 133-34.

so that it applies no more broadly than the statute requires. The Defenders have previously submitted extensive comment describing the serious problems with the career offender guideline and proposing reasonable solutions, most recently in our Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 8-19, September 8, 2008, which we incorporate by reference.

Immigration. There is a rapidly growing Hispanic population in the Eastern District of North Carolina which has led to an increasing number of immigration prosecutions, but there is no authorized fast track program. Likewise, in the Northern District of Georgia, due to the large immigrant population and international airport in Atlanta, we have a large number of Hispanic clients charged with illegal re-entry, but there is no fast track program for these clients.⁵⁸ In 2007, the government moved for early disposition departures in twenty other districts, both on and off the border, in districts with and without heavy immigration caseloads.⁵⁹

Both the Fourth and Eleventh Circuits have held that judges may not vary based on fast-track disparity.⁶⁰ While these decisions appear to be wrong in light of *Gall* and *Kimbrough* for the reasons articulated by the First and Second Circuits, see *United States v. Seval*, 293 Fed. Appx. 834 (2d Cir. Sept. 25, 2008), *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008), they remain the law in the Fourth and Eleventh Circuits.

As a result, most clients convicted of illegal re-entry are sentenced within the draconian guideline range of USSG § 2L1.2. Their sentences are disproportionately high for no reason grounded in the purposes of sentencing. As noted above, our clients know what sentences are being given in other districts, and it is difficult for them to understand why they are looking at four to seven years when an identical person apprehended in Arizona or New Mexico is facing only one or two years.

In 2003, after the Protect Act was passed, the Commission reported that at least 40% of non-substantial assistance departures in 2001 were initiated by the government, and that most of these were fast-track departures.⁶¹ The Commission concluded:

⁵⁸ The only fast track program authorized by the Attorney General in the Northern District of Georgia is for illegal identification documents at the airport.

⁵⁹ See USSC, 2007 Sourcebook of Federal Sentencing Statistics, Appendix B, <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>.

⁶⁰ See *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006). The Eleventh Circuit held that sentencing judges may not vary based on fast-track disparity soon after *Booker*. See *United States v. Arevalo-Juarez*, 453 F.3d 236 (11th Cir. 2006). Following the circuit rule that prior precedent may be overruled only by the en banc court or by the Supreme Court, a split panel of the Eleventh Circuit upheld *Arevalo-Juarez* because *Kimbrough* did not “expressly” overrule it. See *United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008).

⁶¹ U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* iv-v (October 2003).

Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.⁶²

The Commission could address this unwarranted disparity by encouraging judges, in a note to § 5K3.1, to depart or vary downward to take account of it.

The underlying and most significant problem, however, is that guideline ranges under § 2L1.2 are too severe, and lack any empirical basis.⁶³ Most of these defendants pose no danger whatsoever. For example, a Jamaican client in the Northern District of Georgia, seventeen years before his federal arrest for illegal re-entry, had been convicted in Georgia state court of a drug distribution offense for which he was sentenced to thirty years. He was paroled after three years and deported. He returned to the United States, married, had a child, ran his own business, and was never charged with another crime. He was arrested after having an argument with his stepson in a restaurant parking lot. His one seventeen-year-old conviction placed him at a level 24 and criminal history category III. After a reduction for acceptance of responsibility, he faced a sentence of 46 to 57 months, although no one believed he was a danger to anyone or would commit another crime. Fortunately, his arrest came soon after the Supreme Court's decision in *Blakely*, and he was given a much shorter sentence on that basis. But prison was not appropriate at all, given his history of rehabilitation and the complete lack of risk he posed to the community.

The Commission should either encourage downward departure or variance, or reduce the harshness of this guideline.

Child Pornography. As has been well-documented, USSG § 2G2.2 is dramatically flawed.⁶⁴ It does “not exemptify the Commission’s exercise of its

⁶² *Id.* at 66-67.

⁶³ Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

⁶⁴ See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, July 3, 2008.

characteristic institutional role.”⁶⁵ Many judges have found this guideline to be unsound and inhumane.⁶⁶

In the Eastern District of North Carolina, however, the guideline sentence is routinely imposed. Whether the defendant is convicted of possession, receipt or distribution, a 5-level increase for distribution is typical because file sharing or trading is increasingly the way images are obtained. The 2-level computer enhancement applies in almost every case.⁶⁷ A defendant who traded images with more than one person or chatted online to an agent he thought was a minor gets another 5 levels for “pattern of activity involving the sexual abuse or exploitation of a minor.” The number of images adds another 2 to 5 levels, and so on. In short, as documented in many cases rejecting the guideline, the range for a first offender convicted of either possession (with a ten-year maximum) or receipt/distribution (with a twenty-year maximum) easily exceeds the statutory maximum, and indeed often exceeds the guidelines chart, with an offense level of 45 possible before adjustment for acceptance of responsibility.

This guideline invites draconian and manipulative charging practices by prosecutors. In the past, some defendants in the Northern District of Georgia, usually first offenders, were charged with or allowed to plead to only possession of child pornography. A few of the judges imposed sentences of probation for possession in special cases, *i.e.*, the defendant was mentally retarded or extremely physically ill, and judges also imposed below guideline prison sentences in some cases. Prosecutors now insist on a plea to receipt, thus ensuring a five-year mandatory minimum. Defendants who sent even a single image to an agent during a chat are charged with distribution, in addition to possession and receipt, so that the statutory maximums, when stacked, add up to fifty years.

As a result of the severity of the guideline and the government’s harsh charging policies, more and more of these cases are proceeding to trial. In non-distribution cases, the government offers to drop the possession charge and agree to a plea to receipt, with a mandatory minimum of five years and a maximum of twenty years, in exchange for a full

⁶⁵ *Kimbrough*, 128 S. Ct. at 575.

⁶⁶ See *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008); *United States v. Grober*, __ F.Supp.2d __, 2008 WL 5395768 (D. N.J. Dec. 22, 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M.D.Fla. Dec. 19, 2008); *United States v. Stern*, 2008 U.S. Dist. LEXIS 102071 (N.D. Ohio, Dec. 17, 2008); *United States v. Johnson*, __ F.Supp.2d __, 2008 WL 5115047 (S.D. Iowa Dec. 4, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. Aug. 13, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Taylor*, slip op., 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, slip op., 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008).

⁶⁷ In the past five years, the Defender Office in the Northern District of Georgia has had only two cases that started as traditional postal investigations, and one of those had a computer as well.

waiver of appeal and all post-conviction rights. In distribution cases, the government either offers nothing or a plea to receipt and distribution, with the severe waiver of rights described above. First offenders with no prior criminal record face sentences that are effectively life sentences. There is no incentive to plead. As a result, more jurors are exposed to these images, and more children are re-victimized.

Fraud. The fraud guideline, USSG § 2B1.1, can easily produce sentences that are greater than necessary to satisfy sentencing purposes. First, it “place[s] undue weight on the amount of loss involved in the fraud,” which in many cases “is a kind of accident” and thus “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”⁶⁸ Second, it imposes cumulative enhancements for many closely related factors.⁶⁹

Because loss often is not the best indicator of culpability, a guideline driven by loss treats different offenders the same. For example, in the Northern District of Georgia, we have a 67-year-old client who was recently sentenced to prison for health care fraud. This was his first offense. His clinics treated real patients with real health problems and billed the insurance company under the wrong code because it would not otherwise pay for the treatment. His guideline range was the same as it would have been if he had billed for ghost patients (ones who did not exist) or for procedures that were never performed. As a first offender, he was sentenced to prison solely because of the loss amount involved, and even though his co-defendant made full restitution to the insurance company.

Section 2B1.1 is also unduly complicated and cumulative. Approximately forty specific offense characteristics replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3. Section 2B1.1 exemplifies what the Commission’s Fifteen Year Review calls “factor creep,” where “more and more adjustments are added” and “it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”⁷⁰ Citing to a 1999 speech by Justice Breyer, the Fifteen Year Report notes that “[c]omplex rules with many adjustments may foster a perception of a precise moral calculus, but on closer inspection this precision proves false.”⁷¹

⁶⁸ *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004).

⁶⁹ Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006); *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004).

⁷⁰ Fifteen Year Report at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (Complexity of Guidelines has created a “façade of precision” which “undermines the goals of sentencing.”).

⁷¹ Fifteen Year Review at 137, citing Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999).

District court feedback on this guideline shows that it is badly in need of revision. For example, in *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. July 20, 2006), Judge Rakoff reduced a life sentence to 42 months based on the purposes of sentencing and individual factors in the case. Describing the guideline calculation, he said:

[T]he total offense level of 46 determined by the Court (i.e., a base level of 6, plus a 24 points for loss, plus 16 points for adjustments and enhancements) was 9 points less than the level of 55 recommended by the Government (i.e., a base level of 7, plus 28 points for loss, plus 20 points for adjustments and enhancements). But, under the guidelines, this 20% reduction in the offense level made absolutely no difference in the recommended guideline sentence—for as noted, the guidelines recommend life imprisonment for every offense level over 42. Moreover, as a practical matter, a sentence of life imprisonment was effectively available here, for the statutory maximum sentence for the combined five counts of which Adelson had been convicted was 85 years, which, given his current age of 40, would have led to his imprisonment until the age of 125. Even the Government blinked at this barbarity.

Id. at 511. Confronting a similar problem in *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), Judge Block recognized that the guideline range of 360 months to life, the result of guideline increases driven by highly publicized major frauds such as Enron, defied common sense in the comparatively run of the mill securities fraud case before him. He sentenced the defendants to 60 months, based primarily on similarities and differences between the case before him and other securities fraud cases compiled by the parties.

The initial Commission increased sentences for economic crimes above past practice to provide a “short but definite period of confinement for a larger proportion of these ‘white collar’ cases” in the belief that this would “ensure proportionate punishment and . . . achieve deterrence.”⁷² As to deterrence, research has shown no difference in deterrent effect for white-collar offenders, presumably the most rational group of offenders, even between probation and imprisonment.⁷³ The guideline has been ratcheted up over time in response to pressure from DOJ, perceived signals from Congress, and direct interference by Congress. See Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989); Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387-435 (2004).

⁷² Fifteen Year Review at 56.

⁷³ See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995); Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35 (Cambridge University Press) (2002).

The Commission should now simplify and reduce the severity of this guideline, based on empirical data and national experience.

Mitigating Role Adjustment. The mitigating role adjustment, while a sound concept, does not work well in practice. One problem is that its effect is often dwarfed by drug quantity or dollar amount, which often has nothing to do with culpability. Unless the Commission significantly reduces the effect of dollar amount and drug quantity, the number of points for a mitigating role adjustment should be increased to at least six.

Another problem is that it is too rarely used because of the belief, suggested by some case law, that any defendant whose participation is “integral” to the success of the offense could not have played a minor or minimal role. Thus, a drug mule cannot get a mitigating role adjustment because, in a strictly logical sense, without her the offense could not have been carried out, despite the fact that she was easily replaceable and her role was clearly less, relative to other participants like managers, distributors, and kingpins. The question should not be, “Could the offense succeed without this defendant?” Rather, it should be, “In relation to all of the participants in the offense, where does this defendant fall in the pecking order?” Even if their actions are in some sense “essential” to the success of the offense, defendants who perform non-supervisory roles should have that reflected in their sentences.

Some judges have a flat policy, express or implied, against giving a mitigating role adjustment to drug mules when the only quantity included in calculating the guideline range is the quantity the defendant carried or swallowed. This interpretation persists despite Application Note 3(A). Drug mules are expected to somehow prove a mitigating role in a drug organization about which they have little or no information other than a telephone number. Further, probation officers generally do not recognize that the adjustment may be appropriate in cases other than drug cases.

The Commission should define the adjustment in a way that invites its use in more cases. Deleting the word “substantially” would be helpful. Examples should be given to illustrate that a defendant’s having been “integral” to the offense does not preclude the reduction, and to illustrate the proper application of Note 3(A). Examples should be given to show that the reduction is appropriate in cases other than drug cases. For example, those in fraud cases who carry out low-level functions for a small amount of money, *e.g.*, those who open the fake account, deposit the check, show up at a closing with a fake ID, appraise the property, should receive a mitigating role adjustment. In a robbery case, if the person who commits the robbery unexpectedly pulls or shoots a gun, the driver who knew nothing about it, even if it may have been “foreseeable” in the abstract, should receive a mitigating role adjustment.

Acceptance of Responsibility. The Commission should remove the government motion requirement for the third point for acceptance of responsibility under USSG § 3E1.1, or seek permission from Congress to do so if necessary. In many districts, including the Northern District of Georgia, the government uses this requirement as an

offensive weapon, threatening the loss of the third point if defendants do not waive appeal and post conviction relief, or if they pursue motions to suppress. This is contrary to the language of the guideline, *i.e.*, “the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty,” and its stated purpose, *i.e.*, because the government “is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.” USSG § 3E1.1, comment. (n.6). However, since the prosecutor is in sole control of the motion, they are free to apply whatever interpretation they wish.

USSG § 1B1.8, Use of Certain Information. This guideline excludes information from being used in calculating the guideline range if as part of a cooperation agreement the government agrees that it will not be used. The guideline can be read as only applying to information given after there is an agreement or as applying to information given before there is an agreement if the government later agrees.

In the Eastern District of North Carolina, if a defendant cooperates as early and fully as possible by making an immediate statement after apprehension, that information is used to calculate the guideline range even when the defendant later enters into an agreement because he had not yet entered into an agreement when he made the statement. In the Northern District of Georgia, some defendants, before they are represented, provide information about the identity and activities of others who are otherwise unidentifiable. Whatever they have said is used to calculate their guideline range because they gave the information without a formal agreement. This punishes defendants who cooperate early more harshly than those wise enough to wait.

Further, the guideline is not applied consistently. Based on a survey of Defenders, the practice differs among districts, among prosecutors within a single district, and among cases. Some prosecutors agree that information provided before there is an agreement will not be used to calculate the guideline range. Others, as in our districts, refuse to agree that pre-agreement statements are protected.

The problem can easily be cured by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements. Leaving it up to prosecutors creates unwarranted disparity.

APPENDIX

I. The Commission Should Amend USSG § 1A2, Intro. to Accurately Reflect § 3553(a) and the Supreme Court’s Decisions.

The new commentary in USSG § 1A2, entitled “Continuing Evolution and Role of the Guidelines,” which was not the subject of public notice and comment,⁷⁴ inaccurately describes the sentencing procedures and standards set forth in § 3553(a) and the Supreme Court’s cases. An accurate description would better ensure the continuing relevance of the guidelines, the courts’ role in their constructive evolution, and the continuing constitutionality of the guidelines.

First, the commentary sets forth a three-step sentencing procedure that differs little from that struck down by the Court. According to the commentary, the court “must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a).” This is not at all what the statute says and is contrary to what the Court has said: “The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.” *Booker*, 543 U.S. at 234. The “Guidelines are only one of the factors to consider when imposing sentence.” *Gall v. United States*, 128 S. Ct. 586, 602 (2007). The “Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.” *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007). “The statute, as modified by *Booker*, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary,’ to achieve the goals of sentencing.” *Id.* at 570. Judges “may not presume that the Guidelines range is reasonable.” *Gall*, 128 S. Ct. at 596-597. *See also Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“We repeat that . . . the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”); *Nelson*, 2009 WL 160585 at *2 (“The Guidelines are not only *not*

⁷⁴ Although Rule 4.3 of the Rules of Practice and Procedure currently permits the Commission “to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x),” we again urge the Commission to provide notice and comment with respect to commentary, policy statements and amendments thereto. While there may have been a rationale for treating commentary and policy statements differently from guidelines in the past, there is no reason do so post-*Booker*, as the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission.

In the commentary to § 1A1.1, the Commission credits the notice and comment requirement with bolstering its ability to take into account fully the purposes of sentencing when promulgating guidelines. Surely, providing notice and soliciting comment with respect to commentary which seeks to explain so critical an issue as the role of the guidelines in federal sentencing as a result of landmark Supreme Court decisions would similarly bolster the Commission’s ability to provide a more balanced and helpful assessment of the impact of the decisions. As the Commission has said previously, “because the Commission values public input, the Commission traditionally attempts to solicit public comment, even when not required to do so.” *See USSC, Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendment*, at 4 (May 2001).

mandatory on sentencing courts; they are also not to be *presumed* reasonable.”) (emphasis in original).

In *Gall*, and repeated in *Nelson*, the Court set out a very different three-step procedure: First, “begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” Second, “after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” Third, the judge should explain. *Gall*, 128 S. Ct. at 596-97. In *Nelson*, the Court said: “Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.” *Nelson v. United States*, __ S. Ct. __, 2009 WL 160585 *1 (Jan. 26, 2009). In *Gall*, the Court made no mention of the Commission’s policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements. Thus, to suggest that policy statements on departure must be consulted as the second step in sentencing is simply wrong.

At page 2465 of *Rita*, which the commentary cites for the Commission’s three-step procedure, the Court described no such three-step procedure but listed “outside the heartland” as one of several possible arguments for a non-guideline sentence:

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3553(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the “heartland” to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.

Rita, 127 S. Ct. at 2465.

Policy statements regarding departure are not a second step of the sentencing procedure. They are merely one argument the court may consider, if made. They are not considered in every case, and need not be considered even when their subject matter is implicated, as demonstrated in *Gall*. The Commission should replace its three-step procedure with the statute itself and the procedure set forth in the Court’s decisions.

Second, the commentary entirely omits those aspects of the Court’s decisions that invite a critical assessment of the guidelines, which are intended to assist in the evolution of the guidelines, and which preserve the constitutionality of the guidelines. It fails to note that judges may impose a sentence outside the recommended guideline range even in a “mine run” case when the judge determines that a non-guideline sentence better

complies with § 3553(a). This may occur, for example, when the court determines that the guideline represents an “unsound judgment” based “solely on policy considerations, including disagreements with the Guidelines.” *Rita*, 127 S. Ct. at 2468; *Kimbrough*, 128 S. Ct. at 570; *Spears*, ___ S. Ct. ___, 2009 WL 129044 *3 (Jan. 21, 2009) (“we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines”). The commentary should note that the ability of judges to impose a sentence outside the recommended range for policy reasons is a crucial feature of the new system because it preserves the constitutionality of the now-advisory guidelines.⁷⁵ It certainly seems desirable to acknowledge, rather than omit, this constitutional reality within the *Guideline Manual*.

As the rationale for permitting a presumption of reasonableness on appeal, for the guidelines being the starting point and initial benchmark, and for requiring careful consideration of the extent of a variance, the Court said that the guidelines were *generally* based on empirical evidence of past practice and that they *can* evolve in response to court decisions and input from stakeholders.⁷⁶ However, this account of guideline development reflects the ideal envisioned in the SRA, and not necessarily the reality with respect to a given guideline. “Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guideline range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.” *Gall*, 128 S. Ct. at 594 n.2. While “[i]n the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports,” it “did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.” *Kimbrough* at 567. When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)’s purposes, even in “a mine-run case.” *Id.* at 575.

⁷⁵ See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (system that does not permit judges to sentence above a recommended range based on “general objectives of sentencing” alone without a “factfinding anchor” violates the Sixth Amendment.).

⁷⁶ As the rationale for permitting, but not requiring, a presumption of reasonableness on appeal, the court said that it was “fair to assume” that the guidelines reflect a “rough approximation” of sentences that “might achieve 3553(a) objectives” because original Commission used an “empirical approach” based on “past practice” and the guidelines “can” evolve in response to non-guideline sentences and input from practitioners and experts. *Rita*, 127 S. Ct. at 2464-65. As the rationale for requiring “that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate,” the Court said that the guidelines are the product of “careful study” based on “extensive evidence” derived from “thousands” of pre-guideline sentences. *Gall*, 127 S. Ct. at 594. And, as the rationale for the guidelines being the starting point and benchmark, the Court said that the Commission has the “capacity” to base the guidelines on “empirical evidence and national experience.” *Kimbrough*, 128 S. Ct. at 574.

Importantly, the principle that district courts can disagree with guidelines based solely on policy considerations applies to all guidelines, not just the crack guidelines. Otherwise, judges could vary based only on factfindings, and this would violate the Sixth Amendment. See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007). *Kimbrough* did not limit the principle to the crack guidelines; indeed, it referred to the drug guidelines generally as not being based on an empirical approach. The courts of appeals have read the principle as applying to all guidelines. See, e.g., *United States v. Cavera*, ___ F.3d ___, 2008 U.S. App. LEXIS 24717, *24 (2d Cir. Dec. 4, 2008) (en banc); *United States v. Barsumyan*, 517 F.3d 1154, 1158 (9th Cir. 2008); *United States v. White*, ___ F.3d ___, 2008 U.S. App. LEXIS 26095, *14-15 (6th Cir. Dec. 24, 2008) (en banc); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008).

The commentary not only ignores this important aspect of the Supreme Court's decisions and its impact on sentencing and the evolution of the guidelines, but unjustifiably suggests that the decisions affirm the guidelines' central role in sentencing. For example, the commentary cites *Rita* for the proposition that the guidelines remain an important part of sentencing because they "seek to embody the § 3553(a) considerations." However, it fails to explain that, in *Rita* itself, as well as in *Gall*, *Kimbrough* and *Spears*, the Court expressly recognized that the guidelines do not always embody the § 3553(a) considerations. *Rita*, 127 S. Ct. at 2465, 2468 (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way).

Judges may now consider whether a particular guideline is based on empirical data, national experience and expert research, and this is a crucial element in the ongoing revision of the guidelines, as anticipated by the Court. The appellate presumption of reasonableness for a guideline sentence permitted by *Rita* explicitly does not allow courts of appeals to afford "greater factfinding leeway to [the Commission] than to [the] district judge." *Id.* at 2463. Challenges to guideline recommendations can generate testimony, findings and other information that the Commission can use in its ongoing review and revision of the guidelines. These challenges should at least be acknowledged, and preferably encouraged, to ensure adequate feedback and healthy evolution of the guidelines system.

To this end, the commentary should include the Supreme Court's holdings that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 128 S. Ct. at 570, that courts must consider arguments by either party "that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way," *Rita*, 127 S. Ct. at 2468, that when the guidelines at issue in the case "do not exemplify the Commission's exercise of its characteristic institutional role," it is not an abuse of discretion for the judge to conclude that they "yield[] a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case," *Kimbrough*, 128 S. Ct. at 575, and that judges should openly exercises

their judgment to impose a sentence that is sufficient, but not greater than necessary, to achieve §3553(a)'s purposes. *Spears*, 2009 WL 129044 at *3-4.

Third, the commentary provides an incomplete description of appellate review, including only the guidelines and extent of variance as issues for review, while omitting all other potential procedural errors: treating the guidelines as mandatory, failing to consider the purposes and factors set forth in § 3553(a), selecting a sentence based on clearly erroneous facts, and failing to explain the sentence whether inside or outside the guideline range. It omits the requirement that courts of appeals must accord due deference to the judge's decision as to the extent of a variance. And it omits that no special deference is due if the case is unique. The Court described appellate review as follows:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. . . . The uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.

Gall, 128 S. Ct. at 597-98 (emphasis supplied). The Commission should include the italicized language.

Fourth, the commentary inaccurately suggests that Congress can impose mandatory sentencing practices on the courts by issuing specific directives to the Commission: "Congress retains the authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines." This clearly suggests that Congress may use the Commission as a conduit for mandatory sentencing rules. The full quotation from *Kimbrough* is as follows: "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required *the Sentencing Commission* to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum. 28 U.S.C. §

994(h).” *Kimbrough*, 128 S. Ct. at 571 (emphasis supplied). The Court’s comment addressed the government’s argument that the Anti-Drug Abuse Act “implicitly” required *the Commission* to write guidelines corresponding to the statutory mandatory minimums and extrapolating below, between and above those two levels, and explained that there was no congressional directive *to the Commission* to do so.

When Congress directs the Commission to promulgate or amend a guideline, even in express terms, the resulting guideline is *not* a mandate to the courts but one factor for the courts to consider under § 3553(a). The courts have so found in a variety of contexts,⁷⁷ and the Department of Justice has wisely agreed.⁷⁸ If it were otherwise, the separation of powers problem that most troubled the Court in *Mistretta* would arise, *i.e.*, that “the reputation [of the Judicial Branch] for impartiality and nonpartisanship . . . may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The Commission should remove this inaccurate and problematic suggestion.

II. The Commission Should Encourage the Use of Probation and Evidence-Based Alternatives.

We thank the Commission for holding a symposium on alternatives to incarceration last summer so that the federal system could learn from the states how to reduce costs and protect the public through non-prison alternatives. Consideration of alternatives to incarceration was to be a priority for the Commission this amendment cycle. Accordingly, the Chair of the Federal Defender Sentencing Guidelines Committee submitted a list of well-considered proposals, which we incorporate by reference.⁷⁹ *See*

⁷⁷ *See, e.g., United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008) (fast track); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Grober*, __ F.Supp.2d __, 2008 WL 5395768 (D. N.J. Dec. 22, 2008) (child pornography); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008) (child pornography).

⁷⁸ Brief of the United States at 29, *Kimrough v. United States* (“As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under Booker and subject to the general principles of sentencing in section 3553(a).”); Letter Stating the Government’s Position on the Career Offender Guideline, docketed March 17, 2008, *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) (“position of the United States” is that “*Kimrough*’s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.”) (emphasis in original), available at http://www.fd.org/pdf_lib/Funk_aua_Letter.pdf.

⁷⁹ Those proposals are: (1) expand the availability of alternatives to all offenders who are statutorily eligible without regard to the zone system; (2) amend Chapter Five to add a “first

Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 20-26, September 8, 2008. The Commission's proposed amendments and issues for comment for this cycle unfortunately do not include alternatives to incarceration. At the same time, the Commission has issued a report showing that federal courts impose alternative sentences significantly less often than allowed by the guidelines, and far less often than permitted by statute.⁸⁰ Even when courts sentence an offender to an alternative sentence, rates vary significantly among offenders and categories, with the result that a disproportionately high rate of minorities and those with little education end up behind bars.⁸¹ We hope that the Commission will implement the proposals made in the Defenders' letter, and the proposals we make here, next amendment cycle.

As confirmed by the Commission's recent report, non-prison alternatives are not part of the culture of sentencing in federal court.⁸² Judges must consider all of "the kinds of sentences available" under 18 U.S.C. § 3553(a)(3), even if the "kinds of sentence . . . established [by] the guidelines" permit or encourage only prison. *See Gall v. United States*, 128 S. Ct. 586, 602 & n.11 (2007). Yet here in the Northern District of Georgia, we have seen only a small increase in split sentences and probation with home confinement for defendants who would not qualify under the guidelines' zone system. No change has occurred in the Eastern District of North Carolina. For many of our clients in the Northern District of Georgia who are non-violent first offenders, pretrial diversion or probation with drug treatment would be the appropriate sentence, but we have had very little success in convincing judges or probation officers to go along with such programming. In the rare case in which we have been successful, we must find the program and the client must pay for it.

President Obama has pledged to "give first-time, non-violent offenders a chance to serve their sentence, where appropriate, in the type of drug rehabilitation programs that have proven to work better than a prison term in changing bad behavior."⁸³ If the Commission were to legitimize this and other sensible non-prison options in the guidelines, probation officers and judges would cooperate in implementing them. Resources are being wasted on imprisoning people who do not need to be in prison.

offender safety valve"; (3) amend Chapter Five to encourage specific alternative sanctions and programs that have been proven to decrease the risk of recidivism; (4) amend Chapter Seven to recognize and encourage a defendant's participation in reentry programs; and (5) recommend that the Bureau of Prisons revise its policies to address the problem of over-incarceration.

⁸⁰ USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009).

⁸¹ *Id.* tbls. 8, 11, & 13.

⁸² In 2007, just under 18% of federal offenders who are U.S. citizens fell into Zones A, B, or C of the Sentencing Table, making them eligible for a within-guidelines sentence other than straight prison. *Id.* tbl. 5. Of that small number, only 38% were sentenced to probation only, while the rest were sentenced to some term of confinement. *Id.* at 5 & tbl 5.

⁸³ See http://www.whitehouse.gov/agenda/civil_rights/.

Many offenders would be much less likely to recidivate if those resources were spent on treatment, education, and job training instead of prison.

A. *The Commission Should Ensure that the Threshold Question is Whether Probation is Appropriate, Not How Long the Defendant Should Be Imprisoned.*

Chapter 5 should begin with a statement that probation is a sentence in and of itself, which is permissible in every case where a statute does not require imprisonment. This statement also should recommend that courts address at the outset in every case in which probation is statutorily allowed whether prison is necessary to satisfy any purpose set forth in § 3553(a)(1), (2) or (3). This threshold question is routinely ignored in favor of the “how long” question because of the way the Zones cabin discretion -- the guidelines authorize probation only if the guideline range is in Zone A (calling for 0 to 6 months imprisonment), or, if the range is in Zone B (calling for 1 to 12 months imprisonment), and then only if intermittent confinement, community confinement or home detention is substituted for imprisonment. Prison is required in every case in Zones C and D (calling for anywhere from 8 months to life).

The introductory commentary in Chapter Five, Part B, entitled “Probation,” while helpful, goes unnoticed because the guidelines do not allow probation in most cases and it is located in a Part entitled “Probation.”⁸⁴ The U.S. Probation’s Monograph, which states that “[o]fficers should consider the appropriateness of any available alternatives before deciding to recommend a term of imprisonment,” goes unnoticed for the same reason.⁸⁵ The Commission’s recent report confirms “that sentencing zone ultimately determines whether offenders are sentenced to alternatives. Specifically, guideline offense level and Criminal History Category, alone or in combination, are the principal factors determining whether an offender receives an alternative sentence.”⁸⁶

These limits on probation are particularly unfortunate because Congress expected that the threshold question in most cases would be whether probation was sufficient or whether prison was required. In the Sentencing Reform Act, Congress instructed judges as follows:

⁸⁴ That commentary states, “The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.”

⁸⁵ Publication 107 at II-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

⁸⁶ USSC, *Alternatives to Incarceration in the Federal Criminal Justice System*, at 12 (Jan. 2009).

The court, in determining *whether* to impose a term of imprisonment, and, *if* a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a) (emphasis supplied). “This section specifies the factors to be considered by a sentencing judge in determining *whether* to impose a term of imprisonment and, *if* a term is to be imposed, the length of the term.” S. Rep. No. 98-225 at 116 (1983) (emphasis supplied). “The phrase ‘to the extent that they are applicable’ acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.” *Id.* at 119 n.415.

Consistent with this directive to judges, Congress directed the Commission to promulgate guidelines for both the “in/out” question, and the “if prison, how long” question:

The Commission . . . shall promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence . . . including -- (A) a determination *whether* to impose a sentence to probation, a fine, or a term of imprisonment [and] (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment.

28 U.S.C. § 994(a)(1)(A) & (B) (emphasis supplied).

Congress also identified when probation should be the presumptive sentence, and encouraged the use of non-prison alternatives. Probation would be generally appropriate 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.” *See* 28 U.S.C. § 994(j). Some term of imprisonment would be generally appropriate for “a person convicted of a crime of violence that results in serious bodily injury.” *Id.*

For defendants between these poles, Congress encouraged the use of non-prison sentences in a variety of ways. First, “in light of current knowledge that imprisonment is not an appropriate means of promoting correction and rehabilitation,” S. Rep. No. 98-225 at 76 (1983), it directed the Commission and the courts to use prison only if it served some purpose of sentencing other than rehabilitation, and to use probation in all other circumstances. *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225 at 119, 176 (1983). Congress specifically noted that “if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation.” *Id.* at 171 n. 531. *See also id.* at 92 (Committee “expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions”).

Second, Congress recognized that probation would often satisfy the other purposes of sentencing: “It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose. This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service.” *Id.* Indeed, Congress recently restored payment of fine, restitution and community service as the three options for a mandatory condition of probation.⁸⁷ *See* Pub. L. No. 110-406, Sec. 14(a) (Oct. 13, 2008), amending 18 U.S.C. § 3563(a)(2). And the Supreme Court in *Gall* recognized the substantial restriction of liberty involved in even standard conditions of probation, *Gall*, 128 S. Ct. at 595-96 & n.4, and that in some cases, “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” *Id.* at 599 (quoting district court opinion).

Third, Congress provided numerous examples of when probation *should* be used, based on the very same factors that the policy statements in the Guidelines Manual prohibit or discourage from consideration. Through the directives in 28 U.S.C. § 994(d) and (e), Congress sought to guard against the use of incarceration to warehouse defendants who lacked the advantages of education, employment, and stabilizing ties, and specifically encouraged their use as a reason for probation.⁸⁸ Regarding the directive to the Commission to assure that the guidelines and policy statements were “entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders,” 28 U.S.C. § 994(d), the Senate Report explained:

The Committee added [this] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training. Indeed, *in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training.* This qualifying language in subsection (d), *when read with the provisions in proposed Section 3582(c) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a*

⁸⁷ The new law also restores community confinement as a discretionary condition of supervised release and maintains intermittent confinement “only for a violation of supervised release in accordance with section 3583(e)(2) and only when facilities are available.” *See* Pub. L. No. 110-406, Sec. 14(b) (Oct. 13, 2008), amending 18 U.S.C. § 3583(d).

⁸⁸ S. Rep. No. 98-225 at 175, 172-73 (1983).

defendant should not be sent to prison only because the prison has a program that “might be good for him.”

S. Rep. No. 98-225 at 171 & n.531 (1983) (emphasis supplied). In other words, the Commission was to provide for probation to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing.

Emphasizing the same point in explaining the directive to the Commission to “assure that the guidelines, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties,” 28 U.S.C. § 994(e) (emphasis supplied), the Senate Report said:

As discussed in connection with subsection (d), each of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community. The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

S. Rep. No. 98-225 at 174-75.

In specifically discussing the factors listed in subsections (d) and (e), Congress identified a number of ways in which they would call for a sentence of probation, intermittent confinement, or community service:

- “[S]ubsection (e) specifies that education should be an inappropriate consideration in determining the appropriate length” of a prison term [meaning that lack of education should not be used to determine the length of a prison term], but “the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment.” *Id.* at 172-73.
- Similar considerations apply to vocational skills and employment record. *Id.* A “defendant’s education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release.” *Id.* at 173 n.532.
- “The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment.” *Id.* at 173.

- “Drug dependence, in the Committee’s view, generally should not play a role in the decision whether or not to incarcerate the offender. However, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for ‘drying out,’ as a condition of probation.” *Id.*
- “Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. . . . Of course, the physical condition of the defendant would play an important role in the determination of conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs.” *Id.*
- “As stated in subsection (e), the Committee believes that [family ties and responsibilities] is generally inappropriate in determining *to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment.*” *Id.* at 174 (emphasis supplied). The Commission could conclude “that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family.” *Id.*

Data just published by the Commission shows that over 92% of federal defendants are sentenced to prison (85.3% to straight prison).⁸⁹ These defendants are overwhelmingly people of color (70%), poor (87% get no fine imposed), and relatively undereducated (only 6% graduated from college, and half did not graduate from high school); and their crimes are typically victimless (drugs and immigration account for 6 out of 10 convictions). Further, contrary to the perception that guns go with drugs, 83% of federal drug offenses do not involve a firearm. With the exception of crack offenders, drug offenders are usually first offenders. Two-thirds of marijuana defendants are in criminal history category I, as are 60% of heroin and cocaine defendants, and half of methamphetamine defendants. Crack offenders, 82% of whom are African American, are more likely to have criminal history points⁹⁰ because they have a higher risk of arrest and prosecution than similarly situated Whites. This data is totally inconsistent with Congress’s intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders.

⁸⁹ See USSC, Overview of Federal Criminal Cases Fiscal Year 2007 (Dec. 2008), http://www.ussc.gov/general/20081222_Data_Overview.pdf; Changing Face of Federal Criminal Sentencing (Dec. 2008), http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf.

⁹⁰ *Id.*

It is also inconsistent with current research. In 1996, Commission staff authored a paper entitled *Sentencing Options under the Guidelines*,⁹¹ which acknowledged that non-prison sentences are associated with less recidivism than prison sentences,⁹² that “[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,”⁹³ and that “alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”⁹⁴

Other research likewise has shown that prison, and the Bureau of Prisons in particular, does not prepare prisoners for successful re-entry and that prison contributes to increased recidivism. For example, Bureau of Prisons research in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who were then in Criminal History Category I, guideline sentences were costly to taxpayers, had little if any incapacitation or deterrent value, and were likely to negatively impact recidivism.⁹⁵ See e.g., Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994). “The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.” Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005).⁹⁶ The recurring theme at the Sentencing Commission’s Symposium in July 2008 was that lengthy incarceration leads to increased recidivism and is not the most cost effective means of protecting public safety.

B. *The Commission Should Provide Evidence-Based Research on Alternatives to Incarceration.*

⁹¹ U.S. Sentencing Commission, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), available at http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf.

⁹² *Id.* at 18.

⁹³ *Id.*

⁹⁴ *Id.* at 19.

⁹⁵ See also Steve Sady & Lynn Deffebach, *The Need for Full Implementation of Ameliorative Statutes* (June 2008) (demonstrating that BOP has failed to implement existing statutory provisions for treatment and reduced sentences, thus failing to prepare prisoners for re-entry and creating over-incarceration), http://www.rashkind.com/alternatives/dir_04/Sady_Over-Incarceration.pdf.

⁹⁶ Available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

To give guidance to judges, probation officers, and the parties, the Commission should provide, in the Manual or some other easily accessible source, evidence-based research on alternatives to incarceration. “Sound statistical studies on the effectiveness of certain sanctions or treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the Commission under proposed 28 U.S.C. 995, particularly as they relate to research.” *See* S. Rep. No. 98-225 at 178.

The Commission should make clear that prison is generally not appropriate for first offenders, and that its research is consistent with that result. *See Recidivism and the First Offender* (May 2004).

Extensive evidence shows the efficacy of drug courts as an alternative to incarceration. *See, e.g.,* GAO Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, Feb. 2005 at 72-74 (reviewing the literature and finding that drug courts resulted in net cost savings, in the form of reduced future expenditure by criminal justice agencies and reduced future victimization, with net benefits ranging from about \$1,000 to about \$15,000 per participant, and that the true benefits may be even greater).

Research on mental health treatment would also be helpful, including what kinds of treatment are most effective for different kinds of offenders with different mental health problems.

The Commission should suggest that rehabilitation can be addressed through alternatives to imprisonment based on the factors it has identified as predicting reduced recidivism, such as abstinence from drug use, education, and stable employment. *See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005). Other studies also show that stability, social support, steady employment, and education are essential factors in decreasing recidivism.⁹⁷

III. The Commission Should Eliminate Policy Statements Restricting Consideration of Offender Characteristics and Offense Circumstances.

The Commission’s policy statements either prohibiting or limiting consideration of a broad range of offender characteristics and certain offense characteristics are inconsistent with § 3553(a) and Supreme Court law.

⁹⁷ *See* R.K. Hanson & K. Morton-Bourgon, *The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies*, *Journal of Consulting and Clinical Psychology*, Vol. 73(6), 1154 (2005); C.A. Kruttschnitt, C. Uggen & K. Shelton, *Predictors of desistance among sex offenders: The interaction of formal and informal social controls*, *Justice Quarterly*, Vol. 17(1), 61 (2000); J. Petersilia, *When prisoners come home: Parole and prisoner reentry* (2003).

The judge must now consider all relevant characteristics of the defendant and circumstances of the offense in reaching an appropriate sentence under § 3553(a)(1).⁹⁸ The Commission's restrictions on mitigating factors are no longer viable. For example, in *Gall v. United States*, 128 S. Ct. 586 (2007), the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,⁹⁹ or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.¹⁰⁰ *Id.* at 598-602. In approving the sentence and the factors upon which the judge relied, the Court made no mention of the conflicting policy statements.

Further, why the Commission has prohibited and restricted consideration of offender characteristics has never been explained. Congress did not intend it.¹⁰¹ Nor did Justice Breyer explain it in his account of how the original guidelines were developed.¹⁰² Because the Commission writes rules in the abstract, without the ability to know how a particular offender with particular characteristics should be treated to best advance sentencing purposes, it makes sense that the Commission should not write rules trying to

⁹⁸ *See Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well).

⁹⁹ While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. *See* USSG § 5K2.0(d)(2).

¹⁰⁰ *See* USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5.

¹⁰¹ Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed and socioeconomic status," 28 U.S.C. § 994(d), and that they reflect the "general inappropriateness of considering education, vocational skills, employment record, family ties and community ties . . . in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). It made perfectly clear that the purpose of these directives was to guard against the inappropriate use of prison to warehouse the disadvantaged, but that these factors should play other roles in the sentencing decision. *See* S. Rep. No. 98-225 at 171-75 (1983).

¹⁰² Justice Breyer said that the Commissioners debated which offender characteristics should be included in the formal guideline rules and which should be grounds for departure. He said that, based on arguments regarding "fairness" and "uncertainty as to how a judge would actually account for the aggravating and/or mitigating factors," the Commission adopted "offender characteristics rules [that] look primarily to past records of conviction," but "do not take formal account of . . . the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider." *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988).

account for offender characteristic.¹⁰³ But this does not explain why the Commission placed offender characteristics off limits for departure or any other purpose, such as choosing the type of sentence. In any event, the Commission's decision to prevent the courts from considering factors that properly constitute grounds for mitigation of the length of a prison sentence or imposition of a non-prison sentence is no longer permissible under the sentencing statute and Supreme Court law.

In light of *Gall*, retaining these policy statements needlessly complicates and confuses the sentencing process. The "departure" language is "obsolete" or has little force.¹⁰⁴ The data show that the rate of "departures" is shrinking. For example, in fiscal year 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward "departures." See USSC, 2004 Sourcebook, Table 26A. In fiscal year 2008, judges imposed below guideline sentences based on "departures" alone in only 2.1% of cases, on "departures" with *Booker* in another 1.2% of cases, and on grounds that did involve "departures" at all in 9.9% of cases. See USSC, Quarterly Data Report, Table 1 (March 31, 2008). This data tends to show that courts are dispensing with the "departure" analysis even when a "departure" may be warranted. What is worse, some courts still find it permissible to deny a request for an outside-guideline sentence because a policy statement prohibits or discourages departure (or a sentence otherwise outside the guideline range) on the basis of a particular offender characteristic or circumstance of the offense.¹⁰⁵ Some of the policy statements

¹⁰³ As the Commission has said, the guidelines cannot possibly take into account all factors that are relevant to individual sentencing decisions. USSC § 1A1.1, pt. A ¶ 4(b); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003).

¹⁰⁴ See *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9th Cir. 2006); *United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006).

¹⁰⁵ See, e.g., *United States v. Feemster*, 531 F.3d 615, 619-20 (8th Cir. 2008) (holding that district court abused its discretion by imposing a variance based on age because the guidelines' policy statement says age is "not ordinarily relevant," relying on a pre-*Gall* opinion which was GVR'd based on *Gall*); *United States v. Carter*, 530 F.3d 565, 577 (7th Cir. 2008) (reversing district court judge who declined to impose a below-guideline sentence based on public service because he had been "put on notice" at a conference on the guidelines that if he "departed" for a reason without basis in the guidelines, Congress would enact mandatory minimums); *United States v. Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (reversing below-guideline sentence based on defendant's young age (20) and lack of serious involvement with the law, citing pre-*Gall* caselaw for the propositions that a "variant sentence based on factors that are particularized to the individual defendant may be found reasonable, but we are wary of divergent sentences based on characteristics that are common to similarly situated offenders," that "the judge's exercise of discretion . . . represent[s] a disagreement with Congress about the appropriateness of a sentence for a given crime," and that "judges are not allowed to simply ignore the guidelines ranges."); *United States v. Renner*, 281 Fed.Appx. 529 (6th Cir. 2008) ("Because Renner's medical condition is not ordinarily a relevant ground for imposing a lower sentence under the Guidelines unless it 'is present to an exceptional degree,' the failure to reduce his sentence on the basis of his health—either sua sponte or through a motion for downward departure—was not an abuse of discretion.").

explicitly foster that misperception by purporting to apply not only to “departures” but to any sentence below the guideline range.¹⁰⁶

To conform to existing law, we recommend the following specific changes:

- The Commission should delete Chapter 5, Part H (Specific Offender Characteristics) and Part K.2 (Other Grounds for Departure) and move them to a historical note. The restrictions are inconsistent with current law, and the encouraged departures are unduly complicated. It can revise USSG § 1B1.4 to state that the court may not determine the kind or length of the defendant’s sentence “because of” race, sex, national origin, creed, religion or socioeconomic status. *See* below.
- The Commission should retain encouraged “departures” in the Chapter 2 and Chapter 4 guidelines. Because these encourage departure, they are not inconsistent with current law, nor are they unduly complicated. The Commission should delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders. This is inconsistent with current law and the courts are not following it.
- The Commission should revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of “an appropriate sentence . . . within the applicable guideline range, or outside that range,” rather than “within the guideline range, or whether a departure from the guidelines is warranted.” *See* below.
- The Commission should also revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice. *See* below.

If the Commission is not able to take these steps at the present time, it should act quickly to correct the Manual to reflect that § 3553(b) has been excised and to make clear that departure standards only apply to the question whether to grant a departure, and not to any other consideration in the sentencing decision.¹⁰⁷ Specific language is proposed in Appendix A of the Defenders’ September 8, 2008 Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009.

¹⁰⁶ *See* USSG, Chapter 5, Part H, Introductory Commentary; USSG §§ 5H1.6, 5K2.0(b), 5K2.0, comment. (n.3(C)); 5K2.10, 5K2.11.

¹⁰⁷ *See, e.g., United States v. Davis*, ___ F.3d ___, 2008 WL 3288384, at *6 (6th Cir. 2008) (while true that age is “not ordinarily relevant” under § 5H1.1, the court must consider the “history and characteristics of the defendant” under § 3553(a)(1)); *United States v. Limon*, 273 Fed. Appx. 698 (10th Cir. Apr. 3, 2008) (“Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18 U.S.C. § 3553(a), which is at issue here.”); *United States v. Myers*, 503 F.3d 676, 685-86 (8th Cir. 2007) (upholding variance based on mental condition though departure not warranted under §5K2.13).

§1B1.1. Application Instructions

Commentary

Application Notes:

E) "Departure" means (i) for purposes of the provisions of the Guidelines Manual other than §4A1.3 (Departures Based on Inadequacy of Criminal History Category), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3, assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.

"Downward departure" means departure that effects a sentence less than the sentence recommended by the applicable guideline range. "Depart downward" means grant a downward departure.

"Upward departure" means departure that effects a sentence greater than the sentence recommended by the applicable guideline range. "Depart upward" means grant an upward departure.

§1B1.4. Information to be Used in Imposing Sentence

(a) In determining an appropriate sentence to impose within the applicable guideline range, or outside that range, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

(b) Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status. The court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion or socioeconomic status.

Commentary

Application Notes:

1. Subsection (a) distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in

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imposing sentence within or outside that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to impose a sentence outside the guideline range. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for a sentence above the guideline range. Some policy statements do, however, express a Commission policy that certain factors are not relevant or not ordinarily relevant for purposes of departure. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

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Deleted: an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics)

2. Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d). The purpose of this directive was to make clear that it would be inappropriate "to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." See S. Rep. No. 98-225 at 171 (1983). "Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, [the Senate Judiciary] Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training." Id. at 171 n.531.

IV. The Commission Should Revise USSG § 6A1.3 to Ensure Reliable Factfinding.

First, the Commission should delete the last paragraph of the commentary stating that the Commission believes that a preponderance of the evidence standard satisfies due process. Only the courts are authorized to announce constitutional standards for criminal procedure, and the Sentencing Reform Act did nothing to change that.¹⁰⁸ The Eighth and Ninth Circuits have held that a preponderance of the evidence standard is not adequate when the finding would have a disproportionate impact on the guideline range.

¹⁰⁸ The Sentencing Reform Act "does not authorize the Commission to prescribe procedural rules." See Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary at 432, reprinted in Hutchison & Yellen, *Federal Sentencing Law & Procedure*, Appendix 8 (1989).

Surely the Commission exceeds its authority in issuing a policy statement which conflicts with the law of two courts of appeals on a matter of criminal procedure. If the Commission retains any policy statement about the standard of proof, it should note that a higher standard of proof for increases that have a disproportionate effect on the guideline range may be appropriate, citing *United States v. Gonzalez*, 492 F.3d 1031 (9th Cir. 2007); *United States v. Staten*, 466 F.3d 708 (9th Cir. 2005); *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001); *United States v. Charlesworth*, 217 F.3d 1155, 1158 (9th Cir. 2000); *United States v. Hopper*, 177 F.3d 824 (1999); *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008); *United States v. Calva*, 979 F.2d 119, 122 (8th Cir.1992); *United States v. Bradford*, 499 F.3d 910, 919 (8th Cir.2007); *United States v. Matthews*, 29 F.3d 462, 464 (8th Cir.1994); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir.1991).

Second, the “sufficient indicia of probable accuracy” standard should be removed from the policy statement itself, and from the second paragraph of the commentary, because it comes from the pre-guidelines era when factual accuracy was of very little moment. The “probable accuracy” standard first appeared in the guidelines in 1987, where it was quoted directly from a 1981, pre-guidelines, district court case. See 52 Fed. Reg. 18,046, 18,054 (May 13, 1987) (quoting *United States v. Marshall*, 519 F.Supp.751 (D. Wis. 1981), aff’d, 719 F.2d 887 (7th Cir. 1983)). While the commentary cites *United States v. Watts*, 519 U.S. 148, 157 (1997), for the proposition that “[a]ny information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy,” this proposition does not in fact appear in *Watts*.

In the pre-guidelines era, the judge was not required to find or give any weight to any facts in imposing sentence, and could impose sentence “giving no reason at all.” *Williams v. New York*, 337 U.S. 241, 248-49, 252 (1949). In *Williams* itself, the defendant did not attempt to challenge the accuracy of the allegations or ask the judge to disregard them. *Id.* at 244. In that context, the Supreme Court held that a judge could rely on “out-of-court” sources without offending due process. *Id.* at 248, 252. We now have a system in which the guidelines, while advisory, must still be calculated and considered. The relevant facts in support of any sentence must undergo thorough adversarial testing and judges must give reasons for their sentences, whether inside or outside the guideline range. Whether or not this is required by due process, it is sound practice according to the Supreme Court, Rule 32 and § 3553(c). See *Rita*, 127 S. Ct. at 2465, 2468-69; *Irizarry*, 128 S. Ct. at 2203-04. The “sufficient indicia of probable accuracy” standard is inconsistent with current law.

Third, the first paragraph of the commentary should be updated to include relevant principles from *Rita*, *Irizarry*, and circuit caselaw correctly applying those decisions. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure”); *Irizarry v. United States*, 553 U.S. ___, 128 S. Ct. 2198, 2203-04 (2008) (the court should “withhold [its] judgment until after the parties have had a full opportunity to present their evidence and their arguments,” and “make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.”). See also, e.g., *United States v. Pena-Hermosillo*,

522 F.3d 1108, 1116 (10th Cir. 2008) (parties must be given an “adequate” opportunity to present relevant information to the court,” and holding that it was an abuse of discretion to decide a disputed question of fact against a party without giving that party an opportunity to present evidence on the issue, citing *Rita*); *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (courts must subject each sentence to thorough adversarial testing and must give reasons for the sentence, citing *Rita*); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008) (district court erred in “failing to provide Warr with any notice whatsoever before relying on [a recidivism] study” and “should have notified Warr of it before the sentencing hearing,” because the study “amounted to relevant and factual information” and was “[o]ne of the reasons the district court sentenced Warr to a term well beyond the guidelines range,” citing *Irizarry*).

Fourth, cases that are outdated and/or do not stand for the propositions for which they are cited should be removed from the second paragraph of the commentary. This paragraph relies heavily on *Watts*, *Witte v. United States*, 515 U.S. 389 (1995), and *Nichols v. United States*, 511 U.S. 738 (1994), for the general proposition that courts may rely on information without regard to admissibility and without procedural protections. That was not the holding of any of these cases. To the extent they mentioned lax procedural principles that were “traditionally” allowed, they cited the pre-guidelines *Williams* case. The commentary mis-cites these cases in support of applying a pre-guidelines procedural regime in a post-guidelines era. They should be deleted.

Watts and *Witte* should be removed because they simply do not stand for any proposition affecting procedural fairness or accuracy in the resolution of disputed facts, the topic addressed by this policy statement. The majority in *Booker* emphasized that both cases were decided under the Double Jeopardy Clause, and that “*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument.” *Booker*, 543 U.S. at 240 & n.4.

Watts, 519 U.S. at 154 is also cited for the proposition that the “lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct.” This is inaccurate. The Court did not hold that acquitted conduct could be used at sentencing *because* of the preponderance standard, nor did it issue any holding regarding the preponderance standard. The Court noted that the *guidelines* state that the preponderance standard is appropriate, that the Court itself had held that the preponderance standard generally satisfies due process *in other contexts*, that there was a divergence of opinion on this among the circuits in cases under the guidelines, and that it was not addressing the issue. *Id.* at 156-57. As Justice Breyer accurately described it, the guidelines’ treatment of acquitted conduct merely “rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.” *Watts*, 519 U.S. at 159 (Breyer, J., concurring). To say that it is possible to reach different results depending on the standard of proof is quite different from saying that the “lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct.” (emphasis supplied)

V. *The Commission Should Support Amendments to Fed. R. Crim. P. 32 To Improve Fairness and Accuracy in Sentencing.*

A. *Disclosure of Documentary Information*

In some districts (including the Eastern District of North Carolina and the Northern District of Georgia), probation officers include in the pre-sentence report factual assertions based on documents obtained from the government or from a non-party, such as law enforcement reports or letters from victims, which defense counsel is unable to obtain and therefore unable to effectively rebut. In other districts, disclosure is either standard practice or required by local rules. Disclosure has improved fairness and efficiency, and has caused no problems to anyone. Disclosure should be required in every case, to ensure that every defendant has the ability to address the reliability of the information upon which he is being sentenced and to avoid hidden and unwarranted disparity.

The Federal Public and Community Defenders therefore support, and ask the Commission to support, a change to Fed. R. Crim. P. 32 as follows:

1. Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.
2. Where documentary information is submitted by a non-party to the probation officer in connection with a pre-sentence investigation, the officer shall, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties.

The Criminal Rules Advisory Committee is presently considering such an amendment, which has been endorsed by the American Bar Association and the Constitution Project's blue-ribbon panel on sentencing reform. The Defenders do not support the portion of that proposal that would apply a similar requirement to oral information. The presentence report already contains a summary of oral information, and we believe that any additional requirement as to oral information would be too burdensome for probation officers and the parties.

DOJ's Alternative Proposal. The Defenders oppose, and believe the Commission should oppose, an alternative proposed by the Department of Justice which would require the "probation officer," "[u]pon request of either party," "to disclose the underlying basis of any material information contained in the report, unless such disclosure might endanger any person or disclose personal or confidential information about a victim, or there is otherwise good cause."

The Department's proposal is an unacceptable substitute for the ABA/Constitution Project's proposal for a variety of reasons. Rather than requiring automatic disclosure of "documentary information," it would embroil probation officers in discovery battles over vaguely defined terms, and result in delays and extra work. What is worse, important documentary information would not be disclosed at all, thus perpetuating the problem of probation officers considering information from the government and victims that defense counsel may never learn.

First, the terms are vague at best and designed to avoid disclosure. What do "underlying basis," "material information," "might endanger" any person, "personal," or "confidential" mean? Who decides? The probation officer? The government or a victim through instructions to the probation officer? In fact, the "might endanger" language would be used to deny information from informants and family members. Information from victims would always be deemed "personal or confidential." The defendant has no similar protection against disclosure to the government. The purpose of the ABA/Constitution Project's proposal would be defeated.

Second, how would the rule be enforced? It does not say that the probation officer must disclose that she intends to withhold some part of the "underlying basis" or her reason for doing so. If not, there is no opportunity to file a motion to compel.

Third, the proposal would cause delay and create extra burden on all concerned. Within the two weeks between disclosure of the draft PSR and filing of objections, the parties would have to discern which "underlying bases" they needed to request, make the request, and, even assuming all went smoothly, it might be disclosed a week later, leaving one week to investigate the information and write the objections. This would frequently not be enough time, and sentencing would have to be delayed. If disclosure was refused, a motion would have to be filed and heard, and sentencing postponed. Further, the proposal is not limited to documentary information, and so would apply to oral information as well, thus creating additional burden for probation officers and litigation opportunities for the parties.

B. Probation Officer's Recommendation

Rule 32(e)(3) should be revised to require that the probation officer's recommendation be disclosed in every case, absent good cause shown. As amended in 1994, the Rule establishes a "presumption that a probation officer's sentencing recommendation be disclosed to the parties," *see* 154 F.R.D. 433, 461 (1994), but it still permits the court to direct the probation officer, by local rule or by order in a case, not to disclose the recommendation to anyone other than the court. *See* Fed. R. Crim. P. 32(e)(3). This has resulted in widely disparate practices. For example, the recommendation is disclosed in neither the Northern District of Georgia nor the Eastern District of North Carolina, yet it is disclosed in the Middle District of North Carolina, as well as many other districts. In the District of Arizona, the recommendation is disclosed with both the draft and final pre-sentence report, and this has caused no problem, despite the heavy caseload. Disclosure should be the rule in all districts.

The recommendation contains both a “recommendation” as to the length and conditions of sentence and a “justification” consisting of factual allegations, legal interpretation, and subjective opinions. As described by U.S. Probation:

The sentencing recommendation and justification are critical components of the presentence report. The process of making a recommendation begins with a careful assessment of all of the facts pertaining to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, as to what the officer believes to be an appropriate sentence. The justification is the officer’s explanation of the facts and laws that shaped the recommendation.

Publication 107 at II-70, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005. In addition to “facts and laws,” this “explanation” may include the probation officer’s opinion on such matters as whether the defendant has “been cooperative,” what his “attitude toward the system” is, and whether there are “positive or negative influences” in his support network. *Id.* at II-72-73.

Judges generally follow the probation officer’s recommendation. See Stephen A. Fannell and William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1617 (1980). Depriving the defendant of the opportunity to challenge the probation officer’s conclusion, supporting facts, legal analysis, and subjective opinions is fundamentally unfair to the defendant and deprives the court of accurate information. See, e.g., *United States v. Christman*, 509 F.3d 299 (6th Cir. 2007) (vacating and remanding for re-sentencing where judge relied on probation officer’s undisclosed belief, contrary to information disclosed in the pre-sentence report, that defendant had molested children); *United States v. Baldrich*, 471 F.3d 1110 (9th Cir. 2006) (affirming because judge did not credit officer’s belief that defendant was a “danger,” and noting that analysis and opinions should be disclosed); *United States v. Duley*, 2007 WL 752167 (D. Utah Mar. 07, 2007) (court disclosed to the defendant the fact and substance of probation officer’s conversation with defendant regarding medical condition without counsel present).

Changes in probation practices have obviated the original justification for withholding the recommendation. The policy that the recommendation “should not be disclosed” originated at a time when the officer who wrote the report was the same officer who supervised the defendant, and it was thought that disclosure “may impair the effectiveness” of the supervisory relationship. See Fed. R. Crim. P. 32, 1974 advisory committee’s note. After the guidelines went into effect, however, some probation officers began specializing in the writing of pre-sentence reports and others focused on case management. As the number of defendants sentenced to prison greatly increased under the guidelines, the smooth transition between sentencing and supervision became less important. At the same time, the complexity of the guidelines created a need for officers who would focus solely on writing pre-sentence reports. Further, as the Judicial

Conference foretold in 1989, Rule 32's provision that the recommendation need not be disclosed "may well create tensions when juxtaposed with other requirements of the Sentencing Reform Act," *i.e.*, the nature of the recommendation may be relevant if it affected the guideline determination and/or was indicative of bias. *See* Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary at 437, reprinted in Hutchison & Yellen, *Federal Sentencing Law & Procedure*, Appendix 8 (1989).

C. DOJ's Proposal to Require Written Notice of Bases for Departure or Variance to be Filed with Objections to PSR

DOJ has proposed a rule change that would require the parties to provide written notice of "any basis for departure or sentence otherwise outside the guideline range" as part of objections to the pre-sentence report.

The Defenders oppose this proposed change because it would be unworkable, unfair, and is unnecessary. The final pre-sentence report is generally not disclosed until seven days before sentencing. We usually do not file sentencing memoranda, or provide grounds for a sentence outside the guideline range, until receiving the final report, because the arguments often cannot be known or made until the guideline application issues and factual disputes are resolved. Further, probation officers sometimes disclose the report less than seven days before sentencing. And sometimes a basis for a sentence outside the guideline range is not known until even closer to sentencing.

DOJ's proposal would create new battles over what is and is not proper notice, with the parties (most often the government) seeking to have grounds for a sentence outside the guideline range deemed waived, and raising this as an issue on appeal. The possibility of depriving a defendant of a sentencing argument should not be encouraged by the rule. We understand that a few districts have local rules to this effect, which only force the defense to file boilerplate notice stating that they may move for a sentence outside the guideline range based on § 3553(a) to protect against claims of waiver.

The solution to DOJ's concern about notice is simple. If either party is truly surprised, they may seek a continuance and the judge should grant it. *See Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008).