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I thank the Commission for inviting me to testify about how the sentencing system is working and how it can be improved. I am proud to represent the Defenders before the Commission.<sup>1</sup>

In 1989, Sentencing Commissioner, now Justice, Breyer, participated in a debate about the value and efficacy of the newly-created Federal Sentencing Guidelines.<sup>2</sup> In answering the question, “Is the game worth the candle?” Justice Breyer concluded by articulating his hope that:

the new law will force a change in the focus of the criminal justice system. Instead of asking almost exclusively, “Did this person commit the crime,” judges and courts will begin to ask, more systematically, “What should we be doing with this offender, this human being?” The answer will not, in every instance, be to send the offender to a maximum security federal penitentiary. **The answer will often be to explore other forms of punishment that may prove both more cost-effective and more humane.** (emphasis added)

Until now, Justice Breyer’s hope has been in vain. Since the advent of the guidelines and the concurrently enacted mandatory minimum statutes, the federal prison population has increased nearly five-fold from 42,000 in 1987 to 207,908 today.<sup>3</sup> In FY 2008, 89% of all

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<sup>1</sup> The Defenders are required to “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” 28 U.S.C. § 994(o).

<sup>2</sup> The participants in the debate consisted of two of the original Sentencing Commissioners, Ilene N. Nagel and then-Circuit Judge Stephen Breyer, and Terence F. MacCarthy, then-Executive Director of the Federal Defender Program for the Northern District of Illinois. See Nagel, Breyer, MacCarthy, *Equality Versus Discretion in Sentencing*, 26 Am. Crim. L. Rev. 1813, 1825 (1989).

<sup>3</sup> USSC, Supplementatry Report on the Initial Sentencing Guidelines and Policy Statements at 71, June 18, 1987; Federal Bureau of Prisons, Weekly Population Report, last visited August 15, 2009, [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp). Justice Breyer also reported on the prison population impact estimates as required by 28 U.S.C. § 994(q), predicting an increase of no more than 10% over 15 years. *Equality Versus Discretion* at 1822. We now know that prison expansion vastly exceeded Justice

sentenced offenders were sentenced to time in prison,<sup>4</sup> even though the Bureau of Prisons was 85,000 prisoners over capacity at the end of 2007.<sup>5</sup>

Federal defendants are overwhelmingly people of color who are poor, often uneducated, and whose crimes are not violent.<sup>6</sup> Nearly half have 0-1 criminal history points.<sup>7</sup> Drug offenders comprise one-third of the federal docket,<sup>8</sup> and half of the prison population.<sup>9</sup> Except for crack offenders, 86% of whom are African American<sup>10</sup> with a greater likelihood of having prior convictions than similarly situated White persons (as discussed below), drug offenders are usually first offenders.<sup>11</sup> They are still being sentenced to lengthy prison terms, despite the congressional recognition in 28 U.S.C. § 994(j) that it is generally inappropriate to imprison first offenders not convicted of a violent or otherwise serious offense, and that the guidelines should “guard against the inappropriate use of incarceration for persons who lack education, employment, and stabilizing ties.”<sup>12</sup> The cost of imprisonment to taxpayers is now more than \$5 billion per year.<sup>13</sup>

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Breyer’s estimates.

<sup>4</sup> USSC, *2008 Sourcebook of Federal Sentencing Statistics*, Figure D, “Distribution of Offenders Receiving Sentencing Options” at 27.

<sup>5</sup> See Bureau of Justice Statistics, *Prisoners in 2007* (revised 5/12/2009) (federal system reported a capacity of 122,461 beds at year-end 2007).

<sup>6</sup> See USSC, *Overview of Federal Criminal Cases Fiscal Year 2007* (Dec. 2008); USSC, *Changing Face of Federal Criminal Sentencing* (Dec. 2008).

<sup>7</sup> USSC, *2008 Sourcebook of Federal Sentencing Statistics*, Table 21.

<sup>8</sup> *Id.* at Figure A.

<sup>9</sup> Marc Mauer, *The Sentencing Project, Changing Racial Dynamics of the War on Drugs* 6 (2009) (in 2005, 95,211 federal prisoners were drug offenders), [http://www.sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf).

<sup>10</sup> USSC, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 5 (July 2009).

<sup>11</sup> Fifty-two percent of all drug offenders are in Criminal History Category I. The group of offenders is comprised of 69.7% marijuana offenders, 59.3% heroin offenders, 59.9% powder cocaine offenders, 50.3% methamphetamine offenders, 22.6% crack cocaine offenders, and 65.4% offenders involved in “other” drugs. USSC, *2008 Sourcebook of Federal Sentencing Statistics*, Table 37.

<sup>12</sup> S. Rep. No. 98-225 at 175 (1983).

<sup>13</sup> See Bureau of Justice Statistics, *Prisoners in 2007* (revised 5/12/2009) (federal system reported a capacity of 122,461 beds at year-end 2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>; *Costs of Incarceration and Supervised Release* (\$25,894 per inmate in FY 2008),

For me, this sea-change in sentencing is most vividly illustrated by a case I was involved in 27 years ago, six years after I began working at the Chicago Federal Defender Program. In that case, I represented a man convicted of committing three bank robberies. Of the 100s of persons I have represented since, I remember this man most clearly. I remember him because he was given the longest sentence any of my clients had ever received, a sentence so high, it was the talk of the courthouse.

What was his sentence? Eight years in prison.

Today, if we were lucky enough to have some really good cooperation, which most of our clients do not have, eight years might be the agreed-upon sentence we bargained for, down from 15 years. We have become inured to lengthy prison sentences.

But we shouldn't be. Ever-harsher prison sentences are neither productive nor inevitable, and they often have tragic consequences, both for those sentenced and for the larger community. This is what we see as public defenders, and that is what I would like to talk about here – what those consequences are and how the defense bar believes this Commission can help eliminate them.

I will address:

The need for the Commission to address guidelines that have a disparate impact on racial and ethnic minorities without clearly advancing any sentencing purposes (Part I, pp. 4-9);

The need for the Commission to continue to research and prepare a new report for Congress on the impact of mandatory minimum sentences, including their disparate racial impact (Part II, pp. 9-13);

How the increased flexibility of the guidelines since *Booker* has made sentencing more workable and humane (Part III, pp. 13-23);

The need for the Commission to create and encourage the use of sentencing alternatives, as the Commission has already begun to do (Part IV, pp. 23-25); and

The need for the Commission to review departures, as it has stated it intends to do, and to eliminate departures that restrict or prohibit consideration of offender characteristics and offense circumstances (Part V, pp. 26-35).

**I. There is a Need to Reduce Unwarranted Disparity in Sentencing By Identifying and Eliminating or Revising Guidelines that Have a Disparate Impact on Racial and Ethnic Minorities Without Serving Legitimate Sentencing Purposes.**

The Commission has been responsible for some remarkable research on the topic of racial disparity and we are grateful for the work it has accomplished. As my colleague, Jacqueline Johnson has also noted, its research on the crack/powder issue and its persistence in leading the way on that issue have led to a movement in the community, courts and Congress for fairer sentences. Likewise, the research conducted by the Commission on racial disparity created by other specific guidelines is too important to ignore.

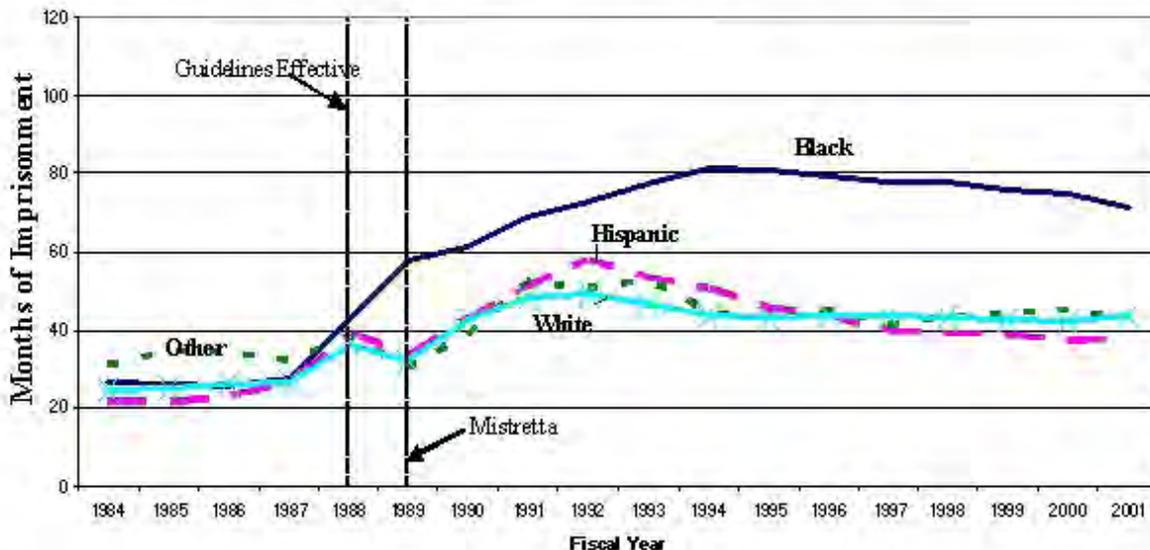
That research shows that the sentencing guidelines have contributed to racial disparity in sentencing in ways unrelated to the crack cocaine guidelines.<sup>14</sup> Before the guidelines, the sentencing gap between white and minority offenders was relatively small. Immediately after their implementation, the gap widened and has not significantly decreased.<sup>15</sup>

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<sup>14</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 115-117 (Nov. 2004) (hereafter “Fifteen Year Review”).

<sup>15</sup> *Id.*

**Figure 4.2: Estimated Time Served by Various Racial and Ethnic Groups 1984-2001**



The dramatic widening of the racial gap at the time of guidelines implementation makes clear that the most important factor was a change in sentencing policies. Sentences simply got more severe, especially for crimes for which African Americans were disproportionately arrested and convicted. Most notorious of these, of course, is the 100:1 ratio between the quantity of powder and crack cocaine qualifying offenders for severe penalties. But policies concerning “career offenders,” firearms offenses and others, also have a disproportionate adverse impact on African Americans.<sup>16</sup> Other severity increases, such as for immigration<sup>17</sup> and other drug offenses, disproportionately affect other racial and ethnic groups.<sup>18</sup>

<sup>16</sup> Fifteen Year Review at 133-134; USSC, *Overview of Statutory Mandatory Minimum Sentencing* at 13 (available at [http://www.ussc.gov/MANMIN/man\\_min.pdf](http://www.ussc.gov/MANMIN/man_min.pdf)) (showing that African Americans constitute 49% of all firearm offenders but 63% of those subject to mandatory minimum penalties).

<sup>17</sup> The often harsh illegal re-entry guideline lacks any empirical basis. See 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 (Mar/Apr. 1996).

<sup>18</sup> Hispanics make up 28% of non-immigration federal offenders, but they constitute 61% of persons sentenced for marijuana, 58% of those sentenced for heroin and 25% of those sentenced for

As the Commission concluded: “Today’s sentencing policies, crystalized into the 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. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.”<sup>19</sup> By pinpointing areas in the guidelines that we now know adversely impact minorities, the Commission gives us a way to turn our attention to this critical undertaking.

### **Criminal History Guidelines**

Criminal history is a good place to begin. Numerous studies show that, because minorities are more likely to be arrested and prosecuted than whites, heavy reliance on criminal history virtually assures a racially disparate impact.<sup>20</sup> In its Fifteen Year Review, the Commission evaluated the racial impact of the “career offender” guideline and found that although only 26% of offenders sentenced under the guidelines in the year 2000 were African American, African Americans constituted 58% of those subject to the career offender guideline.<sup>21</sup> In the year 2008, while 42.5% of all offenders in the sixteen districts in the Sixth and Seventh Circuits were African American, 73.1% of career offenders were African American<sup>22</sup>

The Commission found that recidivism rates are much lower for persons whose career offender predicates are drug trafficking than for persons whose criminal history is based on violent crime. The recidivism rate for career offenders who qualify on the basis of drug trafficking offenses more closely resembles the rates for offenders in the lower criminal history categories in which they would be placed under the normal criminal history rules. The Commission also noted that lengthy imprisonment of retail drug traffickers prevents little, if any, drug crime, because they are readily replaced as long as demand remains high. The Commission concluded that the career offender guideline disproportionately impacts African Americans “without clearly advancing a purpose of sentencing.”<sup>23</sup>

We ask the Commission to present these findings to Congress with a recommendation that 28 U.S.C. § 994(h) be repealed, and that in the meantime, the Commission (1) limit the

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powder cocaine. USSC, *2008 Sourcebook of Federal Sentencing Statistics*, Tables 34 and 36.

<sup>19</sup> Fifteen Year Review at 135.

<sup>20</sup> See, e.g., studies cited in *United States v. Leviner*, 31 F. Supp. 2d 23, 34 & n.26 (D. Mass. 1998).

<sup>21</sup> Fifteen Year Review at 133.

<sup>22</sup> This data was obtained from the 2008 USSC Monitoring Datafile by Paul J. Hofer.

<sup>23</sup> *Id.* at 134.

definition of “controlled substance offense” to the federal offenses required by § 994(h), and if state offenses must be included (even though not required), include only those that are analogous to the required federal offenses and punishable by a maximum of ten years; (2) narrow the definition of “crime of violence” consistent with the definition of “violent felony” under *Bejay v. United States*, 128 S. Ct. 1581 (2008) as described in more detail in Ms. Johnson’s testimony; and (3) limit the definition of “prior felony conviction,” consistent with 21 U.S.C. § 802(13), to offenses classified as felonies by the convicting jurisdiction.

In its Fifteen Year Review, the Commission suggested that, in addition to the career offender guideline, there may be other rules that have an adverse impact on minorities without clearly advancing a purpose of sentencing, and noted that “[t]he use of non-moving traffic violations in the calculation of the criminal history score is one such possibility but there are many others.”<sup>24</sup> As Professor Stone testified at the Commission’s hearing in New York in July, African Americans have a much higher incidence of state convictions for trivial offenses such as disorderly conduct. Is there a need to include such offenses in the criminal history score? We hope that the Commission will undertake this research.

### **Drug Guidelines**

The Commission has also found that drug mandatory minimums and the guidelines upon which they are based have been “a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders.”<sup>25</sup> Because the drug guidelines are tied to the quantity-based mandatory minimums, they do not accurately reflect the seriousness of the offense.<sup>26</sup> The Commission has also found that, except in Criminal History Category I, drug trafficking offenders have the lowest, or second lowest, rate of recidivism across criminal history categories.<sup>27</sup> We therefore ask that the Commission de-link the drug guidelines from mandatory minimums.

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<sup>24</sup>*Id.* at 134.

<sup>25</sup> *Id.* at 48.

<sup>26</sup> See USSC, *Cocaine and Federal Sentencing Policy* at 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to lengthy penalties intended for more serious offenders); USSC, *Cocaine and Federal Sentencing Policy* at 48-49 (2002) (showing drug quantity not correlated with offender function); Fifteen Year Review at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines).

<sup>27</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exhibit 11 (May 2004).

## **Illegal Re-Entry**

The illegal re-entry guideline of course applies most often to racial and ethnic minorities, mainly Hispanics. This guideline appears to be unnecessarily severe in a great many cases, as evidenced by the high rate of below-guideline sentences. Do these sentences accomplish any purpose of sentencing? The Commission has considered ways to reduce the severity of this guideline, but has not yet acted. We urge it to take this up again in the near future.

## **The Need for Change**

Although it was more than a century ago that the Supreme Court recognized that equal justice requires courts to carefully scrutinize laws that disparately impact minority groups, *see Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the courts are not always receptive to arguments concerning racial disparity. *See, e.g., United States v. Armstrong*, 517 U.S. 456 (1996) (defendant's study did not meet strict requirements necessary to obtain pretrial discovery on issue of discriminatory prosecution of crack cocaine offenders). It is, therefore, worth reiterating some of the reasons why it is so important that the Commission help educate us all on those places in the guidelines where racial or ethnic disparity is found.

In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court recognized that just the perception of unwarranted racial sentencing disparity “fosters disrespect for and lack of confidence in the criminal justice system . . . .”<sup>28</sup> Moreover, sentencing policies that contribute to unwarranted racial disparity are less effective in ensuring that the goal of public safety is met not just because they alienate sections of the population and create distrust in our criminal justice system, but also because law enforcement techniques such as racial profiling at the front end of these policies actually uncover contraband at a lower rate for Hispanics than Whites and an equal or lower rate for African Americans.<sup>29</sup> In Illinois, as the ACLU reported this past June, African Americans and Hispanic motorists are more than twice as likely as White motorists to be stopped on a hunch and asked to consent to searches of their cars, even though White motorists are twice as likely to be found with contraband as a result of those searches.<sup>30</sup>

And we know that continuing current federal sentencing practice will perpetuate racial disparity and negatively impact not just the African-American community, but our country as a

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<sup>28</sup> *Id.* at 492-93, quoting The Sentencing Commission's May 2002 *Report to Congress: Cocaine and Federal Sentencing Policy* at 103.

<sup>29</sup> Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. J. Crim. L. 19, 33 (2007); David A. Harris, *Why Racial Profiling Cannot Work* at 12-13 (The New Press 2002).

<sup>30</sup> ACLU & the Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* at 42 (June 30, 2009).

whole. Mauer notes that it seriously affects “life prospects for the generation of black children growing up today.”<sup>31</sup> Numerous studies document the correlation between incarceration and unemployment, low wages, and family instability. In addition, those who leave prison may be denied the right to vote, prohibited from receiving federal financial aid, including food stamps and other welfare assistance, and permanently banned from entering public housing programs. The Sentencing Guidelines should not and need not contribute to these problems. Indeed, there can be no better way to celebrate the 25<sup>th</sup> anniversary of the Sentencing Guidelines than by working to eliminate any racial disparity caused by them, however inadvertent.

## **II. Mandatory Minimum Laws Contribute to Racial and Other Types of Disparity and the Commission Should Continue Researching Their Impact and Speaking Out in Support of their Elimination.**

The Commission has consistently found that mandatory minimums are used unevenly in cases in which they appear to apply. In a 1991 report, the Commission found that 74% of offenders who engaged in conduct that qualified them for a mandatory minimum were initially charged with the most serious count,<sup>32</sup> and 60% were ultimately convicted and sentenced at that level or above. The penalty enhancement at 21 U.S.C. § 851 (which doubles the mandatory minimum or requires mandatory life based on prior felony drug convictions) has been rarely and unevenly used.<sup>33</sup> Analysis of data from 1995 and 2000 found that the proportion of offenders with prior felony drug convictions who received a § 851 enhancement was under 7%.<sup>34</sup>

Similarly, research has consistently found uneven use of the enhancements at 18 U.S.C. § 924 (c).<sup>35</sup> In 1991, the Commission reported that only about 45% of drug offenders who qualified for a § 924(c) enhancement were initially charged with it. The count was later dismissed for 26% of the offenders initially charged. Analysis of 1995 data found that only 34% of offenders who qualified for the enhancement based on use of a firearm received the enhancement. Thirty percent received the two-level guideline increase instead, while 35% received no weapon increase of any kind. Notably, African Americans were 48% of the offenders who appeared to qualify for a charge under § 924(c) but 56% of those who were

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<sup>31</sup> *Id.* at 46.

<sup>32</sup> USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* at 56-58 (1991).

<sup>33</sup> In 1991, the Commission reported that the enhancement was applied in a minority of qualified cases. *Id.* at 57.

<sup>34</sup> Fifteen Year Review at 89.

<sup>35</sup> Paul J. Hofer, *Federal Sentencing For Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects For Improvement*, 37 Am. Crim. L. Rev. 41 (2000). 191 15 Year Report at 89-90.

charged under the statute and 64% of those convicted under it. In 2000, just 20% of offenders who used a firearm received the statutory enhancement, 35% received the guideline enhancement, and 49% received neither. And, as in 1995, African Americans were disproportionately represented among those offenders who actually received the statutory enhancement.<sup>36</sup>

The point is not that these charges should be pursued in every case. Of course they should not. High rates of avoidance of potentially applicable mandatory penalties are desirable because these penalties are so often greater than necessary to meet the purposes of sentencing. But unwarranted disparity results because not every defendant who deserves a lower sentence gets one.<sup>37</sup>

Mandatory minimums require sentences that are longer than necessary to satisfy any purpose of sentencing. They rarely reflect the seriousness of the offense. Although Congress thought that the quantity thresholds set forth in the mandatory minimum drug penalties would result in five- and ten-year minimum sentences for more serious “major” and “serious traffickers,”<sup>38</sup> the largest portion of powder and crack cocaine offenders receiving those penalties perform low level functions (*i.e.*, street level dealer, courier/mule, loader, lookout) and have much less culpability.<sup>39</sup> Other research has likewise shown that drug quantity “is not significantly correlated with role in the offense,” and that this “lack of association” provides “fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing.”<sup>40</sup> Culpability is an important measure of offense seriousness, but mandatory minimums do not account for role in the offense or any other pertinent measure of culpability, such as *mens rea*, motive, addiction, or the government’s role in facilitating the crime and influencing the quantity.

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<sup>36</sup> Fifteen Year Review at 89-90.

<sup>37</sup> *Id.* at 91.

<sup>38</sup> USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 118-21 (1995); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

<sup>39</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* at 85, 19 (Fig. 2-4), 28-29 (Figs. 2-12 & 2-13) (May 2007). Those categorized as “wholesalers” also were frequently subject to mandatory minimums. However, the most frequent function of over one third of crack defendants classified as “wholesalers,” and nearly 8% of powder defendants classified as “wholesalers,” was actually less serious, such as street-level seller. For more than 50% of these defendants, law enforcement initiated a sale of greater than one ounce, thus placing them in the “wholesaler” category. *Id.* at 23-24, A-5 to A-7 (May 2007).

<sup>40</sup> Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009).

Drug quantity manipulation and untrustworthy information provided by informants to establish it are continuing problems in federal drug cases.<sup>41</sup> Quantity is surely an arbitrary measure of offense seriousness when it is controlled by law enforcement or based on unreliable evidence.<sup>42</sup>

Arbitrariness pervades mandatory minimums for other crimes as well. The mere possession of a firearm, even by a co-defendant, and even if never brandished or used in any way, is subject to five, ten or more consecutive mandatory years of imprisonment. Child pornography offenders who “receive” images are subject to a five-year mandatory minimum, while those who “possess” images are not, though there is no meaningful difference in these offenses.

Mandatory minimums do not effectively prevent crime through deterrence or incapacitation. As long as there is demand, drug sellers are easily replaced.<sup>43</sup> All of the empirical research shows that sentence length has no impact on deterrence.<sup>44</sup> Locking up non-violent, low-level offenders for long periods does not accomplish rehabilitation. Instead, it can lead to increased risk of recidivism, by disrupting employment, reducing prospects of future employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.<sup>45</sup>

The safety valve does not solve the problem. In FY 2008, only 5,764 (35%) of defendants subject to a mandatory minimum qualified for the safety valve, while 10,369 (65%) did not. *Id.*, Table 44. Yet, 82.9% of all drug trafficking offenses involved no weapon, 52% of all drug trafficking offenders had 0-1 criminal history points, and another 11.3% had 2-3 criminal history points. *Id.*, Tables 37, 39. By requiring no more than 1 criminal history point, the safety valve excludes many offenders who were not involved in any violence and whose role in the offense was not serious. The safety valve does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes amount low-level offenders who

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<sup>41</sup> Fifteen Year Review at 50, 82.

<sup>42</sup> Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich L. Rev. 2385 (1996).

<sup>43</sup> Fifteen Year Review at 134. *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported dealers were immediately replaced).

<sup>44</sup> *See* Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An analysis of Recent Research* 1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006); David Weisburd et. al, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

<sup>45</sup> *See* Lynne M. Vieraitis, Tomaslav K. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589 (2007).

differ little from each other, *i.e.*, by one criminal history point.<sup>46</sup> African Americans are less likely to receive safety valve relief because they have a higher risk of arrest and prosecution than similarly situated Whites.<sup>47</sup> And while the percentage may be small, 260 people were excluded from safety valve eligibility because of an offense the Commission classifies as “minor,” presumably mostly traffic offenses.

The most recent data also show that a significant portion of offenders are convicted of charges that carry mandatory minimum sentences above the applicable guideline range. In 2008, 11,372 offenders were affected by mandatory minimums that trumped the otherwise applicable guideline range: 8,292 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remaining 3,080 were convicted of a charge with a mandatory minimum that truncated the bottom of the range. Eliminating the crack/powder disparity would not change this result. Excluding cases where available data indicate that crack was the most serious drug involved in the offense, 8,942 offenders were affected by mandatory minimum trumps: 6,605 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remainder with the bottom of the range truncated.

The government’s use of mandatory penalties to override the guidelines continues to have an adverse impact on African American defendants. While African Americans constituted 24% of all federal offenders, they were 31% of those affected by statutory trumps.<sup>48</sup>

In light of these disparate effects, we ask the Commission to continue to research and speak out against mandatory minimum sentencing statutes, something it is well-positioned to do and has shown a great ability to do as well. We also ask that the Commission abandon its policy of mirroring mandatory minimums, a policy not required by Congress, and recommend to Congress that it immediately expand eligibility for the safety valve in 18 U.S.C. § 3553(f) to all mandatory minimums.<sup>49</sup> That expansion would ensure that all those deserving of the safety valve are eligible for it and protect against the possibility that some prosecutors may use their charging power to evade application of the safety valve.<sup>50</sup> The safety valve should also be extended to all

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<sup>46</sup> See Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw U.L. Rev., 1471, 1498-99 (2000).

<sup>47</sup> See Fifteen Year Review at 134.

<sup>48</sup> This data was obtained from the USSC FY 2008 Monitoring Datafile and analyzed by Paul J. Hofer.

<sup>49</sup> Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180 (Jan/Feb. 1999) (the safety valve “is a small, tentative step in the right direction . . . [but a] more complete solution would be to abolish mandatory minimums altogether”).

<sup>50</sup> In districts where almost everything is within 1000 feet of a protected location, such as Iowa, prosecutors can and do charge as an object of a drug conspiracy a violation of 21 U.S.C. § 860

offenders in all Criminal History categories, or at least those in Criminal History Category II. The requirement that offenders have no more than one criminal history point not only excludes many non-violent offenders with minor traffic violations, but disproportionately excludes African American offenders for the reasons discussed above.

### **III. The Advisory Guideline System Created in *Booker* is Working.**

Despite predictions that our criminal justice system would not survive the changes required by *Booker*, reports of its demise turned out to be unfounded. The sky did not fall. To the credit of all involved, the system did not collapse.

Indeed, the opposite seems to have occurred. Judges may now consider all relevant information concerning the persons who stand before them waiting to be sentenced. They may now consider factors that the guidelines do not address (*mens rea*, motive, addiction, non-violence), or undervalue (*e.g.*, role in the offense), or that the Commission's policy statements discourage, prohibit or restrict (*e.g.*, first offender status, addiction, need for treatment, age, aberrant behavior, employment, education, need for training or education, family ties and responsibilities). At the same time, judges still have the benefit of the guidelines, and are required to determine the appropriate guideline sentence before deciding what sentence is "sufficient but not greater than necessary" to meet the goals of § 3553(a)(2). As defense counsel, we now participate in a system that provides an excellent balance between guidance and discretion.

#### **The Case of Mary Short**

Like most of our clients, Ms. Short did not have an easy life. Her mother died relatively early. Her father, a serious alcoholic, effectively abandoned the family. She grew up in the Robert Taylor Homes, a public housing project in Chicago. She was one of six children. Three of them are still alive, all struggled with drug and alcohol addiction. Mary was introduced to marijuana at age 16 by a neighbor and addicted to heroin and crack by age 17. She remained an addict for 25 years. In her late 30's, Ms. Short was formally diagnosed with Clinical Depression. She later married a man who received disability benefits. When he died four years later, she did not notify the VA and continued to illegally use his benefits. She pled guilty to taking this money.

Not surprisingly, Mary has been in and out of the legal system her entire life, making her a Criminal History Category VI. At the time of sentencing, she had been drug free for over three years and had completed several drug abuse and counseling programs. She obtained her GED and passed all the tests for a Carpentry Apprenticeship. She was taking courses to become a

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(distribution in or near schools, playgrounds, public housing, etc.), thus preventing application of the safety valve for low-level offenders who would otherwise qualify.

Certified Alcohol and Drug Abuse Counselor. She became an active church member and a vocal member of the community. Letters of support for her poured in.

Her advisory guideline range was 24-30 months. Yet, because of her extraordinary rehabilitation and low likelihood of recidivism, the court sentenced her to probation. Extraordinary rehabilitation, of course, was not a concept embraced by the guidelines prior to *Booker*. Nor was the idea that the more difficult one's life, the more extraordinary the rehabilitation becomes. She, and we, are grateful for the sentence she received. Ms. Short has remained successful since her sentencing, now almost four years ago.

### **The Case of William Jones**

Mr. Jones was charged in a conspiracy as a "straw purchaser" of several firearms that everyone agreed he purchased for his cousin. Although he plead guilty and had no criminal history, his advisory guideline range was 46-57 months after adjustments for number of firearms, trafficking in firearms, and involvement in a conspiracy where someone else delivered a stolen firearm. The prosecutor argued vigorously for a sentence within the advisory guideline range.

Like many of our clients, Mr. Jones suffered from severe depression which went undiagnosed for most of his adult life. He struggled though high school in Shaw, Mississippi, and even completed some college. In 2000, he attempted suicide by consuming some medicine and was only saved when he was discovered unconscious by his mother. He underwent treatment, which seems to have controlled his symptoms. He completed an apprentice program for truck driving and has been gainfully employed since college. At the time of his arrest, he was a driver for Wonder Bread and a part-time CVS stock clerk. He is close to his family, who were devastated by his arrest.

Taking all of these facts into consideration, the court sentenced Mr. Jones to one year and one day in prison, a sentence that would not have been possible before *Booker*.

What these cases illustrate is that the advisory guidelines allow courts to begin with the guidelines, consider all relevant guideline factors, and then consider other factors unique to that individual to craft a sentence that truly is "sufficient but not greater than necessary" to meet the goals of sentencing in the individual case.

### **Advisory Guidelines Make Sentencing More Transparent and Honest**

Guideline circumvention, whether by judges, prosecutors, or defense lawyers, is no longer necessary. Unless a mandatory minimum applies, judges are no longer required to impose sentences that are unnecessarily harsh. They can explain their sentences to our clients in ways that our clients can understand and we can explain our clients to the judges in ways that make our clients feel that they have been heard and understood. We no longer need to figure out how to tell our client's mother, for example, that all the sadness in her child's upbringing and all the

good he has done in spite of it just doesn't matter to the courts. The ability to speak the truth in a courtroom and be heard promotes respect for the system and the law.

In more concrete ways, it diminishes the unhappiness of our clients and their families, which in turn diminishes their unhappiness with us, their lawyers. That means they move for new counsel less often, which is both more efficient and more economical.

**Explanation of the guidelines would increase understanding and permit reasoned analysis**

District and appeals court judges, as well as defense lawyers and prosecutors, have asked the Commission to explain what each guideline is meant to accomplish and the data upon which it is based. This would allow judges to determine whether the guideline makes sense as a general rule and in the particular case and to better articulate their reasons for the sentence, whether within or outside the guideline range.<sup>51</sup> It would give appeals courts a rationale for substantive review.<sup>52</sup> And it would help the parties frame their arguments as to why the guidelines should or should not be followed. The U.S. Attorney from the Eastern District of New York recently told this Commission that if it were to provide “the policy analysis and data that support its advised Guidelines ranges,” it would be “an effective tool in persuading courts that they should heed the advice that the Guidelines provide.”<sup>53</sup>

Those concerned with consistency should “promote district court acceptance of the content of the Guidelines by encouraging the Commission to explain and (where appropriate) revisit its policy decisions that have shaped the Guidelines.”<sup>54</sup> In attempting to explain its guidelines, the Commission is likely to find that some of them should be revised.

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<sup>51</sup> See, e.g., Testimony of the Honorable Susan Mollway Before the U.S. Sentencing Commission, May 27, 2009, at 125-36, [http://www.usc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.usc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Testimony of the Honorable Vaughn R. Walker Before the U.S. Sentencing Commission, May 28, 2009, at 20, [http://www.usc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.usc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf).

<sup>52</sup> See Testimony of the Honorable Gerald B. Tjoflat Before the U.S. Sentencing Commission, February 10, 2009, at 14, 23-24, 27 (sentencing and appellate review would be improved if the Commission explained the underpinning of its guidelines; judges could then evaluate whether to follow the guideline based on the reasons and empirical data given, and could better articulate why they were or were not following the guidelines' advice; there would then be a rationale for reviewing sentences on appeal).

<sup>53</sup> Statement of Benton J. Campbell Before the U.S. Sentencing Commission, July 9, 2009, at 15, [http://www.usc.gov/AGENDA/20090709/Campbell\\_testimony.pdf](http://www.usc.gov/AGENDA/20090709/Campbell_testimony.pdf).

<sup>54</sup> Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 Marq. L. Rev. \_\_\_\_ (forthcoming 2009), electronic copy available at <http://ssrn.com/abstract=1433581>, at 20.

**Review and revision of the guidelines based on judicial feedback and empirical research would result in more fair and effective sentences and greater acceptance by judges and the parties**

The Commission can review those guidelines that judicial feedback has highlighted as being problematic, and revise them based on empirical evidence, or, if the guideline is based on whole or in part on an express congressional directive, report to Congress regarding why and how the guideline should be revised. This course is contemplated by several provisions of the SRA,<sup>55</sup> and has been strongly urged by the Supreme Court,<sup>66</sup> invited by the leadership in Congress,<sup>67</sup> and urged by judges, defense counsel, probation officers, and academics.<sup>68</sup>

According to the former Director of the District of Columbia Sentencing Commission, an important “strength of the advisory guidelines system is the potential for judicial ‘buy-in’ to the

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<sup>55</sup> See, e.g., 28 U.S.C. § 991(b)(1)(C), (2); § 994(o); § 995(a)(12)-(16); § 995 (a)(20).

<sup>66</sup> *Rita*, 127 S. Ct. at 2469; *Booker*, 543 U.S. at 264.

<sup>67</sup> See *Plenary Speech by Mr. Robert C. “Bobby” Scott* at 11-13, Sentencing Advocacy, practice and Reform Institute, American Bar Association Criminal Justice Section, October 24, 2008.

<sup>68</sup> See, e.g., Testimony of the Honorable Gerald B. Tjoflat Before the U.S. Sentencing Commission at 24 (Feb. 10, 2009) (discussing need to revise arbitrary drug guidelines based on empirical evidence), <http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf>; Testimony of the Honorable Vaughn R. Walker Before the U.S. Sentencing Commission, May 28, 2009, at 6-22 (same), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Testimony of the Honorable Charles Breyer Before the U.S. Sentencing Commission, May 27, 2009, at 110 (“variances should be explained in detail so that . . . there will be empirical evidence on a nationwide basis to support [the Commission’s] changes.”); Testimony of the Honorable Susan Mollway Before the U.S. Sentencing Commission, May 27, 2009, at 123 (“using the Commission’s voice to suggest that a particular directive isn’t based on evidence would go a long way toward educating Congress”), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission, February 11, 2009, (urging the Commission to revise the drug and career offender guidelines so as not to go further than Congress required.), [http://www.ussc.gov/AGENDAS/20090210/Hinkel\\_statement.pdf](http://www.ussc.gov/AGENDAS/20090210/Hinkel_statement.pdf); Testimony of Marilyn Grisham, Probation Officer, Before the U.S. Sentencing Commission, May 27, 2009, at 157, 159 (sentences for methamphetamine and illegal re-entry are too severe and should be revised), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Statement of Rachel E. Barkow, Professor of Law, Before the U.S. Sentencing Commission, July 10, 2009 (recommending that the Commission untie the guidelines from mandatory minimums and “conduct a wholesale review of the current system to assess its fiscal impact and where costs could be reduced without increasing crime rates.”) [http://www.ussc.gov/AGENDAS/20090709/Barkow\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Barkow_testimony.pdf).

system, if judges are involved in their construction and allowed regular meaningful feedback.”<sup>69</sup> In describing Virginia’s wholly voluntary guideline system (which has a compliance rate of 80% although there is no appellate review), the former Director of the Vera Institute’s State Sentencing and Corrections Program noted that “judges have been actively involved in the creation and regular adjustment of guidelines in Virginia and the guidelines themselves were based on a study of actual historical sentences served by defendants for specific offenses. These factors, not present to the same extent in the federal regime, may also help promote judicial compliance . . . because [judges] believe that recommended sentences are fair, just and proportionate.”<sup>70</sup> He noted that the experience of Virginia and other states suggests that “the capacity to study and marshal data nimbly as an objective and regularly recurring basis for policy recommendations, is essential to the ultimate substantive credibility and political legitimacy of sentencing policy,” and recommended that the U.S. Sentencing Commission use its “data as the basis of forceful policy recommendations that advance the ends of justice and build the required political and popular support to see that those recommendations are followed.”<sup>71</sup>

**More information would lead to more effective sentences and greater consistency**

Judges are trained to respect the decisions of other judges and take seriously the views of their colleagues.<sup>72</sup> The Commission publishes extensive data, but it is not in a form that allows judges or the parties to determine what other judges did in similar cases or what distinguishes one case from another. Judges can rely on their Probation Offices,<sup>73</sup> or the parties,<sup>74</sup> to assemble information, but this is not a comprehensive solution. Thus, judges and the Defenders have

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<sup>69</sup> See Kim S. Hun & Michael Connelly, *Advisory Guidelines in the post-Blakely Era*, 17 Fed. Sent. Rep. 233, 237 (2005).

<sup>70</sup> Testimony of Daniel F. Wilhelm, Director, State Sentencing and Corrections Program, Vera Institute of Justice, Before the U.S. Sentencing Commission, Feb. 16, 2005, at 3, [http://www.ussc.gov/hearings/02\\_15\\_05/wilhelm\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/wilhelm_testimony.pdf).

<sup>71</sup> *Id.* at 4.

<sup>72</sup> See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. Rev. 235, 285 (2006).

<sup>73</sup> See Testimony of Judge Nancy Gertner Before the U.S. Sentencing Commission, July 10, 2009, at 6, [http://www.ussc.gov/AGENDAS/20090709/Gertner\\_Testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Gertner_Testimony.pdf).

<sup>74</sup> See *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008) (judge and parties assembled a chart of sentences in similar and dissimilar cases to assist the judge in determining a rational sentence where the guidelines recommended 360 months to life in a run of the mill securities fraud case).

asked the Commission to provide sentencing information in a more useful form.<sup>75</sup> This function is contemplated by the SRA,<sup>76</sup> and would contribute to consistency.<sup>77</sup>

Judges, probation officers, and defense counsel have asked the Commission to assemble information regarding recidivism and effective sentencing options, and to conduct and provide its own research on these issues.<sup>78</sup> This function is contemplated by the SRA,<sup>79</sup> and would build knowledge and consensus on effective sentences.

States have had success by providing information to judges about what other judges are doing and empirical evidence regarding what works to reduce recidivism and protect public safety. For example, Missouri has a website showing actual sentencing data for each offense over the past three years, sentencing options, the sentencing commission's recommendations, an individualized risk assessment score and a management plan for the particular defendant.<sup>80</sup>

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<sup>75</sup> See, e.g., Testimony of Judge Nancy Gertner Before the U.S. Sentencing Commission, July 10, 2009, at 6, [http://www.ussc.gov/AGENDAS/20090709/Gertner\\_Testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Gertner_Testimony.pdf); Testimony of Alan DuBois and Nicole Kaplan, Assistant Federal Defenders, before the U.S. Sentencing Commission at 14-15, February 10, 2009, [http://www.ussc.gov/AGENDAS/20090210/Kaplan\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090210/Kaplan_testimony.pdf).

<sup>76</sup> The Commission is to serve as a “clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices,” to “collect systematically” various forms of sentencing data, and to publish those data. 28 U.S.C. § 995(a)(12)(A), (13)-(16).

<sup>77</sup> See Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 Stan. L. Rev. 361, 371 (2005) (“Data and analysis of the patterns and practices of other judges in similar cases and across all cases can help to inform judges about whether the Guidelines are reasonably applied to the case before them and, in any case, what a reasonable sentence might be.”).

<sup>78</sup> See, e.g. Testimony of the Honorable Robert S. Lasnik Before the U.S. Sentencing Commission, May 27, 2009, at 86-94, [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Statement of Greg Forest, Chief United States Probation Officers, Before the U.S. Sentencing Commission, February 10, 2009, [http://www.ussc.gov/AGENDAS/20090210/Forest\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090210/Forest_testimony.pdf); Joint Statement of FPD Thomas W. Hillier II and AFD Davina Chen Before the U.S. Sentencing Commission, May 27, 2009, at 11-14, [http://www.ussc.gov/AGENDAS/20090527/ChenHillier\\_Testimony.pdf](http://www.ussc.gov/AGENDAS/20090527/ChenHillier_Testimony.pdf).

<sup>79</sup> The Commission is to “collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process,” to “disseminate information concerning . . . the relationship of . . . sentences actually imposed . . . to the factors set forth in section 3553(a),” and to “disseminate information regarding effectiveness of sentences imposed.” 28 U.S.C. § 995(A)(13), (15), (16).

<sup>80</sup> See Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 Ohio St. L. J. 95 (2006).

Virginia provides a recidivism risk assessment tool for judges to apply. This has been used to divert 53% of otherwise prison bound non-violent offenders to alternatives without risk to public safety. Rates of incarceration, recidivism, and crime have all dropped.<sup>81</sup>

### **Concerns About Disparity Under the Advisory System Are Misdirected**

“Disparity is often justified by real differences in culpability or other penologically relevant factors.”<sup>82</sup> “When rules fail to make relevant distinctions, following them rigidly creates unwarranted uniformity--just another name for unwarranted disparity.”<sup>83</sup> In enacting the SRA, Congress recognized the difference between warranted and unwarranted disparities, and that disparities based on factors relevant to the purposes of sentencing were not only inevitable but desirable.<sup>84</sup> Accordingly, it directed the Commission to *reduce* (not eliminate) *unwarranted* sentencing disparities.<sup>85</sup> The guidelines were to permit individualized sentencing, while avoiding arbitrary and unwarranted distinctions among similarly situated offenders.<sup>86</sup>

Sentences outside the guideline range do not necessarily reflect unwarranted disparity, and sentences within the guideline range sometimes do reflect unwarranted disparity, as when the range itself fails to properly reflect the relative seriousness of the offense,<sup>87</sup> or when differences in the strength and reliability of proof, complex and ambiguous rules, or different interpretations

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<sup>81</sup> See Dr. Richard Kern, USSC, *Symposium on Alternatives to Incarceration*, July 15, 2008, Testimony at [http://www.uscc.gov/SYMPO2008/Material/11\\_FINAL\\_StatesImplementation.pdf](http://www.uscc.gov/SYMPO2008/Material/11_FINAL_StatesImplementation.pdf); Power Point at <http://www.uscc.gov/SYMPO2008/Material/Kern.pdf>.

<sup>82</sup> Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 835 (1992).

<sup>83</sup> Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425, 444-45 (2006).

<sup>84</sup> S. Rep. No. 98-225 at 52-53, 150, 161 (1983).

<sup>85</sup> 28 U.S.C. § 994(f).

<sup>86</sup> 28 U.S.C. § 991(b)(1)(B).

<sup>87</sup> Examples of such guidelines include crack, see USSC, *Cocaine and Federal Sentencing Policy* (May 2007), career offender, see *Fifteen Year Review* at 133-35, the fast track departure, see USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003), and criminal history rules that incorporate unwarranted disparity in arrest and conviction in the states. See *Fifteen Year Review* at 134; Testimony of Christopher Stone, United States Sentencing Commission Public Hearing, New York City, July 9-10, 2009; Michael Tonry, *Malign Neglect – Race, Crime, and Punishment in America*, New York: Oxford University Press (1995).

of the rules result in different guideline ranges in similar cases.<sup>88</sup> Through the actions of prosecutors, agents, probation officers, or judges, the guideline range is frequently “calculated” very differently in cases that are essentially the same.<sup>89</sup> In addition, the guidelines often treat offenders with widely varying culpability, risks of recidivism, dangerousness, and need for treatment or training the same (e.g., by over-emphasizing harms, treating different harms the same, and preventing consideration of distinguishing mitigating factors).<sup>90</sup> This results in unwarranted uniformity. In some instances, the guidelines treat offenders who are the same very differently (e.g., by requiring stiff punishment for “career offenders” whose risk of recidivism resembles that of offenders in lower criminal history categories,<sup>91</sup> or requiring much different punishment for offenses involving the same harms, as with crack and powder cocaine). And the

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<sup>88</sup> See Fifteen Year Review at 50, 87 (noting ambiguity in the language of the relevant conduct rule, discomfort with law enforcement’s role in establishing it, and untrustworthy evidence as reasons it is inconsistently applied).

<sup>89</sup> See 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) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant); Panel Discussion, *Federal Sentencing Under “Advisory Guidelines”*: *Observations by District Judges*, 75 Fordham L. Rev. 1, 16 (2006) (Judge Lynch describing how when application of an enhancement is a close call, he could find that it does not apply, which is counted as compliant, or apply it and vary, which is counted as noncompliant); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission, February 11, 2009 (listing ways in which different guideline ranges in similar cases result from the government’s actions or happenstance, and stating, “Your statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range.”), [http://www.ussc.gov/AGENDAS/20090210/Hinkle\\_statement.pdf](http://www.ussc.gov/AGENDAS/20090210/Hinkle_statement.pdf).

<sup>90</sup> For example, policy statements in the Guidelines Manual deem a host of factors to be never or not ordinarily relevant, including but not limited to first offender status, age, employment record and need for training, education and need for education, family ties and responsibilities, addiction and need for treatment, and aberrant conduct in drug cases, see Chapter 5, Part H & Part 5K2, which are highly relevant to the risk of recidivism and the likelihood and need for rehabilitation. See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005).

<sup>91</sup> Fifteen Year Review at 133-34.

guidelines sometimes treat less serious offenses much more harshly than more serious offenses.<sup>92</sup> Thus, when judges sentence outside the guideline ranges, they often avoid unwarranted disparity and unwarranted uniformity.

After *Booker*, judges can compensate for some forms of prosecutor-created disparity. Under mandatory guidelines, prosecutors and law enforcement agents were able to precisely control sentences without judicial review. As Professor Sandra Guerra Thompson observes, “By allowing prosecutors to decide the sentence ranges through the charging power and, to some extent, through control of what sentencing facts were brought to the court’s attention, prosecutors could effectively decide the guideline range that would be applied in a particular case.”<sup>93</sup> Manipulation of defendants’ sentencing exposure during the investigation phase, for example, by influencing the type and quantity of drug, has been identified as a significant source of disparity.<sup>94</sup> The Commission has found that Hispanics and African Americans are less likely to receive substantial assistance departures than Whites.<sup>95</sup> Even when substantial assistance departures are requested by the government, other research shows that African Americans receive

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<sup>92</sup> See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* at 29 (Jan. 1, 2009) (showing that the guideline range is 567% higher for trading pornography than for coercing a child into sex, and 194% higher than for planning a months-long campaign to cross state boundaries and engage in repeated sex with a twelve year-old), [http://www.fd.org/pdf\\_lib/child%20porn%20july%20revision.pdf](http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf).

<sup>93</sup> *The Booker Project: The Future of Federal Sentencing: Introduction*, 43 Hous. L. Rev. 269, 272 (2006).

<sup>94</sup> 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); Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich L. Rev. 2385 (1996). See also, 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 sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

<sup>95</sup> Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy Practice*, (USSC January 1998) at 14, 31.

smaller departures in drug cases than similarly situated Whites.<sup>96</sup> As a number of former federal prosecutors recognize, prosecutorial discretion can lead to racially disparate results for any number of reasons, including race-neutral criteria which create racially disparate results, with or without conscious animus, or from unconscious racial stereotyping.<sup>97</sup>

Under the mandatory guidelines, the federal sentencing system was badly unbalanced.<sup>98</sup> The problem of shifting discretion to prosecutors and the accompanying disparity led one prominent criminologist to remark, “with respect to sentencing, three discretions [prosecutor, judge, and parole board] might be preferable to one.”<sup>99</sup> In fact, disparity arising from prosecutorial practices was a substantial concern of Congress when it was considering the SRA. It became convinced that “without attention to plea bargaining, sentencing reform could actually increase disparities in the federal sentencing process.”<sup>100</sup> Congress therefore adopted the recommendation of a report by the Federal Judicial Center to harness judicial power to review plea agreements under standards promulgated by the Commission,<sup>101</sup> and this became 28 U.S.C. § 994(a)(2)(E). “The legislative history illustrates that both the House and Senate viewed this provision as crucial to the success of the sentencing reform effort.”<sup>102</sup> The Commission responded by adopting the policy statements in Chapter Six, Part B of the *Guidelines Manual*, which provides standards for the acceptance and rejection of plea agreements, as well as other provisions, such as the multiple count rules and the relevant conduct rule.

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<sup>96</sup> Celesta Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 *Law & Soc’y Rev.* 789 (1997).

<sup>97</sup> See generally Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, 3 *Fed. Sent. Rep.* 151 (Feb. 2007).

<sup>98</sup> Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 *Colum. L. Rev.* 1315, 1334 (2005).

<sup>99</sup> Professor Frank Zimring, quoted in Schulhofer & Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 *Am. Crim. L. Rev.* 231 (1989).

<sup>100</sup> Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 *Am. Crim. L. Rev.* 231, 240 (1989).

<sup>101</sup> Federal Judicial Center, *Prosecutorial Discretion and Federal Sentencing Reform* (1979).

<sup>102</sup> Schulhofer & Nagel, *supra* note 100, at 241.

These efforts to control prosecutor-created disparity failed, and “disparate treatment of similar offenders is common at presentencing stages.”<sup>103</sup> The Commission found in its Fifteen Year Review that the relevant conduct rule, for example, had not worked as intended and often served as a one-way ratchet to increase sentences. Judicial review and rejection of plea agreements was rare, in part because judges welcomed plea agreements that avoided overly-harsh guidelines.<sup>104</sup> Surveys of judges and other practitioners consistently document that presentencing disparity is common, as do field studies of particular districts.<sup>105</sup>

Prosecutorial discretion, of course, is critical to the functioning of our criminal justice system. But this does not mean that the guidelines should function as a tool through which prosecutors have sole control over sentences. The advisory guideline system has alleviated the problem.

In rendering the guidelines advisory, the Supreme Court empowered judges to consider all relevant circumstances of the offense and the offender, and invited judges to determine whether the guideline itself achieves § 3553(a)’s objectives. It invited the Commission to listen to judges and to further develop its guidelines based on empirical data and national experience. While all of this was necessary to ensure that the guidelines were no longer treated as mandatory, it also made possible the long term health of the sentencing guideline system. We hope that the Commission will continue its research in this area to help maintain this proper balance.

#### **IV. Courts Should be Encouraged to Impose Alternative Sentences**

Last year the Commission began a new, comprehensive study of alternatives to incarceration. We applaud the initiative. Our clients desperately need these alternatives.

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<sup>103</sup> Fifteen Year Review at 92.

<sup>104</sup> *Id.*

<sup>105</sup> See 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”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission’s mission of eliminating disparity based on race); Federal Courts Study 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.”); Fifteen Year Review at 81-92 (reviewing the evidence of disparity created by law enforcement agents and prosecutors before sentencing).

The timing could not be better. Several of the districts represented here today are embarking on reentry courts, alternatives of a different sort that will fully complement whatever alternative sentences the Commission chooses to incorporate into the guidelines on the front end. In my district, here in Chicago, Judge Ruben Castillo chairs a committee comprised of members of the court, the U.S. Attorney's Office, the Probation Office and our office, who have been working non-stop to create a meaningful reentry program for high risk offenders who are just getting out of prison and who might not otherwise become productive members of society. In other districts, these back-end reentry programs have proven successful in decreasing recidivism. Over time, these programs will undoubtedly lower the overall recidivism rate, keep more people safely in the community, and save money.

But back-end programs are not enough, as my colleagues Thomas Hillier and Davina Chen so ably explained in their joint written statement submitted to the Commission for the hearing at Stanford in May, and as supplemented by my colleague Alex Bunin in his written statement for the hearing in New York in July. Rather than repeat their testimony, I would like to incorporate by reference pages 3-14 of Mr. Hillier and Ms. Chen's testimony, and page 19 of Mr. Bunin's testimony.

As discussed in detail by my colleagues, the Commission should adopt an alternatives guideline which includes the "in/out" decision in cases where probation is allowed by statute, and the option to impose a split sentence where probation is prohibited by statute, allowing judges to first decide whether prison is appropriate at all.

In my view, the importance of this revision cannot be overemphasized. Recognizing that many of our clients have only minor criminal records and are convicted of what should be considered non serious, non violent crimes, the courts should be encouraged to think about alternatives. Prison is expensive. Congress recognized that prison is not an appropriate sentence where the need is rehabilitation,<sup>106</sup> yet, the "sufficient but not greater than necessary" sentence for many of our clients is a sentence that rehabilitates. It not only is senseless to put those people in prison, it is also contrary to congressional intent.

Things are even worse for the 43.6% of male federal inmates and 61.2% of female federal inmates who suffer from mental health problems.<sup>107</sup> According to the Bureau of Prisons, 24%

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<sup>106</sup> In 18 U.S.C. § 3582(a), Congress mandated courts to consider the factors set out in § 3553(a) in deciding whether to impose a prison sentence, "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Similarly, in 28 U.S.C. § 994(k), Congress mandated that: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."

<sup>107</sup> See Doris J. James and Lauren E. Glaze, U.S. Department of Justice, Bureau of Justice Statistic Reports, *Mental Health Problems of Prison and Jail Inmates*, Table 3 (September 2006), available at [www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.htm](http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.htm).

of its inmates “receive treatment after admission,” but only 15.1% receive “professional mental health therapy.”<sup>108</sup> “Treatment” most commonly means being given a prescribed medication and an overnight hospital stay.<sup>109</sup> On-going therapy or monitoring by a mental health professional is simply not possible in most prisons. Translated into real people, these numbers tell us that almost half of our clients are in need of mental health therapy, but that only 15% of them receive it. Although *Booker* allows us to tell the court about how our clients suffer and what on-going mental health treatment could do for them, it does not encourage the courts to keep them out of prison for that reason. That is something we urge this Commission to do. Putting in prison persons whose only chance of improvement is mental health treatment is a virtual guarantee that they will come out worse than when they entered.

As noted above, empirical studies show that sentence length has no impact on deterrence.<sup>110</sup> Moreover, the longer a person is removed from society, the weaker their social ties.<sup>111</sup> The removal of persons from their families and communities tends to “fray family and community bonds, and contribute to an increase in recidivism and future criminality.”<sup>112</sup> Research also shows that “a critical predictor of success for persons returning to the community is family connections, and prospects for employment, [which] are strengthened for person who are able to maintain some degree of attachment to their former networks of contacts.”<sup>113</sup>

If judges understand that probationary sentences with alternative conditions, from community service to vocational training to substance abuse treatment to mental health treatment, are not only legitimate sentences, but are sentences that are encouraged by the Commission, as they should be under § 994(j), the use of those alternatives will become far more common. The result would, at long last, make into a reality Justice Breyer’s hope that the guidelines would allow courts “to explore other forms of punishment that may prove both more cost-effective and more humane.”

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<sup>108</sup> *Id.* at Table 14.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> See See Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An analysis of Recent Research* 1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006); David Weisburd et. al, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995).

<sup>111</sup> Lin Song and Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, Washington State Institute for Public Policy (September 2003) at 3.

<sup>112</sup> Ryan King, Marc Mauer and Malcolm Young, The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005) at 7.

<sup>113</sup> *Id.*

## **V. Review of Departures and Suggestions for Change**

We are pleased that the Commission has made it a priority to review departures, including “(A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the Guidelines Manual, including in chapter Two and Parts H and K of Chapter Five.”

The Defenders believe that the Commission should delete policy statements that prohibit, discourage or restrict consideration of offender characteristics and offense circumstances (Chapter 5, Part H and Chapter 5, Part K.2), while retaining encouraged departures in Chapters 2 and 4, and clarifying the language of USSG §§ 1B1.1 and 1B1.4 to make it consistent with current law. My colleagues who have testified before you in previous hearings have explained the reasons for this position, and I incorporate their testimony by reference.<sup>114</sup> I would like to add some further thoughts regarding current law and practice and the history of departures in the hope that this will assist the Commission in avoiding the mistakes of the past.

### **Current Law and Practice**

In *Booker*, the Supreme Court excised § 3553(b), which constrained judicial discretion to depart from presumptive guidelines. See *United States v. Booker*, 543 U.S. 220, 233, 266 (2005). In *Rita v. United States*, 127 S. Ct. 2456 (2007), the Court listed arguments that parties may make and that judges may consider, including that a departure within the guidelines’ framework is warranted, that application of the factors set forth in 18 U.S.C. § 3553(a) warrants a lower sentence, that the guideline sentence itself fails to achieve § 3553(a)’s objectives, and that the guidelines do not treat defendant characteristics in the proper way. *Id.* at 2461, 2465, 2468. The Court made clear that a judge is free to sentence below the guideline range based on circumstances of the offense or characteristics of the defendant that the guidelines’ policy statements prohibit or deem “not ordinarily relevant.” *Gall v. United States*, 128 S. Ct. 586 (2007).

In the Seventh Circuit, as in all other circuits, this means that the “correctness” of a “departure” under the excised § 3553(b) standard is no longer the relevant inquiry on appeal, *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005), and that judges may not decline to consider factors based on policy statements that prohibit, discourage, or restrict consideration of such factors. *United States v. Powell*, \_\_\_ F.3d \_\_\_, 2009 WL 2431986 at \*\*13-14 & n.7 (7th Cir. Aug. 7, 2009); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009); *United States v. Millet*, 510 F.3d 668, 680 (7th Cir. 2007); see also, e.g., *United States v. Chase*, 560 F.3d 828

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<sup>114</sup> See Statement of Michael Nachmanoff at 22-25, Public Hearing Before the United States Sentencing Commission, July 9, 2009; Joint Statement of Thomas W. Hillier II and Davina Chen at 31-36, Public Hearing Before the United States Sentencing Commission, May 27, 2009; Testimony of Alan Dubois and Nicole Kaplan at 47-50, Public Hearing Before the United States Sentencing Commission, February 10, 2009.

(8th Cir. 2009); *United States v. Simmons*, 568 F.3d 564 (5th Cir. May 18, 2009); *United States v. Hawes*, 309 Fed. Appx. 726, 732 n.2 (4th Cir. 2009).

Sentencing judges must “begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall*, 128 S. Ct. at 596. “Calculating,” of course, refers to the formal guideline rules with an assigned number of points. The parties and judges *may* rely on a departure if one is available, but they are not required to do so. *Rita*, 127 S. Ct. at 2461, 2465, 2468. In *Gall*, the Court approved a below-guideline sentence based on circumstances of the offense and characteristics of the defendant which the guidelines’ policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy, or deem “not ordinarily relevant,” *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs, without mentioning those policy statements. *Id.* at 598-602. Thus, it is clear that, although consulting Chapter Five is perfectly permissible, it is not a required step in the sentencing process, and it cannot be used to prevent consideration of relevant factors under § 3553(a)(1).<sup>115</sup>

Again, judges are free to grant departures, and this is true in every circuit including the Seventh, where the departure standard has been declared “obsolete.” In the first two quarters of 2009, judges in the Seventh Circuit relied on a “departure” in whole or in part more often than the average for judges in all circuits.<sup>116</sup> But the use of departures continues to drop, and this should come as no surprise, since most of the departure provisions do not *invite* departures, but prohibit, discourage, or define them in restrictive terms, although these factors bear directly on culpability, risk of recidivism, and the need for or accomplishment of rehabilitation.

### **Brief History of Departures**

Congress did not direct the Commission to define, prohibit, encourage or discourage departures. The purposes of “guidelines” and “policy statements” do not include anything with respect to sentences outside the guideline range,<sup>117</sup> and there is no provision in the SRA directing

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<sup>115</sup> It is not accurate, as stated in the introduction to the Guidelines Manual, that “[t]he district court, in determining the appropriate sentence in a particular case, therefore, *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).” USSG, Ch. 1 Pt. A(2) (emphasis added).

<sup>116</sup> Nationally, judges relied on a “departure” in whole or in part in 3.1% of cases, and on reasons under § 3553(a) in 12.2% of cases, *i.e.*, departures 20% of the time. In the Seventh Circuit, judges relied on a “departure” in whole or in part in 4.9% of cases, and on reasons under § 3553(a) in 17.8% of cases, *i.e.*, departures 22% of the time. In the Sixth Circuit, judges relied on a “departure” in whole or in part in 3.2% of cases, and on reasons under § 3553(a) in 15.5% of cases, *i.e.*, departures 17% of the time. USSC, *Preliminary Quarterly Data Report*, 2d Quarter Release 2009, Table 2.

<sup>117</sup> See 28 U.S.C. § 994(a)(1), (a)(2). “The sentencing *guidelines* will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by *policy statements* that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to

the Commission to take any action to define, prohibit, discourage, or encourage departures from a guideline sentence. Title 28 U.S.C. § 994(c), (d) and (e) contain directives to the Commission to consider whether to include certain factors in the formal guideline rules regarding the kind and extent of sentence, and have nothing to do with departures.<sup>118</sup> The purpose of the directives in 28 U.S.C. § 994(d) and (e) was to ensure that the guideline rules, in recommending straight prison over other options such as probation, a split sentence, or intermittent confinement, or a longer prison term, were not used to relegate to prison those lacking education, employment, or family or community support on the theory that prison would be good for them.<sup>119</sup> Congress did not intend for the Commission to rule out offender characteristics for purposes of mitigating the kind or length of sentence for any offender of any race, religion, gender or socioeconomic status.<sup>120</sup>

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victims, and order of restitution and the use of conditions of probation and post-release supervision.” S. Rep. No. 98-225 at 51 (1983) (emphasis added).

<sup>118</sup> See 28 U.S.C. § 994(c) & (d) (“*in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment . . .*”); *id.* § 994(e) (“assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment . . .*”); S. Rep. No. 98-225 at 171 (1983) (“Subsection (d) lists a number of factors that the Commission is required to examine in order to determine whether and to what extent they are pertinent to the *establishment of categories of offenders for use in the guidelines and policy statements concerning the nature, extent, place of service, or other incidents of an appropriate sentence.* The Commission is required to determine whether and to what extent each factor might be pertinent to the question of *the kind of sentence* that should be imposed; the *size* of a fine or the *length* of a term of probation, imprisonment, or supervised release; and the *conditions* of probation, supervised release, or imprisonment.”).

<sup>119</sup> See generally S. Rep. No. 98-225 at 171-175 & nn.530-32. Regarding the directive that the rules be “entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders,” 28 U.S.C. § 994(d), Congress explained that it “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.” S. Rep. No. 98-225 at 171 & n.531 (1983). In explaining the directive that the Commission “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), Congress explained: “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.” *Id.* at 175.

<sup>120</sup> Congress suggested that a need for education or vocational skills, mental or emotional conditions, need for drug treatment, or health problems may call for a sentence of probation. S. Rep. No. 98-225 at 171-74 & n.531. It noted that education and vocation would be relevant to community service as a condition of probation. *Id.* at 173 n.532. And it suggested that certain factors might call for a split

The only instructions relating to sentences *outside the guideline range* are the directives *to judges* in § 3553(a) and § 3553(b), the latter of which the Supreme Court has excised. Congress intended that judges would sentence outside the guideline range based on factors not present in kind or degree in the guideline rules, that the Commission would use the results to further refine the rules, and that this combination of judicial discretion and refinement of the rules would ensure fair and individualized sentencing and reduce unwarranted disparity.<sup>121</sup>

This never happened. The original Commission's decisions were not well-considered,<sup>122</sup> and they were never reconsidered.<sup>123</sup> Instead, the Commission continued to add to the list of disfavored factors for purposes of departure, well beyond anything mentioned in 28 U.S.C. § 994(e).<sup>124</sup> The purpose, apparently, was to curtail judicial discretion and any kind of leniency. For example, when a court departed downward based on the fact that a defendant had already been sexually abused in prison and placed in solitary confinement, due to his "diminutive size

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sentence or intermittent confinement. *Id.* at 173 (suggesting that a drug dependent defendant might be placed on probation with community treatment and a brief stay in prison for drying out); *id.* at 174 (suggesting that a defendant with family ties and responsibilities might be sentenced to confinement on evenings and weekends).

<sup>121</sup>S. Rep. No. 98-225 at 51-53, 67-69, 178 (1983).

<sup>122</sup>The original Commission did not even hold hearings on offender characteristics other than prior record. See U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 10 (1987). Then Commissioner Breyer explained that mitigating offender characteristics were not included in the formal guideline rules as the result of a vague "compromise." Notably, he did not attribute this to any directive from Congress. He made no mention of, and did not explain, the policy statements placing mitigating offender characteristics off limits. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988).

<sup>123</sup>One close observer attributed the way in which the original Commission dealt with mitigating factors to "difficult and highly time-constrained circumstances," and noted that the "Commissioners themselves were aware of the need to revisit and refine many of these judgments." Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

<sup>124</sup>In addition to education, employment, vocational skills, family ties and responsibilities, and community ties, factors deemed prohibited or not ordinarily relevant include age, mental, emotional and physical conditions, military service, other charitable or public service, "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," "physical appearance, including physique," "personal financial difficulties and economic pressures," "drug or alcohol dependence," "addiction to gambling," "post-sentencing rehabilitative efforts," diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, and a single aberrant act if the instant offense was drug trafficking subject to a mandatory minimum of five years or greater even if the defendant is eligible for the safety valve. See USSG, Chapter Five, Part H; USSG, Chapter 5, Part K, Subpart 2.

and immature appearance,”<sup>125</sup> the Commission immediately amended the *Manual* to state that physical appearance, “including physique,” is not ordinarily a relevant factor when deciding whether to depart.<sup>126</sup>

Similarly, the Commission amended the guidelines to prohibit consideration of a defendant’s lack of guidance as a youth in response to a Ninth Circuit holding that a disadvantaged childhood could be a mitigating consideration justifying a downward departure in some circumstances.<sup>127</sup> The Commission gave no official reason for this amendment, but, as explained by Judge Wilkins and John Steer, it was concerned that such a departure could “potentially be applied to an extremely large number of cases.”<sup>128</sup> Thus, although the Commission recognized the manifest relationship between disadvantage and crime, it prohibited the courts from recognizing any distinction relevant to sentencing purposes between defendants brought up in privilege and those born into poverty and neglect. Given the correlation between disadvantaged upbringing and minority status in the federal offender population, consideration of this factor as a basis for downward departure would likely have *reduced* the gap in average sentences between whites and racial minorities which grew dramatically under the guidelines, due to congressional policies and the Commission’s own choices.<sup>129</sup> The Commission’s own choices that helped widen the racial gap include tying the drug guidelines to mandatory minimums and including state drug offenses as career offender predicates, neither of which Congress required. But the Commission never considered these choices to have violated Congress’s directive to ensure that the *guideline rules* were entirely neutral as to race.

These actions on the part of prior Commissions prevented individualized sentencing and thwarted the feedback loop that was thought to be essential to the proper functioning of the guideline system.<sup>130</sup> Congress directed the Commission to reduce unwarranted sentencing

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<sup>125</sup> *Koon v. United States*, 518 U.S. 81, 107 (1996) (discussing *United States v. Lara*, 905 F. 2d 599 (2d Cir. 1990) and the Commission’s response).

<sup>126</sup> USSG §5H1.4; see USSG, App. C, Amend. 386 (effective Nov. 1, 1991).

<sup>127</sup> William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 (1993) (citing *United States v. Floyd*, 945 F.2d 1096, (9th Cir. 1993), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc)).

<sup>128</sup> *Id.* at 84-85.

<sup>129</sup> Fifteen Year Review at 117.

<sup>130</sup> “[D]epartures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines,” which “would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines.” USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (Oct. 2003).

disparities, 28 U.S.C. § 994(f), to maintain sufficient flexibility to permit individualized sentences, 28 U.S.C. § 991(b)(1)(B), to reflect advancement in knowledge of human behavior, 28 U.S.C. § 991(b)(1)(C), and to measure the degree to which sentencing practices are effective in meeting the purposes set forth in section 3553(a)(2). 28 U.S.C. § 991(b)(2). The Commission was also to “collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a),” 28 U.S.C. § 995(a)(15), and to “collect systematically and disseminate information regarding effectiveness of sentences imposed.” 28 U.S.C. § 995(a)(16).

In explaining the Commission’s duty to “review and revise,” 28 U.S.C. § 994(o), the Senate Report stated as follows:

Subsection [(o)] requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. . . . [T]his subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight *would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.*

S. Rep. No. 98-225 at 178 (1983) (emphasis added).

By prohibiting and restricting consideration of mitigating factors, the Commission prevented individualized sentencing and deprived itself of information regarding (1) whether defendants were or were not similar, (2) advancement in knowledge of human behavior, (3) the relationship of sentences imposed to the factors set forth in § 3553(a), and (4) the effectiveness of sentences imposed in meeting the purposes set forth in § 3553(a)(2). The Commission has acknowledged the “lack of good data on all legally relevant considerations that might help explain differences in sentences,” which “is especially severe regarding circumstances that might justify departure from the guidelines,” because “[d]ata are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do *not* receive a departure is not routinely collected.” *See Fifteen Year Review* at 119 (emphasis supplied).

In sum, departures were prohibited and discouraged to the detriment of the evolution of the guidelines, for the purpose of restricting judicial discretion. That is no longer permissible, and, because no statute required it, the Commission is free to eliminate the restrictive policy statements.

## **What the Commission Should Do Now**

First, if the Commission wants judges to use departures, it should invite them to do so. The broadly-worded departure provisions in USSG § 2B1.1, comment. (n.19), and USSG § 4A1.3 are good examples. These implicitly acknowledge that certain factors have not been adequately taken into account in the guideline rules and do not purport to prohibit the courts from considering factors they must consider under § 3553(a) and Supreme Court law. The Commission should retain these encouraged “departures” in the Chapter 2 and Chapter 4 guidelines, and could add others like them.

Second, the Commission should delete Chapter 5, Part H (Specific Offender Characteristics) and Chapter 5, Part K.2 (Other Grounds for Departure) and move them to a historical note. The policy statements that deem factors never or not ordinarily relevant are inconsistent with current law. Even many of the “encouraged” departures actually prohibit departures for defendants who do not fit their strict criteria. Moreover, the encouraged departures are complicated and unnecessary.

Third, we do not believe that it is advisable or possible to assign values to mitigating offender characteristics, or to attempt to specifically define them. As the Commission has recognized, such factors “cannot . . . by their very nature, be comprehensively listed and analyzed in advance.” USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 4 (Oct. 2003). As the Commission recognized when it sent the first set of guidelines to Congress on May 13, 1987: “The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing.”<sup>131</sup>

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. For example, severe drug or alcohol abuse and associated repeated violence may point to further recidivism of a dangerous nature and thus a need to incapacitate; under the circumstances in another case, drug or alcohol addiction may point to reduced culpability and the need for and efficacy of drug treatment with less need to incapacitate. A year reduction may be appropriate for family circumstances in one case, but useless in another.

Assigning values would result in too much in some cases and too little in others. Of course, the judge could follow the departure provision and then vary up or down from the departure, but the judge could have varied from the original guideline range and skipped the departure step. There is no point in adding another layer of complexity. We do not believe that precisely defining and placing numerical values on grounds for departure would be helpful or wise.

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<sup>131</sup> 52 Fed. Reg. 18,046, 18,103 (May 13, 1987).

Fourth, the Commission should delete all references to § 3553(b) and not attempt to retain this standard because it has been excised by the Supreme Court and indicates that the guidelines are still mandatory.

Fifth, the Commission should delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders. This limit was adopted in response to, but was not required by, the PROTECT Act. It is inconsistent with current law, and the courts ignore it. It is inconsistent with the Commission’s own research showing that the criminal history category for career offenders is often several categories higher than their recidivism rate would justify.<sup>132</sup>

Sixth, 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.” The robbery example is not appropriate, as the factors judges may consider in sentencing outside the guideline range are now unlimited. The guideline can 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. The proposed language is set forth in the Appendix.

Seventh, 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. The proposed language is set forth in the Appendix.

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<sup>132</sup> Fifteen Year Review at 134.

## APPENDIX

### §1B1.1. Application Instructions

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#### Commentary

#### Application Notes:

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*E) "Departure" means (i) for purposes of the "departure" 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 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.*
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).*