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Public Hearing Before The
United States Sentencing Commission

“The Sentencing Reform Act of 1984: 25 Years Later”

Austin, Texas
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I thank the Sentencing Commission for holding this hearing and for inviting me to testify.¹ My experiences as a defense lawyer lead me to conclude that the advisory guidelines system is a great advancement toward balanced, just, fair and humane sentencing. Prior to my career in the Federal Public Defender's Office, I was an Assistant Public Defender in Tulsa, Oklahoma, where juries imposed sentence upon the defendants they convicted. During my time in the state court system, I developed the belief that sentences would likely be more just and fair if left to the sound judgment of neutral judges, whose decisions would be based not only on criminal conduct (as the state juries' were), but on all relevant information relating to the offense and a defendant's history and characteristics. Then I became an Assistant Federal Public Defender when the sentencing guidelines were mandatory, and was dismayed that judges were required to calculate the sentence based on aggravating factors, but were foreclosed from considering pertinent mitigating factors about my clients and their offenses. The federal system has now reached a better balance, calling upon the Commission to give informed guidance and upon sentencing courts to use their sound judgment.

In Part I below, I will discuss sentencing in my districts under § 3553(a), and propose suggestions for how the Commission could provide useful information to judges without attempting to constrain their discretion. In Part II, I discuss how the advisory guidelines system has had a healthy impact on plea bargaining and the guilty plea process. In Part III, I discuss some of the serious problems created by mandatory minimums, including their corrosive effect on the integrity and accuracy of the system, as well as claims that they are necessary to obtain cooperation. In Part IV, I urge the Commission to revise the drug trafficking, child pornography, acceptance of responsibility, and career offender guidelines. In Part V, I urge the Commission to report the data on the government's role in below guideline sentences in a way that is easily understood.

¹ 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).

I. DEPARTURES AND SUGGESTIONS FOR CHANGE

The Defenders are pleased that the Commission intends to review its departure provisions. We urge the Commission to delete policy statements in Chapter 5, Parts H and K.2; to retain the open-ended departures in Chapters 2 and 4, and to add others; to delete all references to § 3553(b); to delete the one-level limitation on departures for career offenders in USSG § 4A1.3(b)(3); and to revise the language of USSG § 1B1.4 and Application Note 1(E) to USSG § 1B1.1 as we have proposed.

At the hearing in Denver, Judge Ericksen raised the possibility that the Commission might replace the current provisions of Chapter 5 with information regarding various factors, provided in a non-directive manner. The judges on the panel emphasized that they were required to consider all circumstances of the offense and characteristics of the offender, and that the Commission should not attempt to direct or advise them to do otherwise. If the Commission accepts this invitation, it should act, as Judge Ericksen suggested, as an information “clearinghouse,” collecting and disseminating data obtained from studies, research, and empirical experience. *See* 28 U.S.C. § 995(a)(12)-(16). If so, the Commission should take this opportunity, not to attempt to re-assert control over judicial discretion, but to provide useful information in a neutral manner. In this way, the Commission could assist judges and practitioners.

A. What Courts Are Doing

My office serves the Northern and Eastern Districts of Oklahoma, two districts that historically have imposed below guideline sentences not identified as government sponsored far below the national average. This has changed fairly dramatically in both districts after *Booker*. Judges in my districts have shown an interest in post-offense rehabilitative efforts as a basis for below guideline sentences, as well as mental health issues, family circumstances, and age. They usually do not use the “departure” provisions of the guidelines, but instead impose variances.

Timothy Jones

The Northern District of Oklahoma devotes a great deal of money and effort to providing specialized treatment services for defendants under pretrial supervision.² Our client, Timothy Jones, took advantage of those services, to the benefit of himself and the public.

² In fiscal 2009 Northern Oklahoma spent \$622,296 on treatment. Of this amount, \$125,537 was spent for the treatment of pretrial defendants. Treatment costs in this district are evenly distributed between convicted persons and pretrial defendants. These treatment costs include all invoices in FY 2009 for inpatient and outpatient drug and alcohol treatment, family counseling, various forms of mental health treatment, and sex offender treatment.

Mr. Jones was a 24 year old father of two young girls. He was pulled over for failing to signal a left-hand turn. Officers conducted a search of the car and Mr. Jones, finding 17 grams of marijuana, \$180 cash, and a cell phone containing text messages indicating that he was selling marijuana cigarettes. Jones was arrested, and the officers informed him that they had sufficient evidence to get a search warrant for his residence, and that if they found illegal items, they would take any adult in the home to jail and any child to Department of Human Services custody. Not wanting his family to suffer as a result of his conduct, Jones explained that he had additional marijuana hidden under a mattress in a bedroom of the house, and a pistol and ammunition in a shoe box in a closet in another bedroom. Jones, who had a prior felony drug possession conviction, told the officers he had owned the gun for several years. He signed a written statement and a consent form for search of the home. The officers took the consent form to the home, showed it to Jones' girlfriend, she cooperated fully, and the officers found all items exactly where Jones said they would be.

Jones pled guilty to possessing a firearm after a felony conviction. His only prior criminal history was the drug possession case mentioned above, for which he received and successfully completed a two-year probationary term. His guideline range was 10-16 months, in Zone C. Under the guidelines, Jones would be required to serve a minimum term of five months in prison.

While Jones was under pretrial supervision, he completed inpatient substance abuse treatment at a residential drug and alcohol treatment facility under contract with the Probation Office. Jones had a long history of alcohol and substance abuse, dating to his adolescence. He also sustained a traumatic head injury at the age of 12, when he was struck by a semi-truck on his way home from football practice. The accident caused extended hospitalization and therapy, and resulted in permanent brain damage.

Upon completion of the inpatient program, Jones began the 90-day halfway house component of the treatment regimen. After only three weeks, counselors recommended that Jones return to his residence in the community, due to his "exemplary" progress in treatment. The probation officer concurred, so Jones moved home and continued participating in outpatient aftercare treatment.

The judge sentenced Jones to five years' probation over the government's objection. She relied on several factors, including Jones' physical and mental limitations and his post-offense rehabilitative treatment efforts. She noted that this was the first time she heard of any early release from the halfway house program for good performance. The judge also relied on Jones' continuing need for treatment, which would be interrupted by a prison sentence, and the potentially negative influence of more serious offenders on Jones at his young age and with his mental limitations.

Jones' case, and others from the Northern District of Oklahoma, demonstrate that post-offense treatment options can and do assist offenders in changing their behaviors, which in turn, works to prevent recidivism and protect the public. The Defender from Colorado, Raymond

Moore, stated it perfectly in his written testimony for the October, 2009 Commission hearing: Incentives for meaningful early efforts at rehabilitation and improvement should be encouraged rather than viewed with suspicion. I join the many Defenders and other witnesses who have urged the Commission to encourage and provide information about alternatives to incarceration, and to invite a departure for post-offense rehabilitation.

Jane Doe³

I represented Jane Doe in a methamphetamine manufacturing conspiracy case. By the time she was indicted, she had long turned her back on the criminal lifestyle, divorced her methamphetamine-cook husband, successfully completed a drug rehabilitation program on her own volition, obtained full-time employment, remarried and gave birth to a baby boy.

During its investigation, of which my client was unaware, the government made no effort to interview her about the conspiracy or to obtain pre-indictment cooperation from her. Instead, the government built its case and obtained an indictment by using the testimony of several conspirators who were incarcerated for new, unrelated criminal conduct. The “jailhouse snitches” were repeat criminals, yet the prosecutor allowed them to escape federal prosecution for their participation in the conspiracy (named only as “unindicted coconspirators” in the indictment), while my genuinely rehabilitated, now law-abiding client was arbitrarily denied that option.

My client promptly attempted to cooperate when she became aware of the charges. In exchange for the hope of a § 5K1.1 sentence reduction, she was required to plead to “the most serious, readily provable offense,” which was a drug trafficking conspiracy. To its credit, the government took the highly unusual step of asking for ten levels off for cooperation. I argued for probation based on my client’s totally volitional pre-indictment rehabilitation. The judge gave her five levels off for substantial assistance and two levels off for rehabilitation, resulting in a 97-month prison sentence. Thus, a completely rehabilitated mother will sit in prison for eight years while her son grows up without her care or financial support. Why? This particular judge sticks closely to the guidelines and felt constrained not to vary too far. He indicated that the sentence was in part the result of the government’s “charging decision.” After sentencing, the lead investigator told me that if he “had it to do all over again,” he would have sought my client’s pre-indictment cooperation. If he had done so, she likely would not have been charged at all.

B. How the Commission Can Help

1. Abandon Chapter Five as written and the theories behind it.

The Commission is free to abandon the prohibitions and restrictions in Chapter 5 because they are not required by, and are inconsistent with, the Sentencing Reform Act.

³ I use a pseudonym here because of the client’s cooperation against others.

Congress directed the Commission to assure that the guidelines and policy statements, in determining the nature, extent, place of service, or other incidents of a sentence, were “entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” 28 U.S.C. § 994(d). As indicated by the legislative history, this means that the guidelines and policy statements should not direct judges to determine the nature, extent, place of service, or other incidents of a sentence based on those factors.⁴ For example, a guideline that directed courts to add or subtract two levels when or because the defendant is wealthy or the defendant is black would violate this directive. If, as some have suggested, it meant that the Commission should prohibit factors that merely *correlate* with race, sex, national origin, creed, or socioeconomic status, several guidelines would violate this directive, including the career offender guideline, the drug guidelines, and the illegal re-entry guideline. The policy statement prohibiting consideration of “disadvantaged upbringing” probably does violate § 994(d), as it *explicitly* prohibits consideration of lower socioeconomic status.

Congress also directed the Commission to assure that the guidelines and policy statements, “in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.” 28 U.S.C. § 994(e). According to the legislative history, this means that the listed factors should not be used to choose prison over probation, or a lengthier prison term.⁵ As Commission staff concluded in a Simplification Draft Paper, the legislative history supports an “asymmetrical reading of the statute – in other words, that these factors should not increase a defendant’s likelihood of being sentenced to prison but may increase a defendant’s likelihood of being sentenced to probation.”⁶ I would add, based on the statutory language, “in recommending a term of imprisonment *or* length of a term of imprisonment,” and the legislative history suggesting short or intermittent prison terms in connection with offender characteristics,⁷ that these factors also should not

⁴ See 28 U.S.C. § 994(d); S. Rep. No. 98-225, at 171 (1983) (“Committee added the 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 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.”).

⁵ See 28 U.S.C. § 994(d); S. Rep. No. 98-225, at 175 (1983) (“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.”).

⁶ See Simplification Draft Paper, Departures and Offender Characteristics, Part II(B)(2) & II(E)(3), <http://www.ussc.gov/SIMPLE/depart.htm>.

⁷ S. Rep. No. 98-225, 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

increase the likelihood of a longer prison sentence but may increase the likelihood of a shorter prison sentence.

As noted in the Simplification Draft Paper, there are other factors not mentioned in §§ 994(d) or (e) that Chapter 5 currently disfavors or prohibits, including age, mental and emotional condition, general physical condition, and drug dependence, as well as several additional limitations that “came about in response to court decisions,” *i.e.*, physical appearance and physique, military, civic, charitable or public service, employment-related contributions, record of prior good works, and lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing.⁸ Others include personal financial difficulties and economic pressures, 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 more even if the defendant is eligible for the safety valve.

2. Do not assign points or precisely define departures.

We do not believe that it is advisable or possible to assign values to departures, or to attempt to precisely define the circumstances in which they should or should not apply. 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 once recognized when it sent the first set of guidelines to Congress: “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.”⁹

The Commission writes rules in the abstract, without the ability to know how a particular set of circumstances and characteristics should be treated to best advance sentencing purposes. For example, drug or alcohol addiction 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 ineffective in another. These are judgments for judges to make on the scene, not for the Commission to make in advance. 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.

defendant with family ties and responsibilities might be sentenced to confinement on evenings and weekends).

⁸ See Simplification Draft Paper, Departures and Offender Characteristics, Part II(B)(2) & (3).

⁹ 52 Fed. Reg. 18,046, 18,103 (May 13, 1987).

3. Encourage departures by providing useful information in a neutral manner.

Judges are required to consider the circumstances of the offense and the characteristics of the offender,¹⁰ and will continue to do so. They will consider circumstances that cause additional suffering such as loss of employment or reputational harm, and they will continue to consider circumstances that explain and mitigate defendants' culpability such as lack of employment and disadvantaged background. In doing so, judges will be acting entirely neutrally with respect to race and socioeconomic status. The Commission should not tell judges what factors they may or may not consider or what factors are or are not relevant. Instead, the Commission should provide information that judges can use as they find appropriate in the individual case. We suggest the following as examples.

The Commission and others have conducted or compiled research on factors that predict reduced recidivism, as well as sentencing options and programs that reduce recidivism and increase public safety. In their written testimony, Tom Hillier and Davina Chen provided a list of some of these factors, options and programs, along with citations to empirical research. *See* Testimony of Thomas W. Hillier, II, and Davina Chen, at 11-14, May 27, 2009 (education, vocational skills, and employment; drug and alcohol abuse and treatment; mental health treatment; community service; first or near first offender status; age; commission of a non-violent offense; and sex offender recidivism and treatment). This kind of information would be helpful to judges and lawyers.

Family and community ties and responsibilities predict reduced recidivism,¹¹ while breaking up families leads to increased recidivism.¹² This is true whether the defendant is a white

¹⁰ The suggestion that judges must follow the directives in 28 U.S.C. § 994(d) and (e), even if they did direct the Commission to place offender characteristics off limits, is not correct. Title 28's directives apply to the Commission, not the courts. Otherwise, the courts would, for example, be required to minimize prison overcrowding, 28 U.S.C. § 994(g), and even promulgate guidelines and policy statements, 28 U.S.C. § 994(a).

¹¹ Kimberly Bahna, "It's a Family Affair" – *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271, 285 (1994) (prisoners who have supportive families are less likely to recidivate); Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) ("The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.").

¹² The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.").

collar offender or a drug offender like my client Jane Doe. People of all races and at all socioeconomic levels have family.¹² The likelihood that Jane Doe would re-offend was lower because of her husband and child. The child and society would have been better off if Ms. Doe was permitted to raise her young child. The judge's two-level reduction did not fully recognize Ms. Doe's rehabilitation, low risk of recidivism, or the need for her to remain with her baby. The Commission could help to avoid such a result by recognizing the value of keeping families together.¹³

The Commission has found that “[r]ecidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50.¹⁴ There is also substantial research showing that the propensity for risk-taking and poor decision-making in the young has a biological basis in brain development which matures in the early to mid-twenties, thus indicating

¹² Christy A. Visher, The Urban Institute, *Returning Home: Emerging Findings and Policy Lessons about Prisoner Reentry*, 20 Fed. Sent. Rep. 93 (Dec. 2007) (reporting that “[m]ost prisoners (88 percent) in [a study of over 1500 prisoners in several states] reported that they have at least one close family member, and 45 percent reported that they have four or more close family members”).

¹³ Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 Fed. Sent. Rep. 148 (1995) (recognizing research showing “that the better family ties are maintained during incarceration, the lower the recidivism rate,” but that “creative alternatives to imprisonment for first-time, non-violent offenders with parental responsibilities are not generally available under the guidelines”).

¹⁴ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12 & Exhibit 9 (May 2004).

reduced culpability.¹⁵ And there are studies and research on the relationship between immaturity and a unique capacity to reform.¹⁶

Defenders have suggested that the Commission invite open-ended departures based on: (1) the disparity created by lack of a fast track program,¹⁷ (2) the time undocumented immigrants spend in immigration custody and the harder time they serve,¹⁸ (3) situations when the mitigating role adjustment may be inadequate, as when the guideline range is driven by drug quantity or dollar amount,¹⁹ (4) post-offense rehabilitation,²⁰ and (5) unusually adverse conditions on

¹⁵ See James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment By Risky Rewards*, 27 J. of Neurosci. 4839 (2007) (comparing differences in brain activity between 12-17-year olds and 23-33-year olds and finding that brain functions associated with decision making increase from adolescence to adulthood); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents showing that the prefrontal cortex, the “executive” part of the brain important for controlling reason, organization, planning, and impulse control, does not fully mature until the early to mid-twenties); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows “that the region of the brain that inhibits risky behavior is not fully formed until age 25”); United States Department of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report*, at 8 (2005), available at www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf (adolescents “often use the emotional part of the brain, rather than the frontal lobe, to make decisions” and “[t]he parts of the brain that govern impulse, judgment, and other characteristics may not reach complete maturity until an individual reaches age 21 or 22”).

¹⁶ See Brief of the Council of Juvenile Correctional Administrators, National Association for Juvenile Correctional Agencies, National Juvenile Detention Association, National Partnership for Juvenile Services, American Probation and Parole Association, and International Community Corrections Association as *Amici Curiae* In Support of Petitioners, *Graham v. Florida* (U.S. No. 08-7412), at 15-27 (discussing studies); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-12 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinquency 396 (1993).

¹⁷ See Testimony of Alan DuBois and Nicole Kaplan, February 10, 2009, at 28; Statement of Alexander Bunin, July 9, 2009, at 16; Statement of Jacqueline Johnson, September 10, 2009, at 27.

¹⁸ Statement of Jacqueline Johnson, September 10, 2009, at 27; Statement of Raymond Moore, October 21, 2009, at 33.

¹⁹ Statement of Raymond Moore, October 21, 2009, at 28-29; Joint Statement of Thomas W. Hillier, II and Davina Chen, May 27, 2009, at 24, Statement of Alexander Bunin, July 9, 2009, at 18; Statement of Jacqueline Johnson, September 10, 2009, at 28.

²⁰ See Statement of Raymond Moore, October 21, 2009, at 24-27.

American Indian reservations, Alaska Native villages and similar locations.²¹ The Commission can do so by providing information on each of these factors.

II. THE HEALTHY EFFECT OF *BOOKER* ON GUILTY PLEAS AND PLEA BARGAINING

A substantial benefit of the advisory guideline system is that it has restored some balance to the process of pleading guilty and the plea bargaining process.

Plea bargaining in my districts, with or without cooperation, has been fraught with very serious problems, problems that have placed defense lawyers and our clients in difficult positions in the past. Defendants who enter into written plea agreements with the government have been, and still are, almost always required to waive appellate and post-conviction rights, including the right to appeal a sentence based on an erroneous guideline calculation. In the past, we often had little choice but to advise the client to sign the agreement, not knowing what effect this would have on the sentence. We now rarely advise clients to enter into a written plea agreement.

Lately, it is increasingly common that Eastern District of Oklahoma plea agreements require defendants to waive the right to “request, recommend, or file” a variance from the guidelines sentence with either “the U.S. Probation Office or Court,” in effect stipulating to a mandatory guideline sentence. I find this particularly troubling. If it is impermissible for the parties to “stipulate away” truthful relevant conduct (a § 1B1.3 guideline consideration), how can it be acceptable for the parties to agree to withhold facts and arguments the sentencing court needs to perform the *statutory* duties required by § 3553(a)? Again, we rarely advise clients to sign these agreements.

Cooperation agreements have presented further problems. Cooperating defendants are not offered an agreed-to sentence under Rule 11(c)(1)(C), or a percentage off the sentence, as prosecutors offer in other districts. When they enter into their plea agreements, cooperators do not know how much credit they will receive in exchange for their cooperation, or if they will receive any credit at all. Ironically, defendants who attempt to cooperate can end up worse off than if they did not attempt to cooperate. In the Eastern District of Oklahoma, a defendant whose cooperation does not produce substantial results in the prosecutor’s view loses out on a § 5K1.1 motion, and is *also* precluded from requesting a variance or departure, because of the required waivers discussed above. A defendant who does not attempt to cooperate is free to present relevant § 3553(a) factors to the judge. This lopsided result is one of contributing reasons lawyers in my office rarely encourage cooperation.

The process is riddled with other problems. In light of the uncertainty of any reduction and the likelihood of a small reduction if one is given, the risks may often not be worth the

²¹ *Id.* at 34-36.

foreseeable benefits.²² Oversight of cooperation is nearly non-existent, contributing to corrupt actions by officers and agents who “handle” cooperating defendants. The uncertainty of outcome induces unreliable and sometimes fabricated cooperation. See Omer Gillham, *TPD officers under investigation; A federal agent is also being scrutinized for possible corruption*, Tulsa World, Nov. 1, 2009, front page.²³ For these reasons, we do not advise *against* cooperation, but we do not *encourage* cooperation. We provide a very clear picture of the options. When the government effectively addresses these problems, I will be more comfortable representing cooperating clients.

III. MANDATORY MINIMUMS

I am pleased that the Commission intends to issue a new report on mandatory minimums, and I urge the Commission to carefully examine and address claims by prosecutors that mandatory minimums are necessary to obtain cooperation, and also the corrosive effects of mandatory minimums on the integrity and accuracy of the system.

In my experience, mandatory minimums are not necessary to obtain cooperation, nor do mandatory minimums necessarily induce cooperation. As I have just explained, there are many reasons a defendant may choose not to cooperate even in the face of a mandatory minimum. On the other hand, many defendants in the Northern and Eastern Districts of Oklahoma choose to cooperate in an effort to win a reduced sentence, whether or not they are facing a mandatory minimum. People who are inclined to cooperate will do so if there is some hope their sentence will be reduced, without regard for the length of the potential sentence they face. This is borne out by the Commission’s statistics regarding high rates of cooperation when no mandatory minimum applies, as explained by Mr. Hawkins.

As Michael Tonry has observed, the argument that mandatory minimums encourage defendants to plead guilty is a “non sequitur”: “Were there no mandatories, defendants now affected by them would remain subject to all the pressures that face every criminal defendant. They would simply no longer face out-of-the-ordinary – and therefore unfair – pressures resulting from the rigidity and excessive severity of many mandatory minimum sentencing laws.”²⁴ This

²² One of my cooperating clients was brutally murdered, most likely a direct result of suspicions that she was cooperating. She was a single mother with no criminal history who agreed to drive a truck from California to Ohio, knowing it carried hidden drugs. She was apprehended in and charged in Oklahoma, where she was initially debriefed, but returned to Ohio when she was released to cooperate. Agents in Ohio seemed disinterested in protecting her. At one point, an agent left a message on a family member's voice mail, stating that she needed to make an appointment with the DEA to discuss her cooperation. I expressed concerns about this and other threats to her safety, but those concerns were discounted by the agents.

²³ Available at http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20091101_11_A1_Severa232734

extraordinary pressure can result in *false* cooperation by those who have no truthful information to give, and can even result in guilty pleas by innocent people.

When considering a mere two-level reduction for acceptance of responsibility, the original Sentencing Commission was concerned about the fine line between providing leniency to those who plead guilty and punishing those who go to trial. The Commission felt that it had resolved the problem by placing the decision in the hands of the sentencing judge and making clear that the reduction did not automatically apply based on a guilty plea, and was not automatically precluded if the defendant went to trial.²⁵

That concern pales in comparison to the effect of mandatory minimums, which permit prosecutors to punish the exercise of the right to trial by decades in prison, as it did in several reported cases.²⁶ This reduces the number of trials, and the overall accuracy of the outcomes.²⁷ The problem is compounded because the more severe the punishment, the more desperate those under its threat become to avoid it. This can result in fabricated cooperation, and can pressure even the innocent to plead guilty.²⁸

²⁴ Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime and Justice: A Review of Research* 67 n.1 (2009).

²⁵ William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 *Wake Forest L. Rev.* 181, 190-92 & n.64 (1988).

²⁶ See *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

²⁷ Recent empirical research shows that the rates of trials and acquittals is at an all-time low because the risk is too high, and that when the difference between the sentence after trial and the sentence after plea is as high as it is in the federal system, and prosecutors have a monopoly on granting the discount, the system produces less reliable results. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. Pa. L. Rev.* 79, 117 (2005).

²⁸ “[P]lea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences. And those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial. Plea bargaining therefore fails to serve the interests of the public, as it tends to undermine the legitimacy and accuracy of the criminal justice system.” Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1034 (2006).

Northern District of Oklahoma

Prosecutors in my districts file enhanced sentences under 21 U.S.C. § 851 for drug defendants who choose to exercise their rights to trial, but do not typically seek enhanced sentences for similar defendants who plead guilty. Most clients would choose to plead guilty anyway, without the threat of a § 851.

In an unusual move in a case in the Northern District of Oklahoma, the prosecutor filed the § 851 despite the defendant's early effort to plead guilty because she refused to also cooperate. In this case, Larry Barnes, Sr. and his daughter Larita Barnes, were charged with trafficking in methamphetamine and maintaining drug involved premises. I represented Mr. Barnes. Although Ms. Barnes was innocent, as was her father, she had a prior drug felony conviction and was aware that, if she went to trial and was convicted, she would receive a 120-month mandatory minimum rather than the 60-month mandatory minimum that would otherwise apply. In an effort to avoid the § 851, she made an early offer to plead guilty. The prosecutor, however, would not allow her to escape the enhancement unless she agreed to testify against her father. Having no truthful information to give, she declined, the prosecutor filed the § 851, they went to trial, both were convicted, and Ms. Barnes received a 120-month mandatory minimum sentence. Mr. Barnes received a sentence of 66 months.

The only evidence against Larry and Larita Barnes was the testimony of an informant who said he went to their house with \$3,000 and bought methamphetamine from them, the drugs he claimed they sold him, and the testimony of an ATF agent and a Tulsa Police officer corroborating his story. On cross-examination, the informant admitted that he started working for the officers over a year earlier because they caught him with a kilogram of uncut crystal methamphetamine, for which he was not charged. He admitted that he was cooperating to avoid being charged and going to prison, and that he had a previous drug trafficking conviction. He further admitted that he knew his conduct carried a substantial term of imprisonment. In fact, if charged, his sentence would have been a mandatory minimum of 10 years in prison *without* the applicable § 851 enhancement, 20 years with the enhancement. The law enforcement officers for whom he worked and who corroborated his stories never promised him that he would not be charged, but held it over his head, so he cooperated on a continuing basis in hopes he would not be charged. The law enforcement officers are now under investigation by a federal grand jury for corruption involving allegations of false testimony, theft, and questionable handling of drugs and drug proceeds.²⁹ Larry and Larita Barnes were recently released from federal prison after each had served about a year.

²⁹ See Omer Gillham, *TPD officers under investigation; A federal agent is also being scrutinized for possible corruption*, Tulsa World, Nov. 1, 2009, front page, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20091101_11_A1_Severa232734.

Northern District of Ohio

In May 2009, DEA Agent Lee Lucas was indicted in the Northern District of Ohio on eighteen counts of perjury, false statements, and violation of civil rights. The indictment alleges that he and his confidential informant Bray (who has now pled guilty to perjury) and a local police detective (who has now pled guilty to violating a defendant's civil rights) framed twenty-six people for crack cocaine trafficking in Mansfield, Ohio. Bray was not facing a mandatory minimum, but was paid cash for the deals he fabricated. Lucas is alleged to have falsely corroborated Bray's stories in his own testimony and reports.

Many of the people who were framed pled guilty to false charges because they faced mandatory minimums. The first to go to trial was a 24-year-old mother of three small children with no record who refused to plead guilty in return for a sentence of four years, insisting she was innocent. She was convicted at trial and sentenced to a ten-year mandatory minimum. Having seen that occur, fourteen of the defendants, all of whom faced mandatory minimums of ten years or more, pled guilty for less prison time. Three others pled guilty and received probation. Eight of the defendants were acquitted. All of the cases have been dismissed and everyone has been released. Collectively, they spent over thirty years in prison awaiting trial or serving sentences. The scheme first came to light when Bray confessed to an Assistant Federal Public Defender.³⁰

IV. GUIDELINE RECOMMENDATIONS

USSG § 2D1.1 – Drug Trafficking

I join all of those who have testified on this subject in urging the Commission to de-link the drug guidelines from statutory mandatory minimums. The Commission should formulate drug guidelines based on empirical data and research, and give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade, with quantity as a secondary, less weighty, factor. Drug quantity simply does not measure the culpability of an individual defendant involved in a drug offense, and as you have heard before, is subject to manipulation by law enforcement agents. The amount of drugs “is not significantly correlated with role in the offense,” and this “lack of association” provides “fairly robust support of the

³⁰ Karl Turner, *DEA Agent Lee Lucas indicted on perjury, civil rights charges; pleads not guilty*, The Plain Dealer, May 13, 2009, http://blog.cleveland.com/metro/2009/05/dea_agent_lee_lucas_indicted_o.html; Mike Tobin, Amanda Garrett, and John Caniglia, *DEA snitch Jerrell Bray says he decided to come clean*, The Plain Dealer, July 30, 2007, <http://www.cleveland.com/dea/plaindealer/index.ssf?/de/more/073007.html>; John Caniglia, *Judge to free 15 convicted on drug informant's tainted testimony*, The Plain Dealer, January 23, 2008, <http://www.cleveland.com/dea/plaindealer/index.ssf?/de/more/012308.html>. See generally http://blog.cleveland.com/metro/lee_lucas/index.html.

claim of unwarranted or excessive uniformity in federal drug sentencing.”³² Because the drug guidelines are directly tied to the quantity-based mandatory minimums, they do not accurately reflect the seriousness of drug offenses.³³

We hope that the Commission will see its way clear to take the lead on this issue, and not wait for Congress to repeal mandatory minimums. As the Supreme Court has held, the Commission is not required to tie the guidelines to mandatory minimums. *See Kimbrough v. United States*, 128 S. Ct. 558, 571-72 (2007). If it were otherwise, “the [LSD] Guidelines involved in *Neal* would be in serious jeopardy.” *Id.* at 572. The guidelines count each marijuana plant as 100 grams, while 21 U.S.C. § 841 counts each plant as 1 kilogram, and there was a period of time when the guidelines for methamphetamine mixture were not linked to the mandatory minimums.³⁴ The Commission “may abandon its old methods in favor of what it has deemed a more desirable approach.” *Neal v. United States*, 516 U.S. 284, 295 (1996). It has been said that the general introductory phrase in § 994(a), stating that the Commission shall promulgate guidelines “consistent with all pertinent provisions of any Federal statute,” requires the guidelines to be calibrated to mandatory minimums, but there is no evidence whatsoever that this statute was intended for that purpose. In any event, guidelines de-linked from mandatory minimums would be “consistent with” mandatory minimums, since mandatory minimums trump a lower guideline range. *See* USSG § 5G1.1(b).

If the Commission still believes that it must wait for Congress, it should educate Congress by including a proposal for a new set of drug guidelines in its mandatory minimum report.

In any event, the Commission should reduce all of the drug guidelines by two levels, as it did with crack cocaine. As the Commission acknowledged then, the drug guideline ranges are set two levels above that necessary to include the mandatory minimum penalties at the two statutory quantity levels.³⁵

³² Eric L. Seigny, *Excessive Uniformity in Federal Drug Sentencing*, 24 J. Quant. Criminol. 155, 171 (2009)

³³ *See* U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Fifteen Years of Guidelines Sentencing: an Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47-55 (2004) (discussing evidence of numerous problems in operation of drug trafficking guidelines)

³⁴ USSG, App. C, Amend. 555 (Nov. 1, 1997).

³⁵ *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007).

We also urge the Commission to expand the safety valve currently available in the guidelines under USSG §2D1.1(b)(11) and USSG §5C1.2 to all defendants who meet the criteria, regardless of the offense of conviction, and to expand the criteria to include defendants in Criminal History Categories II and III.

USSG § 2G2.2 – Child Pornography

I am pleased that the Commission has made review of the child pornography guideline a priority for the 2010 amendment cycle.

Judges are appropriately concerned that guideline sentences under USSG § 2G2.2 do not reflect the low risk of recidivism associated with most child pornography possessors, but instead focus on factors that bear little, if any, explicable relationship to the purposes of sentencing. *See, e.g., United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009). In my districts, defense attorneys have successfully argued for below-guideline sentences, particularly when they have presented expert evaluations relating to defendants' diagnoses, recidivism risk and amenability to treatment.

As the Commission knows, the guideline range for a typical child pornography offender easily reaches or exceeds the statutory maximum, whether he is charged with possession (with a ten-year maximum), or receipt (with a 20-year maximum). Depending on the circumstances, these sentences can exceed sentences for actual sex with a child.³⁶ Those who express concern about the severity of the child pornography guideline legitimately question the value of such lengthy sentences for offenders who have no prior history of abusing or attempting to abuse a child and are not likely to do so in the future. In my experience, the vast majority of child pornography defendants have no criminal history whatsoever. It is not surprising that judges across the country question the need for severe sentences for first-time offenders, and in particular, offenders who are not likely to re-offend. I share the view that the child pornography guidelines are unreasonably harsh, and urge the Commission to revise them to provide punishment proportional to the offense and the risk to public safety.

USSG § 3E1.1(b) – Acceptance of Responsibility

The Commission should consider encouraging Congress to remove the government motion requirement from the third-level reduction for acceptance of responsibility under § 3E1.1(b). Alternatively, the Commission should clarify the guideline to curb prosecutorial abuses of this power by adding the following commentary:

³⁶ Mr. Ernie Allen of NCMEC testified at the hearing in Denver that he is troubled when he hears the offense of possession of child pornography referred to as “mere” possession. This is not meant to denigrate the plight of the victims who were abused or the seriousness of the conduct of those who abused them, but to distinguish possession of images from child molestation and production of child pornography.

When the defendant has given notice of his intent to plead guilty sufficiently early in the process to permit the government to avoid preparing for trial, it is an incorrect interpretation of this guideline by the government to decline to move for the third point under subsection (b) based on an action or inaction of the defendant that did not cause the government to prepare for trial. If the government declines to move for the third point on such a basis, the court is encouraged to grant a downward departure of one level.

USSG § 3E1.1, Application Note 6, explains that the government is vested with the power to file the motion because it is “in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.” However, the government uses its power to file (or not file) the motion to extract a great deal more than timely guilty pleas, and to punish the exercise of other than trial rights. Increasingly, the third-point motion is used as a threat against defendants who litigate sentencing issues, file suppression motions, enter conditional guilty pleas, request laboratory testing of alleged controlled substances, or cause the prosecutor to engage in any work at all.

Two cases illustrate the government’s expanding efforts to unfairly deny the third point for timely acceptance of responsibility. About two years ago, a lawyer in our office represented a client, Benjamin Olds, charged with possession of child pornography. Mr. Olds pled guilty two months after he was indicted and before the government did any trial preparation. The government refused to move for the third point because it had expended resources responding to the defendant’s litigation of sentencing issues. The judge, who was fairly new to the bench at the time, did not feel he could remedy the government’s refusal to file the third-point motion. He sentenced Mr. Olds to 87 months, at the bottom of the guideline range. We appealed to the Tenth Circuit, where the government conceded error. On remand, the Court imposed a sentence of 82 months.

Just last month, I had a plea hearing before the same judge. My client, Timothy Moore, had notified the government of his intention to plead guilty less than two weeks after his arraignment. I did not solicit a written plea agreement but the prosecutor offered one for Mr. Moore’s consideration. As is typical in the district, the proposed plea agreement contained sweeping, non-negotiable waivers of appellate and post-conviction rights, as well as a waiver of 18 U.S.C. § 3582(c) sentence modification. I informed the prosecutor that my client would be pleading guilty without an agreement. The day before the scheduled plea hearing, the prosecutor told me that he would not file the motion for the third point unless my client signed the agreement. The plea hearing was a mere twenty-three days after arraignment, and the government did not prepare for trial. The night before the plea hearing – with no intention of trying the case – the prosecutor filed a trial brief, proposed jury instructions, and proposed voir dire questions. At the hearing the next day, the prosecutor informed the judge that his superiors had told him that the case could move forward in only two ways – with a plea agreement waiving appeal or by trial. The judge called a recess so that the AUSA could talk to his superiors, after which he agreed to file the motion and the client pled guilty.

USSG § 4B1.1 -- Career Offender

As many of my colleagues have emphasized in previous testimony, the career offender guideline does not “focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate.”³⁷ Instead, the guideline often recommends harsh sentences for serial petty offenders who are not violent and are not drug kingpins or major drug traffickers. The guideline fails to distinguish offenders with relatively minor predicate offenses from those with more serious or violent criminal backgrounds. Accordingly, courts often vary from the career offender guideline.

The Commission should recommend that Congress repeal 28 U.S.C. § 994(h). In the meantime, the Commission should take a number of actions to alleviate the irrational impact of the career offender guideline.

First, the Commission should amend the definition of “controlled substance offense” to include only those federal offenses required by § 994(h). Excluding state drug offenses and the less serious federal offenses not explicitly required by the statute,³⁸ would cure the most problematic application of the guideline identified by the Commission. As the Commission has found, the recidivism rate for “career offenders” classified as such on the basis of controlled substance offenses is no greater than that of offenders in the lower criminal history categories in which they would otherwise be placed, nor does lengthy incarceration prevent or deter drug crime, and the guideline has a disparate impact on African Americans because they are more likely to be arrested and convicted of drug crimes than similarly situated Whites.³⁹ If state offenses must be included, the Commission should limit them to those that carry a maximum punishment of at least ten years and are analogous to the federal offenses listed in § 994(h), which would be consistent with 18 U.S.C. § 924(e).

³⁷ USSG § 4B1.1, comment.

³⁸ The guideline includes the following offenses not required by statute: (1) inchoate offenses – aiding and abetting, attempt, conspiracy; (2) any state offense punishable by more than one year; (3) “[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance,” 21 U.S.C. § 841(c)(1); (4) “[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance,” 21 U.S.C. § 843(a)(6); (5) “[m]aintaining any place for the purpose of facilitating a controlled substance offense,” 21 U.S.C. § 856; (6) “[u]sing a communications facility in committing, causing or facilitating a drug offense,” 21 U.S.C. § 843(b).

³⁹ See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (2004).

A “controlled substance offense” is a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503[, or that is an analogous offense under state law, and that is punishable by imprisonment for at least ten years].

Second, the Commission should amend the definition of “crime of violence” so that it is consistent with the definition of “violent felony” in *Begay v. United States*, 128 S. Ct. 1581 (2008), which the courts are using now in any event.

“Crime of violence” includes burglary of a dwelling, arson, extortion, and offenses involving the use of explosives. Other offenses are included as “crimes of violence” if (A) the offense has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) the elements of the offense of which the defendant was convicted (i) require purposeful, violent and aggressive conduct on the part of the defendant and (ii) present a serious potential risk of physical injury to another.

In the alternative, the Commission could adopt a pure elements test:

An offense is a “crime of violence” if it has as an element the use, attempted use, or threatened use of physical force against the person of another.

Third, the Commission should amend the definition of “prior felony conviction,” consistent with 21 U.S.C. § 802(13), as follows:

“Prior felony conviction” means a prior adult federal or state conviction for an offense classified as a felony by the convicting jurisdiction.

Fourth, the Commission should remove the limit to one criminal history category for departures under USSG § 4A1.3(b)(3)(A), p.s. This limitation was adopted in response to the PROTECT Act, but was not required by the PROTECT Act. If the Commission wants courts to follow encouraged departures, it should remove this limitation.

V. DATA REPORTING

Defenders believe that an excessive focus on statistics can obscure relevant differences among defendants, cases and districts, as well as problems in the guidelines themselves, and we appreciate the fact that some prosecutors agree.⁴⁰ However, prosecutors have also criticized the advisory guidelines system, erroneously suggesting that the rate of “non-government sponsored below guideline sentences” indicates “unwarranted disparity,” and erroneously assuming that

⁴⁰ See Statement of Patrick Fitzgerald at 2-3, USSC Hearing, Chicago, Illinois, Sept. 10, 2009; Statement of B. Todd Jones at 9, USSC Hearing, Denver, Colorado, October 20, 2009.

“non-government sponsored below guideline sentences” are the sole responsibility of judges and opposed by prosecutors.

With thanks to Judge Hinojosa for correcting errors in interpreting these statistics in Chicago and Denver, we now know that during the first three quarters of 2009, the government did not object to 1,738 of 4,137 (42%) of defense motions for a sentence below the guideline range in cases classified as “Non-Government Sponsored Below Range,” and did not object to 2,339 of 5,130 (45.6%) total defense motions for a sentence below the guideline range. This matters because it reveals that prosecutors on the scene, and apparently their supervisors, deemed these sentences to be appropriate.

The overall rate of “Non-Government Sponsored Below Range” sentences also overstates the rate at which judges are sentencing below the guideline range without a government motion and over the government’s objection because it contains 2,368 cases (26% of the total 9,110 cases) in which no attribution box was checked on the Statement of Reasons form, and a potentially large number of cases in which the attribution box labeled “other than a plea agreement or motion by the parties” was checked, yet that box provides no way for the court to indicate the government’s position.

This information can be gleaned from Table 6 in the Quarterly Data Reports (and Table 28A in the annual Sourcebooks), but only with great difficulty. To avoid misunderstandings of the data by prosecutors and others, we ask the Commission to report the data on the government’s role in below guideline sentences, whether known or unknown, in an easily understandable way.