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Before the United States Sentencing Commission
Public Hearing on First Offenders / Alternatives to Incarceration

March 14, 2018

Thank you for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding proposed changes for "first offenders" and the consolidation of Zones B and C in the sentencing table. We commend the Commission for considering these changes that would increase the availability of alternatives to incarceration for "first offenders" and recommend probationary sentences for more individuals.

My statement provides some new evidence in support of the Commission's proposed amendments and summarizes the Defenders' previously submitted comments on these issues, which I support and are attached.[1]

First, amending the guidelines to encourage more frequent imposition of non-incarceration sentences recognizes that probation and home confinement typically fulfill the purposes of sentencing, including protection of the public, just punishment, and the need to promote respect for the law. It also acknowledges the federal statutes that authorize sentences of probation and direct the Commission to recommend alternative sentences for "first offenders."[2] A recent study assessing whether more severe types of sanctions decrease recidivism rates for "first-time felons" found that probation is more effective than prison in reducing reoffending.[3]

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[1] Attached are relevant portions of the Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Nov. 6, 2017), Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Oct. 10, 2017), and the Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Feb., 20, 2017).

[2] 18 U.S.C. § 3561(a); 28 U.S.V. § 994(j).

[3] Daniel Mears & Joshua Cochran, Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions, 55 J. Res. Crime & Delinq. 194, 207-

And recent data from the Federal Bureau of Justice Statistics "shows that trends in crime and imprisonment continue to be unrelated" and that declines in imprisonment had a correlation with decreases in crime rates.[4] Such data is consistent with other evidence that shows how imprisonment "actually contributes to more recidivism."[5]

Second, encouraging greater use of alternatives to incarceration will help the Commission fulfill its obligations to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"[6] and help BOP expand access to programs for those in need. BOP is currently 14% overcrowded.[7] The facilities where most "first offenders" would be incapacitated are particularly overcrowded, at rates of 21% for low security facilities and 18% for medium.[8] Inmate to staff ratios, "an important factor in maintaining institution safety," also has worsened over the past six months: the inmate to staff ratio changed from 4.0-to-1 in July 2017 to 4.3-to-1 in February 2018; the inmate to correctional officer

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217 (2018) (the study assessed four punishments – probation as treatment; intensive probation, jail, and prison).

[4] The Pew Charitable Trusts, *National Prison Rate Continues to Decline Amid Sentencing, Reentry Reforms*, http://www.pewtrusts.org/en/research-and-analysis/analysis/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms. *See also* Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2016* (Jan. 2018), https://www.bjs.gov/content/pub/pdf/p16.pdf?utm_source=juststats&utm_medium=email&utm_content=p16_report_pdf&utm_campaign=p16&ed2f26df2d9c416fbddddd2330a778c6=mlfvnlnqss-mxllqisqk.

[5] *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28-29 (Apr. 18, 2017) (Faye Taxman, Ph.D.). *See also* Rebecca Umbach et al., *Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention*, 45 Crim. Justice & Behav. 31 (2018) (finding that incarceration worsens cognitive functioning—"a known risk factor for crime").

[6] 28 U.S.C. § 994(g). District Judge Adelman recently wrote an article about how the Sentencing Commission is one of the institutions that has "largely ignored the issue of mass incarceration." The Honorable Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration* 3 (Nov. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070489.

[7] BOP, *Program Fact Sheet* (Feb. 2018), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20180222.pdf.

[8] *Id*.

ratio changed from 8.4-to-1 to 8.8-to-1.[9] The lack of staff and resources at BOP severely limits BOP's ability to provide appropriate programs, including cognitive therapy, occupational training, and education.[10] It also results in "[t]oo few resources [to] focus on maintaining and creating links to the outside world," i.e., "critical family ties," and social workers to help build "connections to outside world prior to release."[11] If the Commission encourages greater use of alternatives to incarceration, the annual cost savings from post-conviction supervision instead of imprisonment ($4,392 v. $34,770) may help BOP improve its staffing ratio and better meet the needs of those incarcerated.[12]

As to the specific amendments, Defenders encourage the Commission to adopt the following:

1) Option 1 of the definition of "first offender," which is fairer and easier to apply than Option 2, will not undermine public safety—a conclusion supported by the Commission's 2004 report that individuals with convictions under §4A1.1(c) only had a reconviction rate of 2.9%. In addition, Option 1, unlike Option 2, would not exacerbate racial disparity and disproportionately impact the poor;

2) An invited downward departure for individuals who would qualify for "first offender" status but for a conviction in a jurisdiction where minor offenses listed in §4A1.2(c) carry a prison term of over one year;

3) A 3-level reduction for "first offenders" with a final offense level of 16 or less and a 2-level reduction for "first offenders" with offense levels greater than 16 or Option 2 of the decrease in offense level. An offense level

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[9] *Id.*; BOP, *Program Fact Sheet* (July 2017). In 2015, the inmate to staff ratio was just slightly higher (4.4-to-1) than it is now. BOP Director Charles E. Samuels, Jr., told Congress how such a ratio "negatively impact[ed] [BOP's] ability to effectively supervise prisoners and provide inmate programs." Joe Davidson, *Too Many Inmates, Too Few Correctional Officers: A Lethal Recipe in Federal Prisons*, The Wash. Post (Sept. 1, 2015).

[10] The Boston Consulting Group, *Reducing Recidivism Through Programming in The Federal Prison Population,* 5 (Sept. 2016).

[11] *Id*.

[12] U.S. Courts, *Incarceration Costs Significantly More than Supervision* (Aug. 2017), http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision.

decrease at all final offense levels would help alleviate the severe impact of incarceration on inner-city communities and racial and ethnic minorities;

4) An invited downward departure for nonviolent "first offenders" (e.g., drug trafficking and fraud) who fall within Zones C or D. Such a departure could have a significant impact on Black individuals with zero criminal history points who often fall within Zones C or D for drug trafficking offenses;

5) An application note to §5C1.1, which provides for a rebuttable presumption of probation for "first offenders" whose instant offense of conviction [did not result in serious bodily injury or involved substantial harm to the victim] [is not a crime of violence as defined in §4B1.1]. And an amendment to §5B1.1 that calls for a presumption of probation similar to §5C1.1;

6) Consolidate Zones B and C so that more individuals would benefit from Zone B sentencing options, without jeopardizing public safety and Expand Zone B to a range of 18-24 months.

7) Apply the Zone changes to all categories of offenses and criminal history so that courts are encouraged to more seriously consider whether an alternative to imprisonment is the most appropriate option;

8) Continue to encourage alternatives to incarceration for individuals in Zone D who have not been convicted of a crime of violence and who abuse controlled substances or alcohol, or suffer from a mental illness. Community treatment rather than imprisonment is much more likely to benefit individuals suffering from mental health issues and/or substance dependence.

We appreciate the Commission's consideration of Defender's comments on these issues and the opportunity to testify before the Commission.

Excerpt from Feb. 20, 2017 Defender Comments

I. Proposed Amendment #1: First Offenders/Alternatives to Incarceration

Defenders applaud the Commission for exploring ways to amend the guidelines to encourage alternatives for "first offenders" and expand the Sentencing Table to provide more sentencing options. The Commission has proposed a definition of "first offender" that only includes individuals with no prior convictions. Individuals who qualify as "first offenders" would receive either a 1- or maybe 2- level decrease in offense level and some would be eligible for a rebuttable presumption of a non-incarceration sentence. The Commission also has proposed a consolidation of Zones B and C of the Sentencing Table. In both areas—the "first offender" provisions and the Zone expansion—the Commission seeks comment on a number of topics, including whether the definition of "first offender" should be expanded, and whether certain offense types or offense levels should be excluded.

We discuss these issues in detail below and offer additional suggestions on how the Commission can do more to encourage alternatives to incarceration that will meet the purposes of sentencing better than imprisonment-only-sentences. Our position is summarized here:

- The Commission should expand the definition of "first offender" to include individuals who have prior convictions that are never counted in computing criminal history points under Chapter Four including misdemeanor and petty offenses listed in §4A1.2(c); foreign convictions, §4A1.2(h); tribal convictions, §4A1.2(i); expunged convictions, §4A1.2(j); certain military convictions, §4A1.2(g). If the Commission adopts the proposal to exclude juvenile adjudications from §4A1.2 and accepts the Defender proposal to exclude any conviction committed before the age of 18, then those offenses also should not preclude "first offender" status. The Commission also should include an invited downward departure for minor offenses that carry a term of imprisonment over one year.

- "First Offenders" with an offense level of 16 or less as determined under Chapters Two and Three should receive a 3-level reduction, and those with offense levels greater than 16 should receive a 2-level reduction. These reductions, which are greater than those proposed by the Commission, will decrease the Zones for more "first offenders." The adjustment should be available to all "first offenders" regardless of their offense level determined under Chapters Two and Three.

- The Commission should include an invited downward departure for nonviolent "first offenders" (e.g., drug trafficking and fraud) who fall within Zones C or D so that the guidelines give the court the option of imposing an alternative sentence.

- The proposed amendment to §5C1.1 (Imposition of a Term of Imprisonment), which creates a rebuttable "presumption" of an alternative sentence should only exclude

individuals whose offense of conviction resulted in serious bodily injury as defined in §1B1.1, comment. (n.1(L)).

- The proposed application note to §5C1.1 (Application of Subsection (g)) need not state that a sentence of imprisonment is necessary for individuals excluded from the rebuttable presumption of probation. The note also should not state that "[t]he court may not impose a sentence of probation pursuant to this provision . . . where a term of imprisonment is required under the guideline."[1] In addition to amending §5C1.1, the Commission should amend §5B1.1 (Imposition of a Term of Probation) to be consistent with §5C1.1's presumption of an alternative sentence language.

- Rather than simply consolidate Zones B and C of the Sentencing Table, Defenders encourage the Commission to also expand Zone B by 2 levels to an 18-24 month range. Such an expansion would increase the number of individuals likely to benefit from Zone B Sentencing Options, while also protecting public safety. In addition, the Commission should not provide a mechanism to exempt certain offenses from the zone changes.

- We request that the Commission continue to include in the commentary to §5C1.1 an invited departure for individuals who suffer from a substance abuse disorder or mental illness.

- The Commission also should delete §5C1.1, comment. (n.7) (proposed note 5), which discourages the use of substitutes for imprisonment for those in criminal history category III or above even if the individual falls within Zone B.

- Defenders have no objection to the amendment to §5F1.2 regarding Home Detention.

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

The Commission's effort to increase the use of alternatives to incarceration promotes public safety, serves more purposes of sentencing than imprisonment, and is consistent with many of the Commission's statutory obligations to formulate guidelines, including the need for the guidelines to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[2] Eight years ago, the Commission issued a report that states:

[1] The prohibition on a sentence of probation when "a term of imprisonment is required under §5C1.1" also should be removed from the background commentary to §5B1.

[2] 28 U.S.C. § 994(b)(1)(C).

> Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.[3]

Recently, former Acting Attorney General Sally Yates acknowledged that "current incarceration levels are simply not fiscally sustainable" and that "diverting so much of our public resources to incarceration is undermining, not enhancing, public safety."[4] The most effective way to promote public safety is to ensure that convicted persons "return to society more prepared—not less—to lead law-abiding lives."[5] The best way to accomplish that goal for many individuals is through a non-incarceration sentence, particularly since "[r]esearch suggest that incarceration does little to change a person's behavior" and persons sentenced to prison have higher recidivism rates than those sentenced to community corrections.[6] Alternatives to incarceration are far more likely than prison to meet a person's rehabilitative needs and strengthen the communities in which they reside. A recent report from the Harvard Kennedy School and the National Institute of Justice notes how a conviction, combined with a prison sentence, has devastating collateral consequences.[7] Such consequences include the loss of employment prospects, an increased likelihood of health problems, increased poverty rates and behavioral problems for children of incarcerated parents, and increased racial disparities.[8]

Guidelines that encourage the use of alternatives to incarceration help the Commission fulfill its statutory obligation to formulate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prison." 28 U.S.C. § 994(g). BOP continues to

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[3] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 2-3 (2009).

[4] U.S. Dep't of Justice, *Deputy Attorney General Sally Q. Yates Delivers Remarks at Harvard Law School on Sentencing and Prison Reform, Cambridge, MA, United States* (Jan. 9, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-harvard-law-school-sentencing-and.

[5] *Id*.

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

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

[8] *Id*.

face challenges with inmate crowding[9] and the yearly cost of imprisonment ($31,976) is 7.8 times higher than the cost of post-conviction supervision ($4.097).[10] These high costs of imprisonment continue to consume resources that could be used for more effective programs aimed at promoting public safety. Because "crowding has a negative impact on the ability of the BOP to promptly provide inmate treatment and training programs that promote effective reentry and reduce recidivism,"[11] the better option is to maximize the use of alternatives to incarceration for "first offenders" and others convicted of crimes for which Congress has authorized probationary or split sentences.

Guidelines that encourage greater use of alternatives to incarceration also are consistent with the Commission's statutory mandate to construct guidelines aimed at meeting all the purposes of sentencing,[12] including meeting the rehabilitative needs of the defendant through means other than a sentence of imprisonment[13] and that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[14]

For several years, U.S. Probation has "expanded its training programs pertaining to evidence-based supervision practices."[15] In addition to using actuarial risk assessment instruments to help determine appropriate levels of supervision and assess a person's rehabilitative needs, many probation offices are now using STARR (Staff Training Aimed at Reducing Re-Arrest) skills. "STARR skills include specific strategies for active listening; role clarification; effective use of authority, disapproval, reinforcement, and punishment; problem solving; and teaching, applying, and reviewing the cognitive model."[16] A study published in December 2015 shows that

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[9] U.S. Dep't of Justice, *FY 2017 Performance Budget: Congressional Submission Federal Prison System Buildings and Facilities* 1 (2016), https://www.justice.gov/jmd/file/821371/download. In FY 2016, BOP did not meet its goal of reducing the percentage of system-wide overcrowding. U.S. Dep't of Justice, *FY 2016 Agency Financial Report* I-14, III-12 (2016) ("As of September 30, 2016, BOP's institutions remained 16 percent over rated capacity, and high security institutions were 31 percent over rated capacity").

[10] This information is from the Administrative Office of the U.S. Courts, as of June 24, 2016.

[11] *FY 2017 Performance Budget*, *supra* note 9.

[12] 28 U.S.C. § 994(a)(2).

[13] 28 U.S.C. § 994(k).

[14] 28 U.S.C. § 991(b)(C).

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

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

"[m]easurable decreases in federal recidivism coincide with concerted efforts to bring to life state-of-the-art evidence-based supervision practices into the federal system, including the development and wide-scale implementation of a dynamic risk assessment instrument, emphasis on targeting person-specific criminogenic needs and barriers to success, and training on core correctional practices."[17] As the report states: "despite the increase in risk of the federal post-conviction supervision population and several years of austere budgets, probation officers are improving their abilities to manage risk and provide rehabilitative interventions."[18]

B. Definition of First Offender

A critical issue in this proposed amendment is the definition of "first offender." The Commission requests comment on whether it should "broaden the scope of the term 'first offender'" beyond "defendants with no prior convictions of any kind." Defenders strongly urge the Commission to broaden the definition to include individuals with prior convictions that are excluded from counting for criminal history purposes under §4A1.2. Specifically, individuals should not be excluded from "first offender" status on the basis of convictions for misdemeanor and petty offenses listed in §4A1.2(c), military sentences imposed by a summary court-martial or Article 15 proceeding (§4A1.2(g)), foreign convictions (§4A1.2(h)), tribal convictions (§4A1.2(j)), or expunged convictions (§4A1.2(i)). And for the same reasons discussed in the comments on "youthful offenders," offenses committed before age 18, or at least juvenile adjudications, should be excluded.

The exclusion of minor offenses under §4A1.2(c), is supported by available data on recidivism rates. Although the Commission's recent data analysis did not compare the recidivism rates for individuals with no prior convictions to those with prior convictions for offenses listed in 4A1.2(c), a 2004 report of the Commission showed that individuals who had convictions under 4A1.2(c) only had a reconviction recidivism rate of 2.9%, which was substantially similar to the 2.5% rate for individuals with no prior convictions.[19] In short, the available evidence shows that public safety is not undermined by including in the definition of "first offender" individuals with these types of prior convictions.

Depriving individuals with minor misdemeanors from the benefits of "first offender" status would exacerbate racial disparity. Professor Alexandra Natapoff at Loyola Law School has identified the numerous "systemic implications" of misdemeanor prosecutions, including how

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

[18] *Id*. at 8.

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

"misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal justice system, i.e., 'criminalized,' with little or no regard for their actual guilt."[20] The history of misdemeanor prosecutions shows that they have been "social and economic governance tools" used predominantly in urban areas to "manage various disadvantaged populations."[21] Many minor offenses have significant impact on people of color and the poor. "Police use loitering, trespassing, and disorderly conduct arrests to establish their authority over young black men, particularly in high crime areas, and to confer criminal records on low-income populations of color."[22] The over-policing of poor neighborhoods of color caused by the use of "zero-tolerance" policies often results in disproportionate convictions for loitering, trespassing, and disorderly conduct.[23] In addition, driving on a suspended license, which constitutes a sizable portion of local misdemeanor dockets, is an offense that has a disproportionate impact on the poor. Such offenses criminalize poverty because suspensions often occur when a low-income person cannot afford to pay the fine for a simple traffic violation. [24]

Excluding from "first offender" status individuals with minor convictions also raises significant due process concerns. Many individuals charged with misdemeanor offenses have a greater incentive to plead guilty so they can get out of jail and often do so without defense counsel or with counsel that only have minutes to handle a case.[25] Consequently, the frequency of wrongful convictions for such offenses is troubling.[26]

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

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

[22] *Id*. at 5.

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

[24] Natapoff, *Criminal Misdemeanor Theory and Practice*, *supra* note 21, at 4.

[25] *See generally* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL Fordham Urb. L. J. 101, 147 (2013) (discussing how "a young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind, whether he commits any criminal acts or not"); Natapoff, *Misdemeanors*, *supra* note 20, at 1348 ("bulk urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction"); Robert Boruchowitz, et al., Nat'l Assoc. of Crim. Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009); Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, Slate, Apr. 17, 2012 (discussing major consequences of misdemeanors), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Courts*, 34 Cardozo L. Rev.1751, 1754, 1803-1810 (2013) (discussing incentives for persons charged with misdemeanors to plead guilty so that they can return to their families and jobs rather

In addition to including within the definition of "first offender" individuals with minor convictions listed in §4A1.2(c), Defenders also encourage the Commission to include an invited downward departure for persons who would qualify for "first offender" status but for a conviction in a jurisdiction where minor offenses carry a prison term of over 1 year. As the Commission acknowledged when it promulgated amendment 798 to the career offender guideline, which included an invited downward departure for persons with misdemeanor offenses, "[s]uch statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont."[27] These individuals should not be treated more harshly because of the arbitrariness of state criminal codes.

Defenders also encourage the Commission to include within the definition of "first offender," individuals with foreign, tribal, expunged, and certain military convictions that are not counted in the criminal history score,[28] as well as offenses committed before age 18, or at least juvenile adjudications. As the Commission is aware, the lack of due process associated with tribal and foreign convictions, and sentences resulting from summary court-martial or Article 15 proceedings raise serious questions about the legitimacy of the conviction. And foreign convictions can criminalize conduct that domestic law permits. It also would be anomalous, and more complicated, for the guidelines to not count certain convictions for calculating criminal history, but to consider them in determining whether a person qualifies as a "first offender."

C. Offense Level Decrease for First Offenders

Of the Commission's proposed options on the offense level reduction for "first offenders," Option 2 (a 2-level decrease if the offense level is less than 16 and a 1-level decrease if the offense level is 16 or greater) is plainly more beneficial than Option 1 (a 1-level decrease no matter the offense level).[29] Defenders believe, however, that the Commission can go one step farther by providing for a 3-level reduction in offense level for people with a final offense level of 16 or less and a 2-level reduction for individuals with a final offense level greater than 16. If the purpose of the amendment is for the guidelines to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender

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than remain in jail pending a trial and elevated risk of noncitizens pleading guilty to misdemeanor offenses).

[26] *See* Natapoff, *Misdemeanors*, *supra* note 20, at 135-38, 143; *Cade*, *supra* note 25, at 1793 n.251 (discussing how pretrial detention leads to more wrongful convictions).

[27] USSG App. C, Amend. 798 (2015).

[28] §4A1.2(g)-(j).

[29] Option 1 proposes a 1-level decrease in offense level. Option 2 proposes a 2-level decrease if the offense level determined under Chapters Two and Three is less than level 16 and a 1-level decrease if the offense level is 16 or greater.

who has not been convicted of a crime of violence or an otherwise serious offense,"[30] then that purpose would be better served if more people moved from Zone B into Zone A, and from Zone D into Zone C. For example, a 3-level decrease would permit a person with an offense level of 13 under Chapters 2 and 3, to move from Zone B into Zone A and have the option of a probationary sentence. Similarly, a 3-level decrease would permit a person with an offense level of 16 to move from Zone D into current Zone C or proposed Zone B. Compared to Option 2 of the Commission's proposed amendment, which would only decrease the Zones for 24.3% of "first offenders" in its FY 2014 sample,[31] Defenders' proposal would decrease the Zone for 27.5% percent of "first offenders."

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

Making the adjustment available no matter the offense level would treat "first offenders" more fairly. The Commission's data analysis shows that a vast majority of "first offenders" fell within Zone D and have offense levels of 16 or greater. And a sizable number – 46.3 percent – of "first offenders" with final offense levels of 16 or higher were convicted of drug trafficking.[32] These are precisely the people who should receive lesser sentences. As the Honorable Patti Saris, former Chair of the Commission, wrote:

> [M]ass incarceration of drug offenders has had a particularly severe impact on some communities in the past thirty years. Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing. In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

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[30] 28 U.S.C. § 994(j).

[31] USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 12 (2016).

[32] *Id*. at Slide 15.

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

While the Commission lowered the offense levels for many drug cases, it did not do so for all of them, and it has taken no steps to acknowledge the different levels of culpability and lower risk of recidivism for "first offenders." For the Commission to exclude such persons from the benefit of a reduction in offense level would serve no purpose of sentencing. First, offense level is not correlated with recidivism, so no justification exists for imposing longer sentences on "first offenders" with higher offense levels.[33] Second, the notion that higher offense levels serve as a general deterrent[34] has long been debunked.[35] Third, a lengthier term of imprisonment is not necessary to promote just punishment. The Supreme Court acknowledged in *Gall* that the standard conditions of probation by themselves substantially restrict a person's liberty.[36] Fourth, as previously discussed, longer terms of imprisonment do not promote rehabilitation.

If the Commission wants to make an evidence-based decision, it should lower sentences for "first offenders" so that they do not spend much time in prison learning "more effective crime strategies from each other" and getting desensitized "to the threat of future imprisonment."[37]

D. Presumption of Non-incarceration Sentence for "First Offenders"

The proposed amendment to §5C1.1, which adds a presumption of a non-incarceration sentence for certain "first offenders," is a welcome change to the guidelines that hopefully will encourage courts to impose probationary sentences for "first offenders" falling within Zones A and B of the Sentencing Table. Defenders, however, believe that the proposed exclusions – [instant offense of conviction is a crime of violence] or [defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense] – sweep too broadly. Defenders encourage the Commission to only exempt from the presumption of a non-incarceration sentence a defendant whose instant offense of conviction resulted in serious bodily

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

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

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

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

[37] *Five Things About Deterrence*, *supra* note 35, at 1.

injury. While the Sentencing Reform Act directs that a "first offender who has not been convicted of a crime of violence or an otherwise serious offense," should receive a sentence other than imprisonment, it only singled out "a person convicted of a crime of violence that results in serious bodily injury" for a prison sentence.[38] Accordingly, nothing in the statute precludes the Commission from encouraging non-incarceration sentences for "first offenders" not "convicted of a crime of violence that results in serious bodily injury."

We are particularly concerned about the proposal to exclude individuals who "possessed a firearm or other dangerous weapon in connection with the offense." As the Commission is aware, a circuit split exists on whether an enhancement under §2D1.1(b)(1) ("if a dangerous weapon (including a firearm) was possessed, increase by 2 levels") precludes safety valve relief under §5C1.2(a)(2) ("the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense").[39] Courts are also split on whether constructive possession disqualifies a defendant from safety valve relief.[40] If the Commission were to adopt the proposal to exclude individuals who "possess a firearm or other dangerous weapon in connection with the offense," it would exacerbate the already existing circuit split and promote greater disparity. Therefore, if the Commission rejects our proposal to only exclude individuals whose offense of conviction resulted in serious bodily injury, it should only exclude defendants whose instant offense of conviction is a crime of violence as defined in §4B1.2(a).

The Commission requests comment on whether it should exclude other offenses, such as white collar crimes, from the presumption of a non-incarceration sentence. Defenders strongly oppose any such exclusion. First, for the reasons stated previously, sentences of imprisonment often do not serve the purposes of sentencing. Second, sentences of imprisonment severely limit the

[38] 28 U.S.C. § 994(j).

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

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

defendant's ability to pay restitution, which is often ordered in white collar cases[41] and do not achieve "penal objectives such as deterrence, rehabilitation, or retribution."[42] Third, the notion that all "first offenders" convicted of white-collar offenses should not get the benefit of a presumption of probation is ill-founded.

Our polling of Defenders revealed numerous clients who were "first offenders" who got involved in an economic crime out of desperation and efforts to support themselves or their family. They often stole to survive or were manipulated by others who took advantage of their desperate plight. They are not likely to reoffend, and for many, incarceration is a punishment greater than necessary to meet the purposes of sentencing under 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could cost society more than the original crimes because of the substantial cost of incarceration and the cost associated with removing the defendant from his or her family.

Three examples from the many cases involving "first time offenders" who faced terms of imprisonment under the guidelines, but who received probationary sentences, demonstrate our point. The first case involved a 54-year-old middle-school teacher, twice divorced, who suffered trauma and physical health issues and helped take care of her older sister with a serious chronic medical illness and in need of money to help meet basic needs and pay for medical expenses. She lost her mother and grandmother within a year of each other. The Veteran's Administration's (VA) benefits that her mother received following her father's death continued to be paid into a joint account that the client held with her mother. She suffered from depression, had a period of unemployment, and failed to inform the VA of her mother's death. Approximately $1400 a month was deposited into the account for almost 8 years, resulting in an overpayment of $142,494. She managed to repay $3000 after the VA contacted her about the overpayments and before any criminal charges were brought.

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

The third case involved a loan processor with minor children who suffered from extensive physical and sexual abuse in her personal life and persistent mental illness that made her vulnerable to exploitation by her boss who led a scheme to inflate real estate appraisals to obtain

[41] The Mandatory Victim Restitution Act applies to an offense against property, including those committed by fraud or deceit. 18 U.S.C. § 3663A. Accordingly, defendants must compensate victims for the loss suffered. In FY 2015, restitution was ordered in 67.3% of fraud cases, with an average payment of $1,615,341 and a median payment of $125,200. USSC, *2015 Sourcebook of Federal Sentencing Statistics*, Tbl. 15.

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

mortgage loans that were substantially more than the actual cost of the house. She was ordered to pay restitution in the amount of $42,676,269.14.

Defenders are also concerned about the Commission's proposed application note 10 regarding application of the presumption of alternatives to incarceration for certain "first offenders" with a guideline range falling within Zones A or B. Proposed Note 10(A) states, among other things, that "[t]he court may not impose a sentence of probation pursuant to this provision . . . where a term of imprisonment is required under this guideline." Such a statement is inconsistent with 18 U.S.C. § 3553(a)(3), which "directs the judge to consider sentences other than imprisonment,"[43] and ignores the authority of the court to grant a departure or variance. Probation should not be discouraged for those who fall within Zones C or D, but whose offense of conviction is a Class C, D, or E felony or misdemeanor. Unless otherwise specified in the statute of conviction, 18 U.S.C. § 3561 only prohibits probationary sentences for Class A or B felonies. For the Commission to recommend imprisonment for any Class C, D, or E felony that falls within Zones C or D, regardless of whether the specific statute of conviction prohibits probation, would be inconsistent with 18 US.C. § 3561.[44]

To suggest that a court may not impose a sentence of probation when the guideline range falls within Zones C or D also disregards feedback that the Commission has received from the courts over the years. From 2005 to 2015, the "percentage of offenders with sentencing ranges in Zone D sentenced to alternatives has averaged about 12 percent."[45] The majority of those sentences were probation only or probation with community confinement sentences.[46] To avoid a conflict with the law and acknowledge the feedback that it is receiving from the courts about the appropriateness of probationary sentences for certain individuals falling within Zone D, the Commission should change the proposed application note as follows: "The court may not impose a sentence of probation pursuant to this provision if prohibited by statute. *See* §5B1.1 (Imposition of a Term of Probation)."[47]

The proposed application note also need not state that "[a] sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense." First, if the

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[43] *Gall*, 552 U.S. at 59.

[44] 28 U.S.C. 994(b)(1) requires that the Commission "establish a sentencing range that is consistent with all pertinent provisions of tile 18, United State Code."

[45] USSC, *Alternative Sentencing in the Federal Criminal Justice System 17* (2015).

[46] *Id*.

[47] The prohibition on a sentence of probation when "a term of imprisonment is required under §5C1.1" also should be removed from the background commentary to §5B1.1.

Commission, contrary to Defender recommendations, excludes such individuals from a presumption of a non-incarceration sentence in §5C1.1(c), then including it in an application note is redundant. Second, even if the Commission does not exclude such individuals from the presumption, the proposed note undercuts the presumption and potentially creates an interpretive problem about which party bears the burden of proof on whether the court should or should not impose a non-incarceration sentence. The best course of action would be to allow the presumption of an alternative to apply and let the government rebut the presumption by showing that the individual should actually be sentenced to a term of imprisonment.

E. Conforming Changes

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

In addition, Defenders suggest that the Commission change the language of §5B1.1 to call for a presumption of probation. The attached Appendix A sets forth our suggestions for how the language should be changed.

F. Zone Expansion

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

Defenders are pleased that the Commission is considering expanding the Zones of the Sentencing Table to encourage greater uses of alternatives to incarceration. In addition to consolidating Zones B and C of the Sentencing Table, Defenders encourage the Commission to expand Zone B by 2 levels to an 18-24 month range.[48] Such an expansion would increase the

[48] It is worth noting that in 1990, the USSC Advisory Committee on Alternatives, which included several federal court judges and experts from various other agencies/organizations, recommended that Zone D start at a much higher range (27-33 months) for individuals in CH I through III than it currently does (15-21 months). *See USSC Alternatives to Imprisonment Project, The Federal Offender: A Program of Intermediate Punishments* 78 (1990).

number of individuals likely to benefit from Zone B Sentencing Options without jeopardizing public safety.[49]

The Commission's 2015 report on Alternative Sentencing in the Federal Criminal Justice System concluded that the low rate of alternatives to incarceration was "primarily [] due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in which the guidelines provide for a term of imprisonment."[50] Notwithstanding that conclusion, individuals falling within Zone D are receiving alternatives to incarceration. For example, drug offenses were almost as common among individuals sentenced to alternatives (29%) as those sentenced to imprisonment (31.6%).[51]

And as the Commission's data analysis on "Zone C Offenders" likely to benefit from Zone B sentencing options shows, only 420 people sentenced in FY 2015 would have benefited from consolidation of the zones. A slight expansion of the new Zone B would increase those numbers without jeopardizing public safety because a large number of individuals falling within Zone D are convicted of non-violent offenses such as drug trafficking, money laundering, and fraud.[52] Moreover, an expansion of proposed Zone B to the 18-24 month range would likely have the most significant impact on individuals in criminal history category I. Data from FY 2013 to 2015 show that 1,318 individuals with a criminal history category I had an offense level of 14 (15-21 months) and 3,999 had an offense level of 15 (18-24 months).[53]

Data from the Commission's study shows that expanding Zone B to the 18-24 month range will not impact public safety. The reconviction rate for persons imprisoned from 12 to 23 months was 33.9%, just slightly above the 31.9% rate for those imprisoned 6 to 11 months.[54] At the same time, individuals with a probation only sentence had a recidivism rate of 21.6%.[55] Those rates,

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[49] The Commission's data shows no strong correlation between offense level and recidivism. *Recidivism Report*, *supra* note 33, at 20,

[50] *Alternative Sentencing*, *supra* note 45, at 5.

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

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

[53] USSC, *Interactive Sourcebook*, tbl. 21 FY 2013-2015.

[54] *Recidivism Report*, *supra* note 33, at App. A-2.

[55] *Id*.

combined with other data,[56] show that encouraging greater use of alternatives to incarceration will likely decrease recidivism rates.

In conclusion, the Commission's own data, combined with other points discussed earlier in these comments about how alternatives to incarceration are retributive and more likely to meet a person's rehabilitative needs and strengthen the communities in which they reside, show that making alternatives to incarceration available for more people will better serve all the purposes of sentencing.

2. No Offenses Should Be Exempt From the Zone Changes

The Commission requests comment on whether it should exempt certain offenses, particularly white collar offenses, from the zone changes. For the same reason that the Commission should not exempt any offense from the presumption of an alternative sentence in §5C1.1, it should not exempt any offense from the zone changes.

3. No Additional Guidance is Needed for New Zone B Defendants

The Commission requests comment on whether it should provide guidance to address the new Zone B defendants who previously fell within Zone C. Defenders believe that such guidance is not necessary at this point. The Commission would do better to study the impact of the amendments and determine if they are having their intended effect of expanding the use of alternatives to incarceration.

4. The Commission Should Include an Invited Departure for Zone D Defendants Convicted of Non-Violent Offenses Such as Drug Trafficking

Persons convicted of drug trafficking often fall within Zone D and are typically given lengthy terms of imprisonment even though they may statutorily qualify for probation or may be given a split sentence. An invited departure from Zone D to Zone B for individuals convicted of nonviolent offenses would promote sentences of probation when permitted by statute and a split sentence when not permitted by statute. FY 2015 data show that only 4% of persons sentenced for drug trafficking had a base offense level of 12 or lower and only 6.5% fell within Zones A, B, or C.[57] At the same time, 54.2% were not subject to a mandatory minimum sentence. Any of those individuals, even if convicted of an offense with a statutory maximum of more than 25 years are statutorily allowed to be sentenced to prison for as little as one day. Because all of the purposes of sentencing could be served by a split sentence or probation for many of these individuals, an invited departure is appropriate.

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[56] *See* Discussion *supra* Part A (discussing how persons sentenced to community corrections have lower rates of recidivism and U.S. Probation's success in lowering recidivism rate through new methods of supervision).

[57] USSC, *FY2015 Monitoring Dataset*.

5. The Commission Should Maintain the Invited Departure for Treatment in §5C1.1

The Commission's proposed amendment deletes §5C1.1. comment, (n.6) regarding invited departures for individuals with substance abuse disorders and mental illness. This is a critical departure that promotes treatment needs and recognizes that imprisonment can sometimes exacerbate the problems of people with such disorders. It is consistent with "a growing recognition of the importance of treating, rather than punishing, mentally ill defendants and an understanding that prison may not be the appropriate setting for such treatment."[58] Rather than delete the application note, the Commission should amend it to invite a departure from Zone D to Zone B. "Findings show unequivocally that providing comprehensive drug abuse treatment to criminal offenders works, reducing both drug abuse and criminal recidivism."[59] Other studies favor alternatives to incarceration rather than imprisonment.[60]

An invited departure that makes an alternative sentence available would be especially helpful for people who can turn their lives around. Take, for example, a drug courier whose guideline range is high because he carried a large quantity of drugs. He is a drug addict and committed the offense to support his addiction. After being arrested and before sentencing, he participated in a drug treatment program and reunited with his family in a positive way. At the time of sentencing, he is still doing well in the treatment program. A sentence of imprisonment would interrupt treatment and not advance the purposes of sentencing. An invited departure, however, would encourage the court to fashion a sentence that meets treatment needs and promotes public safety.

Alternatives to incarceration for people who suffer from a mental illness, including a co-occurring substance use disorder, also are important. An "estimated 45 percent of federal prisoners . . . have a mental health problem."[61] Incarcerating such individuals often puts a drain on prison resources and the Bureau of Prisons is not equipped to handle the treatment needs for

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[58] *United States v. Ferguson*, 952 F. Supp. 2d 1186, 1191-92 (M.D. Ala. 2013). *See also United States v. Flowers*, 946 F. Supp. 2d 1295, 1299 (M.D. Ala. 2014).

[59] Nat'l Inst. of Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research Based Guide* 9 (2014).

[60] *See generally Myths & Facts: Why Incarceration Is Not the Best Way to Keep Communities Safe*, *supra* note 6, at 9 ("By large majorities, victims specially prefer investments in mental health, drug treatment, and supervised probation over incarceration."); Missouri Sent'g Advisory Comm'n, *Probation Works for Nonviolent Offenders*, 1 Smart Sent'g 1 (June 2009) ("[R]ecidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations . . . .").

[61] Urban Institute, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System* 8 (2015).

these individuals.[62] Indeed, being able to provide medical care is one of the biggest challenges facing BOP.[63]

Diverting individuals with mental illness to "community-based mental health treatment programs," including mental health courts, is one way to "alleviate the strain on resources caused by incarcerating the mentally ill and providing treatment for them in prison."[64]

6. The Commission Should Delete Current Note 7 (Proposed Note 5) in §5C1.1

Note 7 in §5C1.1 (proposed note 5) should be deleted because it discourages substitutes of imprisonment for "most defendants with a criminal history category of III or above." That provision makes 57% of Zones A, B, and C meaningless because 33 of the 58 ranges in those zones fall within CH III or above. It also discourages judges from imposing alternatives to incarceration for individuals who could benefit from them, and has an adverse impact on Black individuals in Zones B and C, who tend to fall within higher criminal history categories than other groups.[65] Discouraging alternatives for defendants in higher criminal history categories serves no penological purpose and is based on unsound assumptions. No data supports the notion that defendants in higher criminal history categories would not benefit from an alternative to incarceration because we do not know the nature of the previous sentence imposed on those individuals. If they were sentenced to prison or placed on probation without services that meet their rehabilitative needs, their recidivism is at least as much a product of systemic failure as it is their capacity to "reform."

7. Home Detention – Electronic monitoring

Defenders have no objection to the Commission's proposed changes to the commentary on home detention and the use of electronic monitoring because it acknowledges that several different

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[62] FY 2016 Agency Financial Report, *supra* note 9, at I-25 ("[C]rowding has a negative impact on the ability of the BOP to promptly provide inmate treatment and training programs that promote effective reentry and reduce recidivism . . . .").

[63] *Id*. at III-12.

[64] *Id*. at 27.

[65] *Alternative Sentencing, supra* note 45, at 16 ("Black offenders [within Zones A through C] had more serious criminal history scores compared to the other groups."). *See also id*. at 20 (attributing different rates of alternative sentences for "Black offenders" on the difference in criminal history among Black, White, Hispanic, and Other offenders).

location monitoring technologies may be used to verify whether a person is abiding by the conditions of supervision.[66]

[66] *See generally* Admin. Office of U.S. Courts, Guide to Judiciary Policy, Vol. 8, Federal Location Monitoring Program, Monograph 113 (2016).

Excerpt from Oct. 10, 2017 Defender Comments

Proposed Amendment #3: First Offenders / Alternatives to Incarceration

Defenders are disappointed that the Department of Justice (DOJ) and the National Association of Assistant United Sates Attorneys (NAAUSA) are unwilling to support amendments to the guidelines that would encourage courts to punish "first offenders" through means other than imprisonment. The Commission, however, should not be deterred because the prosecutors' objections are not based on meaningful legal analyses or empirical evidence.

Probation is punitive. DOJ ignores both federal statutory recognition of the appropriateness of probationary sentences,[1] and the reality that while sentences of incarceration are "qualitatively more severe than probationary sentences of equivalent terms," a non-incarceration sentence can be quite punitive.[2] Probation is a severe punishment: it places substantial restrictions on a person's liberty;[3] may require home detention, community confinement, and community service;[4] and places the person at risk of imprisonment for a minor technical violation.[5] And for "first offenders," a felony conviction by itself is enormously punitive given the significant

[1] 18 U.S.C. § 3561(a) (authorizing sentences of probation unless the defendant was convicted of a Class A or B felony, probation was otherwise precluded, or the defendant is sentenced at the same time to a term of imprisonment).

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

[3] *Id*. *See also United States v. Walker*, 242 F. Supp. 3d 1269, 1294 (D. Utah 2017) (a longer term of probation and home confinement fulfills retributive purposes); *United States v. Dokmeci*, 2016 WL 915185, at *13 n.79 (E.D.N.Y. Mar. 9, 2016) ("[p]robation metes out significant punishment"); *United States v. Carson*, 560 F.3d 566, 591 (6th Cir. 2009) (rejecting government's challenge and finding that court's imposition of "three years of probation with six months of home confinement is not insignificant" even though guidelines recommend a 15-21 month term of imprisonment); *United States v. Bueno*, 549 F.3d 1176, 1182 (8th Cir. 2008) (affirming sentence of probation; district court observed that the defendant was "subject to house arrest during the entire five year period of probation"); *United States v. Pyles*, 272 F. App'x 258, 262 (4th Cir. 2008) (affirming sentence of 36 months probation for aiding and abetting the distribution of crack cocaine, noting that "probation, although less severe than incarceration, is not a 'get-out-of-jail free card'").

[4] *See* USSG §§5F1.1, 5F1.2, and 5F1.3.

[5] *See*, *e.g.*, USSG §7B1.3(a)(2) (court may revoke probation for a Grade C violation, which includes the least serious violations of a condition of supervision); *United States v. Kippers*, 685 F.3d 491, 499 (5th Cir. 2012) ("leniency at the original sentencing generally may justify a harsher revocation sentence"); *United States v. Chao Vang*, 789 F. Supp. 2d 1020, 1023 (E.D. Wis. 2011) (court's advice to defendant at sentencing when imposing 4-year probation term for conspiracy to distribute MDMA: "an offender revoked from probation may be sentenced to any term available originally, up to the statutory maximum; thus, probation is not to be taken lightly").

collateral consequences of a conviction.[6] While collateral consequences are considered "invisible" punishment because they are not announced at sentencing, they are nonetheless relevant to the overall purposes of sentencing because they increase the importance of educational, vocational, and correctional treatment,[7] which are better served through alternatives to incarceration than imprisonment.

Alternatives to incarceration serve the purposes of sentencing. Contrary to DOJ and NAAUSA claims,[8] deterrence, just punishment, and the need to promote respect for the law are reasons to encourage alternatives to incarceration. Neither DOJ nor NAAUSA provide any empirical data to support their position and they ignore the literature on deterrence and other evidence on what kinds of sentences provide just punishment and promote respect for the law. In previous comments, Defenders have discussed at length the current empirical data that sentence length has, at most, a marginal deterrent effect.[9] As to just punishment and respect for the law,

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[6] *See* Sarah Berson, U.S. Dep't of Just., Nat'l Inst. of Just., *Beyond the Sentence-Understanding Collateral Consequences*, 272 Nat'l Inst. of Just. J. 24 (2013) (a conviction "brings with it a host of sanctions and disqualifications that can place an unanticipated burden on individuals trying to re-enter society and lead lives as productive citizens"); *Collateral Consequences Resource Center*, http://ccresourcecenter.org/about-the-collateral-consequences-resource-center; Council of State Gov'ts, *Nat'l Inventory of Collateral Consequences*, https://niccc.csgjusticecenter.org/.

[7] 18 U.S.C. § 3553(a)(1)(D).

[8] *DOJ Holdover Comment*, at 10-13; Letter from Lawrence Leiser, President, Nat'l Assoc. of Ass'n of Assistant U.S. Attorneys, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2, 3 (Oct. 10, 2017) (*NAAUSA Holdover Comment*).

[9] *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2-7 (Oct. 26, 2017). *See also* Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony* (June 8, 2017) (discussing findings that increases in punishment have no deterrent effect or "that any effects found are too small and contingent on particular conditions to have policy relevance"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981749.

The available evidence also repudiates DOJ's claim that providing alternatives to incarceration for "first offenders" convicted of tax fraud will be "insufficient to provide even a modicum of deterrence." *DOJ Holdover Comment*, at 13. The Commission's own research shows sentence length is not connected to recidivism. Individuals sentenced to probation (35.1%) had lower rearrest rates than those sentenced to imprisonment (52.5%), and individuals convicted of fraud had the lowest rates (34.2%). USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 22, 20 (2016). The rate of federal prosecutions for tax fraud also shows that DOJ does not adhere to the science of deterrence. As the Commission is well aware, certainty of punishment is far more likely to deter crime than the length of a sentence. Yet, in FY 2014, tax fraud offenses accounted for only 1.1% of the federal caseload. USSC, *Quick Facts: Tax Fraud Offenses* (2014). That the government sponsored departures for reasons other than substantial assistance in six to ten percent of those cases, *id*., shows that DOJ's claim that sentence length is a necessary deterrent effect is just an excuse for prosecutors to want to maintain control over the sentence.

the Commission should consider society's views as to appropriate penalties.[10] Public opinion surveys show society supports rehabilitation and alternatives over imprisonment.[11] Moreover, Congress made clear that various sentencing options, including probation, could achieve the multiple objectives of sentencing.[12]

Straw Purchasers. DOJ's and NAAUSA's claims about "straw purchasers" is "especially problematic."[13] First, the number of cases at issue is small. In FY 2016, only 23 individuals with 0 criminal history points were sentenced under §2K2.1(a)(6)(C).[14] Second, Commission data shows the guideline range for straw purchasers is often considered too high. Sixty-nine and one-half percent were sentenced below the guideline range, with 30.4% receiving a government-sponsored below range sentence.[15] If anything, the evidence supports the appropriateness of

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[10] The Senate Report of the Sentencing Reform Act explained that "just punishment" is connected to the public's standpoint. S. Rep. No. 98-225, 98th Cong., at 294 (1983).

[11] *See, e.g.*, National Institute of Corrections, *Myths and Facts: Why Incarceration is Not the Best Way to Keep Communities Safe* 8 (2016) (national surveys show that a majority of the American public favors alternatives to incarceration), https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf; Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victim's Views on Safety and Justice* 5 (2016) ("By a margin of 3 to 1 victims prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service"), https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf; Pew Charitable Trusts, *Nat'l Survey Key Findings-Federal Sentencing & Prisons* 1 (Feb. 2016) (61% of voters believe that federal prisons house too many people convicted of dealing or transporting drugs), http://www.pewtrusts.org/~/media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf.

[12] S. Rep. No. 98-225, at 261. Courts that believe punishment can send a message of general deterrence also have acknowledged that a lengthy term of imprisonment is not the only option. *See United States v. Musgrave*, 647 F. App'x. 529 (6th Cir. 2016) (rejecting government argument that a 1-day sentence of imprisonment, 5 years of supervised release with 2 years of home confinement in a white collar fraud case did not serve purpose of general deterrence).

[13] *DOJ Holdover Comment*, at 12-13; *NAAUSA Holdover Comment*, at 2.

[14] USSC, *FY 2016 Monitoring Dataset*.

[15] *Id*. In FY 2016, 166 defendants with 0 criminal history points were sentenced under §2K2.1(a)(7); 54.2% received below guideline sentences, with 29.5% government-sponsored. USSC, *FY 2016 Monitoring Dataset*. Our polling of Federal Defenders also revealed several cases of women whose spouse or significant other abused them and forced them into purchasing a firearm. For example, a 69-year-old woman with no criminal history had been in a twenty-year emotionally and physically abusive marriage. The husband, a convicted felon, took her to a store to buy a gun. He then shot his daughter's boyfriend. Even though her guideline range was 12-18 months, the court imposed one year of probation and twenty hours of community service. In another case, both the prosecutor and defender recommended a sentence of probation for a woman who bought a firearm for her husband. She had filed for a divorce against him because he would choke her to the point of unconsciousness and drag her through the house

alternatives for certain straw purchasers. It also should cause the Commission to reconsider guidelines that recommend the exact same sentence for a straw purchaser convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A), as for a person prohibited from possessing the firearm.[16]

In addition, contrary to NAAUSA's claim,[17] an individual who provides dozens of firearms to a single person or multiple persons convicted of an offense considered a felony under federal law would have a guideline range greater than 12-18 months imprisonment. The BOL would be 14, and the offense level would increase for the number of firearms.[18] Even with a three-level downward departure for acceptance of responsibility, providing 8-24 firearms would result in a range of 18-24 months. And if the individual sells even more firearms or a specific type of firearm to a person considered a "felon" under federal law,[19]the guidelines would be even higher.

Imprisonment for "First Offenders" can be too severe and disproportionate. DOJ's claim that the sentences imposed on "first offenders" are not too long and likely under 24 months, ignores the problems with proportionate sentencing.[20] In FY 2016, 34% of defendants with 0 criminal history were convicted of drug trafficking. The median sentence length was 32 months – just 1.5 months below manslaughter,[21] and 8 months longer than the median sentence the Commission reported as the length of imprisonment for all persons in Criminal History Category I.[22] The data plainly shows that the sentences imposed under the current guidelines are often too severe. Imprisonment also has significant negative consequences for the imprisoned person, family, and society.[23] Accordingly, the Commission should amend the guidelines to encourage judges to impose probation for most "first offenders."[24]

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by her hair. He would not let her and her children move out, threating to harm her and her extended family. He continued to abuse her and eventually told her she could move out if she bought him a gun.

[16] USSG §2K2.1(a)(6)(A).

[17] *NAAUSA Holdover Comment*, at 2.

[18] USSG §2K2.1(b)(1) (offense level increase of 2 to 10 depending on number of firearms).

[19] USSG §2K2.1(a)(3) (base offense level of 22 for specified firearms).

[20] *DOJ Holdover Comment*, at 14.

[21] USSC, *FY 2016 Monitoring Dataset* (unlike the Commission's Sourcebook analysis, which does not count probationary sentences when reporting on the length of a sentence of imprisonment, this data analysis counts probation as 0 months of imprisonment).

[22] USSC, *2016 Sourcebook of Federal Sentencing Statistics* tbl. 14 (2016).

[23] *See, e.g.*, United Nations Office on Drugs and Crime, *Why Promote Prison Reform* (prison has significant impact individuals and families living in poverty, public health, relationships, and social cohesion), https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-

Federal Offenses as Crimes of Violence. DOJ and NAAUSA assert that if the Commission chooses to incorporate the §4B1.2 definition of "crime of violence" in §5C1.1(g) that it will generate more litigation.[25] While Defenders believe the better solution is to exclude from the presumption of probation "first offenders" whose instant offense of conviction resulted in serious bodily injury or whose offense involved substantial harm to the victim, the "crime of violence" option will not complicate the guidelines. Whether a particular federal offense meets the current definition of a "crime of violence" already has been resolved in many cases.[26] In addition, very few "first offenders" whose instant offense might be considered a crime of violence would qualify for a presumption of probation because they would not fall within Zones A or B of the Sentencing Table.[27] And, the most prevalent offense of conviction for persons with 0 criminal

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imprisonment.html; National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Jeremy Travis et al. eds., 2014) ("Many aspects of prison life-including material deprivations; restricted movement and liberty; a lack of meaningful activity; a nearly total absence of personal privacy; and high levels of interpersonal uncertainty, danger, and fear-expose prisoners to powerful psychological stressors that can adversely impact their emotional well-being."); *id*. at 193 (prison can have criminogenic effects that "increase the probability of engaging in future crime"); *id*. at 338-339 ("incarceration is strongly correlated with negative social and economic outcomes," including "very low earnings, high rates of unemployment;" and "[f]amily instability").

For persons undergoing treatment and who are able to continue employment before sentencing, imprisonment can have devastating consequences and disrupt rather than promote rehabilitation.

[24] Among other changes that will encourage alternatives to incarceration for offenses such as drug trafficking, the Commission should move away from its original decision to depart from the directive encouraging probationary sentences for "first offenders" when it "unilaterally declared in 1987 that every theft, tax evasion, antitrust, insider trading, fraud, and embezzlement case is 'otherwise serious.'" *United States v. Dokmeci*, 2016 WL 915185, at *13 (E.D.N.Y. Mar. 9, 2016) (noting "Commission's gross departure from Congress's directive encouraging probation").

[25] *DOJ Holdover Comment*, at 14-15.

[26] *See, e.g.*, *United States v. O'Connor*, 2017 WL 4872571 (10th Cir. Oct. 30, 2017) (Hobbs Act robbery is not a crime of violence under §4B1.2(a)(1)); *United States v. Claret*, 2017 WL 4899728 (11th Cir. Oct. 31, 2017) (noting that the elements clause in §4B1.2)(a)(1) "remained unchanged [in the August 2016 amendment] and thus crimes of violence qualifying under the elements clause before the amendment continue to qualify under the clause after the amendment"); *United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017) (finding that bank robbery qualifies as a crime of violence); *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017) (same); *United States v. Evans*, 848 F.3d 242 (4th Cir. 2016) (federal carjacking qualifies as a "crime of violence" under § 924(c) force clause).

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history points plainly do not qualify as a crime of violence – e.g., drug trafficking, fraud, and immigration.[28] Hence, the risk of the proposed amendment increasing litigation is quite low.

[28] USSC, *FY 2016 Monitoring Dataset*.

Excerpt from Nov.6, 2017 Defender Reply Comments

Proposed Amendment #3: First Offenders / Alternatives to Incarceration

Defenders are disappointed that the Department of Justice (DOJ) and the National Association of Assistant United Sates Attorneys (NAAUSA) are unwilling to support amendments to the guidelines that would encourage courts to punish "first offenders" through means other than imprisonment. The Commission, however, should not be deterred because the prosecutors' objections are not based on meaningful legal analyses or empirical evidence.

Probation is punitive. DOJ ignores both federal statutory recognition of the appropriateness of probationary sentences,[1] and the reality that while sentences of incarceration are "qualitatively more severe than probationary sentences of equivalent terms," a non-incarceration sentence can be quite punitive.[2] Probation is a severe punishment: it places substantial restrictions on a person's liberty;[3] may require home detention, community confinement, and community service;[4] and places the person at risk of imprisonment for a minor technical violation.[5] And for "first offenders," a felony conviction by itself is enormously punitive given the significant

[1] 18 U.S.C. § 3561(a) (authorizing sentences of probation unless the defendant was convicted of a Class A or B felony, probation was otherwise precluded, or the defendant is sentenced at the same time to a term of imprisonment).

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

[3] *Id*. *See also United States v. Walker*, 242 F. Supp. 3d 1269, 1294 (D. Utah 2017) (a longer term of probation and home confinement fulfills retributive purposes); *United States v. Dokmeci*, 2016 WL 915185, at *13 n.79 (E.D.N.Y. Mar. 9, 2016) ("[p]robation metes out significant punishment"); *United States v. Carson*, 560 F.3d 566, 591 (6th Cir. 2009) (rejecting government's challenge and finding that court's imposition of "three years of probation with six months of home confinement is not insignificant" even though guidelines recommend a 15-21 month term of imprisonment); *United States v. Bueno*, 549 F.3d 1176, 1182 (8th Cir. 2008) (affirming sentence of probation; district court observed that the defendant was "subject to house arrest during the entire five year period of probation"); *United States v. Pyles*, 272 F. App'x 258, 262 (4th Cir. 2008) (affirming sentence of 36 months probation for aiding and abetting the distribution of crack cocaine, noting that "probation, although less severe than incarceration, is not a 'get-out-of-jail free card'").

[4] *See* USSG §§5F1.1, 5F1.2, and 5F1.3.

[5] *See*, *e.g.*, USSG §7B1.3(a)(2) (court may revoke probation for a Grade C violation, which includes the least serious violations of a condition of supervision); *United States v. Kippers*, 685 F.3d 491, 499 (5th Cir. 2012) ("leniency at the original sentencing generally may justify a harsher revocation sentence"); *United States v. Chao Vang*, 789 F. Supp. 2d 1020, 1023 (E.D. Wis. 2011) (court's advice to defendant at sentencing when imposing 4-year probation term for conspiracy to distribute MDMA: "an offender revoked from probation may be sentenced to any term available originally, up to the statutory maximum; thus, probation is not to be taken lightly").

collateral consequences of a conviction.[6] While collateral consequences are considered "invisible" punishment because they are not announced at sentencing, they are nonetheless relevant to the overall purposes of sentencing because they increase the importance of educational, vocational, and correctional treatment,[7] which are better served through alternatives to incarceration than imprisonment.

Alternatives to incarceration serve the purposes of sentencing. Contrary to DOJ and NAAUSA claims,[8] deterrence, just punishment, and the need to promote respect for the law are reasons to encourage alternatives to incarceration. Neither DOJ nor NAAUSA provide any empirical data to support their position and they ignore the literature on deterrence and other evidence on what kinds of sentences provide just punishment and promote respect for the law. In previous comments, Defenders have discussed at length the current empirical data that sentence length has, at most, a marginal deterrent effect.[9] As to just punishment and respect for the law,

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[6] *See* Sarah Berson, U.S. Dep't of Just., Nat'l Inst. of Just., *Beyond the Sentence-Understanding Collateral Consequences*, 272 Nat'l Inst. of Just. J. 24 (2013) (a conviction "brings with it a host of sanctions and disqualifications that can place an unanticipated burden on individuals trying to re-enter society and lead lives as productive citizens"); *Collateral Consequences Resource Center*, http://ccresourcecenter.org/about-the-collateral-consequences-resource-center; Council of State Gov'ts, *Nat'l Inventory of Collateral Consequences*, https://niccc.csgjusticecenter.org/.

[7] 18 U.S.C. § 3553(a)(1)(D).

[8] *DOJ Holdover Comment*, at 10-13; Letter from Lawrence Leiser, President, Nat'l Assoc. of Ass'n of Assistant U.S. Attorneys, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2, 3 (Oct. 10, 2017) (*NAAUSA Holdover Comment*).

[9] *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2-7 (Oct. 26, 2017). *See also* Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony* (June 8, 2017) (discussing findings that increases in punishment have no deterrent effect or "that any effects found are too small and contingent on particular conditions to have policy relevance"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981749.

The available evidence also repudiates DOJ's claim that providing alternatives to incarceration for "first offenders" convicted of tax fraud will be "insufficient to provide even a modicum of deterrence." *DOJ Holdover Comment*, at 13. The Commission's own research shows sentence length is not connected to recidivism. Individuals sentenced to probation (35.1%) had lower rearrest rates than those sentenced to imprisonment (52.5%), and individuals convicted of fraud had the lowest rates (34.2%). USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 22, 20 (2016). The rate of federal prosecutions for tax fraud also shows that DOJ does not adhere to the science of deterrence. As the Commission is well aware, certainty of punishment is far more likely to deter crime than the length of a sentence. Yet, in FY 2014, tax fraud offenses accounted for only 1.1% of the federal caseload. USSC, *Quick Facts: Tax Fraud Offenses* (2014). That the government sponsored departures for reasons other than substantial assistance in six to ten percent of those cases, *id*., shows that DOJ's claim that sentence length is a necessary deterrent effect is just an excuse for prosecutors to want to maintain control over the sentence.

the Commission should consider society's views as to appropriate penalties.[10] Public opinion surveys show society supports rehabilitation and alternatives over imprisonment.[11] Moreover, Congress made clear that various sentencing options, including probation, could achieve the multiple objectives of sentencing.[12]

Straw Purchasers. DOJ's and NAAUSA's claims about "straw purchasers" is "especially problematic."[13] First, the number of cases at issue is small. In FY 2016, only 23 individuals with 0 criminal history points were sentenced under §2K2.1(a)(6)(C).[14] Second, Commission data shows the guideline range for straw purchasers is often considered too high. Sixty-nine and one-half percent were sentenced below the guideline range, with 30.4% receiving a government-sponsored below range sentence.[15] If anything, the evidence supports the appropriateness of

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[10] The Senate Report of the Sentencing Reform Act explained that "just punishment" is connected to the public's standpoint. S. Rep. No. 98-225, 98th Cong., at 294 (1983).

[11] *See, e.g.*, National Institute of Corrections, *Myths and Facts: Why Incarceration is Not the Best Way to Keep Communities Safe* 8 (2016) (national surveys show that a majority of the American public favors alternatives to incarceration), https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf; Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victim's Views on Safety and Justice* 5 (2016) ("By a margin of 3 to 1 victims prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service"), https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf; Pew Charitable Trusts, *Nat'l Survey Key Findings-Federal Sentencing & Prisons* 1 (Feb. 2016) (61% of voters believe that federal prisons house too many people convicted of dealing or transporting drugs), http://www.pewtrusts.org/~/media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf.

[12] S. Rep. No. 98-225, at 261. Courts that believe punishment can send a message of general deterrence also have acknowledged that a lengthy term of imprisonment is not the only option. *See United States v. Musgrave*, 647 F. App'x. 529 (6th Cir. 2016) (rejecting government argument that a 1-day sentence of imprisonment, 5 years of supervised release with 2 years of home confinement in a white collar fraud case did not serve purpose of general deterrence).

[13] *DOJ Holdover Comment*, at 12-13; *NAAUSA Holdover Comment*, at 2.

[14] USSC, *FY 2016 Monitoring Dataset*.

[15] *Id*. In FY 2016, 166 defendants with 0 criminal history points were sentenced under §2K2.1(a)(7); 54.2% received below guideline sentences, with 29.5% government-sponsored. USSC, *FY 2016 Monitoring Dataset*. Our polling of Federal Defenders also revealed several cases of women whose spouse or significant other abused them and forced them into purchasing a firearm. For example, a 69-year-old woman with no criminal history had been in a twenty-year emotionally and physically abusive marriage. The husband, a convicted felon, took her to a store to buy a gun. He then shot his daughter's boyfriend. Even though her guideline range was 12-18 months, the court imposed one year of probation and twenty hours of community service. In another case, both the prosecutor and defender recommended a sentence of probation for a woman who bought a firearm for her husband. She had filed for a divorce against him because he would choke her to the point of unconsciousness and drag her through the house

alternatives for certain straw purchasers. It also should cause the Commission to reconsider guidelines that recommend the exact same sentence for a straw purchaser convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A), as for a person prohibited from possessing the firearm.[16]

In addition, contrary to NAAUSA's claim,[17] an individual who provides dozens of firearms to a single person or multiple persons convicted of an offense considered a felony under federal law would have a guideline range greater than 12-18 months imprisonment. The BOL would be 14, and the offense level would increase for the number of firearms.[18] Even with a three-level downward departure for acceptance of responsibility, providing 8-24 firearms would result in a range of 18-24 months. And if the individual sells even more firearms or a specific type of firearm to a person considered a "felon" under federal law,[19]the guidelines would be even higher.

Imprisonment for "First Offenders" can be too severe and disproportionate. DOJ's claim that the sentences imposed on "first offenders" are not too long and likely under 24 months, ignores the problems with proportionate sentencing.[20] In FY 2016, 34% of defendants with 0 criminal history were convicted of drug trafficking. The median sentence length was 32 months – just 1.5 months below manslaughter,[21] and 8 months longer than the median sentence the Commission reported as the length of imprisonment for all persons in Criminal History Category I.[22] The data plainly shows that the sentences imposed under the current guidelines are often too severe. Imprisonment also has significant negative consequences for the imprisoned person, family, and society.[23] Accordingly, the Commission should amend the guidelines to encourage judges to impose probation for most "first offenders."[24]

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by her hair. He would not let her and her children move out, threating to harm her and her extended family. He continued to abuse her and eventually told her she could move out if she bought him a gun.

[16] USSG §2K2.1(a)(6)(A).

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