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September 8, 2008

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Final Priorities for Cycle Ending May 1, 2009

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders pursuant to 28 U.S.C. § 994(o) in response to the Commission's notice of proposed priorities for the amendment cycle ending May 1, 2009. Attached is a Memorandum addressing the issues identified by the Commission and additional issues we have identified, and an Appendix containing proposed revisions to the departure provisions of the Manual.

The Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), *Rita v. United States*, 127 S. Ct. 2456 (2007), *Kimrough v. United States*, 128 S. Ct. 558 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007), expand the bases for non-guideline sentences to include all offender and offense characteristics and to include policy problems in the applicable guidelines; require judges to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing; require judges to give reasons for their sentences; and encourage the Commission to base its guidelines on "empirical data and national experience." As such, these decisions have breathed new life into the Commission's ability and duty to evaluate and revise the guidelines in response to feedback from the courts, experts and practitioners, as contemplated by the Sentencing Reform Act (SRA).¹ Reasoned non-guideline sentences

¹ In explaining the Commission's duty to "review and revise," 28 U.S.C. § 994(o), the Senate Report stated as follows:

Subsection [(o)] requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. . . . It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of

can, at last, serve their core function in the constructive evolution of responsible guidelines. *See Rita*, 127 S. Ct. at 2464, 2465, 2468-69; *Kimbrough*, 128 S. Ct. at 573-74; *see also United States v. Jones*, 531 F.3d 163, 174 n.8 (2d Cir. 2008).

The new advisory system is a healthy one. Sentencing is more transparent, sentences are more fair and effective, and the Commission receives the robust feedback it needs to revise the guidelines. The advisory system also tends to expose even more clearly the flaws of mandatory minimum penalties. To the extent it has introduced greater uncertainty, as the Department of Justice notes with some disappointment in its letter of August 26, 2008, it is true that the parties are no longer precluded from demonstrating, or the courts from finding, that the guideline sentence is greater than necessary, or insufficient, to satisfy legitimate sentencing purposes. While this has undoubtedly lessened prosecutorial power over sentencing, the Defenders, as well as most neutral observers, believe that the new system is an obvious improvement.² And while the Commission may be concerned that the rate of within-guideline sentences has decreased somewhat and may be uncomfortable with the increased criticism of some of the guidelines (many of which the Commission itself has found to be excessive and to create unwarranted disparities), it seems apparent that the way to reduce the rate of below-guideline sentences and to ensure the Commission's ongoing role in guiding federal sentencing policy is to revise the guidelines in response to feedback from the courts, data and research, that is, to provide advice that makes sense and that the courts want to follow.³

deterrence, incapacitation, and rehabilitation. . . . [T]his subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

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

² *See, e.g., The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-Booker World* (June 1, 2006).

³ In its recent addition to USSG § 1A1.1, entitled "Continuing Evolution and Role of the Guidelines," the Commission credits the statutory mechanisms requiring it to publish proposed amendments and solicit input from experts and the public with bolstering its "ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines," characterizes the guidelines as "the product a deliberative and dynamic process that seeks to embody within federal sentencing policy [those] purposes of the sentencing," and indicates that it will "periodically review[] and revise[] the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources." USSG § 1A1.1 (citing *Rita*, 127 S. Ct. at 2464; *Booker*, 543 U.S. at 264; *Gall*, 128 S. Ct. at 594).

We urge the Commission to embrace the advisory system as an opportunity to substantially revise the guidelines to effectuate the purposes of sentencing and to carry out the SRA's broader goals.⁴ The Commission has been stymied in achieving those goals to some extent by mandatory minimum sentencing laws and other directives from Congress, but also to some extent by its own actions. The Commission has often promulgated amendments more severe than required by legislation. The Department has routinely and successfully argued for increased guideline ranges, or mandatory minimums that in turn lead to increased guideline ranges, on the basis that prosecutors need higher sentences to “merit” prosecution, or to use as leverage to induce guilty pleas and cooperation.⁵ But those are not legitimate purposes of sentencing and are nowhere to be found in the SRA. Further, the essential feedback mechanism through which the guidelines were to be reviewed and revised was stifled by restrictions on grounds for departure (many of which predict reduced recidivism, demonstrate reduced culpability, or indicate a need for treatment in a non-prison setting), the requirement of the now-excised § 3553(b) that courts could look only to the guidelines, policy statements and official commentary of the Commission to determine whether a factor had been adequately considered, and the absence of explanation in those limited sources.

The Commission should refocus its efforts to act in its characteristic institutional role. Insofar as the Commission seeks to fulfill its statutory obligation to fully take into account the purposes of sentencing set forth in § 3553(a)(2) in promulgating the guidelines and to see the guidelines maintain a role in the sentencing courts' determination of appropriate sentences, there would seem to be no other course but to provide the courts with advice they can respect and use. The Commission should do what the Court suggested in *Rita*:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence.

⁴ The Sentencing Reform Act instructed the Commission to ensure that the guidelines met the purposes of sentencing set forth in § 3553(a)(2), to measure the effectiveness of the guidelines in meeting those purposes, to avoid unwarranted disparities and unwarranted similarities, to reflect advancement in knowledge of human behavior, to minimize prison overcrowding, and to regularly review and revise the guidelines in consideration of comments and data coming to its attention and by consulting with authorities on and representatives of the criminal justice system. 28 U.S.C. §§ 991(b), 994(f), 994(g), 994(o), 995(a)(12)-(16).

⁵ For example, in support of the “trafficking” enhancement based on two firearms, the Department argued that firearms “traffickers” traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to “merit” the expenditure of resources to prosecute them. *See* DOJ Written Testimony at 3-4 (March 15, 2006), http://www.uscc.gov/hearings/03_15_06/Richard-Hertling.PDF.

The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 127 S. Ct. at 2464. This healthy interactive process was intended by the SRA but, as the Commission has pointed out, has been subverted: “To date the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that are also mentioned in the SRA.”⁶

The Commission has invited comment on several broad areas in response to the Supreme Court’s decisions, including an evaluation of their impact, development of guideline amendments, development of recommendations for legislation, and a study of mandatory minimums. We believe that the full positive impact of *Booker* has not yet been felt, and will not be felt, until the Commission amends those guidelines that are not based on empirical data and national experience. “While an advisory system is better than a mandatory one when the guidelines routinely recommend an unfair and excessive sentence, it is not as good as an advisory system with guidelines based on research, consultation with front-line participants, and reasoned deliberation.”⁷

To that end, we recommend in Part I (pp. 7-26), that the Commission begin by amending some of the guidelines that are most clearly not “the product of careful study,” *Gall*, 128 S. Ct. at 594, that “[do] not take account of ‘empirical data and national experience,’” and that “do not exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 575. The Commission should reform the relevant conduct guideline; narrow the career offender guideline to the extent possible within statutory limits and recommend to Congress that § 994(h) be repealed; and reassess and adjust the guidelines that are based on mandatory minimums, including the crack guidelines. This amendment cycle or in the very near future, the Commission should amend the guidelines to give the courts more flexibility to sensibly use alternatives to incarceration under the guidelines. These measures would greatly reduce the rate of non-guideline sentences.

In Part II (pp. 26-37) and Appendix A, we propose revisions to those parts of the Guidelines Manual that are urgently in need of correction to accurately reflect Supreme Court law, including the recently amended USSG § 1A1.1, all provisions relating to “departures,” USSG § 1B1.10(b)(2)(B), p.s., and USSG § 6A1.3, p.s.

⁶ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 77 (Nov. 2004).

⁷ Paul J. Hofer, *The Reset Solution*, forthcoming in the *Federal Sentencing Reporter*, 20:5.

In Part III (pp. 37-40), we strongly support the Commission’s proposal to prepare an updated study of mandatory minimum laws and offer suggestions regarding further evidence the Commission should include in that study.

In Part IV (pp. 41-42), we strongly support the Commission’s continuing work with Congress to eliminate the unwarranted disparity in mandatory minimums for crack and powder cocaine, and provide reasons that the Commission should recommend to Congress a 1:1 ratio.

In Part V (pp. 42-46), we recommend ongoing and long-term priorities, including reduction in overall severity levels, reduction in the prison population, an increased focus on rehabilitation; increased flexibility and simplicity; suggestions regarding data, hearings and training to improve the dialogue between the Commission, Congress, the courts, the parties and other participants; and recommendations to Congress that would re-affirm the Commission’s role as an independent expert body.

In Part VI (pp. 46-49), we address responses to legislation, including the Court Security Act. Because no changes are required by the Court Security Act and the data do not support increased guideline ranges, we recommend no changes based on that Act, except to remove the ten-level enhancement under amended USSG § 2H3.1(b)(2)(B), which was not published for comment.

In Part VII (pp. 50-56), we identify four circuit conflicts and recommend how they should be addressed, and also demonstrate that there is no circuit conflict regarding whether persons who are reimbursed for pecuniary losses are “victims” under USSG § 2B1.1(b)(2), contrary to the suggestion of the Department of Justice.

We appreciate the opportunity to provide our input on these important issues. As always, we are happy to provide additional information on any of the issues raised in this letter or on any other issue involving fair and appropriate sentencing policy. We look forward to continuing to work with the Commission in the coming year.

Very truly yours,

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cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
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Ken Cohen, General Counsel
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MEMORANDUM REGARDING PROPOSED PRIORITIES

I. Guidelines Urgently in Need of Amendment

A. Uncharged, Dismissed and Acquitted Offenses

Several times during the Guidelines' history and again two years ago, the Commission announced that it would reconsider relevant conduct, and this should be a top priority now. As set forth in detail in our letter of July 16, 2008, the treatment of uncharged, dismissed and acquitted offenses as required by USSG § 1B1.3 was not required or authorized by Congress, *see* July 16, 2008 Letter from Jon Sands to the Commission at 11, was not based on past practice or national experience, *id.* at 15-16, and, as subsequent research and experience has shown, transfers sentencing power from judges to prosecutors (contrary to the untested theory upon which it was based), creates unwarranted disparity, and brings disrepute to the federal criminal justice system. *Id.* at 12-15. Further, judicial fact finding of uncharged and acquitted crimes is uniquely vulnerable to as-applied Sixth Amendment challenges. *Id.* at 17.

We understand that former Commissioner John Steer, one of the original architects of relevant conduct and co-author of *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990), left the Commission with a proposal to eliminate acquitted conduct from § 1B1.3. In addition to the fact that its use "varies from judge to judge according to the jurist's thinking regarding use of acquitted conduct," he cites "the whole gamut of policy objections to its mandatory inclusion," and the fact that the guidelines are "alone among sentencing reform efforts in using acquitted conduct to construct the guideline range." *See An Interview With Former USSC Vice Chair John R. Steer*, *The Champion* (forthcoming, September 2008). This simple change can easily be made this amendment cycle. Respect for law and common sense, as demonstrated by the increasingly negative reaction in the press and judicial decisions, *see* July 16, 2008 Letter from Jon Sands to the Commission at 13-15, requires it.

Former Commissioner Steer also believes that "the aspect of the guideline that [is] most difficult to defend" is that uncharged conduct is "given the same guideline weight as . . . the count(s) of conviction." *Id.* He believes that the weight given uncharged conduct should be decreased in order to "address another major unfairness perception about the guideline and . . . provide an incentive to prosecutors to convict on more counts if they want the underlying conduct to count more." *Id.*

We agree that the guidelines' treatment of uncharged crimes is unsupportable, but we believe that these problems are best addressed by giving less weight to dismissed conduct (one form of uncharged conduct), and eliminating the use of conduct that was never charged. The government should not be able to obtain any additional prison time based on an offense for which it did not or could not obtain a grand jury indictment.

Moreover, no guideline system accords *any* weight to uncharged crimes.⁸ And reducing the weight would not eliminate the hidden and unwarranted disparities stemming from prosecutorial control over which defendants are or are not “charged” at sentencing with uncharged conduct, the untrustworthy nature of the information upon which it is often based, the differing approaches to “calculating” uncharged conduct by different probation officers and judges, and the real and perceived unfairness of its use. *See* July 16, 2008 Letter from Jon Sands to the Commission at 12-16.

We again urge the Commission to (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of “relevant conduct”; (2) significantly lessen the impact of charged counts that are dismissed as part of a plea agreement by limiting their impact on the guideline range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction as determined under § 1B1.3(a)(1); (3) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3; and (4) address the continuing problem under § 1B1.3(a)(1)(B) of including conduct of others that was merely “reasonably foreseeable” but not within the scope of the defendant’s agreement by making absolutely clear that § 1B1.3(a)(1)(B) does not include any conduct that was not within the scope of the defendant’s agreement.

B. Career Offender

The only priority proposed by the Commission that even touches on the career offender guideline is a proposed “multi-year study of the definition of ‘crime of violence’ used in both statutes and guidelines.” While serious sentencing research is always welcome, the grave and widely recognized problems associated with the career offender guideline demand more direct and immediate attention. First, the Commission should narrow the criteria of the guideline so that it is no broader than § 994(h) strictly requires. As we have previously demonstrated and discuss again below, the career offender guideline is far broader than § 994(h) requires, and this exacerbates the problems inherent in the statutory requirements. Second, as one of its proposals for legislation, the Commission should recommend that Congress repeal 28 U.S.C. §994(h), as it is in conflict with the purposes of sentencing in those cases where it strictly applies.

1. Narrow the Criteria.

There are several steps the Commission should take to improve and rationalize the career offender guideline while § 994(h) remains the law. If the Commission is concerned about the rising rate of below-guideline sentences, these steps would reduce that rate.

⁸ *See* Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512, at *3 (Sept./Oct. 1995).

a. Crime of Violence

There is an urgent need to narrow the current definition of “crime of violence” contained in USSG § 4B1.2 to bring it in line with the definition of “crime of violence” in 18 U.S.C. § 16 and the definition of “violent felony” in 18 U.S.C. § 924(e)(2)(B). Such harmonization cannot wait until the conclusion of the Commission’s proposed multi-year crime of violence study.

Both § 16 and § 924(e), as interpreted by the Supreme Court, require intentional, aggressive, violent conduct on the part of the defendant. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (“crime of violence” includes only “violent, active crimes”); *Begay v. United States*, 128 S. Ct. 1581, 1586-87 (2008) (“violent felony” includes only “purposeful, violent and aggressive conduct”). Section 4B1.2, however, includes offenses that do not involve purposeful, aggressive, violent conduct, including DUI,⁹ reckless or negligent manslaughter,¹⁰ reckless endangerment,¹¹ reckless assault,¹² simple assault,¹³ tampering with a motor vehicle,¹⁴ burglary of a non-dwelling,¹⁵ fleeing or eluding a police officer,¹⁶ operating a motor vehicle without the owner’s consent,¹⁷ possession of a short-barreled shotgun,¹⁸ oral threatening,¹⁹ car theft,²⁰ and failing to return to a halfway house.²¹

⁹*United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005).

¹⁰USSG § 4B1.2, comment. (n.1); *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005).

¹¹ *United States v. Parson*, 955 F.2d 858, 860-61 (3d Cir. 1992); *United States v. Stubler*, 2008 WL 821071, at *2-3 (3d Cir. Mar. 28, 2008).

¹² *United States v. Rendon-Duarte*, 490 F.3d 1142, 1147-48 & n.2 (9th Cir. 2007).

¹³ *United States v. Mangos*, 134 F.3d 460, 464 (1st Cir. 1998).

¹⁴ *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); *United States v. Young*, 229 Fed.Appx. 423, 424 (8th Cir. 2007).

¹⁵ *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992). The First Circuit has granted rehearing *en banc* to reconsider its holding in *Fiore*. *See United States v. Giggey*, No. 07-2317 (1st Cir. June 10, 2008).

¹⁶ *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

¹⁷ *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

¹⁸ *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

¹⁹ *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

²⁰ *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002).

Congress did not intend for such offenses to be used to punish defendants as violent “career offenders,” and their inclusion creates inconsistency with other law and unwarranted disparity due to differing interpretations by different courts. The Sixth Circuit has now held that the guideline must be interpreted consistently with § 924(e),²² and the Supreme Court has signaled the same by granting certiorari in a number of career offender cases, vacating the judgment below, and remanding for further consideration in light of *Begay*.²³ Several circuits, however, have long recognized that the definition of “crime of violence” as written in the commentary to the guideline is broader than the definition of “violent felony” in § 924(e), or the definition of “crime of violence” in § 16, and held that offenses not covered by these statutes are nonetheless covered by the guideline.²⁴

In addition, as noted in our letter of July 16, 2008, at pp. 4-5, the Commission should use “the elements of the offense of which the defendant was convicted” instead of “conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted” because this more accurately describes the categorical approach, is more clearly consistent with Application Note 2, and is what the Commission apparently intended.

In order to bring consistency to the definition, to narrow it to what Congress had in mind, and to further the goal of simplification, we propose that the Commission replace the second, third, and fifth paragraphs of the commentary in Application Note 1 of § 4B1.2 with the following:

“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.

²¹ *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002).

²² *See United States v. Bartee*, 529 F.3d 357 (6th Cir. 2008).

²³ *See, e.g., Archer v. United States*, 128 S. Ct. 2051 (2008), *on remand to United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

²⁴ *See, e.g., United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005); *United States v. Parson*, 955 F.2d 858, 860-61 (3d Cir. 1992).

The Commission should cite to the relevant Supreme Court authority, in order to avoid inconsistent interpretations.

Finally, it would make sense for the Commission to settle on a single definition of “crime of violence” to be used in all Guideline contexts. It causes only confusion and uncertainty to have, for instance, one definition of crime of violence for immigration offenses, *see* USSG § 2L1.2, and another for career offender. It is also exceedingly inefficient for the courts to have to undertake one analysis for the ACCA, another analysis for the career offender guideline, and yet another analysis for the immigration guideline. The fairness and efficiency of the sentencing process would be greatly improved if the Commission standardized with the definition of crime of violence set out above.

b. Drug Trafficking Offense

It is also urgent that the Commission narrow the definition of “controlled substance offense,” given that the majority of career offenders are classified as such on this basis, and the Commission’s own findings that in these cases, the career offender guideline greatly overstates the risk of recidivism, serves no deterrent purpose, creates unwarranted disparity, and has a disproportionate impact on African Americans.²⁵

The career offender guideline exceeds the congressional directive in § 994(h) by including inchoate offenses, state offenses, and a number of federal offenses the elements of which do not require dispensing, distributing or possessing with intent to distribute a controlled substance.²⁶ *See* USSG § 4B1.2(b) & comment. (n.1). The lowest statutory maximum for the serious drug trafficking offenses specified by Congress in § 994(h) was 15 years in 1984 and is now 20 years, but today’s guideline includes any offense that is

²⁵ 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 (Nov. 2004) [*“Fifteen Year Review”*]; *see also United States v. Pruitt*, 502 F.3d 1154,1168 (10th Cir. 2007) (McConnell, J., concurring) (“[t]his might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that ‘[t]he court . . . impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in’ § 3553(a)(2)”).

²⁶ In the latter category are: “[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance,” 21 U.S.C. § 841(c)(1), “[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance,” 21 U.S.C. § 843(a)(6), “[m]aintaining any place for the purpose of facilitating a controlled substance offense . . . if the offense of conviction established that the underlying offense (the offense facilitated) was a ‘controlled substance offense,’” 21 U.S.C. § 856, “[u]sing a communications facility in committing, causing or facilitating a drug offense . . . if the offense of conviction established that the underlying offense (the offense committed, caused or facilitated) was a ‘controlled substance offense,’” 21 U.S.C. § 843(b), and a “violation of 18 U.S.C. § 924(c) or § 929(a) . . . if the offense of conviction established that the underlying offense was a . . . ‘controlled substance offense.’”

punishable by as little as a year and a day, and regardless of whether it was a felony or a misdemeanor in the convicting jurisdiction. In part because of the Commission's expansion on the statutory definition, the career offender guideline fails to distinguish between small-time drug offenders and the serious drug traffickers Congress had in mind, resulting in a high number of below-guideline sentences,²⁷ and many opinions criticizing the guideline for being too severe and creating unwarranted disparity and unwarranted uniformity.²⁸

The Commission should distinguish between true career drug offenders on the one hand, and repeat street dealers and minor, sporadic offenders on the other,²⁹ by amending the definition of "controlled substance offense" as follows:

a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503, or that is a similar offense under state law, and that is punishable by imprisonment for at least ten years.

This definition is consistent with 28 U.S.C. § 994(h), and is also consistent with the definition in 18 U.S.C. § 924(e), from which the definition of "crime of violence" was derived.

c. Prior Felony Conviction

Section 994(h) directed the Commission to specify a prison sentence at or near the maximum term authorized for defendants with qualifying prior "felony" convictions.³⁰ When § 994(h) was enacted in 1984, the term "felony" was defined for all purposes under the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State law as a felony." See 21 U.S.C. § 802(13). Section 802(13) still defines the unadorned term "felony," and it applies specifically to several career offender

²⁷ See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-39 (March 2006).

²⁸ See, e.g., *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Pruitt*, 502 F.3d 1154, 1166-70 (10th Cir. 2007) (McConnell, J. concurring), cert. granted, judgment vacated, 128 S. Ct. 1869 (Apr 14, 2008); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2007) (per curiam); *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005).

²⁹ See, e.g., *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008) (defendant was convicted of distribution of one marijuana cigarette in 1992 and distribution of 6.92 grams of crack in 1996).

³⁰ 28 U.S.C. § 994(h).

predicates. *See* 21 U.S.C. § 951(b); *Burgess v. United States*, 128 S. Ct. 1572, 1579 (2008) (listing offenses to which the definition set forth in § 802(13) applies, including § 843(b) (use of a communication facility to commit a felony), § 843(d)(1)-(2) (sentencing enhancements for § 843(a)(6), (b) if one or more prior convictions for a felony), and § 848(c)(1) (“continuing criminal enterprise”).

The commentary, however, includes all convictions for an offense punishable by more than one year, “regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.”³¹ Defendants are thus unnecessarily classified as “career offenders” when they were actually convicted of a misdemeanor and received an insignificant jail sentence or no jail sentence at all.³²

As the Commission is aware, some states punish misdemeanors by up to two, three, or even ten years.³³ Convictions under these statutes, by definition, are for conduct considered by the convicting jurisdiction to be less serious than a felony. *See United States v. Colon*, slip op., 2007 WL 4246470, at *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (“Both of the predicate offenses were classified as misdemeanors under Massachusetts law, which provides, at minimum, some indication as to the seriousness of the underlying conduct.”). And because these offenses are considered less serious and are thought to have minor collateral consequences, they are not treated with the same level of care and scrutiny as that accorded felony charges.³⁴

The career offender guideline, however, treats such dispositions exactly the same as felonies, resulting in unwarranted uniformity. Defendants with prior misdemeanor convictions in some states have a countable career offender predicate, while defendants convicted of the identical conduct in most other states do not, resulting in unwarranted geographic disparity. *See* Table of Statutory Maxima for Assault and Battery (of 48 states reviewed, the statutory maximum for assault and battery was greater than one year

³¹ USSG § 4B1.2, comment. (n.1).

³² *United States v. Thompson*, 88 Fed. Appx. 480 (3d Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and a \$25 fine qualified as career offender predicate).

³³ *See, e.g.*, Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa re: Follow-Up to March 20 Hearing 5-6 (Mar. 29, 2007); *see also* Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, at *14 n.7 (May 24, 2007) (listing state misdemeanors punishable by more than two years imprisonment).

³⁴ *See* Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, *passim* (May 24, 2007) (discussing difference in collateral consequences between felony and misdemeanor convictions in the states).

in only Maryland, Massachusetts and Pennsylvania).³⁵ We therefore recommend that the Commission revise the commentary as follows:

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

In addition, we continue to urge the Commission to add a requirement that the sentence served, or at least the sentence imposed, exceeded a threshold that reasonably distinguishes between serious and minor offenses. Under the career offender guideline, a defendant who served, or was sentenced to, 6 months of unsupervised probation, and a defendant who served, or was sentenced to, 20 years in prison are treated exactly the same.³⁶

The most accurate measure of the seriousness of the offense is the sentence actually served. A large number of jurisdictions continue to sentence defendants on the understanding that the defendant will serve less than 50% of the time imposed,³⁷ and the average time served for all states as of 2004 is 66% of the sentence imposed.³⁸ A “sentence served” rule would also solve the false equality generated by treating non-parole jurisdictions the same as parole jurisdictions.³⁹ Further, as the Second Circuit recognized in *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), deterrence is a major purpose of the career offender guideline and this “requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses... In some circumstances, a large disparity in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present ‘to a degree’ not adequately considered by the Commission.” *Id.* at 220; *see also Colon, supra*, at *6

³⁵ Available at

http://www.fd.org/pdf_lib/Appendix%20F%20Tables%20of%20Statutory%20Maxima.pdf.

³⁶ *See United States v. Washington*, 2001 WL 1301744, at *5 (6th Cir. Aug. 8, 2001) (“the district court did not abuse its discretion by electing not to sentence Defendant as a ‘career offender’ subject to a sentence of 360 months to life imprisonment, where Defendant’s prior convictions resulted only in probation”).

³⁷ A DOJ study found that, between 1992 and 1994, inmates incarcerated for violent offenses in parole jurisdictions (which include most states) served an average of 48 % of the sentence they had received. *See* U.S. Dept. of Justice, Bureau of Justice, *Prison Sentences and Time Served for Violence* (April 1995), available at <http://www.ojp.usdoj.gov/bjs/abstract/psatsfv.htm>. For non-violent offenses, the percentage rate is likely lower still.

³⁸ <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/sheets/scs04t105.csv>.

³⁹ U.S. Sentencing Commission, *Simplification Draft Paper, Chapter Four, Part V* (failing to distinguish between sentences imposed in parole and non-parole systems is problematic because defendants may serve two very different terms of imprisonment).

(“The relationship between the current sentence and prior sentences is an important factor in the over-representation inquiry.”).

The Commission should revise the guideline to count only those offenses for which time served was at least 36 months. A 2004 Department of Justice Report estimates that people sentenced to state prison for violent offenses of all types, from minor (39 months) to serious (147 months), will serve an average of 61 months.⁴⁰

In the alternative, the Commission should count only sentences imposed of at least 60 months. A 2004 Department of Justice study reports that the average sentence imposed for all violent offenders sentenced to state prison was 92 months.⁴¹ At the very least, the Commission should count only those offenses assigned three criminal history points under § 4A1.1(a) for purposes of § 4B1.2. Because the information about the sentence imposed is already part of the criminal history calculation, there can be no objection based on the difficulty of obtaining the information, and it would serve the goal of simplification.

d. Departure

If the Commission wishes for departures to remain relevant, it should remove the limit to one criminal history category for departures under USSG § 4A1.3(b)(3)(A), p.s. While this limit was adopted in response to the PROTECT Act, it was not required by the PROTECT Act. This limited departure is inadequate to correct the over-representation when the Commission’s own research shows that the criminal history category for offenders qualifying under the career offender guideline is often several categories higher than their recidivism rate would justify,⁴² and is out of step with feedback from the courts.

2. Recommend Repeal of Section 994(h).

The Commission’s own research and sentencing data, as well as feedback from judges, all demonstrate that even applications of the career offender guideline that are clearly required by § 994(h) are unnecessary and interfere with the purposes of sentencing and the broader goals of the SRA, including fairness and avoidance of unwarranted disparity.⁴³ While the Commission can and should ameliorate the damage by scaling back the guideline definitions to the statutory terms, the statute itself hobbles

⁴⁰ See <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/sheets/scs04t105.csv>.

⁴¹ See <http://www.ojp.usdoj.gov/bjs/sent.htm#publications>.

⁴² *Fifteen Year Review* at 134.

⁴³ See 28 U.S.C. § 991(b)(1)(A), (B); 18 U.S.C. § 3553(a).

the Commission's ability to adjust and improve the career offender guideline in response to new information and understanding as contemplated by the SRA.⁴⁴

The most problematic aspect of § 944(h) and the one which presents the greatest obstacle to ensuring that the career offender guideline advances rather than subverts the objectives of the SRA is the provision which states that “[t]he Commission shall assure the guidelines specify a sentence at or near the maximum term authorized.” The Commission's own research shows unequivocally that this mandate results in systematic and unjustified over-punishment for large numbers of defendants.

For instance, it is well documented that automatically elevating defendants classified as career offenders to criminal history category VI overstates their true risk of recidivism. The overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus “more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules.”⁴⁵ This “makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.”⁴⁶ In the words of the Commission's own report: “[I]t appears that assigning offenders to criminal history category VI” under the career offender guideline “is for reasons other than their recidivism risk.”⁴⁷

In fact, the Commission has never indicated what reasons might justify disparate treatment of prior drug trafficking or crimes of violence (compared to other prior offenses) and no justifiable reason is apparent. There is no reason to believe, for example, that repeated drug trafficking or crimes of violence categorically indicate greater culpability than do repeated fraud, tax, or environmental offenses, or any other offenses that are not presently included as predicate offenses. In this sense, sentencing within the ranges recommended by the career offender guideline actually *creates*

⁴⁴ See 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”); 28 U.S.C. § 991(b)(1)(C) (Commission to establish sentencing policies and practices that “reflect, to the extent practicable advancement in knowledge of human behavior”); 28 U.S.C. § 991(b)(2) (Commission to “develop means of measuring the degree to which the sentencing . . . practices are effective in meeting the purposes of sentencing”); 28 U.S.C. § 995(a)(12)-(16) (Commission to systematically collect, study and disseminate empirical evidence of sentences imposed under the guidelines, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes).

⁴⁵ *Fifteen Year Review* at 134.

⁴⁶ *Id.* (emphasis in original).

⁴⁷ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 9 (May 2004).

unwarranted sentencing disparity. Thus, it is no wonder that the departure rate in career offender cases is substantially higher than is typical for other guidelines.

Moreover, the Commission has determined that the draconian punishments regularly visited on low- to mid-level drug defendants by the career offender guideline cannot be justified by any other purpose of sentencing. These penalties have minimal deterrent effect. “[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating low-level drug sellers prevents little, if any, drug selling; the crime is simply committed by someone else.”⁴⁸

The Commission has not yet released a report on career offenders based on “crimes of violence” as the instant offense or one or more predicate offenses. The Commission did report in 2004 that the recidivism rate of those whose career offender status was based on one or more prior “crimes of violence” was about 52%.⁴⁹ Yet, this did not mean that the recidivating events were violent, or even that they were drug trafficking offenses. Only 12.5% of the recidivating events for Category VI offenders overall were a “serious violent offense,” defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses, and only 4.1% were drug offenses.⁵⁰ Thus, it appears likely that the vast majority of career offenders based on “crimes of violence” are not the threat to public safety that Congress envisioned when it enacted § 994(h).

Finally, the career offender guideline has created racial disparities that did not exist in the pre-Guidelines era. The Commission reports that sentences in the Guidelines era “have a greater adverse impact on black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation,” and one of the reasons is the “increasingly severe treatment of . . . repeat offenders” under the career offender guideline.⁵¹ In FY 2000, black offenders were 26% of offenders sentenced under the guidelines generally, but 58% of offenders sentenced under the career offender guideline.⁵² Most of these were subject to the guideline based on drug trafficking crimes, for which black offenders have a higher risk of conviction than similarly situated white offenders.⁵³

⁴⁸ See *Fifteen Year Review* at 134.

⁴⁹ *Id.*

⁵⁰ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 32, Ex. 13 (May 2004).

⁵¹ *Id.* at 135.

⁵² *Id.* at 133.

⁵³ *Id.* at 133-34.

Courts have long recognized these problems and have, for many years, urged the Commission to address them.⁵⁴ Moreover, post-*Booker*, courts have increasingly used their expanded discretion to impose below-guideline sentences in career offender cases.⁵⁵ According to the Commission, “departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”⁵⁶ However, § 994(h) prevents this feedback loop from operating effectively in the career offender context because it unduly constrains the Commission’s ability to improve the guideline in ways that incorporate this judicial wisdom and experience. See *United States v. LaBonte*, 520 U.S. 751 (1997). In order for the Guideline development process to work as intended, § 994(h) must be discarded.

Significantly, the repeal of § 994(h) would in no way thwart Congress’s goal of ensuring that “a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets,” *i.e.*, those “who stab, shoot, mug, and rob,”⁵⁷ receive stern punishment. First, there are several statutory sentencing enhancements, such as those found at 21 U.S.C. § 851 and 18 U.S.C. § 3559(c), which mandate stiff prison terms for repeat offenders. Indeed, the Commission has found that the career offender increase and such statutory enhancements constitute “unwarranted double counting.”⁵⁸ Second, and even more importantly, the courts now possess the authority and discretion to identify those truly dangerous offenders who have made a “career” out of serious crime and, through § 3553(a), to impose a punishment as severe as their misdeeds deserve. This approach, relying on the experience and expertise of judges on the ground, is much more likely to capture the true “career offender” than a “one-size-fits-all” guideline based on a statutory mandate. Whatever purposes § 994(h) may once

⁵⁴ See, e.g. *United States v. Pruitt*, 502 F.3d 1154, 1167-70 (10th Cir. 2007) (O’Connell, J., concurring) (collecting cases), *cert. granted, judgment vacated*, 2008 WL 1699453 (U.S. Apr 14, 2008); see also Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996) (finding “extensive use of [downward] departures from sentences generated by the career offender guideline,” that these were “quite substantial,” “typically” to the sentence that would have applied absent the career offender provision).

⁵⁵ One year after *Booker*, the rate of below-guideline sentences in career offender cases had risen to 21.5%, and average sentence length markedly decreased. Ninety-four percent of below-guideline sentences were in cases with an instant offense of drug trafficking, robbery or firearms, and 75% were drug trafficking cases. See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-40 (March 2006).

⁵⁶ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (Oct. 2003).

⁵⁷ 128 Cong. Rec. 26,512, 26,518 (Sept. 30, 1982).

⁵⁸ USSC, App. C, Amend. 506 (Nov. 1, 1994).

have been intended to serve, it now demonstrably thwarts, rather than advances, the goals of sentencing.

C. Re-Assess and Adjust the Guidelines that Are Based on Mandatory Minimums.

We strongly support the Commission's proposal to issue a new report on mandatory minimum sentences, and urge the Commission to recommend to Congress that it abolish mandatory minimums. *See* Part III. In the meantime, the Commission should re-evaluate all of the guidelines that are based on mandatory minimum statutes, and amend them to ensure that they comply with the purposes of sentencing in the most fair, efficient and effective manner possible. USSG § 5G1.1(b) can operate in cases where the mandatory minimum exceeds the amended guideline range.

Kimbrough highlighted the fact that mandatory minimums have interfered with the Commission's development of rational and fair sentencing guidelines, as the Commission itself had already acknowledged.⁵⁹ Last year, the Criminal Law Committee of the Judicial Conference urged the Commission to assess and adjust the existing guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums.⁶⁰ The Judicial Conference has opposed mandatory minimums since 1953 -- because they "unnecessarily limit judicial discretion," "interfere with the operation of the Sentencing Reform Act," and "may, in fact, create unwarranted sentencing disparity."⁶¹ Further, guidelines that are based on nothing more than mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply.⁶² The Criminal Law Committee therefore believes that the Commission is "obligated to make an independent assessment of what the appropriate sentence should be."⁶³

If the Commission is not prepared to re-assess and adjust the guidelines that are based on mandatory minimums now, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels. *See* USSG, App. C, Amend. 706,

⁵⁹ "In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission." *Fifteen Year Review* at xvii.

⁶⁰ *See* Comments of the Criminal Law Committee of the Judicial Conference 4, 5 (March 16, 2007), http://www.uscc.gov/hearings/03_20_07/walton-testimony.pdf.

⁶¹ *Id.* at 3.

⁶² *Id.* at 4.

⁶³ *Id.* at 3.

Reason for Amendment (Nov. 1, 2007). This is true of all of the drug guidelines, and should be addressed.

We also support the Commission in continuing to urge Congress to eliminate the unwarranted disparity in sentencing between crack and powder cocaine offenders. *See* Part IV. However, we urge the Commission to reconsider its position that it cannot amend crack guideline penalties beyond the two-level reduction unless and until Congress creates a new ratio at the two mandatory minimum levels, particularly if Congress does not act quickly. First, Congress did not require the Commission to key guideline ranges to mandatory minimum penalties at the two statutory levels, or to extrapolate guideline ranges below, between and above those levels. *See Kimbrough v. United States*, 128 S. Ct. 558, 571-73 (2007). Second, as the Judicial Conference has pointed out, the Commission has an obligation under the Sentencing Reform Act to make its own assessment of the appropriate sentence, independent of mandatory minimum statutes, and to adjust the guidelines accordingly.⁶⁴ Third, the guidelines already take account of any mandatory minimum that is higher than the recommended guideline range through USSG § 5G1.1(b).

D. Alternatives to Incarceration

We welcome the Commission's proposal to consider alternatives to incarceration, and offer some ideas for implementing such alternatives in the guidelines. We also look forward to the public dissemination of the record of the "Symposium on Crime and Punishment in the United States: Alternatives to Incarceration" hosted by the Commission on July 14-15, 2008.

Through the Sentencing Reform Act, Congress directed the Commission to design a federal sentencing policy that "ensure[d] that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society" while permitting "increased use of restitution, community service, and other alternative sentences" in all other cases.⁶⁵ Contrary to Congress's intent, the Guidelines make prison a potential sanction in every case, and the only sanction in the vast majority of cases. The result has been massive overcrowding in the federal prison system and exorbitant costs to taxpayers with no demonstrable increase in public safety.⁶⁶

⁶⁴ *See id.* at 3-5.

⁶⁵ *See* Pub. L. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (emphasis added); *see also* 28 U.S.C. § 994(g) (the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); *id.* § 994(j) (Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" and the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence *that results in serious bodily injury*") (emphasis added).

⁶⁶ *See, e.g.,* Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 *Stan. L. Rev.* 339 (Oct. 2005).

This Commission is now poised to do what no other Commission has done – rectify the problems of over-incarceration caused by Guideline policies. The information presented at the Commission’s comprehensive Symposium on Alternatives to Incarceration confirmed Congress’s original finding, now twenty-four years old, that alternatives to prison for nonviolent and nonserious offenses serve “the interests of society as a whole, as well as individual victims of crime.”⁶⁷ It also confirmed the Commission’s own finding – reflected in numerous Commission-generated reports throughout the past two decades – that the Guideline system routinely calls for unnecessary incarceration.⁶⁸

Through this accumulation of research, culminating with its recent Symposium, the Commission has amassed a wealth of sound empirical support that it can now draw upon to refine the Guidelines’ approach to the question of whether and when a prison sentence – and only a prison sentence – will adequately serve the purposes of punishment. Federal courts around the country are already establishing programs that offer community-based alternatives to prison and encourage defendants’ successful reentry into society without guidance from the Commission. The Commission should encourage these efforts and foster further experimentation with programs that will serve both defendants and the public by simultaneously reducing recidivism and the heavy costs of unnecessary incarceration. We encourage the Commission to embrace Congress’s direction, take concrete steps in this cycle, and revise those guideline sections which are most at odds with current research and data concerning human behavior as it relates to the criminal justice process.⁶⁹

1. Expand the Availability of Alternative Sentences in the Guidelines Sentencing Table.

We can no longer afford to pretend that a penalty structure that ties the availability of alternatives to pre-determined Zones in the Sentencing Table serves the purposes of punishment. This fact was echoed time and again at the Symposium by representatives from all sectors of the criminal justice community. In the state systems, the ability to fashion a sentence based on empirical data regarding offense type, individualized offender characteristics, and need-based conditions has been crucial to reducing prison populations and costs while increasing public safety through reduced

⁶⁷ See Pub. L. 98-473, § 239, 98 Stat. 1987, 2039 (1984).

⁶⁸ See *Fifteen Year Review* at 47-49; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12-16 & Exs. 9-11 (May 2004); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* (1996); USSC, Alternatives to Imprisonment Project, *The Federal Offender: A Program of Intermediate Punishments* (Dec. 28, 1990).

⁶⁹ See 28 U.S.C. §§ 991(b)(1)(C), 994(f).

crime rates, arrests and revocations. In the problem solving courts in the federal system, the same flexible, individualized approach has worked on the back end to ensure that those offenders with a high recidivism risk successfully reenter society and do not return to prison.

Through the experience of states like Washington, Pennsylvania, Virginia, Texas, New York, and Maryland, and federal districts like Massachusetts, Oregon, Utah, the Western District of Michigan, the Western District of Philadelphia, and the Eastern District of Missouri (to name just a few of the jurisdictions represented at the Symposium), we know that there are many non-prison options that better serve the purposes of just punishment, incapacitation, deterrence and rehabilitation. As but one example, the Washington State Institute for Public Policy has issued a “Consumer Reports”-type analysis of the benefits in crime reduction and cost savings of over 70 different types of alternative sanctions.⁷⁰ Each of the jurisdictions represented at the Symposium has demonstrated through experience that the best way to ensure success in every case is to establish a sentencing system that is sufficiently flexible to address the specific needs of each offender.

Given this universal experience, it is a mistake to attempt to limit and control (except in broad strokes) whether and when courts can impose alternative sentences. The guidelines closely link the availability of alternatives to the offense level, and to a lesser extent, the criminal history category, even though these measures do not reflect the considerations that judges have traditionally employed to decide if prison is necessary and beneficial for a particular defendant. The guidelines zones do not address an offender’s amenability to treatment, the availability of treatment options in the community that are not found in prison, or the impact of incarceration on the defendant’s employment, family, or health. In short, the guidelines fail to provide useful guidance to judges regarding which defendants can be safely, effectively, and sufficiently punished with a non-prison punishment, and which defendants for whom prison is “necessary.”

In addition to placing limitations on who can receive alternative sentences, the Guidelines arbitrarily limit the types of alternatives judges can consider. By statute, probation is generally available to any defendant convicted of a Class C felony or less, meaning any crime punishable by less than 25 years; under the Guidelines, it is available only for those with a sentencing range of 1 year or less.⁷¹ And although courts are

⁷⁰ See Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (Oct. 2006).

⁷¹ Compare 18 U.S.C. § 3561 with USSG Ch. 5, Pt. A & § 5C1.1(c)(3). Under the Guidelines, only those few defendants who face a maximum of six months in prison and thus fall within Zone A can receive a straight probation sentence, meaning a sentence without any type of confinement, despite the fact that confinement for certain types of low-level offenders has been empirically shown to *increase* recidivism risk. Compare USSG § 5C1.1(b)-(d) with USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 & Ex. 12 (May 2004). The court cannot sentence Zone B defendants to probation unless the sentence requires community confinement or home detention, and a supervised release sentence requires at least one month incarceration. See USSG § 5C1.1(c)(3). Zone C defendants must

statutorily authorized to impose on probationers such beneficial conditions as treatment, community service, fines and restitution, only probation with a condition of intermittent confinement, community confinement or house arrest is acceptable under the Guidelines for defendants subject to a sentencing range of between 6 and 12 months (Zone B defendants), while those subject to a range of more than 12 months are excluded from receiving a probation sentence altogether.⁷²

The Commission should revise the Guidelines' cramped approach to non-prison alternatives in favor of a more flexible approach that permits courts to tailor probationary conditions to fit the needs of any particular offender. It can do this without further complicating the Manual by simply removing the Zones altogether and revising USSG § 5C1.1 to permit probation and supervised release for nonviolent and nonserious offenders with whatever conditions the court finds appropriate in light of § 3553(a). Standard release conditions that are currently ignored by § 5C1.1, such as restitution, community service, electronic monitoring, intensive supervision, day reporting, substance abuse or mental health treatment, and the like, can be added to either the guideline or its commentary to provide guidance to the court on the types of sanctions available.⁷³ Further guidance could be provided by including examples of offenses and types of offenders who statistically tend to benefit from particular types of sanctions (e.g., residential substance abuse treatment for substance abusers, mental health treatment for the mentally ill, etc.). To the extent the data suggests non-prison sentences are inappropriate for certain offenders, such as truly violent offenders who need to be incapacitated, the commentary can so advise the courts.

Removing the artificial lines drawn by the Zones in favor of rational guidance based on empirical evidence serves the interests of simplicity and efficiency, in addition to allowing for more effective, humane and rational sentences. The guideline ranges themselves would not need to be adjusted, nor would the criminal history categories. A guideline range of 30-37 months for a drug offender, for example, would remain but could be satisfied, when appropriate, by a sentence of 24 months in a residential treatment program, 6 months in community or home confinement, and 6 additional months of supervised probation. Additional conditions, such as community service, restitution, or electronic monitoring could be added where necessary to serve the purposes of punishment and ensure the safety of the community. At the very least, the Commission should collapse the Zones to make all defendants in Zones A-C eligible for

serve at least half of their sentences in prison before supervised release can begin, and probation is not permitted at all. *Id.* at § 5C1.1(d).

⁷² Compare 18 U.S.C. § 3563(b) with USSG § 5C1.1(c)(3), (d).

⁷³ We urge caution with respect to GPS monitoring as a non-prison alternative. A panelist at the Symposium indicated that web-based GPS monitoring data has been made accessible to local law enforcement personnel for prosecutorial purposes. Another panelist pointed to research showing that GPS monitoring may be “dysfunctional” for low risk offenders. The impact on privacy and efficacy must be analyzed with care.

the full panoply of non-prison sentences currently available by statute, and should conduct studies to determine which Zone D defendants should also be eligible for such sanctions, for example, those defendants who were not convicted of a crime of violence that resulted in serious bodily injury. *Accord* 28 U.S.C. § 994(j).

We are eager to work with the Alternatives Working Group to develop specific language that would permit courts the necessary flexibility to craft non-prison sentences in appropriate cases and, in so doing, to better ensure public safety both during and after the supervisory period.

2. Amend Chapter Five To Add a “First Offender Safety Valve” Provision.

In addition to removing the artificial Zones in the Sentencing Table, the Defenders join the Practitioners Advisory Group in recommending that the Commission amend Chapter Five to add a “first offender safety valve, which” would operate similarly to § 5C1.2.⁷⁴ This would achieve § 994(j)’s mandate to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense” in a simpler, more effective way than tinkering with the criminal history categories or otherwise further complicating the Sentencing Table.

3. Amend Chapter Five To Encourage Specific Alternative Sanctions and Programs That Have Been Proven To Decrease Recidivism Risk.

Part F of Chapter Five currently provides only four alternative sentencing options for courts to consider: community confinement, home detention, community service, and shock incarceration. Of those options, shock incarceration is no longer available through BOP, and the Manual places restrictions on the other three. We recommend that the Commission amend Part F by deleting the first two sentences of Application Note 2 to § 5F1.1, which recommend that the court limit community confinement to no more than 6 months unless necessary to accomplish a specific rehabilitative program, deleting Application Note 1 to § 5F1.3, and expanding the availability of alternative sentencing options as discussed in subpart 1, *supra*. In addition, the Commission should recognize that fines and restitution can be punishing sanctions and allow them to offset any prison time that is necessary to ensure proportionate punishment, as is currently possible with other alternatives under §5C1.1(e).

4. Amend Chapter Seven to Recognize and Encourage a Defendant’s Participation in Reentry Programs.

The Commission should also amend Chapter 7 to make clear that:

⁷⁴ See July 23, 2008 Letter from Practitioners Advisory Group to U.S. Sentencing Commission at 4-6.

- Before revoking or terminating any term of supervised release, the court should consider whether the purposes of sentencing would be served by requiring the defendant to participate in a court-approved post-sentence reentry program.
- In determining whether to impose a term of imprisonment for a violation of supervised release conditions, the court should consider the availability of alternatives to incarceration.

5. Recommend That the Bureau of Prisons Revise Its Policies to Address the Problem of Over-Incarceration.

Finally, we urge the Commission to recommend that the Bureau of Prisons revise its policies that conflict with federal sentencing policy as reflected in statutes or the Guidelines and, if BOP refuses, to promulgate appropriate policy statements recommending compensatory reductions at sentencing. The Commission is empowered to take these actions pursuant to its authority under 28 U.S.C. § 991(b)(2) to develop means of measuring the degree to which sentencing, penal and correctional practices are effective in meeting the purposes of sentencing set forth in § 3553(a)(2), as well as its obligations under 28 U.S.C. § 994(g) & (q) to make recommendations to BOP that may become necessary as a result of the Guidelines, to minimize prison overcrowding, and to analyze and recommend the maximum utilization of resources to deal effectively with the Federal prison population. Those BOP policies that should be revised include:

- Its practice of awarding good time credits at a rate of 12.8% of the sentence imposed instead of the 15% rate the Commission used when constructing the Sentencing Table;
- Its refusal to provide a mechanism for meaningfully implementing USSG § 1B1.13's policy on sentence reductions for "extraordinary and compelling circumstances;"
- Its unilateral discontinuation of the federal boot camp despite its express inclusion as a sentencing option under USSG § 5F1.7;
- Its failure to implement the Residential Drug and Alcohol Program consistent with 18 U.S.C. § 3621, USSG § 4A1.1 and Commission studies on recidivism;
- Its sentence computation policies, which conflict with 18 U.S.C. §§ 3584 & 3585 and USSG § 5G1.3; and

- Its refusal to revise its community corrections policies as contemplated by 18 U.S.C. §§ 3621 & 3624, as amended by the Second Chance Act.⁷⁵

Once again, we commend the Commission for its interest in alternatives to imprisonment and look forward to working with the Commission as it seeks to better integrate these alternatives into the federal guidelines sentencing system.

II. Correcting the Manual to Accurately Reflect Current Law

Consistent with the Commission’s intention to continue its work on federal sentencing policy in light of *Booker* and subsequent Supreme Court decisions, the Commission should act quickly to revise the Manual to accurately reflect those decisions.

A. USSG § 1A1.1, “Continuing Evolution and Role of the Guidelines”

The Commission should amend the soon-to-be-effective commentary in USSG § 1A1.1, entitled “Continuing Evolution and Role of the Guidelines,” so that it honestly reflects both the vitality of the guidelines and the courts’ role in their constructive evolution. The commentary, which was not the subject of public notice and comment,⁷⁶ identifies two related themes in the decisions: first, that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing and as such

⁷⁵ Each of these issues is discussed extensively in Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, the Bureau of Prisons and the Need for Full Implementation of Existing Ameliorative Statutes to Address Unwarranted and Unauthorized Over-Incarceration* (June 2008), which was included in the Commission’s materials from the Alternatives to Incarceration Symposium. For efficiency, this letter incorporates that article by reference.

⁷⁶ Although Rule 4.3 of the Rules of Practice and Procedure currently permits the Commission “to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x),” we again urge the Commission to provide notice and comment with respect to commentary, policy statements and amendments thereto. While there may have been a rationale for treating commentary and policy statements differently from guidelines in the past, there is no reason do so post-*Booker*, as the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission.

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

continue to play an important role in the sentencing court's determination of an appropriate sentence; and second, that the guidelines are evolutionary in nature.

The commentary fails to provide an accurate and balanced account of the Supreme Court's decisions. First, it inaccurately suggests that the Supreme Court's cases set forth a three-step sentencing procedure in which the court considers the guideline range first, policy statements regarding departure second, "and then the factors under 18 U.S.C. § 3553(a)," as if the governing statute were some sort of afterthought. There is no such three-step procedure to be found in the Court's decisions, and the Court made perfectly clear that the "Guidelines are only one of the factors to consider when imposing sentence," *Gall v. United States*, 128 S. Ct. 586, 602 (2007), that the Guidelines, "formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence," *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), and that "[t]he statute, as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *Id.* at 570.

In *Gall*, the Court set out a very different three-step procedure: First, "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Second, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Third, the judge should explain. *Gall*, 128 S. Ct. at 596-97. Moreover, in *Gall*, the Court made no mention of the Commission's policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements.

At page 2465 of *Rita*, which the commentary cites for the Commission's three-step procedure, the Court did not describe that three-step procedure but instead listed departures as one of several possible arguments for a non-guideline sentence:

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

Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

In sum, policy statements regarding departure are not a second step of the sentencing procedure. They are merely one argument the court may consider, if made. They are not considered in every case, and they are not necessarily considered even when

their subject matter applies to the offense or offender, as demonstrated in *Gall*. They certainly do not take precedence over § 3553(a)(1), (a)(2) or (a)(3). We urge the Commission to replace this inaccurate slant on the Supreme Court’s decisions with what the Court actually said.

Second, the commentary entirely ignores the most important feature of the Court’s recent sentencing jurisprudence, *i.e.*, those aspects of the Court’s decisions which invite a critical assessment of the guidelines and which are intended to assist in the evolution of the guidelines. It fails to note that judges may impose a sentence outside the recommended guideline range even in a “mine run” case when the judge determines that a non-guideline sentence better complies with § 3553(a). This may occur, for example, when the court determines that the guideline represents an “unsound judgment” based “solely on policy considerations, including disagreements with the Guidelines.” *Rita*, 127 S. Ct. at 2468; *Kimbrough*, 128 S. Ct. at 570. It should be noted that the possibility of imposing a sentence outside the recommended range in these circumstances is what preserves the constitutionality of the now-advisory guidelines and is thus a crucial feature of the new system.⁷⁷ It certainly seems desirable to acknowledge, rather than omit, this constitutional reality within the *Guideline Manual*.

As the rationale for permitting a presumption of reasonableness on appeal, for the guidelines being the starting point and initial benchmark, and for requiring careful consideration of the extent of a variance, the Court said that the guidelines were *generally* based on empirical evidence of past practice and that they *can* evolve in response to court decisions and input from stakeholders.⁷⁸ However, this account of guideline development reflects the ideal envisioned in the SRA, and not necessarily the reality with respect to a given guideline. “Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guideline range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.” *Gall*, 128 S. Ct. at 594 n.2. While “[i]n the main, the Commission

⁷⁷ See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (system that does not permit judges to sentence above a recommended range based on “general objectives of sentencing” alone without a “factfinding anchor” violates the Sixth Amendment.).

⁷⁸ As the rationale for permitting, but not requiring, a presumption of reasonableness on appeal, the court said that it was “fair to assume” that the guidelines reflect a “rough approximation” of sentences that “might achieve 3553(a) objectives” because original Commission used an “empirical approach” based on “past practice” and the guidelines “can” evolve in response to non-guideline sentences and input from practitioners and experts. *Rita*, 127 S. Ct. at 2464-65. As the rationale for requiring “that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate,” the Court said that the guidelines are the product of “careful study” based on “extensive evidence” derived from “thousands” of pre-guideline sentences. *Gall*, 127 S. Ct. at 594. And, as the rationale for the guidelines being the starting point and benchmark, the Court said that the Commission has the “capacity” to base the guidelines on “empirical evidence and national experience.” *Kimbrough*, 128 S. Ct. at 574.

developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports,” it “did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.” *Kimbrough* at 567. When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)’s purposes, even in “a mine-run case.” *Id.* at 575.

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

While it is understandable that the Commission may be uncomfortable acknowledging that judges may now critically review its judgments and find them unsound, this review is a crucial element in the ongoing revision of the guidelines, as anticipated by the Court. The appellate presumption of reasonableness of a within-guideline sentence permitted by *Rita* explicitly does not allow courts of appeals to afford “greater factfinding leeway to [the Commission] than to [the] district judge.” *Id.* at 2463. Challenges to guideline recommendations can generate testimony, findings and other information that the Commission can use in its ongoing review and revision of the guidelines. These challenges should at least be acknowledged, and preferably encouraged, to ensure adequate feedback and healthy evolution of the guidelines system.

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

Third, the commentary provides an incomplete description of appellate review by including only the guidelines and extent of variance as issues for review, while omitting all other potential procedural errors (treating the guidelines as mandatory, failing to consider the purposes and factors set forth in § 3553(a), selecting a sentence based on clearly erroneous facts, and failing to explain the sentence whether inside or outside the guideline range) and omitting the deference that is due the district court’s decision as to

the extent of any variance and the fact that no special deference is due based on the uniqueness of the case. The Court described appellate review as follows:

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

Gall, 128 S. Ct. at 597-98 (emphasis supplied). We urge the Commission to include the italicized language.

Fourth, the commentary inaccurately suggests that Congress can impose mandatory sentencing practices on the courts by issuing specific directives to the Commission: “Congress retains the authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines.” To support this proposition, the commentary takes out of context a passage from *Kimbrough*: “As the Supreme Court noted in *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007), ‘Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders ‘at or near’ the statutory maximum. See 28 U.S.C. § 994(h).’” The full quotation from *Kimbrough* is as follows: “Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders ‘at or near’ the statutory maximum. 28 U.S.C. § 994(h).” *Kimbrough*, 128 S. Ct. at 571. The Court’s comment addressed the government’s argument that the Anti-Drug Abuse Act “implicitly” required *the Commission* to write guidelines corresponding to the statutory mandatory minimums and extrapolating below, between and above those two levels, and explained that there was no congressional directive *to the Commission* to do so.

When Congress directs the Commission to promulgate or amend a guideline, even in express terms, the resulting guideline is *not* a mandate to the courts but one factor for the courts to consider under § 3553(a). The courts have so found in a variety of contexts,⁷⁹ and even the Department recognizes as much.⁸⁰ If it were otherwise, the separation of powers problem that most troubled the Court in *Mistretta* would arise:

We are somewhat more troubled by petitioner’s argument that the Judiciary’s entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. . . . The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Mistretta v. United States, 488 U.S. 361, 407 (1989).

Moreover, the suggestion that Congress can mandate sentences by acting through the Commission is at odds with the Commission’s role as an independent expert body, as well as the Commission’s opposition to mandatory minimum statutes. The Commission should remove this inaccurate and problematic suggestion.

B. Provisions Relating to “Departures”

Many of the departure provisions in the Manual are not consistent with current law, nor do we believe they are a good idea. Sentencing is needlessly complicated if the

⁷⁹ *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Marshall*, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008) (career offender); *United States v. Moreland*, slip op., 2008 WL 904652 (S.D. W. Va. Apr. 3, 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); *United States v. Shipley*, ___ F. Supp. 2d ___, 2008 WL 2470001 (S.D. Iowa June 19, 2008) (child pornography); *United States v. Hanson*, ___ F. Supp. 2d ___, 2008 WL 2486336 (E. D. Wis. June 20, 2008) (child pornography); *United States v. Rausch*, ___ F. Supp. 2d ___, 2008 WL 3411819 (D. Colo. Aug. 13, 2008) (child pornography).

⁸⁰ Brief of the United States at 29, *Kimbrough v. United States* (“As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under Booker and subject to the general principles of sentencing in section 3553(a).”); Letter Stating the Government’s Position on the Career Offender Guideline, docketed March 17, 2008, *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) (“position of the United States” is that “*Kimbrough*’s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.”) (emphasis in original), available at http://www.fd.org/pdf/lib/Funk_aua_Letter.pdf.

court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions. In addition, the restrictions potentially stifle feedback from the courts. We believe that the best solution is to delete all of the prohibitions, restrictions and limitations on departure, and possibly move them to a Historical Note.

However, we recognize that the Commission may not be willing or able to do this at the present time, and so we propose specific changes to correct what is now incorrect in the Manual. As we have previously proposed, the Commission should remove from USSG § 5K2.0 all references to 18 USC § 3553(b),⁸¹ given that it has been excised by the Supreme Court in *Booker*.⁸² In addition, the Commission should revise other portions of the Manual in order to make clear that the Commission's departure standards are relevant only to a decision to "depart," and do not control the sentencing court's discretion to sentence outside the guideline range.⁸³ These specific proposed amendments are set forth in Appendix A to this Memorandum.

The Supreme Court has recognized that a "departure" is one kind of outside-guideline sentence that judges can impose, *see Rita*, 127 S. Ct. at 2468, and also that "departure" is a "term of art" applicable to a "narrow category of cases" authorized by the now-excised § 3553(b). *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008). The data show that "departures" are still being imposed, but that their rate is shrinking. For example, in FY 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward "departures." *See* USSC, 2004 Sourcebook, Table 26A. In the first two quarters of FY 2008, there were only 3.3% non-government-sponsored downward "departures," and 9.4% non-government-sponsored below-guideline sentences not categorized as "departures." *See* USSC, Quarterly Data Report, Table 1 (March 31, 2008). This data confirms anecdotal evidence we have received from Defenders in many districts -- that after *Booker*, *Gall* and *Kimbrough*, many courts are dispensing with the "departure" analysis even when a

⁸¹ *See* Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Regarding Proposed Priorities 2007-2008, at 4 (July 9, 2007).

⁸² The Supreme Court explicitly excised subsection (b)(1), but the lower courts have held that subsection (b)(2) was implicitly excised as well. *See United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (en banc).

⁸³ *See, e.g., United States v. Davis*, ___ F.3d ___, 2008 WL 3288384, at *6 (6th Cir. 2008) (while true that age is "not ordinarily relevant" under § 5H1.1, the court must consider the "history and characteristics of the defendant" under § 3553(a)(1)); *United States v. Limon*, 273 Fed. Appx. 698 (10th Cir. Apr. 3, 2008) ("Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18 U.S.C. § 3553(a), which is at issue here."); *United States v. Myers*, 503 F.3d 676, 685-86 (8th Cir. 2007) (upholding variance based on mental condition though departure not warranted under §5K2.13).

“departure” may be warranted. Indeed, some circuits have held that the departure concept is “obsolete” or that it has little force.⁸⁴ Nonetheless, departures are still being imposed in some cases.

Although departures still have a role in sentencing, prohibitions, restrictions and limitations on the factors judges may consider in sentencing that were devised in the pre-*Booker* era are not consistent with current Supreme Court law.⁸⁵ Several provisions remain that indicate that such prohibitions, restrictions and limitations apply beyond the narrow category of “departures.” Under current law, however, the judge must consider the characteristics of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for “departure” or any other purpose.⁸⁶ This principle was demonstrated in practice in *Gall v. United States*, 128 S. Ct. 586 (2007). There, the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines’ policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,⁸⁷ or deem “not ordinarily relevant,” *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.⁸⁸ *Gall*, 128 S. Ct. at 598-602. In approving the factors upon which the judge relied, the Court made no mention of these policy statements whatsoever.

Thus, while departures are *allowed*, as the Court said in *Rita*, it is not permissible to *deny* a request for an outside-guideline sentence because a policy statement prohibits or discourages departure (or a sentence otherwise outside the guideline range) on that

⁸⁴ See *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9th Cir. 2006); *United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006).

⁸⁵ The following provisions prohibit downward departure under all or some circumstances: USSG §§ 4A1.3(b)(2)(A), 4A1.3(b)(2)(B), 5H1.4, 5H1.7 & 5K2.0 (d)(3), 5H1.10, 5H1.12, 5K2.0(b), 5K2.0(c), 5K2.10, 5K2.12, 5K2.19, 5K2.0(d)(2), 5K2.0(d)(4), 5K2.0(d)(5), 5K2.13, 5K2.16, 5K2.20. The following provisions deem certain factors “not ordinarily relevant” for downward departure: USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, 5H1.11, 5K2.10, 5K2.12. USSG § 4A1.3(b)(3) limits the extent of downward departure.

⁸⁶ See *Rita*, 127 S. Ct. at 2473 (Although various factors are “not ordinarily considered under the Guidelines,” § 3553(a)(1) “authorizes the sentencing judge to consider” these factors and “an appellate court must consider” them as well) (Stevens, J., concurring).

⁸⁷ While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. See USSG § 5K2.0(d)(2).

⁸⁸ See USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5.

basis. This is a necessary corollary of the Court's decision, on constitutional grounds, to make the guidelines advisory. *United States v. Booker*, 543 U.S. 220, 233-34 (2005).

The Commission can and should act quickly to revise the Manual to reflect the fact that § 3553(b) has been excised and to make clear that departure standards only apply to the question whether to grant a departure, and not to any other consideration in the sentencing decision. Again, our specific proposals are set forth in Appendix A.

C. USSG § 1B1.10(b)(2)(B), p.s.

The second sentence of subsection (b)(2)(B) of revised § 1B1.10, p.s., bolded below, should be deleted. Subsection (b)(2)(B) reads as follows:

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. **However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.** (emphasis supplied)

This sentence has created confusion, and nothing the Commission has said in explanation has dispelled it. On its face, subsection (b)(2)(B) says that a defendant who received a "departure" at his first sentencing may receive a comparable reduction from the amended guideline range, but a defendant who received a below-guideline sentence as authorized by the Supreme Court and the controlling sentencing statute "generally" should not. One court has read it to mean that if a variance was imposed at the original sentencing, a further reduction is simply "not appropriate." See *United States v. Estevez*, slip op., 2008 WL 3200832 (D.R.I. Aug. 7, 2008).

Understandably, this provision has been perplexing to judges and practitioners. Further, it invites unwarranted disparity, as the sentence would depend on whether the judge labeled the sentence a departure or a sentence pursuant to *Booker* and § 3553(a).

The explanations the Commission has given, when asked, are difficult to understand. One explanation was that the sentence refers to when a judge does not consider the guideline range "at all," but judges must consider the guideline range and to do otherwise is reversible error. *Gall*, 128 S. Ct. at 596; *Kimbrough*, 128 S. Ct. at 564, 570; *Rita*, 127 S. Ct. at 2465, 2468; *Booker*, 543 U.S. at 245-46. Another, slightly different, explanation was that it refers to a situation where the judge did not "peg" the variance to the guideline range. While judges must consider the extent of a variance and give a reason that supports it, they may not be required to use mathematical formulas or percentages. *Gall*, 128 S. Ct. at 595, 597. Both explanations suggest that judges "generally" do not follow the law when imposing outside guideline sentences other than

departures. The second explanation also suggests that judges should do what *Gall* says they may not be required to do.

The Commission could not have intended these meanings, but we remain at a loss as to what it did mean. The second sentence of § 1B1.10(b)(2)(B), p.s. should be deleted.

D. USSG § 6A1.3, p.s.

This policy statement is in need of revision to ensure fair notice of the facts relevant to sentencing, and accurate resolution of those facts, consistent with current Supreme Court decisions, rules of criminal procedure, and statutes.

First, the first paragraph of the commentary to § 6A1.3, p.s., should be updated to include relevant principles from *Rita*, *Irizarry*, and circuit caselaw correctly applying those decisions. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure”); *Irizarry v. United States*, 553 U.S. ___, 128 S. Ct. 2198, 2203-04 (2008) (the court should “withhold [its] judgment until after the parties have had a full opportunity to present their evidence and their arguments,” and “make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.”). See also, e.g., *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1116 (10th Cir. 2008) (parties must be given an “adequate” opportunity to present relevant information to the court,” and holding that it was an abuse of discretion to decide a disputed question of fact against a party without giving that party an opportunity to present evidence on the issue, citing *Rita*); *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (courts must subject each sentence to thorough adversarial testing and must give reasons for the sentence, citing *Rita*); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008) (district court erred in “failing to provide Warr with any notice whatsoever before relying on [a recidivism] study” and “should have notified Warr of it before the sentencing hearing,” because the study “amounted to relevant and factual information” and was “[o]ne of the reasons the district court sentenced Warr to a term well beyond the guidelines range,” citing *Irizarry*).

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

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

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

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

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

of proof is quite different from saying that the “lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct.”

Fourth, we again urge the Commission to delete the last paragraph of the commentary, as the standard of proof required by the Due Process Clause is a matter for the courts, not the Commission.

III. Study of Statutory Mandatory Minimum Statutes, Recommendation to Congress to Abolish Mandatory Minimums

Seventeen years ago, the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.⁸⁹ Since then, only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated.⁹⁰ Further, several judges and appeals courts recently have found mandatory minimums to be cruel and irrational even if not unusual by Eighth Amendment standards, and have highlighted the problems of prosecutorial power over sentencing that mandatory minimum statutes confer.

In its *Fifteen Year Review*, the Commission detailed many of these problems with support from many sources, including a study by the Department of Justice, showing “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders.”⁹¹ By virtue of mandatory minimums, sentences for similarly situated offenders vary dramatically depending on the disparate charging and plea bargaining decisions of individual prosecutors,⁹² and such decisions

⁸⁹ See USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991).

⁹⁰ *Fifteen Year Review* at 135; Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

⁹¹ See *Fifteen Year Review* at 51 (citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994)).

⁹² *Fifteen Year Review* at 84-85, 89-91, 102-04, 106, 141-42; see also Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm’n Before the ABA Justice Kennedy Comm’n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

“disproportionately disadvantage minorities.”⁹³ “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁹⁴

The related problems of undue severity, unfettered prosecutorial power, and unwarranted disparity have been highlighted in several recent cases. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), Judge Cassell was required to sentence a twenty-four-year-old first offender, a music executive with two young children, to a mandatory consecutive term of 55 years based on his three convictions in the same trial for possessing (not displaying) a firearm in connection with small marijuana deals.⁹⁵ The judge found this sentence to be “unjust, cruel, and even irrational,” but felt he had no choice but to impose it. He called upon the President to commute the sentence, and upon Congress to make the “second or subsequent” enhancement applicable only to true recidivists who *previously* had been convicted of a serious offense. One hundred and sixty-three former U.S. Attorneys, federal judges, and DOJ officials, including four former Attorneys General, filed an *amicus* brief in the appeal before the Tenth Circuit, arguing that the sentence violated the Eighth Amendment, to no avail.

In the course of rational basis review under the Equal Protection Clause, Judge Cassell found that § 924(c) is not justified by its plea-inducing properties, but quite the opposite. When Angelos “had the temerity to decline” a plea bargain to drug trafficking and one § 924(c) count (with a fifteen-year sentence), the government charged him with four additional § 924(c) counts, thus demonstrating that the statute’s “harsh punishment” is not visited on ““flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial).”” *Id.* at 1254 (quoting Stephen J. Shulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 203 (1999)). Further, the government obtained 25 years of the 60-year mandatory minimum sentence by not arresting Mr. Angelos after the first controlled buy, but by arranging additional controlled buys which produced an additional § 924(c) count. Because the government had “in some sense procured” the additional criminal acts, the deterrence rationale did not justify the stacking feature. *Id.* at 1253.

The Fifth Circuit was faced with a similar situation in *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008). There, a 53-year-old woman with no prior convictions received a 45-year sentence for a crime involving no violence, which the court found to be “disproportionate punishment” and “unduly harsh.” *Id.* at 396-97. Forty years of the sentence were attributable to mandatory minimums – ten years for drug conspiracy and

⁹³ *Fifteen Year Review* at 91.

⁹⁴ *Id.* at 135.

⁹⁵ In 1993, the Supreme Court interpreted “second or subsequent” in § 924(c) to refer to convictions on separate counts in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993).

possession with intent to distribute drugs, and thirty years for two counts of possessing guns in furtherance of drug dealing, though there was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.” *Id.* at 396. The judge “had little discretion in imposing this sentence . . . [b]ecause of the way the indictment was stacked by the prosecutor.” *Id.* at 395. The prosecutor had several less draconian options, but instead exercised his discretion, “rather poorly we think,” to charge Ms. Looney with counts providing for a life sentence.

The court of appeals, which had no power to do anything but affirm, observed “that the possibility of abuse is present whenever prosecutors have virtually unlimited charging discretion and Congress has authorized mandatory, consecutive sentences”:

[T]he power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence. For example, a defendant who sincerely and fervently believes in his innocence, and who has witnesses and other evidence that support his claim of innocence, could easily be pressured into pleading guilty under a plea agreement that eliminates the threat—rather than face the possibility of life imprisonment based on a prosecutor’s design of an indictment that charges and stacks mandatory minimum consecutive sentences.

Id. at 398.⁹⁶

An even more tragic result of the absolute prosecutorial power conferred by mandatory minimum statutes occurred in *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006). There, a severely mentally ill 52-year-old woman was sentenced to 159 years in prison, 150 years of which were due to seven stacked § 924(c) counts. Ms. Hungerford had no prior convictions and had led a spotless and law-abiding life. Her husband of 26 years and father of her four children had recently left her due to her deteriorating mental condition. With no money and no employment prospects, she began living with another man. To obtain money for living expenses, he robbed several stores with a gun. No one was hurt and the total loss was less than \$10,000. Ms. Hungerford shared in the proceeds but never touched a gun and took no active part in the robberies. Due to Ms. Hungerford’s mental illness, she held a fixed belief that she was innocent.⁹⁷

⁹⁶ See also *United States v. Ramos*, ___ F.3d ___, 2008 WL 2875791, at *2 (5th Cir. July 28, 2008) (noting that the judge had no discretion but to impose ten-year mandatory minimum sentences on Border Patrol agents who shot at fleeing drug smuggler because they were the result of the government’s charging decision).

⁹⁷ She repeatedly declared her innocence at sentencing: “I have not done anything illegal. I did not go about with any gun. I don’t like them. . . . I didn’t take any money. . . . I honestly didn’t

For this reason, she declined the prosecutor's offer of a plea bargain in exchange for her testimony against the man who actually robbed the stores and held the gun. The prosecutor told the judge that the 159-year sentence was fair because she declined to cooperate and so had no one to blame but herself. The robber received a reduced sentence in exchange for his testimony against Ms. Hungerford. The judge, of course, was not permitted to consider any of the substantial mitigating circumstances in Ms. Hungerford's sentencing because of the prosecutor's unreviewable decisions. At sentencing, he instructed Ms. Hungerford to report to the probation office within 72 hours of her release at the age of 208, and then to undergo 104 urinalysis tests, participate in mental health counseling, and pay the cost of her treatment. *Id.* at 1118-23 (Reinhardt, J., concurring in the judgment). Judge Reinhardt described the sentence as "irrational, inhumane, and absurd," as well as "immensely cruel, if not barbaric," but all he could do was concur in the judgment and call upon Congress to abolish the mandatory minimum sentencing regime. *Id.*

Nor are mandatory minimums a cost-effective way to reduce crime. As Judge Cassell pointed out in *Angelos*, if Mr. Angelos "only" served 55 years of his 61-year sentence, the cost would be at least \$1,265,000, not including increased costs for medical care in his old age. While this would prevent any future crimes by Mr. Angelos and might (or might not) deter some others, the money would be better spent on programs that would produce greater reductions in crime. 345 F. Supp. 2d at 1255. In its 1991 report, the Commission found that uneven application of mandatory minimums by prosecutors reduces certainty, and thus thwarts their possible deterrent value.⁹⁸ Since then, the Commission has also determined that, with respect to street level drug dealers, who bear a large brunt of mandatory minimum sentencing laws, lengthy imprisonment serves no deterrent purpose, as they are immediately replaced and the crime is committed by someone else.⁹⁹

The Commission should therefore recommend to Congress that it abolish mandatory minimum penalties. Effective and efficient resource allocation is of greater concern to the public and to Congress than ever before. There is now a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, Justice Kennedy and the ABA's Justice Kennedy Commission, and the Constitution Project's Sentencing Initiative.¹⁰⁰

do it So please don't do whatever you're going to do to me for what you think I did, because I didn't do it." 465 F.3d at 1121.

⁹⁸ USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* iii (1991).

⁹⁹ *Fifteen Year Review* at 134; USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995).

¹⁰⁰ See U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006); Statement of Paul G. Cassell Before the Subcommittee on Crime, Terrorism and

IV. Crack Cocaine Legislation

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

An additional reason to recommend a 1:1 ratio is that any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.¹⁰¹ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and a very small increase in the quantity of crack results in a very large increase in the sentence.¹⁰²

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

¹⁰¹ *Fifteen Year Review* at 50, 82.

¹⁰² See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

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

V. Recommended Ongoing and Long-Term Priorities

A. **Reduce Sentence Severity, Reduce the Prison Population, Increase Focus on Rehabilitation**

Any evaluation of the guideline system should, first and foremost, seek ways to lower sentences for offenders who are not dangerous to the public, to reduce the federal prison population to no more than 100% of its capacity in a specific and short period of time, and to provide rehabilitation to violent and non-violent offenders in the most effective manner. The recurring theme at the Alternatives Symposium was that lengthy incarceration may actually lead to increased recidivism and is not the most cost-effective means of protecting public safety.

The federal prison population is four and half times what it was when the guidelines became law,¹⁰³ has increased at least three times the rate of state prisons since 1995,¹⁰⁴ and costs the taxpayers over \$5 billion per year.¹⁰⁵ As of year end 2006, the Bureau of Prisons was 37% overcapacity.¹⁰⁶ Some of this over-incarceration is due to mandatory minimums, but much of it is due to the guidelines alone. By 2002, the guidelines, independent of mandatory minimums, accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession.¹⁰⁷ Further, “[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums.”¹⁰⁸

¹⁰³ The federal prison population was 44,408 in 1986, 48,300 in 1987, *see* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988*, tbl. 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is almost 201,417 today. *See* <http://www.bop.gov/news/quick.jsp#1>.

¹⁰⁴ Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf.

¹⁰⁵ *Costs of Incarceration and Supervised Release* (\$24,922 per inmate in FY 2007), available at <http://www.uscourts.gov/newsroom/2008/costs.cfm>.

¹⁰⁶ U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>.

¹⁰⁷ *Fifteen Year Review* at 53-54, 64, 67, 139.

¹⁰⁸ *Id.* at 138.

While federal prison sentences are long and costly, they do little to prepare prisoners for successful reentry and contribute to increased recidivism.¹⁰⁹ Inmates are released after lengthy sentences untreated, unable to find employment, and without family ties, thus leading to the commission of further crimes.¹¹⁰ Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.¹¹¹ As Justice Kennedy said, “our resources are misspent, our punishments too severe, our sentences too long. In the federal system the sentencing guidelines are responsible in part for the increased terms,” and they “should be revised downward.”¹¹²

B. Provide More Flexibility and Simplicity in the Guidelines

The Commission can take steps to give judges more flexibility in using the guidelines, and to simplify the guidelines. First, the Commission should greatly reduce the number of aggravating factors that currently go into calculating the guideline range. Many of these factors are trivial, many essentially duplicate others, many overstate the seriousness of the offense, and altogether, they make calculation of the guideline range far too complex. Judges are well-situated to determine whether an offense is particularly serious or not particularly serious based on the totality of the circumstances, without being required to add up points for every possible aspect of the offense. Second, the Commission should remove restrictions on downward departures. Third, the Commission could recommend to Congress that it repeal the 25% rule, in order to give judges more flexibility even when sentencing within the guideline range.

C. Provide More Useful Data

¹⁰⁹ Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994) (recidivism study published by Bureau of Prisons researcher in 1994 concluding that for the 62.3% of federal drug trafficking prisoners who were in Criminal History Category I, guideline sentences were costly to taxpayers, had little, if any, incapacitation or deterrent value, and were likely to negatively impact recidivism).

¹¹⁰ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

¹¹¹ *Id.* at 8; Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

¹¹² Speech at the American Bar Association Annual Meeting, Associate Justice Anthony M. Kennedy, August 9, 2003, http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

The Commission is authorized to systematically collect, study and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes.¹¹³ See 28 U.S.C. § 995(a)(12)-(16).

Particularly after *Booker* and before *Rita*, *Gall* and *Kimbrough*, sentences that were different from the guideline range were often characterized as creating “unwarranted disparity.” However, one of the goals of the SRA was to provide for “sufficient flexibility to permit individualized sentencing.” 28 U.S.C. § 991(b)(1)(B). *Gall* reaffirmed that goal and specifically endorsed the “need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.” 128 S. Ct. at 600 (emphasis in original). And both *Rita* and *Kimbrough* opened the door to outside-guideline sentences based on policy problems with the guidelines, with the hoped-for result of improving the guidelines, including reducing unwarranted disparities that the guidelines themselves create.

After these clarifications by the Court, the Commission could better assist judges in imposing sentences that are sufficient but not greater than necessary to achieve sentencing purposes and that avoid unwarranted disparities and unwarranted similarities, and could facilitate a more productive dialogue between the Commission and all stakeholders, by reporting more specific data. Currently, the Commission publishes reasons that are in many cases too general to be meaningful, the number and rate of such reasons in all cases but not by guideline or offense type, see USSC Sourcebook, tbls. 24-25B, and the number of outside-guideline sentences by guideline but without reasons. *Id.* tbl. 28. We suggest that the Commission report the reasons for outside-guideline sentences in a more specific and meaningful way. Reasons such as “criminal history issues,” “general guideline adequacy issues,” “circumstances not considered by guidelines,” really say nothing about what the specific problems were. The Commission should also publish the number, rate and reasons for outside-guideline sentences for each offense guideline, and for each offense type where the guideline covers different offense types. In addition, the Commission should publish the number of defendants sentenced under the career offender guideline, what their qualifying instant and prior convictions were, the mean and median sentence length, and the rate of and reasons for outside-guideline sentences.

We also think that regional variation in sentencing has been misunderstood and misused in the past, and if this issue is again raised, the Commission should be very

¹¹³ Congress considered this to be “essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” S. Rep. No. 98-225 at 182 (1983).

careful about accurately identifying the reasons for it. As demonstrated in the Commission's *Fifteen Year Review* and in its *Final Report on the Impact of United States v. Booker on Federal Sentencing* in March 2006, most regional variation is due to government practices. Congress's failure to understand this led to passage of the PROTECT Act. In this regard, we note that in 2007, the government moved for early disposition departures in twenty districts, both on and off the border, in districts with and without heavy immigration caseloads, but not in other districts that are on the border and do have heavy immigration caseloads.¹¹⁴ Further, regional variation is not necessarily inappropriate, as community norms vary for entirely legitimate reasons. Indeed, Congress contemplated that judges would take into account the community view of the gravity of the offense and the public concern generated by the offense. See 28 USC 994(c)(4), (5).

D. Training, Hearings

The Commission proposes "to receive feedback and provide expanded training on the federal sentencing guidelines, including possibly holding regional public hearings," pursuant to 21 U.S.C. § 995(a)(17), (18) and (21), and "in light of the Supreme Court's recent jurisprudence."

We believe that the Commission can receive the most useful feedback and provide the most useful training by including judges, probation officers, defense counsel and prosecutors together in its seminars and workshops. While it is sometimes done this way, usually these seminars are held separately by profession. The statutes that authorize the Commission to conduct seminars and workshops seem to contemplate an inclusive model, in which a transparent discussion can take place, not only about guideline application issues, which are surely important, but about broader sentencing issues and techniques, the need for which is heightened by the Supreme Court's recent jurisprudence.¹¹⁵ The process should be opened up so that we can all learn from each other and a productive dialogue can occur.

A good way to expand training would be to include Defenders, and prosecutors if they are interested, in teaching at Commission seminars and workshops. Their daily, hands-on expertise would be beneficial to all concerned. The Defender Services Training Branch invites Commission staff to teach at its Winning Strategies seminars. Defenders have co-taught with Commission staff at the invitation of judges or Defenders in particular districts. This has worked out well, as we assume the staff would agree.

¹¹⁴ See USSC, 2007 Sourcebook of Federal Sentencing Statistics, Appendix B, <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>.

¹¹⁵ Section 995(a)(17) authorizes the Commission to conduct "seminars and workshops providing studies for persons engaged in the sentencing field." Section 995(a)(18) authorizes the Commission to conduct "periodic trainings of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process."

If the Commission holds regional hearings, as authorized by § 995(a)(21), it should elicit testimony regarding both mandatory minimums and guidelines that are in need of reform. It should ensure that all stakeholders are fully and fairly represented. For example, the Commission may get more useful information from line prosecutors than from Main Justice. Likewise, the Commission should hear from a broader range of judges, especially judges who have taken the trouble to examine the fairness and efficacy of the guidelines in individual cases. Further, we believe regional hearings should be used as a forum to raise questions to which the staff can turn for further study. The Commission should not amend by anecdote, but based on research, data and national experience.

E. Re-Affirm the Commission's Role as an Independent Expert Body

In order for true improvement to occur, the Commission must be willing to act as an independent expert body, and Congress must be willing to allow it to do so. To that end, the Commission might propose to Congress that it direct the Commission to re-evaluate the guidelines, without regard to mandatory minimums and other statutory directives, to ensure that they comply with the purposes of sentencing in the most fair, efficient and effective manner, and reduce the prison population to no more than 100% capacity within a few years. The Commission might also recommend that Congress enact a law specifically reaffirming that the Commission is an independent expert body and that it should act solely on the basis of research, judicial feedback, and consultation with all stakeholders in the criminal justice system. The Commission can and should demonstrate to Congress that guidelines based on mandatory minimums and other statutory directives are unsound.

VI. Implementation of Crime Legislation

The Commission proposes as a priority the “implementation of crime legislation enacted during the 110th or 111th Congress warranting a Commission response, including (A) the Court Security Improvement Act of 2007, Pub. L. 110-177; and (B) any other legislation authorizing statutory penalties or creating new offenses that requires incorporation into the guidelines.”

The Commission should not take any action to implement crime legislation unless it is based on its own expert evaluation of the need for changes in the guideline structure and then narrowly designed to further the purposes of sentencing in the most fair, effective and efficient manner.

The stated purpose of Title II of the Court Security Improvement Act of 2007 is to enact “criminal law enhancements to protect judges, family members, and witnesses.” *See* Pub. L. No. 110-177, 121 Stat. 2534. The Act created two new offenses, codified at 18 U.S.C. § 1521 (relating to false claims and slander of title in retaliation against a Federal judge or federal law enforcement officer) and 18 U.S.C. § 119 (relating to publication of restricted information about certain persons performing official duties with the intent to threaten or intimidate). In addition, the Act added “or other dangerous

weapon” to 18 U.S.C. § 930(e)(1) (possessing a firearm in a court facility), and increased statutory penalties for tampering with a witness, victim or informant, 18 U.S.C. § 1512, retaliating against a witness, victim or informant, 18 U.S.C. § 1513, manslaughter, 18 U.S.C. § 1112(b), and assault of a federal judge, federal officer, or immediate family member, 18 U.S.C. § 115(b)(1).

With respect to threats punishable under 18 U.S.C. § 115, Congress directed the Commission to study the guidelines as they apply to threats occurring over the Internet and determine “whether and by how much that circumstance should aggravate the punishment” and provided several factors the Commission should consider in conducting the study, including the number of threats made and the intended number of recipients. *See* Pub. L. No. 110-177, § 209. Except for this specific directive to study threats occurring over the Internet as they relate to § 115, Congress did not direct the Commission to take any action in response to the Act.

During the last amendment cycle, the Commission requested and received public comment regarding the two new offenses and the directive to study threat offenses occurring over the Internet. In May, it promulgated amendments responding to the two new offenses. *See* 73 Fed. Reg. 26,924, 26,931 (May 9, 2008) (Amendment 2). The Commission amended § 2A6.1 (Threatening or Harassing Communications; Hoaxes) to incorporate the new offense under 18 U.S.C. § 1521, and amended § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to incorporate the new offense under 18 U.S.C. § 119. *Id.*

Although the Commission did not refer specifically to Congress’s directive regarding threats under 18 U.S.C. § 115 or to any study conducted, the amendments also included an enhancement under § 2A6.1, which also applies to § 115(b)(4) threat offenses, to account for large numbers of, or prolonged periods of, harassing communications, as well as for multiple victims. *Id.* (Reason for Amendment). In addition, it amended § 2H3.1 in a manner that includes an additional two levels if the offense under new § 119 “involved the use of a computer or an interactive computer service to make restricted personal information about a person publicly available.” *Id.*

The Commission should not take any further action to increase guideline ranges in response to the Act. The Criminal Law Committee of the Judicial Conference has urged the Commission, when deciding whether to amend the guidelines in response to a new or increased mandatory minimum, to make an assessment based on its own study and expertise and independent of any potentially applicable mandatory minimum. *See* Comments of the Criminal Law Committee of the Judicial Conference, at 4 (Mar. 16, 2007).¹¹⁶ Likewise, the Commission should not amend the guidelines to increase punishment simply because Congress increased the statutory maximum penalty for an offense. Instead, it should be guided by the stated purpose of the legislation, the purposes of sentencing, and the need to avoid unwarranted disparity and unwarranted uniformity as it considers whether to take action and if so, what action is appropriate.

¹¹⁶ Available at http://www.usc.gov/hearings/03_20_07/walton-testimony.pdf.

Commission data indicates that guideline ranges for the offenses for which the statutory maxima were raised by the Act are more than adequate to reflect the seriousness of the offenses. Currently, almost twice as many sentences for manslaughter offenses are below the guideline range as they are above.¹¹⁷ For assault, the rate of sentences below the guidelines is almost three times the rate of sentences above the guidelines.¹¹⁸ Because the rate of sentences outside the guideline ranges is important feedback regarding the proper operation of a guideline,¹¹⁹ these numbers show that, if anything, the guideline ranges are too high for these offenses.

In addition, generally increasing offense levels for manslaughter or assault would disproportionately impact Native Americans in a manner disconnected from the stated purpose of the Act. In fiscal year 2007, Native Americans represented 87.5% of persons convicted of manslaughter in federal court, and 38.9% of persons convicted of assault,¹²⁰ yet Congress was not concerned with increasing punishment for Native Americans when it passed the Court Security Improvement Act of 2007. Although the statute sweeps more broadly than offenses involving court security, the Commission – as the independent body charged with developing sound sentencing policy – should interpret Congress’s actions narrowly.

With respect to the penalty increases in 18 U.S.C. § 1512 (tampering with a witness, victim, or informant) or § 1513 (retaliating against a witness, victim or informant), the Commission should likewise refrain from increasing guideline ranges. Again, Congress did not direct the Commission to take any action with respect to these changes. Although the Commission does not publish specific data regarding sentences for these offenses, available data for the relevant guidelines – which apply broadly to numerous federal offenses – indicate rates of upward departure far lower than rates that

¹¹⁷ See USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 27 (2007) (for the primary offense category of manslaughter, showing 15.5% rate of sentences above the guideline range and a 26.9% rate of sentences below the guidelines).

¹¹⁸ *Id.* tbl. 27 & App. A (for the primary offense category of assault, which includes offenses involving threatening communication and obstructing or impeding officers, showing a rate of sentences above the guideline range in 4.6% of cases, and a 13.4% rate of sentences below the guidelines).

¹¹⁹ See USSC, *Report to Congress: Downward Departures From the Federal Sentencing Guidelines*, at 5 (Oct. 2003) (“Downward Departures”) (“[A] high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.”); see also USSG ch. 1, intro, pt. 4(b); see also 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

¹²⁰ USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 4 & App. A (2007).

have previously prompted the Commission to revise a given guideline.¹²¹ In any event, the Commission should not increase guideline ranges for these offenses unless empirical evidence shows it to be necessary to protect judges, their family members, or witnesses.

Finally, because § 2K2.5 already includes a two-level enhancement for possessing a firearm or any other dangerous weapon in a court facility, *see* USSG § 2K2.5 (b)(1)(A), there is no need to amend the guidelines to account for the Act's change to 18 U.S.C. § 930(e).

If the Commission does anything, it should *remove* the ten-level enhancement under amended § 2H3.1(b)(2)(B) if the new offense of publishing restricted information under 18 U.S.C. § 119 involved a computer or interactive computer service. First, Congress's directive regarding the Internet was aimed at threats under 18 U.S.C. § 115, not at the offense of publishing restricted information under new 18 U.S.C. § 119. Second, the Commission did not state in its request for public comment that it was considering such an enhancement,¹²² and so lacked the benefit of public comment. Third, the scope of the enhancement exceeds its stated purpose.

The Commission explained that this enhancement "accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet." *See* 73 Fed. Reg. 26,924, 26,932 (May 9, 2008). However, given that the Internet functions as the most readily available and widely used means of communicating all kinds of information, it is far more likely that the use of a computer or interactive computer service will prove to be the ordinary means of violating of § 119, with the result that virtually every offender will receive the enhancement. This would be true when the information was not "widely disseminated" but emailed to one person, and when no additional harm resulted from the use of a computer or interactive computer service. If a given case presents extraordinary harm due to the wide dissemination of restricted information, the court is free to account for it. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A).

¹²¹ *Id.* tbl. 28 (for fiscal year 2007, showing above-guidelines sentences at a rate of only 1.7% for first degree murder (§ 2A1.1); 9.1% for second degree murder (§ 2A1.2); 15.4% for voluntary manslaughter (§ 2A1.3); 5.7% for assault with intent to murder and attempted murder (§ 2A2.1); 5.4% for aggravated assault (§ 2A2.2), and 2.0% for obstruction of justice (§ 2J1.2)). The Commission previously amended guidelines in response to higher rates of departure, including the guidelines for homicide. *See* USSG App. C, Amend. 663 (Nov. 1, 2004) (explaining that it amended many of the homicide guidelines based in part on high rates of upward departure for second degree murder (34.3%) and voluntary manslaughter (28.6%)); *see also Downward Departures* at 16-17 (explaining that the 2001 amendment to § 2L1.2 (Illegal Reentry) was prompted by the 35.6% rate of downward departure).

¹²² *See* 73 Fed. Reg. 4,931, 4,939 (Jan. 28, 2008).

VII. Resolution of Circuit Conflicts

- A. **USSG § 4A1.2(c)(1) – Whether § 4A1.2(b)(2) (providing that “[i]f part of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended”) applies when determining whether a sentence for certain misdemeanor and petty offenses was “a term of imprisonment of at least thirty days” under § 4A1.2(c)(1).**

The circuits are split over whether § 4A1.2(b)(2) -- which provides that “[i]f part of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended” – applies when determining whether a sentence for certain misdemeanor and petty offenses was “a term of imprisonment of at least thirty days” under § 4A1.2(c)(1) – which renders the sentence countable under § 4A1.1(c). In a recent en banc decision, the Ninth Circuit held that § 4A1.2(b)(2)’s definition of “sentence of imprisonment” applies in that instance. *United States v. Gonzalez*, 506 F.3d 940, 943-45 (9th Cir. 2007) (en banc). Thus, “a totally suspended sentence for a qualifying misdemeanor, regardless of its length, cannot be *counted* as a prior sentence.” *Id.* at 945. Likewise, “a partially suspended sentence for a misdemeanor listed in §4A1.2(c)(1) counts only if the non-suspended portion of the sentence is at least thirty days.” *Id.*

The Eleventh Circuit, on the other hand, has held that a suspended sentence is counted under § 4A1.2(c)(1), pointing only to § 4A1.2(a)(3), which provides that a “sentence [that] was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1(c).” *United States v. Hernandez*, 160 F.3d 661, 670-71 & n.7 (11th Cir. 1998). The court did not mention the definition of “sentence of imprisonment” in § 4A1.2(b)(2), or explain why that definition would not apply to determinations of sentence length under § 4A1.2(c)(1). *See id.*

The Eleventh Circuit’s position produces anomalous results. Under that court’s interpretation of the guideline, a 29-day imprisonment sentence for reckless driving would not be counted for criminal history purposes, but a 30-day sentence which was totally suspended would count. The Ninth Circuit’s interpretation, which gives full effect to all relevant provisions in § 4A1.2, avoids such anomalies. It is also more consistent with the guideline’s commentary, which shows that § 4A1.2(a)(3)’s general statement concerning suspended sentences must be read together with (b)(2)’s specific instruction on how to calculate the length of imprisonment when a sentence is partially or totally suspended: “To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). *See §4A1.2(a)(3) and (b)(2).*” USSG § 4A1.2, comment. (n.2) (emphasis added); *see also* Thomas W. Hutchison et al., *Federal Sentencing Law and Policy* § 4A1.1, author’s cmt. 5(f)(B)(5), at 1289-90 (2008 ed.) (“Taking the guidelines and commentary as a whole, it would appear equally plausible, and consistent with the principle of lenity, to exclude the suspended portion of a term of imprisonment in

determining the application of § 4A1.2(c)(1).”) The Commission should amend § 4A1.2 to make clear that the Ninth Circuit’s approach is the correct one.

B. USSG § 2A3.2(b)(2)(B)(ii) – Whether the enhancement for unduly influencing a minor to engage in statutory rape applies to law enforcement stings.

USSG § 2A3.2(b)(2)(B)(ii) – the statutory rape guideline – provides for a four-level increase if “a participant . . . unduly influenced the minor to engage in prohibited sexual conduct[.]” Application Note 3(B) explains that, “[i]n determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.”

The Eleventh Circuit has held that the enhancement applies to sting operations in which an undercover officer poses as a minor. *See United States v. Root*, 296 F.3d 1222, 1233-34 (11th Cir. 2002). The court relied on Application Note 1’s definition of the term “minor,” which includes fictitious people as well as undercover law enforcement officers. *Id.* at 1233. It then reasoned that if no actual victim is necessary, then the focus of the enhancement must be on the defendant’s conduct. *Id.* at 1234. *Root* ultimately concluded that for the enhancement to apply, “the offender need only have exerted undue influence aimed at convincing the victim ‘to engage’ in future improper sexual activities.” *Id.*

The Sixth and Seventh Circuits, focusing on the text of the guideline and commentary, disagree with the Eleventh Circuit. In *United States v. Mitchell*, the Seventh Circuit held that because the enhancement, and the discussion of “undue influence” in Application Note 3(B), both rely on the past tense, “the offender must have succeeded in influencing or compromising.” 353 F.3d 552, 556-57 (7th Cir. 2003). Thus, “the enhancement cannot apply where the offender and victim have not engaged in illicit sexual conduct.” *Id.* at 557. The court expressly declined to follow *Root*, faulting it for ignoring the plain language of the guideline, which “was specifically written to require an examination of the effect on the victim,” not of the offender’s conduct. *Id.* at 561-62.

In *United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2005), the Sixth Circuit likewise held that the enhancement does not apply in the case of a sting operation. Like the Seventh Circuit in *Mitchell*, the Sixth Circuit in *Chriswell* faulted *Root* for ignoring the discussion of “undue influence” in Application Note 3(B), and held that the “plain language of § 2A3.2(b)(2)(B) indicates that the two level enhancement should not be available in cases involving undercover agents rather than actual minors.” *Id.* at 468-69. The Sixth Circuit agreed with the Seventh Circuit that “the court must engage in a victim-focused inquiry when applying this subsection in any case.” *Id.* at 469. Thus, it would not make sense to apply the enhancement in cases arising out of sting operations because “[t]he dictionary definition of ‘undue influence’ suggests, by its reference to affecting the mind or action of another, that there must be an actual person who is affected in some way[.]” and “[a]n undercover officer who is not at all persuaded in thought or in deed . . .

cannot be ‘unduly influenced.’” *Id.* The Sixth Circuit also found compelling *Mitchell*’s observation that applying Application Note 3(B)’s rebuttable presumption of undue influence – which is triggered when “a participant is at least 10 years older than the minor” – to cases involving undercover officers would, as a practical matter, “render[] the presumption irrebuttable.” *Id.* at 469-70. As the *Mitchell* court explained, the application note says that the court is to determine whether the victim was unduly influenced based on careful consideration of the facts of the case, but if the facts are the imaginary ones produced by the government, including the victim’s age, the presumption of undue influence would be irrebuttable. 353 F.3d at 560-61.

The Commission last amended the guideline in 2004, raising the enhancement from two levels to four levels. USSG, App. C, Amend. 664 (Nov. 1, 2004). The Commission should now amend the guideline to make clear that the enhancement does not apply in cases involving an undercover officer posing as a minor.

C. USSG § 2D1.1 – Whether the district court must err on the side of caution and take into account the margin of error when estimating the drug quantity used to determine the base offense level when no drugs were seized.

The Guidelines direct a court to calculate a defendant’s offense level on the basis of quantities of drugs not specified in the counts of conviction, if those other drugs were part of the same course of conduct.¹²³ “Where there is no drug seizure . . . the court shall approximate the quantity of the controlled substance.”¹²⁴ Courts of appeals have approved various methods of approximation, including the use of a “multiplier” to extrapolate the total quantity of a controlled substance involved in an entire course of conduct by multiplying the amount a witness or report says was involved in a single instance of conduct by the number of reported instances. *See, e.g., United States v. Betancourt*, 422 F.3d 240, 246-47 (5th Cir. 2005); *United States v. Culps*, 300 F.3d 1069, 1077 (9th Cir. 2002); *United States v. Paulino*, 996 F.2d 1541, 1548-49 (3d Cir. 1993).

However, the courts of appeals are divided over the exact process that a district court must follow when estimating drug quantity. Recognizing the inherent imprecision of multiplier estimates, the Ninth Circuit has held that “a sentencing judge must err on the side of caution . . . whenever a court is estimating drug quantities[.]” *United States v. Scheele*, 231 F.3d 492, 498 (9th Cir. 2000). It noted that caution is particularly important when estimating drug quantities, as “slight differences in the amount ultimately assessed can result in the imposition of significantly longer sentences.” *Id.* For that reason, “the district court must consider the margin of error before finally fixing the amount attributable to the defendant.” *Id.* “Under that requirement, a final approximated quantity must be compared to the ‘break points’ under the Sentencing Guidelines.” *Culps*, 300 F.3d at 1076 n.3. “If taking the margin of error into account and erring on the

¹²³ USSG §§ 1B1.3(a)(2), 2D1.1, comment. (n.12).

¹²⁴ USSG § 2D1.1, comment. (n.12).

side of caution would reduce the defendant's base offense level to the next lowest level, the court must do so." *Scheele*, 231 F.3d at 499.

The Fifth Circuit applies a less rigorous standard than the Ninth Circuit. Although it has approved what it has characterized as "conservative" estimates, it does not expressly require a sentencing court to err on the side of caution or to take into account the margin of error inherent in the process, as the Ninth Circuit does. *See, e.g., Betancourt*, 422 F.3d at 247. Instead, it simply requires that any estimate be supported by a preponderance of sufficiently reliable evidence. *Id.*

As the Commission has noted, "[d]rug quantity is often highly contested, and disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators," *see Fifteen Year Review* at 50, and there is "discomfort with the role of law enforcement in establishing relevant conduct." *Id.* at 87. These problems are, of course, especially pronounced when no actual drugs were seized. This, in combination with the fact that small changes to the variables in a multiplier estimate can produce large changes in the resulting advisory guideline range, especially at higher quantities, should lead the Commission to expressly adopt the Ninth Circuit's approach to such inherently imprecise estimates.

D. USSG § 2D1.1(b)(1) – Whether the government bears the burden of proving that it was not clearly improbable that a dangerous weapon was possessed in connection with a drug offense.

USSG § 2D1.1(b)(1) directs the court to apply a two-level enhancement if a dangerous weapon was possessed in connection with the offense, "unless it was clearly improbable that the weapon was connected with the offense."¹²⁵

The circuits are split over which party bears the burden of proving clear improbability. As the Eighth Circuit recently explained, most circuits "have taken the language of clear improbability to reduce what the government must prove to such an extent that the defendant has the burden of disproving the connection once the government has shown that the weapon was present." *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008) (citing cases), *petition for cert. filed*, (U.S. July 18, 2008) (No. 08-5387). The Eighth Circuit disagreed, holding that the application note "reduce[s] the quantum of proof" otherwise necessary for Guidelines enhancements, but that the government still retains the burden of proof: "The Government must simply show that it is not clearly improbable that the weapon was connected to the drug offense." *Id.*

The Eighth Circuit's position is consistent with the general rule that the party seeking to apply an adjustment bears the burden of establishing the necessary factual predicate. The Commission should amend § 2D1.1(b)(1) as follows: "If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2

¹²⁵USSG § 2D1.1, comment. (n.3).

levels.” The third sentence of Application Note 3 should be amended as follows: “The adjustment should be applied if the government proves that the weapon was present and that it is not clearly improbable that the weapon was connected with the offense.”

E. USSG § 2B1.1(b)(2) – There is no circuit conflict regarding whether persons who are reimbursed for pecuniary losses in fraud and theft cases are “victims.”

The Department contends that the circuits are split over whether persons who have been reimbursed in fraud cases are “victims” for purposes of the enhancement in guideline § 2B1.1(b)(2). While statements in some opinions may suggest such a split, the cases are entirely consistent with one another. The different outcomes are due to the evidence, or lack thereof, offered to support the enhancements in those cases.

As the Department notes, the Fifth and Sixth Circuits have held that persons who were reimbursed for temporary pecuniary losses were not “victims” for purposes of USSG § 2B1.1(b)(2). See *United States v. Conner*, No. 06-50218, 2008 WL 2876564, at *8-9 (5th Cir. July 28, 2008); *United States v. Yagar*, 404 F.3d 967, 970-72 (6th Cir. 2005). But those cases did not hold, as the Department implies, that a person who is reimbursed can never be a victim. Instead, both holdings rested on the lack of any evidence that the persons incurred losses which were not reimbursed. In *Yagar*, the Sixth Circuit expressly stated that “account holders [were] not ‘victims’ under the Guidelines because they were *fully reimbursed* for their temporary financial losses. While there may be a situation in which a person could be considered a ‘victim’ under the Guidelines even though he or she is ultimately reimbursed, in situations such as this, where the monetary loss is short-lived and immediately covered by a third-party, we do not think that there has been ‘actual loss’ or ‘pecuniary harm.’” *Id.* at 971. Likewise, in *Conner*, the Fifth Circuit noted that “[i]t is possible that with a proper evidentiary foundation these types of unreimbursed business losses,” such as credit account holders “pa[ying] bills with fraudulent account charges before being reimbursed, . . . logically involv[ing] a loss of business time,” “could be considered ‘actual losses’ for the purposes of counting ‘victims.’” But the district court’s speculation as to the existence of these facts,” after “admitt[ing] that it did not have ‘any evidence’ for that finding,” “was an insufficient basis to enhance Conner’s sentence.”¹²⁶ 2008 WL 2876564, at *8.

¹²⁶ A third case cited by the Department as being in accord with the Fifth and Sixth Circuits on this point does not address the question of whether a person who is reimbursed for any or all pecuniary losses is a “victim.” In *United States v. Icaza*, the defendants had shoplifted merchandise from hundreds of Walgreens stores. 492 F.3d 967, 968–69 (8th Cir. 2007). The Eighth Circuit held that there was only one victim in the case – Walgreens Corporation, not the individual Walgreens stores – because of testimony that “ultimately the corporation takes the loss” and receives any restitution that the defendants would be ordered to pay. *Id.* at 969–70. The testimony did not characterize the arrangement as a reimbursement, but rather that the “stores would be – they would – everything is done by budget. They have inventoried – they have taken their loss, but ultimately the corporation takes the loss.” *Id.* at 969.

Although some statements in opinions from the Second and Eleventh Circuits suggest a different interpretation of the term “victim,” they are consistent with the approach of the Fifth and Sixth Circuits. In *United States v. Lee*, the Eleventh Circuit suggested that *Yagar* should have read guideline § 2B1.1’s actual loss provision – and a “victim” is one who suffered an “actual loss” – in conjunction with the guideline’s provision concerning “credits against loss.” 427 F.3d 881, 895 (11th Cir. 2005). In *Lee*’s view, one whose losses are reimbursed may still suffer an actual loss because “inherent in the credit against loss provision is an acknowledgment that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods.” But that quibble with *Yagar* is *dictum*, because, as *Lee* acknowledged, “the facts before us are significantly different than those before” the Sixth Circuit in *Yagar*. *Id.* In *Lee*, the victim’s losses were not fully offset by the return of the collateral obtained by fraud, because they had to incur litigation costs to reclaim the collateral. *Id.* Thus, “unlike the individual account holders in *Yagar*, our victims suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party.” *Id.* *Lee* is therefore fully consistent with *Yagar* and *Conner*, which both suggested that that such unreimbursed losses may suffice to establish “victim” status under § 2B1.1(b)(2), provided that there is evidence to support such a finding.

More recently, in *United States v. Abiodun*, 536 F.3d 162 (2d Cir. 2008), the Second Circuit “conclude[d] that individuals who have been fully reimbursed for their financial losses may be deemed victims for purposes of the sentencing enhancement set forth” in § 2B1.1(b)(2). *Id.* But it also recognized that “[i]n doing so, . . . [it] need not reject the Sixth Circuit’s reasoning in *Yagar*[.]” and that *Yagar*’s reasoning is similar to *Lee*’s. *Id.* The Second Circuit “agree[d] with the Sixth Circuit and Eleventh Circuit that individuals who are ultimately reimbursed by their banks or credit card companies can be considered ‘victims’ of a theft or fraud offense for purposes of USSG § 2B1.1(b)(2) if, as a practical matter, they suffered (1) an adverse effect (2) as a result of the defendant’s conduct that (3) can be measured in monetary terms.” *Id.* And there was such evidence in *Abiodun*: “the District Court found that the individuals whose credit card information defendants stole had to spend an appreciable amount of time securing reimbursement from their banks or credit card companies and that this ‘loss of time’ could be measured in monetary terms.” *Id.* That was the very type of evidence that was lacking in *Yagar* and *Conner*, and which those cases suggested would have been sufficient to trigger the enhancement if it had been presented to the district court. *See Conner*, 2008 WL 2876564, at *8 (no evidence that businesses lost time “pa[ying] bills with fraudulent account charges before ultimately being reimbursed”); *Yagar*, 404 F.3d at 971-72 (no evidence that bank failed to reimburse account holders who had to order new checks as a result of defendant’s scheme).

As the circuits agree in their interpretation of § 2B1.1(b)(2)’s victim enhancement, there is no split for the Commission to resolve. And for the same reason, it is not the case, as the Department contends in urging issues for the Victims Advisory Group to explore, that “defendants in some Circuits are not held fully accountable for the harm caused [in fraud cases] if the victims are ultimately reimbursed by their banks or credit cards.” As long as the government offers evidence that the victims in a particular

fraud case incurred some unreimbursed pecuniary loss, all of the circuits, as discussed above, would uphold application of the enhancement.

APPENDIX A

§1B1.1. Application Instructions

Commentary

Application Notes:

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

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

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

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

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

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

Commentary

Application Notes:

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1. Subsection (a) distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within *or outside* that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to *impose a sentence outside the guideline range*. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for *a sentence above the guideline range*. *Some policy statements do, however, express a Commission policy that certain factors are not relevant or not ordinarily relevant for purposes of departure. See , e.g. , Chapter Five, Part H (Specific Offender Characteristics).*

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

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

CHAPTER 5 – DETERMINING THE SENTENCE

PART H - SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

The following policy statements address the relevance of certain offender characteristics to the determination of whether *to depart from* the applicable guideline range and, in

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certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission. The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether the sentencing court should depart from the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a departure is warranted, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

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In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment. "The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225 at 175 (1983).

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§5H1.6 Family Ties and Responsibilities

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a downward departure is warranted.

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§5K2.0 Grounds for Departure (Policy Statement)

- (a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.--
 - (1) IN GENERAL.--The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds that there exists an aggravating or mitigating circumstance; or

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(B) in the case of child crimes and sexual offenses, the court finds that there exists an aggravating circumstance,

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of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.--This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g ., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with the provisions of this subpart may be warranted.

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(B) UNIDENTIFIED CIRCUMSTANCES.--A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.--A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.-
-An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted

may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) **DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.**--The sentencing court may **depart downward** only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
- (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
- (3) should result in a sentence different from that described.

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The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

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(c) **LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.**--The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

- (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and
- (2) each such offender characteristic or other circumstance is—
 - (A) present to a substantial degree; and
 - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) PROHIBITED DEPARTURES.--Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

- (1) Any circumstance specifically prohibited as a ground for departure in § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).
- (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
- (3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
- (4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e ., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).
- (5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e ., a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
- (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.--If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera , shall state those reasons with specificity in the written judgment and commitment order.

Commentary

Application Notes :

1. Definitions .--For purposes of this policy statement:

“Circumstance” includes, as appropriate, an offender characteristic or any other offense factor.

“Depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement .--

(A) Departures Covered by this Policy Statement .--This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range.

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Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines .--This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a) .--As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines .--Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case other than a child crime or sexual offenses, or an aggravating circumstance in a case of a child crime or sexual offense, of a kind not adequately taken into consideration in the guidelines.

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- (i) Identified Circumstances .--This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.
- (ii) Unidentified Circumstances .--A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines .—

- (i) In General .--Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case other than a child crime or sexual offense, or an aggravating circumstance in a case of a child crime or sexual offense, to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.
- (ii) Examples .--As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense

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caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) Departures Based on Circumstances Identified as Not Ordinarily Relevant .-- Because certain circumstances are specified in the guidelines as not ordinarily relevant *for purposes of departure*, (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

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In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

4. Downward Departures in Child Crimes and Sexual Offenses .--

(A) Definition .--For purposes of this policy statement, the term “child crimes and sexual offenses” means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure .--

(i) Requirement of Affirmative and Specific Identification of Departure Ground .--The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).

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(ii) Application of Subsection (b)(2) .--The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in

subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

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5. *Departures Based on Plea Agreements* .--Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background : This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, “it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.” (*See* Historical Note to §1A1.1 (Authority)). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”, Public Law 108-21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce

unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to--

“(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;

(B) a policy statement authorizing a departure pursuant to an early disposition program; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of ...section 5K2.0”.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the “heartland”, that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§5K2.1. Death (Policy Statement)

If death resulted, the court depart upward.

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Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of

personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may depart upward. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

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§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may depart upward. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

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Normally, psychological injury would be sufficiently severe to warrant application of this policy statement only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

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§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may depart upward.

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§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may depart upward. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

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§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may depart upward. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

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§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may depart upward to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

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§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may depart upward to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

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§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may depart upward to reflect the actual seriousness of the defendant's conduct.

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§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may depart downward from the guideline range to reflect the nature and circumstances of the offense. In deciding whether a departure is warranted, and the extent of such reduction, the court should consider the following:

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Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a downward departure in the case of a non-violent offense. For example, an extended course of

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provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a downward departure may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a downward departure is not warranted. For example, providing defense secrets to a hostile power should not receive a downward departure, simply because the defendant believed that the government's policies were misdirected.

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In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a downward departure might be warranted.

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