

**Written Statement of Margy Meyers
Incoming Chair, Federal Defender Sentencing Guidelines Committee
and
Marianne Mariano
Federal Public Defender for the Western District of New York**

On Behalf of the Federal Public and Community Defenders

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2010**

**Re: Alternatives to Incarceration, Specific Offender Characteristics,
Application Instructions, and Recency**

March 17, 2010

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Thank you for the opportunity to address the Commission regarding the proposed amendments to the Sentencing Guidelines with respect to alternatives to incarceration, specific offender characteristics, application instructions, and recency points. For the reasons stated below, the Defenders believe that the Commission should defer for consideration proposed §5C1.3 so that next year it may take up a proposal that is more comprehensive and meets the myriad treatment needs of non-violent offenders. We support expansion of the Zones to encourage alternatives for more defendants, but believe that the current proposal does not go far enough. Regarding specific offender characteristics, the Defenders adhere to our longstanding view that individual offender characteristics are relevant to the court's sentencing decision and should be encouraged as potential bases for downward, but not upward, departures. And while we welcome the Commission's efforts to acknowledge the role that 18 U.S.C § 3553(a) plays in sentencing, we do not believe that the proposed changes to USSG §1B.1 accurately capture the state of the law. Finally, we welcome the Commission's proposal to eliminate recency points from the calculation of the criminal history score and fully support Option One.

I. ALTERNATIVES TO INCARCERATION

A. Proposed Amendment: §5C1.3

We offer this written testimony regarding proposed amendments and issues for comment on alternatives to incarceration. Given the high rate of incarceration in the federal prisons, severe prison overcrowding, and the increased danger to public safety when offender rehabilitative and treatment needs are unmet, the Commission should encourage the use of community-based alternatives that meet the purposes of sentencing in a balanced way.

At the Commission-sponsored 2008 Symposium on Alternatives to Incarceration and the 2009-2010 Regional Public Hearings, the Commission heard from judges, practitioners, probation officers, criminal justice scholars, and treatment experts that community-based sanctions are effective crime control strategies that punish offenders and protect public safety. A growing body of "what works" literature, grounded in evidence-based practices, tells us that an effective criminal justice system must employ alternatives to incarceration.

While we welcome the Commission’s consideration of alternatives to incarceration, we find that the current proposals do not begin to address the pressing need for guidelines that encourage community-based sanctions and provide sentencing options that attack the causes of criminal behavior and reduce the risk of recidivism.

1. Proposed §5C1.3 Does Not Address the Needs of Offenders with Substance Use Disorders.

With proposed amendment §5C1.3, the Commission purportedly seeks to “expand[] the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria.” Proposed Amendments to the Sentencing Guidelines, 75 Fed. Reg. 3,525, 3,526 (Jan. 21, 2010). While the Defenders support efforts to expand alternatives to incarceration under advisory guidelines, we cannot support this proposal without substantial modification. We therefore encourage the Commission to study the issue more closely and consider a more comprehensive and inclusive alternative sentence guideline next year.

We believe that this specific proposal is misguided because it (1) excludes too many offenders who could be provided community-based drug treatment without minimizing the seriousness of the offense, lessening the deterrent effect of the sentence, or jeopardizing public safety; (2) seeks to manage treatment decisions more appropriately made locally by trained professionals; and (3) runs a grave risk of discouraging judges from considering alternatives to incarceration for the many offenders who need treatment, but do not fall within the narrow confines of proposed §5C1.3.

2. Substance Abuse Treatment Alternatives Should Not Be Limited to a Narrow Category of Drug Offenders.

By limiting the proposed Guideline to a narrow range of drug offenses (21 U.S.C. §§ 841, 844, 846, 890, 960, or 963), the Commission leaves behind many non-violent offenders who suffer from substance use disorders,¹ including alcohol abuse, and who could be punished and managed with community-based sanctions that have been proven more effective than prison in reducing recidivism. A recent report from the National Center on Addiction and Substance Abuse (CASA), which comprehensively analyzes federal, state, and local inmate data on substance use, unequivocally states: “Substance misuse and addiction are overwhelming factors

¹ The Commission should use the term “substance use disorder” rather than “addiction” in identifying those offenders who could benefit from treatment alternatives. “Substance use disorder” is consistent with the DSM-IV-TR’s classification and covers substance dependence (with and without physiological addiction) and substance abuse. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* 191-199 (2000) (hereinafter *DSM-IV-TR*). In contrast, “addiction” is an ambiguous term with no settled meaning. Whether the term will even appear in DSM-V, which is still undergoing revision, remains to be seen. See Robin Fainsinger and Jean Fergusson, *What’s in a Word? Addiction Versus Dependence in DSM-V*, 163 Am. J. Psychiatry 2014 (Nov. 2006); Stanton Peele, *War Over Addiction: Evaluating the DSM-V*, The Huffington Post (Feb. 11, 2010), available at http://www.huffingtonpost.com/stanton-peelee/war-over-addiction-evalua_b_456321.html.

in all types of crimes.” National Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America’s Prison Population*, at 2 (Feb. 2010) (hereinafter *Behind Bars II*). Indeed, in 2006, 86.2% of federal inmates were “substance involved.” *Id.*

As the Commission learned from Dr. Diana DiNitto at the regional hearing in Austin, Texas, “of all federal prisoners regardless of their offense, 64% were regular drug users (up from 57% in 1997), and 45% met the criteria for drug abuse or dependence, with the majority (29%) meeting the criteria for the more serious diagnosis of dependence.”²

These statistics are unsurprising given the connection between drug abuse and crime. The National Institute of Drug Abuse (NIDA) tells us:

Drug abuse is implicated in at least three types of drug-related offenses: (1) offenses defined by drug possession or sales, (2) offenses directly related to drug abuse (e.g., stealing to get money for drugs), and (3) offenses related to a lifestyle that predisposes the drug abuser to engage in illegal activity, for example, through association with other offenders or with illicit markets.³

Proposed §5C1.3 ignores the last two categories of offenses and reaches only a tiny fraction of the first. We believe that the Commission should be recommending drug treatment as an alternative for all non-violent offenders who suffer from a substance use disorder. The reason is simple: “treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems.”⁴ As NIDA puts it:

The case for treating drug abusing offenders is compelling. Drug abuse treatment improves outcomes for drug abusing offenders and has beneficial effects for public health and safety. Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual’s relationships with his or her family, and may improve prospects for employment.⁵

² Statement of Diana DiNitto, at 2 (USSC Regional Hearing, Austin, Texas, Nov. 19, 2009) (citing Christopher Mumola and Jennifer Karberg, *Drug Use and Dependence: State and Federal Prisoners, 2004, Bureau of Justice Statistics Special Report*, at 2-3 (revised Jan 2007)); see also National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12-13 (Sept. 2007) (hereinafter *Principles of Drug Abuse Treatment*). Data on the number of federal probationers receiving judiciary-funded substance abuse drug treatment bear out the need for treatment across offense categories. For the twelve months ending September 30, 2008, 45% of defendants under supervision with substance abuse conditions received judicially funded treatment. An unknown number received treatment through local, county, and state governments. Administrative Office of U.S. Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts*, Table S-13, available at <http://www.uscourts.gov/judbus2008/contents.cfm>.

³ *Principles of Drug Abuse Treatment*, supra note 2, at 12.

⁴ *Id.* at 13.

⁵ *Id.* at 16.

Notwithstanding the proven efficacy of drug treatment in reducing recidivism and protecting public safety, treatment is not widely available to offenders in need of it. According to the National Criminal Justice Treatment Practices Survey (NCJTPS), “[l]ess than 10 percent of adults . . . with substance abuse problems in the Nation’s jails, prisons, and probation programs can receive treatment on any given day.”⁶ The Commission should adopt a proposal that reaches more offenders, not just a select few who stand a good chance of receiving an alternative sentence even without the amendment.

Even if the Commission were to have a sound basis for focusing on offenses defined by possession or sales, few offenders, even first offenders, would qualify under proposed §5C1.3. In FY 2008, 25,498 offenders were sentenced for drug offenses. Of those, 51.8% (13,216) fell into criminal history category (CHC) I. However, only 16.7% were in CHC I and had final offense levels of 16 or less; and even fewer, 4.9%, fell into CHC I with final offenses levels of 11 or less.⁷

Offenders convicted of Class A and B felonies, including all those subject to mandatory minimum sentences under 21 U.S.C. § 841, would automatically be excluded from the proposed §5C1.3 because they are ineligible for probation. This exclusion of Class A and B felonies is troublesome for many reasons. First, the Commission has long been aware that mandatory minimum statutes result “in lengthy imprisonment for many low-level, non-violent, first-time drug offenders” – the very offenders the proposed guideline is supposed to be helping. USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (Nov. 2004) (hereinafter *Fifteen Year Review*). Second, by excluding Class A and B felonies, proposed §5C1.3 would make the drug treatment alternative available mainly to offenders convicted of marijuana offenses and prescription drug offenses, while excluding those convicted of cocaine, heroin, and methamphetamine offenses. See USSC, *2008 Sourcebook of Federal Sentencing Statistics* at Table 44 (2008) (hereinafter *2008 Sourcebook*) (85% of drug offenders with no drug mandatory minimum, but who met safety valve, were involved with marijuana and drugs other than cocaine, methamphetamine, or heroin). Defendants have represented numerous crack, heroin, and methamphetamine addicts who were left to fend for themselves at an early age, became addicted, sold drugs to support their habit, and then were eventually arrested selling to an undercover officer or informant. These clients would benefit from treatment in lieu of incarceration.

Third, proposed §5C1.3 would exclude first offenders who received sentences below a mandatory minimum under 18 U.S.C. § 3553(f) – nearly a quarter of all drug offenders in fiscal year 2008. *Id.* Congress enacted the safety-valve to ameliorate the harsh effect of mandatory minimums on low-level offenders, but the Commission would nonetheless deprive those offenders of a drug treatment alternative. Fourth, proposed §5C1.3 would give prosecutors the

⁶ Lori Whitten, *Research Addresses Needs of Criminal Justice Staff and Offenders* (April 2009), available at http://www.drugabuse.gov/NIDA_notes/NNvol22N3/nidaatwork.html.

⁷ This data was obtained from the Federal Justice Statistics Center. The variables for FY 2008 were Offense Type (Drug Offenses) and Criminal History Category (All), <http://www.fjsrc.urban.org>.

ability to manipulate charges so that even low-level couriers with a substance use disorder would be denied the benefit of a guideline recommendation of community-based drug treatment.⁸

Regardless of the class of the felony, a guideline that recommends imprisonment rather than community-based drug treatment for offenders at higher offense levels is unsound. Drug quantity is a poor measure of offense severity or the role the offender played in the offense. Indeed, when the Commission categorized drug offenses according to offender function within the distribution network, it did so independent of drug quantity. *See USSC, Report to Congress: Federal Cocaine Sentencing Policy* at 95 (May 2007); *see also Fifteen Year Review* at vii (quantity thresholds for crack cocaine “result[] in lengthy incarceration for many street-level sellers and other low culpability offenders”); *id.* at 50 (discussing criticisms of drug quantity as “a particularly poor proxy for the culpability of low-level offenders”).

At the regional hearing in Denver, the Commission heard from Kevin Lowry of the U.S. Probation Office in the District of Minnesota about how low-level, addicted offenders with mitigating roles “are often lumped in with major offenders in a conspiracy and fall prey to sentences for significant quantities and mandatory minimums.” Transcript of Public Hearing, Denver, Colorado, at 98-99 (Oct. 20, 2009). According to Mr. Lowry, sentences “could be more effective if the factors about the offender and the offense were considered that appropriately punish, deter, protect and consider what would be necessary for the offender to develop a successful law-abiding lifestyle.” *Id.*

Removing the offense level caps from the proposed §5C1.3 would open up a drug treatment alternative to more of the “low-level” offenders that the Commission appears to want to help with this proposal. Based on FY 2008 data, if the Commission were to cap the offense level at 16 in proposed §5C1.3, it would exclude more than fifty percent of criminal drug trafficking offenders who received a four-level mitigating role adjustment for minimal participation and who fell within CHC I. And it would exclude close to 70% of CHC I trafficking offenders who received either a two- or three-level role adjustment. In FY 2008, 887 CHC I drug trafficking offenders received a four-level mitigating role adjustment under §3B1.2. Of those, only 11.2% fell at a final offense level of 11 or below; another 31% fell within offense levels 12-16. Fifty-seven percent (56.7%), however, fell within offense levels 17-27. Another 3,068 CHC I drug trafficking offenders received either a two or three level mitigating role

⁸ For example, the proposal excludes the kind of low-level offenders the Commission heard about at the Regional Hearing in Colorado – a courier who gets pulled into delivering methamphetamine or making some phone calls, or the person involved in “smurfing” whose only role was to buy pseudoephedrine from the local convenience store. Transcript of Public Hearing, Denver, Colorado, at 336-37 (Oct. 21, 2009) (Nicholas Drees). A similar problem exists with the proposed exclusion of offenses involving distribution in protected locations. U.S. Attorney Offices in selected districts charge violations of 21 U.S.C. § 860 to avoid application of the safety valve for low-level offenders or to otherwise obtain higher sentences. *See id.*; *see also* Federal Justice Statistics, FY 2008 data set (§2D1.2 offenses by district) (majority of prosecutions for drug offenses occurring near protected locations occur in Northern Iowa, Massachusetts, Puerto Rico, Western Texas, Eastern Pennsylvania, Eastern Virginia, and West Virginia, Northern), *available at* <http://www.fjsrc.urban.org>.

adjustment. Of those, only 4.9% were at an offense level of 11 or below; 25.8% fell within offense levels of 12 to 16. Sixty-two percent (61.9%) fell within levels 17 to 27.⁹

Imprisonment of non-violent offenders with drug problems serves no legitimate penological purpose. Offenders who serve prison sentences and then return to their communities face severe obstacles in reentry that would be alleviated if they were placed on probation in the first instance. As Judge Julia Gibbons explained to Congress in 2009:

Offenders coming out of prison on supervised release generally have greater financial, employment, and family problems than when they committed their crimes, and they often lack adequate life skills to transition back into society smoothly.¹⁰

For these offenders, the penological benefits of imprisonment are often illusory. It is far better to treat them now, in the community, where they can receive treatment, job placement and educational services and their families can support them in the recovery process.

3. A Treatment Alternative Should Be Available under the Advisory Guidelines for All Criminal History Categories, Not Just Those with One Criminal History Point.

By incorporating into proposed §5C1.3 the requirement in §5C1.2 that the defendant have no more than one criminal history point, the Commission unnecessarily limits the reach of a treatment alternative.

The National Institute on Drug Abuse recognizes that treatment is “effective for offenders who have a history of serious and violent crime, particularly if they receive intensive targeted services. The economic benefits in avoided crime and cost to crime victims (e.g., medical costs, lost earnings and loss in quality of life) may be substantial for these high-risk offenders.”¹¹ Providing treatment alternatives to offenders with criminal histories, and not just first-offenders, is sound policy. Substance-involved inmates who have committed a crime to get money to buy drugs have, on average, a higher number of arrests than those who committed the offense under the influence of alcohol or other drugs. *Behind Bars II, supra*, at 3. Among substance involved federal inmates, 41.7% had at least one prior incarceration compared to 29.9% for non-substance

⁹ USSC Monitoring Datafile FY2008. These statistics do not include the numerous defendants who receive no mitigating role adjustment because the only evidence available on the defendant’s role comes from the defendant himself. See Statement of Henry J. Bemporad at 7 (USSC Regional Hearing, Phoenix, Arizona, Jan. 21, 2010).

¹⁰ *Hearing Before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the United States House of Representatives* at 10 (Mar. 19, 2009) (statement of Honorable Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States), available at http://www.uscourts.gov/Press_Releases/2009/Gibbons2010HouseFinal.pdf.

¹¹ See *Principles of Drug Abuse Treatment, supra* note 2, at 17-18.

involved inmates. *Id.* at 20, Table 3.4. Offenders with three or more prior incarcerations were more likely to suffer from a substance use disorder than other offenders.¹²

Community-based supervision works in reducing recidivism for non-violent offenders with criminal histories. A recent Missouri study shows “that recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations.” Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart Sentencing at 1 (June 2009).¹³ On a three-year follow up from the start of probation or release from prison, offenders on probation were incarcerated at a significantly lower rate than those who had been sent to prison.

Percentage of Offenders Incarcerated After Three Years

	Probation	Prison
1 or 2 prior felonies	36%	53%
1 prior incarceration or 3 prior felonies	47%	55%

Id.

As to drug treatment alternatives, offenders “with extensive prior criminal history benefit more than offenders with no prior criminal history (a reduction in incarceration of 15 percentage points compared with 8 percentage points).” Missouri Sentencing Advisory Commission, *Drug Treatment Can Reduce Recidivism*, 1 Smart Sentencing at 2 (July 2009).¹⁴

In short, the Commission should encourage drug treatment alternatives to non-violent offenders regardless of their criminal history because it works.

The Commission should also consider its own data showing that, for offenders with prior drug convictions, criminal history category is a “less perfect measure of recidivism risk.” *Fifteen Year Review* at 134 (emphasis in original). Hence, the Commission might consider removing a blanket CHC I cap for such offenders. By removing, or at least expanding, the criminal history cap, the Commission would also include more low-level crack cocaine offenders in a drug treatment alternative. If the Commission were to cap eligibility under proposed §5C1.3 at CHC I, it would have the effect of excluding many low-level crack cocaine offenders because those offenders tend to have greater contacts with the criminal justice system. In FY 2008, for

¹² *Behind Bars II, supra*, at 37 (77.3% of inmates with three or more incarcerations suffer from substance use disorder compared to 67% with one or two prior incarcerations and 54.8% of those with no prior prison or jail sentence).

¹³ Available at <http://www.mosac.mo.gov/file/Volume%201%20Issue%203.pdf>.

¹⁴ Available at <http://www.mosac.mo.gov/file/Vol%201%20Issue%204%207.20.09.pdf>.

example, while 52% of drug offenders fell within CHC I, only 22.6% of offenders involved in crack cases were in CHC I. *2008 Sourcebook, supra*, Table 37.

4. Residential Treatment Should Not Be a Required Condition of Probation.

The advisory guidelines should not recommend that the court, when imposing probation, require that the defendant “participate in a residential substance abuse treatment program.” Using a “one-size fits all” approach that would require residential treatment is contrary to what experts tell us about the principles of effective treatment and may well be counter-productive. Indeed, intense supervision of low-risk offenders may well increase their risk of recidivism.¹⁵ In addition, a core principle of drug abuse treatment for criminal justice populations is “[t]ailoring services to fit the needs of the individual.” *Principles of Drug Abuse Treatment, supra*, at 2. This is because “[i]ndividuals differ in terms of age, gender, ethnicity and culture, problem severity, recovery stage, and level of supervision needed. Individuals also respond differently to different treatment approaches.” *Id.* When treatment is not tailored to the needs of the individual, it “may not yield meaningful reductions in drug use and recidivism.” *Id.* at 13; *see also id.* at 20 (discussing how “various combinations of treatment services may be required” over time).

In keeping with the core principle that “[n]o single treatment approach will help every person,” Office of Probation and Pretrial Services, *Court and Community: Substance Abuse Treatment* (2007),¹⁶ the Administrative Office of the U.S. Courts, pursuant to its statutory authority to contract for substance abuse and mental health treatment for offenders, *see* 18 U.S.C. § 3672, contracts with providers who provide a range of services. Such services include “intake assessments; individual, group, family, and intensive outpatient counseling; physical examinations; detoxification; psychotherapy; and psychological/psychiatric workups. Contractors also may provide substance abuse prevention and relapse prevention programs and vocational testing, training, and placement.” *Id.* In carrying out its responsibility to provide treatment services, U.S. Probation Officers use a treatment placement matrix in deciding what services to provide.¹⁷ The Commission should encourage courts to defer to the expertise of treatment professionals and U.S. Probation regarding the appropriate kinds of treatment.

A blanket recommendation for residential treatment also ignores the myriad other needs that substance involved offenders are likely to have, including educational and vocational programming. Compared with offenders who are not substance involved, substance involved

¹⁵ Scott VanBenschoten, Office of Probation and Pretrial Services, *Risk/Needs Assessment: Is This the Best We Can Do?*, 72 Federal Probation (Sept. 2008), available at http://www.uscourts.gov/fedprob/September_2008/06_risk_assessment.html.

¹⁶ Available at http://jnet.ao.dcn/Probation_and_Pretrial_Services/Publications/Court_and_Community/Substance_Abuse_Treatment.html

¹⁷ Administrative Office of the U.S. Courts, Guide to Judiciary Policy, Vol. 8: Probation and Pretrial Services, Part E: *Supervision of Federal Offenders (Monograph 109)*, Ch. 5: *Supervision of Offenders with Treatment Services Needs* at 20-21 (2009), available at http://jnet.ao.dcn/img/assets/6617/Vol8E_Ch5.pdf.

offenders are less likely to have completed high school and more likely to be unemployed. *Behind Bars II, supra*, at 24. Offenders in later stages of recovery may well need these services more than residential drug treatment.

5. A Drug Treatment Guideline Should Not Require that the Addiction or Substance Use Disorder “Contributed Substantially to the Commission of the Offense.”

A criterion that the offender’s “addiction” must have contributed “substantially” to the commission of the offense places an unnecessary and unwise limitation on the availability of alternatives that would meet the medical and criminogenic needs of the defendant with a substance use disorder. First, such a requirement would create unnecessary litigation over the meaning of “substantially.” It would require probation officers, judges, and lawyers to debate the degree to which the offender’s drug abuse contributed to the commission of the particular offense even if all parties agreed that the defendant’s drug use had some bearing on his or her criminal activity.

Second, the connection between drug abuse and crime is far more complicated than the Commission’s proposed nexus requirement suggests. Even in cases where drug use is not the proximate cause of a defendant’s criminal activity (e.g., where the defendant dealt drugs or stole money to obtain drugs), it is nonetheless connected to criminal activity. Individuals who use illegal drugs lead a lifestyle that “predisposes the drug abuser to engage in illegal activity, for example, through association with other offenders or with illicit markets.” *Principles of Drug Abuse Treatment, supra*, at 12. Whether drug abuse substantially contributes to the commission of a specific offense, it is a risk factor for criminal activity and may compound other factors associated with criminal activity, e.g., lack of employment, poor educational attainment, financial problems, unstable family relationships, and criminal peers. To treat the disease of drug use and dependence is to help ameliorate these other risk factors, thereby protecting public safety.

Third, the requirement of a strict causal connection between the disease and the crime is of unsound pedigree. For 16 years, from 1987 to 2003, the diminished capacity guideline, §5K2.13, from which this language is borrowed, operated without a strict causal nexus requirement. It merely told courts “a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense.” USSG §5K2.13 (1988-2002). The Commission added the stricter requirement that the defendant’s condition must have “contributed substantially to the commission of the offense” in 2003 in response to the PROTECT Act’s directive that the Commission reduce the number of departures. The Commission offered no other penological reason for the requirement. *See* USSG, App. C, Amend. 651.

6. The Commission Should Expand the Availability of Alternatives under the Guidelines to a Wider Pool of Offenders Because Treatment Works and Is Part of the National Drug Control Policy, and Because BOP Cannot Meet the Demand.

Evidence-based drug treatment interventions targeted at the needs of the individual work and are cost-effective. *Drug Treatment for Offenders: Evidence-Based Criminal Justice and*

Treatment Practices, Testimony before Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 10, 2009) (statement of Faye Taxman, Professor, Administration of Justice Department, George Mason University) (hereinafter Taxman).¹⁸ Treatment reduces drug abuse and criminal activity by 40 to 60 percent and increases employment by 40 percent. NIDA, *Understanding Drug Abuse and Addiction: What Science Says* at Slide 27.¹⁹ “Longitudinal outcome studies find that those who participate in community-based drug abuse treatment programs commit fewer crimes than those who do not participate.” *Principles of Drug Abuse Treatment, supra*, at 17. Because drug treatment is a sound strategy for combating crime, the Office of National Drug Control Policy priorities include expanding specialty care for addiction and developing safe and effective ways to manage drug-related offenders in the community. Executive Office of the President of the United States, *National Drug Control Budget: FY 2011 Funding Highlights* 3, 6 (Feb. 2010); Office of National Drug Control Policy, *President Obama’s 2010 Drug Control Strategy: Seeking Solutions at the Community Level*, 1 ONDCP Update 1, 2 (Jan. 2010) (“demand reduction” will “include a more intense concentration on recovery from addiction”).

Aside from being effective, community-based treatment services are necessary because few inmates with substance use disorders receive appropriate treatment within the Bureau of Prisons. The Director of the Bureau of Prisons, Harry Lappin, reported to Congress that since fiscal year 2007, “the BOP has been unable to meet the requirement for residential drug abuse treatment of all eligible inmates due to a lack of funding for expansion of the program. Since 2003, the waiting list for residential drug abuse treatment has grown at an average of approximately 700 inmates per year. Currently, the waiting list is in excess of 7,000 inmates.”²⁰ And although BOP offers drug education to a greater number of inmates, these programs do not meet the needs of offenders with chronic substance abuse disorders. Such programs are “more appropriate for individuals with recreational use patterns.” Taxman, *supra*, at 4-5.

Other data show the inability of BOP to keep up with the need for drug treatment services. CASA calculated the percentage of federal prison inmates with substance use disorders receiving treatment or related-services as follows:²¹

¹⁸ Available at http://appropriations.house.gov/Witness_testimony/CJS/faye_taxman_03_10_09.pdf.

¹⁹ Available at www.drugabuse.gov/pubs/Teaching/Teaching3/teaching5.html (last visited Mar. 13, 2010).

²⁰ *Hearing Before the Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, U.S. House of Representatives Concerning Federal Prisoner Reentry and the Second Chance Act* at 6 (Mar. 10, 2009) (Statement of Harley G. Lappin, Director, Federal Bureau of Prisons) (hereinafter Lappin).

²¹ *Behind Bars II, supra*, at 40, Table 5-1.

**Percent of Federal Prison Inmates with Substance Use Disorders
Receiving Treatment or Addiction-Related Services Since Admission**

Service	Percent
Detoxification	0.9
Any professional treatment since admission	15.7
Residential facility or unit	8.8
Counseling by a professional	7.8
Maintenance drug	0.3
Other addiction-related services since admission	39.7
Mutual support counseling	22.3
Education	29.2

For defendants who receive services, 94% do so in the general prison population where exposure to the “prison culture” may “derail [] the recovery process.” *Behind Bars II, supra*, at 48. Those with co-occurring disorders (substance abuse and another disorder like post-traumatic stress disorder or fetal alcohol spectrum disorder) are unlikely to obtain the necessary services within a prison setting. *Id.* at 49. Indeed, only a quarter of federal inmates with mental health problems receive treatment. *Id.* at 50. Even fewer receive effective treatment that employs an integrated approach. *Id.*

For too long, the criminal justice system has failed to view drug abuse and dependence as the medical disease that it is. See National Institute of Health Press Release, *Drug Abusing Offenders Not Getting Treatment They Need in Criminal Justice System: Treating Inmates Has Proven Public Health, Safety, and Economic Benefits* (Jan. 2009).²² Rather than confine its recommendations for drug treatment alternatives to an exceedingly narrow range of defendants, it should be on the forefront of encouraging treatment alternatives for non-violent offenders.

B. Proposed Amendment: Zone B and C Expansion

1. The Proposal to Expand Zones B and C by One Offense Level Represents a Positive First Step Toward Expanding the Availability of Alternative Sentences.

Part B of the proposed amendment would increase Zones B and C by one level each across all six criminal history categories. Defendants with minimum guideline ranges of 8 (CHCs I-IV) or 9 (CHCs V-VI) months would fall within Zone B and be eligible for a guideline sentence of probation plus intermittent or community confinement or home detention, while defendants with minimum guideline ranges of 12 months would fall within Zone C and be eligible for a guideline sentence of half-time imprisonment plus community confinement or home detention.

²² Available at <http://www.drugabuse.gov/newsroom/09/NR1-13.html>.

The Defenders support this proposal, which represents a positive first step toward increasing the availability of non-prison sentences or sentences that do not involve lengthy prison stays under the guidelines. As the Commission recently recognized, alternative sentences are both “money-saving” and “public-safety-oriented,” and are “important options” for the federal system because they divert offenders away from prison and into “programs providing the life skills and treatment necessary [for them] to become law-abiding and productive members of society.”²³ The Commission has established through numerous studies that alternatives to prison have proven more effective than prison at reducing recidivism²⁴ and thus further one of the Commission’s core principles, the protection and promotion of public safety.²⁵ The proposed amendment is also squarely within the Commission’s statutory authority to draft guidelines that are fair, maintain sufficient flexibility to permit individualized sentences when warranted, and reflect what works to reduce crime.²⁶

At the same time, we hope that the Commission will begin to take more of a leadership role in reducing the numbers of people who are unnecessarily sentenced to prison in the federal system. According to our review of the FY2008 data, only 1358 people were sentenced under a guideline range with a minimum of 8 or 9 months (those who would move from Zone C to Zone B under the proposed amendment), representing a mere 1.8% of all people sentenced in 2008. Similarly, only 2845 people (3.7% of the total) were sentenced under a guideline range with a

²³ See USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2, 20 (Jan. 2009) (hereinafter *Alternative Sentencing*).

²⁴ See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 (May 2004) (hereinafter *Measuring Recidivism*) (“[O]ffenders are most likely to recidivate (25.6%) when their sentence is a straight prison sentence. . . . Of those offenders sentenced to a probation only sentence, 15.1 percent recidivate. Offenders serving a sentence of probation combined with confinement alternatives have a similar rate of 16.7 percent.”); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* at 19 (Nov. 1996) (hereinafter *Sentencing Options*) (“At the very least, . . . alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”); see generally USSC, *Symposium on Alternatives to Incarceration* (July 14-15, 2008); see also The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 8 (hereinafter *Incarceration and Crime*) (“A variety of research demonstrates that investments in drug treatment, interventions with at-risk families, and school completion programs are more cost-effective than expanded incarceration as crime control measures.”), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_iandc_complex.pdf.

²⁵ See, e.g., USSC, *Guidelines: News from the U.S. Sentencing Commission*, at 1 (Winter 2010) (quoting Chief Judge Sessions describing the Commission’s commitment toward “shaping a policy that remains fair and certain, *protects and promotes public safety*, and ensures equal justice for those involved in the process”) (emphasis added); see also 28 U.S.C. § 994(k) (directing Commission “shall insure” the guidelines “reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment”).

²⁶ See 28 U.S.C. § 991(b)(1)(B), (b)(1)(C).

minimum of 12 months (those who would move from Zone D to Zone C). Removing non-citizens²⁷ and those who already received probation or split sentences from that total means that if the proposed amendment had been in place in 2008, it would in reality have only offered a potential benefit to 1272 defendants, a mere 1.7% of 2008 offenders.

Given the near-universal consensus by stakeholders – including the Attorney General – decrying the use of prison as the primary form of punishment and encouraging alternative sentences for more people,²⁸ and the empirical research that supports such policies, we remain puzzled why this particular line, which has the potential to generate at best a marginal impact, was drawn. Although the proposed amendment is a step in the right direction, given the small numbers at issue, it will likely have minimal effect on the prison population going forward.²⁹

2. In Addition to the Proposed Amendment, the Commission Should Reconsider Recommending Any Prison Time for Defendants in Zone C and Should Delete §5C1.1, comment. (n. 7).

In addition to recommending alternative sanctions for more defendants, we encourage the Commission to reconsider the utility of recommending prison for defendants in Zone C. In our experience, since DOJ no longer designates defendants to serve short prison sentences in

²⁷ The Commission has taken the position that non-citizens should generally be removed from the pool of those considered eligible to receive alternative sentences because the “overwhelming majority” are “illegal aliens . . . subject to deportation.” *Alternative Sentencing, supra*, at 4. Because immigration offenses represent the largest pool of offenders in the relevant ranges, it is important to make this distinction when drawing statistical comparisons about who is likely to benefit from increased alternatives. At the same time, although people against whom detainers have been filed (such as people subject to deportation) are not eligible for community placement under BOP policy, they are still “eligible” to receive non-prison sanctions as a matter of law.

²⁸ See, e.g., Attorney General Eric Holder, Speech to National Organization of Black Law Enforcement Executives, Tampa, Florida (Feb. 12, 2010) (“[I]n our work to protect the American people, incarceration cannot be our only law enforcement strategy. We’ve learned that simply building more prisons and jails will not solve all our problems. It’s time to face facts about our current approach to incarceration. It’s not sustainable. It’s not affordable. And we’ve seen that it isn’t always as effective as we think in reducing crime and keeping Americans safe. . . . [O]ur best research suggests that there are other, more effective ways to invest taxpayer dollars and ensure public safety. . . . It’s time for a new approach . . . [including] strengthening our drug abuse treatment programs, expanding our prisoner education programs, growing our network of halfway houses, and enlisting more police officers, volunteers, and community partners in our work.”), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100212.html>.

²⁹ Cf. 28 U.S.C. § 994(g) (“The sentencing guidelines promulgated under this Chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”); U.S. Dep’t of Justice, *Federal Bureau of Prisons FY2010 Congressional Budget*, at 1 (noting that BOP is operating “36 percent above rated capacity” and that “a net growth of nearly 4,500 inmates is projected for the next several years”).

community confinement, split sentences rarely serve any purpose of sentencing and often do more harm than good,³⁰ which is likely why they appear to be imposed relatively rarely.

The Commission's recent report on Alternative Sentencing in the Federal System shows that in 2007, courts imposed a split sentence in only 32.1% of Zone C cases involving citizens, while another 30.2% were sentenced to probation with or without a condition of confinement.³¹ In other words, in cases where the sentencing court decided an alternative to straight prison was appropriate, a Zone C defendant was almost as likely to receive a non-guideline (probation) sentence as a guideline (split) sentence. And even when imposing split sentences, the length of the sentence imposed was within the range only 40.5% of the time (compared to within-range rates of 59.7% over all four Zones); 58.1% of the defendants who received a split sentence received shorter than recommended sentences.³² Our review of the data from 2008 reveals a similar pattern. Of the 1,358 people who were sentenced in 2008 under a guideline range with a minimum of 8 or 9 months (current Zone C), almost the same percentage received non-guideline probation sentences (13%) as were sentenced to a split sentence (14.3%).³³

Judicial reluctance to sentence certain offenders to prison, even for comparatively short periods of time, is justified by past practice, empirical evidence, and simple logic. Until December 2002, courts typically imposed "split sentences" that included not imprisonment, but instead terms of incarceration to be served in community confinement, because BOP interpreted 18 U.S.C. § 3621(b) as authorizing it to designate a community corrections facility as the place of a prisoner's imprisonment. Such sentences were deemed to satisfy the need for short-term custody where appropriate without raising the defendant's recidivism risk by unnecessarily separating the defendant from his or her family, place of employment, community, and other support systems or activities that would otherwise reduce the risk of the defendant committing future crimes.

The Department of Justice changed this historical practice by administrative fiat in December 2002. Its Office of Legal Counsel re-interpreted § 3621(b), concluding that it does not give BOP the general authority "to place[] an offender in community confinement from the outset of his sentence or to transfer him from prison to community confinement at any time BOP

³⁰ See National Institute of Justice, *Effects of Judges' Sentencing Decisions on Criminal Careers* at 8 (Nov. 1999) ("This study found no evidence to justify the belief that the addition of jail time to a probation sentence has a specific deterrent effect. Unless it is believed that jail time is required for punishment, or the hope of an effective warning to others is maintained, this study would support abandoning the use of split sentences."); USSC, *Proceedings from the Symposium on Alternatives to Incarceration*, at 18 (July 14-15, 2008) (Catherine C. McVey) ("Over-incarceration exacerbates recidivism.").

³¹ See *Alternative Sentencing*, *supra*, at 5, Table 5.

³² See *id.* at 11, Table 8.

³³ We did not analyze data for those with a minimum guideline range of 10 months because they would not be affected by the proposed change, but expect the results would be similar for that group as well.

chooses during the course of his sentence.”³⁴ Under the 2002 interpretation of § 3621(b), front-end placements are not authorized and back-end offenders are only eligible for community confinement for the lesser of ten percent of their sentence or six months.

There was near-universal outcry to DOJ’s new position.³⁵ One court explained its frustration with the new policy as follows:

Imprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents. . . . For innocent third parties, particularly children, the economic and emotional devastation caused by a parent’s distant incarceration can be, to some extent, palliated. With the inmate employed, families can stay off welfare; with a parent available, children can avoid placement in foster homes. . . . [and] the cost of community confinement, when it serves the interest of justice, is far less than the price tag on more conventional forms of imprisonment. . . . To jettison even the possibility of a sentence of imprisonment to community corrections – for anyone, ever – is the ultimate act of tossing out the proverbial baby with the bath water.³⁶

The Commission, however, never revised the guidelines in light of DOJ’s new refusal to place inmates in community confinement at the front end of their sentence. As a result, at least until *Booker*, courts had to choose between squeezing the facts of a case to fit a restrictive departure analysis or sending someone to prison unnecessarily.³⁷

³⁴ Op. Off. Legal Counsel, 2002 WL 31940146 (December 13, 2002).

³⁵ At least two courts held that DOJ’s new interpretation of § 3621(b) was contrary to the plain meaning of the statute and therefore invalid. *See Goldings v. Winn*, 383 F.3d 17, 28-29 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842, 847 (8th Cir. 2004); *see also Pearson v. United States*, 265 F. Supp. 2d 973, 975-76 (E.D. Wis. 2003) (finding defendant’s sentence violated due process where BOP expressly assured court that Zone C defendant sentenced to split sentence would serve prison term at halfway house with work release and parent care privileges and then reversed position based on Office of Legal Counsel’s Memorandum); *Iacoboni v. United States*, 251 F. Supp. 2d 1015, 1016-17 (D. Mass. 2003) (same for three defendants, two of whom were already serving prison portion of split sentences in halfway houses); *Culter v. United States*, 241 F. Supp. 2d 19, 20, 22-23 (D.D.C. 2003) (same for defendant whose “rehabilitation has continued, and even accelerated” during her halfway house placement).

³⁶ *See Iacoboni*, 251 F. Supp. 2d at 1022-1023.

³⁷ *See, e.g., Pearson*, 265 F. Supp. 2d at 977 (“had the Court at the time of sentencing been advised of BOP’s newfound position that a Zone C offender cannot serve her full sentence in a halfway house, petitioner’s resulting sentence would undoubtedly have been different”); *Culter*, 241 F. Supp. 2d at 27-28 (“[I]f the Court had been so prescient to know that DOJ would require BOP to send Zone C offenders to prison, the Court would have looked quite differently at petitioner’s two-level departure request, which would have dropped her into Zone B, thereby avoiding the mandatory imprisonment requirement of USSG §5C1.1(d.)”); *United States v. Norton*, 218 F. Supp. 2d 1014, 1020-22 (E.D. Wis. 2002) (departing down four levels to Zone B for numerous reasons, including fact that defendant was solely responsible for

Requiring some prison for all defendants in Zone C undoes the purpose of offering alternative sentencing options in the first place. “Incarceration creates a supply of both crime and more incarceration,”³⁸ and “[t]he persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.”³⁹ Even though split sentences do not carry lengthy terms, they still impose the same types of disabilities as all other prison sentences: “[E]ven a short period of incarceration has been shown to affect people’s earnings and ability to get a job, to be parents, and to become productive parts of their communities.”⁴⁰ In some ways, short sentences are harder to serve. Our clients frequently languish for their entire four-month sentence in the county jail, or a remote facility, waiting for a designation with no services or programs available to them. Those that do receive a designation may be sent to a facility hundreds of miles from their families and friends. Neither option assists our clients or their families, or enhances public safety in any way.

Almost 15 years ago, the Commission noticed that non-prison sentences can “divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”⁴¹ This, theoretically, is the purpose behind the Zones, and one that we think would be furthered by doing away with Zone C’s restrictive approach to sentencing options.⁴²

The Commission should also delete from Application Note 7 in USSG §5C1.1, which states: “The use of substitutes for imprisonment as provided in subsections (c) and (d) is not

three children with health problems including an infant, because public safety would be better served by maintaining a stable family unit, which is “more likely to produce productive, law abiding citizens” and noting that “a departure is most appropriate when the defendant could be given probation (or home confinement) rather than incarceration with only a small downward departure”) (citing *United States v. Wright*, 218 F. 3d 812, 815 (7th Cir. 2000)).

³⁸ See Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urban L. J. 1551, 1554-55 (July 2003) (hereinafter *Reciprocal Effects of Crime and Incarceration*) (studying New York City neighborhoods with high crime and incarceration rates and concluding that “[w]hen high incarceration rates are internalized into the ecology of small, homogeneous neighborhoods, it adversely affects the economic fortunes, political participation, family life, and normative orientation of people living in the social context of imprisonment and its aftermath”).

³⁹ See *Incarceration and Crime*, *supra*, at 7.

⁴⁰ See Justice Policy Institute, Doug McVay, Vincent Schiraldi & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment*, at 3 (Jan. 2004), available at http://www.justicepolicy.org/images/upload/04-01_REP_MDTreatmentorIncarceration_AC-DP.pdf.

⁴¹ *Sentencing Options*, *supra*, at 19.

⁴² This could be done, for instance, by simply collapsing Zone B into Zone A, renaming Zone C as Zone B, renaming Zone D as Zone C, and deleting USSG §5C1.1(d).

recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.” This provision discourages judges from imposing alternatives for offenders who could benefit from them, and has an adverse impact on black offenders in Zones B and C, who tend to fall within higher criminal history categories in those zones than white offenders.⁴³ While adverse impact alone is not cause for concern, it is when the reason for the adverse impact has insufficient penological purpose.

Discouraging alternatives for defendants in higher criminal history categories serves no such purpose and is based on unsound assumptions. No data supports the notion that defendants in higher criminal history categories have “failed to reform despite the use of such alternatives” because we do not know the nature of the previous sentence imposed on those offenders. If they were sentenced to prison or placed on probation without services that met their criminogenic needs, their recidivism is at least as much a product of systemic failure as it is their capacity to “reform.” Such offenders, given appropriate evidence-based alternatives, respond quite well.⁴⁴

C. Issues for Comment: Additional Suggestions for Alternatives to Incarceration

1. USSG §5H1.4 Should be Deleted or Modified to State That Physical Condition, Drug or Alcohol Dependence or Abuse May Be Relevant to Downward Departure, and to Remove the Prohibition on Considering Gambling Addiction.

The Commission requests comment on how part A of the proposed amendment should interact with other provisions in the Guidelines Manual. As stated earlier, the Defenders believe that the Commission should defer consideration of proposed §5C1.3. As discussed below in Part II.F, we encourage the Commission to remove language from §5H1.4 that discourages departures for physical condition, including drug and alcohol dependence and state simply that such conditions may be relevant. The Commission should also delete its prohibition on the consideration of gambling addiction.

⁴³ *Alternative Sentencing, supra*, at 14, 16-17.

⁴⁴ Transcript of Public Hearing, Chicago, Illinois, at 390 (Sept. 10, 2009) (Hon. Roger K. Warren, President Emeritus, National Center for State Courts) (“[I]f you give up on all offenders who have committed one offense and say, well, we’re not really going to focus on you anymore, we’re just going to send you to prison, you’re not doing everything you can do to protect public safety because there are many folks who have committed two, three and four offenses who are still prime targets . . . to try to change their behavior.”); *id.* at 393 (James Van Dyke, Executive Director, Salvation Army Correctional Services Program) (“Sometimes it’s an individual who has been in the system more than once who is ripest for a change because he or she now sees themselves as having a criminal conduct problem, as opposed to this was just a one-time mistake.”); *see also* Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart Sentencing, at 1 (June 2009) (noting that “recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations”); Missouri Sentencing Advisory Commission, *Drug Treatment Can Reduce Recidivism*, 1 Smart Sentencing, at 2 (July 2009) (offenders “with extensive prior criminal history benefit more [from drug treatment] than offenders with no prior criminal history”).

2. **Defendants with Treatment or Rehabilitative Needs Other than Substance Abuse Treatment Should Be Considered for Alternatives to Incarceration.**

The Commission requests comment on “whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.” The Defenders believe the Commission should amend the advisory guidelines to encourage non-prison sentences for more defendants who do not need to be incapacitated in order to protect public safety. Examples of these scientifically supported interventions include educational and employment initiatives; structured supervision; cognitive-behavioral programs targeted toward criminal attitudes, anger, and values; and motivational interviewing that engages offenders in self-motivating behaviors.⁴⁵

Federal offenders present with a variety of mental health, educational, vocational, employment and related needs that place them at risk for recidivism and otherwise interfere with their ability to function as law-abiding, productive persons. Some of those needs are discussed in more detail below. Community-based, evidence-based interventions that address offender needs serve all of the purposes of sentencing: they reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes of the defendant, and provide the defendant with needed services “in the most effective manner.” 18 U.S.C. § 3553(a)(2) (B), (C), and (D).

Non-prison sentences, particularly those where the offender is required to do the hard work of grappling with problems that place him at risk of criminal activity, represent significant restraints on a person’s liberty. *Gall v. United States*, 552 U.S. 38, 48 (2007). Offenders who are not imprisoned are punished; they simply face a different form of punishment. A non-prison sentence does not send a message that “crime pays” or that the offense is not serious. It merely reflects that the defendant need not be incapacitated to protect public safety, and that incarceration may undercut efforts to protect the public because the offender may return to the community without addressing the issues that placed him at risk of criminal activity in the first instance.

Lengthy terms of imprisonment rather than fair and effective community-based sanctions often run counter to the statutory purposes of sentencing. In African-American communities, for example, mass incarceration has undermined respect for the law and led to the breakdown of social norms, thereby “seriously jeopard[izing] community safety.” Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stanford L. Rev.* 1271, 1285 (2004); *see also* Joseph E. Kenney, *The Jena Six, Mass Incarceration and the*

⁴⁵ *See generally* Edward J. Latessa and Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 *U. St. Thomas L. J.* 521 (2006); Washington State Institute for Public Policy, *Evidence-based Adult Corrections Programs: What Works and What Does Not* (Jan. 2006), available at <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf>; National Institute of Corrections, U.S. Dep’t of Justice, *A Guide for Probation and Parole: Motivating Offenders to Change* (June 2007); RKG Group, Roger Przybylski, *What Works, Effective Recidivism Reduction and Risk-Focused Prevention Programs: A Compendium of Evidence-based Options for Preventing New and Persistent Criminal Behavior* (Feb. 2008), available at http://dcj.state.co.us/ors/pdf/docs/WW08_022808.pdf.

Remoralization of Civil Rights, 44 Harv. C.R.-C.L. L. Rev. 477, 486-87 (2009); Jeffrey Fagan and Tracey Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 Ohio St. J. Crim. L. 173, 212-24 (2008) (discussing how high levels of punishment “ultimately undermine the goal of crime reduction” and undermine the legitimacy of government). As Professor Roberts explains it,

[a] key component of the criminogenic dynamic of mass incarceration is the negative view of the justice system it generates. Social scientists have theorized, based on social control research, that people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities.

Roberts, *supra*, at 1,287.

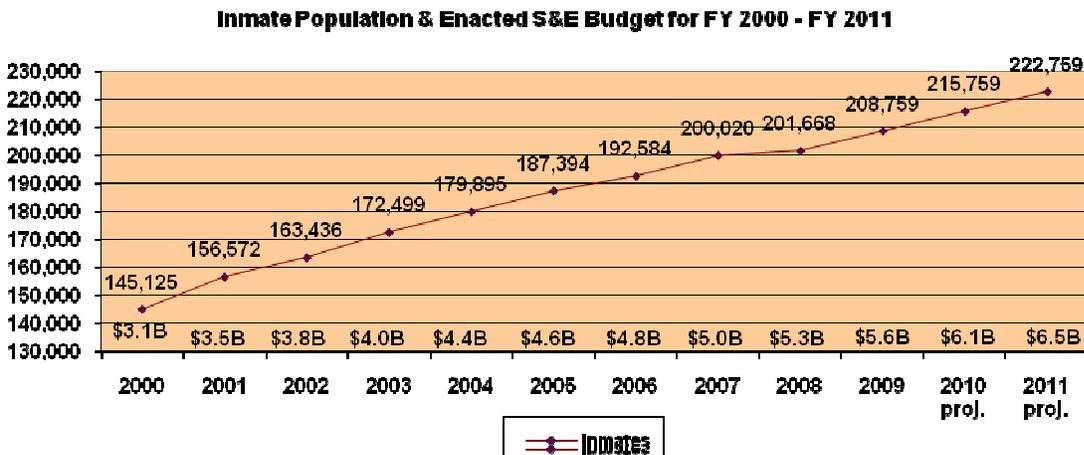
Public opinion polls also reveal that long prison terms are not necessary to promote respect for the law or appropriately punish. See Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harvard L. & Pol’y Rev. 173, 175 (2010) (“The median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges.”).⁴⁶ Close to three-quarters (72%) of adults surveyed in 2003 either completely agreed or mostly agreed that “[t]he criminal justice system should try to rehabilitate criminals, not just punish them.” Bureau of Justice Statistics, U.S. Dep’t of Justice, *2003 Sourcebook of Criminal Justice Statistics* 139, Table 2.46.⁴⁷

In addition to satisfying the statutory purposes of sentencing, a system that places non-violent offenders in community-based programming designed to meet their needs complies with the Commission’s mandate to formulate guidelines “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” 28 U.S.C. § 994(g). In January 2010, BOP was operating at 36 percent over its total rated capacity. U.S. Dep’t of Justice, *Federal Prison System FY 2011 Performance Budget*, at 7. “The system-wide crowding level in BOP facilities is estimated to climb to 43 percent above rated capacity by the end of FY 2011.” *Id.* at 3. Because of this crowding, “as of May 2009, 18,630 (93 percent) of high security inmates were double bunked, and 14,180 (26 percent) of medium security inmates and almost 35,000 (81 percent) of low security inmates were triple bunked.” *Id.* at 2.

⁴⁶ Available at http://hlpronline.com/wp-content/uploads/2010/02/gwin_jurorsentiment.pdf.

⁴⁷ Available at <http://www.albany.edu/sourcebook/pdf/t246.pdf>. Three years later, close to two-thirds (65%) of those surveyed believed that “more money and effort should go to attacking the social and economic problems that lead to crime through better education and job training” than to “deterring crime by improving law enforcement with more prisons, police and judges.” Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics Online, Attitudes Toward Approaches to Lowering the Crime Rate in the United States*, Table 2.0013.2006, available at <http://www.albany.edu/sourcebook/pdf/t200132006.pdf>.

In ten years, from 2000 to 2010, BOP’s budget doubled and the number of inmates in BOP custody increased by 43.8%:



Id. at 5. For FY 2010, the Obama Administration has requested from Congress a total of \$6.8 billion for the Bureau of Prisons – nearly a quarter (23.2%) of the Department of Justice’s entire budget,⁴⁸ and more than the \$6.49 billion the entire federal judiciary received in FY 2009.⁴⁹ In contrast, the FY 2011 budget includes only \$100 million to implement the Second Chance Act of 2007, which is geared toward meeting the reentry needs of state and federal offenders to keep them from reoffending. See Justice Policy Institute, *The Obama Administration’s 2011 Budget: More Policing, Prisons, and Punitive Policies*, at 5 (Feb. 2010). This state of affairs, with more people going to prison and not getting the services they need to reduce recidivism, “makes debilitation much more likely than rehabilitation.” *United States v. K*, 160 F. Supp. 2d 421, 433-36 (E.D.N.Y. 2001).

Missouri’s Chief Justice William Ray Price, Jr. recently characterized the practice of locking up non-violent offenders:

[W]e are following a broken strategy of cramming inmates into prisons and not providing the type of drug treatment and job training that is necessary to break their cycle of crime. Any normal business would have abandoned these practice years ago, and it is costing us our shirts.

Missouri Sentencing Advisory Commission, *The Overuse of Prisons for Nonviolent Offenders: Excerpt from Chief Justice Price’s State of Judiciary Speech*, 2 Smart Sentencing 1 (Feb. 2010).

Advisory guidelines that emphasize rehabilitation for non-violent offenders who need not be incapacitated to protect the public would help break the growth of prisons and move the

⁴⁸ Dep’t of Justice, *FY 2011 Budget and Performance Summary: 2011 Budget Authority by Organization*, available at <http://www.justice.gov/jmd/2011summary/pdf/positions.pdf>.

⁴⁹ Administrative Office of the U.S. Courts, *Judiciary Budget: Facts and Impact*, available at <http://www.uscourts.gov/budget.html>.

federal criminal justice system into a “smart on crime” approach and away from harsh terms of imprisonment that serve no legitimate penological purpose. To continue down the path of filling already overcrowded prisons with non-violent offenders would “represent[] an institutional failure” on the part of the Sentencing Commission. *United States v. K.*, 160 F. Supp. 2d at 440.

a. *Defendants with mental and emotional conditions should be considered for alternatives to incarceration.*

Mental Illness. People with mental health problems are overrepresented in the criminal justice system. See Seth Prins and Laura Draper, *Improving Outcomes for People with Mental Illness under Community Corrections Supervision: A Guide to Research-Informed Policy and Practice* 1 (2009). In 2006, forty-five percent (45%) of federal prisoners were estimated to suffer from a mental health problem.⁵⁰ Doris James and Lauren Glaze, *Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates* (Sept. 2006) (rev’d Dec. 2006) (hereinafter *Mental Health Problems*). Fourteen percent (14%) had a recent history of problems, including symptoms of psychotic disorders, major depression, or mania. *Id.* at 2.⁵¹

Alcohol abuse is a significant problem among federal offenders with mental health problems. Of the 45% of federal prisoners with mental health problems, 66% percent regularly used alcohol. Of those without mental health problems, 58.2% regularly used alcohol. *Mental Health Problems, supra*, at 6. Alcoholism is a medical disease just like drug abuse and dependence. Both have devastating effects on the lives of those suffering from the disease and both are identified risk factors for criminal conduct. There is no legitimate reason to exclude offenders who abuse alcohol from alternative treatment programs.

Many offenders with mental health problems would present no risk to public safety if given a community-based sentencing option. Fifty-one percent (51.3%) of federal inmates with mental health problems committed drug offenses. *Id.* at 7, Table 8. Close to three-quarters of offenders with mental health problems committed a non-violent offense and had no prior criminal record (27.1%) or were non-violent recidivists (40.3%), making them candidates for community-based treatment options at little or no risk to public safety. *Id.* at 8, Table 10.

A variety of programs exist for individuals suffering symptoms of mental illness. The Center for Mental Health Services’ National GAINS Center has identified five interventions that have proven effective for individuals diagnosed with mental illness and adaptable to criminal justice settings. These interventions are Assertive Community Treatment (ACT), supported employment, illness self-management and recovery, integrated treatment for co-occurring mental health and substance use disorders, and housing. See generally National Gains Center, *Publications on Evidence-Based Practices*.⁵² Similarly, the Council of State Governments

⁵⁰ “Mental health problems were defined by two measures: a recent history or symptoms of a mental health problem.” *Mental Health Problems, supra*, at 1.

⁵¹ Close to 40% reported symptoms of a mental health disorder, including major depressive disorder (16%), mania disorder (35.1%), and psychotic disorder (10.2%). *Id.*

⁵² Available at <http://www.gainscenter.samhsa.gov/html/resources/publications.asp>.

Justice Center has set forth ten essential elements of probation initiatives that have proven effective in meeting the needs of offenders with mental health problems. See Seth Jins and Fred Osher, M.D., *Improving Responses to People with Mental Illnesses: The Essential Elements of Specialized Probation Initiatives* (2009).⁵³ For many offenders with mental illness, the key is not to simply treat the symptoms of mental illness, but to target the same criminogenic needs applicable to all offenders. See generally Jennifer Skeem, Ph.D., *Individuals with Mental Illnesses in the Criminal Justice System: Addressing Both Criminogenic Needs and Mental Health Needs*, Justice and Mental Health Collaboration Program Webinar (Nov. 18, 2009).⁵⁴

Developmental, Intellectual, and Cognitive Disabilities. In addition to expanding the reach of alternatives to incarceration to those suffering symptoms of mental illness, the Commission should encourage the use of alternatives for non-violent offenders who suffer from a wide range of conditions that impair their thinking and impulse control. Persons with developmental, intellectual, and cognitive disabilities represent a “small, but nonetheless growing percentage of suspects/offenders within the criminal justice system.” See generally Leigh Ann Davis, The Arc, *People with Intellectual Disabilities in the Criminal Justice System: Victims and Suspects*.⁵⁵ While the prevalence of such disabilities among inmates is not closely monitored, researchers estimate that developmentally and intellectually disabled inmates “represent 4% to 10% of the prison population.” *Id.* This is because their disabilities may make them particularly susceptible to being involved in the criminal justice system.

For example, persons with fetal alcohol spectrum disorder (FASD) or prenatal exposure to drugs may find themselves involved in criminal activity because they display a lack of impulse control, have trouble thinking of future consequences, have problems expressing anger, and are easily influenced. See Fetal Alcohol Spectrum Disorders Center for Excellence, SAMSHA, *Fetal Alcohol Spectrum Disorders and the Criminal Justice System*, at 1 (Jan. 2006); see also *Behind Bars II, supra*, at 36 (discussing prevalence of FASD among inmates).⁵⁶ FASD is the “leading non-genetic cause of mental retardation in the world.” *Id.* Non-violent offenders suffering from FASD or a similar intellectual disability may be uniquely suited for an alternative to incarceration sentence. See FAS/FAE Legal Issues Resource Center, Fetal Alcohol and Drug Unit, Univ. of Wash. Dep’t of Psychiatry and Behav. Sciences, School of Law, *Sentencing and Supervising Offenders with FASD*.⁵⁷

⁵³ Available at http://consensusproject.org/jc_publications/probation-essential-elements.

⁵⁴ Available at <http://www.cjmh-infonet.org/features/webinar-archive-individuals-with-mental-illnesses-in-the-criminal-justice-system-addressing-both-criminogenic-risks-and-mental-health-needs>.

⁵⁵ Available at <http://www.thearc.org/NetCommunity/Page.aspx?pid=2140>.

⁵⁶ Native Americans are at especially high risk for FASD because of the high alcoholism rate in Indian Country – 627 percent higher than the national average. Democratic Policy Committee, *A Closer Look at Issues Affecting Indian Country Part 1: Health Care* (Sept. 2004).

⁵⁷ Available at <http://depts.washington.edu/fadu/legalissues/SENTENCING.3rdDraft.fasd.pdf>.

Such individuals benefit from longer terms of supervision and structure. Lengthy sentences are unlikely to deter an individual with FASD from committing crimes because they “have only a limited grasp of cause and effect.” *Id.* at 4. And “prolonged incarceration may severely harm the ability of an already disabled individual with FASD to function when he or she returns to society” or place them at risk for victimization by fellow inmates. *Id.*;⁵⁸ see also The Arc, *Position Statement on Criminal Justice System* (at sentencing, persons with intellectual and/or developmental disabilities should “[h]ave available reasonable and appropriate accommodations, treatment, and education, as well as alternatives to sentencing and incarceration that include community-based corrections”).⁵⁹

Offenders with cognitive deficits other than intellectual and/or development disabilities are also prevalent in the criminal justice system. Many suffer cognitive deficits that distort their thought process and “impair[] their ability to correctly read social clues, accept blame, and morally reason. This distorted thought process can lead them to demand instant gratification, misperceive harmless situations as threats, and confuse wants with needs.”⁶⁰ Such thinking in turn leads to involvement in criminal activity. Cognitive-behavioral programming is one of the more promising rehabilitative programs for such offenders.⁶¹

Impulse Control Disorders. Treatment alternatives should also be available for individuals with impulse control disorders like problem gambling and pathological gambling.⁶² Pathological gambling is recognized as a mental disorder by the American Psychiatric Association. *DSM-IV-TR, supra*, at 671. It is a disorder linked to crime, particularly drug distribution and possession. See Richard McCorkle, National Institute of Justice, *Gambling and Crime Among Arrestees: Exploring the Link*, at 6 (July 2004). Pathological gamblers who are arrested are “drawn disproportionately from the social and economic fringes of society.” *Id.* at 7. Treatment protocols, such as cognitive-behavioral programs, medications, and programs similar to those used for drug treatment, have proven effective in addressing the needs of gambling addicts. See

⁵⁸ See, e.g., *United States v. Meillier*, 650 F. Supp. 2d 887, 898 (D. Minn. 2009) (departing from advisory guideline range of 57-71 months to one day in prison, thirty years of supervised release, with one year in residential reentry center, and 2000 hours of community service, for mentally retarded defendant convicted of downloading child pornography who would likely be victimized in prison. noting that U.S. Probation Office would be able to provide vocational and psychological services).

⁵⁹ Available at <http://www.thearc.org/NetCommunity/Page.aspx?pid=1356>.

⁶⁰ Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come From and What They Do*, 72 *Federal Probation* (Sept. 2008).

⁶¹ Harvey Milkman and Kenneth Wanberg, *Cognitive-Behavioral Treatment: A Review and Discussion for Corrections Professionals* (May 2007).

⁶² Few studies measure the prevalence of problem gambling among the federal criminal justice population. A 2005 review of the literature “suggests that approximately one third of criminal offenders are problem or pathological gamblers.” Robert Williams, Jennifer Royston, and Brad Hagen, *Gambling and Problem Gambling Within Forensic Populations: A Review of the Literature*, 32 *Crim. Just. & Beh.* 665, 679 (2005).

Deborah Brauser, *Substance Abuse Medications May Offer Effective Treatment Option for Pathological Gamblers*, Medscape Medical News (Dec 11, 2009) (reporting on research presented at American College of Neuropsychopharmacology); Ken Belson, *New York Gambling Treatment Court Stresses Help*, N.Y. Times, May 1, 2007.⁶³

Combat-related Trauma and Mental Health Conditions. The Commission should also encourage the use of alternatives to incarceration for combat veterans with service-related trauma and mental health conditions. One in ten federal inmates is a veteran. *Behind Bars II, supra*, at 36; see also CMHS National GAINS Center, *Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions: A Consensus Report of the CMHS National GAINS Centers' Forum on Combat Veterans, Trauma, and the Justice System 1* (Aug. 2008) (hereinafter *Responding to the Needs*). As more veterans “return home with combat stress exposure resulting in high rates of posttraumatic stress disorder (PTSD) and depression, more veterans will inevitably find themselves involved in the federal criminal justice system.” *Id.* “PTSD symptoms can indirectly lead to criminal behavior (for example, self medication or hypervigilance) or through direct linkage to a traumatic incident in a specific crime.” Under Secretary for Health’s Information Letter, *Information and Recommendations for Services Provided by VHA Facilities to Veterans in the Criminal Justice System*, at 3 (April 2009) (hereinafter *Information and Recommendations*).⁶⁴ In addition to PTSD, these veterans may suffer from traumatic brain injuries that lead to depression, anxiety, substance abuse, difficulty controlling anger, impulsive behavior, and cognitive impairment. See *id.* at 2-3.⁶⁵

The Center for Mental Health Services of the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, as well as the Department of Veterans Affairs, are on the forefront of ensuring that the needs of these individuals are served. See *Responding to the Needs, supra*; *Information and Recommendations, supra* at 1. The Veterans Health Administration (VHA) launched the Veteran Justice Outreach (VJO) initiative “to avoid the unnecessary criminalization of mental illness and extended incarceration among Veterans by ensuring that eligible justice-involved Veterans have timely access to VHA mental health and substance abuse services when clinically indicated, and other VA services and benefits as appropriate.” Dep’t of Veterans Affairs, *Veteran Justice Outreach Initiative*; ⁶⁶ see also *Information and Recommendations, supra*, at 4. Because the Veterans Health Administration has expressly stated its commitment to providing VA mental health

⁶³ Available at <http://www.nytimes.com/2007/05/01/nyregion/01gamble.html>.

⁶⁴ Available at http://www1.va.gov/VHAPUBLICATIONS/ViewPublication.asp?pub_ID=2019.

⁶⁵ See also Center for Disease Control, *Traumatic Brain Injury: A Guide for Criminal Justice Professionals*, at 1-2; *Behind Bars II, supra*, at 37 (“Untreated substance use disorders and depression account for much of the risk of incarceration among veterans.”).

⁶⁶ Available at www1.va.gov/HOMELESS/VJO.asp.

services to non-violent offenders as an alternative to incarceration, *id* at 4, we strongly urge the Commission to recommend alternatives for justice-involved veterans.⁶⁷

BOP's ability to provide mental health treatment to defendants with mental conditions is severely compromised.⁶⁸ A 2006 survey showed that only 24% of federal inmates with mental health problems actually received treatment, with 19.5% using medications, and 15.1% receiving mental health therapy. *Mental Health Problems, supra*, at 9. Even those who receive treatment may not get proper care. Defenders have represented mentally ill clients who were properly medicated and stable upon entering a BOP facility, but then decompensated after BOP doctors changed their medications. In one such case, doctors switched the medication of a defendant suffering from bipolar disorder without performing a psychiatric evaluation. Outside experts determined that the practice fell below the standard of medical care.⁶⁹ In another case, handled by CJA counsel, the court imposed a two-week jail sentence for a diagnosed schizophrenic upon learning that BOP could not give any assurance that the defendant "would be placed in a medical facility or other institution that would monitor his psychiatric condition and maintain treatment." *United States v. Boutot*, 480 F. Supp. 2d 413, 420 (D. Me. 2007) (granting departure from guideline calling for longer period of imprisonment).

b. Employment, educational, and vocational training programming remain a significant rehabilitation need.

Criminal behavior and recidivism are unquestionably linked to unemployment, underemployment, and lack of educational attainment.⁷⁰ Indeed, some studies show that "more than 70% of those whose supervision is revoked are unemployed when they go astray. Those offenders who did not graduate from high school and do not have an equivalency diploma are twice as likely to have their supervised release revoked." Administrative Office of U.S. Courts, *Probation Officers Helping Offenders Get Back on Their Feet*, The Third Branch: Newsletter of the Federal Courts (June 2004). Among employed federal offenders, a 2007 study showed that nine out of ten completed supervision successfully. Jack McDonough and William Burrell,

⁶⁷ Some state legislatures have already passed laws "expressing a preference for treatment over incarceration" for these veterans. *Responding to the Needs, supra*, at 1.

⁶⁸ Questions about BOP's ability to handle medically vulnerable inmates extend to those with physical conditions. Alternative sentences should be encouraged for those individuals as well. *See, e.g., United States v. Pineyro*, 372 F. Supp. 2d 133, 138 (D. Mass. 2005) (granting time served sentence for defendant suffering from rare bone disease where BOP did not carry burden of showing it could provide necessary care).

⁶⁹ *See* Ken Kobayashi, *Prison Care for Mentally Ill Criticized*, 13 Star Bulletin (Feb. 4, 2008), available at <http://archives.starbulletin.com/2008/02/04/news/story02.html>.

⁷⁰ *See* Mark Sherman, Federal Judicial Center, *Reducing Risk through Employment and Education*, Special Needs Offenders Bulletin (Jan. 2000) (discussing how probation supervision that incorporates employment and education assistance can reduce "violations, revocations . . . and risk of danger to the community"), available at [http://www.fjc.gov/public/pdf.nsf/lookup/snobull4.pdf/\\$file/snobull4.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/snobull4.pdf/$file/snobull4.pdf).

Offender Workforce Development: A New (and Better?) Approach to an Old Challenge, 72 Federal Probation (Sept. 2008).⁷¹

The correlation between lack of employment and education with recidivism does not mean that offenders with such needs should be imprisoned. The cost-effective and far-sighted solution is to impose alternative sanctions that focus on the offender's needs for employment and education. The U.S. Probation Office in St. Louis, Missouri, and other offices around the country understand that meeting the employment and education needs of offenders is a cost-effective way of protecting public safety.⁷² The results of Defendant/Offender Workforce Development (DOWD) efforts have been stunning. For example, in the last five years, offenders supervised in the Eastern District of Missouri have experienced a lower unemployment rate than the general population in St. Louis, Missouri, and the United States.⁷³ A recent study of the District of Delaware's Workforce Development Program, which includes higher risk probationers and supervised releasees, concluded that participants were 58% less likely to recidivate than the matched samples of offenders who received no workforce development services (15% vs. 26%, respectively).⁷⁴

Alternatives like these are more likely to meet the vocational, employment, and other needs of offenders than imprisonment. The Director of the Bureau of Prison told Congress in March 2009 that "the combination of elevated crowding and reduced staffing has decreased our ability to provide all inmates with the necessary range of programs that provide the job skills and life skills necessary to prepare them fully for a successful reentry into the community." Lappin, *supra*, at 3. Mr. Lappin informed the Commission during his testimony at the regional hearing in Austin, Texas that the "waiting list for education programs currently exceeds 15,000 inmates."⁷⁵ The Bureau's Federal Prison Industries (FPI) program is a successful training initiative with a record of reducing recidivism. Department of Justice, *FY 2009 Performance and Accountability Report II-46* (FPI exceeded recidivism rate goals 3 and 6 years following release; 22% less likely to recidivate after 3 years; 12% after 6 years). The ability of a defendant to obtain job skills through FPI is, however, severely limited.

⁷¹ Available at http://www.uscourts.gov/fedprob/September_2008/12_offender_workforce.html.

⁷² See generally Office of Probation and Pretrial Services Defendant and Offender Workforce Development website, available at http://jnet.ao.dcn/Probation_and_Pretrial_Services/Employment_Main.html.

⁷³ Webpage of U.S. Probation Office for the Eastern District of Missouri, available at <http://www.moep.uscourts.gov/>

⁷⁴ Christy Visher, Nicole Smolter, and Daniel O'Connell, Center for Drug and Alcohol Studies, University of Delaware, *Workforce Development Program: Experiences of 80 Probationers in the U.S. Probation Office, District of Delaware*, at 15 (Nov. 2009). Services included vocational training, job referrals, interview skills, resume building, and job counseling. The program also added a Cognitive Behavioral Therapy (CBT) component in mid-2008.

⁷⁵ Statement of Harley G. Lappin, at 3 (USSC Regional Hearing, Austin Texas, Nov. 20, 2009).

At present, FPI reaches only 13 percent of the BOP inmate population; this is a 30-percent decrease from just 6 years ago. This decrease is attributable to various provisions in Department of Defense authorization bills and appropriations bills that have weakened FPI's standing in the Federal procurement process. In order to increase inmate opportunities to work in FPI new authorities are required to expand product and service lines. Absent any expansion of FPI, the BOP would need additional resources to create inmate work and training programs to prepare inmates for a successful reentry into the community.

Lappin, *supra*, at 5.

Alternatives to incarceration for educational purposes are also important. For those offenders with a high school diploma or GED, imprisonment significantly diminishes their educational opportunities. Pell grants used to be the primary source of funding for prison-based higher education programs.⁷⁶ In 1994, however, Congress passed the Violent Crime Control Act, which rendered incarcerated people ineligible to receive Pell grants while they remain incarcerated. The first year after Pell grant eligibility was removed from incarcerated people, the number of inmates receiving any post-secondary education in prison dropped by 44%.⁷⁷ Federal prisoners who wish to enroll in any post-secondary education course are now responsible for their own tuition.⁷⁸ Congress is unlikely to reverse course on this issue. For over a decade, scholars and other criminal justice experts have urged Congress to reinstate Pell grant eligibility to incarcerated people, but to no avail.⁷⁹

Pell grants remain available for non-incarcerated persons under criminal justice supervision, provided they remain drug-free and meet other conditions. What the Commission can do is encourage alternatives to incarceration for offenders who wish to enroll in post-secondary education courses. The benefits of an education alternative are clear. Education improves decision-making skills, promotes pro-social thinking, and improves cognitive functioning by changing thinking patterns, attitudes and beliefs.⁸⁰ Criminal and anti-social behavior is often driven by deficits in social cognition (the ability to understand and react appropriately to social interactions and behavioral cues), the ability to set and achieve goals,

⁷⁶ See The Urban Institute, *From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry*, at 14 (2009) (hereinafter *Classroom to Community*), available at http://www.urban.org/uploadedpdf/411963_classroom_community.pdf.

⁷⁷ *Id.* at 14.

⁷⁸ See 28 C.F.R. § 544.21(b)(2) ("An inmate who wishes to participate in a post-secondary education course . . . is responsible for the payment of any tuition either through personal funds, community resources or scholarships available to the inmate.").

⁷⁹ See, e.g., D. Karpowitz & M. Kenner, *Education and Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated*, New York, Bard College (1994), available at http://www.bard.edu/bpi/pdfs/crime_report.pdf.

⁸⁰ *Classroom to Community*, *supra*, at 17.

problem solving abilities and other cognitive deficits that education can improve or even rectify.⁸¹ It also improves self-esteem.⁸² Higher education in particular helps people develop cognitively by opening their minds to new possibilities and more complex thought patterns. Higher education also opens up far more employment opportunities, both because employers will be more impressed with (and thus likely to hire) an offender, or ex-offender, with a post-secondary education, and because more and more jobs require that level of academic achievement.⁸³

3. The Commission Should Not Provide Standards for “Effective” Treatment Programs.

The Commission has proposed commentary to USSG §5C1.1 and requested comment on whether the proposed amendment should include standards for effective residential treatment programs. Our short answer to this question is no. While we appreciate the Commission’s interest in encouraging treatment over prison, there is no need for it to weigh in on the effectiveness of treatment programs in order to ensure that defendants are receiving appropriate referrals.

Federal agencies with expertise in substance abuse treatment programs have already identified principles of effective treatment, and have published materials on evidence-based practices.⁸⁴ U.S. Probation and Pretrial Services has years of experience drawing on that information when contracting for appropriate treatment services for federal defendants with substance abuse and other treatment needs. Probation “work[s] closely with treatment providers to identify the most appropriate services, and to administer them in a fiscally responsible manner,

⁸¹ *Id.* at 17-18.

⁸² *Id.* at 17.

⁸³ *Id.* at 8 (quoting Department of Education Secretary Margaret Spellings’ assertion that “90 percent of the fastest-growing jobs require post-secondary education or training”).

⁸⁴ SAMHSA’s Center for Substance Abuse Treatment, for example, maintains an inventory of consensus-based guidelines on effective treatment practices developed by clinical, research and administrative experts in the field, which is continually updated to reflect the latest research. *See* CSAT, *Inventory of Effective Substance Abuse Treatment Practices*, available at <http://csat.samhsa.gov/treatment.aspx> (listing wide variety of treatment protocols for specific needs, including clinical and administrative issues in intensive outpatient treatment, detoxification, medication-assisted treatment, substance-specific treatment, treatment for persons with co-occurring disorders, group and family therapies, integrated services, and treatment for people with particular medical issues such as HIV/AIDS, social issues such as child abuse or neglect, physical or cognitive difficulties, or motivational needs); *see also* National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide*; SAMHSA, *Substance Abuse Treatment for Adults in the Criminal Justice System* (2003); SAMHSA Center, *A Call to Action: Ending an American Tragedy: Addressing the Needs of Justice-Involved People with Mental Illness and Co-Occurring Disorders* (Sept. 2009); *Criminal Justice/Mental Health Consensus Project Report* (June 2002).

in an effort to both reduce recidivism, and to address the treatment needs of this population.”⁸⁵ In contracting for treatment services, Probation puts out Requests for Proposals, which identify the kinds of services the provider is expected to provide, including the nature of the therapy and qualifications of counselors.⁸⁶ And it employs Substance Abuse Specialists to coordinate treatment services, match the defendant or offender with appropriate treatment providers, monitor the person’s progress in and compliance with treatment, control treatment and testing funds, and oversee the various treatment providers.⁸⁷

The Commission should not reinvent (and thereby potentially inhibit) the substantial work performed by these agencies by trying to set out its own recommended standards for programs. In fact, a one-size-fits-all approach to substance abuse treatment is contrary to empirical research. As discussed in Part I(A)(4), treatment must be tailored to fit the needs of the individual and the resources available to her or him in order for it to be “effective.” Encouraging the use of substance abuse treatment as a more effective criminal justice sanction is a matter of national policy; precisely which type of program to use in any given case is, of necessity, an individualized question better left to local districts.

Indeed, requiring a treatment program to be licensed, accredited, or otherwise approved by the relevant state agency, as the proposed amendment would, appears to be contraindicated. We have not found any studies reflecting that accreditation or licensing of a treatment provider guarantees higher quality in every case. To the contrary, the leading study to date “questions . . . how well licensing and accreditation signal quality to substance abuse stakeholders” because “no one form of accreditation or licensure reflects all aspects of comprehensive treatment sufficiency or adequacy.”⁸⁸ To check the actual quality of any given provider, U.S. Probation already takes a more effective, hands-on approach than any accreditation requirement.⁸⁹

The same is true for the other features of the proposed amendment, which would recommend that the sentencing court ensure that the program is operated by well-trained, qualified and experienced professionals who follow established professional standards and is based on the best available scientific knowledge. U.S. Probation seeks this information as a matter of course in its Requests for Proposals, and monitors the quality of the services provided

⁸⁵ U.S. Probation Office, Northern District of California, Mission Statement for Treatment Services, available at <http://www.canp.uscourts.gov/vendors.htm>.

⁸⁶ See, e.g., *Requests for Proposal, Drug Testing and Outpatient Drug Counseling: Intensive Outpatient Drug Counseling*, available at http://www.casp.uscourts.gov/procurement/treatment_services.html.

⁸⁷ See U.S. Probation and Pretrial Services, *The System and Its Officers: Substance Abuse Treatment*, available at <http://www.uscourts.gov/fedprob/treatment/substance.html>.

⁸⁸ See Rebecca Wells et al., *Do Licensing and Accreditation Matter in Outpatient Substance Abuse Treatment Programs*, 33 *Journal of Substance Abuse Treatment* 43, 49 (2007).

⁸⁹ U.S. Probation and Pretrial Services, *The System and Its Officers: Substance Abuse Treatment*, <http://www.uscourts.gov/fedprob/treatment/substance.html>.

by those entities with which it contracts.⁹⁰ It is unclear to us how a court will be better able to assess the training of a program's professional staff, much less stay apprised of "the best available scientific knowledge." If quality control is the issue, U.S. Probation – which is, after all, "the community corrections arm of the federal judiciary"⁹¹ – working with other federal agencies like SAMHSA, is much better positioned to make these determinations.

"Because drug abuse and addiction have so many dimensions and disrupt so many aspects of an individual's life, treatment is not simple."⁹² Putting together a list of the features that constitute an effective program is thus much more complicated than setting forth national standards for businesses on how to maintain ethics and compliance programs. Moreover, the guidance offered by SAMHSA and other agencies is constantly changing to reflect advances in medical, psychological, and sociological knowledge, as well it should. Innovation is the hallmark of effective treatment.⁹³ This is simply not the sort of thing that the Commission can or should attempt to define (and therefore pigeonhole) on a national level.

We are also concerned that the Commission will be unable to draw a principled line between setting standards for substance abuse treatment versus other forms of alternative sanctions. If the Commission decides that it is appropriate to supersede local U.S. Probation offices and advise courts on a national level about substance abuse programs, will it also need to do so for mental health programs, electronic monitoring programs, residential facilities, community release centers, community supervision centers, free and clean programs, specialized programs, enhanced supervision, local resources, and the like? While we appreciate the Commission's interest in encouraging alternative sanctions, we firmly believe that the Commission can better serve that goal by recommending alternative sanctions in more cases, and allowing other more experienced stakeholders to determine which programs will be effective for particular defendants.

4. The Proposed Zone Changes Should Apply to All Offenses.

The Commission requests comment on whether the proposed Zone changes should apply to all offenses, or only to certain categories of offenses. The Defenders feel strongly that the contemplated Zone changes should apply equally to all offenses. Not only is that approach in

⁹⁰ *Id.*; see also note 87, *supra*.

⁹¹ U.S. Probation and Pretrial Services, *A National System*, available at <http://www.uscourts.gov/fedprob/system.html>.

⁹² See, e.g., National Institute on Drug Abuse, *Principles of Drug Abuse Treatment: A Research Based Guide*, available at <http://www.nida.nih.gov/podat/Preface.html>.

⁹³ Numerous community centers pride themselves on the "innovative" approach to treatment. See, e.g., The Council on Substance Abuse and Mental Health ("Innovation is the hallmark of the Council's treatment and recovery programs"), <http://www.milehighcouncil.org/adultPrograms.htm>; St. Joseph's Addiction and Recovery Centers ("Program innovation, responsiveness to the changing needs of our clients, and continuous quality improvements are the hallmarks of our professional efforts."), <http://www.sjrcrehab.org/about.html>.

keeping with the historical structure of the guidelines and evidence-based practices, but it is also the most appropriate given the low offense levels at issue.

The Commission intended Chapter Two – and indeed the entire Manual – to provide for proportional punishment by accounting for and harmonizing offense seriousness across offense types.⁹⁴ Variations in offense seriousness are theoretically taken into account by the base offense level and by the adjustments available throughout the guidelines. By the time users reach the Sentencing Table, these differences are supposed to be ironed out, at least as a theoretical matter, which is why the Sentencing Table has historically applied the same to all offenses and all offenders. Applying the proposed Zone changes to some but not all offense types would be tantamount to declaring that the guidelines’ structure fails to achieve proportional punishment among different types of offenses, which would in turn reflect a fundamental failure of the guidelines themselves.

While we do not believe that the guidelines as written have achieved the goal of recommending proportional punishment, we see no reason to do violence to the guidelines’ structure in order to ensure that judges impose prison for specified offenses. The guidelines already suggest terms of imprisonment as a sentencing option at every offense level and every criminal history category.⁹⁵ Courts can and do impose guideline sentences to prison even in Zones A and B when they find such sentences are necessary to serve the purposes of punishment.⁹⁶

Nor is there any empirical reason to believe that certain offenders require prison as a categorical matter, especially at the low offense levels contemplated by the proposed amendment. Take, for example, the Commission’s query about exempting white-collar offenders from the proposed changes to reflect a view that it would not be “appropriate” to increase the numbers of such offenders who would be eligible to receive a non-prison sentence. If by “appropriate,” the Commission means to suggest that non-prison sentences might not serve the purposes of sentencing as a categorical matter for such defendants (or any others for that matter), we strongly disagree.

⁹⁴ See, e.g., USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 13 (June 18, 1987) (explaining that Chapters Two and Three were developed with proportionality in mind because “[t]he guidelines must authorize appropriately different sentences for criminal conduct of significantly different severity”) (citing 28 U.S.C. § 991(b)(1)(B)); *Measuring Recidivism, supra*, at 1 (“The vertical axis of the sentencing table contains 43 ‘offense levels’ designed to quantify the seriousness of the instant offense.”).

⁹⁵ See USSG, Ch. 5, Pt. A; *id.* §5C1.1(b)-(d).

⁹⁶ See USSC, *2008 Sourcebook of Federal Sentencing Statistics*, Table 16 (showing that in FY2008, courts imposed straight prison sentences on 57.8% of Zone A offenders, 66.3% of Zone B offenders, and 70.3% of Zone C defendants); see also *United States v. Maas*, 444 F. Supp. 2d 952, 963 (E.D. Wis. 2006) (finding “a sentence without a period of institutional confinement would not be sufficient” for Zone B defendant given defendant’s pattern of conducting himself as though he were above the law).

Prison sentences for “white collar offenders” whose conduct falls at guideline ranges with minimum terms of 8, 9, or 12 months are not necessary as a categorical matter to achieve either deterrence or “just” punishment. With respect to specific deterrence, studies show “no significant difference between white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.”⁹⁷ The Commission’s own research found that people convicted of fraud and larceny offenses were among the least likely to recidivate.⁹⁸ Indeed, the need to imprison even high-level white collar offenders “to achieve deterrence or retribution is questionable. Intermediate and informal sanctions could most likely serve these functions adequately.”⁹⁹

We have heard the rhetoric from law enforcement agencies that prison sentences in certain white collar offenses are somehow necessary to deter others from committing those same crimes. Setting aside the philosophical question of whether it is ever appropriate to punish people for the feared future conduct of others, studies have found that “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance” and “do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects.”¹⁰⁰ This applies with equal if not greater force to the relatively minor offenses committed by people in the offense levels relevant to the proposed amendment, and the relatively small numbers of people who would be affected by it.

With respect to “just” punishment arguments, the assumption that “white collar” crime necessarily involves a privileged defendant, massive amounts of money, and a sophisticated fraud¹⁰¹ – and thus deserves a lengthy prison sentence – is simply not accurate. People like

⁹⁷ See Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

⁹⁸ See *Measuring Recidivism*, *supra*, at 13 & Exhibit 11.

⁹⁹ Szockyj, *supra*, at 502.

¹⁰⁰ See Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); see also Gary Kleck et al., *The Missing Link in General Deterrence Theory*, 43 Criminology 623 (2005) (“There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms.”).

¹⁰¹ See Edwin H. Sutherland, *White Collar Crime* 2 (1949) (defining “white collar crime” for the first time as “crimes committed by a person of respectability and high social status in the course of his occupation”). The Commission has heard this type of description before. For example, in 2001, then Acting Deputy Attorney General Robert S. Mueller III testified to the Commission with respect to a proposed departure for certain white collar offenders that “[t]he Department is adamantly opposed to proposed amendments that would have the effect of reducing the sentences for this privileged group of defendants . . . [who] have generally benefited from society, have strong educational backgrounds, and are often successful professionals.” See Testimony before U.S. Sentencing Commission, Acting Deputy Attorney General Robert S. Mueller III (March 19, 2001). Of course, since Mr. Mueller’s testimony, the Commission has increased penalties “significantly” for numerous white collar offenses including “high dollar fraud and theft” offenses in 2001 (<http://www.usssc.gov/PRESS/rel0401.htm>), “corporate fraud and

Bernard Madoff make the front page for a reason; he and offenders like him, who fleece millions of dollars from high end investors, are statistical outliers –none of them come anywhere near the low offense levels contemplated in the proposed amendment. Research shows that the typical “white collar offender” is more likely to be middle class at best,¹⁰² and does not necessarily engage in any sophisticated criminal activity. This is particularly true for the relatively small loss amounts required to fit within offense levels 5 through 13 on the Sentencing Table. As one Assistant Federal Public Defender from Florida put it, it’s “the little guys [who] tend to be involved in little schemes.”

Our white collar clients tend to be anywhere from poor to lower-middle class. They are generally law abiding people, who engage in minor frauds out of desperation driven by financial need and/or substance abuse or mental health issues, often under the direction of or to provide for someone else. Far from being sophisticated crimes, their offenses tend to fall into general categories.

We have HUD/hidden income cases, typically involving single mothers or young fathers who are the sole financial support for their children, are working, and under-report their marginal incomes in order to be able to stay in public housing, which is often the only type of housing they can afford. These clients are not “privileged”; they are the working poor.

We have Social Security/deceased payee cases involving dirt poor clients who fail to report a relative’s demise to the Social Security office and continue to collect the marginal payments made to their deceased relative, typically because they literally have no other income. One such case involved a 68-year old woman who cared for her stepfather and Alzheimers-ridden sister. She continued to cash her stepfather’s Social Security checks, which were the only source of income for her and her sister, after he died. The checks amounted to only \$6,800 per year but because she continued receiving them for ten years before anyone noticed, the loss amount drove the guideline recommendation higher than necessary. Given the client’s unique personal circumstances, the exaggerated loss calculation, and the guidelines’ rigid focus on imprisonment, the court imposed a non-guideline sentence of one year of probation and restitution at \$25 per month; she died a year after successfully completing her sentence.

We have bad check or check-cashing rings involving local folks who are organized by a ringleader into cashing bogus checks made out in their names in exchange for minimal payments. These clients are often down on their luck or drug addicts, generally get no more than 10% of the face value of the check, and are inevitably caught and sentenced for the face value of the check plus getting conspiratorial liability for the acts of other such check cashers. It is not unusual for a client to have received only \$2500 and be facing guidelines for \$75,000 (and restitution requirements in keeping with the guidelines).

other serious white collar fraud offenses” in 2003 (<http://www.uscc.gov/PRESS/rel010803.htm>, <http://www.uscc.gov/PRESS/rel0403.htm>), and identity theft and antitrust offenses in 2005 (<http://www.uscc.gov/PRESS/rel110105.htm>).

¹⁰² See, e.g., Szockyj, *supra*, at 488 (noting that for various reasons, including the resources available to people with higher social status, “white collar offenders who are sentenced in criminal court tend to come from the middle-classes rather than the upper classes”).

We have identity theft cases similar to the check cashing cases, where poverty-stricken people are brought into a scheme to obtain false identifications and use them for credit at stores or at the local casino. As with the check cashing cases, the crimes are easily detected but although the amounts at issue are relatively low, they are often aggregated under the relevant conduct rules.

And we have credit union cases, where a good employee dips into the till for a myriad of reasons, usually for amounts that are so small, they go undetected for a period of time. These clients typically have no criminal history, tend to be older, and are often in denial about their conduct. It is not unusual for them to stop on their own before detection. Unfortunately, the amounts add up and since the dollar amount drives the guidelines, they often get some jail time.

The money at issue in each of these cases is typically used for day to day expenses such as rent, food or diapers. Restitution orders are usually devastating since these people work minimum wage jobs, if they work at all. Most of them are at low risk for recidivism and do not have much of a prior record, if any. Many of their stories are absolutely heartbreaking, like the information we shared with the Commission two years ago about our disaster fraud clients, who are more often than not disaster victims themselves. In the interest of brevity, we set forth only three stories here, but there are many others.

We recently represented a woman who used union funds for personal expenses. The client's behavior turned out to be the result of misdiagnosed mental disorders, including post-traumatic stress disorder resulting from her sexual molestation as a child. Once she entered the criminal justice system, she was diagnosed correctly and placed on appropriate medication, greatly improving her mental state. Unfortunately, because she had a guideline range of 12 to 18 months, she fell within Zone D of the guidelines, meaning straight prison. The judge followed the guidelines and sentenced her to a year and a day, believing that BOP would follow her treatment program. It did not and her PTSD symptoms returned. She is now on supervised release, back on the appropriate medication and doing well, but as her attorney commented, the prison portion of her sentence "was completely unnecessary and ended up being detrimental to her mental health treatment." Under the proposed amendment, she would have fallen under Zone C, which at least would have suggested that she serve only half the recommended sentence in prison.

Another client admitted to misusing diabetes education funds for personal needs. Like most of our "white collar" clients in the Southwest, she was a poor Navajo Indian living on the reservation. She did not buy Lexuses or yachts; she bought diapers and food – often food for her co-workers at the diabetes education office. The loss amounts for her offense put her in Zone C, which requires at least some prison time. Although her lawyer was confident that the client's story was sufficiently compelling to warrant a non-guideline sentence, the client herself was so mortified about what she had done and so frightened of being sent to prison that she committed suicide. Her lawyer described her as "a dynamo [who] did wonderful things on the reservation educating her people on diet, exercise, and other aspects of diabetes prevention," and believes that with this proposed amendment, she would have been able to give the client much stronger assurances of non-incarceration, perhaps averting the tragic outcome in her case.

A third client passively stole around \$50,000 in social security funds that were going into the account of a deceased aunt. She was in her mid-40s, a single mom, and was struggling with paying her mortgage and supporting her son. She would take small amounts to make ends meet, and stopped spending the money before she was apprehended, although she did not notify the Social Security Administration to stop depositing the money. When she was caught, there was about \$25,000 in the account that had not been touched for around two years. The government sought the bottom of her 6-12 month range, with six months home detention, but the court followed the Probation Office's recommendation and sentenced her to probation with three months home detention, which she successfully completed.

In sum, the “white collar offenders” that we see are people who, for a variety of needs, engage in non-violent criminal behavior that they would never have engaged in had those needs been met. They are perfect candidates for evidence-based non-prison sentences,¹⁰³ and it would be remiss of the Commission to limit their opportunities – and harm the public's interest in reduced crime rates – simply because of the (inapplicable) misdeeds of a few.

On a more global note, categorically carving out “disfavored” types of offenses for special treatment is simply an inappropriate way to make sentencing policy.¹⁰⁴ The most fervent criticisms of the guidelines – and sentencing policy in general – are directed at those aspects that were based in whole or in part on “headline” crimes:

[D]uring the period 1985-95, there was an almost unending series of moral panics about crime problems: the panic precipitated by the 1986 cocaine-overdose death of basketball star Len Bias and the outbreak of the “crack cocaine epidemic,” which together led to passage of the federal Anti-Drug Abuse Act of 1986, the 100-to-1 policy, and mandatory minimum sentences of unprecedented length for drug crimes; the panics precipitated by the deaths of Megan Kanka and Polly Klaas, leading to federal legislation and major changes in sex-offender legislation throughout the country; and the generalized fear of stranger violence represented by candidate George Bush's use of Willie Horton as a campaign symbol, leading to unremitting concern for toughness embodied in movements to abolish parole,

¹⁰³ See, e.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 *Cardozo J. Conflict. Resol.* 421, 429-30 (Spring 2007) (“There is nothing new or challenging about applying a restorative justice process to a widow who continues cashing her husband's Social Security checks for several months after he passes away. . . . Such cases are referred to restorative justice interventions just like other low-level property offenses, which are the most common offenses to be referred to restorative justice programs in the United States.”).

¹⁰⁴ See, e.g., Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 *U.C.L.A. Law Rev.* 1751, 1789 (August 1999) (“U.S. crime policy for nearly two decades has been driven much more by ideology, exaggerated fears, and political opportunism than by rational analysis of options and reasoned discussion, almost as if a continuous moral panic has prevented policy makers from stepping back and reflecting on what they have been doing.”).

greatly increase sentence lengths, establish truth in sentencing, and require life sentences without possibility of parole for third-strike offenders.¹⁰⁵

The Commission was created as an independent commission in the judicial branch of the United States because the public benefits from sentencing policies developed pursuant to rational thought and empirical fact, not those responding to the latest public outcry. If the Commission wishes its proposed amendment to maximize public safety, it should apply the proposed changes to all offense categories without exception.¹⁰⁶

5. The Commission Should Change Chapter Five, Parts B and F to Encourage the Use of Alternatives to Incarceration.

The Commission requests comment on what changes to Chapter Five, Part B (Probation) and F (Sentencing Options) may be appropriate to provide more guidance on the use of alternatives. The Defenders here suggest several changes to those provisions. These suggestions are consistent with the Commission's own observations:

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

Alternative Sentencing, supra, at 20.

The Commission's own data show that the guidelines do not provide an adequate mechanism for judges to impose alternative sentences. Indeed, judges often need to impose sentences below the guideline range to impose prison/community split sentences or probation. *Id.* at 10. In our experience, judges do not sentence more offenders to alternatives because they do not want to vary from the guidelines and instead follow the guidelines tacit advice that the

¹⁰⁵ *Id.* at 1787; *see also id.* at 1756 (“[H]istorical conditions and social pressures often lead policy makers and others to do things that, on reflection and with the passage of time, they will realize to have been cruel and unnecessary.”).

¹⁰⁶ *See* USSC, Transcript of Public Hearing, Chicago, Illinois, at 369-370, 375 (Sept. 10, 2009) (President Emeritus Roger Warren) (“[T]he central reason why evidence-based practice is important is not just that it’s cheaper, it’s not just that it reduces the economic and social cost of crime, not just that it reduces the cost of families and communities and to the offenders themselves, not just that it frees up prison bed space that can be used for the more serious offenders, but it reduces crime, and it reduces crime more effectively than our current crime control policies . . . and that’s what we should be about in the criminal justice system, public safety.” At the same time, “to weigh the risks to the public presented by the offender in the future based on what has happened in the past, the crime committed and the prior criminal record. If that’s all we were guided by, we wouldn’t be able to reduce recidivism at all.”).

needs for retribution (as measured by offense level) and incapacitation (as measured by criminal history) are the most important purposes of sentencing.¹⁰⁷

Our experience is consistent with the Commission’s conclusion that “sentencing zone ultimately determines whether offenders are sentenced to alternatives.” *Alternative Sentencing, supra*, at 12. Because the guidelines expressly discourage or limit consideration of offender characteristics that may lessen a defendant’s culpability, place him at a lower risk of recidivism than his criminal history score alone may indicate, or indicate a rehabilitative need that can be met with a community-based sanction, the guidelines impede the sentencing court’s consideration of alternative sentences. Even among judges willing to look beyond the guidelines to offender characteristics and rehabilitative needs, many are reluctant to impose a non-prison sentence for fear that it will appear disproportionately lenient when compared to other guideline or mandatory minimum sentences.

We offer here four broad suggestions for amending Parts B and F of Chapter Five. A redlined version of those suggestions appears in Appendix A.

First, the Commission should make clear in the introductory commentary to Part B that a court should consider probation whenever it is statutorily authorized.

Second, in such cases where probation is statutorily prohibited, the Commission should encourage courts to consider whether the purposes of sentencing may be served with an alternative sentence that includes the sentencing options set out in Part F.

Third, the Commission should remove from the guidelines, policy statements, and commentary all references to probation being “authorized” or prison “required.” Such language is inconsistent with the now advisory language of the guidelines. Even proposed §5C1.3 speaks in mandatory and permissive terms, purporting to tell the court when it “may” sentence a defendant to probation, §5C1.3(a), when it “must” include a condition of probation, §5C1.3, when probation is “authorized,” §5B1.1(a)(3) and Application Notes 1(c) and 2, and when imprisonment is or is not “required,” USSG §5C1.1(g). Such mandatory language is a vestige of an earlier time. The Commission should endeavor to draft the guidelines to make sure that the reader understands their advisory nature. Instead of saying that a particular sentence is required or authorized, the guideline should speak to what is recommended or what the court ought to consider in deciding to impose sentence. The goals of both simplicity and fidelity to 18 U.S.C § 3553(a) are best served by employing language that acknowledges the advisory nature of the guidelines.

Fourth, the Commission should provide further explanation of the various options set out in Part F.

¹⁰⁷ Although we use the Commission’s data regarding alternatives sentences that appears in the 2009 Alternative Sentencing report, we question its accuracy in at least one critical respect. Offenders in districts with high pretrial detention rates do not get probation or prison/community split sentences because they get “time served” sentences instead. The Commission appears to count these cases in the “alternative not applied” category when in fact, they were the functional equivalent of an alternative sentence.

II. SPECIFIC OFFENDER CHARACTERISTICS

A. Issue for Comment 1 & 2(A): The Commission Should Delete Chapter 5H.

The Commission requests comment on the extent to which specific offender characteristics should be considered at sentencing and in the Manual. It also asks whether the guidelines are adequate as they apply to five specified offender characteristics. We reiterate our earlier position that the Commission should delete Chapter 5H. As currently written, Chapter 5H (and much of Chapter 5K2) is in conflict with current law, has created needless complexity and confusion, and has become increasingly irrelevant.¹⁰⁸ This does not mean that we oppose departures; we have often urged the Commission to invite departures.

We do not agree that it would contravene congressional directives to delete Chapter 5H. The Commission was required to consider whether to include eleven offender characteristics in the guideline rules.¹⁰⁹ It included role, criminal history and criminal livelihood in the rules, and no others. The Commission was not required to issue policy statements telling judges whether or not they could consider these or any other factors for purposes of departure. In fact, judges were to use departures to take account of factors not included in the guideline rules, and to provide feedback to the Commission.¹¹⁰ The original Commission recognized this, but nonetheless

¹⁰⁸ Statement of Alan DuBois and Nicole Kaplan, at 47-52 (USSC Regional Hearing, Atlanta, Georgia, Feb. 10, 2009); Statement of Thomas W. Hillier II and Davina Chen, at 31-37 (USSC Regional Hearing, Stanford, California, May 27, 2009); Statement of Michael Nachmanoff, at 22-27 (USSC Regional Hearing, New York, New York, July 9, 2009); Statement of Carol Brook, at 26-35 (USSC Regional Hearing, Chicago, Illinois, Sept 10, 2009); Statement of Raymond Moore, at 19-29 (USSC Regional Hearing, Denver, Colorado, Oct. 21, 2009); Statement of Julia O'Connell, at 2-10 (USSC Regional Hearing, Austin, Texas, Nov. 20, 2009).

¹⁰⁹ The Commission was directed, "in establishing categories of defendants for use in the guidelines and policy statements governing" probation, fines, imprisonment, supervised release, and other sanctions, to "consider whether [eleven specified] matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence." See 28 U.S.C. § 994(d); *see also* S. Rep. No. 98-225 at 168, 175 (1983).

¹¹⁰ S. Rep. No. 98-225 at 51-52, 67-69, 178 (1983).

issued policy statements to discourage and prohibit departures.¹¹¹ Later Commissions issued further policy statements to stop departures in direct response to court decisions.¹¹²

We believe that the Commission took a wrong turn, and that it should now delete these restrictive policy statements.

B. Issue for Comment 1 & 2(A): The Commission Should Clarify that Chapter 5H Applies Only to “Departures” and Should Eliminate the Word “Exceptional” from the Introduction.

The Defenders recognize that the Commission intends to retain Chapter 5H. It should therefore amend the Introduction to make clear that it pertains only to “departures,” and not to other sentences outside the guideline range. The Introduction to Chapter 5H, which was written when the only type of sentence outside the guideline range was a departure, refers generally to sentences outside the guideline range. Under current law, this could be misunderstood.

As the Commission recognizes in its proposed revision of §1B1.1, comment. (n.1(E)), Chapter 5H pertains to “departures.” “‘Departure’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.” *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008). Obviously, there are other kinds of sentences outside the guideline range, which the Commission cannot control. *See Rita v. United States*, 551 U.S. 338, 351, 357 (2007) (court may impose sentence different from that recommended by the guidelines based on an argument for “departure,” or because the guidelines “do not generally treat certain defendant characteristics in the proper way,” or because “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations”).

We propose a revision to the Introduction to Chapter 5H to make clear that the policy statements therein apply only to a decision whether to “depart.” This would alleviate one of the problems we have repeatedly raised regarding Chapter 5H. Chapter 5H created confusion and unfairness after *Booker* as some judges and courts of appeals thought that the policy statements controlled the courts’ consideration of offender characteristics under § 3553(a)(1) and (2). The

¹¹¹ The public record does not reveal why the original Commission did this. It said that it did not include certain factors in the guideline rules if they infrequently influenced sentences before the guidelines, but that judges would take such factors into account through departures. *Supplementary Report* at 17. One close observer said that the “first iteration [was] crafted under difficult and highly time-constrained circumstances,” and that “[t]he Commissioners themselves were aware of the need to revisit and refine many of these judgments, and to leave room for departures in the meantime.” Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

¹¹² In direct response to court decisions, the Commission issued policy statements deeming physical appearance and physique; military, civic, charitable or public service; employment-related contributions; and record of prior good works not ordinarily relevant. It also issued policy statements deeming lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing and post-sentencing rehabilitation not relevant. *See USSC, Simplification Draft Paper, Departures and Offender Characteristics*, Part II(B)(2) & (3); USSG, App. C, Amend. 602 (Nov. 1, 2000). The prohibition on addiction to gambling was added in response to, but was not required by, the PROTECT Act.

Supreme Court then made clear that this was incorrect.¹¹³ For a time, however, some appellate panels continued to cite outdated caselaw to treat the policy statements as controlling.¹¹⁴ The courts of appeals have finally cleared up the confusion, making clear that policy statements that restrict consideration of offender characteristics do not override § 3553(a) and may not be used to deny a sentence outside the guideline range.¹¹⁵

We also propose that the word “exceptional” be eliminated. The original statutory basis for departures, 18 U.S.C. § 3553(b), which has been excised, did not include an “exceptional” requirement. The word “exceptional” was first added to the Introduction of Chapter 5H in 1994, for reasons that were not explained. *See* USSG, App. C, Amend. 508 (Nov. 1, 1994). If the Commission wants judges to use departures more often, it should eliminate the word “exceptional.” We propose a revision of the final sentence of the second paragraph to conform with the removal of the word “exceptional” and our proposed changes to §5K2.0.

As discussed below in our section on suggested conforming changes (Issue for Comment 3), the Commission should also remove the word “exceptional” from §5K2.0, and should substantially revise that section to return to the pre-PROTECT Act version of §5K2.0, minus the first sentence, which refers to the excised 18 U.S.C. § 3553(b). The “exceptional” requirement was added to USSG §5K2.0 in response to, but was not required by, the PROTECT Act. *See* USSG §5K2.0 (2003). The pre-PROTECT Act version of §5K2.0, promulgated in 1998, “incorporated the principle holding and key analytical points from the *Koon* decision into the general departure policy statement” and did not include the word “exceptional.” *See* USSG, App. C, Amend. 585 (Nov. 1, 1998). The Commission should return to that policy.

We continue to object to the Commission’s interpretation of 28 U.S.C. § 994(e) in Chapter 5H,¹¹⁶ but will not discuss it at this time since those factors are not listed in the Issues for Comment.

¹¹³ *See Gall*, 552 U.S. at 59-60 (upholding below guideline sentence in which the judge imposed a sentence of probation based on characteristics of the defendant which the policy statements deem “not ordinarily relevant”); *Rita*, 551 U.S. at 357 (court may conclude that the guidelines “do not generally treat certain defendant characteristics in the proper way”).

¹¹⁴ *See, e.g., United States v. Feemster*, 531 F.3d 615, 619-20 (8th Cir. 2008) (holding that district court abused its discretion by imposing a variance based on age because the guidelines’ policy statement says age is “not ordinarily relevant,” relying on a pre-*Gall* opinion which was vacated based on *Gall*); *United States v. Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (reversing below-guideline sentence based on defendant’s young age (20) and lack of serious involvement with the law, citing pre-*Gall* caselaw).

¹¹⁵ *See, e.g., United States v. Chase*, 560 F.3d 828 (8th Cir. 2009); *United States v. Hamilton*, 323 Fed. App’x 27 (2d Cir. 2009); *United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009); *United States v. Hawes*, 309 Fed. App’x 726, 732 n.2 (4th Cir. 2009).

¹¹⁶ *See, e.g.,* Statement of Heather Williams, at 35, 39-40 (USSC Regional Hearing, Phoenix, Arizona, Jan. 21, 2010).

INTRODUCTORY COMMENTARY

The following policy statements address the relevance of certain offender characteristics to the determination of whether a ~~sentence should be outside~~ **departure from the** applicable guideline range **is warranted** and, in 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 a ~~sentence should be outside~~ **departure from the** applicable guideline range **is warranted**. 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 from the** applicable guideline range **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~~ **alone or in combination with other such circumstances, in the discretion of the sentencing court.** See §5K2.0 (Grounds for Departure).

C. Issue for Comment 2(B): The Commission Should State that Offender Characteristics May Warrant Downward Departure, and Should Not Suggest That Any Characteristic May Warrant Upward Departure.

As set forth in response to Issue for Comment 3(B) and (E) below, we recommend that the Commission delete statements regarding appearance and physique, gambling addiction, and lack of youthful guidance and disadvantaged upbringing. The Commission should state that each of the remaining offender characteristics is or may be relevant to a decision to depart downward from the kind or length of sentence recommended by the applicable guideline range if such a departure advances one or more purposes of sentencing. We strongly oppose any suggestion that any of these characteristics, such as being a veteran, being younger, being older, or having a mental or emotional condition, would be a reason “to increase the sentence.”

The guidelines focus on the offense, not the offender. There is plenty of evidence indicating that downward departures based on offender characteristics are often warranted. To

establish a need to encourage upward departures based on offender characteristics, however, would require evidence that the current guidelines are not adequately severe because they omit offender characteristics. The evidence shows the opposite. The guidelines are constructed primarily of aggravating factors, many of which overstate the seriousness of the offense, the need for incapacitation, and any realistic possibility of deterrence. The guidelines do not include offender characteristics that, for example, indicate lesser culpability, a lower risk of recidivism, good character, or a need for treatment or training in the most effective manner, and therefore should mitigate punishment. While mitigating offender characteristics are generally unsuitable for inclusion in the guideline rules because they cannot be defined and quantified in the abstract, the structure of the guidelines, with their heavy numerical emphasis on aggravating circumstances and omission of mitigating circumstances about the offender, indicates that downward departures based on offender characteristics are often justified, while upward departures are not.

As Congress intended,¹¹⁷ as the Commission has long recognized,¹¹⁸ and as the Supreme Court has re-emphasized,¹¹⁹ feedback from judges is the best evidence of whether the guidelines are set at appropriate levels and if not, why not. Judges have long reported that restrictions on consideration of offender characteristics as mitigating factors is a primary failing of the guidelines, and that greater consideration of such factors is warranted to reduce unnecessarily harsh sentences recommended by the guidelines.¹²⁰ At the Commission's regional hearings, judges repeatedly said that the guidelines often recommend punishment that is too severe,¹²¹ and

¹¹⁷ See 28 U.S.C. § 994(o) (Commission shall “review and revise” the guidelines in light of “comments and data coming to its attention”); S. Rep. No. 98-225 at 178 (1983) (explaining that § 994(o) “would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level,” but “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.”); *id.* at 51-52 (caselaw that is developed from departures “may, in turn, be used to further refine the guidelines).

¹¹⁸ See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, at 5 (Oct. 2003); USSG ch. 1, pt. 4(b).

¹¹⁹ See *Kimbrough v. United States*, 552 U.S. 85, 107 (2007); *Rita*, 551 U.S. at 350; *Booker v. United States*, 543 U.S. 220, 264 (2005).

¹²⁰ See USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary (Feb. 2003) (“Both district and circuit court judges were most likely to indicate” that “fewer” of the guidelines “maintain[ed] sufficient flexibility to permit individualized sentences,” or “provid[ed] defendants with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner where rehabilitation is appropriate.”).

¹²¹ See, e.g., Transcript of Public Hearing, Atlanta, Georgia, at 133 (Judge Presnell); Transcript of Public Hearing, Stanford, California, at 70, 81 (Judge Winmill); Transcript of Public Hearing, Chicago, Illinois, at 19 (Judge Holderman); Transcript of Public Hearing, New York, New York, at 377 (Judge Dearie); *id.* at 328 (Judge Ambrose); Transcript of Public Hearing, Denver, Colorado, at 263 (Judge Gaitan); Transcript of Public Hearing, Austin, Texas, at 14-16 (Judge Cauthron).

urged the Commission to listen to them and consider the sentencing data to revise the guidelines downward.¹²² They emphasized that consideration of offender characteristics is essential to determining fair and effective sentences.¹²³

The Commission’s data shows that judges, and prosecutors as well, often find that guideline sentences are too harsh. In fiscal year 2009, 15.9% of all sentences were “non-government sponsored” below the range. The government “sponsored” below range sentences in 25.3% of cases, nearly one quarter of which were for reasons other than cooperation or fast track. Only 1.8% of sentences were above the range.¹²⁴ Other evidence shows that the guidelines recommend punishments that are unjustly severe in light of the seriousness of the offense alone. In a study conducted by three federal judges in twenty-two drug, gun and child pornography cases, jurors who had just convicted the defendant, without hearing any of the mitigating evidence that is presented at sentencing, were asked to “[s]tate what you believe an appropriate sentence is, in months.” The “median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges.”¹²⁵

¹²² See Transcript of Public Hearing, Stanford, at 82, 85 (Judge Winmill); *id.* at 89 (Judge Lasnik); Transcript of Public Hearing, New York, at 362 (Judge Gertner); *id.* at 124 (Judge Woodcock); Transcript of Public Hearing, Austin, at 222 (Judge Jones); *see also* Transcript of Public Hearing, New York, at 460-61 (Professor Barkow) (If “judges are not complying with [a guideline], then I view that as a fire alarm for the field that there is something wrong with the guideline.”).

¹²³ Transcript of Public Hearing, Stanford, at 46-47 (Judge Walker); *id.* at 81-82 (Judge Winmill); Transcript of Public Hearing, Chicago, at 33, 37 (Judge Carr); *id.* at 91 (Judge McCalla); *id.* at 105 (Judge Simon); Transcript of Public Hearing, Denver, at 64, 91-92 (Judge Marten); *id.* at 292 (Judge Gaitan); *id.* at 297-98 (Judge Pratt); *id.* at 301-02 (Judge Ericksen); Transcript of Public Hearing, Austin, at 11-13 (Judge Cauthron); *id.* at 23-24 (Judge Starrett); *id.* at 256 (Judge Holmes).

¹²⁴

	Number	% of Outside Range Sentences	% of All Sentences
Sentences Outside the Guideline Range	33,194	100%	43%
Sentences Above the Guideline Range	1,414	4%	1.8%
“Non-Government Sponsored” Below Range	12,262 (9,599 5K1.1; 7,087 fast track; 2,832 other)	37%	15.9%
“Government Sponsored” Below Range	19,518	59%	25.3%

2009 Preliminary Quarterly Data Report, Table 1.

¹²⁵ See Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harvard L. & Pol’y. Rev. 173, 175 (2010), available at http://hlpronline.com/wp-content/uploads/2010/02/gwin_jurorsentiment.pdf.

According to available data, judges almost never cite the offender characteristics mentioned in §§5H1.1, 5H1.3, 5H1.4, 5H1.11 or 5H1.12 as reasons for sentences above the guideline range, but frequently cite them as reasons for sentences below the guideline range, in imposing both non-government sponsored and government-sponsored below range sentences. The Commission classifies each of these reasons as “D” for downward, as opposed to “U” for upward or “B” for both. See USSC, *Variable Codebook for Individual Offenders*, at A9-A12 (codes 11, 13, 14, 15, 656, 826, 1207).

Offender Characteristic	Total Below Range	Non-Gov Sponsored	Gov Sponsored	Total Above Range
Age (code 11)	699	542 Dep only 101 w/Booker 441	157	1
Mental and Emotional Conditions (code 13)	556	460 Dep only 110 w/Booker 350	96	4
Physical Condition (code 14)	700	509 Dep only 143 w/Booker 366	191	0
Drug Dependence and Alcohol Abuse (code 15)	305	219 Dep only 14 w/Booker 205	86	1
Prey to Other Inmates/Susceptibility to Abuse in Prison (code 656)	18	14 Dep only 4 w/Booker 10	4	0
Military Record/Charitable Works/Good Deeds (code 1207)	177	132 Dep only 29 w/Booker 103	45	0
Lack of Youthful Guidance (code 826)	109	83 Dep only 9 w/Booker 74	26	0
Total	2564	1959	605	6

Source: USSC FY2008 Monitoring datafile. Cases were selected if any of variables REAS1-REAS12 listed the indicated code. Because cases can have more than one reason, the number of reasons exceeds the number of cases. Note that 2008 *Sourcebook* Tables 24-25B do not include reasons from cases categorized in BOOKERCD as government-sponsored.

Of over 2,500 times, judges relied on one of these factors to go above the guideline range only six times. Four of those times were for mental and emotional condition. While we have been unable to identify these cases to determine what the judges had in mind, as we explain below in our response to Request for Comment 3(E), it may have been because courts do not recognize that civil commitment is the appropriate mechanism for delaying release if the defendant is a threat to public safety because of a mental illness at the conclusion of his or her sentence. One was for drug or alcohol dependence, which was likely based on a mistaken belief that a longer sentence would allow the defendant to get the benefit of RDAP while in prison. The last, for age, may have been a data entry error, as the defendant was 32, neither young nor old. In any event, given the overwhelming consideration of these factors as mitigating, and given all other evidence that the guidelines are already too severe, for the Commission to encourage judges to consider these factors for upward departure would be to ignore how they uniformly function in practice.

This data also shows that when judges specifically cite an offender characteristic mentioned in one of these policy statements, they rely on § 3553(a)/Booker in whole or in part 79% of the time, and on a “departure” alone only 21% of the time. This is because the policy statements themselves, the appellate caselaw interpreting them, or both, prohibit or strongly discourage departures although these characteristics are clearly relevant as mitigating factors. For the same reason, the Commission’s data understates the number of instances in which judges rely on these and other offender characteristics that are mentioned in its policy statements.¹²⁶

The SRA charges the Commission to minimize the possibility that the federal prison population will exceed the Bureau of Prisons’ capacity, 28 U.S.C. § 994(g), but the Bureau of Prisons is at least 36% above capacity today.¹²⁷ The Commission should be finding ways to reduce incarceration, not increase it when there is no basis in evidence for doing so.

D. Issues for Comment 2(B) & 3: The Commission Should Take a Simple Open-Ended Approach.

The Commission has asked, if any of the five offender characteristics is relevant, “when is it relevant, why is it relevant, what effect should it have, and how much effect should it have? Are there categories of offenses or categories of offenders for which the characteristic is more or less relevant? What criteria should be used to establish such categories?”

The Defender Guidelines Committee has carefully considered several options for an approach the Commission should take. The Commission could be very directive and explicit, as

¹²⁶ The Statement of Reasons form captures consideration of specific offender characteristics only if a box corresponding to one of the Commission’s policy statements is checked or the judge writes in an offender characteristic. A judge imposing a below guideline sentence based on youth and mental illness is unlikely to check the boxes corresponding to §§5H1.1 and 5H1.3 because those policy statements deem those characteristics to be “not ordinarily relevant.” A judge relying on disadvantaged upbringing is unlikely to check the box corresponding to §5H1.12 because it prohibits consideration of that characteristic. The judge is much more likely to check the boxes corresponding to § 3553(a)(1) and (2). Unless the judge also writes in the relevant characteristic, the Commission does not collect the information.

¹²⁷ See U.S. Dep’t of Justice, *Federal Prison System FY 2011 Performance Budget*, at 7.

this set of questions indicates, but this is unrealistic and unhelpful. Or it could post research regarding each factor on its website and provide links to the research in the Manual, but this too would be limiting and may not fit the facts of an individual case. Or it could provide examples, but experience has shown that when the Commission provides examples, courts take them as excluding all other situations. Or the Commission could invite open-ended departures by simply stating that the factors may be relevant as a reason for downward departure if such a departure advances one or more purposes of sentencing.

We believe that the last option is best. To impose a sentence that is fair, efficient and effective, a judge must weigh all of the characteristics of the defendant and circumstances of the offense in the individual case. The sentencing court, which “has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court . . . must make an individualized assessment based on the facts presented.” *Gall*, 552 U.S. at 51-52. In our experience, judges rarely rely on only one factor, but on the whole picture, which includes variety of factors. Rather than limiting departures based on offender characteristics to narrow criteria, the Commission should simply say that the characteristics are or may be relevant.

Congress directed the Commission to “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). With the exception of criminal history, criminal livelihood and role in the offense, the Commission did not take offender characteristics into account in the guidelines. As the Commission has repeatedly said, it could not possibly establish guidelines that would adequately take into account every conceivable set of offense and offender characteristics.¹²⁸ “Because of the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision,” the Commission “recognized that departures play an important role in the guideline system.”¹²⁹ Until November 2003, the Commission stated: “Circumstances that may warrant departure from the guideline range . . . cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis.” USSG §5K2.0, p.s. (2002). It acknowledged that there were many factors it had not adequately taken into account in formulating the guidelines, and that the “[p]resence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court.” *Id.*

If the Commission wants judges to use departures, it should acknowledge the limits of the guidelines and invite departures by saying that the offender characteristics are or may be relevant.

¹²⁸ USSG, Ch. 1, Pt. A(4)(B) (Apr. 13, 1987); USSC, *Downward Departures from the Federal Sentencing Guidelines*, at 3 (Oct. 2003).

¹²⁹ *Id.* (internal punctuation omitted).

E. Issue for Comment 2(C): Use as Proxy for Forbidden Factors

Congress directed the Commission that it “shall assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders.” 28 U.S.C. § 994(d). The Commission asks whether any of the offender characteristics mentioned in the five policy statements “could . . . be used as a proxy for one or more of the ‘forbidden’ factors,” and “[i]f so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant.” The issue for comment does not explain what the Commission means by the phrase “used as a proxy.” Whatever its meaning, we believe there is no evidence suggesting that judges use offender characteristics as proxies to mask intentional discrimination, as that term is normally used in civil rights law. Nor do we believe that any potential disproportionalities in the use of offender characteristics as reasons for departure raise concerns under the ordinary analysis of disparate impact found in civil rights law.

The Commission should encourage consideration of these offender characteristics whenever they are relevant to one or more purposes of sentencing. This will benefit offenders of all demographic groups who have the relevant characteristic. It will harm no individual offenders of any group. And it will prevent the Commission from basing policy on race-conscious considerations, which might itself compromise the neutrality of the guidelines. The bottom line is that offenders should be treated as individuals based on their characteristics relevant to the purposes of sentencing. Consideration of the distribution of those characteristics among various demographic groups is both irrelevant and improper.

Our answer to this question is driven by our intense interest in fair sentencing policy. Our clients *are* the racial and ethnic minorities, and the economically disadvantaged of all races, who are sentenced in federal court every day. The Federal Public and Community Defenders work diligently and argue passionately against sentencing policies that adversely and unfairly affect the sentences of racial and ethnic minorities and the economically disadvantaged in the courts,¹³⁰ and before the Commission.¹³¹ Because it is so important to the welfare of our clients, we have thought carefully about the implications of the Commission’s question and similar questions posed previously by Commissioners,¹³² and the Commission’s prior actions in this area.

1. Concerns Expressed by the Commission

The Commission’s concerns regarding the impact on protected groups of the use of offender characteristics have never been clearly laid out in the context of any analytical framework found in relevant areas of civil rights law. Members of the original Commission

¹³⁰ See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007).

¹³¹ See, e.g., Statement of Carol A. Brook (USSC Regional Hearing, Chicago, Illinois, Sept. 10, 2009); Statement of Michael Nachmanoff (USSC Regional Hearing, New York, New York, July 9, 2009); Statement of Raymond Moore (USSC Regional hearing, Denver, Colorado, Oct. 21, 2009).

¹³² See, e.g., Transcript of Public Hearing, Denver, Colorado, at 295, 299 (Oct. 20, 2009); Transcript of Public Hearing, Austin, Texas, at 195-96, 199 (Nov. 19, 2009).

explained in a law review article that the “prohibitions” against consideration of education, vocational skills, employment record, family ties, and community ties “help to ensure that other considerations, possibly associated with a defendant’s race or personal status, are not used to ‘camouflage’ the improper use of those factors as to which the statute mandates neutrality.”¹³³ It is unclear from this explanation whether the Commission’s concern was an assumed correlation of these factors with membership in particular demographic groups or a fear that judges might intentionally use them to discriminate or some combination of both. Yet, what constitutes “improper” use of a factor is precisely what civil rights law attempts to sort out.

As a result of the Commission’s amorphous approach in this area, offenders who are at low risk to reoffend because they already have an education, an employment record and stabilizing ties, offenders who have overcome adversity and obtained education and steady work, and offenders who could be rehabilitated if they were given needed treatment or training, have all been denied consideration of those highly relevant factors. It has also led to results directly at odds with the concerns of civil rights law. For example, in prohibiting consideration of lack of youthful guidance and other circumstances indicating a disadvantaged upbringing, the Commission appears to have acted based on an assumed correlation between these circumstances and particular demographic groups, without regard to the relevance of the factor to the purposes of sentencing. This decision had a direct adverse impact on defendants of lower socioeconomic classes, and adversely affected defendants of every race and class who lacked guidance as a youth.

The Commission’s use of the term “proxy” in this issue for comment further complicates our understanding of the Commission’s concerns. In the civil rights context, the term “proxy” is a term of art used in the analysis of *intentional* discrimination. It means that an actor takes an adverse action based on a facially neutral factor in order to evade the prohibition on intentional discrimination based on a forbidden factor. *See, e.g., Rice v. Cayetano*, 528 U.S. 495 (2000) (limiting voters to those persons whose ancestry qualified them as either a “Hawaiian” or “native Hawaiian,” as defined by statute, violated Fifteenth Amendment by using ancestry as “proxy” for race, and thereby enacting a race-based voting qualification); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993) (firing employees because of their pension status, though a factor correlated with age, did not violate the Age Discrimination in Employment Act because the employer did not deliberately use pension status as a proxy for age). In other words, an actor intentionally uses a “proxy” to achieve a forbidden result.

In the sentencing context, use of a “proxy” would appear to mean that a judge used a facially neutral factor to impose a more severe sentence on account of race, sex, national origin, creed, or socioeconomic status. We do not believe that judges are using neutral factors to intentionally discriminate. Even if it “could” happen, a policy statement already states that these factors “are not relevant in the determination of a sentence.” USSG §5H1.9, p.s. Moreover, even if a factor “could” be used as a proxy for an improper reason, this does not justify saying it may or should not be used for the legitimate reason of satisfying the purposes of sentencing. There is certainly equal or greater cause for concern that prosecutors or judges who are so

¹³³ William W. Wilkins Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Disparity Problem*, 2 Crim. L.F. 355, 370-71 (1991).

inclined could use weapon enhancements, or drug quantity findings, or failures to cooperate, or the presence of a prior drug offense, as a proxy to ensure longer incarceration for members of groups they fear or dislike. Yet the Commission has not suggested that these factors should not be considered.

2. Disparate Impact Analysis

Once the implications of the term “proxy” are appreciated, we think it is more likely that the Commission is concerned not with intentional “use” of offender characteristics as “proxies,” but simply with the potential for their disproportionate impact on certain demographic groups. But under this analysis too, consideration of an offender characteristic that is relevant to the purposes of sentencing should not be discouraged or prohibited.

Under disparate impact analysis, discrimination is shown by evidence of a practice that has a disproportionate adverse impact on a certain group *and* is not shown to be consistent with legitimate purposes.¹³⁴ From discussions at the Regional Hearings and with Commissioners, however, it has sometimes seemed that the Commission’s concern is about the possibility that consideration of offender characteristics could have disproportionate impact *alone*, regardless of the relevance of the characteristic to legitimate sentencing purposes. We believe that if the Commission were to make policy on the basis of the group impact alone, it would elevate race, ethnicity, sex, or socioeconomic status itself to explicit considerations in policy making, in violation of the SRA’s directive that the guidelines and policy statements be entirely neutral regarding those characteristics.¹³⁵

It is unclear why a special concern with disproportionate impact should be raised with regard to offender characteristics. Many guideline rules have been shown to have a disproportionate adverse impact on certain demographic groups. The Commission itself, of course, conducted this analysis regarding crack cocaine penalties, and has also shown that the career offender guideline disproportionately impacts black defendants.¹³⁶ There are likely many more examples. The drug guidelines have a disproportionate impact on black, Hispanic or white

¹³⁴ See 42 U.S.C. 2000e-2(k) (disparate impact under Title VII is established only where the practice causes a disparate impact and the challenged practice is not job-related and consistent with business necessity); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹³⁵ Cf., e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675-79 (2009) (holding that the city lacked an “objective, strong basis in evidence” to discard test results with a “significant statistical disparity” because there was no evidence that the tests were “not job related and consistent with business necessity”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school districts failed to show use of racial classification in student assignment plans was necessary to achieve stated goal of diversity and thus violated Equal Protection Clause); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 500 (1989) (city’s race-conscious set-aside program violated the Equal Protection Clause because city lacked strong basis in evidence to conclude that race-conscious action was necessary to remedy identified discrimination).

¹³⁶ Fifteen Year Review, *supra*, at 133-34.

defendants depending on the drug,¹³⁷ guidelines for certain offenses against the person disproportionately impact Native American defendants,¹³⁸ and the criminal history rules in general disproportionately impact black and Hispanic defendants.¹³⁹

Under a disparate impact analysis, however, the question is whether this disparate impact is justified by sentencing purposes. That is the approach the Commission has taken with respect to guideline rules, and it is the approach it should take with offender characteristics. In its first report on crack cocaine sentencing, the Commission found that a disproportionate and vast majority of offenders subject to these harsh penalties were African American. It found that there was no evidence of intentional racial discrimination, and Commissioners were emphatic that a disproportionate impact alone was no reason to change policy if the policy itself was justified by sentencing purposes. But the Commission noted that “when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio,” and went on to find that the harms of this offense and the culpability of these offenders did not justify the enhanced ratio. *See USSC, Cocaine and Federal Sentencing Policy* at xii (1995).

The disparate impact framework was laid out explicitly and in greater detail in the Commission’s Fifteen Year Review:

Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect [that] the *average* sentence of different demographic groups are the same or different. As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group. . . . Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others. But if a rule has a significant adverse impact and there is insufficient evidence

¹³⁷ As compared to their representation in the defendant population, black defendants are disproportionately impacted by the powder and crack guidelines; Hispanic defendants are disproportionately impacted by the powder, heroin, and marijuana guidelines; and white defendants are disproportionately impacted by the methamphetamine guidelines. *See USSC, 2008 Sourcebook of Federal Sentencing Statistics*, Table 34.

¹³⁸ *See USSC, Report of the Native American Advisory Group* (Nov. 4, 2003).

¹³⁹ USSC Monitoring Datafile FY2008. In fiscal year 2008, white defendants made up 55.6 % of those falling in Criminal History Category I, while black defendants made up only 30.6%. Similarly, white defendants made up 9.4% of those falling in Criminal History VI, while black defendants made up 21.1%.

that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group.¹⁴⁰

After a detailed review of the evidence, the Fifteen Year Review concluded that mandatory minimums and certain guidelines “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 that attention should be turned to “asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.”¹⁴¹ As detailed in response to the Commission’s Request for Comment 3(A)-(E), each of the characteristics on which the Commission has sought comment is highly relevant to one or more purposes of sentencing. To continue to discourage judges from considering relevant factors to mitigate the harshness of the guidelines because they may have disproportionate effects would, in our view, badly misplace priorities.

Sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group. Once the Commission adopts a policy discouraging consideration of factors, the policy must apply to everyone, including deserving members of the minority or disadvantaged group the Commission sought to protect. The way to address any disproportionate impact of offender characteristics is to stop prohibiting consideration of relevant factors likely to benefit members of disadvantaged groups, such as disadvantaged upbringing, addiction, and personal financial difficulties. The solution is not to deny all defendants individualized consideration of all their relevant characteristics because of how some of those characteristics may be distributed among groups.

3. The Commission’s Data Is Not Adequate to Demonstrate Discrimination in the Use of These Offender Characteristics.

Whether the Commission’s concern is with judges’ intentional discrimination through the use of a “proxy” or with potential disparate impact, it does not have the kind or degree of evidence necessary to show that use of any offender characteristics is improper. As the Commission knows from its own studies, reliable data regarding legally relevant factors that might explain a disproportionality is necessary before any conclusion can be drawn that conscious or unconscious discrimination or bias affects the decisionmaking of judges.

It might be that certain groups receive more downward departures based on one of the five offender characteristics that are the subject of this issue for comment. But, apart from age, the Commission does not have the statistics that tell us how many defendants of any given demographic group actually possessed the characteristic. It does not collect statistics on mental and emotional conditions, or physical condition, or special vulnerability due to size or demeanor, or addiction, or military service, or a history of charitable contributions or public service, or lack of guidance as a youth. The Commission records the presence of a characteristic only when a

¹⁴⁰ *Fifteen Year Review*, *supra*, at 113-14 (emphasis in original).

¹⁴¹ *Id.* at 135.

judge cites it as a reason for departure, not when it is present but *not* used as a reason.¹⁴² A departure or variance is not given in every case where an offender characteristic exists for any number of reasons, including countervailing considerations in the case such as relative seriousness of the offense or criminal history, or because a fast-track departure or other plea agreement precludes it, or because of a mandatory minimum, or because some judges are still in the habit of following the Commission’s restrictions. Thus, there is no way to know if any disproportionality among groups in the use of a reason reflects bias or the true distribution of the characteristic, in combination with any number of other characteristics and circumstances, among groups.¹⁴³

F. Issue for Comment 3: Specific Offender Characteristics

The Commission requests comment on five specific offender characteristics. We provide the following information to demonstrate why each specific offender characteristic is relevant as a ground for downward departure. We do not mean to suggest that the Commission should attempt to delineate under what circumstances any of these factors should or should not be used as grounds for downward departure in an individual case. We provide this information only to show that the Commission should revise the pertinent sections of Chapter 5, Part H as we propose.

1. Issue for Comment 3(A): Age

The Commission should delete the current version of §5H1.1, p.s., and state that age may be relevant as a reason for downward departure if such a departure advances one or more purposes of sentencing. It should not state that age may be a reason for upward departure, or as a reason to choose a sentence of incarceration.

Neither youth nor older age should be a reason to impose an upward departure. The guidelines and criminal history rules make no distinction among defendants based on age. There is no evidence that the absence of age as a factor in calculating guideline ranges results in

¹⁴² As the Commission has acknowledged, “[d]ata are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do not receive a departure is not routinely collected.” *Id.* at 119.

¹⁴³ *Cf. Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 & n.13 (1977) (in a case involving a claim of intentional discrimination, emphasizing the importance of looking to the proper base “group” when making statistical comparisons to show discrimination); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (in a disparate impact case, statistical evidence must be “of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of the membership in a protected group”); *id.* at 991-92, 996 n.3 (indicating that the need for probative comparisons is especially true where distinctions are based on subjective criteria, as “statistics come in infinite variety [whose] usefulness depends on all of the surrounding facts and circumstances”); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (cautioning courts not to reach mistaken conclusions regarding statistics in disparate impact cases and explaining that the preferred comparison is between those in different groups who are actually qualified (*i.e.*, share the characteristic) for the job in question).

punishment that is not severe enough. In fiscal year 2008, judges cited age as a reason for a sentence below the guideline range 699 times. Age was apparently cited as a reason for an upward departure with *Booker* once, though the defendant, age 32, was neither young nor old. We have been unable to identify this case, or to determine what the judge had in mind or whether it reflects a clerical mistake.¹⁴⁴

According to the SRA's legislative history, Congress had no concern that young offenders should be sentenced *more* severely than adults, or that older offenders should be sentenced *more* severely than middle-aged offenders. In fact, it noted that 28 U.S.C. § 994(j) was "a recognition that a youth first offender, who has not committed a serious crime, ordinarily should not receive a sentence to imprisonment" at all. S. Rep. No. 98-225 at 120 (1983). Congress was concerned only that under prior law, juveniles and young adults could receive harsher sentences than adults for relatively minor offenses, and that they could serve less time for more serious offenses than adults with the same salient factor scores. *Id.* at 172.

Youth. In fiscal year 2008, 3,154 defendants sentenced under the guidelines were under the age of 21, and 12,408 were between the ages of 21 and 25, mostly for drug and immigration offenses.¹⁴⁵ Those under 21 either committed an offense at age 18 or older, or committed an offense under the age of 18 and were convicted as adults.¹⁴⁶

Youth is relevant in determining whether a downward departure is warranted for a number of reasons. First, the young are less culpable than the average offender and have a high likelihood of reforming in a short period of time. *Roper v. Simmons*, 543 U.S. 551, 567, 569-70 (2005). Current research shows that the regions of the brain that govern judgment, impulse control, and ability to accurately assess risks and foresee consequences do not fully mature until the early to mid-twenties.¹⁴⁷ Research shows that adolescents and youths are more susceptible to

¹⁴⁴ According to the Commission's monitoring dataset, this defendant was sentenced to 180 months in the Eastern District of Louisiana.

¹⁴⁵ See USSC, 2008 *Sourcebook of Federal Sentencing Statistics*, Table 6.

¹⁴⁶ Of 3,000 youths committed to BOP from 1994 to 2001 for offenses committed under the age of 18, 1,346 were committed as adults. See U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report*, at 118, <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. Although Native Americans are only 1% of the youth population, they are 31% of youth committed to BOP as adults. *Id.*

¹⁴⁷ Dr. Giedd of the National Institutes of Health reports findings showing that "the frontal cortex area — which governs judgment, decision-making and impulse control — doesn't fully mature until around age 25." Sophia Glezos Voit, *NIMH's Giedd Lectures on Teen Brain*, NIH Record, Vol. LVII, No. 16 (Aug. 12, 2005); see also U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report*, at 8 (2005), available at www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf (adolescents "often use the emotional part of the brain, rather than the frontal lobe, to make decisions" and "[t]he parts of the brain that govern impulse, judgment, and other characteristics may not reach complete maturity until an individual reaches age 21 or 22"); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Science* 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents showing that the prefrontal cortex, the "executive" part of the brain important for controlling reason, organization, planning, and impulse

peer pressure to engage in risky behavior than adults age 24 and older.¹⁴⁸ And research shows that the young have a unique capacity to reform.¹⁴⁹ In short, adolescents and young adults are less culpable for their actions, and their tendency to engage in illegal activity is short-lived. “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Roper*, 543 U.S. at 570 (internal quotation marks and citation omitted).

Second, the punishment that adolescent and young adult offenders endure is harsher than that suffered by adults.¹⁵⁰ Adolescents and young adults are at particular risk of rape and other

control, does not fully mature until the twenties); James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment By Risky Rewards*, 27 J. of Neurosci. 4839 (2007) (comparing differences in brain activity between 12-17 year olds and 23-33 year olds and finding that brain functions associated with decision making increase from adolescence to adulthood); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8826 (2001) (study showed that pronounced brain maturation continued during adolescence into post-adolescence); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows “that the region of the brain that inhibits risky behavior is not fully formed until age 25”).

¹⁴⁸ Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

¹⁴⁹ See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinquency 396 (1993); Brief of the Council of Juvenile Correctional Administrators, National Association for Juvenile Correctional Agencies, National Juvenile Detention Association, National Partnership for Juvenile Services, American Probation and Parole Association, and International Community Corrections Association as *Amici Curiae* In Support of Petitioners, *Graham v. Florida* (U.S. No. 08-7412), at 15-27 (discussing studies).

¹⁵⁰ Young defendants who are currently age 18 or older are designated or moved to an adult BOP facility. See U.S. Dep’t of Justice, Federal Bureau of Prisons, Program Statement 5216.05. Those who are currently under the age of 18 are (1) designated to a juvenile facility (under contract with BOP) where they can be housed with youthful offenders serving state imposed adult sentences, or (2) housed with adults in a community corrections center if ordered to a community corrections center as a condition of probation, or (3) housed in a BOP adult facility if the institution can ensure that there will be no regular contact with adults. *Id.* BOP has no adult facilities that can ensure that there will be no regular contact with adults. Researchers have found it difficult to learn from BOP how many juveniles are in BOP custody or where they are placed. See Neelum Arya and Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* at 26, http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf; Juveniles in Adult Prisons and Jails: A National Assessment at 36 (Oct. 2000), U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Assistance, <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>. BOP reports that the majority are Native Americans. See Juveniles in the Bureau, http://www.bop.gov/inmate_programs/juveniles.jsp.

violence by other prisoners and staff.¹⁵¹ Even in juvenile facilities, they are often victimized by staff and sometimes by other inmates.¹⁵² Being a target of sexual aggression in prison results in a seventeen-fold increase in the likelihood of attempted suicide.¹⁵³ Young persons are often protected from abuse by being isolated in solitary confinement, but solitary confinement itself increases the risk of suicide twelve-fold,¹⁵⁴ and also discourages reporting of staff abuse.¹⁵⁵ A

¹⁵¹ Based on surveys of correctional officers in state and federal adult facilities regarding what they found to be substantiated reports of inmate-on-inmate sexual violence, the Bureau of Justice Statistics reports that “victims were on average younger than perpetrators,” and that the victims were under the age of 25 in 44% of all incidents in 2006 and 53% of all incidents in 2005. See Bureau of Justice Statistics Special Report, Beck, Harrison and Adams, *Sexual Violence Reported by Correctional Authorities, 2006* at 4, Aug. 2007, <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf>. The under-25 age group comprises only about 20% of all state and federal prisoners. See Bureau of Justice Statistics, West and Sabol, *Prison Inmates at Mid-Year 2008 – Statistical Tables*, Table 17, Mar. 2009. See also Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. Crim. L. & Criminology 127, 164-66 (2002) (citing studies showing that in prison populations in which the average age was 29, the average age of rape victims was 21 or 23); Human Rights Watch, *No Escape: Male Rape in U.S. Prison*, Ch. IV (2001) (“Young or youthful-looking inmates are at particular risk of rape.”); National Council on Crime and Delinquency, *Fact Sheet: Youth Under 18 in the Adult Criminal Justice System* (June 2006) (“Youth are at greater risk of victimization and death in adult jails and prisons than in juvenile facilities.”), available at http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf; Stephen Donaldson, *The Rape Crisis Behind Bars*, New York Times Dec. 29, 1993 at A11 (activist who eventually died from AIDS contracted in prison rape, stating, “I soon learned that victims of prison rape were, like me, usually the youngest, the smallest, the nonviolent, the first-timers and those charged with less serious crimes”); Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. of Offender Rehabilitation 1, 6, 22 (1991) (victims of physical, and in particular, sexual assault, in male prisons “tend to be []small, young, and . . . lack mental toughness and are not ‘street-wise’ . . . appear to be less involved in a criminal culture before incarceration and to have less institutional experience”); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 Stan. L. Rev. 1541, 1545 (1992) (“Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims.”); see also U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in Adult Prisons and Jails: A National Assessment*, at 7-8 (Oct. 2000) (citing high risk of suicide, violent victimization, and sexual assault by older inmates and staff), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

¹⁵² In 2008-09, 10.8% of youths held in juvenile facilities reported sexual victimization by staff, and 2% reported sexual victimization by another youth. Of the 25,550 youths reporting victimization, 4,920 were 15 or younger, 6,150 were 16, 7,410 were 17, and 8,080 were 18 or older. See Beck, Harrison & Guerino, U.S. Department of Justice, Bureau of Justice Programs, *Bureau of Justice Special Report: Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, Table 8 (Jan. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

¹⁵³ Daniel Lockwood, *Prison Sexual Violence* 68 (1980).

¹⁵⁴ “An unexpected result . . . was that juveniles were often held in solitary confinement, leading to a suicide rate for juveniles held twelve times that of juveniles not held.” H.R. Rep. 102-756, H.R. Rep. No. 756, 102nd Cong., 2nd Sess. 1992, 1992 WL 184552, 1992 U.S.C.C.A.N. 4229 (Leg. Hist.).

prison sentence that would destroy a young person is certainly harsher than contemplated by the guidelines.

Third, prison increases the risk of recidivism for the young and can unnecessarily destroy an otherwise law-abiding life. Prison exposes less serious offenders to more serious offenders, breaks family ties, and significantly reduces the ability to earn a living legally.¹⁵⁶ In contrast, the relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.”¹⁵⁷ Exposing young offenders to “more experienced inmates ... can influence their lifestyle and help solidify their criminal identities.”¹⁵⁸ Indeed, recidivism rates are higher for young offenders who are convicted and sentenced as adults than for those adjudicated in juvenile courts.¹⁵⁹

United States v. K, 160 F. Supp. 2d 421 (E.D.N.Y. 2001), is an example of how a judge can weigh and balance various issues relating to youth to make the most of the defendant’s capacity for reform and protect him from unnecessary harm. The guideline range in this case, for trafficking in Ecstasy, would have been 46-57 months if calculated based on the amount negotiated, but the government agreed to a range of 12-18 months based on the amount actually sold. The judge deferred the sentence for one year to allow the defendant to complete his GED (he had learning disabilities and had dropped out of high school) and to continue to work to help support his family (his mother had recently been diagnosed with terminal cancer and been fired from her job). The judge took into account the defendant’s vulnerability to abuse in prison because of his young age (21), slight build, and timid demeanor, as well as his successful efforts at rehabilitation and his family circumstances. At the end of one year, the judge departed to a sentence of three years’ probation. See Judgment, Case No. 00-CR-951, May 31, 2002, available on PACER. A life was improved rather than destroyed.

¹⁵⁵ U.S. Dep’t of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Department of Justice’s Efforts to Prevent Staff Sexual Abuse of Federal Inmates* at 55 (Sept. 2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf>.

¹⁵⁶ See Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Public Policy* 589, 614-16 (2007); see also *Sentencing Options* at 19 (recognizing imprisonment has criminogenic effects including “contact with more serious offenders, disruption of legal employment, and weakening of family ties”).

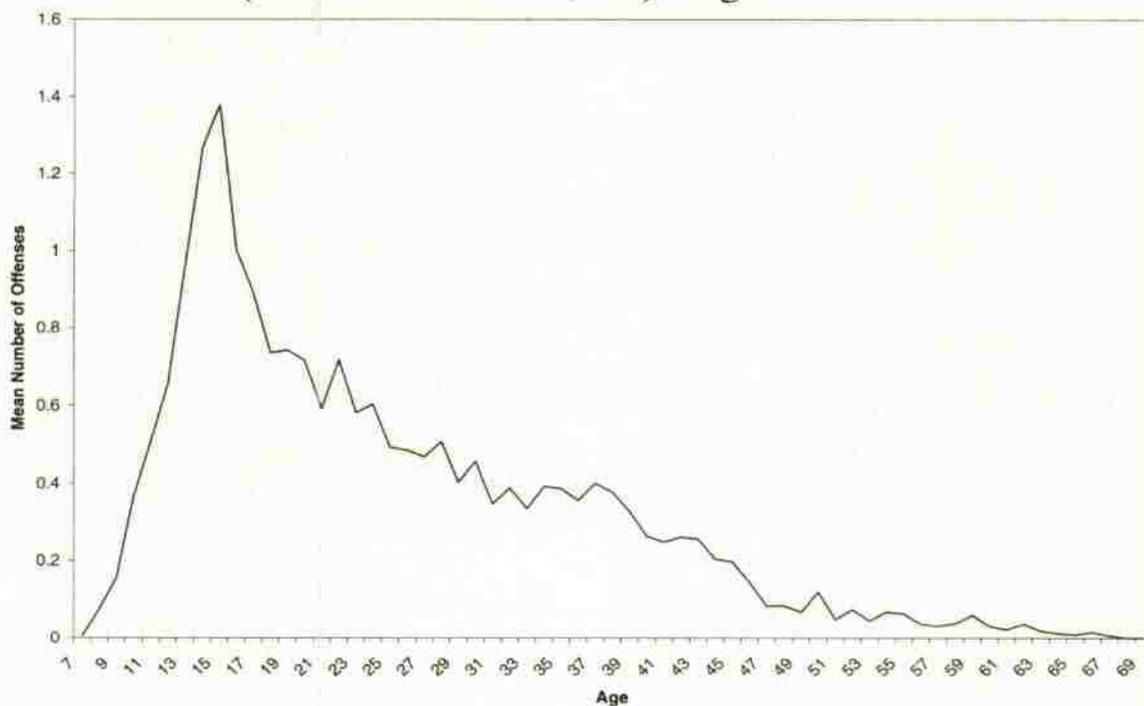
¹⁵⁷ Shirley R. Klein et al., *Inmate Family Functioning*, 46 *Int’l J. Offender Therapy & Comp. Criminology* 95, 99-100 (2002).

¹⁵⁸ Vieraitis, *supra* note 158, at 593.

¹⁵⁹ Richard E. Redding, U.S. Dep’t of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* (Aug. 2008), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>; Dep’t of Health and Human Services, Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services* (Nov. 30, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

Youth should not be a reason for upward departure to reflect a view that younger offenders are more likely to recidivate. This would make no sense, since prison increases the likelihood of recidivism, and the vast majority of young offenders age out of risky behaviors.¹⁶⁰ A Commission study shows that 35.5% of offenders under 21 and 31.9% of offenders between 21 and 25 recidivated within 24 months (including minor supervised release and probation violations), but that this dropped to 23.7-23.8% for offenders age 26-35.¹⁶¹ An even sharper decline is shown in the following graph, which charts the number of offenses for delinquent boys followed from their first offense to age 70.

**Figure 1 Actual Mean Number of Offenses for Total Crime
(Total Events = 9,548): Ages 7 to 70**



Robert J. Sampson and John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 451 *Criminology* 555 (2003).

Finally, the criminal history rules add more than enough time to adequately incapacitate and justly punish young offenders. According to the Commission, the criminal history rules reflect not only the likelihood of recidivism, but a theory of just deserts that regards repetition as reflecting increased culpability.¹⁶² The original Commission said that the factors in the criminal

¹⁶⁰ Steinberg & Scott, *supra* note 149, at 1014 (“Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”).

¹⁶¹ *Measuring Recidivism, supra*, Exhibit 9.

¹⁶² USSG §4A.1, intro. comment., pt. A; *Supplementary Report* at 41.

history score (seriousness, frequency, recency, and status) reflected both risk of recidivism and just punishment.¹⁶³ Young offenders are less culpable for their transgressions because of their immaturity, yet they are likely to receive points for both recency and status. Young offenders may also receive a point for an otherwise uncounted violent offense under §4A1.1(f), which the Commission has found is not statistically significant in predicting recidivism.¹⁶⁴

Older Age. Older age is relevant in determining whether a downward departure is warranted. Numerous studies, including the one shown in the graph above, show that the likelihood of recidivism drops dramatically with age. The Commission’s study, which included not just offenses but supervision violations, found that the recidivism rate of offenders age 41 to 50 was only 12.7% and that of offenders over 50 was only 9.5%.¹⁶⁵ The cost of incarcerating prisoners age 50 and older has been estimated to be two to four times that of the general inmate population.¹⁶⁶ “In addition to the economic costs of keeping older prisoners incarcerated, it is important to consider whether the infringement upon the liberty interest of an older prisoner who is no longer dangerous is justified.”¹⁶⁷

The same prison sentence for an older offender often amounts to harsher punishment than that for a middle-aged offender. For one thing, the sentence is a greater proportion of an older offender’s remaining life, and can amount to a life sentence.¹⁶⁸ For another, the various life and health problems of inmates before and during incarceration “accelerate their aging processes to an average of 11.5 years older than their chronological ages after age 50.”¹⁶⁹ They suffer increased rates of chronic and terminal illnesses, and collateral emotional and mental health problems.¹⁷⁰ Offenders who committed their first crime after the age of 50 “have problems

¹⁶³ *Id.* at 42.

¹⁶⁴ USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* at 15 (Jan. 4, 2005).

¹⁶⁵ *Measuring Recidivism, supra*, Exhibit 9.

¹⁶⁶ U.S. Dep’t of Justice, National Institute of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 11 (2004) (*Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*), available at <http://www.nicic.org/pubs/2004/018735.pdf>; Oklahoma Department of Corrections, *Managing Increasing Aging Inmate Populations* (Oct. 2008), available at <http://www.doc.state.ok.us/adminservices/ea/Aging%20White%20Paper.pdf>.

¹⁶⁷ William E. Adams, *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 *Nova L. Rev.* 465, 466 (1995) (hereinafter *Incarceration of Older Criminals*).

¹⁶⁸ See Hannah T.S. Long, *The “Inequality” of Incarceration*, 31 *Colum. J. L. & Soc. Probs.* 321, 343-44 (1998) (suggesting that prison sentences be adjusted for life expectancy due to age and illness).

¹⁶⁹ See *Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 10; see also *id.* at 8-9.

¹⁷⁰ *Id.* at 10.

adjusting to prison since they are new to the environment, which will cause underlying stress and probable stress-related health problems,” and are “easy prey” for more experienced inmates.¹⁷¹

The Bureau of Justice Statistics reports that 60% of federal prisoners age 45 or older in 2004 reported a current medical problem, including diabetes, heart disease, hypertension, stroke, tuberculosis, hepatitis, cancer and paralysis, and 22.9% had had surgery since admission. In addition, 33.8% had one or more impairments in mobility, hearing, vision, speech, learning or mental functioning.¹⁷² Older inmates with medical problems are less likely to recidivate than healthy inmates of the same age.¹⁷³ Older inmates with health problems suffer greater punishment than the average inmate, particularly because the Bureau of Prisons often fails to provide adequate medical treatment.¹⁷⁴

Older age should not be a reason to impose an upward departure to reflect a view that older offenders should be more mature and responsible. This is a moral judgment that the Commission has no basis to make for any individual offender. It would be fiscally irresponsible to encourage judges to impose upward departures on the population least likely to recidivate. See 28 U.S.C. § 994(g). It would compound the existing problems associated with prison overcrowding, including lack of adequate medical care and dangerous conditions for inmates and staff. That an older inmate “should have known better” is reflected in the conviction. Not only are the Chapter Two and Four guidelines more than severe enough, but Chapter Three calls for increases based on aggravating role in the offense, abuse of position of trust or special skill, and using a minor to commit a crime. A defendant’s mere older age does not warrant an upward departure.

2. Issue for Comment 3(B): Mental and Emotional Conditions

Mental or emotional condition should be a reason to impose a downward departure. There is no evidence that the absence of this factor in calculating guideline ranges results in recommended punishment that is too low. In 2008, judges cited mental and emotional condition

¹⁷¹ *Id.*; see also Elaine Crawley & Richard Sparks, *Older Men in Prison: Survival, Coping, and Identity*, in *The Effects of Imprisonment* 343, 346-47 (Alison Lieblich & Shadd Maruna eds., 2005) (for older prisoners who are unfamiliar with prison culture, “the prison sentence represents nothing short of a disaster, a catastrophe, and, in consequence, they are often in a psychological state of trauma”).

¹⁷² Laura Maruschak, *Medical Problems of Prisoners*, Bureau of Justice Statistics, Tables 1, 2, 4 (Apr. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf>.

¹⁷³ *Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 7.

¹⁷⁴ An audit by the Office of the Inspector General found that Bureau of Prisons facilities often do not provide preventive services recommended in BOP guidelines, that chronic conditions and medication side effects often are not monitored, that unqualified persons may be providing services, and that performance levels for the treatment of conditions including diabetes, HIV and hypertension were often below target levels. See U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, *The Federal Bureau of Prisons’ Efforts to Manage Health Care* (Feb. 2008), available at <http://www.justice.gov/oig/reports/BOP/a0808/final.pdf>.

as a reason to impose a sentence below the guideline 556 times. Mental and emotional condition was apparently cited as a reason for an upward departure or above range with *Booker* only four times. The Commission should state that mental or emotional condition may be relevant as a reason for downward departure if such a departure advances one or more purposes of sentencing. It should also remove certain limitations on departures based on coercion and duress under §5K2.12 and diminished capacity under §5K2.13. It should not state that mental or emotional condition may be a reason for upward departure or as a reason to choose a sentence of incarceration, and should encourage judges to recognize that civil commitment is the appropriate mechanism for protecting public safety *if* a defendant poses a risk due to a mental disease or defect at the conclusion of his or her sentence.

Congress charged the Commission with considering the relevance, in formulating guidelines and policy statements, of mental and emotional conditions “to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant.” 28 U.S.C. § 994(d). At the time, Congress suggested that the Commission “might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment.” S. Rep. 98-225 at 173. Although Congress believed that “[c]onsideration of this factor might lead the Commission to conclude in a particularly serious case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting,” *id.*, this did not suggest that the Commission should recommend a longer prison term because of a mental or emotional condition, but only that the Commission might not recommend that the court lower a sentence to probation in a particularly serious case. Congress could not have meant that the Commission should recommend prison for the purpose of treatment. *See* 18 U.S.C. § 3582(a); 28 U.S.C § 994(k); *see also* 18 U.S.C. § 4244-4247 (setting forth the mechanisms, procedures, and protections for sentences “in lieu of” a term of imprisonment or a longer term of imprisonment for persons suffering from a mental disease or defect and presenting a danger to the public).

In its initial draft of the guidelines proposed in February 1987, the Commission did not restrict the relevance of mental and emotional conditions, but instead recognized, as did Congress, that there exist mental and emotional conditions “that mitigate a defendant’s culpability” and referred the court to a proposed ground for departure on the basis of diminished capacity. 52 Fed. Reg. 3,920 (Feb. 6, 1987) (§§ D313, Y218). There was no suggestion that mental or emotion condition might be a reason to depart *upward*.

In the policy statement ultimately promulgated, the Commission declared that mental and emotional conditions “are not ordinarily relevant in determining whether a sentence should be outside the guidelines,” except as provided by the departure provisions for diminished capacity and coercion. USSG §5H1.3, p.s. (Nov. 1, 1987). The Commission also advised that a mental condition, “whether aggravating or mitigating” might be relevant to determining the length and conditions of probation or supervised release, providing as an example that the court might require mental health treatment. *Id.*¹⁷⁵

¹⁷⁵ In 1991, the Commission removed the language “whether aggravating or mitigating” for “clarity and consistency.” USSG App. C, Amend. 386 (Nov. 1, 1991).

Thus, the Commission has never viewed mental or emotional condition as a reason to impose a prison sentence longer than the applicable guideline range or as a reason to choose incarceration over probation. To do so *now* would be wholly inconsistent with prevailing district court practice, as well as inconsistent with the Supreme Court’s understanding of mental health evidence and current “advancement in knowledge of human behavior as it relates to the criminal justice system,” 28 U.S.C. § 991(b)(1)(C). It would also ignore systemic deficiencies at BOP that indicate that treatment within prison may not serve the purposes of sentencing “in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D).

Impaired mental functioning is “inherently mitigating,” *see Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004), and plainly relevant to culpability. Indeed, in death penalty cases, it is *unconstitutional* to disallow the consideration of mitigating mental health evidence. *See Payne v. Tennessee*, 501 U.S. 808, 822 (1991). Similarly, counsel’s failure to investigate and present mitigating mental health evidence constitutes ineffective assistance of counsel. *See Porter v. Florida*, 130 S. Ct. 447 (2009) (relating to the defendant’s post-traumatic stress disorder stemming from his military service in Korea).

District courts also recognize that a sentence of imprisonment for defendants with mental conditions can be counterproductive to achieving the purposes of sentencing. *See, e.g., United States v. Polito*, 215 Fed. App’x 354, 356 (5th Cir. 2007) (affirming a sentence of probation in a child pornography case imposed in part because a term of imprisonment would interrupt the defendant’s mental health treatment); *United States v. Clark*, 2008 U.S. Dist. LEXIS 56821 (E.D. Wis. July 25, 2008) (where guidelines called for a term of imprisonment for 18-24 months in a drug case, imposing sentence of four years’ probation for a middle-aged defendant who became addicted to cocaine after a series of family tragedies, serious medical problems, and the loss of her long-held job, with conditions that she participate in drug testing and treatment, and a mental health treatment program); *United States v. Repp*, 466 F. Supp. 2d 788, 791 (E.D. Wis. 2006) (where guidelines called for sentence of 10-16 months of imprisonment in a copyright infringement case, recognizing the defendant’s severe anxiety as a mental condition militated against prison and sentencing defendant to probation with a condition of mental health treatment).

Commission data show that the percentage of defendants with mental illness is approximately the same regardless of criminal history category, *see USSC, Recidivism and the First Offender*, at 8 (2004), suggesting that mental illness does not indicate an increased risk of recidivism. Therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences can reduce recidivism rates.¹⁷⁶ The Council of State Governments Justice Center recently released a report that summarizes the kind of community mental health treatment programs proven to work.¹⁷⁷ Often a mentally ill defendant’s need for

¹⁷⁶ *See* Dale E. McNeil, Ph.D. and Renée L. Binder, M.D, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (Sept. 2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (Apr. 2007).

¹⁷⁷ *See* Council of State Governments Justice Center, *Improving Outcomes for People with Mental Illness Under Community Corrections: A Guide to Research Informed Policy and Practice* (2009).

special attention is confused with increased risk, when the factors used to predict recidivism for these defendants is the same as for all defendants.¹⁷⁸

Finally, a defendant with a mental condition cannot be assured that BOP will provide needed treatment. *See, e.g., United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000). A recent audit by the Office of the Inspector General reported that at a number of institutions, the BOP “did not provide required medical services to inmates,” which including failing to monitor inmates with chronic care conditions and failing to properly monitor inmates for psychotropic medical side effects.¹⁷⁹ At several institutions, BOP has allowed medical practitioners to perform medical services without valid authorizations, proper privileges or protocols, increasing “the risk that the practitioners may provide medical services without having the qualifications, knowledge, skills and experience necessary to correctly perform the services.”¹⁸⁰

Danger to the community. A mental or emotional condition, such as antisocial personality disorder, is not a reason for an upward departure even if, at the time of sentencing, the court finds that the mental or emotional condition makes the defendant a particular danger to the community.

First, a diagnosis of antisocial personality disorder, or of any other mental condition, does not in and of itself make the defendant a danger to the community. Antisocial personality disorder in particular is not a reliable diagnostic criteria to use in sentencing evaluations for predicting future dangerousness.¹⁸¹ The disorder is often overdiagnosed,¹⁸² and is prevalent in the prison population. In one study, 28.7% of inmates were diagnosed with antisocial personality disorder, often co-occurring with a substance use disorder.¹⁸³ Other studies estimate a much higher rate.¹⁸⁴ Antisocial personality disorder can be treated and managed.¹⁸⁵

¹⁷⁸ *Id.* at 15.

¹⁷⁹ *See* U.S. Dep’t of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison’s Efforts to Manage Inmate Health Care*, at 32-34 (Feb. 2008), available at www.justice.gov/oig/reports/BOP/a0808/final.pdf.

¹⁸⁰ *Id.* at 48-49.

¹⁸¹ Mark Cunningham & Thomas Reidy, *Antisocial Personality Disorder and Psychopath: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 16 *Behav. Sci. & L.* 333-51 (1998) (the use of actuarial data, sometimes combined with clinical judgment, is the current method for assessing the risk of danger an offender may present to the community); Erica Beecher-Monas & Edgar Gargia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 *Cardozo L. Rev.* 1845 (2003).

¹⁸² Cunningham, *supra*. The data also may be insufficient data to determine if the individual suffered from Conduct Disorder before the age of fifteen – a prerequisite to a diagnosis of ASPD. DSM-IV-TR.

¹⁸³ Bernadette M. M. Pelissier and Joyce O’Neil, *Antisocial Personality and Depression Among Incarcerated Drug Treatment Participants*, at 2; *see also* Bonita M. Veysey & Gisela Bichler-Robertson, *Prevalence Estimates of Psychiatric Disorders in Correctional Settings*, 2 *Nat’l Comm’n on Corr. Health*

Even more important, if a defendant is so severely mentally ill that he presents a danger to society, civil commitment is the proper mechanism for protecting the public, not upward departure. As the Tenth Circuit recently explained, the federal civil commitment statute, 18 U.S.C. § 4246, provides for further commitment of a “person in the custody of the Bureau of Prisons whose sentence is about to expire” who “is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.” *See United States v. Pinson*, 542 F.3d 822, 838 (10th Cir. 2008). An upward departure based on mental illness “in effect circumvents the civil commitment procedure and the procedural and substantive protections that go along with it: specifically, the clear and convincing evidence standard is replaced by the lower, preponderance of the evidence standard.” *See id.* And it is a less precise measure of dangerousness, because it takes place before the defendant has received treatment during incarceration. *Id.* (citing Note, Booker, *The Federal Sentencing Guidelines, And Violent Mentally Ill Offenders*, 121 Harv. L. Rev. 1133, 1144 (2008) (“To impose post-prison civil commitment, the state is required to prove an offender's continuing dangerousness by clear and convincing evidence, whereas an above-Guidelines prison sentence relies on a possibly unreliable prediction of what the offender’s mental health will be at the end of the Guidelines sentence.”)).

We share the Tenth Circuit’s concern. As in *Pinson*, a very few courts have sentenced seriously mentally ill defendants to longer terms of imprisonment because of a perceived risk of danger to the public *before* the defendant had the opportunity to receive treatment while incarcerated and without considering that civil commitment procedures will be available if necessary. In a case in the Southern District of Ohio, a district judge sentenced a defendant, with a long history of bipolar disorder and schizophrenia, to a sentence five months above the guideline range of 30-37 months, to be served at the Federal Medical Center at Butner, so that he would be provided with the “structured environment and treatment necessary to develop the skills, routine, habit and judgment necessary to continue taking his medications and to

Care 57 (Apr. 2002) (predicting prevalence rate of 21-28% among federal prisoners), *available at* http://www.ncchc.org/pubs/pubs_stbr.vol2.html.

¹⁸⁴ *Id.* at 7 (study of federal inmates found that 38% of male drug dependent inmates had diagnoses of ASPD), *available at* http://www.bop.gov/news/research_projects/published_reports/drug_treat/oreprcormor10.pdf.

¹⁸⁵ Extensive clinical guidelines address the treatment and management of persons with antisocial personality disorder. National Collaborating Centre for Mental Health, *Antisocial Personality Disorder: Treatment, Management, and Prevention* (Jan. 2009), *available at* the National Guideline Clearinghouse, www.guideline.gov. Both U.S. Probation and the Federal Bureau of Prisons target for treatment the anti-social attitudes, beliefs, and behaviors associated with ASPD. Such treatments include cognitive-behavioral therapy, as well as therapeutic communities. *See* Federal Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs FY 2008*, at 607 (Jan. 2009); Melissa Alexander, Scott WanBenschoten, and Scott Walters, *Motivational Interviewing Training in Criminal Justice: Development of a Model Plan*, 72 Federal Probation 61, 62 (2008) (discussing results of study showing that offenders with ASPD who were exposed to motivational interviewing accomplished greater treatment gains than those who were not).

experience the benefits of an appropriate treatment regime” and to reduce risk of harm. The court noted that none of the defendant’s previous encounters with the criminal justice system had provided him with that structured environment or with needed treatment.

The Commission should follow the Tenth Circuit’s lead and “encourage sentencing courts to consider that civil commitment procedures will be available if the defendant continues to pose a considerable risk to the public after confinement.” *Id.*

Diminished capacity. The Commission should clarify that the limitations in §5K2.13, p.s., do not control the determination of whether a downward departure is warranted under §5H1.3, p.s., and refer courts to §5H1.3, p.s., if the defendant’s mental condition does not meet the requirements of § 5K2.13, p.s., or would be more effectively treated there.

The Commission should also delete the language added in 2003 in response to (but not required by) the PROTECT Act, which requires a finding that the significantly reduced mental capacity “contributed substantially to the commission of the offense.” *See* USSG, App. C. Amend. 651 (Oct. 30, 2003). The Commission gave no reason for this change, which is inconsistent with present understanding of impaired mental functioning. *Cf. Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004) (evidence of impaired mental functioning is inherently mitigating, and defendant need not demonstrate a “nexus” between his mental capacity and the crime committed).

The Commission should also remove the prohibition on departures under §5K2.13, p.s., if the reduced mental capacity “was caused by the voluntary use of drugs or other intoxicants.” As discussed below, addiction is an illness, a brain disease that is relevant to culpability. It can be treated, and is a reason to depart below the guidelines.

Finally, the Commission should clarify that it did not intend the prohibition on downward departure in §5K2.13 if “the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence” to categorically preclude a departure where the defendant was convicted of a crime of violence as defined in §4B1.2. Some courts have recognized that this language, added in 1998, was intended to allow departures even for offenses that would otherwise qualify as a “crime of violence” under §4B1.2. *See United States v. Bradshaw*, 1999 U.S. Dist. LEXIS 19171 (N.D. Ill. Dec. 1, 1999) (finding that under the amended version, an unarmed bank robbery involving a note saying “this is a stickup” was not a “serious threat of violence”); *see also United States v. Sam*, 467 F.3d 857, 861 (5th Cir. 2006) (noting that the amendment was intended to resolve a circuit split and reversing the district court for failing to consider the facts and circumstances of a bank robbery, which did not involve any overt violence). Others, however, continue to cite pre-amendment caselaw holding that a defendant convicted of a “crime of violence” as defined under §4B1.2 is categorically precluded from a departure under §5K2.13. *See United States v. Petersen*, 276 F.3d 432 (8th Cir. 2002); *see also United States v. Gibbs*, 237 Fed. App’x 550, 567 (11th Cir. 2007). Yet, even the government abandoned that position in at least one case, *see United States v. Woods*, 364 F.3d 1000, 1001 (8th Cir. 2004) (noting the government’s concession in that case). The Commission should clear up the confusion.

Coercion and duress. The Commission should clarify that the limitations in §5K2.12 do not control whether a downward departure is available under §5H1.3, and should refer courts to

§5H1.3 for any mental or emotional condition that does not meet the requirements of §5K2.12 or would be more effectively treated there.

In addition, the Commission should delete the last sentence of §5K2.12, which prohibits the consideration of “personal financial difficulties or economic pressures on a trade or business” for purposes of downward departure. It is true that economic duress has traditionally never been accepted as an affirmative defense to a criminal charge, but it is not clear why the Commission prohibited consideration of personal financial difficulties or economic pressures as a mitigating factor at sentencing. At least some state courts have said that economic duress can be a legitimate mitigating factor. *See, e.g., Illinois v. Turner*, 619 N.E.2d 781 (Ill. App. Ct. 1993); *Colorado v. Fontes*, 89 P.3d 484, 486 (Colo. Ct. App. 2003) (“[E]conomic necessity may be an important issue in sentencing . . .”). In Tennessee, one of the statutory mitigating factors is whether the defendant “was motivated by a desire to provide necessities for the defendant’s family or the defendant’s self.” *See* Tenn. Code. Ann. § 40-35-113(1), (7) (2006).

The Commission should also delete the proportionality requirement added in 2003 in response to the PROTECT Act. *See* USSG, App. C, Amend. 651 (Oct. 27, 2003). The Commission gave no specific reason for this amendment, referring to it in its contemporaneous report to Congress simply as another limitation on departures as part of the Commission’s efforts to reduce the rate of departures in response to the PROTECT Act. USSC, *Downward Departures from the Federal Sentencing Guidelines*, at 19 (Oct. 2003). It does not appear that any courts had suggested that proportionality should be part of the analysis for a departure based on coercion or duress. Moreover, a defendant is not required to make a showing of proportionality to be entitled to a jury instruction for the affirmative defense of justification. *See, e.g., United States v. Butler*, 485 F.3d 569, 572 (10th Cir. 2007) (setting forth the requirements for a justification instruction).

Effects of childhood abuse and neglect. The deleterious mental and emotional effects of physical, emotional and sexual abuse as a child are also relevant to downward departure. *Cf. Porter v. McCollum*, 130 S. Ct. at 449, 454; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable.”). Child abuse and neglect can cause chemical changes in the brain and nervous system. Studies involving abused and neglected children show that “abused individuals were 1.8 times more likely to be arrested for a juvenile offense, 1.5 times more likely to be arrested as an adult, and 1.35 times for likely to be arrested for a violent crime.” Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DePaul L. Rev. 847 (2007). Studies also show that abuse can be in the form of neglect only and “need not involve actual physical injury to do lasting damage to the developing brain.” *Id.* at 849.

[E]xposure to stress early in life – specifically, to inadequate or abusive parenting – changes in emotional circuitry of the brain and the neuroendocrine mechanisms underlying allostasis [the inherent flexibility that allows functions such as rate and respiration to increase or decrease to counter potentially destabilizing events] in enduring and often compromising ways.

Id. at 849, 855, 861 (concluding that “the criminal justice system would be better served if child welfare laws, policies, sentencing guidelines, and treatment approaches were informed by a better understanding of the impact of abuse and neglect on the human brain”).

This is yet another reason that the Commission should encourage the consideration of mental and emotional conditions under §5H1.3, and why we urge the Commission to delete §5H1.12 (discussed below).

Veterans with post-traumatic stress disorder. Section 5H1.3 should already allow consideration of post-traumatic stress disorder and the effects of traumatic brain injury in veterans. *Cf. Porter v. McCollum*, 130 S. Ct. 447 (2009) (finding ineffective assistance of counsel where counsel failed to investigate or present evidence of PTSD resulting from military combat). The Commission need not craft a special policy to account for veterans with mental and emotional conditions. It should encourage judges to consider mental and emotional conditions in all cases.

3. Issue for Comment 3(C): Physical Condition (Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)

Physical condition, including drug dependence, should be a reason to impose a downward departure. As with age and mental and emotional conditions, there is no evidence that the absence of this factor in calculating guideline ranges results in recommended punishment that is not severe enough. In fiscal year 2008, judges cited physical condition, including drug and alcohol dependence and susceptibility to abuse in prison, as a reason to sentence below the guideline range 1,023 times. In the same year, drug and alcohol dependence was cited only once as a reason for an upward departure with *Booker*.¹⁸⁶ The Commission should state that physical condition, including drug dependence, may be relevant as a reason for downward departure. It should also delete the general prohibition on considering gambling addiction. It should not state that physical condition, including drug dependence, may be a reason for upward departure.

¹⁸⁶ We have not been able to find out any more information about this case, but we note that according to Tables 24-24B of the 2008 *Sourcebook*, judges cited the need for education, treatment or training/medical care as a reason for a below guideline sentence 1,294 times (as the sole reason or one of multiple reasons). They cited the same factors as a reason for an above-guideline sentence only 127 times.

We surveyed Defenders to find out what this data might mean. Most offices reported this either never happens or only happens in supervised release revocation cases as an attempt to help defendants by giving them enough time to participate in the BOP’s RDAP program. A handful of offices reported that judges sometimes imposed an original sentence above the guideline range (*i.e.*, up to 24 or 30 months) believing this would provide sufficient time to complete RDAP and obtain its sentence reduction. In some districts, judges have done this over a defendant’s objection; in others, only with the defendant’s agreement. In a number of districts, judges who once did this no longer do because they learned people do not even get into RDAP within 24 months, much less complete the program or get the 12 month reduction.

Addiction. Drug addiction is relevant in determining whether a downward departure is warranted. It is an illness, “a brain disease that can be treated.”¹⁸⁷ It can mitigate culpability while frequently resulting in an already inflated criminal history. Drug addiction should also be a reason to decrease the sentence if it can be more effectively treated outside of prison. Although Congress expected that drug dependence “generally should not play a role in the decision whether or not to incarcerate the offender,” it contemplated that the Commission might recommend probation in order for the defendant to participate in a community drug treatment program, possibly with an initial brief stay in prison for “drying out.” S. Rep. 98-225 at 173.

Drug treatment works. A host of current studies show the efficacy and cost savings of drug treatment as an alternative to incarceration and as a method to reduce crime.¹⁸⁸ At the Commission’s recent Symposium on Alternatives to Incarceration, evidence-based research was presented to show that properly matched treatment programs for addicted offenders are effective in reducing recidivism. See USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008).

The Sentencing Project recently reviewed the evidence on drug courts, which address addiction through drug treatment “instead of solely relying upon sanctions through incarceration or probation,” and reported that graduates of drug court programs, are “less likely to be rearrested than persons processed through traditional court mechanics.” See Ryan S. King and Jill Pasquarella, The Sentencing Project, *Drug Courts: A Review of the Evidence*, at 1, 5 (April 2009) (collecting findings of drug court evaluations).

In a recent bulletin distributed to the state’s criminal justice stakeholders, the Missouri Sentencing Advisory Commission highlighted the fact that even for chronic abusers with a

¹⁸⁷ Nat’l Institute on Drug Abuse, Nat’l Institutes of Health, U.S. Dep’t of Health & Human Services, *Drugs, Brains, and Behavior: The Science of Addiction* ii (2007), available at <http://www.drugabuse.gov/scienceofaddiction/sciofaddiction.pdf>.

¹⁸⁸ See, e.g., Nat’l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006) (concluding that “treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. . . . Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings” because every dollar spent toward effective treatment programs yields a \$4 to \$7 dollar return in reduced drug-related crime, criminal costs and theft), available at http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf; Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment “Pay for Itself?”*, Health Services Res., 41(1), 192-213 (2006) (for every \$1 spent on drug treatment, \$7 is saved in general social savings, primarily in reduced offending and also in medical care); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 5-6 (Mar. 2004), Justice Policy Institute Policy Report. (“Dollar for dollar, treatment reduces the societal costs of substance abuse more effectively than incarceration does.”); see also *id.* at 18 (“A prison setting is ill-suited for the most effective approach to persistent drug abuse, which consists of a broad framework of substance abuse counseling with “job skill development, life skills training, [and] mental health assessment and treatment.”).

history of previous incarcerations, probation with community drug treatment reduces recidivism. See Missouri Sent'g Advisory Comm'n, *Smart Sentencing*, Vol. 1, Issue 4 (July 20, 2009). In fact, while all offenders benefit from community drug treatment, offenders with serious substance abuse or with extensive criminal history benefit *more* from community drug treatment than offenders with moderate substance abuse or no prior criminal history. *Id.*

As Congress suggested, courts might choose to place a drug dependent defendant on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173. In *Gall*, the defendant's addiction to drugs and alcohol helped to explain his criminal activity; he was waging a successful battle against it, and the district court made treatment a condition of his probation. *United States v. Gall*, 374 F. Supp. 2d 758, 762, 763 n.4 (D. Iowa 2005). The Supreme Court affirmed the district court's sentence of probation, noting the district court's observation that the defendant's offenses "appeared 'to stem from his addictions to drugs and alcohol.'" *Gall v. United States*, 552 U.S. 38, 57 (2007).

A defendant's dependence on drugs or alcohol should not be a reason to increase the sentence because it might increase her risk of recidivism. Congress instructs judges, in determining whether to impose a term of imprisonment and, if so, for how long, to keep in mind that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). To the extent that drug addiction may be linked to an increased propensity to commit crimes, the better answer is not to encourage a longer sentence, but to encourage treatment and rehabilitation. See *Smart Sentencing*, at 2-3; see also *United States v. Perella*, 273 F. Supp. 2d 162, 164 (D. Mass. 2003) ("If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism."). This is especially true given that a defendant's drug dependence often will have already inflated her criminal history score and increased the recommended guideline range.

Moreover, current research does not support the theory that a longer term of incarceration will reduce the risk that an offender will commit further crimes. A study involving federal white-collar offenders in the pre-guideline era found no difference in deterrent effect even between probation and imprisonment.¹⁸⁹ That is, offenders given terms of probation were no more or less likely to reoffend than those given prison sentences.

In a very recent study of drug offenders sentenced in the District of Columbia, researchers tracked over a thousand offenders whose sentences varied substantially in terms of prison and probation time.¹⁹⁰ The results showed that variations in prison and probation time

¹⁸⁹ See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995); see also Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 448-49 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.").

¹⁹⁰ Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, __ *Criminology* __ (forthcoming May 2010), electronic copy available at: <http://ssrn.com/abstract=1477673>.

“have no detectable effect on rates of re-arrest.”¹⁹¹ In other words, “at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior.”

Given that treatment has been shown to reduce recidivism, while longer sentences have not been shown to have that same effect, the Commission should not encourage judges to sentence above the guideline range because a defendant is addicted to drugs.

Physical condition. Physical condition other than drug dependence should be a reason to decrease the sentence, particularly if the condition can be more effectively treated outside of prison or renders the defendant so infirm that home confinement might be sufficient. Among other purposes, judges must consider the need for the sentence imposed “to provide the defendant with needed . . . medical care . . . *in the most effective manner.*” 18 U.S.C. § 3553(a)(2)(D). Congress expected that “other health problems” might lead the Commission to recommend probation “in certain circumstances involving a particularly serious illness.” S. Rep. 98-225 at 173. It also recognized that such a recommendation would be “consistent with proposed section 3582(c) permitting the Director of the Bureau of Prisons to petition the court for a reduction of a term of imprisonment in a compelling case, such as terminal cancer.” *Id.*

Not only is prison an inappropriate means for promoting treatment, *see* 18 U.S.C. § 3582(a), but the Bureau of Prisons cannot always assure adequate treatment. *See, e.g., United States v. Martin*, 363 F.3d 25 (1st Cir. 2004) (affirming downward departure where the Bureau of Prisons could not assure adequate treatment for the defendant’s Crohn’s disease); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000) (holding that it was not an abuse of discretion to grant a downward departure under §5H1.4 where the government’s only evidence that the Bureau of Prisons would adequately treat the defendant’s medical condition was merely a “form letter trumpeting the BOP’s ability to handle medical conditions of all kinds”).

A recent audit by the Office of the Inspector General found systemic deficiencies in the Bureau of Prisons’ delivery of health services and that the Bureau of Prisons in fact does not always provide adequate treatment for chronic conditions, does not properly monitor side effects of medication, allows possibly unqualified providers to render medical services, and does not meet its performance target levels on treatment of serious conditions including diabetes and HIV.¹⁹²

Of course, the need to provide treatment in the most effective manner is not the only purpose of sentencing. Judges recognize that a defendant’s medical condition may increase the relative severity of imprisonment as a form of punishment, making it more onerous and possibly even fatal. They understand how to strike a balance among the statutory purposes of sentencing on a case-by-case basis. For example, Senior District Judge Kane of the District of Colorado recently engaged in that balancing process to sentence a defendant with chronic medical

¹⁹¹ *Id.* (“Those assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame.”).

¹⁹² *See* U.S. Dep’t of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison’s Efforts to Manage Inmate Health Care* ii-xix, 32-34 (Feb. 2008), available at www.justice.gov/oig/reports/BOP/a0808/final.pdf.

conditions to one day in prison and lifetime supervised release in a child pornography case where the advisory guideline range was 97 to 120 months' imprisonment. *United States v. Rausch*, 570 F. Supp. 2d 1295, 1305 (D. Colo. 2008).

There, the defendant was in extremely poor health, under severe dietary restrictions, suffering severe effects from a colostomy, on kidney dialysis and in dire need of a kidney transplant. As it commonly does in cases involving defendants with severe or chronic illness, the government claimed that the BOP could provide needed medical treatment and kidney transplant surgery. In support, it provided an affidavit by the Assistant Director, Health Services Division and Medical Director of the Bureau of Prisons, asserting that organ transplant and related care for inmates "is available" and that the BOP would pay for such services if the BOP finds that a transplant is appropriate. *Id.* at 1302.

Counsel for Mr. Rausch showed, however, that eligibility for a kidney transplant through BOP would be, in fact, subject to non-medical considerations such as funding, available space, or "correctional issues." *Id.* at 1306. She further showed that although Mr. Rausch was on the kidney transplant list, his eligibility would be suspended once placed in BOP custody, and remain so until BOP approved the transplant through its own administrative process, which is not guaranteed and would involve additional evaluation and approval by the only medical center to whom it refers organ transplant surgery. *Id.* at 1301-03. If and when a transplant was ever approved, Mr. Rausch likely would have been dead.

While acknowledging the "grievous" nature of the offense, Judge Kane explained that the purposes of sentencing and criteria of § 3553(a)

may clash, and not all apply in each case. The criteria also point to individuated considerations: No one size fits all. The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one -- one that is decent, appropriate and deserved under all attendant circumstances.

Id. at 1305. The judge found that Mr. Rausch's "extremely poor health and the complexity of his needs for medical care," which the government had not shown BOP could or would meet in the most effective manner, "override any value that further imprisonment would have." *Id.* at 1308. He concluded that the sentence imposed was "strongest penalty I can exact without putting [the defendant's] life at substantial risk." *Id.*

Judge Kane did exactly what he is directed to do by Congress. He considered the purposes of sentencing under § 3553(a), including the need to "provide the defendant with needed . . . medical care . . . *in the most effective manner*," 18 U.S.C. § 3553(a)(2)(D) (emphasis added), to arrive at a sentence that is not greater than necessary. He recognized that while BOP may in theory be able to provide needed medical services, in reality it may not be able to do so "in the most effective manner" and that, as a result, a term of imprisonment would be too severe.

In addition, a defendant's physical condition is relevant to sentencing when it reduces the likelihood of recidivism due to infirmity. *See United States v. Jimenez*, 212 F. Supp. 2d 214, 219-20 (S.D.N.Y. 2002) (deciding to grant a downward departure where the defendant's unusual post-offense medical condition, while perhaps treatable by the Bureau of Prisons, "seriously

erodes her capacity to threaten society” and “reduces, to an exceptional degree, the applicability of other rationales for punishment – incapacitation, specific deterrence, and rehabilitation”).

Finally, persons with serious or chronic medical conditions and housed at a federal medical center often serve their prison terms many thousands of miles away from family members. Studies show that supportive family connections predict reduced recidivism,¹⁹³ while breaking up families leads to increased recidivism.¹⁹⁴

Physique. Physical appearance, including physique, can mean that a sentence of imprisonment, or a particularly long one, is unnecessarily cruel. Because “[p]hysical force, or the threat of physical force, is the most common element of coercion used in prison rape,” a “particularly strong indicator of whether a prisoner will be victimized is his physical build.”¹⁹⁵ Physique is precisely the type of evidence that establishes deliberate indifference to prison rape under the Eighth Amendment. See *Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Wright*, 998 F. Supp. 650 (E.D. Va. 1998); see also *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980).

Federal judges, familiar with the Eighth Amendment standard for deliberate indifference and the typical victim profile for prison abuse, have taken physical size and appearance into account at sentencing. In a well-known case, the Second Circuit upheld a downward departure based on the defendant’s “potential for victimization” due to his “diminutive size, immature appearance and bisexual orientation.” See *United States v. Lara*, 905 F.2d 599, 601 (2d Cir. 1990). The record in that case included a description of the defendant’s actual experience with victimization in the prison setting, which had prompted officials to plan to place him in solitary confinement as protection. *Id.* at 601. In affirming the downward departure, the court of appeals noted that “the severity of the defendant’s prison term is exacerbated by his placement in solitary confinement as the only means of segregating him from other inmates.” *Id.* at 603.

Immediately after *Lara* was decided, the Commission amended §5H1.4 to direct that physical “appearance, including physique” is not ordinarily relevant. USSG, App. C., Amend. 386 (Nov. 1, 1991). In its official reason for the amendment, the Commission did not mention *Lara*, but summarily stated that it “sets forth the Commission’s position that physical appearance, including physique, is not ordinarily relevant in determining whether a sentence

¹⁹³ Kimberly Bahna, “It’s a Family Affair” – *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271, 285 (1994) (prisoners who have supportive families are less likely to recidivate); Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int’l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) (“The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.”).

¹⁹⁴ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf (“The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.”).

¹⁹⁵ See Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. Crim. L. & Criminology 127, 167 (2002).

should be outside the applicable guideline range.” However, when the Commission initially proposed the amendment, it was more forthcoming about its motivation for the amendment, revealing that it was intended to clamp down on disfavored judicial decisions. It noted that “[i]n several cases, court[s] have departed based on the defendant’s alleged vulnerability to sexual assault in prison due to youthful appearance and slender physique.” 56 Fed. Reg. 1,846 (Jan. 17, 1991).

Nevertheless, courts continued to consider a defendant’s extreme vulnerability to abuse in prison due to physical appearance and small size. For example, in *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992), the Eighth Circuit upheld the district court’s downward departure based on a physical impairment which made him “exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries.” *Id.* at 1277. And in *United States v. K.*, 160 F. Supp. 2d 421 (E.D.N.Y. 2001), the district court deferred sentencing to promote rehabilitation after identifying as a ground for downward departure the fact that the defendant was “extremely small-boned and feminine looking” and after having noted the documented relationship between small size and physical appearance to vulnerability to abuse in prison. *Id.* at 443-44, 446-47. In fiscal year 2008, susceptibility to abuse in prison was cited as a reason for a sentence below the guideline range in 18 cases.

Finally, physical appearance and physique are not factors listed in 28 U.S.C. § 994(d). To the extent that the Commission considers itself obligated to address the factors listed in § 994(d) in some manner, it is under no similar obligation with respect to physical appearance or physique. It should delete any reference to physical appearance or physique.

Gambling addiction. The Commission should delete the prohibition in §5H1.4 on considering a defendant’s addiction to gambling as a reason for downward departure, added in 2003 in response to the PROTECT Act, but not required by it. *See* Pub. L. 108-21 § 401(b) (Apr. 30, 2003) (adding a prohibition on gambling addiction only for child crimes and sex offenses at §5K2.22). As its reason for expanding the prohibition to all offenses, the Commission said only that it “determined that addiction to gambling is never a relevant ground for departure.” USSG App. C, Amend. 651 (Oct. 27, 2003) (Reason for Amendment).

Published only four days before its effective date, and not published for comment,¹⁹⁶ this categorical prohibition conflicted with the decisions of many courts finding that gambling addiction is an appropriate ground for downward departure. *See United States v. Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000) (recognizing several courts’ consideration of addiction to gambling, and holding that the district court did not abuse its discretion to grant a downward departure based compulsive gambling under §5K2.13); *United States v. Liu*, 267 F. Supp. 2d 371, 372 (E.D.N.Y. 2003) (departing downward based on defendant’s diminished capacity

¹⁹⁶ The Commission relied on the “good cause” exception to the notice and comment requirement under 5 U.S.C. § 553(b) & (d)(3), incorporated by reference in 28 U.S.C. § 994(x) and governing the Commission’s amendment process. The Commission found “good cause” to dispense with notice and comment because “the extensive nature of these amendments, and limited Commission resources made it impracticable to publish the amendments in the Federal Register within the otherwise applicable 30-day period.” *See* 68 Fed. Reg. 60,154, 60,154 (Oct. 21, 2003).

resulting from addiction to gambling); *United States v. Harris*, 1994 U.S. Dist. LEXIS 17366, No. S192 Cr. 455, 1994 WL 683429, at *3-4 (S.D.N.Y. Dec. 6, 1994) (pointing out that the American Psychiatric Association has recognized pathological gambling as an “impulse control disorder”); *United States v. Iaconetti*, 59 F. Supp. 2d 139, 146 (D. Mass. 1999).

Pathological or compulsive gambling is a diagnosable mental health disorder¹⁹⁷ that is the subject of intense research regarding its prevalence, biological basis, social impact, and effective treatment. In 2000, Harvard Medical School created the Institute for Research on Pathological Gambling and Related Disorders, which engages in scientific research on the individual, social, medical and economic burdens caused by pathological gambling. The National Center for Responsible Gaming collects leading studies on treatment of compulsive gambling.¹⁹⁸ The Iowa Department of Public Health runs a specialized treatment program for “problem gamblers” because it is a treatable addiction.¹⁹⁹ In an effort to reduce recidivism and prison overcrowding, Louisiana has enacted a voluntary diversion program offering gambling addiction treatment rather than prison time for first or second offenders who have committed non-violent crimes such as theft, forgery, issuing worthless checks, and failure to pay child support that can be directly related to compulsive gambling.²⁰⁰

These few examples show that the Commission’s categorical prohibition on considering gambling addiction is not consistent with current knowledge of its relationship to crime and treatment.

Like physical appearance and physique, gambling addiction is not one of the factors listed in § 994(d). The Commission should delete it from §5H1.4.

4. Issue for Comment 3(D): Military, Civic, Charitable, or Public Service, Employment-Related Contributions, Prior Good Works

Military, civic, charitable, or public service, employment-related contributions, and prior good works are relevant to the question whether to grant a downward departure. None of these factors should be a reason to impose an upward departure. There is no evidence that the absence of these factors in calculating guideline ranges results in recommended terms of imprisonment

¹⁹⁷ The criteria for pathological gambling, classified as an impulse control disorder, are set forth in at section 312.31 of the *DSM-IV-TR*.

¹⁹⁸ The NCRG is a national organization that funds research that helps increase understanding of pathological and youth gambling and find effective methods of treatment for the disorder. See <http://www.ncrg.org>.

¹⁹⁹ See Iowa Gambling Treatment Program, available at <http://www.1800betsoff.org> (“Problem gambling is a treatable addiction.”)

²⁰⁰ See the 20th Judicial District Attorney’s Office website at <http://www.felicianasda.org/diversion.html#Gambling> (describing the pretrial diversion program), last visited Mar. 6, 2010; see also Matthew Penix, *Compulsive gambling surges*, New Orleans City Business (Dec. 18, 2006) (describing the widespread use of the program and its benefits).

that are too short. In fiscal year 2008, judges never cited any of these reasons for sentence above the guideline range but cited them as a reason for a below guideline sentence 177 times.

The Commission should delete §5H1.11. The factors addressed by that policy statement are not listed in 28 U.S.C. § 994(d), so the Commission is not required to consider them. If it does not delete the policy statement, it should state that each of these factors may be relevant to the question whether a downward departure is warranted. It should not state that any of these factors could be a reason for upward departure.

Military service. Before the guidelines were promulgated, military service was recognized as relevant. *See, e.g.,* Tr. of Sentencing, *United States v. North*, No. CR. 88-00080-02 (D.D.C. July 5, 1989). After the guidelines were promulgated, courts continued to consider military service. For example, in *United States v. Pipich*, the district court considered the prior exemplary military service of a postal employee charged with theft of mail matter as relevant, both under 18 U.S.C. § 3553(a) and as a matter of due process, ultimately departing from the guideline range to sentence him to probation. *See* 688 F. Supp. 191, 193 (D. Md. 1988). The court noted the “lack of any discussion of military history” in the administrative record of the Sentencing Commission and explained a person’s military record

reflects the nature and extent of that person’s performance of one of the highest duties of citizenship. An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.

Id.; *see also United States v. McCaleb*, 908 F.2d 176, 179 (7th Cir.1990) (defendant’s military record might, under some circumstances, warrant a downward departure); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir.1990) (military service may warrant a downward departure “in an unusual case”).

In 1990, Judge William Wilkins (and then-Chair of the Sentencing Commission) writing for the Fourth Circuit rejected a defendant’s argument for a lower sentence based on the defendant’s employment-related contributions to the community and prior good works. *United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990). The court concluded that part H of chapter 5, specifically the provisions relating to community ties and socio-economic status, already evidenced that the Commission had considered the factors the defendant relied on and deemed them ordinarily irrelevant. *Id.*

In the very next amendment cycle, the Commission, headed by Judge Wilkins, added a new policy statement discouraging departures based on “military, civic, charitable, or public service; employment-related contributions; and similar prior good works.” 56 Fed. Reg. 22,762 (May 16, 1991); USSG, App. C, Amend. 386 (Nov. 1, 1991). The Commission gave no reason for issuing this policy statement, at odds with a long history of considering military service, except to say that it had done so. USSG, App. C, Amend. 386 (Nov. 1, 1991) (Reason for

Amendment). In a later article, Judge Wilkins and John Steer, General Counsel for the Commission, explained that district court decisions involving departures based on good works or positive contributions “played a prominent role in the issuance of this policy statement.” William Wilkins & John Steer, *The Role of Sentencing Guideline Amendments in Reducing Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 n.107 (1993).

A significant percentage of federal prisoners have a history of military service.²⁰¹ Discouraging judges from considering military service runs contrary to a long and continuing tradition of viewing military service as evidence of reduced moral culpability. As the Supreme Court recently emphasized, “[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.” *Porter v. McCollum*, 130 S. Ct. 447, 455 & n.8 (2009) (finding that the Florida Supreme Court “unreasonably discounted the evidence of Porter’s . . . military service” and holding that trial counsel’s failure to uncover and present evidence of the petitioner’s military service, among other factors, constituted ineffective assistance of counsel); *see also Rita v. United States*, 551 U.S. 338 (2007) (Stevens, J., concurring) (recognizing the relevance of military service to sentencing).

Senior District Judge Kane of the District of Colorado, testifying before the Commission at its regional hearing in Denver, emphasized the need for the criminal justice system to account for military service and its physical and mental consequences.²⁰² As he pointed out, veterans returning from combat often suffer post-traumatic stress disorder, *see Porter*, 130 S. Ct. at 451 n.4, traumatic brain injury or other mental conditions.²⁰³ Long and multiple deployments to combat zones place massive amounts of stress on military personnel and their families. A recent study of National Guard troops found that previously deployed soldiers were more than three times as likely as soldiers with no previous deployments to screen positive for posttraumatic stress disorder, more than twice as likely to report chronic pain, and more than 90% more likely to score below the general population norm on physical functioning.²⁰⁴

²⁰¹ *See* Bureau of Justice Statistics, Margaret E. Noonan & Christopher J. Mumola, *Veterans in State and Federal Prison* (2004) (reporting that just under 10% of federal prisoners have a history of military service).

²⁰² *See* Transcript of Public Hearing, Denver, Colorado, at 70-72 (Oct. 20, 2009) (Judge Kane).

²⁰³ *See id.*; *see also* RAND Center for Military Health Policy Research, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* xxi (Tanielian & Jaycox, eds. 2008) (reporting that up to one-third of all military personnel, including the Nation Guard and reserve troops, come home from Iraq and Afghanistan with mental health problems, including post-traumatic stress disorder, depression, and other serious disorders).

²⁰⁴ Anna Kline, PhD, et al., *Effects of Repeated Deployment to Iraq and Afghanistan on the Health of New Jersey Army National Guard Troops: Implications for Military Readiness*, 100 Am. J. Pub. Health 276-83 (2010); *see also* Thom Shaker, *Army Is Worried by Rising Stress of Return Tours to Iraq*, New York Times (Apr. 6, 2008) (reporting that an official Army survey of soldiers’ mental health showed that “[a]mong combat troops sent to Iraq for the third or fourth time, more than one in four show signs of anxiety, depression or acute stress”).

Military service shows courage, loyalty, and personal sacrifice. It should not be a reason to increase a sentence to reflect a view that the offender is a role model who “should have known better.” Many service members are barely even adults themselves, deployed two and three times before reaching their mid-twenties, and too often suffer from the mental and emotional conditions outlined above. The Commission should not make abstract moral pronouncements about how a circumstance might be “viewed” in general. It should leave to judges the balancing of the history and characteristics of the particular defendant and the nature and circumstances of the offense in reaching conclusions regarding relative moral culpability.

Civic, Charitable, or Public Service, Employment-Related Contributions, Prior Good Works. Defendants of every background come before judges with a history of good works and community contributions. The significance and magnitude of their contributions, and the extent to which they might weigh against other factors, depends on all the facts and circumstances of the case and the defendant’s circumstances. The Commission should not attempt to describe in the abstract the significance of these factors or to limit judges’ consideration of them.

Our clients repeatedly remind us that there is simply no way to predetermine in the abstract the measure of a person’s good works as they relate to the appropriate sentence. They should also remind the Commission that it is not only wealthy defendants whose backgrounds include charitable contributions or good works. They include a black woman who, while raising seven children by herself and caring for her terminally ill mother, volunteered for seven years as a coach at a high school plagued by poverty and dismal graduation rates; a Native American woman, living in extreme poverty herself, who was honored for her many years of work as community activist on the Navajo reservation, educating others about the care and prevention of diabetes and other health issues; a young black man who grew up surrounded by poverty and crime and who managed to escape his past, become a carpenter and go on to restore abandoned property in an economically distressed area of the city; a black man of average income and suffering from AIDS for many years who contributed to his community by serving as a mentor to youth and assisting the elderly and others with AIDS; and a Salvadoran man who, after being deported to El Salvador, created a non-profit organization for flood victims and other dispossessed people in El Salvador.

Their contributions, and the contributions of countless indigent defendants like them, are relevant to the determination of what sentence, in the circumstances of that case, will be sufficient but not greater than necessary to achieve the purposes of sentencing. Because they are relevant to every defendant with such a history, the Commission should not be concerned that consideration of these factors might have disproportionate race or class effects. *See* Carissa Hessick, *Why Are Only Bad Acts Sentencing Factors?*, 88 B.U. L. Rev. 1109 (2008) (“If a system is willing to tolerate a certain amount of race and class effects [through aggravating factors], there is no reason to think that those effects should be permitted for aggravating factors but not for mitigating sentencing factors.”).

5. Issue for Comment 3(E): Lack of Guidance as a Youth and Similar Circumstances

Lack of guidance as a youth and similar circumstances, including a disadvantaged upbringing, are relevant to the question whether to grant a downward departure. In fiscal year 2008, judges cited lack of youthful guidance 109 times. Consideration of these factors could help close the racial and socioeconomic gaps created by the current system. Because the factors addressed in §5H1.12 are not listed in 28 U.S.C. § 994(d), the Commission need not weigh in on them. As discussed in response to Issue for Comment 3(B), mental or emotional conditions caused by a disadvantaged upbringing, whether child abuse, neglect, or any other circumstances, are reasons for downward departure under §5H1.3. The Commission should delete §5H1.12.

In 1991, the Ninth Circuit held that lack of youthful guidance was a valid basis for downward departure, recognizing that it “may have led a convicted defendant to criminality.” *United States v. Floyd*, 945 F.2d 1096, 1101 (9th Cir. 1991), *reported as amended at* 956 F.2d 203 (9th Cir. 1992). In that case, the defendant had been abandoned by parents at a young age. In reaching its conclusion, the court in *Floyd* discussed at length the relevant provisions of the Sentencing Reform Act, the directives to the Commission, congressional intent, the “background rule” at USSG §1B1.4 (to consider every characteristic unless already determined), and the clear mandate of 18 U.S.C. § 3661 that “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.” *Id.* at 1101-02. In other words, the court explained its decision with clarity and precision, tying it to the purposes of sentencing and reconciling it with Congress’s concern that the guidelines should not relegate to prisons persons without education and family ties.

In the very next amendment cycle, the Commission added a new policy statement prohibiting the court from considering “lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds” as grounds for a departure. USSG, App. C, Amend. 466 (Nov. 1, 1992); USSG §5H1.12 (Nov. 1, 1992). As its reason, the Commission simply stated: “This amendment provides that the factors specified are not appropriate grounds for departure.” *Id.* (Reason for Amendment).

In a subsequent article, then-Chair Wilkins and General Counsel John Steer, acknowledged that the Ninth Circuit’s decision in *Floyd* “directly precipitated this Commission action.” William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash & Lee L. Rev. 63, 84 (1993). The authors explained there that a number of factors contributed to the Commission’s disapproval of the court’s consideration of “lack of youthful guidance”:

Among them was a concern that this particular label, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines). The unwarranted disparity that could result from such a wide-open path around the guidelines was inconsistent with SRA objectives as the Commission understood them. Moreover, departures predicated on this factor could reintroduce into the

sentencing equation consideration of a defendant's socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.

Id. at 84-85. Given the concern that the factor would be applied “in an extremely large number of cases,” it is clear that even the Commission understood the manifest relationship between disadvantage and crime. Moreover, if the prohibition is in fact based on socioeconomic status, then it appears to run afoul of Congress's directive that policy statements must be “entirely neutral” regarding socioeconomic status. 28 U.S.C. § 994(d).

Research shows that a disadvantaged upbringing, whether in poverty or not, is highly relevant in any number of ways. The Department of Justice identifies as risk factors for childhood delinquency and later adult criminal behavior to include delinquent peer groups, family antisocial behavior, parental psychopathology, hyperactivity, poor parenting, and maltreatment.²⁰⁵ As discussed above in response to Issue for Comment 3(B), child abuse and neglect can cause chemical changes in the brain and nervous system, and increases the risk of criminal behavior. In addition, young people who grow up without role models, in terrible schools, with absent parents or parents who introduce them to crime end up disconnected from mainstream society, often fighting a “pervasive sense of hopelessness” and simply not understanding how to “navigate the mainstream society.” See Erik Eckholm, *Plight Deepens for Black Men, Studies Warn*, New York Times, Mar. 20. 2006.

For many of these defendants, acquiring basic life skills and job skills would better serve the purposes of sentencing than a long prison sentence.

6. Issue for Comment 3: Conforming Changes

The Commission requests comment regarding what, if any, conforming changes should be made to Chapter Five, Part K, or elsewhere in the Manual.

USSG §5K2.0, p.s. The Commission should remove the word “exceptional” from §5K2.0, and should substantially revise that section. Most of the restrictive language there was added in response to, but was not required by, the PROTECT Act. Only subsection (b) was required by the PROTECT Act. We suggest that the Commission return to the pre-PROTECT Act version of §5K2.0, minus the first sentence, which refers to the excised 18 U.S.C. § 3553(b). See USSG §5K2.0 (2002).

USSG §4A1.3(b)(2)(A), p.s. & comment. (n.3) The Commission should delete USSG §4A1.3(b)(2)(A), which states that a “departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited,” and the explanation for it in application note 3, which states that it is “due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.”

The Commission's research shows that the lower limit of the guideline range for Criminal History Category I is *not* set for a first offender with the lowest risk of recidivism.

²⁰⁵ See U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk and Protective Factors of Child Delinquency* (2003).

Identifiable types of offenders in Criminal History Category I have a lower risk of recidivism than other offenders in Criminal History Category I. These include offenders with zero criminal history points; who have never been arrested; who are over 40; who are convicted of drug trafficking, fraud or larceny; who have been employed in the past year; who have not used illicit drugs in the past year; who have some education; and who have ever been married. See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* Exhibits 2, 4, 9-11 (May 2004); USSC, *Recidivism and the First Offender* at 13-14 (May 2004).

A comparison of reasons for below guideline sentences before *Blakely* in 2004 and after *Booker* in 2005 showed that “defendant status as a first offender showed the greatest proportional increase,” *i.e.*, a 1720% increase, indicating that the prohibition in USSG §4A1.3(b)(2)(A) was the one judges were “most ready to discard.” See Paul J. Hofer, *United States v. Booker as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 *Criminology and Public Pol’y* 433, 449-50 (2007).

There are many more defendants in Criminal History Category I than in any other criminal history category (47% of all defendants) and many more defendants with zero criminal history points (38.7% of all defendants) than with any number of points. See 2008 *Sourcebook*, *supra*, Table 20. As judges often recognize, there is no need to protect the public from further crimes of many offenders in Criminal History Category I, nor is punishment at the lower limit of the guideline range necessary to justly punish all offenders in Criminal History Category I. Non-incarceration sanctions or shorter prison terms are sufficient for many such offenders. Many offenders in Criminal History Category I who would otherwise be subject to a term of straight imprisonment would benefit from treatment or training in the community, either as a condition of probation or as a condition of supervised release as part of a split sentence.

Eliminating §4A1.3(b)(2)(A) would be consistent with the Commission’s empirical research and with judicial feedback. It would help to implement congressional directives to minimize over-incarceration, 28 U.S.C. § 994(g), and to ensure that the guidelines reflect the general appropriateness of a sentence other than imprisonment for first offenders not convicted of a serious offense, 28 U.S.C. § 994(j).

G. Issue for Comment 4: The Collateral Consequences of a Defendant’s Status as a Non-Citizen Should Be an Encouraged Basis for Departure.

The Commission requests comment on whether it should “amend the guidelines to address when, if at all, a downward departure may be warranted on the basis of “collateral consequences of a defendant’s status as a non-citizen.” We believe that such a departure should be encouraged and would reflect a departure long recognized in the case law.²⁰⁶ We propose the following language:

²⁰⁶ See, *e.g.*, *United States v. DeBeir*, 186 F.3d 561, 569 (4th Cir. 1999) (collecting cases); *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) (concluding that Supreme Court in *Koon v. United States*, 518 U.S. 61 (1996), overruled previous contrary authority, including *United States v. Restrepo*, 999 F.2d

Non-citizen defendants facing deportation may face collateral consequences of their status as non-citizens, which may result in their being treated more harshly than U.S. citizens. They may be treated differently in prison and may spend more time in immigration custody either pretrial or pending deportation. In such cases, a downward departure may be warranted.

Deportable non-citizens, against whom Immigration and Customs Enforcement (ICE) has placed a detainer, face limited sentencing options and are treated differently than other defendants.

First, non-citizens facing deportation do not receive the benefit of sentencing options²⁰⁷ because they are not eligible for community confinement and judges generally do not impose split sentences or probation because they cannot be supervised following deportation.

Second, deportable non-citizens may be held in immigration custody for weeks or months before being formally charged or after sentencing, but when their time in custody is calculated, BOP gives them no credit for that time.²⁰⁸ Federal law provides that inmates should receive credit for any time spent in official detention “as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed” so long as that time has not been credited against any other sentence.²⁰⁹ BOP, however, will not credit against a federal sentence the time spent in immigration custody.²¹⁰

Third, once placed within the custody of BOP, BOP treats inmates with ICE detainees differently. For example, deportable non-citizens are typically required to be housed in at least a low security level institution. Deportable aliens are not eligible for placement in a minimum-security facility, i.e., a federal prison camp.²¹¹ Nor are they eligible for community confinement or halfway house placement during the last months of their sentence.²¹² As a result, they do not

640, 644 (2d Cir. 1993) that declined to allow departure based on defendant’s anticipated in post-sentencing detention pending deportation).

²⁰⁷ USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 4-5 & Tables 4 & 5.

²⁰⁸ See, e.g., *United States v. Montez-Gavira*, 163 F.3d 697, 702 (2d Cir. 1998) (distinguishing *United States v. Restrepp*, 999 F.2d 640, 644 (2d Cir. 1993), and finding that court could depart to reflect pretrial time in custody as result of INS detainer); *United States v. Camejo*, 333 F.3d 669, 676-77 (6th Cir. 2003) (district court has discretion to depart for defendant’s previous incarceration as immigration detainee).

²⁰⁹ 18 U.S.C. § 3585(b).

²¹⁰ U.S. Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual (CCCA of 1984)*, at 1-15A (7/20/99), available at http://www.bop.gov/policy/progstat/5880_028.pdf.

²¹¹ U.S. Bureau of Prisons Program Statement 5100.08, *Inmate Security Designation and Custody Classification*, Ch. 5, at 9 (Sept. 12, 2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

²¹² 28 C.F.R. § 550.55(b); BOP Program Statements 5331.02 *Early Release Procedures under 18 U.S.C. § 3621(e)*, at 3, §5(1) (3/19/2009) and 7310.04, *Community Corrections Center (CCC) Utilization and*

benefit from the early release provisions that apply to other inmates who participate in the Residential Drug Abuse Treatment Program (RDAP).²¹³ Non-citizen inmates subject to removal, deportation or exclusion do not receive the full 54 days good time credit until after completion of the deportation hearing. Non-citizen inmates also are not required to attend, and are low priority in enrolling in, occupational and educational programs²¹⁴ or English as a Second Language programs.²¹⁵ Because of their inability to participate in these programs, they may not meet the literacy prerequisites for work in UNICOR above the most minimal grade.²¹⁶

In turn, the lower pay of non-citizen inmates affects their ability to purchase from prison commissaries basic amenities, including personal care items, shoes, and food items. It also lessens their opportunity to maintain telephone contact with family members because inmates must pay for phone calls through a phone credit account.²¹⁷ Deportable inmates also do not get the \$10 release gratuity.²¹⁸

Fourth, once their BOP sentence is complete, defendants with immigration detainers wait two to five days for ICE to pick them up and take them to an immigration prison. These prisons are no different from any BOP or contract facility and are, in some ways, worse. In recent years,

Transfer Procedures, at 11, §(10)(b) (12/16/1998), available at www.bop.gov/policy/progstat/5331_002.pdf and www.bop.gov/policy/progstat/7310_004.pdf.

²¹³ 28 C.F.R. § 550.55(b); U.S. Bureau of Prisons Program Statements 5331.02 *Early Release Procedures under 18 U.S.C. § 3621(e)*, at 3, §5(1) (3/19/2009) and 7310.04, *Community Corrections Center(CCC) Utilization and Transfer Procedures*, at 11, §(10)(b) (12/16/1998), available at www.bop.gov/policy/progstat/5331_002.pdf and www.bop.gov/policy/progstat/7310_004.pdf.

²¹⁴ 28 C.F.R. §§ 544.51(b) and 544.71(a)(3); U.S. Bureau of Prisons Program Statement 5353.01, *Occupational Education Programs*, at 3, §7(b) (12/17/2003), available at www.bop.gov/policy/progstat/5353_001.pdf.

²¹⁵ 28 C.F.R. §§ 523.20(d) and 544.41(a)(3); U.S. Bureau of Prisons Program Statement 5350.24, *English-as-a-Second Language Program (ESL)*, at 3, §5(a)(3) (7/24/1997), available at www.bop.gov/policy/progstat/5350_024.pdf. And while this will not affect the alien's ability to earn good time credits of 54 days a year (prorated for partial year), 28 C.F.R. § 523.20(d), BOP will not award full good time credits until after completion of the deportation hearing. BOP Program Statement 5884.03, *Good Conduct Time Under the Prison Litigation Reform Act*, at 4 (12/5/2005), available at http://www.bop.gov/policy/progstat/5884_003.pdf. Hence, inmates who do not obtain final orders of deportation until after completion of their sentence must serve longer periods of imprisonment.

²¹⁶ 28 C.F.R. §§ 544.74(a) and 345.35(a) precluding inmates with deportation, exclusion or removal orders from working except in the lower paying non-federal prison industry jobs.

²¹⁷ U.S. Bureau of Prisons Program Statement 5264.07, *Inmate Telephone Regulations*, at 14 (2/11/2008), available at www.bop.gov/policy/progstat/5264.07.pdf.

²¹⁸ U.S. Bureau of Prisons Program Statement 5873.06, *Release Gratuities, Transportation and Clothing*, at 5, §7(e) (8/6/2003), available at www.bop.gov/policy/progstat/5873_006.pdf.

concerns have arisen over the lack of medical treatment for immigrants in ICE custody.²¹⁹ ICE itself identified 104 ICE custody immigrant deaths from October 2003 to August 2009.²²⁰ In December 2009, a Department of Homeland Security (DHS) - Office of the Inspector General report, recommended ways to improve medical care for immigrants in ICE custody.²²¹ The results of those recommendations remain to be seen.

How long defendants stay in these facilities awaiting their removal proceedings and ultimate removal from the United States depends upon a number of factors: the facility's proximity to the border; its proximity to an Immigration Court; whether the defendant fights removal; and how many other immigrants are held in custody at the facility and in need of removal hearings. Our clients report that they spend anywhere from a week to a month awaiting removal to their countries of origin. The time is longer if there are many immigrants whose removal hearings need to be scheduled. When an immigrant fights removal - frequently *pro se* from a prison far from the family who can provide the information necessary for the case²²² - the stay can be months or years.²²³ The immigrant's actual removal should occur within 90 days from when the removal order is "administratively final."²²⁴ The time may be longer when the facility is located further from the border, the scheduling of departures is infrequent, or the immigrant is an "inadmissible or criminal alien."²²⁵

²¹⁹ House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Hearing on Detention and Removal: Immigration Detainee Medical Care* (10/04/2007); DHS Press Release, *Secretary Napolitano and Ice Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives*, (Oct. 7, 2009), available at http://judiciary.house.gov/hearings/hear_100407_2.html and <http://www.ice.gov/pi/nr/0910/091006washington.htm>.

²²⁰ DHS Press Release, *ICE Identification of Previously Un-tracked Detainee Deaths Highlights Importance of Detention Reform* (Aug. 17, 2009), available at www.ice.gov/pi/nr/0908/090817washington.htm; see also Tom Barry, *A Death in Texas - Profits, poverty and immigration converge*, Boston Review, p.7-15 (Nov/Dec 2009); Heartland Alliance National Immigrant Justice Center, *Statement before Senate Judiciary Committee, Subcommittee on Human Rights and the Law, Hearing on Human Rights at Home: Mental Illness in U.S. Prisons and Jails* (Sept. 15, 2009) (recounting deaths of two mentally ill women who died in ICE custody after not receiving proper mental health care), available at <http://www.immigrantjustice.org/resourcespolicy>.

²²¹ Department of Homeland Security, Office of the Inspector General, *The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees*, at 8-16(Dec. 2009), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-23_Dec09.pdf.

²²² Sandra Hernandez, *Detained Immigrants Area Scattered* (Daily Journal Newswire Articles, 12/9/09), (citing the Syracuse University-based Transactional Records Access Clearinghouse (TRAC) report *Huge Increase in Transfer of ICE Detainees*), <http://trac.syr.edu/immigration/reports/220>.

²²³ 8 U.S.C. §§ 1229A and 1231(a).

²²⁴ 8 U.S.C. § 1231(a).

²²⁵ 8 U.S.C. § 1231(a)(1)(C) and (6).

Lastly, the collateral consequences of conviction followed by deportation can be particularly harsh for lawful permanent residents who have been convicted of a crime that subjects them to deportation, such as drug trafficking. Those defendants may very well never be able to reunite with family or reside in the United States even though they may have been born here or lived here much of their lives. Such consequences are by themselves extremely harsh.

In short, because non-citizen defendants face different, and harsher, rules within BOP than other defendants, and may spend significant time in custody pending deportation, we urge the Commission to encourage departures for the collateral consequences of a non-citizen's status.

H. Issue for Comment 5: A Defendant's Cultural Ties to the United States, *i.e.*, Cultural Assimilation, Should Be an Encouraged Basis for Departure in Cases under USSG §2L1.2.

The Commission requests comment on whether it should “amend the guidelines to address when, if at all, a downward departure may be warranted in an illegal reentry case on the basis of ‘cultural assimilation.’” We believe that such a departure should be encouraged.²²⁶ We propose the following language:

There may be cases in which the defendant's motives for reentering the United States are unconnected to any other criminal activity, or where the defendant's ties to family, employment, or community in the United States mitigate the reentry offense or make deportation an especially harsh additional sanction. In such cases, a downward departure may be warranted.

This departure provision would incorporate into the guidelines a number of factors that judges often consider when distinguishing between differing levels of culpability of those reentering the country unlawfully.²²⁷ These factors include the defendant's motivation for

²²⁶ This departure would be a positive step, but only begins to ameliorate the harshness of the penalties under USSG §2L1.2. The Defenders most recently discussed some of the other problems with §2L1.2 at the regional hearing in Phoenix. Statement of Henry Bemporad (Phoenix, Jan. 12, 2010).

²²⁷ See, e.g., *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 964 (E.D. Wis. 2005) (motive for reentry mitigates seriousness of § 1326 offense, supports below guideline sentence); *United States v. Castillo*, 386 F.3d 632, 638 (5th Cir. 2004) (affirming cultural assimilation departure where defendant arrived in the United States at age three, grew up in Houston, and lived in the US continuously for 18 years until deported to Mexico; he had no significant ties to Mexico; his parents, siblings, and children lived in the United States; and he spoke fluent English); *United States v. Tejada-Baltazar*, 2004 WL 1427117 *4-5 (N.D. Ill. 2004) (departure granted where defendant's mother brought him to the US as a small child; he had lived here ever since, attending school and becoming a permanent resident; defendant had no experience living in Mexico; and he returned within a month of being deported and began working to support his family); *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917, 921-22 (E.D. Wis. 2003) (departure granted where defendant's motivation for returning was that he had spent virtually his entire life here and because most of his relatives live here; defendant had lived in the US since he was six months old, attended public schools in Chicago, and had had permanent-resident status); *United States v. Hernandez-Garcia*, 97 Fed. App'x 119, 123 (9th Cir. 2004) (affirming cultural assimilation departure where defendant arrived in the United States at age six, lived here continuously for 28 years, defendant

reentering, the extent of the defendant's ties to the United States, whether the defendant had ever lived in the country to which he was deported, whether the defendant was caught in the United States during or after the commission of a new crime, the length of time the defendant remained outside the country before returning, the existence or non-existence of prior legal status, and the number of prior reentries. The Department of Justice, too, has recognized that an "illegal alien drug dealer" who did not return to practice his trade but who had a "sympathetic reason to reside here illegally" should receive a lower sentence.²²⁸ Judges also have suggested that the guidelines take account of defendants whose illegal return to the United States is not connected to any other criminal activity, but instead based on a desire to reunite with family or some other benign motive.²²⁹

Defenders have represented clients who have returned to the United States for a multitude of reasons wholly unrelated to criminal activity, including burying a loved one, donating a kidney to a sister, nursing a desperately ill mother through the debilitating effects of cancer treatments, earning money to pay off crushing medical expenses, or seeing a child left behind. They are placed in the impossible position of reentering the country unlawfully or abandoning their loved ones.

An example demonstrates why the Commission should encourage a departure for cultural assimilation rather than rely on variances to correct the unwarranted and severe sentences often called for under USSG §2L1.2. A client in Texas was born in El Salvador, but came to this country with his mother after his father was killed in that country's civil war. He grew up here and became completely acculturated. As a 17 year old, he and some other teens burglarized a house belonging to the father of one of them. He was arrested, convicted, and successfully completed a term of probation. He went to college, eventually married, had two children, and earned a salary of \$59,000 a year working as a safety supervisor. In 2003, when he applied to adjust his status as a legal permanent resident, he disclosed his prior conviction. Immigration officials requested that he appear for an interview. When he did, they promptly arrested and incarcerated him pending deportation. Within a short period, he was deported to El Salvador – a

graduated from high school here, and his three children, who were American citizens, also lived here; additionally, he worked here legally for many years, and he spoke English fluently); *United States v. Paniagua-Ortiz*, 91 Fed. App'x 575, 576 (9th Cir. 2004) (affirming cultural assimilation departure where defendant had lived in the United States for 27 years, attended school in California, read and wrote English, and had a parent, siblings, and two children who were legal residents of the United States); *United States v. Reyes-Campos*, 293 F. Supp. 2d 1252, 1258-59 (M.D. Ala. 2003) (departure granted where defendant had lived in the United States from ages 9 to 17 and his immediate family lived here; and the defendant's familial motivation for returning was demonstrated by the fact that, upon reentering, he went to South Carolina to find his wife and child, after which he and his wife traveled to her parents' home in Alabama, where he planned to work).

²²⁸ U.S. Dep't of Justice, *Statement of Joe Brown Before the U.S. Sentencing Commission*, at 8 (Mar. 5, 1991) (available in USSC archives).

²²⁹ See Transcript of Public Hearing, at 268-70, 279-82 (Austin, Texas, Nov. 20, 2009) (Judges Cardone and Alvarez).

place that he knew little about and with few family ties.²³⁰ He found a job, which paid \$600 a month – a fraction of his salary in the United States. He could no longer support his family. He lost his house, his property, and his savings. Desperate to see the young daughter he had left behind in the United States, he tried to sneak back into the country. He was arrested, convicted and faced a guideline range of 37-46 months due to his prior conviction for burglary – an aggravated felony. The court, seeing that prison would serve no legitimate sentencing purpose for this defendant, imposed a time-served sentence. Other clients are not so lucky. For them, a downward departure for cultural assimilation should be encouraged.

III. APPLICATION INSTRUCTIONS

We offer the following comments regarding the Commission’s proposed amendments to §1B1.1.

A. Proposed Subsection (c)

Although we welcome the Commission’s effort to recognize that courts are required to follow § 3553(a), proposed subsection (c) unnecessarily paraphrases the law and inaccurately describes what courts are required to do. There is nothing in 18 U.S.C. § 3553(a) or the Supreme Court’s cases that says anything about “factors . . . taken as a whole.” Instead, it requires a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. 18 U.S.C. § 3553(a); *Rita v. United States*, 551 U.S. 338, 348 (2007). Proposed subsection (c) also suggests that a sentence may be either a “departure” or a “variance,” when in fact many sentences are both. As proposed, subsection (c) diminishes the importance of § 3553(a).

As its title states, the purpose of USSG §1B1.1 is to provide application instructions regarding the guideline rules and guideline policy statements, including those governing departures. In adding a recognition of the courts’ ultimate duty under § 3553(a), the Commission should at most say the following:

The court shall then determine the sentence in accordance with 18 U.S.C. § 3553(a).

B. Proposed Application Note 1(M)

This proposed note should not be included. “Variance” is not, as the introductory sentence to Note 1 states, a “term[] that [is] frequently used in the guidelines,” and the Commission should not say that it is. Moreover, this note does not define a “variance” accurately. That would require explaining § 3553(a) accurately. All this does is say that a variance is something other than as provided in the Guideline Manual, indicating that it does not belong in the Manual. It does not belong in the Manual, and should not be included.

²³⁰ “Deportation under any circumstances is a “drastic measure and at times the equivalent of banishment or exile.” *Costello v. INS*, 376 U.S. 120, 128 (1964) (citations omitted). Although not a criminal penalty in itself, “in severity it surpasses all but the most Draconian criminal penalties.” *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975).

C. Subsection (a)

The word “advisory” should be inserted between the word “the” and the word “guidelines” in the introductory portion of proposed subsection (a). It should not be controversial that the “application instructions” for the guidelines should acknowledge that the guidelines are advisory.²³¹

D. Proposed Subsection (b)

Proposed subsection (b) should be revised to track more closely the language of 18 U.S.C. § 3553(a)(5) and to make clear that the “pertinent” policy statements, and the commentary referenced therein, pertain to “departures.” This would be consistent with the Commission’s proposed revision to application note 1(E). The following language would be more consistent with § 3553(a)(5) and application note 1(E):

The court shall then consider any pertinent policy statement in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures and any other pertinent policy statements or commentary in the guidelines that might warrant departure. See 18 U.S.C. § 3553(a)(5).

In Part II above, we once again recommend that the Commission delete Chapter 5H, but recognize that this is unlikely.

E. Note 1(E)

The last four sentences in application note 1(E), describing “downward departures” and “upward departures” should be deleted. It is not necessary to say that downward means below the guideline range and upward means above it. The language also indicates that departures are the only kind of sentence less or greater than the guideline range that “could be imposed.”

We propose the following revision of §1B1.1, which include some of the Commission’s changes and our additional proposed changes.

²³¹ See *United States v. Booker*, 543 U.S. 220, 245 (2005) (“So modified, the federal sentencing statute . . . makes the Guidelines effectively advisory.”); *Rita v. United States*, 551 U.S. 338, 361 (2007) (guidelines “are now advisory, rather than binding”); *Gall v. United States*, 552 U.S. 38, 59 (2007) (“the Guidelines are only one of the factors to consider when imposing sentence”); *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (“the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”); *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (guidelines “are advisory only”); *Nelson v. United States*, 129 S. Ct. 890, 892 (2009) (“The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”).

§1B1.1 Application Instructions

- (a) ~~Except as specifically directed~~ **The court shall determine the kinds of sentence and the guideline range as set forth in the advisory guidelines (see 18 U.S.C. § 3553(a)(4)) by applying** the provisions of this manual ~~are to be applied~~ in the following order, **except as specifically directed:**
- (a1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
 - (b2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
 - (e3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (d4) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
 - (e5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
 - (f6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
 - (g7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
 - (h8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (ib) ~~Refer to~~ **The court shall then consider any pertinent policy statement in** Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and ~~to~~ any other policy statements or commentary in the guidelines that might warrant ~~consideration in imposing sentence~~ **departure.**
- (c) **The court shall then determine the sentence in accordance with 18 U.S.C. § 3553(a).**

Commentary

Application Notes :

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(E) “Departure” means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence **as provided for in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, or any other policy statements or commentary in the guidelines**; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), 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 a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. “Depart downward” means grant a downward departure.~~

~~“Upward departure” means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. “Depart upward” means grant an upward departure.~~

IV. RECENCY

The Commission has proposed two options regarding the calculation of recency points under the criminal history rules. Option One would eliminate recency points for all offenders in all cases. Option Two would only eliminate the one recency point currently applied in cases where the defendant also receives two points under USSG §4A1.1(d).

The Defenders fully support Option One. Recency points add essentially nothing to the criminal history score’s predictive quality, and do not operate in theory or in practice to distinguish which defendants are more culpable. That said, it is unclear why the Commission’s proposal addresses timing-related recency points under §4A1.1(e) and not also status-related recency points added under §4A1.1(d). According to §4A1.1’s Commentary, “Section 4A1.1(d) implements one measure of recency by adding two points if the defendant was under a criminal justice sentence during any part of the instant offense. Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b).”²³² We are not aware of any research separating the two measures from each other in any other context, including the Commission’s own 2005 recidivism study.²³³ Thus, while we support Option One, we urge the Commission to remove §4A1.1(d) as well.

²³² See USSG §4A1.1, comment. (backg’d).

²³³ See USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 13-14 & Exhibit 5 (Jan. 4, 2005) (analyzing the predictive qualities of §4A1.1(d) and (e) together); see also USSC, *Simplification Paper: Criminal History*, reprinted in 9 Fed. Sent. Rep. 216 (Feb. 1, 1997) (suggesting that Commission could simplify operation of Chapter Four, in part, by “consolidat[ing] status and recency subsections”).

A. Recency Points Add Nothing to the Predictive Quality of the Criminal History Score.

Adding recency points to the criminal history score is not consistent with empirical research and does not serve Chapter Four’s intended purposes. The Commission intended the criminal history calculation under Chapter Four “first, to predict recidivism, and second, to reflect offender culpability.”²³⁴ Chapter Four’s Introduction makes clear that “the way in which the sentencing guidelines account for culpability and recidivism should be ‘consistent with the extant empirical research’ and should incorporate ‘additional data insofar as they become available in the future.’”²³⁵ The specific factors included in §4A1.1 are themselves supposed to be “consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior,”²³⁶ and any factor that is not so consistent should be removed.²³⁷

Recency points (both those related to status under §4A1.1(d) and those related to timing under §4A1.1(e)) were added by the original Commission to increase the predictive quality of Chapter Four. The Commission was unable to independently study their predictive value, however, because of inadequate time, resources and data.²³⁸ Instead, the Commission assumed that “recency of the defendant’s prior record” was a “reliable[] predictor of future criminal conduct” because it was “very similar” to those included in the Salient Factor Score of the United States Parole Commission and the Inslaw Scale.²³⁹

Over time, the Commission was able to amass sufficient data to enable it to conduct its own research. The results of that research were released in the Commission’s Research Series on the Recidivism of Federal Guideline Offenders – three papers that analyzed and reported on various aspects of federal offender recidivism data for offenders sentenced under the guidelines.²⁴⁰ The Commission intended that this Research Series would permit the “empirical

²³⁴ See *Salient Factor Comparison, supra*, at 1-2.

²³⁵ See *Measuring Recidivism, supra*, at 2 (citing USSG, Ch. 4, Pt. A, intro. comment.).

²³⁶ See USSG, Ch. 4, Pt. A, intro. comment.

²³⁷ *Measuring Recidivism, supra*, at 2.

²³⁸ See *Salient Factor Comparison, supra*, at 2-4 (“the guideline’s criminal history measure did not emanate from its own direct empirical evidence”); *Measuring Recidivism, supra*, at 1 (stating same “[d]ue to pressing congressional deadlines”).

²³⁹ See *Simplification Paper, supra*; *Measuring Recidivism, supra*, at 1 (“[T]he chosen criminal history instrument combined elements from the already validated U.S. Parole Commission’s ‘Salient Factor Score’ and the ‘Proposed Inslaw Scale.’ It was reasoned that the Salient Factor Score’s high predictive power would transfer, at least in part, to the nascent guidelines’ criminal history measure.”).

²⁴⁰ *Salient Factor Comparison, supra*, at 2, 9-10.

fine-tuning” of Chapter Four that had been “desired and foreseen by the original federal Sentencing Commission.”²⁴¹

Release 3 of the Research Series quantified the predictive quality of the §4A1.1 factors and demonstrated that recency (and status) points add essentially nothing to the criminal history score’s ability to accurately predict an offender’s risk of recidivism.²⁴² The Commission conducted a statistical analysis called the receiver operating characteristic curve, which involves determining the area under a specific geometric curve in order to measure the predictive quality of any given instrument.²⁴³ The Commission noted that “[m]easuring the area under the curve (AUC) is an established technique associated with receiver operating characteristic curve analysis,” and it used the AUC technique to test the “probability that an offender’s criminal history is able to predict recidivism.”²⁴⁴

Exhibit 5 of Release 3 reflects an AUC of 0.6982 for those §4A1.1 factors relating to the frequency and seriousness of prior offending (§§4A1.1(a), (b), and (c)).²⁴⁵ This indicates that 698 out of 1000 times the criminal history score calculated under §4A1.1(a), (b) and (c) will be higher for the recidivist than the non-recidivist.²⁴⁶ When points relating to status and recency (§4A1.1(d) and (e)) were added to equation, however, the AUC increased a mere 1/1000th of a point to 0.6992, indicating that those two provisions *combined* increase the criminal history score’s ability to predict recidivism risk only 1 time out of every 1000.²⁴⁷ The predictive quality of §4A1.1(d) and (e) taken separately would likely be the same, or even less.

The sole purpose for adding §4A1.1(d) and (e) to the Manual was the (incorrect) assumption that “recency of the defendant’s prior record” is a “reliable[] predictor of future criminal conduct.”²⁴⁸ The extant empirical research conducted by the Commission shows that recency points in fact are *not* a reliable predictor of future criminal conduct, even when combined with status points. For that reason, Option Two, which would limit recency points only when combined with status points, is insufficient. Instead, the Commission should adopt

²⁴¹ *Id.* at 2-3, 17.

²⁴² *Id.* at 2.

²⁴³ *Id.* at 10, 32.

²⁴⁴ *Id.* at 11 (noting that the AUC ranges from “a value of 0.5 (indicating no ability to predict recidivism) to a value of 1.0 (indicating 100 percent accuracy in predicting recidivism). The greater the AUC, the better the predictive power of the measure being tested”); *see generally id.* at 32-34 (describing technique).

²⁴⁵ *See id.* at 13, 26.

²⁴⁶ *Id.* at 33.

²⁴⁷ *Id.* at 13, 26, 33.

²⁴⁸ *See Simplification Paper, supra.*

Option One: §4A1.1(e) should be removed from the Manual because it is not “consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior.”²⁴⁹ The Commission should also remove §4A1.1(d) for the same reason.²⁵⁰

B. Recency Points Fail to Reliably Reflect Meaningful Differences in Past Criminal Behavior.

Even if the original Commission had intended recency points in Chapter Four to serve the purpose of ensuring harsher punishment for more culpable offenders, the Commission should still support Option One because recency points fail to reliably distinguish between offenders with more or less relative culpability. The people who move into a higher criminal history category because of recency points are often no different from – or are less culpable than – those who do not. In fact, the only group that is certain to go up a category for recency points under §4A1.1(e) are those with less serious criminal backgrounds, because only Criminal History Category II has a two-point span (Criminal History Categories III through VI each have a three-point span). Thus, recency points are more likely to increase punishment for theoretically less culpable defendants.

Nor do recency points distinguish between people who have committed more or less serious offenses. For those convicted of committing a continuing offense, recency points are frequently added, *not* because those defendants are inherently more culpable than other defendants but because of the legal fiction that their offense is “continuously” being committed.²⁵¹ The injustices caused by this policy are most stark with our illegal reentry clients. We have many clients who have been deported for committing minor offenses and return illegally within a relatively short time to reunite with their parents, spouses or children, obtain a living wage for their work, or live in the only country they have known for most of their lives. They may live productive, peaceful lives for ten years or more, but if they get arrested for any reason, they get a higher criminal history score based on the “recency” of their illegal reentry.

Similarly, our clients often attempt to reenter the United States to respond to emergency situations, meaning that the timing of their entry is not related to their previous release date in any way. For example, we represented a client who came to the United States legally and married a United States citizen, with whom he had five children. Although his crossing card expired in 1996, the couple did not legalize his status due to their lack of sophistication, and he was convicted of illegal entry and deported in 1999, shortly after the premature birth and death

²⁴⁹ See USSG, Ch. 4, Pt. A, intro. comment.

²⁵⁰ See *Measuring Recidivism, supra*, at 2 (“the way in which the sentencing guidelines account for culpability and recidivism should be ‘consistent with the extant empirical research’ and should incorporate ‘additional data insofar as they become available in the future’”) (citing USSG Ch. 4, Pt. A, intro. comment.).

²⁵¹ See, e.g., *United States v. Corro-Balbuena*, 187 F.3d 483, 486 (5th Cir. 1999) (offense began when defendant made first of five illegal entries prior to discovery); *United States v. Santana-Castellano*, 74 F.3d 593 (5th Cir. 1996) (defendant committed offense while under criminal justice sentence because offense continued while he was incarcerated until he was discovered by INS).

of his son. After his deportation, the client lived in Nuevo Laredo, Mexico, where his wife and children would visit him every weekend. He had one conviction for illegally transporting an alien with no aggravating circumstances in 2004 for which he received a sentence of 7 months and was again deported in 2005; other than that, he had no prior criminal history.

In November 2006, our client learned that his 8-year-old daughter had been taken to the hospital with an unknown illness that was causing chunks of her hair to fall out. After unsuccessfully attempting to reach his wife, the client left his job as a security guard and attempted to enter the United States to find her and learn how his daughter was doing; he did not even change out of his uniform, as he fully intended to return to Mexico and report to work at 8:00 a.m. the next day. Unfortunately, he was arrested during the short time he was in the country. His guideline range was completely driven by his two prior convictions, and included recency points despite the fact that the timing of his entry was unrelated to his culpability. The result was a vastly overstated sentence recommendation. He received a 16-level bump under §2L1.2, four points for the prior convictions under §4A1.1(b), two points under §4A1.1(d), and one point under §4A1.1(e), resulting in an offense level of 21, a criminal history category of IV, and a recommended guideline range of 57 to 71 months plus additional time for violating his previous “supervised” release term. The court, recognizing that the guideline recommendation was far greater than necessary to satisfy the purposes of sentencing, imposed a below-guideline sentence of 12 months (plus six consecutive months for the supervised release violation).

Another client attempted to reenter the United States after being deported for possessing marijuana with intent to distribute. He had lived in the United States as a resident alien since he was a child, his parents were naturalized citizens, his wife was a citizen, and they had four citizen children. Nonetheless, he did not attempt to return to the United States until he was informed that his 12-year old son’s heart condition had so deteriorated that doctors had restricted the boy’s physical activity due to risk of death. The defendant was arrested while his son was waiting for heart surgery to receive a pacemaker. Because our client’s son’s condition happened to worsen shortly after his deportation, he received three additional points for recency (plus the standard 16-level bump, plus the extra time for the “supervised” release revocation). Here again, the judge recognized that the guideline recommendation vastly overstated the defendant’s culpability and sentenced him to time served.

These stories are not unusual, and they demonstrate the trouble with using recency as a proxy for increased culpability. Deportation often causes severe physical or mental stress for the loved ones left behind in the United States, and many of our clients return to help with these emergency situations. Because of the sheer accident of timing, they often receive additional criminal history points, even though they are less blameworthy. Because recency points are as unreliable at sorting out more culpable offenders as they are at sorting out recidivists, they should be removed altogether from the criminal history calculus.²⁵²

²⁵² The same is true for status-related recency points under §4A1.1(d), which are imposed on those illegal reentry clients who returned to the U.S. before their “supervised” release period ran. “‘Supervised’ release is a misnomer when it comes to deported defendants. They receive no supervision at all – no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment . . . [they] are simply dropped on the other side of the border and told not to return.” *See* Statement of Henry J. Bemporad, at 17 (USSC Regional Hearing, Phoenix, Arizona, Jan. 21, 2010).

C. Removing Recency Points Does Not Go Far Enough to Remedy the Unwarranted Double- and Triple-Counting of Criminal History under the Guidelines.

The Commission has also requested comment on whether it should reduce the cumulative impact of recency points when they apply in combination with status points or when criminal history is factored into the offense level calculation under Chapter Two.

The first aspect of the Commission's question appears to be asking about Option Two. For the reasons given above, we do not believe there is any empirical, historical or policy-based reason to maintain recency points, irrespective of whether they are assigned under §4A1.1(d) or §4A1.1(e). Because of this, we support Option One and also urge the Commission to go further and delete §4A1.1(d) as well. If the Commission is unwilling to do this, reducing the cumulative impact of the two provisions would obviously be better than nothing, but if the Commission wishes to remain loyal to its avowed intent to include only those §4A1.1 factors that "are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior," it should not maintain §4A1.1(e) (or §4A1.1(d)) at all.

The same is true with respect to the second aspect of the Commission's question – reducing the cumulative effect of recency points when they apply in combination with provisions regarding criminal history in Chapter Two. The effect of the points should be removed in every case because they do not serve any predictive function and do not distinguish between more and less culpable defendants. And while we very much appreciate the Commission's tacit concern with remedying the double- and triple-counting of criminal history that occurs in certain Chapter Two guidelines – most notably §§2L1.2 and 2K2.1 – recency points are only the tip of that iceberg. As Henry Bemporad, Federal Defender for the Western District of Texas, testified in January 2010, a person sentenced under §2L1.1 with a single prior conviction can have that conviction operate to increase the potential punishment as many as six times:

- (1) to increase the statutory maximum penalty from 2 to 10 or 20 years under 8 U.S.C. § 1326(b);
- (2) to increase the offense level by four to sixteen levels under §2L1.1(b)(1);
- (3) to increase the criminal history score by one to three points under §4A1.1(a)-(c);
- (4) to increase the criminal history score by another two points under §4A1.1(d) if the defendant returned to the United States while on supervised release;
- (5) to increase the criminal history score by yet one to two points under §4A1.1(e) if the defendant returned with two years of his release; and

(6) to revoke the supervised release term, if applicable, a revocation for which the guidelines recommend a consecutive imprisonment sentence under policy statement §7B1.3(f).²⁵³

There simply is no justification for allowing a single prior offense to increase the offense level by up to sixteen levels *and* the criminal history score by up to six points and result in additional prison time for the revocation of the release period, particularly when “[s]upervised’ release is a misnomer when it comes to deported defendants.”²⁵⁴ The same is true under §2K2.1, where a single prior offense can lead to an eight level increase under §2K2.1(a)(4) *and* a six point increase under §4A1.1.²⁵⁵

Diminishing the criminal history score by one or two recency-related points would certainly be better than nothing, but it does not go far enough to actually resolve the fundamental problem of overpunishment in these guidelines. We regularly represent people whose guideline ranges are far greater than necessary to serve any purpose of punishment. In Part B, we discussed a few examples of the tragic stories we see every day. In the interest of space, we submit only two more representative cases here, although there are many more.

We represented a young man whose mother brought him to the United States from El Salvador when he was seven years old, after his father was killed in that country’s civil war. At the age of 17, he and a group of friends burglarized a home belonging to the father of one of the friends. Our client was the only person involved over the age of 16 and the only one prosecuted; he was sentenced to seven years probation, which he successfully completed in 2002. While on probation, our client married, had two children, obtained his GED, took courses at Texas A&M, and was gainfully employed. In 2003, he applied to adjust his status to that of a legal permanent resident and disclosed his prior conviction. In August 2004, INS officials requested that he appear for an “interview;” he did and was immediately arrested and handcuffed in front of his wife and infant daughter. He was incarcerated and deported to El Salvador, a country with which he had few ties. His salary went from \$59,000 a year to \$7600, and he lost his house, his property, his savings and his ability to live with his family. Desperate to see his wife and children again, our client attempted to reenter the United States within the year; he was arrested during the attempt and convicted of illegal reentry. Even though his prior burglary conviction did not count under Chapter Four (because of his age at the time of conviction, the sentence

²⁵³ *Id.* at 16-17.

²⁵⁴ *See id.* at 16-18; *see also* Statement of Jason Hawkins at 9-14 (USSC Regional Hearing, Austin, Texas, Nov. 19, 2009) (describing problems with illegal reentry guideline).

²⁵⁵ The Commission ignored empirical data and the purposes of sentencing when it amended §2K2.1 to increase the base offense level from 12 to 20 based on a prior crime of violence or controlled substance offense. *See USSC, Firearms and Explosive Materials Working Group Report*, at 9-10, Tab D at 10 (Dec. 11, 1990) (finding no strong correlation between upward departures and the type of prior conviction). Instead, the Commission approved the increase because it decided the increase was consistent with implied congressional policy as expressed in amendments to 18 U.S.C. §§ 922(g) and 924(e). *Id.* at 19-20.

imposed, *and* its staleness), it nonetheless increased his offense level by 16 levels, resulting in a guideline range of 37 to 46 months. He received a below-guideline sentence of time served.

Another client illegally reentered the United States solely out of fear for his and his family's safety. This man lived in the United States as a resident alien from 1995 to 2002, when he was deported for a drug conviction. He moved his family to Mexico and set up a new life for himself. He worked as a physician, ran a pharmacy and was able to purchase property and provide well for his family. One day, a group of men came to his home, beat him, and told him that he and his family would be killed unless they paid the men \$50,000. The client immediately brought his family to the United States. His neighbors told him that the group returned, ransacked his home, stole his belongings and taken over all that he had worked for. Because of his prior conviction, his recommended guideline range was 41 to 51 months. The court imposed a below-guideline sentence of 12 months and one day.

Sentences under §2K2.1 are also overly severe. Judge James Gwin recently published a study he conducted about how well guideline recommendations reflect community views of just punishment in the Northern District of Ohio.²⁵⁶ In 22 cases, after juries had “learned the actual details of the criminal conduct, the defenses and any mitigating facts” through trial and found the defendant guilty, they were given a description of the defendant's past criminal convictions and asked to make individual recommendations for an appropriate punishment.²⁵⁷ The results showed stark differences between the jurors' recommendations and the guideline ranges.²⁵⁸ Six of those cases were sentenced under §2K2.1. Each time, the minimum guideline recommendation was between 140% and 1367% *higher* than the jurors' median recommendation:

- In *United States v. Ballard*, the defendant's guideline range was 100 to 120 months because Mr. Ballard had “been previously convicted of various offenses” that drove the guideline range. The 100-month guideline minimum was 167% higher than the median sentence (60 months) recommended by the jurors who sat through his trial and knew his criminal history;²⁵⁹
- In *United States v. Smith*, the defendant's guideline minimum was 46 months, 256% higher than his jurors' median recommendation of 18 months;²⁶⁰

²⁵⁶ See James Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 41 *Harvard L. & Pol'y Rev.* 173, 174 (2010).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 175 (noting that the median juror recommended sentence was only 19% of the median guideline range and only 36% of the bottom of the ranges).

²⁵⁹ *Id.* at 173, 197.

²⁶⁰ *Id.* at 197.

- In *United States v. Ousley-Lee*, the defendant’s guideline minimum was 21 months, 1367% higher than his jurors’ median recommendation of 3 months;²⁶¹
- In *United States v. Raver*, the defendant’s guideline minimum was 46 months, 140% higher than his jurors’ median recommendation of 15 months;²⁶²
- In *United States v. Knowledge*, the defendant’s guideline minimum was 188 months, 522% higher than his jurors’ median recommendation of 36 months;²⁶³ and
- In *United States v. Pullen*, the defendant’s guideline minimum was 70 months, 389% higher than his jurors’ median recommendation of 18 months.²⁶⁴

There is no doubt that sentences under §§2L1.2 and 2K2.1 are higher than necessary. That said, we believe the Commission can best address problems of over-punishment in those and other guidelines by amending them directly. At the Regional Hearings, we suggested ways to ameliorate the problems of over-reliance on criminal history better than reducing a point here or there in Chapter Four.²⁶⁵ If the Commission makes the unlikely choice to retain §4A1.1(e) in any form, it should certainly not be applied in cases where the defendant receives an offense-level enhancement for the same prior conviction under Chapter Two.²⁶⁶ The Commission should also make clear that prior offenses should not be used to increase the offense level under §2L1.2 if they are not counted under Chapter Four, as is already the case in §2K2.1.²⁶⁷ Our preference, however, is for the Commission to follow the empirical evidence, eliminate recency points entirely for all offenses, and address problems with Chapter Two directly.

²⁶¹ *Id.* at 198.

²⁶² *Id.* at 199.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See, e.g.*, Statement of Henry J. Bemporad, *supra*, at 11-16 (§2L1.2); Statement of Jason D. Hawkins, *supra*, at 9-14 (§2L1.2); Statement of Raymond Moore, *supra*, at 29-33; Statement of Jacqueline A. Johnson, at 19-21 (USSC Regional Hearing, Chicago, Illinois, Sept. 10, 2009) (§2K2.1).

²⁶⁶ The same should be true for §4A1.1(d) and §4A1.2(k) enhancements.

²⁶⁷ *See* USSG §2K2.1, comment. (n.10).

V. CONCLUSION

We would be happy to discuss any modifications to the guidelines that would advance the goal of simplicity and fidelity to 18 U.S.C. § 3553(a). Thank you for considering our comments. As always, we look forward to working with the Commission on these and other issues.