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

Re: Report on Federal Sentencing Since *United States v. Booker*

Dear Judge Hinojosa:

We understand that the Commission intends to issue a report on federal sentencing since *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). On behalf of the Federal Public and Community Defenders, we write to offer our perspective on post-*Booker* sentencing, and to suggest issues and questions to be addressed in your report.

1) The Commission Should Explain the New Sentencing Framework.

In *Booker*, the Supreme Court held that the Guidelines violated the Sixth Amendment because they were mandatory.¹ To allow courts to continue to take the Guidelines into account without violating the Sixth Amendment, the Court “severed and excised” 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, as well as 18 U.S.C. § 3742(e), the appellate review section that assumed the Guidelines’ mandatory nature.² This left 18 U.S.C. § 3553(a) as the governing sentencing law: “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in

¹ As Justice Stevens wrote, “the Guidelines as written . . . are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases. . . . The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.” *Id.* at 750 (emphasis in original).

² *Id.* at 756-57.

turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.” *Id.* at 766.

The new sentencing framework is different from the mandatory Guideline regime. The court is no longer required to impose a sentence within the guideline range except in narrow circumstances. Instead, it must adhere to section 3553(a)’s mandates that the court “*shall* impose a sentence that is sufficient, but not greater than necessary” to satisfy the purposes of sentencing listed in subsection (2), and in determining that particular sentence, the court “*shall* consider” the purposes and factors listed in subsections (1) through (7).³ The overriding sentencing principle is parsimony after considering the complete range of relevant factors as directed by Congress, including the defendant’s history and characteristics, the relative seriousness of the offense, the needs of the public and the needs of the defendant.

Many courts after *Booker* are faithfully applying the new sentencing framework, calculating and considering the guideline range, but imposing sentences that in their independent judgments achieve sentencing goals without being excessive. Others assume that the Guidelines are a perfect reflection of the purposes of sentencing in all but an extraordinary case, and that adherence to the Guidelines is necessary to maintain uniformity. The latter approach is indistinguishable from the mandatory system just struck down.⁴ Moreover, it cannot in truth be said that the Guidelines produce sentences that achieve, but do not overstate, the goals of punishment in light of all relevant purposes and considerations. The Guidelines by definition do not permit the courts to determine the sentence by examining those considerations.⁵ The parsimony demand has been disregarded, as the results of the Commission’s data, criminological research, and collaboration with all frontline actors have often been overridden or ignored by mandatory minimum laws, other congressional directives, and the Commission’s own actions.⁶ The Commission, and the courts of appeals, restricted or prohibited a host of factors that now must be considered as they bear on culpability, deterrence, protection of

³ “Section 3553(a), unlike the guidelines themselves after *Booker*, is mandatory.” *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005).

⁴ See note 1, *supra*. See also *Booker*, 125 S. Ct. at 794-95 (Scalia, J., dissenting in part).

⁵ Before *Booker*, the statutory considerations were “dormant.” *United States v. Trujillo-Terrazas*, 405 F.3d 814, 819 (10th Cir. 2005).

⁶ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Executive Summary at vi, xvii (2004) (hereinafter “*Fifteen Year Report*”). See also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (May 2005) (chronicling the one-way upward ratchet in the guideline amendment process and its causes); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 33-34 (2003) (Commission’s actions with respect to the drug guidelines were not independent or based on past practice or the purposes of sentencing).

the public, and rehabilitative and treatment needs. Thus, while the sentence required by section 3553(a) and the Guideline sentence may correspond, often they do not.

The Commission should note the ways in which the new sentencing system is different and help define the now-governing sentencing principles. It should explain that the unifying principle is defined by section 3553(a): the purposes of punishment applied with parsimony.⁷ It should tell the courts that “similar records” and “similar conduct” are to be measured against the purposes of punishment to determine whether a difference in treatment is warranted or unwarranted. It should explain the purposes of sentencing where they seem to be poorly understood. For example, the Commission should explain that the concept of *relative* seriousness is inherent in “just punishment” for the “seriousness of the offense,” and that undue severity undermines the goal of *proportional* punishment.⁸

A limited but correct explanation of the sentencing system by the Commission would help to assure that consideration of the guidelines is truly advisory and therefore remains constitutional.

2) The Commission Should Heed the Courts’ Advice Regarding What Needs to be Repaired.

As with departures before Booker, sentences below the advisory guideline range serve the necessary function of providing important feedback from the courts regarding the operation of the guidelines and sentencing laws.⁹ After Booker, the courts have been

⁷ See United States v. Cawthorn, 419 F.3d 793, 802 (8th Cir. 2005) (“district court’s duty” is that it “shall impose a sentence sufficient but not greater than necessary”); United States v. Neufeld, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005) (a “more-than-adequate sentence would conflict with § 3553(a)’s injunction against greater-than-necessary sentences”); United States v. Soto, 2005 WL 281178 (3d Cir. Oct. 27, 2005) (the sentence must be “adequate and appropriate, not greater than necessary”); United States v. Acosta-Luna, 2005 WL 1415565 (10th Cir. June 17, 2005) (the “provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing”); United States v. Angelos, 345 F.Supp.2d 1227, 1240 (D. Utah Nov. 16, 2004) (“In imposing sentences in criminal cases, the court is required by the governing statute-the Sentencing Reform Act -to ‘impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act].’”) (Cassell, J.).

⁸ In a rare case articulating this subtle but important distinction between the governing law and the mandatory guidelines, the Seventh Circuit reminded the district court that “1.84 kilograms of cocaine base is a moderate quantity compared to those higher amounts contemplated by 21 U.S.C. § 841. Yet, in comparison, the 405 month sentence nearly reaches the statutory maximum. Such a term leaves little room for the proportional sentencing that motivated Congress to pass the sentencing guidelines, a motivation recognized by the Supreme Court’s second holding in Booker.” United States v. Lister, No. 04-4304 (7th Cir. Dec. 28, 2005).

⁹ See U.S. Sentencing Commission, Downward Departures from the Federal Sentencing Guidelines, Executive Summary at ii (October 2003).

able to give feedback on many problems they could not effectively address previously, many of which have plagued federal sentencing for years. The Commission should consider these lower sentences, and the reasons for them, not as a problem with judges, but as advice on what problems are in need of repair.

Mandatory Minimums. At least two courts have reduced the advisory guideline sentence to offset the effect of a consecutive mandatory minimum they found to be grossly excessive in light of sentencing goals.¹⁰ In another case, the court of appeals stated, “One cannot help but cringe at the seven-year consecutive prison sentence recommended in the PSI Report with respect to count two for this troubled mother of three who otherwise lacks a criminal history,” and thus concluded that it was not necessary to the integrity and fairness of the sentencing proceeding to recognize the government’s forfeited claim that the consecutive sentence was statutorily required.¹¹ The Commission should include these and any similar cases in its report as further evidence that mandatory minimums are bad policy, unjust, and inhumane. The Commission should remind Congress of the solid opposition to mandatory minimums by a broad range of critics.¹² It is important that the Commission renew and update its recommendations against mandatory minimums at this time, given the raft of bills proposing mandatory minimums introduced in or passed by the House, which (if passed by the Senate) would function as an offense-by-offense Booker “fix,”¹³ and given the Attorney General’s speech last summer voicing at least tentative support for a “minimum guideline system.”¹⁴

Crack/Powder Ratio. Congress legislated a 100:1 ratio between powder and crack cocaine offenses at the two mandatory minimum thresholds set forth in 21 U.S.C. § 841. Though not required to do so, the Sentencing Commission incorporated that ratio

¹⁰ See United States v. Alexander, 381 F.Supp.2d 884 (E.D. Wis. Aug. 9, 2005) (Adelman, J.); United States v. Angelos, 345 F. Supp.2d 1227, 1260 (D. Utah Nov. 16, 2004) (Cassell, J.).

¹¹ United States v. Gorsuch, 404 F.3d 543, 547 (1st Cir. 2005).

¹² See, *inter alia*, Constitution Project’s Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); Harris v. United States, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

¹³ See H.R. 1279 (“Gang Deterrence and Community Protection Act of 2005”); H.R. 3132 (“Children’s Safety Act of 2005”); H.R. 1751 (“Secure Access to Justice and Court Protection Act of 2005”); H.R. 4437 (“Border and Immigration Enforcement Act of 2005”); H.R. 3889 (“Methamphetamine Epidemic Eradication Act”); H.R. 4472 (“Children’s Safety and Violent Crime Reduction Act of 2005”).

¹⁴ See Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech, Washington, D.C, June 21, 2005, available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsocrime.htm>.

(along with most, but not all, drug quantities set forth in the statute¹⁵) into the drug guideline in increments below, between and above the mandatory minimum thresholds. The Sentencing Commission later concluded that the 100:1 powder to crack ratio produces sentences that are greater than necessary to satisfy the purposes of punishment because it exaggerates the relative harmfulness of crack cocaine and the majority of crack offenders have low drug quantities, low criminal histories, and no violence, and that in doing so it creates unwarranted disparity, inappropriate uniformity, racial disparity, and disrespect for law.¹⁶

After Booker, a number of courts have imposed sentences below the range in crack cocaine cases in light of the Commission's conclusions, the facts and circumstances of the case, and the history and characteristics of the defendant.¹⁷ These courts have independently evaluated the guideline sentence in light of the purposes of punishment, have looked to the purposes of punishment as the measure of whether a different sentence was warranted or unwarranted, and have recognized that to do otherwise would be to impose the mandatory guideline regime just rejected by the Supreme Court. The government is appealing some of these sentences, claiming that these matters are prohibited from consideration. Thus far, the only court to decide such an appeal is the First Circuit, which held that the district court could not "jettison" the guideline range and "construct a new sentencing range,"¹⁸ but could take into account, on a case-by-case basis, "the nature of the contraband and/or the severity of a projected guideline sentence."¹⁹ The First Circuit described the disparity as a "problem that has tormented many enlightened observers ever since Congress promulgated the 100:1 ratio," and "share[d] the district court's concern about the fairness of maintaining the across-the-board sentencing gap associated with the 100:1 crack-to-powder ratio."²⁰

In light of the critical feedback from the courts, the Commission should amend the Guidelines, either by incorporating a 20:1 powder to crack ratio, or by stating that the

¹⁵ The impact of the same amount of LSD and the same number of marijuana plants is less under the Guidelines than in the statute. See 21 U.S.C. § 841(b)(1)(A)(v), (b)(1)(B)(v); U.S.S.G. § 2D1.1(c), n. (H); 21 U.S.C. § 841(b)(1)(A)(vii), (b)(1)(B)(vii); U.S.S.G. § 2D1.1, n. (E).

¹⁶ See U.S. Sentencing Commission, Cocaine and Federal Sentencing Policy, Executive Summary at v-viii (May 2002).

¹⁷ E.g., United States v. Perry, 389 F.Supp.2d 278 (D.R.I. 2005); United States v. Clay, 2005 WL 1076243 at **3-6 (E.D. Tenn. May 6, 2005); United States v. Williams, 372 F. Supp.2d 1335 (M.D. Fla. 2005); Simon v. United States, 361 F.Supp.2d 35 (E.D.N.Y. 2005); United States v. Harris, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005); United States v. Smith, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005).

¹⁸ United States v. Pho, No. 05-2455, 2461 ** 5, 6, 8 (1st Cir. Jan. 5, 2006).

¹⁹ Id. at *12.

²⁰ Id.

guideline sentence for 5 or more but less than 50 grams of crack is five years, and that the guideline sentence for 50 grams or more is ten years. Neither is prohibited by statute.

The Commission should also report the number and extent of below-guideline sentences based in whole or in part on the crack/powder disparity, as well as all decisions by the courts of appeals on the issue. The Commission's data is critical to understand whether the district courts will continue to be allowed to correct this clear instance of a guideline that undermines the goals of sentencing, or whether the Commission needs to renew its efforts to draw congressional attention to the issue, and whether the courts of appeals are enforcing a *de facto* mandatory guideline system.

Drug Quantity, Dollar Amount, Relevant Conduct. The Commission chose to emphasize quantity and amount, to magnify their effect through the relevant conduct rules, to give relatively little effect to role in the offense or *mens rea*, and to prohibit or restrict consideration of many mitigating factors. The Constitution Project's Sentencing Initiative, comprised of a broad coalition of judges, lawyers and experts, recently identified the excessive emphasis on quantifiable factors, insufficient emphasis on other considerations such as role in the offense, and excessive emphasis on conduct not centrally related to the offense of conviction as serious deficiencies in the Guidelines.²¹ These aspects of the Guidelines have long been criticized for giving false precision and undue significance to one factor that is broadly defined, inconsistently applied, and often proved with untrustworthy evidence, that may have little to do with the seriousness of the offense, and that treats low-level offenders the same as kingpins.²² While "real offense conduct" under the Guidelines was intended to avoid the transfer of sentencing power from judges to prosecutors, it has not worked as intended, but instead has increased prosecutorial power over sentencing, magnified undue severity and unfairness, introduced hidden disparity, and created disrespect for law.²³ The Commission has proposed, but never acted on, ways to limit or abolish relevant conduct.²⁴

²¹ Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005).

²² Fifteen Year Report 50-52.

²³ American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

²⁴ Id. at 49, 92, 104; U.S. Sentencing Commission, Relevant Conduct and Real Offense Sentencing (Staff Discussion Paper, 1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993); 62 Fed. Reg. 152, 161 (1997); 61 Fed. Reg. 34,465 (1996).

Under advisory Guidelines, several courts have found that drug quantity or dollar amount is an unreliable and random proxy for offense seriousness and creates unwarranted uniformity among unlike offenders.²⁵ Others have corrected for unwarranted disparity between equally or more culpable offenders charged in the same or related cases.²⁶ Some district courts have declined to consider acquitted conduct;²⁷ appellate courts have held that they may consider it but are not required to give it effect.²⁸ Sentencing based on separate uncharged, dismissed and acquitted offenses concerned a

²⁵ E.g., United States v. Nellum, 2005 WL 300073 *5 (N.D. Ind. Feb. 3, 2005) (randomness results from quantity-based approach insofar as it depends on how many controlled buys the agents decide to make); United States v. Jaber, 362 F.Supp.2d 365, 380 (D. Mass. 2005) (drug quantity was a poor indicator of harm and culpability where defendant followed precise instructions of supervisor and could not sell what he produced on his own); United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019, 1025-26 & n.6 (D. Neb. 2005) (quantity system was developed to punish big distributors more harshly, but it makes a low-level dealer look like a large-quantity distributor); United States v. Ranum, 353 F.Supp.2d 984, 990 (E.D. Wis. 2005) (dollar amount overstated offense seriousness because defendant did not act for personal gain or intend to harm the bank); United States v. Emmenegger, 329 F. Supp.2d 416, 427-28 (S.D.N.Y. 2004) (overly-rigid loss table places undue weight on quantity, which, as here, is often an accident unrelated to intent, and fails to take account of personal characteristics).

²⁶ E.g., United States v. Aldridge, 413 F.3d 829, 835-36 (8th Cir. 2005) (remanding for re-sentencing so court could consider adjusting sentence in light of sentence of significantly more culpable co-defendant); United States v. McGee, 408 F.3d 966, 988 (7th Cir. 2005) (remanding for re-sentencing where defendant was a “gofer” whose sentence was more than ten years longer than other co-defendants’ and the same as a high-ranking co-conspirator); United States v. Lewis, 406 F.3d 11, 21-22 (1st Cir. 2005) (remanding for re-sentencing so court could consider reducing sentence in light of lower sentence received by equally culpable co-defendant); United States v. Ferrara, 372 F.Supp.2d 108, 121-22 (D. Mass. 2005) (declining to consider alleged relevant conduct, additional role enhancement, or upward departure which government did not seek in related cases); United States v. Hensley, 363 F.Supp.2d 843 (W.D. Va. 2005) (reducing defendant’s sentence in order to reduce unwarranted disparity vis a vis identical co-defendant); United States v. Gray, 362 F.Supp.2d 714, 718-19 (S.D. W. Va. 2005) (imposing same sentence as co-defendant because they were equally culpable); United States v. Jaber, 362 F. Supp.2d 365, 381 (D. Mass. 2005) (where kingpin received 51-month sentence, reducing low-level defendant’s 70-month sentence to adjust for difference driven by happenstances of when and where defendant was indicted).

²⁷ E.g., United States v. Coleman, 370 F.Supp.2d 661 (S.D. Ohio 2005); United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. Apr. 15, 2005); United States v. Carvajal, 2005 WL 476125 at *4 (S.D.N.Y. Feb. 22, 2005).

²⁸ United States v. Vaughn, 2005 WL 3219706, **5-7 (2d Cir. Dec. 1, 2005) (citing cases in other circuits and holding that acquitted conduct need not be taken into account).

majority of the Court in both Blakely and Booker.²⁹ Even if constitutional at the moment, the Commission should abolish the use of separate “real offense” crimes as a matter of policy.

History and Characteristics of the Defendant, Circumstances of the Offense.

The courts have found that a wide variety of mitigating circumstances of the offense (e.g., motive, role in the offense, lack of *mens rea*) and characteristics of the defendant (e.g., age, addiction, physical or mental illness, family responsibilities, tragic upbringing, demonstrated commitment to rehabilitation, treatment as a more effective means of protecting the public, solid employment record, good works in the community, and lack of a prior criminal record) are very relevant in arriving at what particular sentence is sufficient but not greater than necessary to provide proportional punishment and deterrence, to protect society, and to provide needed treatment and rehabilitation. While given short shrift or forbidden by the pre-Booker Guidelines, it is clear that such considerations are essential to the inquiry demanded by section 3553(a).

Career Offender Guideline. In a number of cases after Booker, courts have held that the career offender guideline produced a sentence that was excessive in light of the purposes of sentencing, created unwarranted uniformity, and would have been a waste of taxpayer dollars.³⁰ The Commission has defined both “controlled substance offense” and

²⁹ Blakely, 542 U.S. at 306 (that “a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it” was an “absurd result” that “not even Apprendi’s critics would advocate.”); Booker, 125 S. Ct. at 754 n.4 (indicating that Watts was wrongly decided and noting Justice Kennedy’s dissent in Watts).

³⁰ See United States v. MacKinnon, 401 F.3d 8 (1st Cir. 2005) (remanding for re-sentencing where the district court, before Booker, found that the career offender guideline produced a sentence that was “obscene” and “unwarranted by the conduct.”); United States v. Williams, 372 F. Supp.2d 1335 (M.D. Fla. 2005) (sentencing defendant to 204 months because career offender sentence of 360 months to life was out of character with the seriousness of the offense, was not necessary to achieve deterrence or incapacitation, and would undermine respect for law); United States v. Person, 377 F. Supp.2d 308 (D. Mass. 2005) (departing downward from 262 to 84 months where career offender status based on one drug distribution and resisting arrest “grossly overstated” seriousness of defendant’s criminal history); United States v. Moreland, 366 F.Supp.2d 416, 421, 424 (S.D. W. Va. April 27, 2005) (career offender guideline equates defendant’s delivery of a single marijuana cigarette for which he was sentenced to 60 days in custody over ten years ago to a kingpin’s distribution of kilos of drugs and violent offenses; twenty extra years for a defendant with no history of violence or pattern of recidivism at a cost of over half a million dollars would be a waste of taxpayer dollars; ignores the severity and character of the predicate offenses and equates relatively minor distribution convictions with violent and egregious drug trafficking crimes for sentencing purposes); United States v. Naylor, 359 F. Supp.2d 521 (W.D. Va. 2005) (reducing defendant’s career offender sentence from 188 to 120 months because he committed the predicates almost fifteen years prior to the instant offense during a six-week period in the middle of which he turned seventeen, and the predicates would not have been counted if the state had treated him as a juvenile or if his present crime was committed a few months later); Carvajal, 2005 WL 476125 at *4-6 (career offender guidelines are “the same regardless of the severity of the crimes, the dangers posed to victims’ and bystanders’ lives, and other appropriate criteria;”

“crime of violence” more broadly than Congress required in 28 U.S.C. § 994(h), so that it commonly reaches offenders who are not the “repeat violent offenders and repeat drug traffickers” Congress had in mind.³¹ Because the “otherwise” clause includes as “crimes of violence” offenses that do not involve or substantially risk the intentional use of force against another, career offender predicates include offenses that are not violent, such as failure to pull over for a police cruiser, unlawful use of a motor vehicle, child neglect, breaking and entering an unoccupied commercial building, and pickpocketing. By covering any offense that is “punishable by more than one year,” the guideline sweeps in misdemeanors and other minor offenses under state laws that do not attempt to calibrate the maximum penalty according to the seriousness of the offense, while ignoring more salient indicators such as the actual sentence served.³² Finally, as the Commission has recognized, the career offender guideline has a disparate impact on Black offenders, and is not justified by an increased risk of recidivism.³³ The Commission should heed the lessons from these decisions and take steps to narrow and rationalize the career offender guideline.

Other Criminal History Issues. Courts have imposed below-guideline sentences based on reduced risk of recidivism because of age,³⁴ and because of lack of a criminal record.³⁵ To help illuminate these issues, the Commission should report the number of sentences below the guideline range, for any reason, by criminal history category and by age. The Commission should also report, if possible, what aspects of the criminal history rules themselves have caused the courts to impose downward departures under U.S.S.G. § 4A1.3 or below-guideline sentences under § 3553(a).

career offender sentence was “excessive,” and “greater than necessary, to comply with the purposes” set forth in the statute).

³¹ S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

³² See NACDL Report: Truth in Sentencing? The Gonzales Cases, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (defendant was classified as a career offender based on possession of less than 1 gram of crack and three “crimes of violence” classified as non-violent misdemeanors under state law, all committed at the age of 17, to which he pled guilty on the same day when he was 18, and for which he received a suspended sentence and served 7 months).

³³ Fifteen Year Report at 133-34; U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 9 (May 2004).

³⁴ E.g., United States v. Thomas, 360 F.Supp.2d 238, 243 (D. Mass. Mar. 14, 2005) (defendant would be no danger to the community at the time of his release in late fifties or early sixties); United States v. Naylor, 359 F. Supp.2d 521 (W.D. Va. 2005) (predicates committed as a teenager were poor evidence that defendant was career offender).

³⁵ E.g., United States v. Gorsuch, 404 F.3d 543, 547 (1st Cir. 2005); United States v. Ranum, 353 F.Supp.2d 984, 986 (E.D. Wis. 2005).

Disparity Due to Government Fast Track Policies. In several reported and unreported cases, district courts have imposed sentences below the guideline range based in whole or in part on the need to avoid unwarranted disparities among similarly situated offenders that result from the Attorney General's designations of some but not other districts as meriting fast track programs. The government argues that these disparities are warranted because Congress approved the institution of fast track programs. Many courts have disagreed, finding no principled distinction between districts with and without fast track programs.³⁶ Other courts have declined to reduce the sentence, though acknowledging that the selection of only some districts for fast track treatment creates disparity among defendants with similar records convicted of similar conduct, that this selectivity is unjustified, and that fast track programs ought to be extended across the country.³⁷

The existence of fast track programs underscores that the sentences for immigration offenses are excessive in light of the relative seriousness of the offenses and the needs of the public. The Department of Justice seeks and obtains ever-increasing sentences for these offenses, the most recent example being the many new mandatory minimums in H.R. 4437, the Border Protection, Antiterrorism and Illegal Immigration Act of 2005 recently passed by the House. Yet, for many years the prosecutors and judges who handle the majority of immigration cases have found it unnecessary to seek or impose the severe sentences already on the books. It seems that the primary purpose of lengthy immigration sentences is to induce quick guilty pleas in selected districts, but there is no justification for saddling defendants in other districts with sentences that all recognize are excessive. As the Commission has said previously, "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders."³⁸ Thus,

³⁶ E.g., United States v. Santos, 2005 WL 3434791 **4-7 (S.D.N.Y. Dec. 12, 2005) (and citing unreported cases); United States v. Medrano-Duran, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); United States v. Peralta-Espinoza, 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); United States v. Galvez-Barrrios, 355 F.Supp.2d 958, 963 (E.D. Wis. 2005). It does not appear that the government has appealed these decisions.

³⁷ See United States v. Perez-Chavez, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005) ("these programs clearly result in sentencing disparity between similarly situated offenders" and should be extended across the country because "[b]ased on the information that has been presented in this case, it is hard to see any real justification for having fast track programs in only selected jurisdictions."). In cases in which defendants have raised the issue on appeal, the courts of appeal have found it unnecessary to resolve. See United States v. Simpson, 430 F.3d 1177, 1189-90 (D.C. Cir. 2005); United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005); United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005).

³⁸ U.S. Sentencing Commission, Report to Congress: Downward Departures from the Federal Sentencing Guidelines 66-67 (October 2003).

the Commission should recommend that immigration sentences be reduced to better reflect the purposes of sentencing.

Simplification. Guideline complexity contributes to unwarranted severity, transfers power from judges to prosecutors at the case level, and has been a major cause of imbalance in the rulemaking process.³⁹ Many of the two-level adjustments throughout the Guidelines are of questionable significance and simply add to excessive severity without meaningfully distinguishing among offenders. Though the Commission has long recognized that the Guidelines should be simplified, they have instead become more complex, and this continues after Booker. As Judge Carnes recently pointed out, the level of judicial resources expended on the Guidelines' complex minutiae makes even less sense after Booker.⁴⁰ Importantly, should Congress be inclined to legislate a new sentencing system, simplified Guidelines with broader ranges in which a small number of significant facts are put to a jury and the rest are left to the judge, has widespread support.⁴¹ The Commission should take the lead in this process.

3) The Commission Should Make Clear That There is No Need for a More Punitive or More Rigid Sentencing System.

Defendants are not being punished too leniently after Booker. Because of "direct and indirect effects" of mandatory minimum statutes, and the "substantial and independent contribution" of the sentencing guidelines themselves, average sentence length at least doubled between 1986 and 2002.⁴² According to the Commission's most recent data, average sentence length for the most frequently applied guidelines steadily increased from 2000 to 2004 and has remained at 56 months in 2004 and 2005.⁴³ It would be difficult to argue that defendants are being punished too leniently after Booker.

Why has sentence length continued the upward trend? This is curious, given that the significant increase in 2004 before Blakely was presumably due to the PROTECT Act, and the number of both government-sponsored and non-government-sponsored sentences below the range has increased after Booker. The Commission should identify, if possible, the causes and the extent to which each has contributed to the upward trend.

³⁹ See Bowman, supra note 4; Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005).

⁴⁰ United States v. Williams, No. 05-11318, *17 (11th Cir. Nov. 30, 2005) (Carnes, J., concurring).

⁴¹ E.g., Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005).

⁴² Fifteen Year Report, Executive Summary at vi, 46-52.

⁴³ U.S. Sentencing Commission, Special Post-Booker Coding Project 13-15 (Prepared December 1, 2005), http://www.ussc.gov/Blakely/PostBooker_120105.pdf.

Possibilities include (a) Guideline increases just taking effect, (b) new or increased mandatory minimums, (c) smaller substantial assistance or fast track departures, (d) sentences above the guideline range in certain kinds of cases, and/or (e) sentences above the guideline range in outlier districts or cases.

We would also like to know how many of the sentences above the guideline range were sponsored by the government, as opposed to imposed *sua sponte* by the judge. (The data thus far does not say.)

If anything, sentences are too severe. Given the linked history of mandatory minimum laws and the guidelines, it would be remarkable if current penalty levels met the purposes of sentencing without being excessive.⁴⁴ The Commission was to continually review and revise the guidelines – up or down – based on feedback from judges, prosecutors, defense counsel, probation officers, the Bureau of Prisons, and even defendants.⁴⁵ Instead, the Guidelines, which were high at the outset, were amended

⁴⁴ The original Commission established the initial guidelines at significantly more severe levels than past practice for the most frequently sentenced offenses. Fifteen Year Report at 47. The drug guidelines were pegged to mandatory minimum statutes enacted while the initial Guidelines were being written, which were passed in the midst of public hysteria over the death of basketball star Len Bias and an upcoming election, without the usual internal deliberation and without input from the Sentencing Commission, the Judicial Conference, the Bureau of Prisons or the Parole Commission. See Eric E. Sterling, The Sentencing Boomerang: Drug Prohibition Politics and Reform, 40 Vill. L. Rev. 383, 408-12 (1996); David M. Zlotnick, The War Within the War on Crime: The Congressional Assault On Judicial Sentencing Discretion, 57 SMU L. Rev. 211, 218-19 (Winter 2004); Peter Kerr, Anatomy of the Drug Issue: How, After Years, It Erupted, N.Y. Times, Nov. 17, 1986, at A1. The Commission set the base offense levels according to the mandatory minimum thresholds, and extrapolated in smaller weight-based increments below, between and above the statutory levels, Fifteen Year Report at 47-49, such that the guideline range for any drug offender held responsible for an amount between or above a mandatory minimum threshold, or in a criminal history category greater than I, or subject to any enhancement, is higher than the mandatory minimum that would otherwise apply. High drug penalties, in turn, “exerted upward pressure on sentences for other federal offenses,” and “was plainly at work in the debate over economic crime sentences leading to the passage of the Sarbanes-Oxley Act and the sentencing increases that followed.” Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1332 (May 2005). The original Commission emphasized quantity and amount, magnified its effect through the relevant conduct rules, gave relatively little effect to role in the offense or *mens rea*, and prohibited or restricted consideration of many mitigating factors. Later Commissions, usually in response to Justice Department demands, congressional directives, or both, Fifteen Year Report, Appendix B (92 congressional directives between 1988 and 2004), added many more aggravating factors, increased the impact of existing ones, and removed more mitigating factors.

⁴⁵ 28 U.S.C. § 994(o), (s); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988) (“the Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years. Thus, the system is ‘evolutionary’--

almost exclusively upward. According to many, including the Justice Kennedy Commission and the Constitution Project's Sentencing Initiative, due in large measure to increasing interference by political actors who lack the Commission's neutrality and competence, federal sentences have reached the point where they are unjust, ineffective, and inefficient.⁴⁶ Justice Kennedy himself called for a decrease in the length of Guideline sentences and the repeal of mandatory minimum laws, citing, *inter alia*, the human and financial costs.⁴⁷

Sentence severity has come under fire from a broader range of judges, institutions and experts than ever before. Congress is now at least beginning to discuss the cost of proposals to put more people in prison for longer. This is the time for the Sentencing Commission to evaluate whether current penalty levels are worth the financial and human cost.

The federal prison population has increased from 24,000 in 1980 to over 188,000 today,⁴⁸ at a cost of over \$4 billion per year.⁴⁹ Over 65% of people sentenced in federal court every year are black or Hispanic. The Bureau of Prisons is now 40% over capacity,⁵⁰ has eliminated or restricted many treatment and rehabilitation programs in recent years,⁵¹ and increasingly fails to provide adequate medical care.⁵²

the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time.”).

⁴⁶ See Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Marc L. Miller, Sentencing Equality Pathology, 54 Emory L. J. 271, 277 (2005); Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 Stan. L. Rev. 37 (October 2005); Rachel E. Barkow, Our Federal System of Sentencing, 58 Stan. L. Rev. 119 (October 2005); Frank O. Bowman, III, Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform, 58 Stan. L. Rev. 235 (October 2005); Jeffrey Parker & Michael Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001 (2001).

⁴⁷ Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003).

⁴⁸ <http://www.bop.gov/news/quick.jsp#1>.

⁴⁹ <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>.

⁵⁰ Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7.

⁵¹ E.g., Woodall v. Bureau of Prisons, ___ F.3d ___, 2005 WL 3436626 (3d Cir. Dec. 15, 2005); Bussert & Sickler, Bureau of Prisons Update: More Beds, Less Rehabilitation, The Champion (Mar. 2005).

The Department of Justice regularly claims that the lengthy federal sentences imposed over the past twenty years have had a direct causal effect on the drop in the rate of violent crime.⁵³ But the Director of the Office of National Drug Control Policy has told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.⁵⁴

According to studies by the Sentencing Project, the Sentencing Commission's data, and other reputable research, the costs of lengthy federal sentences outweigh their limited benefits. To begin with, because the incarceration rate includes all offenses, but the crime rate measures only property and violent crime and not drug offenses, comparing the crime rate to the incarceration rate makes it appear as if increased incarceration has led to less crime than it actually has.⁵⁵ The drop in the crime rate is due to declines in violent and property offenses, which are prosecuted primarily by the states.⁵⁶ Further, three-quarters of the decline in violent crime in the 1990s was due to factors other than incarceration, such as economic trends and employment rates.⁵⁷

Only 13% of federal prisoners have been convicted of a violent offense, while 55% have been convicted of a drug offense. Federal drug offenders are primarily low-level couriers or street dealers (59-66% for cocaine base and powder offenders in 2000),

⁵² Daniel Zwerdling, The Death of Richard Rust, National Public Radio, All Things Considered, December 5, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=5022866>; Betty Brink Betty Brink, Hospital of Horrors, Fort Worth Weekly, October 19, 2005, available at <http://www.fwweekly.com/content.asp?article=3325>; Betty Brink, Cancer Cell, Fort Worth Weekly, August 24, 2005, available at <http://www.fwweekly.com/content.asp?article=2691>.

⁵³ See Testimony of Christopher Wray Before the U.S. Sentencing Commission 2-3 (November 17, 2004), http://www.ussc.gov/hearings/11_17_04/111704-Panelthree.pdf; Testimony of Christopher Wray Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee 7 (February 10, 2005), <http://judiciary.house.gov/media/pdfs/Wray021005.pdf>; See Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech at 5, Washington, D.C, June 21, 2005, available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm>.

⁵⁴ Kris Axtman, Signs of Drug-War Shift, Christian Science Monitor, May 27, 2005.

⁵⁵ The Sentencing Project, Incarceration and Crime: A Complex Relationship at 2 (2005) ("Incarceration and Crime"). See also Bowman, *supra* note 4, at 1332-33; Henry Ruth & Kevin Reitz, The Challenge of Crime: Rethinking Our Response 5, 15-18 (2003).

⁵⁶ Incarceration and Crime at 6-7.

⁵⁷ Id. at 4.

had no weapon involvement (87% in 2002), and are in Criminal History Category I (55.7% in 2002).⁵⁸

While the prison population has skyrocketed, drug use rates have remained substantial and even increased over the past few years. Because drug crime is driven by demand, and low-level dealers and couriers are easily replaced, incarceration has little effect on reducing drug crime.⁵⁹ Nor do lengthy terms of incarceration have a deterrent effect on white-collar offenders, presumably the most rational group of offenders.⁶⁰ The persistent removal of persons from the community for lengthy periods of incarceration, by weakening family ties and prospects for employment, actually contributes to increased recidivism, and harms families and the community at large.⁶¹ As several judges have noted post-Booker, a sentence that is so long that it removes all hope of living a useful life is counterproductive.⁶² Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.⁶³ This is consistent with the Commission's research indicating that programs to address drug use and education would have a high cost-benefit value in reducing the risk of recidivism.⁶⁴

Regional disparity continues, but what are its causes, what is its real extent, and what does it mean? It is true that regional disparity exists after Booker, but regional disparity remained and even increased for drug offenses during the mandatory Guideline era.⁶⁵ The government has highlighted regional disparity as an issue of concern, presumably to support an effort to restore mandatory guidelines.

⁵⁸ Id. at 6-7; U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002); U.S. Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics.

⁵⁹ Incarceration and Crime at 6-7.

⁶⁰ See Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995).

⁶¹ Incarceration and Crime at 7-8.

⁶² E.g., Carvajal, at *4, 15-16; Moreland, 366 F. Supp.2d at 422; Simon, 361 F.Supp.2d at 48.

⁶³ Incarceration and Crime at 8, citing three RAND studies.

⁶⁴ U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 15-16 (May 2004).

⁶⁵ Fifteen Year Report at 140-41.

Has regional disparity significantly changed since Booker? What are the causes of regional disparity in post-Booker sentencing? Are there large numbers of cases with high guideline ranges in some districts or regions but not others (e.g., a large number of methamphetamine or crack cases)? Has there been a large increase in sentences above the guideline range in particular districts? Is some regional disparity acceptable, given that judicial sentencing decisions are public and subject to appellate review?

To what extent do regional differences in prosecutorial charging, plea or departure policies or practices contribute to regional disparity? When all such differences are taken into account, is there more or less regional disparity? Do prosecutorial practices and policies indicate that line prosecutors view sentences as too severe? To answer these questions accurately, we suggest that the Commission examine the following:

a) A number of districts with approved fast track programs use a charge bargain rather than a departure method. The Commission should report the number of fast track charge bargains and the resulting sentence reduction by district. The Commission should analyze whether use of the charge bargain method increases or lessens regional disparity that otherwise appears.

b) As the Commission noted in its report to Congress on downward departures in 2003, prosecutors in some districts rely heavily on Rule 35(b) motions instead of substantial assistance departures, but the Commission had been unable to obtain documentation of the use of Rule 35(b) motions at that time.⁶⁶ If the Commission has now been able to obtain that data, it should report the number and extent of Rule 35(b) sentence reductions by district. If it has not been able to obtain the data, it should note that this practice exists and that it obscures the true picture of regional disparity and average sentence length.

c) What constitutes “substantial assistance” varies by district. In some districts, providing information in an investigation of another is enough for a substantial assistance motion (as the statute and the guideline state), while in others, the official policy is to approve a substantial assistance departure only if the defendant testifies against another, regardless of the reason the defendant did not testify (e.g., the defendant was prepared to testify but the other person pled guilty). This is reflected in the variation in rates of substantial assistance departures among districts. Studies show that line prosecutors exercise their discretion in various ways to reduce sentences they believe are too high.⁶⁷ Accordingly, the Commission should analyze whether districts with low substantial assistance departure rates tend to have higher rates of uncontested or unappealed below-

⁶⁶ U.S. Sentencing Commission, Downward Departures from the Federal Sentencing Guidelines 68-69 (October 2003).

⁶⁷ Frank O. Bowman and Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level, 87 Iowa L. Rev. 477, 479-83 (January 2002).

guideline sentences, or lower guideline sentences to begin with (which may reflect charging practices).

The Justice Department's prediction that it would lose control over §§ 5K1.1, 5K3.1, 3E1.1 motions appears not to have come true. A chief concern of the government following Booker was that it would lose exclusive control over substantial assistance departures and other law enforcement tools.⁶⁸ Based on reported cases and in our experience, the courts have been as protective of the government's prerogatives after Booker as they were before.⁶⁹ Furthermore, it appears that the extent of substantial assistance departures is receiving closer scrutiny on appeal⁷⁰ than before Booker, when the extent of a substantial assistance departure was rarely reversed, if the government appealed at all.

Is the Commission aware of judges granting departures under § 5K1.1, fast track departures under § 5K3.1, or the third acceptance of responsibility under § 3E1.1 point without a government motion? If so, did the government appeal? If so, what was the outcome?

⁶⁸ See Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech at 6, Washington, D.C, June 21, 2005 ("Under the advisory guidelines system, judges are free to reduce sentences when they believe the defendant has sufficiently cooperated."), available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm>; H.R. 1528 § 12(a)(3) ("Unless the Government makes a motion, asking for a sentence below the range referred to in subsection (a)(4), and stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court shall not, based on a consideration of the defendant's cooperation with or assistance to the Government or on the extent of that cooperation and assistance, impose a sentence below the range referred to in subsection (a)(4).").

⁶⁹ E.g., United States v. Moreno-Trevino, 2005 WL 3541070 (10th Cir. Dec. 28, 2005) (upholding district court's refusal to grant third point under § 3E1.1; although government refused to move for third point for a reason unrelated to timeliness, it was not animated by an unconstitutional motive and was related to a legitimate governmental end); United States v. Cannon, 2005 WL 3159567 (7th Cir. Nov. 29, 2005) (Defendant was convicted by a jury after being arrested in possession of 60 grams of crack, which he contended he did not intend to distribute. Because he had pled guilty ten years earlier to two state charges of possessing small amounts of cocaine, and the government filed a notice under § 851, a mandatory life sentence was required. The district court imposed a twenty-year sentence, relying on Booker to hold that a life sentence based on the two minor priors overstated the seriousness of the defendant's criminal history. Noting that mandatory minimum statutes do not permit judges to sentence based on their sense of justice and that only the government has the discretion to file or not file a notice under § 851, the Seventh Circuit reversed.).

⁷⁰ E.g., United States v. Saenz, 428 F.3d 1159 (8th Cir. 2005); United States v. Coyle, 429 F.3d 1192 (8th Cir. 2005).

4) The Commission Should Delete or Revise its Policy Statement Concerning the Standard of Proof.

The Defenders, as well as many courts and commentators, have long believed that use of the preponderance of the evidence standard in sentencing, particularly with respect to separate “real offense” crimes, violates the Due Process Clause of the Fifth Amendment, and results in unfairness, inaccuracy and uncertainty in sentencing.⁷¹ Under Fifth Amendment jurisprudence, the standard of proof serves to allocate the risk of error between the litigants and in doing so reflects the relative importance society attaches to the ultimate decision. In presentations across the country outlining sentencing procedure after Booker, the Commission has encouraged courts to give “substantial weight” to the guideline range, and the courts are giving it that much or “presumptive weight.” The Supreme Court has not yet decided what burden of proof the Due Process Clause would require for such a system. In an abundance of caution, the Commission should either delete its policy statement as to the requisite burden of proof, or replace it with the following, which we think is all that can accurately be said at this time:

In resolving disputed facts involved in the calculation of the guideline range, due process requires that the courts use a standard of proof commensurate with the importance of the factual determination.

The Sentencing Reform Act said nothing about the burden of proof, but the Commission, in 1991, issued a policy statement stating its belief that a preponderance of the evidence standard met due process requirements. Nonetheless, even before the line of cases culminating in Booker, at least seven of the courts of appeals held or stated in *dicta* that a heightened standard of proof (either beyond a reasonable doubt or clear and convincing evidence), or an opportunity to depart downward, was required for facts with a significant, disproportionate, unreliable, or otherwise unfair impact on the sentence.⁷²

⁷¹ E.g., “More About Reasonable Doubt at Sentencing,” Sentencing Law and Policy, Feb. 6, 2005, available http://sentencing.typepad.com/sentencing_law_and_policy/2005/02/assessing_and_o.html; American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Susan N. Herman, The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. Cal. L. Rev. 289 (1992).

⁷² See United States v. Jordan, 256 F.3d 922, 927-28 (9th Cir. 2001); United States v. Valencia, 222 F.3d 1173, 1182 (9th Cir. 2000); United States v. Munoz, 233 F.3d 1117, 1127 (9th Cir. 2000); United States v. Shonubi, 103 F.3d 1085, 1087-92 (2d Cir. 1997); United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996); United States v. Lombard, 72 F.3d 170, 186-87 (1st Cir. 1995), *aff'd after remand*, 102 F.3d 1 (1st Cir. 1996); United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.D.C. 1992); United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992); United States v. Restrepo, 946 F.2d 654, 656 n.1 (9th Cir. 1991); United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990).

In both Watts and Almendarez-Torres, the Supreme Court acknowledged these opinions but did not resolve the issue.⁷³

It remains for the Supreme Court to decide what standard of proof judges must use in applying the “advisory” Guidelines. As the Court explained twenty-five years ago in In re Winship, the function of a standard of proof as embodied in the Due Process Clause of the Fifth Amendment is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”⁷⁴ In a civil suit for damages, the preponderance standard is acceptable because it is viewed as no more serious for there to be an error in the plaintiff’s favor than for there to be an error in the defendant’s favor.⁷⁵ But “[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.”⁷⁶ Winship involved factfinding in a juvenile delinquency proceeding, where, as in federal sentencing today, the judge did the factfinding and it did not result in “conviction” of a “crime.” The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.⁷⁷

In Apprendi v. New Jersey, the Supreme Court stated: “Since Winship, we have made clear beyond peradventure that Winship’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”⁷⁸ In Ring v. Arizona, the Court held that any “increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt.”⁷⁹ And, importantly, in Summerlin v. Schriro, the Court held that Ring

⁷³ United States v. Watts, 519 U.S. 148, 156-57 (1997) (declining to address the issue because the cases before it did not present such “exceptional circumstances”); Almendarez-Torres v. United States, 523 U.S. 224, 247-48 (1998) (noting but not addressing the Due Process issue because appellant did not raise it).

⁷⁴ 397 U.S. 358, 370 (1970).

⁷⁵ Id. at 371-72.

⁷⁶ Id. at 363-64; id. at 370, 371-72 (Harlan, J. concurring). See also Addington v. Texas, 441 U.S. 418, 423 (1979) (“standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision,” holding that clear and convincing standard is required for civil commitment).

⁷⁷ Id. at 365-66.

⁷⁸ 530 U.S. 466, 484 (1999).

⁷⁹ 536 U.S. 584, 602 (2002).

was not retroactive because, though the Sixth Amendment rights at stake were fundamental, Arizona's requirement that the judge make the factfindings beyond a reasonable doubt protected the "fundamental fairness and accuracy of the criminal proceeding."⁸⁰

In Booker, the questions presented and holdings were stated solely in terms of the Sixth Amendment,⁸¹ but there are indications that a majority of the Court would hold that the Fifth Amendment requires more than a preponderance of the evidence, particularly for separate "real offense" crimes, even if the Guidelines are "advisory." In Blakely, the majority strongly criticized real offense sentencing generally.⁸² In Booker, a majority indicated that Watts was wrongly decided.⁸³ Justice Scalia sharply criticized the unreliability of the way in which facts are found under the Guidelines,⁸⁴ and Justice Thomas thought that the Court had corrected the Commission's "mistaken belief" that judges may use a preponderance of the evidence standard.⁸⁵

How the Supreme Court will decide the issue when squarely presented will depend on the impact of factual determinations under the "advisory" Guidelines. After Booker, disputed facts that increase the guideline range continue to have a definite and measurable effect on the sentence. Every circuit and district court has interpreted Booker to mean that the district court must still find the facts relevant to the guideline range and calculate that range correctly.⁸⁶ At minimum, the courts are "carefully" and "seriously" considering the guideline range, but many are giving it "presumptive weight" in the district court,⁸⁷ and a "presumption of reasonableness" on appeal.⁸⁸ Many courts of

⁸⁰ 124 S. Ct. 2519, 2524 (2004).

⁸¹ Booker, 125 S. Ct. at 746, 747 n.1, 748-50, 756, 769.

⁸² Blakely, 542 U.S. at 306 (that "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it" was an "absurd result" that "not even Apprendi's critics would advocate.").

⁸³ Booker, 125 S. Ct. at 754 n.4 (indicating that Watts was wrongly decided and noting Justice Kennedy's dissent in Watts).

⁸⁴ Id. at 790 (criticizing factfinding under the Guidelines as "judges determin[ing] 'real conduct' on the basis of bureaucratically-prepared, hearsay-riddled presentence reports") (Scalia, J., dissenting in part).

⁸⁵ Id. at 798 n.6 (Thomas, J. dissenting in part).

⁸⁶ See, e.g., United States v. Ellis, 419 F.3d 1189, 1192 (11th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005); United States v. George, 403 F.3d 470, 472-73 (7th Cir. 2005); United States v. Harris, 397 F.3d 404, 416 (6th Cir. 2005); United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. 2005).

⁸⁷ E.g., United States v. Wilson, 355 F.Supp.2d 1269 (D. Utah Feb. 2, 2005).

appeals are judging whether a sentence is “unreasonable” by how much it differs from the guideline range, and some explicitly require greater justification for a sentence outside the guideline range than one within it.⁸⁹ As one appeals court judge said, the “the reality” is that sentences are not being reversed for unreasonableness, but only for mistakes in calculating the guideline range.⁹⁰ The rate of sentences above the guideline range has nearly doubled, but those sentences are rarely reversed.⁹¹

Recognizing that the guideline range still has a definite and measurable effect on the loss of liberty, a number of district courts after Booker have adopted the beyond a reasonable doubt standard as a matter of constitutional avoidance, as a matter of discretion, or as an indicator of how much weight they should give the guideline range, and some have declined to use acquitted conduct.⁹² Some courts of appeals have held that the district courts may use the preponderance standard, but thus far, none has held that they must.⁹³

In an abundance of caution, the Commission should delete or amend its policy statement regarding what burden of proof satisfies the Due Process Clause.

⁸⁸ United States v. Cunningham, 429 F.3d 673, 675 (7th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005).

⁸⁹ See, e.g., United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); United States v. Rogers, 400 F.3d 640, 642 (8th Cir. 2005).

⁹⁰ United States v. Williams, No. 05-11318 at *15 (11th Cir. Nov. 30, 2005) (Carnes, J., concurring).

⁹¹ E.g., United States v. Winters, 416 F.3d 856 (8th Cir. 2005) (upholding 240-month sentence for a first offender whose guideline range was 161-171 months for highly questionable reasons as pointed out by dissent).

⁹² See United States v. Okai, 2005 WL 2042301 at **4-10 (D. Neb. Aug. 22, 2005); United States v. Coleman, 370 F.Supp.2d 661 (S.D. Ohio 2005); United States v. Pimental, 367 F. Supp.2d 143 (D. Mass. Apr. 15, 2005); United States v. Gray, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. Mar. 17, 2005); United States v. Thomas, 360 F.Supp.2d 238, 241 (D. Mass. 2005); United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019, 1028 (D. Neb. Feb. 1, 2005); United States v. Carvajal, 2005 WL 476125 *4 (S.D.N.Y. 2005); United States v. West, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

⁹³ See United States v. Cuellar-Cuellar, 2005 WL 3395371 *3 n.4 (Dec. 13, 2005) (declining to reach what standard of proof due process requires for prior convictions with a significant effect on the sentence in light of appellant’s failure to argue that he did not admit the fact of conviction); United States v. Vaughn, 2005 WL 3219706 (2d Cir. Dec. 1, 2005) (courts may use preponderance of the evidence standard but are not required to take into account acquitted conduct); United States v. Welch, 429 F.3d 702, 704-05 (7th Cir. 2005) (district court may use preponderance of the evidence standard); United States v. Pirani, 406 F.3d 543, 551 n.4 (8th Cir. 2005) (nothing in Booker requires use of the beyond a reasonable doubt standard).

4) The Commission Should Provide Information on the Impact of Decisions of the Courts of Appeals.

Aside from whether district court judges are giving too little or too much deference to the Guidelines, what has been the impact of the decisions of the courts of appeals? While we recognize that a year is not enough time for the appeals courts to address all of the issues fully, we would like to see data on:

- (1) the number of appeals of sentences imposed under Booker (as distinguished from appeals of sentences imposed before Booker seeking a remand for re-sentencing under Booker), by the government and by the defendant, respectively
- (2) in each category, the number of reversals (or remands) and the reason: (a) error in guideline calculation, (b) error in application of a departure provision, (c) error in application of a statutory sentencing provision, (d) unreasonable non-guideline sentence, (e) unreasonable within-guideline sentence, (f) faulty or inadequate statement of reasons

We would also like to see an account of the holdings of the courts of appeals on certain issues by circuit, including:

- (1) Whether or not the courts of appeals have jurisdiction to review a correctly calculated within-guideline sentence?
- (2) Whether or not a correctly calculated within-guideline sentence is *per se* reasonable?
- (3) Whether or not a correctly calculated within-guideline sentence is presumptively reasonable?

In circuits where a correctly-calculated within-guideline sentence has been held presumptively reasonable, what kind of presumption is being employed?

If the presumption disappears upon the production of evidence challenging the presumption (the “bursting bubble” theory), does the party challenging the application of the presumption bear the burden of production? What quantum of evidence must be produced to invalidate the presumption? If the presumption is invalidated, what burden of proof is used to evaluate the evidence produced in support of the sentence requested?

If the presumption is a rebuttable presumption, does the party challenging its application bear the burden of proof as well as the

burden of production? Or does the burden of proof shift? What quantum of evidence is necessary to meet those burdens?

- (4) Which courts of appeals have explicitly held that the district court must provide a greater justification for sentences outside the guideline range than for sentences within the guideline range?
- (5) Have any courts of appeals stated that they afford any deference to the district court's application of the law, *i.e.*, 18 U.S.C. § 3553(a), to the facts in determining reasonableness, and, if so, what degree of deference? *Cf.* 18 U.S.C. § 3742(e) (court of appeals "shall give due deference to the district court's application of the guidelines to the facts").
- (6) Which courts of appeals have held that any particular factor is prohibited from consideration, such as the crack/powder ratio, disparity created by non-existence of a fast track program in the district, or any other factor? Which courts of appeals have held that such factors may not be prohibited from consideration?
- (7) What constitutes a sufficient statement of reasons for purposes of appellate review? For example, must the district court specifically address the 3553(a) factors argued by the defendant or will a general statement that the court has considered all 3553(a) factors suffice?
- (8) Have any courts of appeals held that that the district court *must* apply a preponderance of the evidence standard, or put another way, that a standard of proof greater than a preponderance of the evidence is *prohibited*?

We hope that these comments are useful to the Commission in preparing its report on federal sentencing after Booker. Please do not hesitate to contact us for further information.

Very truly yours,



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