

PRELIMINARY STATEMENT

On November 25, 2008, Your Honor will sentence John Doe for his violation of 18 U.S.C. § 922(g), for which he pled guilty on December 11, 2007. This memorandum will proceed in accordance with the three-step framework set forth in *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006). That framework requires (1) calculation of the guidelines range, (2) consideration of any departure motions, and (3) consideration of the § 3553(a) factors. With respect to step one, Probation has calculated a guidelines range of 110 to 137 months, based on a total offense level of 25 and a criminal history category of VI. Presentence Investigation Report (“PSR”), § 90. The statutory maximum, however, is 120 months. *See id.* While Mr. Doe has no objections to the mechanical calculation of this range, he submits that the range is far greater than necessary to satisfy the purposes of sentencing, for the reasons that will be discussed as part of the third step of the *Gunter* inquiry.

Because Mr. Doe will not make any downward departure requests, this memorandum will not discuss step two. Instead, in turning to step three, that of considering the § 3553(a) factors, this memorandum will demonstrate that the mechanically determined guideline range, with or without the obliterated-serial-number enhancement, is flawed in five discrete ways that bear directly on its usefulness as a guide to the minimally sufficient sentence in this case. First, it reflects amendments made in direct contravention of the United States Sentencing Commission’s research regarding the correlation between sentences imposed and certain types of prior convictions. Second, it reflects the Commission’s restructuring of the guideline to meet mandatory minimum penalties enacted by Congress for an entirely different statute, the Armed Career Criminal Act (“the ACCA”), rather than to satisfy the purposes of sentencing overall. Third, it reflects the incorporation of overly broad and otherwise problematic definitions from the career offender provision. Fourth, the history of the obliterated-serial-number enhancement typifies the relentless addition of enhancements absent any indication of how they serve the overall purposes of sentencing. And, fifth, data collected by the Commission compellingly indicate a widespread judicial view that the dramatically increased ranges now produced by the guideline are greater than

necessary to satisfy the purposes of sentencing, yet the Commission has not revised the guideline to reflect that judicial feedback.

Overall, § 2K2.1(a)(2) in its current form represents an abdication, rather than a fulfillment, of the Sentencing Commission's mandate to function as an independent, expert body that formulates guidelines based on empirical research and input from judges and other participants in the criminal justice system. As a result, the range is a poor guide to the minimally sufficient sentence. When these circumstances are taken into account, along with the other relevant sentencing factors, it becomes clear that a sentence below that mechanically calculated range is the minimally sufficient sentence.

The Advisory Guidelines Range

Probation has calculated an advisory guidelines range of 110 to 137 months, based on an offense level of 25 and a criminal history category of VI. PSR ¶ 90. Specifically, § 2K2.1(a)(2) provides for a base offense level of 24 if the defendant has "at least two felony convictions of either a crime of violence or a controlled substance offense." Mr. Doe acknowledges the mechanical applicability of the 4-level enhancement based on the obliteration of the serial number, but maintains that the enhancement itself, as well as the degree of the enhancement, are part and parcel of the flawed development of this guideline. Given the nature of his objection, it will be discussed as part of Section II. With a three-level downward adjustment for acceptance of responsibility, Mr. Doe's final offense level is 25. At criminal history category VI, the applicable advisory range is 110 to 137 months, but the statutory maximum of ten years makes the range 110 to 120 months. Mr. Doe has no objections to this calculation but submits that it is far greater than necessary to satisfy the purposes of sentencing in this case for the reasons discussed in Section II.

I. In Determining The Appropriate Sentence, The Court Must Consider The Factors Set Forth In 18 U.S.C. § 3553(a), Which Compel The Conclusion That The Mechanically Calculated Guideline Range Is Overly Punitive And Support A Sentence Below That Range.

The third step of the procedure set forth in *Gunter* is the Court's consideration of the relevant § 3553(a) factors. One of those factors is the guideline range, of course. But, in contrast to sentencing practice only a few short years ago, that one factor is no longer

the end of the discussion. The Supreme Court has firmly instructed that sentencing courts “may not presume that the Guidelines range is reasonable.” *Gall v. United States*, 128 S. Ct. 586, 596 (2007) (citing *Rita v. United States*, 127 S. Ct. 2456 (2007)). Rather, a sentencing court must make an “individualized assessment based on the facts presented.” *Gall*, 128 S. Ct. at 597. Above all, a court’s final determination of a sentence must reflect “§ 3553(a)’s overarching instruction to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the sentencing goals advanced in 3553(a)(2),” namely, retribution, deterrence, incapacitation, and rehabilitation. *See Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007).

Rita made clear, and *Kimbrough* affirmed, that in making these individual assessments, sentencing courts are free to disagree with the guidelines’ recommended sentence in any particular case, and may impose a different sentence based on a contrary view of what is appropriate under § 3553(a). This includes the freedom to disagree with “policy decisions” of Congress or the Sentencing Commission that are contained in the guidelines. As the Supreme Court noted, “[a]s far as the law is concerned, the judge could disregard the Guidelines” *Rita*, 127 S. Ct. at 2466. This broad discretion exists because district courts have a co-equal role with the Sentencing Commission. The courts are not subordinate partners in sentencing. As the Supreme Court put it in *Rita*,

The upshot is that sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic 3553(a) objectives, the one, at retail, the other at wholesale.

Id. at 2463.

In *Kimbrough*, moreover, the Supreme Court effectively acknowledged that not all guidelines are equal. While some “exemplify the Commission’s exercise of its characteristic institutional role,” others do not. At issue in *Kimbrough* was the crack guideline, about which the Court said:

The crack Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines *do not* exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guideline ranges for crack offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of “empirical data and national experience.”

Kimbrough, 128 S.Ct. at 575. In the wake of *Rita*, *Gall*, and *Kimbrough*, courts around

the country are scrutinizing once-inscrutable guidelines, finding that a perhaps-surprising number of them are *not* the result of empirical research and national experience, and imposing sentences that accord with their evaluation of the § 3553(a) factors overall. *See, e.g., United States v. Moreland*, 568 F.Supp.2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (over-emphasis on drug quantity, under-emphasis on minimal role); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008) (second-degree murder guideline); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa 2008) (child pornography); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008) (child pornography); *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. June 20, 2008) (child pornography); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008) (child pornography); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008) (child pornography); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008) (child pornography); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography). And appellate courts are affirming the authority of sentencing courts to conduct precisely this type of inquiry. *See, e.g., United States v. Vanvliet*, 542 F.3d 259, 271 (1st Cir. 2008) (*Kimbrough* permits disagreement with use-of-computer enhancement); *United States v. Liddell*, 2008 WL 4149750 at **5-6 (7th Cir. Sept. 10, 2008) (career offender); *United States v. Jones*, 531 F.3d 163, 172-73 (2d Cir. 2008) (*Kimbrough* analysis applicable to all guidelines); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221, 226-30 (1st Cir. 2008) (fast track); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender).

A. Consideration Of The Guidelines As Merely One Factor Within The Overall Statutory Inquiry Properly Acknowledges The Limitations Of, And The Compromises Inherent In, The Guidelines.

Considering the guidelines range as merely one factor within the overall sentencing framework is not only required under the post-*Booker* regime, but is also appropriate in light of the limitations of the guidelines and the compromises made to formulate them in the first place. Those limitations and compromises were forthrightly

acknowledged at the outset of the guidelines era. While the Sentencing Commission has made some effort to reflect the objectives of § 3553(a) in the guidelines, *Rita*, 127 S. Ct. at 2463, the Sentencing Commission itself acknowledged the difficulty of devising a guidelines system that captured and accounted for “the vast range of human conduct potentially relevant to a sentencing decision,” USSG § 1A1.1, editorial note, ch. 1, pt. A(4)(b). In the introduction to the first Guidelines Manual in 1987, the Commission acknowledged it was unable to reach consensus regarding how to take the purposes of sentencing into account in crafting the guidelines. *See id.* at pt. A(3). As an example, the Commission cited the difficulty of reconciling just two of the purposes, namely, “just deserts” and “crime control.” *Id.* As a result, the Commission abandoned the purposes of sentencing as the basis of the guidelines, building a system based instead on “typical past practice, determined by an analysis of 10,000 actual cases.” Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988) (footnote omitted). Justice Breyer, a member of the original Sentencing Commission, has urged understanding this and other key compromises and the reasons for them because they “underlie” the guidelines. *See* Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 Crim. Just. 28, 29-30 (Spring 1999) (hereinafter *Guidelines Revisited*).

1. Even The Initial Decision To Base The Guidelines On Past Practice Reflected Significant Compromises.

First among the compromises that Justice Breyer discussed was the length of sentence. *See id.* at 30. He described in detail the process by which the Sentencing Commission formulated what is, at least for defendants, indisputably the most important aspect of the guidelines: “How long a prison term should attach to each guideline category?” The philosophical differences among the members of the Commission led eventually to a compromise, “the decision to base guideline punishments on typical past practice.” Justice Breyer explained this process:

We found typical past practice by asking probation officers to analyze more than 10,000 cases. These analyses, along with data from 100,000 other cases, were entered into the commission’s computers and used to determine what factors typically accounted for more or less time actually served. We then used this data to create a rough draft of categories and

subcategories, and to assign prison time to each. We adjusted the rough draft to avoid unfair anomalies, for example, increasing certain white-collar sentences when necessary to avoid disparity between “white collar” and “blue collar” crime.

Id. at 30.

As this description makes abundantly clear, the length of sentence was itself a product of compromise, rather than the result of careful consideration of the statutory purposes of sentencing. Instead, the length of sentence was determined by reviewing the past practices of judges (acting, it must be noted, with the discretion accorded them in the pre-guidelines era), crunching numbers and data, making some adjustments, and producing what Justice Breyer called a “starting point.” *Id.*

From this starting point, Justice Breyer explained, “judges would remain free to depart.” *Id.* The Commission contemplated the courts explaining their reasons for departing and the Commission’s learning from those explanations and adjusting the guidelines in response. *See id.* With appellate review as a key component of the statutory structure, Justice Breyer anticipated the development of a “common law” of sentencing. *Id.* at 29. *See also United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992) (“The Commission was charged not only with developing an initial set of guidelines, 28 U.S.C. § 991(b)(1), but also with monitoring and evaluating them on an ongoing basis, 28 U.S.C. § 991(b)(2). It must review the guidelines periodically, 28 U.S.C. § 994(p). Judicial commentary, whether in the form of opinions or views expressed at judicial workshops and conferences, is a primary means for the Commission to obtain feedback and to learn of flaws in the operation of the Guidelines.”).

2. The Sentencing Guidelines Failed to Develop as Contemplated.

While the Commission appreciated the shortcomings of the guidelines, it clearly believed, at least at the outset, that the system’s faults would be ameliorated over time as it digested and adapted to feedback. The Commission saw its original product as the first step in an “evolutionary” process. USSC *Guidelines Manual*, Ch. 1, pt. A(2). The guidelines were to be refined along two fronts by: (1) incorporating the findings of the Commission’s “continuing research, experience, and analysis,” *id.*; and (2) developing a

sentencing “common law,” whereby judges would “remain free to depart from the guidelines’ categorical sentences,” transmitting their reasons for doing so to the Commission, which would then revise the guidelines to incorporate the common practices of the judiciary, *Guidelines Revisited*, 14 Crim. Just. at 29-30; *see also Booker*, 543 U.S. at 263. This vision never materialized. As one commentator noted, “the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant.” Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 321 (2006).

Rather than adapting and becoming more flexible, the guidelines became increasingly rigid and unjustifiably exalted over the years and, at the same time, were amended to be increasingly severe. For example, instead of giving judges greater flexibility to take into account mitigating factors, even where research and feedback indicated that flexibility was needed, the Commission often reacted by curtailing, or eliminating altogether, sentence reductions based on mitigating factors. Overall, the amendment process has been notable for its relentless addition of factors that serve to increase offense levels and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants. The guidelines have now been amended more than 720 times, *see USSC Guidelines Manual App. C* (2008), but only a handful of these changes have operated to decrease the length of sentences, *see Amy Baron-Evans, The Continuing Struggle for Just, Effective, and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply with 3553(a)*, 30 Champion 32 at n.39 (Sept./Oct. 2006). The cumulative effect of the remaining changes has been a “one-way upward ratchet” in sentencing. Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (May 2005).

Thus, despite the originally envisioned process of adaptation and evolution, the guidelines ranges came to represent not just the starting point but nearly the entire universe of possibilities, and departures became not just unusual but actively and

ever-increasingly discouraged, not only by the government, but by Congress, the Sentencing Commission and appellate courts. Moreover, to the extent the guidelines did “evolve,” the evolution tended toward increasingly severe sentences and was often influenced more by congressional directives than independent research and evaluation by the Commission. As the next section will demonstrate, this is particularly true of the firearms guideline.

B. Section 2K2.1 Does Not Reflect The Commission’s Exercise Of Its Characteristic Institutional Role And Is, Therefore, Entitled To Little, If Any, Deference.

The firearms guideline is problematic in Mr. Doe’s case not only because it reflects the relentless march toward increasing severity, but because the upward ratchet does *not* reflect an exercise of the Commission’s unique role and expertise. To the contrary, the guideline is flawed in five discrete ways that bear directly on its usefulness as a guide to the minimally sufficient sentence in this case. First, it reflects amendments made in direct contravention of the Sentencing Commission’s research regarding the correlation between sentences imposed and certain types of prior convictions. Second, it reflects the Commission’s restructuring of the guideline to meet mandatory minimum penalties enacted by Congress for an entirely different statute, the Armed Career Criminal Act (“the ACCA”), rather than to satisfy the purposes of sentencing for § 922(g) offenses. Third, it reflects the incorporation of overly broad and otherwise problematic definitions from the career offender provision. Fourth, the history of the obliterated-serial-number enhancement typifies the relentless addition of enhancements absent any indication of how they serve the overall purposes of sentencing. And, fifth, data collected by the Commission compellingly indicate a widespread judicial view that the dramatically increased ranges are greater than necessary to serve the purposes of sentencing. These issues will be addressed in turn.

1. § 2K2.1 was amended dramatically in 1991 in direct contravention of Commission research regarding the lack of correlation between sentences imposed and the nature of prior convictions.

The original version of § 2K2.1 set a base offense level of 9 and included a one-level enhancement if the serial number was obliterated. *See USSC Guidelines Manual*, §

2K2.1 (Oct. 1987). Under this version, Mr. Doe's range, even assuming the applicability of the enhancement, with the two-level downward adjustment then applicable for acceptance of responsibility and a criminal history category of VI, would have been 18 to 24 months. This initial version was soon amended, however, to increase the relevant base offense level to 12 and the obliterated- serial-number enhancement to 2. *See USSC Guidelines Manual*, § 2K2.1(a)(2) (Nov. 1989). Under this version, Mr. Doe's range would have been 30 to 37 months.

The Sentencing Commission requested the Firearms and Explosive Materials Working Group ("the working group") to review the firearms guidelines and propose amendments. In December, 1990, the working group issued its report. *See USSC Firearms and Explosive Materials Working Group Report* (Dec. 11, 1990) ("*Firearms Report*"). The working group reviewed a range of data, including, *inter alia*, pre-guidelines sentencing practice and sentencing practice under the 1987 and 1989 versions of the firearms guidelines. It concluded that the ranges produced by the guidelines as they existed were unacceptably low. *See id.* at 8-11. It based this finding on the relatively high proportion of sentences imposed at or above the high end of the ranges and the relatively high upward departure rate. *See id.* Specifically, it found an upward departure rate of 8.4% in firearms cases, compared with an overall guideline average of 3.5%. *Id.* at 8. It also found that 34% of cases sentenced under § 2K2.1(a)(2) were sentenced at or above the upper end of the range. *Id.* at 10. These figures suggested to the working group "a general insufficiency of these guidelines." *Id.* at 10.

The working group also sought to discern which offense characteristics correlated with the higher average sentences or those at the upper end of the range. *See id.* at 9-10; *see also id.*, Tab D at 7-14 (Review of Case File Summaries for Firearms Guideline § 2K2.1 (1989)). The review determined that these characteristics included "actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection purposes, drug-related conduct, N.F.A. firearms, destructive devices." *Firearms Report* at 9-10 (footnotes omitted). Significantly, the existence of prior convictions for firearms offenses, drug-related offenses, or convictions for crimes of violence was *not* among this list. *See id.* Indeed, the working group very closely analyzed the evidence regarding courts' consideration of criminal history

categories in general and their consideration of these types of prior convictions in particular. In its review of 1989 firearms cases, it found that criminal history category “appears to be a significant factor in determining the offense level and length of sentence imposed.” *See id.*, Tab D at 8. *See also id.*, Tab E, Table Ia (adequacy of criminal history cited as basis for upward departures in 61.4% of the cases involving upward departures). Specifically, it found that defendants in criminal history categories V and VI had “extraordinarily high average sentences[.]” *Id.*, Tab D at 9. That “extraordinarily high average” sentence was 38 months. *See id.* On the other hand, the working group explicitly concluded that there was *no strong correlation* between the existence of the types of prior convictions listed (firearms offenses, drug-related offenses, or convictions for crimes of violence) and the length of sentence imposed. *See id.*, Tab D at 10. In fact, the sentences for defendants with these types of convictions were spread fairly even along the ranges. *See id.*, Tab 10 at 10 (36% sentenced to lower end, 20% to middle, and 28% to upper end of range; three upward departures justified by prior records). *See id.*, Tab D at 10. The average sentence for these defendants was *14 months*. *See id.*, Tab D at 10.

In summary, the working group concluded that some increase in the ranges was warranted, based in part on the relatively large proportion of sentences at the upper end and above the range. It also identified a number of specific offense characteristics that correlated with the higher-end sentences, and specifically concluded that the existence of the specified types of prior convictions was a characteristic that did *not* correlate. Then, in direct contravention of this evidence, the working group proposed a dramatically higher base offense level for § 2K2.1(a)(2) based on the existence of precisely these non-correlating prior convictions. Specifically, the base offense level was increased from 12 to 24 for those defendants who committed the instant offense after sustaining “at least two felony convictions of either a crime of violence or a controlled substance offense.” This dramatic increase, then, from 12 to 24, was utterly disconnected from the evidence analyzed, and the conclusions drawn, by the working group. This disconnect alone undercuts the reliability of the base offense level as a guide to the appropriate sentence.

2. The 1991 amendment was structured around mandatory

minimum penalties applicable to the Armed Career Criminal Act, rather than to meet the overall purposes of sentencing.

Further undercutting the reliability of the guideline is the working group's rationale for the proposed amendment of the base offense level. That rationale was to ensure that the ranges produced by the guideline were more proportionate in relation not to the purposes of sentencing overall but to the sentences triggered by the Armed Career Criminal Act ("ACCA"). *Firearms Report* at 19-23. The working group was explicit about this aim:

The proposed guideline would ensure that felons with a demonstrated propensity for engaging in violent or particularly harmful offenses are punished more severely. *Congress has established this objective* by increasing the relative statutory maximum penalties to be applied not only to prohibited persons, e.g. felons convicted under 922(g)(1) (ten-year statutory maximum), but also to felons with violent and drug-related prior convictions, see 18 U.S.C. 924(e) (mandatory minimum of fifteen years for person convicted of 18 U.S.C. § (22)(g) who has three previous convictions for violent felonies or serious drug offenses).

Id. at 19-20 (emphasis added; footnotes omitted). Thus, the Sentencing Commission's eventual adoption of the increased base offense level was not designed to establish ranges for § 922(g) offenders that were "sufficient, but not greater than necessary" to achieve the purposes of sentencing identified in 18 U.S.C. § 3553(a)(2). Rather, the amendment was designed instead to achieve consistency with a statute used primarily to prosecute individuals with a persistent history of repeated violent conduct.

This is a far cry from the evolutionary process that was envisioned at the outset of The guidelines era. Rather than basing the guideline on past practice, with adjustments based on independent analysis, feedback from judges and practitioners, and congressional input, the Commission acted, in the words of Justice Scalia, like a "junior-varsity Congress." *See Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). This is not only an abdication of its intended role, but a violation of its broad mandate to develop guidelines that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)," by, *inter alia*, considering past practices and consulting with various parties in the criminal justice system. *See* 28 U.S.C. § 994(b)(1)(A), 994(m),

994(o).

This approach of using a congressionally established minimum as a benchmark, declining to independently analyze the reasonableness or efficacy of that benchmark, and then setting guidelines ranges in relation to that benchmark, has obvious parallels to the Commission's design of the drug guidelines. Congress tied mandatory minimum penalties for certain drug offenses to drug quantity. Instead of fulfilling its statutorily-mandated mission of serving as an independent, expert agency, and in the absence of any congressional directive, the Commission simply accepted and extended this weight-driven approach. *See Kimbrough*, 128 S. Ct. at 567. While the *Kimbrough* Court's overarching concern was the crack cocaine guideline, its observation about the lack of empirical basis pertained equally to the weight-driven structure of *all* of the drug guidelines. *See id.* ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme."). The Commission followed a strikingly similar path in amending the firearms guideline in 1991 by using the mandatory minimum penalties set by the ACCA to establish ranges for offenses and offenders not subject to the ACCA. This approach further undercuts the reliability of the firearms guidelines as a guide to the statutorily mandated minimally sufficient sentence.

3. § 2K2.1 incorporated the overbroad and otherwise problematic definitions of qualifying prior convictions from the career offender provision.

A third factor undercutting the reliability of § 2K2.1 as a guide to the minimally sufficient sentence is the fact that the Commission incorporated the definitions of qualifying prior convictions that apply to the career offender provision. *See USSC Guidelines Manual* § 2K2,1, cmt. n. 1 (incorporating definitions of "controlled substance offense" and "crime of violence" contained in career offender provision, § 4B1.2(a) & (b)). These definitions have been criticized by courts and the Commission itself as, *inter alia*, overbroad and poor measurements of the risk of recidivism or the need for deterrence. In *United States v. Parson*, 955 F.2d 858, 863-66 (3d Cir. 1992), for example, the Third Circuit painstakingly reviewed the history of the "crime of violence" definition in the career offender provision, from the original incorporation by reference

of the relatively narrow definition contained in 18 U.S.C. § 16 to the expansion of the definition to include offenses that did not involve the intentional use of force. *See Parson*, 955 F.2d at 863-66. Under the mandatory guidelines system, however, once the Court determined that the Commission was authorized to broaden the definition, *see id.* at 866-67, and then determined that the prior conviction at issue met this broader definition, *see id.* at 872-73, it was required to affirm the district court's application of it in sentencing the defendant, *see id.* at 873. Noting the "evolutionary nature of the sentencing guidelines scheme" and the Commission's responsibility to "monitor[] and evaluat[e] them on an ongoing basis," the *Parson* Court urged the Commission to "reconsider its career offender Guidelines to the extent that they cover such 'pure recklessness' crimes." *Id.* at 874.

On December 21, 1993, the Commission published a proposed amendment to the commentary of § 4B1.2 in which it acknowledged that the *Parson* court had "pointed out" what it apparently did not intend, *i.e.*, that the commentary "calls for a considerably broader reading of the definition of crime of violence than is set forth in § 924(e)(2)(B), when this statute is read in conjunction with its legislative history" and "the principle of *ejusdem generis*." *See* 58 Fed. Reg. 67,522, 67,533 (Dec. 21, 1993). The Commission recognized that "crimes not traditionally considered crimes of violence," such as "driving while intoxicated or recklessly endangering a child by leaving it alone might qualify as a crime of violence under § 4B1.2, but would not qualify as a crime of violence under § 924(e)." *Id.* The amendment would have required that an unlisted offense be both similar in some respect to a listed offense and pose a serious potential risk of injury to another. *Id.*

With no explanation, the Commission failed to promulgate the amendment. The Commission has not responded to repeated requests to reexamine its position, contrary to its duty under 28 U.S.C. § 994(o) to review and revise the guidelines. *See United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995) (sharing *Parson's* concerns and calling upon Commission to re-evaluate), *abrogated by Begay v. United States*, 128 S. Ct. 1581 (2008), as recognized by *United States v. Adams*, slip copy, 2008 WL 3889935 (7th Cir. Aug. 22, 2008) (not published); *United States v. McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996) (renewing request that Commission reexamine its position in

including purely reckless crimes as career offender predicates); *United States v. Stubler*, 2008 WL 821071 *2 (3d Cir. Mar. 23, 2008) (reluctantly following *Parson* in a case involving reckless endangerment; though *Parson* “questioned the wisdom of the possibly inadvertent adoption of a definition for ‘crime of violence’ that can include offenses that do not involve the intentional use of force . . . neither Congress nor the Sentencing Commission has seen fit to revise that definition”).

In the same set of proposed amendments on December 21, 1993, the Commission proposed to state in the commentary that “crime of violence” does not include any kind of burglary other than burglary of a dwelling. *See* 58 Fed. Reg. 67,522, 67,533 (Dec. 21, 1993). This would have correctly resolved a circuit split, in light of “the express listing of burglary of a dwelling in § 4B1.2.”¹ *Id.* Rather than stand by its choice to include only burglary of a dwelling and prevent further unwarranted disparity, the Commission did nothing and did not explain.

The definition of “controlled substance offenses” to trigger the career offender provisions (and, therefore, the enhanced offense level set forth in § 2K2.1(a)(2)) has also been criticized. In its fifteen-year review of the guidelines, the Commission noted that the use of drug trafficking offenses as career offender predicates contributed to racial disparity in sentencing, did not serve the goal of general or specific deterrence, and was not a good predictor of recidivism. *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving The Goals of Sentencing Reform* (“Fifteen Years”), at 133-34 (2004).

To summarize, the Sentencing Commission conditioned the dramatically higher base offense level on specific offense characteristics (*i.e.*, prior convictions for “controlled substance offenses” and “crimes of violence”) that (1) did *not* correlate with the sentences imposed, according to the Commission’s own research, and (2)

¹ The Commission cited *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1992) (includes burglary of a commercial structure), *United States v. Talbott*, 902 F.2d 1129 (4th Cir. 1990) (does not include burglary of a commercial structure), and *United States v. Smith*, 10 F.3d 724 (10th Cir. 1993) (does not include non-residential burglary). The First Circuit voted to hear a case *en banc* in order to determine whether it should reconsider its holding in *Fiore*. *See United States v. Giggey*, No. 07-2317, June 10, 2008 (argued Oct. 7, 2008).

incorporated overly broad definitions of the types of prior convictions that would trigger the higher offense level. And, despite repeated criticism from courts about the breadth of those definitions, and the Commission's own research about the unjust consequences resulting from these definitions, the Commission has yet to "revise" the definitions, in contravention of its statutory mandate. These circumstances also undermine the usefulness of § 2K2.1 as a gauge to the minimally sufficient sentence.

4. The obliterated-serial-number enhancement has quadrupled since the initial guidelines without any consideration of the overall purposes of sentencing.

A fourth factor indicating that § 2K2.1 does not reflect the Commission's exercise of its characteristic institutional role is the quadrupling of the obliterated-serial-number enhancement since the inception of the guidelines. As already noted, the first edition of the guidelines provided a one-level enhancement for this specific offense characteristic. This enhancement was doubled in short order, by an amendment effective November 1, 1989. The official reason for the amendment explained only that the enhancement was increased "to better reflect the seriousness of the offense." *See USSC Guidelines Manual*, App. C, amend. 189. It was doubled again in 2006, and the reason ultimately given was no more illuminating. When published for comment, the reason given was "the difficulty in tracing firearms with altered or obliterated serial numbers." 71 Fed.Reg. 4782-01, 4789 (Jan. 27, 2006). The final amendment, however, was published with an additional reason, "the increased market for these types of weapons," which was never published for comment or raised by any witness in a public document or hearing. 71 Fed.Reg. 28,063-01, 28,071 (May 15, 2006).

Responding to the published reason, the Federal Defenders provided information from a law enforcement website explaining that a simple laboratory procedure can restore serial numbers in most cases and anecdotal information that the number is recovered more often than not. *See Defenders' Written Testimony* at 16 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf. The Defenders and the Practitioners' Advisory Group also urged the Commission to add a *mens rea* requirement based on § 3553(a)(2)(A) (the need to achieve "just punishment" in light of the "seriousness of the offense") and § 3553(a)(6) (the need to "avoid unwarranted

disparities” created by treating dissimilar defendants the same). *Id.* at 17; PAG Written Testimony at 9-10 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

The Department of Justice expressed no direct opinion on a *mens rea* requirement but perhaps unwittingly supported such a requirement by arguing that the 4-level enhancement would “better reflect[] the culpability of this conduct” because the “intentional obliteration of a serial number can be intended only to make it more difficult” to trace the firearm. DOJ Written Testimony at 10 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

The Commission adopted a 4-level increase and declined to add a *mens rea* requirement. This enhancement is, therefore, a perfect example of what Judge Rendell called “criminaliz[ing] activity ‘on the cheap.’” *See United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2006) (Rendell, J., concurring). Possessing a firearm with an obliterated serial number is an independent criminal offense, pursuant to 18 U.S.C. § 922(k). In order to prove this offense, the government would have to establish beyond a reasonable doubt not only knowing possession of the firearm but also knowledge that the serial number had been obliterated. *See United States v. Haywood*, 363 F.3d 200, 206 (3d Cir. 2004). The guidelines, on the other hand, permit Mr. Doe’s offense level to be enhanced by four levels based on a showing by a mere preponderance of the evidence of the fact that the serial number was obliterated. Absent a more compelling explanation from the Commission that this dramatic increase in the enhancement was implemented through an exercise of its characteristic institutional role, this specific enhancement is entitled to little deference as a useful measure of the minimally sufficient sentence.

5. Data collected by the Commission compels the conclusion that courts consider the ranges produced by § 2K2.1 overly harsh.

Finally, a fifth factor undercutting the reliability of § 2K2.1(a)(2) as a guide to the minimally sufficient sentence is the trajectory of sentences for firearms offenses since the 1991 amendment. As a preliminary matter, it must be noted that while the sentences resulting from the early versions of the guidelines were disproportionately imposed at the high end of, or above, the ranges, the working group’s data demonstrated a

remarkable consistency in the average sentence length. Specifically, the *Firearms Report* noted that § 922 cases “not sentenced under the guidelines have received sentences ranging from 32 months to 62 months, with an approximate average annual total of 42 months,” *Firearms Report* at 7, while the 1989 data file showed an average sentence of 43 months, *id.* at 8.² This suggests general satisfaction with pre-guidelines *sentence length*; the dissatisfaction appears to have been with the *ranges* produced by the guideline, as reflected by the relatively large proportion of sentences at the high end or above the ranges. This, in turn, suggests that modest adjustments to the guidelines could have been made to ensure that sentence length was more evenly distributed throughout the range while maintaining average sentence length. Instead, the Sentencing Commission dramatically increased the base offense level (and, again, based on an offense characteristic its own review deemed not strongly correlated to sentence length) for § 2K2.1(a)(2). This dramatic change, not surprisingly, produced dramatic increases in sentence length. Specifically, the average sentence for firearms possession doubled between 1988 and 1995, independent of mandatory minimums. *See Fifteen Years*, at 67, 139.

This change served the stated aim of greater proportionality in relation to the sentences produced by the ACCA, but if departure rates for § 2K2.1 are any indication, it did not produce more “generally sufficient” ranges. From 1997 through 2002, the downward departure rate in § 2K2.1 cases equaled or topped 10%.³ Indeed, in the years prior to the PROTECT Act, the rate climbed fairly steadily, from approximately 10% in 1997, 1998 and 1999 to approximately 12% in 2000 and 2001, to more than 13% in the portion of fiscal year 2002 that occurred before the PROTECT Act. The rate dipped precipitously from 2003 through 2005, after the PROTECT Act, *see id.*, but has picked up again since *Booker*. In 2007, for example, more than 14.5% of § 2K2.1 sentences

² This average was for all 945 firearms cases reviewed in the 1989 data file. *Firearms Report* at 8. The average sentence for the 43 cases sentenced under the 1989 version of § 2K2.1(a)(2) was 14 months. *Firearms Report*, Tab D at 1-4.

³ The data discussed in this section are drawn from Table 28 of each fiscal year’s Sourcebook of Federal Sentencing Statistics and Table 4 of the Preliminary Post-*Kimbrough/Gall* Data Report, all available at ussc.gov. These tables show “Sentences Relative to the Guideline Range by Each Primary Offense Category.”

were below the range for reasons other than a government-sponsored motion. And the most recent data, compiled after *Gall* and *Kimbrough*, reveal a 17.3% non-government-sponsored below-range rate.

Significantly, the departure rates in the years leading to the PROTECT Act and non-government-sponsored below-range sentences since *Booker* are *higher* than the 8.4% departure rate that spurred the dramatic change in 1991. As already noted, the Commission interpreted the upward departure rate of 8.4% as evidence that the ranges were “generally insufficient.” *Firearms Report* at 10. The pre-PROTECT Act downward departure rate of 13% and the recent non-government-sponsored below-range rate of 17.3% must be read similarly, as even more powerful evidence of general insufficiency, but with the “insufficiency” being that the ranges are too harsh, rather than too lenient. In fact, these downward departure and below-range rates compel the conclusion that the amendment “overcorrected” the problem identified by the working group and, in the process, created precisely the opposite problem – exceedingly harsh ranges which courts, at ever-increasing rates, felt necessary to temper.

In summary, the Commission’s working group explicitly admitted that it tailored the amendment to bring sentences closer to those produced by ACCA, rather than in relation to the overall purposes of sentencing. It did so in part by increasing the base offense level based on a factor that its own research indicated was not particularly correlated with perceived dissatisfaction with the ranges. And, despite data indicating that a modest adjustment was all that was required, it implemented a dramatic increase that has contributed to significantly more severe sentences for firearms cases. In light of these circumstances, and in light of the candid admission made at the outset of the *Firearms Report* that the “fashioning of a comprehensive, yet workable, [firearms] guideline is handicapped from the start” by the “complexity and confusion bred by political compromise,” the result is not owed any deference as a reflection of the sentencing purposes as a whole.

C. Consideration Of The Factors Other Than The Guidelines Also Supports The Imposition Of A Sentence Below The Mechanically Calculated Range.

Whereas a few short years ago, the Court would have been bound by this poorly

fashioned, overly punitive guideline, *Booker, Rita, Gall, and Kimbrough* offer a new lease on life for both the retail, *i.e.*, the individualized, approach to sentencing, and for the sentencing common law initially envisioned by the Sentencing Commission, and this case presents a perfect opportunity for meaningfully implementing that approach. Meaningful consideration of the history of the guideline, as well as Mr. Doe's individual circumstances, is now possible and, indeed, necessary for determining the appropriate sentence. All of these circumstances, when considered in light of the purposes and goals of sentencing, compel the conclusion that a sentence below the advisory range is the minimally sufficient sentence in this case.

There is no point in disputing that Mr. Doe has made many poor decisions in his life, but there is also no dispute that he was handed few, if any, breaks. His childhood was, in his own words, "crazy" and "rough." His mother was addicted to heroin, forcing him to step in while still a child and help provide food for his family. Without any compassionate intervention or constructive guidance, he turned to crime to provide the help his family needed. His life since that time has been nothing short of chaotic and traumatic. His father died of complications from AIDS in 1996, one brother is in prison, and another brother was killed in a gang-related incident. Yet, despite this chaos, trauma and loss, nowhere in the record does it indicate that anyone anywhere ever stepped in to help this child, then teenager, then young man. The result, while not inevitable, is hardly surprising. Mr. Doe now stands before this Court with a criminal history record and an instant offense that ensure a long period of incarceration.

The question, of course, is how long that term should be. For all the reasons already discussed, Mr. Doe submits that the guidelines range is not a helpful guide to the minimally sufficient sentence. As demonstrated, the beginning offense level is based on a specific offense characteristic – the predicate prior convictions – that was not shown to be correlated with sentences imposed. Moreover, those priors are already taken into account in calculating Mr. Doe's criminal history category, a factor that *was* found to correlate with sentences imposed. While defendants in the higher criminal history categories tended to receive sentences at the higher end of the range, it must be noted that those ranges were dramatically lower than they are now. The average sentence for those in criminal history categories V and VI, while nearly twice as long as the average

for defendants in all criminal history categories combined, was *38 months*. *Firearms Report*, Tab D at 9. The firearms working group called that average “extraordinarily high.” *Id.* Where the Commission’s own research indicated that the criminal history category was correlated with the sentences imposed, and the existence of the specified types of prior convictions was not, the increased base offense level is not a good gauge of the minimally sufficient sentence.

Similarly, the obliterated-serial-number enhancement of 4 levels is not a good gauge for Mr. Doe’s case. As already discussed, the dramatic increase in the enhancement was enacted based on one rationale (the difficulty of tracing firearms with obliterated serial numbers) that is not well-founded and on one (the increased market for such firearms) that was not subject to public comment, and without a *mens rea* requirement. The enhancement is particularly inappropriate in Mr. Doe’s case because the serial number was restored.

The dramatic increases in the base offense level and the enhancement, and the resulting increase in average sentence length must be seen for what they are – measures that serve the punitive and incapacitative purposes of sentence at the expense of all others. This is an abdication, not a fulfillment, of the Commission’s broader mandate. District courts that impose sentences within the resulting ranges without consideration of the other, equally important purposes and factors of sentencing similarly abdicate their statutory mandate to determine the minimally sufficient sentence in light of *all* of the statutory purposes and factors of sentencing.

In Mr. Doe’s case, the purposes of rehabilitation, deterrence and protection of the public would all best be served by his developing marketable skills, building family and community support, obtaining counseling to deal with a tremendous history of loss and trauma, and developing better coping skills. Nothing about a prison sentence more than twice as long as it would have been at the outset of the guidelines era will serve those aims. To the contrary, helpful intervention once he is out would be far more tailored to those purposes. Mr. Doe is still a young man, and there is still real hope for him to reform his ways and become a law-abiding member of society. Mr. Doe is determined to set his life on the right track and will redouble his efforts upon release to become a law-abiding and productive member of society. He respectfully requests the Court’s

consideration of these factors in fashioning his sentence.

V. Conclusion

For all of the foregoing reasons, Mr. Doe respectfully requests a sentence below the mechanically calculated guideline range. He further requests the Court's recommendation to a facility in New Jersey and a waiver of the fine.