Honorable William H. Pryor, Jr.
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002

February 21, 2017

Dear Judge Pryor:

The National Association of Criminal Defense Lawyers (NACDL) welcomes the opportunity to submit comments on the Commission's Proposed Amendments to the Sentencing Guidelines, dated December 19, 2016 (the "Amendments").

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL adopts the Federal Defender's comments, and here offers additional comments regarding these topics:

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

NACDL supports the broadest possible definition of "first offender," to include all defendants in Criminal History Category ("CHC") I (those scored with up to one criminal history point). Commission data illustrates that separate treatment is appropriate for two distinct kinds of "first offender": "true" first offenders making their first serious contact

with the criminal justice system; plus a broader category of "technical" first offenders whose prior criminal justice contacts either did not result in conviction or are so minor, or temporally distant ("stale"), as to be insignificant for typical Guidelines purposes.[1]

NACDL recognizes that a technical first offender will, by definition, have had prior criminal justice contacts. The Commission has recognized how several different criminal history patterns can lead to a CHC I scoring, including both true first offenders and defendants with multiple, but old, prior convictions. "Thus, the treatment of minor offenses in the criminal history calculation can vary."[2]

But to be in CHC I with prior offenses is generally to have been imprisonment-free for a very long time, or to have committed among a few select misdemeanors within more recent years.[3] We recognize that "[e]ach additional criminal history point was generally associated with a greater likelihood of recidivism."[4] But some increase in recidivistic risk exists with *any* prior contacts with the criminal justice system, not just convictions.

The Commission's recidivism data supports a bifurcated definition of "first offender" that could include even one criminal history point. Those criminal history *points* better forecast re-offense risks than the broader Criminal History Category.[5] We recognize that

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[1] *See* U.S.S.C., "Recidivism and the First Offender," (Release 2, May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf* , last visited 2/20/2017]," at 3, FN 5, and at 5.

NACDL continues to support excluding from criminal history computations all prior convictions already proscribed by Chapter Four (*e.g.*, sentences resulting from foreign or tribal court convictions, misdemeanors, or petty offenses listed in §4A1.2(c)). Any definition of "first offender" should also ignore these kinds of prior convictions.

[2] *See* U.S.S.C., "Impact of Prior Minor Offenses on Eligibility for Safety Valve," (March 2009) at 5, 2-3 [online at *http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2009/20090316_Safety_Valve.pdf* , last visited 2/20/2017].

[3] *See* USSG § 4A1.2(c)(1).

[4] *See* "Impact of Prior Minor Offenses on Eligibility for Safety Valve," at 5.

[5] U.S.S.C., "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines – A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate" (hereafter, "Criminal History Computation") (Release 1,

offenders without a prior arrest re-offend just 6.8% of the time, while offenders with even one criminal history point re-offend 22.6% of the time.[6] But even offenders with arrests, but no prior convictions, have been measured with a 17.2% recidivism rate.[7] Anything more than no contact with the law is associated with an elevated chance of re-offense. But those risks still appear to be around one-in-five, significantly less than the recidivistic risks among higher CHC offenders.

Distinguishing the various subcategories of CHC I offenders seems not only impractical, but also a task properly addressed by analyzing and revising the CHC system itself. Meanwhile, the Commission has already spoken of leniency for inmates with fewer "culpability criteria" than others, including for defendants with one criminal history point.[8]

NACDL notes that the "Total Offense Level," which measures an instant offense's seriousness, is neither designed to measure nor correlated with recidivistic risks.[9] It would therefore be inappropriate to key any adjustments to offense level on a final instant offense level that has nothing to do with risks of re-offense.

Reductions to instant offense level would more accurately reflect diminished recidivistic risk if, instead, a 1-level downward adjustment were allowed to technical first offenders – including those with up to one criminal history point – while a 2-level downward adjustment would go to offenders with zero criminal history points (even those with prior convictions or, perhaps more at risk, with only prior arrests).

NACDL does not believe that excluding additional offenses from rebuttable presumptions against imprisonment would serve sentencing's purposes. Many to most opportunities for public corruption, tax offenses, and white-collar crimes cease after an

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May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf* , last visited 2/20/2017], at 7.

[6] *See* "Recidivism and the First Offender," at 13-14.

[7] *See* "Recidivism and the First Offender," at 14.

[8] *See* U.S.S.C., "Recidivism and the First Offender," at 9-10.

[9] *See* U.S.S.C., "Recidivism and Criminal History," at 13 ("There is no apparent relationship between the sentencing guideline final offense level and recidivism risk.").

initial prosecution. The offender loses the role or other circumstances that made such an offense possible. In this way, at least some purpose of sentencing (incapacitation and specific deterrence) is served before sentencing.

Imprisonment in these circumstances, just for the sake of meting out prison time, not only ignores the final goals of sentencing – promoting rehabilitation and a crime-free existence -- but also exceeds the punishment allowed under 18 U.S.C. § 3553(a) (the "Parsimony Provision").

2. TRIBAL ISSUES

NACDL supports the recommendation of the Tribal Issues Advisory Group (TIAG) that tribal convictions continue not to be counted under USSG §4A1.2, but rather should be addressed using a more structured analytical framework under USSG §4A1.3.

As TIAG elaborates in its 2016 report, the quality of tribal justice varies widely across the 351 tribal courts in terms of its due process protections (including, *e.g.*, provision of appointed counsel, independence of the judiciary, recognition of the presumption of innocence) and consistency in its application, outcomes and recordkeeping. As such, a process of mechanically assigning criminal history points to tribal convictions is fraught with practical and fairness concerns.

Departure authority, on the other hand, permits a more nuanced and flexible approach, cognizant of the disparities in tribal justice. We further support TIAG's recommendation that the proposed list of factors in the departure analysis be non-exhaustive with no one factor determinative.

3. YOUTHFUL OFFENDERS

NACDL applauds the Commission's recognition that juvenile adjudications should not count in determining an offender's criminal history or for any other purpose. However, NACDL believes that this Amendment needs to go farther, in particular by not counting *any offense* committed by someone prior to age 18, whether the person is convicted and sentenced as a juvenile or as an adult. The reasons for broadening the Amendment are the same reasons that support its adoption in the first place:

First, as previously recognized by the U.S. Supreme Court,[10] juveniles are immature and have a diminished capacity to recognize the potential consequences of their behavior and are more likely to engage in risky and impulsive behavior without mature consideration. More recently, an overwhelming body of literature has recognized that the pre-frontal cortex, the part of the brain responsible for reasoning, self-control, judgment, and decision-making, is not fully developed until the mid to late 20s,[11] providing a scientific basis for holding juvenile offenders less morally culpable for their conduct.

Second, state laws vary considerably in determining at what age a juvenile may be tried as an adult. In some states, juveniles over a certain age are *automatically* tried as adults, at least for certain offenses, with no preliminary determination of the child's capacity. Because of these differences in state law, use of convictions for juveniles sentenced as adults would result in unwarranted disparity, based solely on the circumstance of the state in which the juvenile happened to commit the crime.

To the extent that the Amendment allows consideration of convictions for juveniles sentenced as adults, NACDL supports the commentary that a downward departure may be warranted if such a conviction has been included in the criminal history. Nevertheless, such language would not be necessary if convictions for offenses occurring before age 18 were never counted. Nor should juvenile offenses be a basis for an upward departure, as this would undermine the very reasons for this Amendment in the first place.

4. CRIMINAL HISTORY ISSUES

We at NACDL have had the opportunity to review the Written Statement of Marjorie Meyers, Federal Public Defender for the Southern District of Texas, prepared on behalf of the Federal Public and Community Defenders. We join the Federal Defenders in their comments regarding the proposed amendments to Guideline Sections 4A1.2(k) and 4A1.3.

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[10] *Roper v. Simmons,* 543 U.S. 551 (2005).

[11] *E.g.,* Melissa Caulum, Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System, 2007 Wis. L. Rev. 729, 730 (2007); Antoinnette Clarke, Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy, 56 DePaul L. Rev. 927, 934 (2007).

With regard to the proposed amendment to §4A1.2(k) and its interaction with §2L1.2, we join the Federal Defenders in their suggested revisions to §2L1.2.

Proposed Amendments to USSG § 4A1.2(k)

NACDL supports the proposed amendment to USSG § 4A1.2(k). Specifically, NACDL supports the removal of revocation sentences from consideration in determining one's criminal history score as provided in the proposed amendment. As discussed in the Defenders' Comments, the current rule of counting revocation sentences "can have a devastating and unjust impact on defendants in a number of different ways, including (a) deeming defendants 'career offenders' on the basis of old convictions that would not have otherwise counted; (b) rendering defendants ineligible for safety valve relief; and (c) elevating the criminal history category based on very old convictions."[12]

By amending §4A1.2(k) to exclude revocation sentences, the Commission will address the unwarranted increase in criminal history computation that results when revocation sentences based on technical violations (*e.g.,* failure to report a law enforcement contactor failure to attend a probation meeting) result in additional criminal history points. As noted in the Defenders' Comments, in many jurisdictions more than half of revocations are for technical violations.[13] The increase of one's criminal history points, and possibly one's criminal history category determination, in these instances is not supported by the policy underlying use of criminal history to increase the advisory sentencing guideline range.[14]

NACDL agrees that revocation sentences are more appropriately considered in the scope of a §4A1.3 upward departure. Such consideration would allow for the appropriate individualized assessment of the defendant and the defendant's history at sentencing. Indeed, consideration of revocation sentences would appear to fall directly within the types of information that may form the basis for upward departure as set forth in

[12] *See* Comments from Federal Defender Sentencing Guidelines Committee on Proposed Amendment 4 (hereinafter "Defenders' Comments"), p. 38.

[13] *See* Defenders' Comments, p. 39, fn. 189.

[14] *See* USSG Ch. 4, Pt. A, Introductory Commentary.

§4A1.3(a)(2)(A)-(E). A reference to consideration of revocation sentences could easily be added as an addendum to subsection (A): "Prior sentence(s) not used in computing the criminal history category (*e.g.* revocations or sentences for foreign and tribal offenses."

NACDL agrees with the Defenders that the Commission should provide additional guidance about how courts may consider revocation sentences under USSG §4A1.3, to help narrow the consideration to revocations for serious violations that are not otherwise accounted for under the criminal history rules. As noted in the Defenders' Comments, the grading system in Chapter 7 could be incorporated to provide such guidance.[15]

If the Commission amends USSG §4A1.2(k) as proposed, NACDL would support a simultaneous revision of the definition of "sentence imposed" at §2L1.2 to avoid any confusion or disparate impact. As the Defenders suggested, revising the § 2L1.2 definition of "sentence imposed" should simply remove the last sentence of the current definition. This would avoid the confusion created when different definitions of the same term exist in different guidelines (*e.g., "crime of violence"* in USSG § 4B1.2 as opposed to *"crime of violence*" in USSG § 2L1.2 (n.2)).

Proposed Amendment to USSG § 4A1.3

NACDL supports the proposal to include an explicit statement that a downward departure under USSG §4A1.3 may be warranted in a case where the period of imprisonment actually served is substantially less than the length of the sentence imposed. NACDL agrees that the Defenders' proposed revision better clarifies that the specified examples are demonstrative, and not a specifically enumerated list limiting the departure's availability.

NACDL does not agree that the Commission should exclude from consideration cases where time actually served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant's case (*e.g.,* over-crowding). This exclusion could hamper a court's ability to consider this factor where, either based on the passage of time or the unfamiliarity with the locale in which the sentence was served, the information may be difficult to ascertain or

[15] *See* Defenders' Comments, p. 41.

may be unreliable. Moreover, it may inadvertently lead to prohibiting this factor from deserving candidates. For example, a defendant whose actual time served was reduced for *good conduct* might be deemed ineligible if the sentence originated in a jurisdiction known for early releases based on overcrowding.

5. ACCEPTANCE OF RESPONSIBILITY

NACDL urges the Commission to clarify that good faith challenges about relevant conduct shall not, by themselves, deprive defendants of §3E1.1's "Acceptance of Responsibility" downward adjustment. Specific conduct and offenses are admitted by the defendant in an ordinary plea agreement and guilty plea. The factual basis underlying that guilty plea is too often the *starting* point of allegations against the defendant, while the Presentence Investigation Report (PSR) can allege substantially larger volumes to drive substantially longer sentences (e.g., where total dollar loss or drug weight drives the Guidelines range). .

But those PSRs sometimes add to a plea agreement's factual basis, particularly where a cumulative value such as money loss or drug weight drives the calculation (even if on an advisory basis). . Basic fairness and the Due Process clause demand that defendants be allowed a good faith factual challenge of conduct not already admitted. .

Good faith fact challenges allow defendants the essential right to challenge incorrect memories, incomplete or faulty reporting, and even in some cases outright fabrication by, among others, other defendants hoping for "substantial assistance" relief. . Our adversarial system demands the ability to make good faith challenges to misinformation. .

This is not to say that perjury or other obstruction should not be penalized, including through the two-level enhancement available at §3C1.1. . But where a sentencing calculation is based upon facts not already admitted by a defendant, defendants have a right to be heard even as they continue to accept responsibility for their admitted misconduct. .

Allowing defendants to make good faith legal challenges will help develop sentencing law, which even today is too often driven by the Government's appellate wishes, while defendants are forced to waive appeal and collateral challenge rights to get any

resolution by plea. . Expressly prohibiting penalties for good faith legal arguments is not only, again, essential for operating our adversarial system -- it also ensures that defense counsel can meet its ethical obligations not just as a defendant's lawyer, but also an officer of the court.

Sincerely Yours,

NACDL Sentencing Committee