
PUBLIC COMMENT

2007 AMENDMENT CYCLE



March 30, 2007



U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

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The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2007. We thank the Commissioners and Commission staff for addressing these important issues in addition to the valuable work the Commission has already done in providing updated information on cases decided since the Supreme Court's decision in United States v. Booker as well the eleventh edition of the United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* containing all of the data for fiscal year 2006. We look forward to continuing to work with the Commission on these issues to ensure a fair sentencing guidelines system that serves justice and the American people.

1. Transportation

Issue for Comment 1 - USSG § 2Q1.2 (49 U.S.C. § 5124): 49 U.S.C. § 5124 (Transportation of Hazardous Material) was amended to provide a new aggravated felony with a 10-year statutory maximum term of imprisonment for cases involving a release of a hazardous material that results in death or bodily injury. The Department recommends adding specific offense characteristics to the applicable guideline, USSG § 2Q1.2, to enhance the penalty for violations of 49 U.S.C. § 5124 in which death or injury results. USSG § 2Q1.2 already provides an enhancement of 9 levels if there was a substantial likelihood that death or serious bodily injury would result from the offense. Although Application Note 6 states that an upward departure would be warranted in any case in which death or serious bodily injury results, it would be logical to provide a greater offense level when death or serious bodily injury actually results if a substantial likelihood of the same is already a specific offense characteristic. Such a structure would be consistent with other guidelines for crimes presenting risks of death or serious bodily injury. *See, e.g.,* USSG § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) (including specific offense characteristics for substantial risk of death or serious bodily injury; for actual

bodily injury; for death; and using a cross-reference to murder guideline); § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) (including specific offense characteristic for injury; using cross-reference for murder); *but see* § 2K1.4 (Arson; Property Damage by Use of Explosives) (relying on Chapter Five, Part K departure in case of bodily injury and on cross-reference for death). Such an enhancement could be in intervals proportional to the enhancements at USSG § 2L1.1 for death or serious bodily injury.

The Commission has also proposed the option of increasing the already-existing two-level enhancement that applies under USSG § 2Q1.2 for violations of 49 U.S.C. § 5124. Such an across-the-board enhancement for 49 U.S.C. § 5124 sentences, however, would not address a need for greater sentences in the case of actual injury or death. The Commission also proposes providing a minimum offense level for 49 U.S.C. § 5124 offenses resulting in death or serious bodily injury. The Department has no objection to appropriate minimum offense levels for offenses resulting in death or serious bodily injury.

Issue for Comment 2 - USSG § 2B2.3 (18 U.S.C. § 1036): 18 U.S.C. § 1036 (Entry by False Pretenses to Any Real Property, Vessel, or Aircraft of the United States or Secure Area of Any Airport) was amended to add seaports to the list of covered locations and to increase the statutory maximum term of imprisonment from 5 years to 10 years. The statute is referenced to USSG § 2B2.3 (Trespass), which provides a cross-reference in subsection (c) if the offense was committed with the intent to commit a felony offense. The Department recommends keeping the guideline as it is, rather than adding a specific offense characteristic with a fixed increase for all 18 U.S.C. § 1036 crimes committed with the intent to commit another felony. Cross-referencing the relevant underlying felony allows the sentence to be correlated to the gravity of potential underlying crimes, ranging from a relatively minor theft of goods to a bombing of a port. A general specific offense characteristic would not achieve the same proportionality with the seriousness of the intended offense.

Issue for Comment 3 - USSG § 2C1.1 (18 U.S.C. § 226): The Commission has proposed referring the new statute against bribery affecting port security, 18 U.S.C. § 226, to USSG § 2C1.1, which addresses, among other things, bribery. The Department agrees with that reference because Section 2C1.1 most closely addresses the statute's conduct. The guideline provides a cross-reference if the offense was committed for the purpose of facilitating the commission of another criminal offense, *see* USSG § 2C1.1(c)(1). The Commission proposes, as an alternative to that cross-reference, a specific offense characteristic for bribery cases involving an intent to commit an act of domestic or international terrorism; the specific offense characteristic would result in an offense level similar to that used for material support (USSG § 2M5.3, which has a base offense level of 26). In the Department's view, the cross-reference is the better option because it offers the advantage of providing a penalty correlated to the gravity of the plotted offense. The cross-reference to the underlying offense would also allow an adequate sentence for some cases that endanger security without necessarily meeting a terrorism intent definition. However, the Department would not object to adding to the guideline a material-support-like specific offense characteristic, in addition to (rather than in place of) the cross-reference to the

underlying criminal offense. Alternatively, a cross-reference to USSG § 2M5.3 would achieve the same result as incorporating a new specific offense characteristic into USSG § 2C1.1, and the Department would not object to a cross-reference to USSG § 2M5.3 if it is in addition to the cross-reference already existing at USSG § 2C1.1(c)(1). The Department does not support the proposal by the Practitioners Advisory Group to state that §3A1.4 would not apply if there were an enhancement added at USSG § 2C1.1. If the sentence increases were not to apply together, it is USSG § 3A1.4 that should apply. *See* USSG § 2J1.2, comment. n.2(B) (applying USSG § 3A1.4 adjustment but not specific offense characteristic relating to terrorism).

Issue for Comment 4 - USSG § 2A5.2: The Department favors in USSG § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) using the term “mass transportation” instead of “public transportation.” “Mass transportation” is the term used in 18 U.S.C. § 1992, which is referenced to USSG § 2A5.2, and the term is defined in that statute to include school bus, charter, and sightseeing transportation and passenger vessels. “Public transportation” excludes school bus, charter bus, intercity bus, and intercity passenger rail transportation. The guideline would be most useful if it correlated to the crimes defined in the statute. Differing coverage between the statute and the guideline could lead to confusion at sentencing.

2. Sex Offenses

Proposed § 2A3.5 (18 U.S.C. § 2250): We believe it is appropriate to amend the specific offense characteristic for an offense against a minor to track the Congressional directive, which is not limited to sex offenses against a minor. Accordingly, “committed a sex offense against a minor” should be changed to, “committed an offense against a minor”.

Additionally, this guideline should reflect the ten year maximum penalty for this offense by providing a guideline sentence that would encompass ten years’ imprisonment for an aggravated offense. For example, assuming an offender was in criminal history category III, was required to register for a Tier III offense, and committed an offense against a minor while not registered, that offender should face a guideline range encompassing 120 months before acceptance of responsibility. We believe this can be accomplished by increasing the specific offense characteristic for a defendant, who was required to be registered for a Tier III offense and committed an offense against a minor, to 12 levels which would mean a total offense level of 28, with a range of 97-121 months.

Moreover, we recommend that the specific offense characteristic for an offender who committed a sex offense while not registered should be 8 levels, not 6. If this change were made, a criminal history category III offender whose registration was for a Tier III offense and who committed a sex offense while not registered would be at level 24 before acceptance, with a range of 63-78 months.

In proposed § 2A3.5(b)(1), we recommend that the Commission adopt Option 1, applying the enhancements in cases where the defendant committed the specified offenses while unregistered, because that language tracks the Congressional directive at Section 141(b) of the Walsh Act. That directive states that the Commission “shall consider whether the person committed [a specified offense] in connection with, or during, the period for which the person failed to register.” See Section 141(b)(1) and (2) of the Walsh Act. In contrast, Option 2, which would apply the enhancements only in cases where the defendant was convicted of the specified offenses, would be inconsistent with that directive. Simply put, Option 2 would unnecessarily limit the enhancement to cases where the offender had been convicted of a specified offense while unregistered, whereas Congress indicated the real issue for application of the enhancement should be whether the offender committed a specified offense while unregistered.

The most recent proposal has two options for addressing an offender’s voluntary attempt to correct a failure to register, in response to the Congressional directive in Section 141(b)(3) of the Walsh Act. In considering these options, the Commission should first recognize the affirmative defense at 18 U.S.C. § 2250(b), which in our opinion would prevent the vast majority of cases where offenders voluntarily attempted to comply with registration requirements from ever reaching the sentencing phase. The Commission should also recognize that the underlying purpose of this legislation is to provide an incentive for sex offenders to register as required by establishing a meaningful consequence for their failure to do so. Finally, it should also be noted that whether an offender voluntarily attempted to correct a failure to register offense is an issue only in cases where the offender knowingly committed that offense. Accordingly, as a completed offense has already occurred, arguably the base offense level would be an appropriate range for a case where, having committed the offense, the offender later attempts to correct his failure to register.

That said, of the two options under consideration we recommend Option 1 with a two level decrease. Option 2, which would allow for a downward departure, is not limited to cases where the offender does not commit a specified offense while unregistered. Accordingly, it would potentially provide a windfall reduction to offenders who commit specified offenses while unregistered, precisely those who least merit a sentence reduction. In contrast, Option 1 rightly would deny this reduction to offenders who committed specified offenses while unregistered.

Under our recommendation, an aggravated offender, such as one whose registration was for a Tier III offense and who committed an offense against a minor while unregistered, would face a guidelines sentence encompassing the maximum statutory penalty, assuming criminal history category III. At the other extreme, a criminal history category III offender whose registration was for a Tier I offense, who did not commit a qualifying offense while unregistered, and who voluntarily attempted to correct his failure to register would be at level 10 (10-16 months) before acceptance. In the middle, still assuming the offender is in criminal history category III, an offender who did not commit a qualifying offense while unregistered and whose registration was for a Tier II offense would be at level 14 before acceptance, or 21-27 months. We believe our suggestion appropriately creates a sentencing scheme where aggravated offenders will

face sentences encompassing the statutory maximum while also taking into account the relative severity of different types of violations and the mitigating factor of an offender's voluntarily attempting to correct the failure to register before being informed of the violation by law enforcement.

Proposed § 2A3.6 (18 U.S.C. §§ 2250(c) and 2260A): As drafted, the current proposal would simply state that the guideline sentence is that required by statute for violations of 18 U.S.C. § 2260A, and that the guideline sentence is the minimum term required by statute for violations of 18 U.S.C. § 2250(c). This is an appropriate guideline for § 2260A, as the sentence for that offense is set at 10 years in addition and consecutive to the penalty for the underlying offense. However, it is not appropriate for § 2250(c), because the statutory sentence has such a broad range – between 5 and 30 years in addition and consecutive to the underlying § 2250(a) offense. Simply put, the current proposal ignores Congress's decision to set a minimum and maximum term for a § 2250(c) offense.

In order to account for the significantly dissimilar penalties under the two statutes, we recommend that this proposed guideline be revised to read as follows:

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

- (a) If the defendant was convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) If the defendant was convicted under 18 U.S.C. § 2250(c):
 - (1) Base Offense Level: 25
 - (2) Specific Offense Characteristics:
 - (i) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.
 - (ii) If the offender committed a crime of violence against a minor while not registered, increase by 6 levels; if the minor sustained bodily injury as a result, increase by 9 levels; if the minor sustained serious bodily injury as a result, increase by 12 levels.
 - (iii) If the offender committed a sex offense against someone other than a minor while not registered, increase by 10 levels.

- (iv) If the offender committed a sex offense against a minor while not registered, increase by 12 levels.

This recommendation would preserve the current formulation for § 2260A offenses and would create a framework for § 2250(c) offenses with a base offense level of 25, the first offense level exceeding the mandatory minimum for category II, and with specific offense characteristics that would provide for up to level 41, encompassing 30 years for these offenders, in aggravated cases. In order to have appropriate gradations accounting for injuries to minors in cases where the offender committed a crime of violence against a minor while unregistered, we have considered the enhancements at § 2A2.2(b)(3) in developing this proposal and have incorporated similar enhancements here. While the specific offense characteristics would be similar to those under § 2A3.5, we believe that any possible double-counting concerns should be minimized by the fact that Congress specified that the penalty for a § 2250(c) offense is in addition and consecutive to the underlying penalty for the § 2250(a) offense.

We note that the Federal Public Defenders, at pages 11-12 of their letter to the Commission, argue that it is appropriate to have a guideline providing that the guideline range is the minimum period required by statute by citing §§ 2B1.6 and 2K2.4. However, in contrast to the statutes at issue in those guidelines (18 U.S.C. §§ 1028A, 844(h), 924(c), and 929(a)), which with one exception (§ 929(a)), provide for specific terms of imprisonment depending on the applicable facts, § 2250(c) provides a range of between 5 and 30 years' imprisonment. In our view, the Commission should not ignore that broad range and should instead fashion a guideline that would appropriately provide for sentences other than the mandatory minimum term.

Amendment to § 2A3.3: We recommend that the base offense level for this offense be increased to 20, which would recognize the fact that the maximum penalty for this offense has been increased from 5 to 15 years.

Amendment to § 2A3.4: We support the change to § 2A3.4(b)(1) raising the floor offense level for sexual contact offenses against children under 12 from level 20 to level 22.

Amendment to § 2G1.1: The proposal would establish a base offense level of 34 or 36 for 18 U.S.C. § 1591 offenses not involving minors. While the range at level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years for that offense, we believe 36 is an appropriate base offense level given the inherent gravity of these crimes, where force, fraud, or coercion is used to cause persons to engage in commercial sex acts.

Amendment to § 2G1.3: The proposal would establish a base offense level of 34 or 36 for 18 U.S.C. § 1591 offenses involving minors under 14. While the range at level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years for that offense, we believe 36 is an appropriate base offense level given the inherent

gravity of these crimes, where offenders cause children under 14 to engage in commercial sex acts.

The proposal would establish a base offense level of 30 or 32 for 18 U.S.C. § 1591 offenses involving minors between 14 and 18. While level 30 (97-121 months for a criminal history category I offender) encompasses the new 10 year mandatory minimum for this offense, we believe level 32 (121-151 months for a criminal history category I offender) is more appropriate given the inherent gravity of these crimes, where offenders cause children between 14 and 18 to engage in commercial sex acts.

The proposal would establish the same base offense level, either 28 or 30, for 18 U.S.C. §§ 2422(b) and 2423(a) offenses. These offenses, however, now carry the same penalty as 18 U.S.C. § 1591 offenses where the victim is between 14 and 18 years of age. As Congress has set the same penalty for these offenses, they should all have the same base offense level, 32.

At § 2G1.3(b)(5), the proposal would provide for either a 4, 6, or 8 level increase if the victim was under 12 instead of the current 8 level increase. In our view, the amendment's increases to relevant base offense levels resulting from statutory changes to the mandatory minimum penalties should not be a reason to decrease the impact of this specific offense characteristic. Accordingly, we recommend keeping it at 8 levels.

Amendment to § 2G2.5: The proposal would simply add 18 U.S.C. § 2257A as an offense referenced to this guideline. We recommend, however, a specific offense characteristic that would apply to a defendant who tried to frustrate enforcement of §§ 2257 or 2257A by refusing to permit an inspection be added, in order to prevent such a defendant from being eligible for intermittent confinement, home detention, or community confinement. Accordingly, we recommend that the following § 2G2.5(b) be added, and that existing § 2G2.5(b) be renumbered § 2G2.5(c):

(b) Specific Offense Characteristic: If the offense involved the refusal or attempted refusal to permit the Attorney General or his or her designee to conduct an inspection pursuant to 18 U.S.C. §§ 2257(c) or 2257A(c), increase by 6 levels.

Proposed § 2G2.6: The proposal would establish a base offense level of 34, 35, 36, or 37 for child exploitation enterprise offenses. We recommend level 37 since that is the only base offense level that encompasses the 20 year mandatory minimum for these offenses for a criminal history category I offender. Additionally, we support the revised proposal's inclusion of a specific offense characteristic adding 2 levels for use of a computer or interactive computer service.

Amendment to § 2G3.1: The proposal would revise the specific offense characteristic at § 2G3.1(b)(2) to encompass both use of misleading domain names and embedded words or images in the source code of a website to deceive a minor into viewing material harmful to minors, and contemplates either 2 or 4 levels. As the maximum penalty for relevant offenses under § 2252B is

ten years and under § 2252C is 20 years, it would be appropriate for this to be a 4 level enhancement.

Amendment to § 2J1.2: The proposal would provide a new specific offense characteristic for false statement offenses (18 U.S.C. § 1001) where the matter in which the false statement was issued involves specified sexual abuse or sexual exploitation offenses, or failure to register as a sex offender. As the maximum penalty for this type of § 1001 offense is the same, 8 years, as false statements in the terrorism context, the specific offense characteristic at § 2J1.2(b)(1)(C) should add the same enhancement as § 2J1.2(b)(1)(B) – 12 levels.

Amendment to § 4B1.5: We support changing the definition of “minor” in this guideline to include undercover agents posing as minors, and including 18 U.S.C. § 1591 offenses as covered sex crimes.

Amendments to §§ 5B1.3 and 5D1.3: We support adding compliance with the Walsh Act’s sex offender registration requirements as a mandatory condition of probation and supervised release for sex offenders, and we similarly support adding consent to search as a recommended condition of probation and supervised release in sex offense cases.

Amendment to § 5D1.2: We support expanding the definition of “sex offense” to include chapter 109B offenses and § 1591 offenses, and expanding the definition of “minor” to include undercover agents posing as minors.

Issue for Comment 1 - We believe that the best approach for how to incorporate mandatory minimum sentences is the first approach listed, which sets the base offense level at the guideline range in excess of the mandatory minimum (*i.e.*, a 10 year mandatory minimum base offense level would be 32, or 121-151 months for a criminal history category I offender). The reason this is the best approach is simple: Congress, in passing the mandatory minimum penalty, has set that penalty as the absolute minimum, applicable to the least egregious violation of the statute at issue. Applicable specific offense characteristics and criminal history category adjustments reflect aggravated violations and thus it would not be appropriate to have them considered in reaching a guideline range that encompasses the mandatory minimum.

Issue for Comment 2 - We believe the enhancement in § 2A3.5 for crimes against minors should be for all offenses committed against minors, and as noted above, suggest that it should be 12 levels. We also recommend, as noted above, that the enhancement for sex offenses (against non-minors) should be 8 levels, not 6. Ideally, the enhancement should provide for a minimum offense level for all cases where the offender committed either an offense against a minor or a sex offense against a non-minor. The proposal contemplates that this minimum offense level would be between level 24 and 28. We believe this offense level should be level 28.

Issue for Comment 3 - With respect to the proposed reduction for offenders who voluntarily attempted to correct their failure to register, we do not believe it is necessary for the

guideline to cover circumstances in which it was impossible for the defendant to register, because such circumstances would be covered by the affirmative defense at 18 U.S.C. § 2250(b). Moreover, prosecutors exercise their discretion soundly and it is extremely unlikely that a case would be prosecuted in which an offender was prevented from registering due to uncontrollable circumstances, debilitating illness, or severe mental impairment.

We recommend that the reduction for voluntary attempts to comply with registration requirements should not apply in cases where offenders actually commit qualifying offenses. Simply put, unregistered offenders who commit these offenses are precisely the reason that the registration requirements are in place, and it would be unjust to provide these offenders – who victimized others yet again, while unregistered – a windfall reduction in their sentences.

Issue for Comment 4 - We believe new 18 U.S.C. § 2244(a)(5) is already covered by § 2A3.4, which accounts for offenses that would have violated § 2241(c) had the sexual contact been a sexual act via its specific offense characteristics.

Issue for Comment 5 - As noted above, we recommend a 6 level enhancement under § 2G2.5 for cases where offenders refuse to permit inspections under applicable provisions of 18 U.S.C. §§ 2257 and 2257A. That said, it would also be appropriate to provide in an application note that when warranted by the facts of the refusal, in cases where that 6 level enhancement does not adequately account for the offenders' misconduct, an upward departure as well as application of § 3C1.1 may be appropriate.

Issue for Comment 6 - As noted above, among the proposal's options ranging from a base offense level of 34 to 37 for § 2G2.6 offenses, we recommend 37, as it is the only one which encompasses the 20 year mandatory minimum for 18 U.S.C. § 2252A(g) offenses for a criminal history category I offender. However, as we recommend that the best approach for addressing mandatory minimums is to set the base offense level at the guideline range in excess of the statutory minimum, level 39 (262-327 months for a criminal history category I offender) would be more appropriate. We do not believe a separate specific offense characteristic for 18 U.S.C. § 1591 offenses is necessary. As noted above, however, we support a 2 level enhancement for use of a computer or interactive computer service.

We do not recommend a decrease for conduct that is limited to possession or receipt of child pornography without the intent to traffic or distribute that material. Those who receive and possess child pornography contribute to the demand for child pornography, thereby causing other offenders to sexually exploit children to supply that demand. Accordingly, those who receive and possess child pornography do not merit any sentence reduction, as their conduct fuels child sexual exploitation committed by other offenders. Moreover, those who receive and possess child pornography also harm the child victims depicted in the child pornography they receive and possess, even if they themselves were not physically involved in the child sexual abuse depicted in those images. Additionally, often these offenders' receipt and possession of child pornography drives them to sexually abuse children themselves, as their receipt and possession of child

pornography to satisfy their desires is part of a cycle that leads to their own sexual abuse of children. Simply put, it is appropriate to use all available means to deter this conduct.

As if that were not enough, we anticipate that violations of this statute may involve offenders who receive and possess child pornography produced or distributed by other members of the child exploitation enterprise, often at the request of those who receive and possess it. In these cases, there is an even more direct causal link between receivers/possessors' conduct and the sexual exploitation of the child victim. It would thus be wholly inappropriate to afford these receivers/possessors a sentence reduction in these circumstances. Finally, it appears that Congress intended to punish all members of these enterprises equally. For all these reasons, we strongly recommend that receivers/possessors not receive a windfall sentence reduction.

Issue for Comment 7 - We have no comment on whether an enhanced penalty at § 2G3.1 should be provided for those who deceive a person other than a minor into viewing obscene material.

Issue for Comment 8 - As noted above, we recommend that the specific offense characteristic at § 2G1.3(b)(5) applicable in cases where the victim is under 12 be kept at 8 levels. This is appropriate because while certain of the offenses at issue include enhanced penalties based on the age of the victim, none of these enhanced penalties apply to cases where the victim is under 12.

Issue for Comment 9 - It does not appear that any change is necessary to address proportionality between §§ 2G1.3 and 2A3.1 in cases where the cross-reference at § 2G1.3(c)(3) applies because the cross-reference only applies in cases where the offense level under § 2A3.1 is higher than that reached under § 2G1.3. It appears that the offense levels contemplated by the current proposals under §§ 2G1.3 and 2A3.1 are appropriate.

3. Technical and Clarifying Amendments to the Sentencing Guidelines

We have no comments on these technical and clarifying amendments.

4. Miscellaneous Laws

We have no comments on these amendments reflecting recently enacted legislation - *Respect for America's Fallen Heroes Act*, Pub L. 109-228 and *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub L. 109-162.

5. Intellectual Property Re-Promulgation

USSG §2B5.3 We support making permanent the amendments promulgated on an emergency basis concerning counterfeit trademarked labels, documentation and packaging pursuant to the *Stop Counterfeiting in Manufactured Goods Act* ("SCMG Act"), Pub. L. 109-181.

The *Digital Millennium Copyright Act (DMCA)*, (17 U.S.C. §§ 1201-1205) criminalizes three types of conduct: (1) circumventing an *access* control (17 U.S.C. § 1201(a)(1)); (2) trafficking in technology to circumvent an *access* control (§ 1201(a)(2)); and (3) trafficking in technology to circumvent a *copy* control (§ 1201(b)(1)).

We support new application note 2(A)(viii) with two minor drafting changes. Because “circumvention” itself is prohibited only under 17 U.S.C. § 1201(a), but not § 1201(b), the note should be limited to cases where a defendant circumvented a technological measure in violation of “17 U.S.C. Secs. 1201(a)(1) and 1204,” rather than “17 U.S.C. Secs. 1201 and 1204.” We also would suggest that the clause “the ‘retail value of the infringed item’ is the price the user would have paid to access lawfully the copyrighted work” should be reworded to move the adverb “lawfully” to follow “copyrighted work.”

For the trafficking crimes, there are three options. Option 1 would use a specific offense characteristic that increases the offense level by 2, regardless of how many devices the defendant trafficked in. In our view, this is the worst of the alternatives because: (1) it does not differentiate between small- and large-scale traffickers; (2) it does not specify how to calculate the “infringement amount” in trafficking cases, which was the very question on which the Department sought clarification (when it drafted the SCMG Act provision); and (3) it limits its applicability to defendants “convicted under 1201(b) and 1204,” thereby leaving out 1201(a)(2) trafficking crimes entirely. The latter can easily be corrected by simply referring to convictions under “1201 and 1204,” as is done with Option 2.

Option 2 would calculate the infringement amount in all trafficking cases by using the retail value of the circumvention device(s), multiplied by the number of devices involved in the offense. This would underestimate the economic harm for cases in which the circumvention device was not sold (as in the classic warez example of a barter transaction) and had no legitimate retail value. The department’s proposal would use *the greater of* the retail value of the circumvention device *or* the price a person using the device to access or make use of a copyrighted work would have had to pay to access or use the work legitimately.

Option 3 is closest to what the Department would suggest, but we propose a few changes. First, as with Option 1, § 1201(a)(2) trafficking crimes are not covered. Again, this could be easily remedied by simply substituting “1201” for references to “1201(b).” Second, the phrase “the price a person legitimately using the device to access or make use of a copyrighted work would have paid” needs to be changed because of the placement of the word “legitimately.” In most or all DMCA trafficking cases, there is no “legitimate” use of the circumvention device. Therefore, that phrase should be replaced with a phrase such as “the price a person using the device to access or use a copyrighted work would have had to pay to access or use the work lawfully.”

Finally, for each of the DMCA-related proposals, the Proposed Amendment defines the term “circumvent a technological measure” as having the same meaning as that term in 17 U.S.C.

§ 1201(a)(3)(A). This definition applies to the circumvention of access controls, prohibited by 17 U.S.C. Sec. 1201(a)(1), and trafficking in devices for such circumvention, under 1201(a)(2). However, it should be noted that the operative term in DMCA trafficking cases involving devices for circumventing copy controls (i.e., those under 17 U.S.C. § 1201(b)), rather than access controls, is somewhat different: “to circumvent protection afforded by a technological measure....” The definitions of these operative terms also differ slightly. In order to avoid confusion and make clear that the amended application notes are intended to apply to both § 1201(a) and § 1201(b) trafficking offenses, we recommend the Commission include a separate definition of “device for circumventing a technological measure,” such as the following: “‘Device for circumventing a technological measure’ includes any technology, product, service, device, component, or part thereof for circumventing a technological measure (as defined in 17 U.S.C. § 1201(a)(3)) or for circumventing protection afforded by a technological measure (as defined in § 1201(b)(2)).”

6. Terrorism

USSG § 2K1.4 (18 U.S.C. § 2282B): Congress enacted 18 U.S.C. § 2282B to address violence against aids to maritime navigation, and the Sentencing Commission has referred the new statute to USSG § 2K1.4 (Arson; Property Damage by Use of Explosives). The Department agrees with the offense level of 16 if the offense involved conduct under 18 U.S.C. § 2282B, which has a statutory maximum of 20 years. A lesser offense level would not adequately reflect the statutory maximum or the seriousness of the conduct, which must be done intentionally and must endanger or be likely to endanger the safe navigation of a ship. The Commission has proposed two alternative phrasings of the guideline (USSG § 2K1.4(a)(3)); the Department favors the guideline describing the offense conduct, rather than the guideline simply referencing the statute. There are other statutes that could address damage to aids to maritime navigation, and describing the conduct generally in the guideline would provide a clearer reference for the same conduct that might be charged under other statutory provisions.

7. Drugs (not including crack cocaine)

21 U.S.C. § 841(g) (Adam Walsh Child Protection and Safety Act): With regard to the new offense in 21 U.S.C. § 841(g), which provides a penalty of not more than 20 years for distributing a date rape drug over the internet knowing or with reasonable cause to believe it would be used to commit criminal sexual conduct, or to any unauthorized purchaser, the Department supports Option Three. That option provides a six level enhancement with a floor of 29 if the person knew the drug would be used to commit criminal sexual conduct, a three level increase with a floor of 26 if the person had reasonable cause to believe the drug would be used to commit criminal sexual conduct, and a two level increase if the drug were sold to an unauthorized purchaser.

Option Three is preferable to Options One and Two for the following reasons. First, Option Three establishes a significant sentencing floor (29), whereas Options One and Two do not. The Department believes that situations involving knowing distribution of a drug over the

internet to commit a criminal sexual act require a significant minimum offense level and a mere two or four level increase is not sufficient to adequately reflect the severity of the offense. Second, Option Three provides a more appropriate enhancement (six levels) than the smaller enhancements in Options One and Two (two or four levels). Again, the severity of the offense requires a six level, rather than a two or four level enhancement. Third, while providing an appropriately severe penalty for the most egregious conduct, Option Three also provides a tiered approach that punishes less severe conduct – such as distribution with reasonable cause to believe the date rape drug would be used for illicit purposes – less severely than distribution knowing the date rape drug would be used for illicit purposes. In general, the Department favors tiered approaches that establish more stringent guidelines for the most culpable and allow lesser sentences for less culpable individuals. Finally, Option Three provides the appropriate two level enhancement for illegal distribution to an unauthorized purchaser. This enhancement is similar to the enhancement applicable to those who use the internet for mass marketing.

We believe floor levels of 26 and 29 are appropriate based on a comparison with the various gradations for sexual offenses under Criminal Sexual Abuse Guideline Section 2A3.1.

- 18 USC § 2241 (USSG §2A3.1) (aggravated sex abuse -- i.e., actual use of force or threat of death or serious bodily injury or kidnapping, or by rendering the victim unconscious by some means, including by drug) has a base offense level of 30 plus an SOC of 4 for subsections (a) and (b) which means effectively an offense level of 34.
- 18 USC § 2242 (USSG 2A3.1)(sex abuse, i.e., a sexual act committed by threat less aggravated than 2241, or where the person is incapable of declining permission) has a base offense of 30.

The 29/26 proposal falls below those levels. Given that a conviction under 21 U.S.C. § 841(g) would demonstrate that the probable intent of the defendant selling the drugs over the internet was to further the purchaser's intent to render a victim unconscious, incapacitated, or at least less resistant to a sexual assault, the choice of a base offense level on the higher end of the range in Section 2A3 is justified. From this perspective, a level 29/26 base offense is rather modest. Moreover, cases where the drug seller can actually be shown to "know" of the intended use of the drug will doubtless be rare; prosecutions for "reasonable cause to believe" -- subject to base offense level 26 -- are likely to be more frequent. The guidelines provide a 3 level differential for the "knowing" versus "reasonable cause to believe" in the context of prohibited listed chemical distribution under 841(c)(2) and 2D1.11, thus allowing a comparison and basis for the 3 level differential between level 29 and 26 for the two distinct mens rea states.

21 U.S.C. § 860a (USA PATRIOT Act): With regard to the new offense in 21 U.S.C. §860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing (or possession with intent thereof) methamphetamine on premises in which a minor is present or resides, the Department supports Option Two, which provides a six

level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases.

Option Two establishes a tiered, measured response which properly punishes at a significant level offenders who manufacture methamphetamine in the presence of minors, while imposing a lesser offense level for defendants who distribute methamphetamine on premises. In our view, Option Two appropriately reflects the severity of the offense, while protecting the public from further crimes of the defendant.

Option Two is preferable to Option One for the following reasons. First, manufacturing offenses inherently involve a risk of harm to a minor and expending the resources to demonstrate actual risk in each and every case by presenting expert testimony at the sentencing phase should not be required particularly given the dictates of Congress. Since Option One provides a six level enhancement with a level 30 floor, it is appropriate to provide for near parity through Option Two (six level increase with floor of 29). Second, in situations where the Government did not present evidence of risk of harm to the minor (even in manufacturing cases), Option One only provides a two level increase with no floor. This paltry enhancement fails to reflect the severity of the offense, e.g., the actual or potential harm caused by manufacturing methamphetamine where young people are present. Finally, in addition, all distribution convictions under Section 860a would only be subject to the two level increase, as opposed to a three level increase with a 15 floor. Again, the meager two level enhancement fails to adequately reflect the harm caused by distribution on premises with a minor.

In the event the Commission adopts Option One, the Department respectfully requests that the six level enhancement with a 30 floor be applicable to distribution, and possession with intent to distribute and manufacture cases. This would allow the Government to obtain meaningful sentences for a broader range of offenses. The establishment of a floor is important. In many of these cases the Government will be unable to establish a drug amount, for example when a lab blows up or is destroyed by fire. Thus the small increases proposed, without a significant minimum offense level, would result in little jail time.

21 U.S.C. § 960a (Narco-Terrorism): The Government believes that 21 U.S.C. § 960a is an important provision designed to target the insidious connection between drug trafficking and terrorism and punish proportionately. The Government agrees with the basic approach of calculating the drug quantity first, then increasing the sentence by an appropriate number of levels so that the sentence is twice the mandatory minimum punishment. The Government strongly believes, however, that a six-level (6) increase would effectuate congressional intent more than a four-level (4) increase, because the six-level increase consistently produces a doubling of the mandatory minimum sentence. Moreover, using a four-level increase to allow for the specific offense characteristics to increase the base offense level to the statutory double range is counterintuitive. The specific offense characteristics are designed to increase the base offense level found in § 2D1.1(a) due to the presence of conduct in § 2D1.1(b), which were deemed independently worthy of an increase by the Commission. Thus, a four-level (4) increase designed

to allow specific offense characteristics to "make up" any shortcomings of a four-level (4) increase defeats the enhancement mechanism of § 2D1.1(b). The specific offense characteristics should be in addition to, not in lieu of, the intent of Congress to punish those convicted of narco-terrorism harshly.

The Government does not have a strong preference on whether the new provision should be incorporated into § 2D1.1 or be placed in a new and separate section § 2D1.14, so long as the result is the same.

Finally, the Government suggests a few minor changes to ensure that the provisions are clear. First, the language in § 2D1.14 eliminates all of § 2D1.1(a)(3), including the base offense level. This should be clarified to simply eliminate the safety valve and mitigating role reduction. Second, the heading for § 2D1.14 should read: § 2D1.14 Narco-terrorism; *attempt or conspiracy*. This would appear to be consistent with the rest of the provisions in § 2D.

8. Immigration

USSG §§ 2L1.1 and 2L2.1: With regard to the proposed amendments to the tables in §§ 2L1.1 and 2L2.1, that provide for increases in sentence based on the number of aliens or the number of documents, the Department strongly supports the idea of amending both tables to cover a broader numerical range. Our experience reveals that the tables do not adequately address the scale of the more serious alien smuggling and immigration fraud offenses we now regularly encounter. The challenges we face in enforcement in this area have grown dramatically since these guidelines went into effect. Offenses involving hundreds of fraudulent immigration documents have become common, and offenses involving a thousand or more documents are not unique. Reform is needed in order to provide a uniform mechanism for handling cases of this size in place of the current undefined upward departure process. This, in our view, serves the twin purpose of proportionality and uniformity.

We think both of the options under consideration are an improvement over the existing Guidelines. We favor option two because it offers a more discriminating approach to the escalating seriousness of offenses involving 6 to 99 aliens or documents. Our experience reveals that the degrees of misconduct between the extremes of 6 and 99 aliens or documents are more significant than the present tables acknowledge. For instance, a smuggling offense involving 23 aliens generally is indicative of greater culpability than one involving 8 aliens, but the current table treats the offenses identically.

Second, option 2 is superior because it provides greater offense-level increases for smuggling and fraud offenses involving larger numbers of aliens or documents. We welcome such increases because organized alien smuggling and immigration fraud are two of the most serious enforcement problems we face today. Alien smuggling, for example, is a global affair with estimated annual profits in the billions. The increasing scale of immigration fraud is similarly alarming. In a recent prosecution in the Eastern District of Virginia, several U.S. members of an

international network of visa brokers—including a former CIA officer—were prosecuted for selling 1,400 fraudulent applications for U.S. visas to Chinese and Russian citizens abroad. One particular application was offered for an astonishing \$120,000. If we are to turn this tide, it is very important that the Guidelines provide adequate punishment and deterrence to those who violate the law on such a grand scale.

USSG § 2L1.2: We believe that in contrast to the other guidelines, 2L1.2 is in dire need of major change. The Courts, the probation offices, defense attorneys, law enforcement officers and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. In FY 2006, the Courts handled over 17,000 immigration cases (24.2% of its cases). We must do more, however, to ensure that we are fully utilizing the resources that have been given to us by Congress to enforce our immigration laws. The simple reality is that the current immigration guidelines provide a significant barrier to doing more. The Department favors a variation of either Option 6 or Option 7.

We do not favor either of these options as a means to increase the overall sentences for illegal re-entry cases. Rather, we favor these as a means to achieving fair sentences more efficiently, thereby allowing all participants in the process to make better use of their limited resources. We originally offered the potential triggers in Option 6 as examples only, and recognize that the Commission may need to employ different triggers to develop a balanced Guideline with the goal of increased simplicity and net neutrality in terms of the total number of defendants who would receive the particular adjustments to their base offense level. The triggers in Option 7 were based on a subsequent analysis of a sample of cases and are the levels that would produce little change in the over all length of sentences. Of the 108 cases reviewed, 85 received the same sentence under option 7 as they would under existing § 2L1.2. Of the 23 that did not "neutralize," 14 were increased, and 9 were reduced.

In its current form, § 2L1.2 encourages endless litigation over whether convictions qualify for enhancement under the "categorical approach" outlined in the Supreme Court's *Taylor* decision. This litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the defense. This burden falls disproportionately on the five Southwest Border judicial districts, which prosecute the overwhelming majority of immigration related cases.

Making the Guidelines simpler will in turn make the system stronger and allow these cases to be handled more efficiently. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies or trigger specific offense characteristics under § 2L1.2. Defense attorneys must perform the same analysis, and eventually judges must do so as well. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results, allowing bad actors to avoid appropriate punishment on seemingly technical grounds. For example, even when documents show what looks like a

qualifying conviction, the outcome remains subject to litigation and the courts reach inconsistent results on whether convictions will qualify. For example, in *United States v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005), the Ninth Circuit held shooting at an occupied dwelling is a “crime of violence.” However, in *United States v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006), the same court, relying on a different State statute, declared such an offense is not a crime of violence, requiring proof that the residence actually was occupied at the time of the shooting—a fact one scarcely could glean from court records. The Fifth Circuit, based on yet another State statute, also found shooting at an occupied dwelling is not a crime of violence. *United States v. Alfaro*, 408 F.3d 204 (5th Cir. 2005). Further, the problem of the categorical analysis is not limited to crimes of violence. For example, the Supreme Court’s *Lopez v. Gonzalez*, 126 S. Ct. 625 (2006) decision and the Ninth Circuit’s *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*) decisions did not involve crimes of violence.

Options 6 and 7 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases – an extremely important consideration given the increasing volume of cases. It is important to emphasize also that the benefit will not be felt in just the cases prosecuted but also in the cases that we review and decline to prosecute criminally because it will make it far easier for prosecutors to ascertain the possible sentence and, therefore, whether the case merits the expenditure of federal resources. The Guideline calculation would be driven primarily by the length of sentence imposed for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. After all, the present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. We also note that present Guideline 4A1.3, (Criminal History) provides judges with the flexibility to address prior sentences that overstate the seriousness of an underlying offense.

While we are in favor of a shift away from the categorical approach, we do believe that convictions for certain specified offenses (murder, rape, for a child pornography offense or an offense involving sexual abuse of a child, or for conspiracies or attempts to commit such offenses), regardless of the length of sentence, should merit a 16 level increase to the base offense level.

We also recognize that in making such a major change, and despite the fact that there will be general neutrality in the effect on sentences imposed, in specific cases a defendant may receive a greater sentence or lesser sentence depending upon their particular record. We believe that these changes are a necessary result of a need to shift to a far more efficient, predictable, and rational system for determining the seriousness of the prior record.

We urge the Commission not to wait to amend 2L1.2 until Congress considers again this year possible amendments to the Immigration and Nationalization Act. The system needs relief now. First, as the media has repeatedly reported there is a good chance that nothing will happen and we will be in the same position we were last year at the end of the Commission cycle. Second, even if legislation is passed, it would most likely have little, if any, impact on the changes proposed in option 6 or 7. The compromise Senate bill, S 2611, which was passed by the Senate last year and has been the basis for discussions this year, amends the sentencing scheme for illegal entry and re-entry violations so that they are based for the most part on the length of sentence imposed for prior convictions rather than the type of offense. We would submit that delaying change to 2L1.2 for another year only prolongs the expenditure of unnecessary resources and continues time consuming litigation. We urge the Commission to act this year to shift away from the use of the categorical approach, an approach we believe ill-serves all involved.

Finally, with regard to the request for comment regarding whether the Department believes the base offense levels for §§ 2L1.1, 2L2.1, and 2L2.2 should be increased. With respect to § 2L1.1, we do not believe the Commission should increase the current base offense level of 12, assuming the Commission adopts either option 1 or 2 to amend the table governing the number of aliens involved in the offense. Regarding § 2L2.1, last year we recommended that the Commission raise the current base offense level from 11 to 12 to match the base offense level in 2L1.1, and we stand by that recommendation here. As for § 2L2.2, we believe the base offense level of 8 should be increased, especially for offenses involving immigration or naturalization documents. Under the present Guideline, most offenders face a zone A sentence of 0 to 6 months upon conviction for an offense involving a green card, naturalization certificate, or asylum claim – this is insufficient punishment in light of the seriousness of the offense.

9. Compassionate Release

We reiterate the comments included in our letter to the Commission on July 14, 2006.

We do not believe that the Commission should provide examples of extraordinary and compelling reasons but if it does so, they should be limited to the inmate's medical condition. These medical conditions may be terminal, with a life expectancy of one year or less, or medical conditions that are profoundly debilitating in nature. While the statute itself does not define "extraordinary and compelling," the Bureau of Prisons (BOP) has always narrowly interpreted the statutory language, established medical criteria for reduction in sentence consideration, and limited motions for reduction in sentence to circumstances where an inmate has either been diagnosed with a terminal illness with a life expectancy of one year or less, or a profoundly debilitating and irreversible medical condition that severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others.

With respect to consideration of terminal medical conditions, BOP considers cases where the inmate has entered into the "terminal phase" of his/her disease, which medically is usually

measurable as one year or less. The prognosis in these patients is based on the medical expertise and clinical judgment of the physician, based upon his or her knowledge of the disease. An essential element associated with the terminal phase of an illness is that medical care becomes focused on palliation or comfort care, as there are no available therapeutic measures that can prolong the patient's life or alter the course of the disease. The terminal phase of a disease is experienced by an individual over a period of days to months and is characterized by a decline in physical functioning, while cognitive functioning may be preserved in some patients until death.

To expand consideration to medical conditions where the life expectancy is greater than one year would result in the inclusion of many chronic diseases which can broadly be defined as "terminal," will predictably shorten an individual's life, but has not progressed beyond the chronic stage. In treating a chronic illness, available medical treatment options have not been exhausted and treatment remains focused on managing and stabilizing the disease. In addition, treatment therapies may often improve functional status and prevent or significantly slow the progression of the disease to the terminal phase.

The BOP has not approved reduction in sentence for inmates who have chronic medical conditions (e.g. advanced heart disease or AIDS) unless the inmate is also significantly functionally impaired. In assessing these inmates, it is often the degree of functional impairment paired with the exhaustion of treatment options that gives rise to a determination that the individual has entered the terminal phase of his or her illness.

With respect to BOP motions for medical conditions, the BOP feels that 1B1.13 should allow the court the opportunity to consider cases where the circumstance fall under options (i) or (ii). Clearly, the court should be able to consider a BOP motion for a reduction in sentence where the medical condition did not exist at the time of sentencing, or the court was simply unaware of the inmate's medical condition at the time of sentencing. In addition, the court should also be able to consider a BOP motion where it may have been aware of a medical condition at the time of sentencing, but that condition has significantly deteriorated during the inmate's incarceration and the inmate's condition has entered the terminal phase of his or her illness, or his or her condition has become profoundly debilitating.

Finally we would like to note that Page 8 of the ABA's letter to the Commission provides compelling substantiation of the possible adverse consequences, noted in the Department's letter, if the Commission were to adopt (pursuant to 28 U.S.C. 994(t)) standards for the judicial granting of reduction in sentence motions which were broader than the grounds on which the Department has traditionally (and currently) sought such reductions. Specifically, the ABA argues that it would be unconstitutional for BOP to continue to apply their current standards, and that BOP would be constitutionally required to make its decisions whether to seek sentence reductions instead on the basis of the Commission's policy statement for judicial granting of sentence reduction motions. This directly confirms the concern raised in the Department's letter that such discrepancies "would be an incitement to prisoners to file more suits seeking to compel the Department to exercise its authority under section 3582(c)(1)(A)(i) -- in contravention of its own

policies, judgment, and discretion -- in order to get them out of prison before they have served their sentences as imposed by the court."

We submit that this current effort to persuade the Commission to adopt standards which would effectively treat the 3582(c)(1)(A)(i) reduction in sentence authority as an open-ended parole-like early release mechanism, thereby undermining the fundamental premises and operation of the determinate sentencing system established by the Sentencing Reform Act of 1984 is just the first step. If successful, the next step would be the bringing of injunctive suits against the Department of Justice which would seek to compel the use of these parole-like standards in deciding whether to file 3582(c)(1)(A)(i) motions, and force the Bureau of Prisons to function as a de facto Parole Commission for this purpose. As noted in our letter last year, the potential result - the undermining of the abolition of parole and determinate sentencing -- would be "exactly the evil . . . that Congress sought to avoid by vesting exclusive authority to seek reductions of sentence for prisoners under section 3582(c)(1)(A)(i) in the executive agency responsible for their custody."

10. Criminal History

The Department believes that the criminal history sentencing guidelines have created an effective and workable system that identifies offenders who have a greater risk of recidivism and provides progressively higher penalties as that risk of recidivism increases. Before the Commission moves forward with any proposal that excludes additional offenses from the criminal history score, it should be very confident that such additional exclusions will improve (and not worsen) the guidelines' effectiveness in identifying and appropriately punishing offenders with higher recidivism risk. Further, we believe that just because certain records may not be uniformly available does not mean that those that can be obtained are not useful in determining the risk of a particular offender. With regard to the offense of driving while suspended we would suggest that the Commission may well want to examine if the basis for the suspension may be an important criteria. It is clearly one thing if the person was suspended for what has been described as an "economic offense." It is a far different and more serious situation if the defendant had been suspended for driving under the influence, vehicular manslaughter, or even reckless driving.

11. Pretexting

USSG §2H3.1 (18 U.S.C. § 1039): The Department supports the Commission staff's proposal to refer 18 U.S.C. § 1039 to §2H3.1, but we recommend that it be modified to properly take into account the victims of these offenses. In particular, pretexting crimes can violate the privacy of many people. While some offenses involve one person obtaining the records of another (in furtherance of a stalking crime, for instance), others involve offenders who obtain the records of many individuals. For example, by data brokers may obtain confidential records of many people in order to resell them. Additionally, where the crime is committed through a computer intrusion, there may be thousands of victims.

Moreover, in general, the seriousness of the offense is directly related to the number of victims. An offense that violates the privacy of ten people is simply much more serious than one that involves only one. Consequently, the USSC should consider adding to §2H3.1 a victim table similar to that currently found in §2B1.1 in order to ensure that pretexters (as well as those committing related privacy offenses referenced to §2H3.1) are rationally sentenced based on the scope of their offense.

The current proposal makes an offense that involves "a large number of customers" grounds for an upward departure. While this approach is not without merit, we believe that the use of a table like that in §2B1.1 would be more appropriate. Like financial crimes, pretexting offenses become more serious as the number of victims increases.

We also suggest that the USSC contemplate adding a definition of "victim" to §2H3.1 that includes those suffering privacy invasions whether or not they suffer a measurable monetary loss. Because §2H3.1 is used for sentencing offenses, including pretexting, where invasion of privacy is the core harm, existing definitions of "victim" that require pecuniary loss would fail to account for much of the damage caused by privacy offenders. A revised definition would improve the application of other privacy offenses to be referred to §2H3.1 in addition to § 1039. Courts will not have a problem identifying who is a victim under the expanded definition as it is easy to determine whose confidential records were disclosed.

12. Crack Cocaine

In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine offenses. The existing policy – including statutory mandatory minimum penalties and sentencing guidelines – has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. The problems that crack brought to our communities have not gone away.

That said, the Department recognizes that the Commission and many others have been especially concerned that the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. We believe it may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum and guidelines sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission, the Administration, and the Congress will continue its work together to determine whether any changes are indeed warranted. We think this collective work is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We are committed to continuing our participation in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

We continue to stress that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. The Commission, however, has a critical role to play. We think the Commission should continue to provide Congress, the Department of Justice, and the general public updated information on the current overall sentencing environment, crack and powder cocaine sentences being imposed in district courts around the country, and other research and data that will assist in the consideration of federal cocaine sentencing policy. We think all of this information will help ensure that federal policy will be crafted in a way that best achieves the purposes of sentencing. While we look forward to continuing all of this work with the Commission, we reiterate here that we would oppose any sentencing guideline amendments that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

* * * * *

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,



Benton J. Campbell
Acting Principal Deputy Assistant Attorney
General and Chief of Staff



Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 14, 2007

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

RE: Response to Request for Comments on Proposed Amendments for 2007

Dear Judge Hinojosa:

On behalf of the Practitioners Advisory Group, we submit the following comments on the Commission's various proposed amendments and requests for comment for the 2007 amendment cycle. We look forward to addressing some of these proposals at the Commission's hearing, on March 20, 2007.

1. TRANSPORTATION

Appropriateness Of Sentence Enhancement For Convictions Under 18 U.S.C. §§ 659 or 2311 (Section 307(c) of PATRIOT Act)

Congress has directed the Commission to determine whether a sentence enhancement is appropriate for convictions under 18 U.S.C. §§ 659 or 2311. Accordingly, the Commission requests comment on whether the two-level enhancement under § 2B1.1(b)(4) should be expanded to include cases where the defendant was convicted under § 659. It should not. The current enhancement under § 2B1.1(b)(4) is narrowly tailored to those defendants who were *in the business of* receiving and selling stolen property. Application Note 5 lists a number of factors to consider in distinguishing these more culpable "professional" purveyors of stolen property from those who merely receive or sell stolen property without being in the business of doing so. In that respect, note 5 parallels the criminal livelihood provision, § 4B1.3, in recognizing that one who makes a living out of criminal conduct is more culpable than one whose conduct is less involved. The proposed amendment would eliminate the distinction because § 659 applies to a very broad range of conduct, including every theft from an interstate shipment and every receipt or sale of such stolen items. For the same reason it would be inappropriate to impose the enhancement for those convicted under §§ 2312 or 2313. Those statutes criminalize the transportation, sale or receipt of stolen motor vehicles without any distinction between those who, for example, receive a single stolen vehicle and those who are "in the business" of committing such violations.

Similarly, the suggestion in Option 2 of expanding § 2B1.1(b)(11) to those convicted under § 659 should be rejected. That enhancement of two levels, with a floor of 14, is currently reserved for those whose offense "involved an organized scheme" to steal vehicles or vehicle parts. As noted above, § 659 is

not limited to those involved in such organized schemes, nor is it limited to offenses involving vehicles or vehicle parts.

Adequacy Of § 2Q1.2 For New Aggravated Felony Under 49 U.S.C. § 5124 (Request For Comment 1)

The Commission seeks comment on whether the penalties are adequate under § 2Q1.2 for this new offense, which applies to the release of a hazardous material causing bodily injury or death. There is no need to enhance the penalties under this provision. For a conviction under this statute involving a repetitive discharge, the top of the guideline range is 71 months (approximately six years). A judge would be able to impose a higher sentence in those cases where the other § 3553(a) factors weigh in favor of a sentence above the guideline range. The guideline already encourages an upward departure where death or serious bodily injury results. We are unaware of data showing that death or serious bodily injury is occurring in enough cases to make the addition of an enhancement necessary. If any change is made to account for actual bodily injury or death, as opposed to the risk of such outcomes, a minimum offense level would properly account for that factor.

Cross Reference or Specific Offense Characteristic For Trespasses Committed With Intent to Commit Another Offense (Request For Comment 2)

The Commission seeks comment on whether trespasses committed with the intent to commit other offenses should be punished more severely through a cross reference or, instead, a specific offense characteristic. The PAG opposes cross references to other guidelines in the absence of a jury finding that warrants using the more severe provision. There are serious due process concerns when the more severe Chapter Two guideline is used based on judicial findings alone. A modest specific offense characteristic is the preferred approach because it prevents a fact not found by the jury from converting a conviction for one offense into the functional equivalent of a conviction for one that was not charged and found by the jury.

Bribery Affecting Port Security (Request for Comment 3)

The Commission requests comment on whether the new offense of bribery affecting port security, 18 U.S.C. § 226, should be referenced to § 2C1.1 and, if so, whether the cross reference is sufficient to punish bribery with the intent to commit an act of terrorism. Alternatively, it suggests adding a specific offense characteristic. PAG believes that § 2C1.1 is the appropriate guideline for 18 U.S.C. § 226 because it provides the same starting point for all bribery offenses. An enhancement in that guideline to account for the intent to commit an act of terrorism is preferable to a cross reference. Such a provision would be more in line with the goal of simplifying the guidelines and would better ensure that the enhancement – which can significantly change the sentence range – is based on convicted conduct. Finally, if an enhancement is adopted, there should be clear guidance that § 3A1.4 does not apply because it would account for precisely the same offense characteristic.

2. SEX OFFENSES/ADAM WALSH ACT

In an effort to implement the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (the Act), and directives related thereto, the Commission has developed a four-part proposed

amendment. The PAG is in substantive agreement with the comments that the Federal Public and Community Defenders submitted on March 6, 2007 (J. Sands 3/6/07 Ltr.). Rather than reiterate the Defenders' comprehensive, thoroughly-researched submission, we offer the following brief comments.

§ 2A3.5/18 U.S.C. § 2250

For the new offense of Failure to Register (18 U.S.C. § 2250), the Commission proposed § 2A3.5. The PAG supports Option 1's establishment of base offense levels tied to the tier of the offense which gave rise to the need to register, and it also supports the availability of a four-level reduction where a defendant voluntarily attempted to ameliorate the targeted harm by correcting the failure to register. In response to Issue for Comment 3, the scope of conduct constituting an attempt to register should be construed broadly. The PAG does not believe it necessary to define and offer examples of what types of attempts may serve as a basis for relief; however, it would be appropriate to make clear that courts should view such efforts in the context of a defendant's physical or mental health limitations and/or the practical impossibilities that may be present in certain cases. Furthermore, a reduction should be available regardless of any new convictions a defendant may have sustained.

The proposed reduction, which gives meaning to Directive 3, is sound by encouraging compliance with registration requirements and authorizing leniency for less culpable defendants. Equally sensible are the Defenders' proposed bases for downward departure and reductions for defendants whose offense giving rise to the need to register resulted in a relatively short sentence (13 months or less) or who have established a "clean record" of ten years or more, a consideration that would apply only to Tier II or III offenders. J. Sands 3/6/07 Ltr. at 6-7, 9-11; see USSC, *Literature Review – Targeting Sex Offenders in Sentencing Federal Offenders: Protection of Children from Sexual Predators Act of 1998*, App. K (Feb. 2000) (discussing value of risk assessment models).

The PAG opposes the other specific offense characteristics set forth in § 2A3.5(b)(1) [or (b)(2) of Option 2]. Notwithstanding the language of Directives 1 and 2, Congress intended the term "committed" to mean "convicted of" when referring to other offense conduct. See 42 U.S.C. § 16911(1). Thus, as proposed, § 2A3.5 needlessly opens the floodgates of "relevant conduct." USSC, *Discussion Paper: Relevant Conduct and Real Offense Sentencing* (since 1987, "training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline's application has been very inconsistent across districts and circuits"). There is particular unease with the inclusion of uncharged or acquitted conduct as well as expansion of the definition of "minor" beyond that envisioned by Congress. See 42 U.S.C. § 16911(14).

Where a State conviction would serve as the basis for application of the proposed specific offense characteristics, there appears to be a substantial risk of double-counting criminal history. Moreover, when a defendant who has failed to register pursuant to SORNA commits a new State offense that may be classified a "sex offense" or an "offense against a minor," he will be subject to local prosecution and punishment, which will undoubtedly account for his failure-to-register status. Therefore, the proposed enhancement, which is designed for those who violate federal registration requirements, effectively duplicates punishment for the underlying State conviction.

When, and only when, a prosecution under 18 U.S.C. § 2250 is brought jointly with other federal sexual offenses that would ostensibly satisfy the proposed enhancement, the PAG submits that the better

approach is to implement a two-level adjustment under Chapter Three for “sex offenses” (e.g., § 2G1.1) and “offenses against minors” (e.g., §§ 2G1.3, 2G2.1) akin to § 3C1.1’s more general application to conduct reflected in § 2J1.2. As an example, under this approach a two-level increase in application of § 2G2.1, before enhancement(s), produces a 30-month increase in the low end of a defendant’s offense level. In offering this proposal, the PAG cautions that the two-level adjustment should not apply in circumstances where a defendant voluntarily attempted to correct the failure to register. Additionally, we note that enhancements and recommendations for an upward departure intended to reflect recidivist considerations are already contained in the Guidelines’ sexual abuse provisions. *See, e.g.,* §§ 2G2.2, cmt., n. 6 & 4B1.5.

With respect to Issue for Comment 2, the PAG opposes extending the enhancement to other than sex offenses. Congress did not intend to encompass non-sexual offenses. *See, e.g.,* 42 U.S.C. § 16911(7). Indeed, absent clear evidence of congressional design, the contemplated expansion would produce incongruous results. For instance, where the offense that gave rise to a defendant’s registration requirement did not involve a child, there would be no rationale for enhancing his offense level if, while in failure-to-register status, he is convicted of a non-sexual offense involving a child. This is but one example, yet it highlights the disturbing consequences of singling out this class of offender for enhanced penalties where the conduct at issue is non-sexual in nature.

New Offenses and Increased Penalties

Issue for Comment 1 requests input about how the mandatory minimum terms of imprisonment created or increased by the Act should affect calculation of the guideline range. The Commission offers four possible approaches: (1) set base offense levels to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum; (2) set base offense levels to correspond to the first offense level on the sentencing table with a guideline range to include the mandatory minimum; (3) set base offense levels below the mandatory minimum, anticipating that ordinary application of specific offense characteristics will increase the guideline range to encompass the mandatory minimum; or (4) make no change to base offense levels and allow § 5G1.1(b) to operate.

The PAG supports Option 4. Congress has not directed or otherwise promoted amendment to the Guidelines, and the Commission does not rely on new empirical data or evidence to substantiate a need for change. Leaving aside relatively recent amendments to the sex offense guidelines that increased dramatically defendants’ sentence ranges, Option 1, and to a similar extent Option 2, is imprudent because it serves to propagate an approach that has been roundly subject to criticism and debate since the Guidelines’ inception. Anchoring offense levels to statutory mandatory minimums, in the absence of any congressional mandate, drives guideline sentences too high. Allowing § 5G1.1(b) to operate, rather than make the proposed offense level changes (e.g., §§ 2A3.1, 2G1.1 and 2G1.3), affords the opportunity for study and review, specifically to determine more accurately the necessity for and suitability of potential increases. At most, the approach set forth in Option 3 should be considered because history shows that offense levels, once adopted, are seldom reduced.

With respect to § 2A3.3, there appears no need to raise the base offense level. Notwithstanding the increase in the statutory maximum under 18 U.S.C. § 2243(b) from one to 15 years’ imprisonment, Commission data shows that courts have sentenced within the prescribed guideline range in each of the 11 cases to which this guideline has applied in the past three years. *See* USSC, *Sourcebook of Federal*

Sentencing Statistics, Table 28 (2004-2006). Over time the Commission can gauge courts' experience with the existing guideline, along with any systemic dissatisfaction with prescribed penalties, and amend as necessary. For reasons articulated above, as well as the practical realities attendant to unlawful conduct under § 2443(b) that are set forth in the Defenders' letter, the PAG also opposes as inappropriate the definition of "minor" proposed in Application Note 1. J. Sands 3/6/07 Ltr. at 16-17.

With respect to § 2A3.4 and Issue for Comment 4, in the absence of congressional directive or support, the PAG opposes the proposed increase in minimum offense levels where the victim has not yet attained the age of 12 years. Commission data shows that of the 44 cases sentenced under this guideline in the past three years, courts have sentenced within the prescribed range 35 times (80 percent), with relatively equal occurrences of upward departures (4) and downward departures and/or below range sentences (5). See USSC, *Sourcebook of Federal Sentencing Statistics*, Table 28 (2004-2006). In sum, the existing guideline has proven to be sufficient.

Other Criminal Provisions

In response to Issue for Comment 7, the PAG opposes an enhancement to § 2G3.1 where the use of embedded words or digital images in the website source code deceived an adult into viewing obscene material. Congress did not direct or suggest the enhancement. Furthermore, the new offense is wholly analogous to the use of misleading domain names criminalized in 18 U.S.C. § 2552B and merits analogous treatment. Correspondingly, the PAG sees no need for an increase from two to four levels under § 2G3.1(b)(2).

3. TECHNICAL AND CLARIFYING AMENDMENTS

The PAG supports the only substantive amendment in this category – applying the rules in § 3D1.1 to a situation where the defendant is sentenced on multiple counts in different indictments.

4. MISCELLANEOUS LAWS

Fallen Heroes

The Respect for America's Fallen Heroes Act prohibits unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of the Arlington National Cemetery. 38 U.S.C. § 2413. The Commission has recommended that this new offense be sentenced under § 2B2.3 (Trespass). Although the Commission has identified the proper guideline, we agree with the Federal Public and Community Defenders that a two-level enhancement is not appropriate because a cemetery is materially different from the other locations, such as a nuclear energy facility, a vessel or aircraft of the United States or a secured area of an airport, that give rise to the higher offense level. Those other locations are not ordinarily open to the public, and trespass on them implicates security concerns not present at public cemeteries.

International Marriage Brokers

Section 833 of the Violence Against Women Act creates both a misdemeanor (8 U.S.C. § 1375a(d)(3)(C)) and a felony (8 U.S.C. § 1375a(d)(5)(B)) for marriage brokers who unlawfully disclose

certain information required to be collected under the law. The Commission has incorporated both offenses under § 2H3.1, with the felony at a base offense level of 9 and the misdemeanor at a base offense level of 6. We agree with the Commission's treatment of these two offenses.

Internet Gambling

On October 13, 2006, the President signed the Security and Accountability For Every Port Act of 2006 (the SAFE Port Act) into law. Included in the SAFE Port Act are provisions that make it a crime to accept funds in connection with "unlawful internet gambling." Those provisions are codified at 31 U.S.C. § 5363. The new statute prohibits persons engaged in the business of betting or wagering from knowingly accepting various financial instruments from another person engaged in unlawful internet gambling. The penalty for this offense is imprisonment of up to five years. In response to this new offense, the Commission has requested comments regarding whether it should be referenced to § 2E3.1 (Gambling Offenses) or either § 2S1.1 or § 2S1.3 (money laundering).

The PAG supports the Commission's proposal to reference to § 2E3.1, the existing guideline for Gambling Offenses. The new offense is identical in virtually every respect to the offenses currently referenced to § 2E3.1. Like the offenses referenced to § 2E3.1, 31 U.S.C. § 5363 contains a statutory maximum of 5 years. Conversely, the offenses referenced to § 2S1.1 and § 2S1.3 involve very different criminal conduct that carries maximum penalties of up to 20 years.

Currently, § 2E3.1 contains no cross references or specific offense characteristics, and there is no need to add either if the Commission refers 31 U.S.C. § 5363 to § 2E3.1. A cross reference to the money laundering related guidelines is inappropriate. Unlike the offenses covered by § 2S1.1 and § 2S1.3, § 5363 is not intended to deter the concealment of certain criminal behavior. Rather, § 5363 merely prohibits engaging in transparent financial transactions with persons engaged in unlawful internet gaming. The conduct covered by guidelines appropriate for laundering of monetary instruments or structuring transactions to evade reporting requirements is dissimilar to unlawful internet gambling.

5. INTELLECTUAL PROPERTY RE-PROMULGATION

The Commission has asked for comment on Congress's directive to determine whether the infringement amount definition in § 2B5.3 is adequate for certain offenses. Various options are proposed for measuring the infringement amount. The PAG believes Option 1 – which would give every trafficking case under 17 U.S.C. § 1201(b) a minimum of 12 offense levels – is premature. The experience with this offense is still developing, and there is no relevant case law. There is not yet any reason to think the guideline as it stands, including its provision that allows for upward departures, will be insufficient to capture the seriousness of trafficking cases under § 1201(b). And Option 3 is too complex to be applied reliably: it is not at all clear what is meant by "the price a person legitimately using the device ... would have paid" in the context of a copy control circumvention device. The PAG believes that Option 2 is the simplest to apply and should be adopted.

There are two issues for comment, and the PAG agrees with the responses and recommendations made by the Federal Public and Community Defenders. First, the PAG believes there should be a downward departure provision in § 2B5.3 to deal with cases where the infringement amount overstates the offense's seriousness. Given the rapidly-changing technology involved, the guideline should provide

flexibility. Just as other guideline sections allow for upward and downward departures in appropriate cases, so too should § 2B5.3. Second, the PAG supports the deletion of Application Note 3 and believes the special skill enhancement should not be required in every instance of initial access. Again, given the complexity and ever-changing nature of the relevant technologies, the PAG believes that significant flexibility in the guidelines, particularly in the short term, is desirable so as to permit accumulation of more sentencing data and experience under sections 1201 and 1204.

6. TERRORISM/PATRIOT ACT

Narco-terrorism

In response to the new crime of Narco-Terrorism enacted at 21 U.S.C. § 960a, the Commission has proposed referencing either § 2D1.1 (Option 1), or an entirely new guideline § 2D1.14 (Option 2). First, we agree with the Defenders that the current guidelines already adequately account for this new offense through § 3A1.4. We also agree that if the Commission chooses to make any changes it should use Option 2, which would treat the new offense in a manner similar to the sale of drugs within 1,000 feet of a school. *See* § 2D1.2. We are concerned about the broad reach of the statute. It would apply, for example, to a defendant who knew some of the drug proceeds would make their way to a person who had previously engaged in a terrorist act but for whom there was no realistic likelihood of terrorist acts in the future. As a result, we do not support a categorical disqualification from eligibility for the lower sentences available under § 2D1.1(a)(3) and § 2D1.1(b)(9). In addition, the Commission should add an Application Note to § 2D1.14 stating that the enhancement under § 3A1.4 does not apply. The four [or six] level enhancement proposed under § 2D1.14 already accounts for the fact that justifies the § 3A1.4 enhancement – an intent to promote terrorism.

Border Tunnels And Passages (And Request For Comment 2)

In response to the congressional directive to promulgate or amend guidelines for persons convicted of offenses involving tunnels, the Commission has proposed new guideline: § 2X7.1. The new guideline provides a base offense level of 8 or 9 for defendants convicted under 18 USC § 554(b) (permitting the construction of a tunnel on one's property), 16 for defendants convicted under 18 U.S.C. § 554(a) (constructing or financing the construction of a tunnel) and 4, plus the underlying offense level for a minimum combined offense level of 16, for a violation of 18 U.S.C. § 554(c) (using a tunnel to unlawfully smuggle an alien, goods, controlled substances, weapons of mass destruction or a member of a terrorist organization). The PAG opposes the four-level increase to the offense level for the underlying offense. In immigration offenses, in particular, this could lead to very significant increases for those with an already high offense level – an increase disproportionate to the added culpability of using a tunnel rather than other means of illegal entry. In response to the second request for comment, we also see no reason to increase the other penalties beyond those proposed.

Adequacy Of Punishment For Smuggling Offenses (Request For Comment 1)

The Commission asks whether the current guidelines provide sufficient punishment for violations of 18 U.S.C. §§ 545 and 549. The sole basis cited for raising this issue is the recent increase in the statutory maximum for each offense. But in the absence of either an explicit directive from Congress that the guidelines are too low or data gathered from prior sentencings demonstrating that judges have

frequently needed to exceed the current guidelines, the Commission should not increase the guidelines. There may be unusual cases where the higher statutory penalty gives the courts the ability to impose a sentence above the current norm, but that is no reason to increase the sentences for the heartland of cases prosecuted under those statutes.

Displaying insignias and uniforms (Request for Comment 3)

The PAG agrees with the Federal Public and Community Defenders that the appropriate response to the congressional directive regarding offenses committed while wearing or displaying insignia and uniform is to, at most, provide an application note recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.

7. DRUGS (NOT INCLUDING CRACK COCAINE)

18 U.S.C. § 865 and Issues for Comment 3(a)-(c)

The PATRIOT Act created a new offense – 21 U.S.C. § 865, “Smuggling Methamphetamine or Methamphetamine Precursor Into the United States While Using Facilitated Entry Programs.” It provides a new mandatory consecutive sentence of not more than 15 years for any drug offense involving smuggling of methamphetamine or any listed chemical while using a facilitated entry program.

The proposed amendment would add two levels in §§ 2D1.1(b)(5) and 2D.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. The proposal includes an application note instructing judges on how to impose the sentences under section 865 consecutively.

Congress intended that those who abuse their facilitated entry privileges to import methamphetamine receive an enhanced sentence. In our view, the Commission’s handling of the enhancement is consistent with Congress’s intention.

Issue for Comment 3(a) asks whether the enhancement should exceed two levels and whether the offense should trigger a separate base offense level. The PAG opposes both courses. The two-level enhancement in the proposed amendment is in line with other enhancements that punish relatively comparable harms, such as use of an aircraft (§ 2D1.1(b)(2)) or use of mass marketing (§ 2D1.1(b)(5)). Providing more than two levels would dwarf the enhancements for comparable harms and we can discern no justification for doing so. Indeed, increased enhancements are inconsistent with enhancements for conduct that is arguably more serious, such as the two levels provided for gun possession (§ 2D1.1(b)(1)), or for distribution in a prison (§ 2D1.1(b)(3)). Moreover, importers of actual methamphetamine already face stiff sentences, comparable to those for crack cocaine, and their sentences are enhanced under § 2D1.1(b)(4) by two levels. The real effect of the proposed two-level enhancement is thus a four-level enhancement for all facilitated entry abusers, save those who receive a mitigating role adjustment under § 3B1.2. *See* § 2D1.1(b)(4)(B).

Issue for Comment 3(b) asks whether the Commission should extend the facilitated entry enhancement to importation of all drugs under 21 U.S.C. §§ 960 and 963. The PAG opposes this suggestion. We see no reason that justifies extending this enhancement to other than methamphetamine. To our knowledge there is no reason to assume that the practice of using facilitated entry programs to

import drugs is so widespread that it warrants a special enhancement beyond the special case of methamphetamine. Congress certainly has not identified it as a concern and explicitly limited enhanced penalties to methamphetamine importers. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (The provision "creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.")

In Issue for Comment 3(c), the Commission asks if it should amend § 3B1.3, Abuse of Position of Trust or Use of a Special Skill, to include offenses that involve a facilitated entry program. The PAG opposes this suggestion. It is difficult to see how facilitated entry offenders fit the abuse of trust or special skill parameters. As Application Note 1 states, the public or private trusts that triggers section 3B1.3 is a position of trust "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." Thus, for example, while bank tellers or hotel clerks are trusted to safeguard currency and other valuables, they are excluded from the guideline due to their lack of professional or managerial discretion. *Id.* Those who use the facilitated entry program bear no resemblance to the offenders contemplated in § 3B1.3. The program serves not only the interests of the frequent border crosser, but also of the government. The program shortens the long lines and delays by permitting easier access to individuals who provide information in advance that assists the government in administering border crossings. Facilitated entry program users enjoy no special relationship of trust nor do they employ any special skill. They are in fact subject to the same level of inspection as is any border crosser, but the time the inspection takes is shortened because the user has provided much of the information ahead of time. *See* U.S. Customs and Border Patrol, *Secure Electronic Network for Travelers Rapid Inspection (SENTRI)* (available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler-/sentri/sentri.xml).

Section 3B1.3 would have to be significantly rewritten to accommodate these sorts of offenses. The PAG sees no need to do so.

18 U.S.C. § 860a

The PATRIOT Act also added 21 U.S.C. § 860a, "Consecutive Sentence for Manufacturing or Distributing, or Possessing with Intent to Manufacture or Distribute, Methamphetamine on Premises Where Children are Present or Reside." The Act provides for a consecutive mandatory term of not more than 20 years' imprisonment for possession with intent to distribute, or manufacture methamphetamine on premises where a minor is present or resides. Two options are presented.

Proposed Option 1. Congress directed the Commission in 2000 to enhance sentences for defendants whose manufacturing conduct creates a substantial risk of harm to a minor or incompetent. The Commission complied and in § 2D1.1(b)(8)(C) provides a six-level enhancement (minimum of level 30) for the harm.

Proposed Option 1 sets out a two-level enhancement where the methamphetamine manufacturing is punishable under 21 U.S.C. § 860a but does not pose a substantial risk of harm as already contemplated by § 2D1.1(b)(8)(C). Otherwise, and as currently provided in § 2D1.1(b)(8)(C), a six-level enhancement (minimum of level 30) applies.

The PAG recommends option one. It utilizes the current enhancement to address the risks posed

to minors, while providing an appropriately smaller enhancement where the activity does not pose such a risk. This is sound, punishing significantly more severely the more culpable manufacturer whose activity creates a substantial risk to minors, while still additionally penalizing conduct conducted in places where children are present or reside, as Congress intended.

Proposed Option 2 creates a two-tiered penalty enhancement. It proposes a six-level enhancement (and floor of level 29) for manufacture where a minor is present or merely resides. It proposes a three-level enhancement (and floor of level 15) for distribution or possession with intent to distribute methamphetamine where a minor is present or resides. The PAG opposes this option in light of the adequacy of the existing six-level and two-level enhancements provided in Option 2.

Option 2 contains penalties that are overbroad and dwarf existing enhancements that punish similar – and in some cases – greater harms. For example, the proposed three-level enhancement for possession with intent to distribute in the residence of a minor could be applied when no minor is present (and has not been present for some time) and when no drug distribution ever took place. Clearly the enhancement is unduly harsh in such cases. Moreover, the enhancement, of its own and when compared to others, is disproportionate. For example, it is greater than the enhancement for defendants who possessed drugs in a school zone, § 2D1.2 (two levels), possessed a firearm in connection with a drug trafficking offense, § 2D1.1(b)(1) (2 levels), or who distributed drugs in a juvenile detention facility (§ 2D1.1(b)(3) (2 levels)).

The Commission also seeks comment on whether the enhancement for risk of substantial harm to a minor should be based on relevant conduct. The PAG opposes basing the enhancement on other than convicted offenses under the statute. Doing otherwise exposes a defendant to a six-level enhancement in unwarranted circumstances. For example, applying the relevant conduct rule, a defendant who never manufactured methamphetamine, but received and distributed it, could be subject to a six-level enhancement due to the conduct of a co-conspirator, whose manufacturing posed a substantial risk of harm to a minor, or following Option 2, where no risk is present whatsoever. Such an enhancement would also be applied under a preponderance of the evidence standard. The PAG can discern no justification for such an outcome; it offers no discernable deterrent to defendants who traffic methamphetamine but do not manufacture it, and it punishes defendants for harm neither intended nor risked.

The pernicious effects of applying the enhancement for relevant conduct are even more pronounced when the proposals move away from substantial risk of harm from the manufacture of methamphetamine to risks attendant to possession with intent to distribute methamphetamine or any other drug. There is simply no real offense involved in such a scenario and the underlying purposes of the relevant conduct rules are not served by this approach. Furthermore, in light of the Commission's stated intention to re-examine the relevant conduct rules, it is particularly unwise to increase their impact at this time.

The issue for comment further asks if the enhancement should be broadened to include simple distribution of methamphetamine or even possession with intent to distribute methamphetamine to the extent the distribution of methamphetamine poses a substantial risk of harm. And the Commission asks whether the enhancement should be further expanded to include all drugs. We oppose these constructions.

Congress, in 2000, recognized a special danger attendant to methamphetamine manufacturing.

The nature of the chemicals involved, the risks of their combinations and the dangers posed by their disposal all trigger special concerns that are simply not implicated when already manufactured methamphetamine, or any other drug, is present. The Commission drafted guidance in Application Note 20 addressing factors such as the quantity of chemicals and hazardous or toxic substances, the manner of their disposal, the extent of the operation and the location of the lab. Such a nuanced examination is an appropriate approach for courts to take in making a determination of whether an operation poses the accepted risks. Presence of the end product does not trigger them. If such an enhancement were adopted, it is an easy step to apply the same penalty in the case of simple possession of the drug, making drug addicts who keep their drugs on the premises liable for extreme sentences because their minor children reside with them. This approach is excessive, unnecessary and unsupported by any evidence.

Furthermore, Congress has not seen fit to expand this protection. Congress, in 2000 and again in 2006, could have addressed an enhancement for simple possession or possession with intent to distribute methamphetamine. It did not. Similarly, Congress could have expanded the reach of the substantial risk of harm to a minor to include manufacture or possession of all other drugs, but it has not. The Commission does not present any support for an option that would be used to increase already significant sentences for drug defendants.

Similarly, we know of no evidence supporting any increased risk of substantial risk of harm to a minor that would be posed by the mere presence of already manufactured methamphetamine or any other drug. In the case where a defendant's conduct with respect to a controlled substance poses a substantial risk of harm to a minor, the judge may exceed the top of the guideline range.

21 U.S.C. § 841(g)

Issue for Comment 1 concerns three proposed approaches to enhancements intended to account for convictions under 21 U.S.C. § 841(g), which, pursuant to Section 201 of the Adam Walsh Act, prohibits the knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. As an initial matter, we offer three observations.

First, § 841(g)(1)(B) criminalizes the use of the Internet to distribute a date rape drug to an unauthorized purchaser. For guidelines purposes, this provision is superfluous; all offenses within Section 2D1.1 involve, in one form or another, the distribution of drugs to unauthorized purchasers. There is no support or justification for an "unauthorized purchaser" enhancement exclusive to convictions under § 841(g)(1)(B).

Second, Section 2D1.1(b)(5) [or 2D1.1(b)(6) under proposed changes] already provides a two-level increase whenever a controlled substance is distributed through mass marketing by means of an interactive computer service. This enhancement encompasses the use of the Internet (i.e., websites) for mass promotion of sale of date rape and other drugs. In other words, Section 2D1.1(b)(5) already affords an increased penalty for what might be characterized as an aggravated § 841(g) offense, wherein a defendant's offense conduct involves extensive or far-reaching Internet use.

Third, in enacting § 841(g), Congress expressed no intent as to specific enhancements or

penalties, aside from increasing the statutory maximum for ketamine offenses in one, limited circumstance (see below). Accordingly, the Commission should act judiciously and consistent with existing guidelines and policy. In particular, enactment of § 841(g) does not support adoption of the type of minimum base offense level (floor) proposed in Option 3. Indeed, the Commission should move away from such stringency.

With the foregoing in mind, the PAG submits an alternate amendment:

9. If the defendant was convicted under § 841(g)(1)(A) and (i) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level, or (ii) knew that the date rape drug was to be used to commit criminal sexual conduct, add 2 levels.

This approach satisfies several considerations. For one, it distinguishes the degrees of culpability established by § 841(g)(1)(A). It also advances the aim of consistency within the guidelines. Section 2D1.1(e) makes cross-reference to § 3A1.1(b) when a defendant is found to have used a controlled substance to facilitate commission of a sexual offense. Inasmuch as a defendant who actually uses the controlled substance is subject to no greater than a two-level enhancement, a defendant who violates § 841(g) should be subject to comparable penalties — a consideration that, standing alone, undermines the unduly harsh proposal set forth in Option 3. Finally, in view of the additional two levels for aggravated use of the Internet under § 2D1.1(b)(5) [or (b)(6)], a defendant convicted under § 841(g)(1)(A) would effectively be subject to a three- or four-level increase in his base offense level. In spite of general disfavor with judicial inquiry into a defendant's state of mind when determining offense levels, the PAG believes this proposal tracks the purpose conveyed in the language of 21 U.S.C. § 841(g) and is sufficiently straightforward that it will not complicate plea negotiations.

Ketamine

Although not listed in the Issues for Comment, the PAG is concerned about the apparent mistaken premise upon which the Commission proposes amendment to the offense levels for ketamine offenses. Because ketamine is a Schedule III controlled substance, the Drug Quantity Table currently provides a maximum offense level of 20. Citing 21 U.S.C. § 860(a) for the proposition that Congress has raised the statutory maximum for ketamine offenses from five to 20 years, the Commission proposes to lift the Quantity Table ceiling/cap for ketamine. However, § 860(a) concerns methamphetamine; it is silent as to ketamine. The only increase in the statutory maximum for ketamine offenses is where a defendant is convicted under 21 U.S.C. § 841(g). Indeed, Congress has expressed no intent, nor otherwise directed, that the Commission create penalties for ketamine separate from those for other Schedule III controlled substances.

The PAG believes that the enhancements designed to reflect convictions under 21 U.S.C. § 841(g) are sufficient to achieve congressional ends and that the guidelines for ketamine offenses do not require amendment. Concurrently, we recognize the apparent interest in eliminating the ceiling/cap for ketamine-related offenses to reflect the one scenario where the statutory maximum is higher. We, therefore, submit that the appropriate approach is an Application Note, such as:

In any case in which a defendant is convicted under 21 U.S.C. § 841(g) for distributing

ketamine, ketamine should not be treated as a Schedule III substance. Rather, the Drug Quantity Table for Schedule I or II Depressants should be used. This means that for ketamine offenses under 21 U.S.C. § 841(g), a maximum level of 20 does not apply, as it does for other ketamine offenses.

This approach, which eliminates the need for additional listings in the Drug Quantity and Drug Equivalency Tables, advances the aim of simplification while satisfying the debatable end sought to be achieved.

8. IMMIGRATION

The Commission has invited comment on its proposed amendments to 2L1.1, the guideline for offenses involving the smuggling, transporting, or harboring unlawful aliens; 2L2.1, for offenses involving unlawful trafficking in immigration-related documents; and 2L1.2, for unlawfully entering or remaining in the United States. The Commission has also asked for comment on *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006).

The PAG agrees with the comments submitted on behalf of the Federal Public and Community Defenders by Jon M. Sands, Federal Public Defender in Arizona, in his letter of March 2, 2007. With regard to the proposed increases under 2L1.1, any increase at present is unwarranted, and therefore, the PAG opposes both Options 1 and 2. Under Option 1, the Commission proposes additional increases in the offense level for offenses involving more than 200 illegal aliens. As Mr. Sands notes in his letter, offenses involving more than 100 illegal aliens account for fewer than two percent of the total. One of the Commission's reasons for the proposed increase appears to be two bills introduced in the House last year containing directives to the Commission to increase penalties based on the number of aliens smuggled. See Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines at 8. However, Congress did not pass immigration reform legislation last year, and it continues to debate the issue. With the targeted cases accounting for such a small percentage of the total, and with Congress still debating immigration reform, the Commission should continue to gather data and determine whether those data support a change before amending the existing guideline.

Option 2 is likewise unwarranted. Like Option 1, Option 2 would increase offense levels for that very small percentage of cases involving more than 100 illegal aliens. In addition, Option 2 would significantly increase the sentences for offenses involving 16 to 24 and 50 to 99 aliens. As Mr. Sands points out, according to the Commission's data the vast majority of cases involve fewer than 25 illegal aliens, and in approximately 65 percent of the cases defendants receive sentences within the advisory guideline range. Under these circumstances, the PAG does not see any empirical justification for the proposed increases.

The proposed amendment to 2L2.1 (for illegal trafficking in immigration-related documents) is also unwarranted. The offense level increases, which are based on the number of documents involved in the offense, mirror the increases based on number of illegal aliens under 2L1.1, and are, for the same reasons, unwarranted at this time. Moreover, the PAG, like the Defenders, questions the underlying premise that one document is, as a measure of offense seriousness, the equivalent of one illegal alien. The Commission should study further the issue of the appropriate ratio of documents to illegal aliens. In the interim, the Commission should allow the district courts, using the existing advisory guidelines, to assess

the actual and potential harm in each case based on its own facts. If variance or departure trends emerge from that process, the Commission could then assess whether the guidelines need to be amended.

The PAG also endorses the Defenders' detailed comments on the Commission's proposed amendment to 2L1.2 for illegal re-entry offenses. In particular, we note the absence of any apparent justification for the 16-level increase under 2L1.2(b)(1), which runs through most of the proposed options. Additionally, the Defenders point out the value of distinguishing between "sentence served" and "sentence imposed," given the wide variation in state sentencing procedures. The Commission should use the former rather than the latter in measuring the seriousness of the re-entry offense, an approach that would reduce the existing disparity resulting from differences in state sentencing procedures. If the Commission is inclined to mention the availability of an upward departure in cases where the elements of the prior offense under-represent its seriousness, then fairness requires (as illustrated by the examples given by the Defenders) a downward departure in those cases in which the elements of the prior offense over-represent its seriousness.

Lastly, with regard to *Lopez v. Gonzalez*, 127 S.Ct. 625, for reasons set forth in the Defender's comments, the Supreme Court's decision requires no response by the Commission. If Congress passes new legislation in response to the *Lopez* decision, then the Commission can consider whether an amendment to the guidelines is warranted.

9. BUREAU OF PRISONS MOTION/"COMPASSIONATE RELEASE"

On March 8, 2007 the PAG sent the Commission a separate letter addressing requests for comments on § 1B1.13, which governs motions by the Bureau of Prisons for reductions in sentence based on extraordinary and compelling circumstances. Since then, the PAG has reviewed the ABA's revised proposed policy statement, dated March 12, 2007, and it supports that updated proposal.

10. CRIMINAL HISTORY

Minor Offenses

USSG §4A1.2(c)(1) was intended to exclude minor offenses in all but a few circumstances. In practice, however, the exceptions have swallowed the rule. Minor offenses regularly add to the criminal history score, resulting in higher sentence ranges and, in many cases, preventing application of the safety valve. Section 4A1.2(c)(1) should be amended to provide that the listed offenses never count for criminal history computation purposes. If the Commission is not prepared to take this corrective action, which will ensure that such dispositions are appropriately excluded (while allowing for a higher sentence if there really is an aggravating circumstance surrounding a petty offense disposition), then the guideline should be amended and restricted so that criminal history points are assigned for minor and non-criminal offenses only in the rarest and most limited of circumstances: aggravated, recent minor offenses involving lengthy terms of incarceration.

The Commission originally drafted § 4A1.2(c)(1) with the intention and goal that sentences for extremely minor, petty and non-criminal dispositions would be presumptively excluded from criminal history calculations because such sentences are not indicative of the seriousness of a person's criminal history and nor predictive of the likelihood of future criminal conduct. The exceptions for when such

offenses were counted were designed to be rarely applicable, and only for aggravated instances where a stiff sentence was imposed for the minor offense. This made great sense. The listed offenses are extremely minor; most have no intent requirement; and many are not even *criminal*. Moreover, none has predictive value for future criminality, that is, the fact that someone has a conviction for non-criminal disorderly conduct makes it no more likely that they will ever be in trouble again.

Despite this clear intention, gradually, over the years, the exceptions to the bar on including minor offenses have swallowed the rule. And they have done so in a way that presents a frontal attack on the Commission's goal to have a workable, easily understandable, and reliably predictive way of assigning criminal history points. The rules of application have become extremely difficult in practice, consuming thousands of hours of Probation Office, attorney, district court and court of appeals time in applying and interpreting the results in countless cases. Equally troubling is that minor offenses often count for up to three points (one point for the prior sentence itself and another two points under USSG §4A1.1(d) for being under that sentence at the time of the instant offense), resulting not just in a higher criminal history category but the loss of safety valve eligibility for low-level drug offenders.

There are hundreds of examples of how this occurs every day, but we will focus on just one that reflects the common impact on minor drug offenders. In that case, the defendant had no prior felony or misdemeanor criminal record. However, she had two convictions for non-criminal New York violations: harassment in the second degree and disorderly conduct. See N.Y. Penal § 10.00(3) & Comm'n Staff Notes (referring to violations, defined by a maximum jail term of 15 days, as non-criminal offenses). For both offenses, she received no jail time or fine. Instead, she was given one-year conditional discharge as to each, an unsupervised sentence that, under New York law, is not probation and has no conditions other than to lead a law-abiding life. The applicable sentence calculation without these dispositions was Criminal History Category I (zero points) and offense level 10, which included the safety valve reduction. The calculations ended up being increased following a determination that the two conditional discharge sentences – deemed to be one-year terms of probation – counted as one point each, and the instant federal offense was committed while under the conditional discharge. As a result of these two non-criminal violations, which generated one of the most lenient sentences available under New York law, the defendant now faced the loss of the safety valve, criminal history category III, and a sentencing range of 15-21 months (Zone D), rendering her ineligible for probation.

This result is inconsistent with the purpose of the criminal history calculations, the Commission's original intentions, and the facts and circumstances of this particular offender and her federal offense: the sale of one milligram of crack. It is also inconsistent with the realities of the state statute. Consider that if this defendant had received the statutory maximum under New York law for each of her convictions – fifteen days incarceration – that neither conviction would have counted. However, because she received the *more lenient* sentence of a conditional discharge, which can only be imposed when the sentencing judge determines that a harsher sanction is not appropriate, the two convictions/sentences *count* for criminal history purposes. Such an absurd outcome cannot be what the Commission intended in promulgating § 4A1.2(c)(1).

Other examples, which cumulatively run into thousands of federal cases per year, abound, and they are cogently set out in the letter submitted by the Federal Public and Community Defenders to the Commission. For example, under USSG § 4A1.2(c)(1)(B), convictions for minor offenses are often

deemed "similar" to a federal narcotics trafficking offense, such that one point is counted for the disorderly conduct conviction. In the following example, a conviction for "driving without a license" that resulted in a fine was considered "similar to" a federal narcotics trafficking conviction such that one point was assessed:

Criminal Trespassing, 2nd Degree, A misdemeanor	02/12/1997 (Age 23) 04/24/1997: Pled Guilty - 1 to Driving Without a License, \$100 fine, conditional discharge
Possession of a Hyperdermic Instrument, A misdemeanor	
Aggravated Unlicense Operation, U misdemeanor	
Failure to Obey Traffic Signs, an infraction	
City Court Buffalo, New York 97M-[redacted]	

DETAILS: On February 12, 1997, at approximately 10:00 a.m. the defendant was stopped by Buffalo Police officers for running a red light. At that time, a hypodermic needle was found in his jacket. Additionally, his driver's license was suspended and a VTL warrant was outstanding.

The Guideline must be amended to ensure that the Commission's original intent to exclude such dispositions is honored. To deal with these various problems, we agree with the proposals suggested by the Federal Public and Community Defenders.

Proposal 1 – providing that sentences for these offenses are never counted – is best because it provides for a practical bright line rule, allows for reliable and easy application, and is consistent with the Commission's original intent and with the purposes of guideline sentencing. A more idealized solution, such as tailoring a guideline that would only count offenses when there is a sufficiently serious aggravator, is not feasible because of the state variations (by offense, by sentence and by plea bargaining policies) that frustrate universal application of such a rule and its myriad exceptions. Any proposal that continues to include exceptions to the general rule of exclusion will continue to "overcapture" non-

criminal and petty offense dispositions that should not properly be included in the criminal history calculations.

The Commission should not hesitate in amending the guideline in this way. First, and importantly, whether it is specified in the application note or not, the sentencing court always has the option of considering an upward departure or variance for minor/non-criminal offenses that might, in the rare case, be appropriate for consideration. The best analogy is the Commission's decision to always exclude foreign convictions/sentences for criminal history purposes under § 4A1.2(h). Even with that prohibition, such sentences "may be considered under § 4A1.3." This is a workable, common sense, easily-applied rule that provides for consistency in sentencing while allowing for the consideration of special circumstances. The same approach can be used in amending § 4A1.2(c).

Second, the Commission should not lose sight of the types of offenses covered by § 4A1.2(c). All of the offenses are, by definition, minor. Almost all of them, except for scattered definitions in a few states, are misdemeanors or non-criminal violations. Sentences for these offenses are imposed in a manner that demonstrates a defendant is not deserving of more serious charges or prosecution, and usually the result is a non-prison sentence.

Third, the proposed approach avoids the unwarranted and very harsh denial of safety valve relief to hundreds of otherwise-eligible defendants for whom such relief was intended. Persons convicted of non-criminal violations and petty offenses are within the category of offenders that, if they meet all the other requirements, merit application of the safety valve.

Fourth, the proposed approach will streamline and simplify federal sentencing, free up time for the participants to give their attention to more serious matters and promote better, more equitable and more accurate sentencing decisions.

Proposal 2 by the Defenders has our full support if the Commission decides to amend the Guideline rather than adopt a rule excluding such offenses from criminal history calculations. The amendments will narrow the situations in which sentences for minor offenses will be counted to those that include only very serious criminal conduct with sufficiently stiff sentences.

The Defenders' Proposal 2 would eliminate the counting of offenses at § 4A1.2(c)(1)(A) if the sentence "was a term of probation of at least one year." We believe that eliminating this qualifier is appropriate and would ensure that only sufficiently stiff and serious punishments (*i.e.*, significant incarceration) trigger counting of the minor offense. However, if the Commission decides to keep the current structure of § 4A1.2(c)(1)(A), we strongly urge modification of this subsection to provide that the minor offense counts only if "the sentence was a term of *supervised* probation of at least one year...." (Emphasis added). Counting only supervised probation terms will provide a more accurate measure of the seriousness of the prior offense. More importantly, it would avoid the irrational result noted above in which a prior conviction counts where the defendant received the most lenient possible disposition, such as conditional discharge under New York law, *see United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), yet receives *no* points if he received the most *severe* sentence (*e.g.*, 15 days in jail for violations such as disorderly conduct or harassment in the second degree under New York law).

We have only one addition to the Defenders' comprehensive second proposal, and accompanying

explanation. The offense of "harassment," like disorderly conduct, is a minor offense and, in many jurisdictions, is even a noncriminal offense. As is the case with disorderly conduct, harassment should be included as an offense that never counts in the amended USSG § 4A1.2(c)(2). This is consistent with the purpose of the Guideline, and it will save extensive time and resources that are now spent litigating whether a harassment disposition is "similar to" the listed offenses of disorderly conduct, resisting arrest or disturbing the peace. *See, e.g., United States v. Morales*, 239 F.3d 113 (2d Cir. 2000) (New York second degree harassment conviction/sentence was "similar to" listed offenses such that it should not have been counted; vacated and remanded for resentencing).

Related cases

The PAG joins in the recommendations of the Federal Public and Community Defenders and their proposed amendment to Application Note 3 to USSG § 4A1.2.

11. PRETEXTING

For the new statute criminalizing, among other things, the fraudulent acquisition and disclosure of confidential telephone records, the PAG believes the appropriate guideline is § 2H3.1, which the Commission has proposed expanding to cover disclosure of certain personal information. We understand that consideration is also being given to use of § 2B1.1, but that provision is not as good a fit. The harm from unauthorized access to telephone records is principally an invasion of privacy. As reflected in Congress's findings, telephone records ("call logs") may reveal the names of a telephone user's doctors, public and private business relationships, business associates and more. *See* Pub. L. 109-476, § 2. The privacy interest at stake does not readily equate to a dollar amount, nor would it be practical for courts to try to translate the injury into pecuniary harm. Section 2H3.1 provides a higher base offense level than § 2B1.1 (9 versus 6) to account for the harm caused in the absence of pecuniary loss.

In the event the new telephone records offense is committed in its aggravated form – usually with the intent to further the commission of another crime – the cross reference will frequently direct the application of a higher offense level. We believe, consistent with the Sixth Amendment implications of the statutory sentence enhancements, that the Commission should require a conviction under either subsection (d) or (e) for the cross reference to apply. Under subsection (e), the court is *required* to impose some additional period of imprisonment of up to five years (although no particular amount of prison time is specified). Subsection (d) contains a similar requirement: an additional prison term of up to five years, a fine up to double the normal statutory maximum, or both. The Commission already takes this "offense of conviction" approach for violations of 21 U.S.C. §§ 859, 860 and 861, which deal with aggravated forms of drugs offenses, such as those occurring within 1,000 feet of a school. *See* § 2D1.2. Consistent with the approach used in § 3C1.3 for imposition of the sentence enhancement in 18 U.S.C. § 3147, we recommend an application note explaining that some portion of the total sentence determined under 18 U.S.C. § 3553(a) be apportioned to the consecutive enhancement under subsection (d) or (e).

It would be premature to add specific offense characteristics to § 2H3.1. To maintain consistency with the Commission's goal of simplifying the Guidelines, the better approach is to let courts vary from the guideline range in those cases where the base offense level does not adequately account for an aggravating or mitigating circumstance. If it turns out that certain circumstances are resulting in variances

in a large number of cases, the Commission can then consider whether a new specific offense characteristic is appropriate.

On a related note, we understand that the President's Task Force on Identity Theft is proposing an expanded definition of "victim" under § 2B1.1 that would include persons who suffer non-monetary harm, such as invasion of privacy, damage to reputation and inconvenience. This proposed definitional expansion is terribly ill-advised. Section 2B1.1 is already complicated enough without requiring courts to identify the number of non-monetary-harm victims, as well as to assess the extent to which the offense has harmed them in such a non-monetary manner. The proposed definition is sufficiently broad and vague that it could conceivably require courts to count as victims any person who is required to testify as a witness before the grand jury or at trial. Even the larger categories of persons who are interviewed, or entities from which the government subpoenas or otherwise requests records, during the course of an investigation would surely have a claim of being "inconvenienced" by the offense.

The proposed expansion of the definition is also unnecessary. The guideline already contains Application Note 19, which encourages courts to sentence above the range if the loss amount understates the seriousness of the offense. It specifically mentions cases where the harm is invasion of privacy. Absent some indication that courts have needed to vary from the guideline in a sizeable number of cases to account for non-monetary harms, the Commission should not further complicate this provision.

Finally, the proposed definition could have the unintended consequence of greatly expanding the number of persons to whom the Crime Victims' Rights Act applies. *See* 18 U.S.C. § 3771. If the courts are required to identify and consider as victims, for Guidelines purposes, those persons who incur non-monetary harm, including "inconvenience," they may very well determine that the Commission's approach justifies considering such persons "victims" for purposes of the Act. If so, persons who suffered no harm other than inconvenience would have to be accorded a number of rights at and before sentencing, including the right to be heard, the right to confer with the prosecutor, the right to file a motion in the district court asserting their rights, and the right to file a petition for mandamus if the district court denies the relief the victim has sought. The Commission should not send the courts down the road of either greatly expanding the scope of the Act or creating a glaring and confusing inconsistency between who is a victim under the Guidelines and who is a victim under the Act.

12. CRACK COCAINE

The Commission seeks comment on the testimony it received regarding cocaine sentencing policy at the November 14, 2006 hearing. The PAG stands by its proposal that the Commission equalize crack and powder cocaine sentences at the current powder cocaine levels. The hearings confirmed that equalization is appropriate in light of the lack of evidence supporting the current penalty structure. Crack cocaine sentencing policy is fundamentally unsound, as discussed by many of the witnesses at the hearing. There is no legitimate justification for continuing the policy and many reasons to abandon it.

Many of the witnesses pointed out that the crack cocaine penalty structure creates racial disparity in sentencing that is unsupportable and profoundly detrimental. For example, A.J. Kramer, Federal Public Defender for the District of Columbia echoed the assessment of the Honorable Robert Sweet, who called federal crack policy the "new Jim Crow law" and that of the Honorable Louis F. Oberdorfer, who has likened the guideline and the mandatory minimum from which it derives its questionable legitimacy to the

Fugitive Slave Law.¹ The NAACP told the Commission that the penalty “show[s] a callous disregard for our people and our communities.”² The Commission has long identified the perception of racial bias as a reason to abandon the penalty.³ The disparity in sentencing that results from the starkly different penalties and their correspondence to race undermines confidence in our criminal justice system.

A number of witnesses discussed the fact that the various justifications cited in the Anti-Drug Abuse Act of 1986 have been found baseless or no longer exist. For example, Dr. Harolyn Beltcher of Johns Hopkins University repeated the now well-known fact that prenatal exposure to crack cocaine is no different than that for powder and less damaging by far than the impact of alcohol and tobacco.⁴ Professor Alfred Blumstein reiterated his findings that the violence associated with crack cocaine markets has long since abated as the markets for crack cocaine evolved.⁵ Crack cocaine’s perceived preferential appeal for young people is contradicted by evidence from the Monitoring the Future study.⁶

The deterrent impact of the 100:1 ratio is impossible to determine. Dr. Bruce Johnson testified that “[c]rack sellers/distributors rarely mention awareness of it, nor do they report changing their business activities due to its existence.”⁷

While some witnesses testified in favor of maintaining crack penalties at their current levels, none presented the Commission with compelling evidence to justify their conclusions or to overcome the wealth of evidence for eliminating the distinction. For example, Alexander Acosta testified that weapon involvement was somewhat higher for crack cocaine involved defendants.⁸ This factor is present in some crack cases, yet it is reflected in the penalty structure for all crack cocaine defendants. The PAG has long urged that the better course is to equalize the penalties and address added harms, defendant by defendant, at sentencing by using appropriate offense characteristics.⁹

The Commission has taken evidence and heard from the community for a dozen years on this issue. The PAG urges that the Commission bring its investigation to a close and now act to eliminate the current penalty for crack cocaine and equalize the two penalty structures. Thousands of defendants have been incarcerated for unjustifiably long terms of imprisonment based on a fiction that the Sentencing Commission exposed twelve years ago. There is no justification for further delay.

¹ See Testimony of A. J. Kramer, Federal Public Defender for the District of Columbia, at 1-2.

² Testimony of Hilary O. Shelton, Director, NAACP Washington Bureau, at 2.

³ See United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* 102-103 (May 2002).

⁴ Testimony of Harolyn Beltcher, M.D., M.H.S., Associate Professor of Pediatrics, Johns Hopkins School of Medicine, at 1.

⁵ See Testimony of Alfred Blumstein, H. John Heinz III School of Public Policy and Management, Carnegie Mellon University, at 3-4; see also Testimony of Bruce D. Johnson, Institute for Special Population Research at 4 (ADAM research indicates “violence is relatively rare among current crack/cocaine users.”).

⁶ See Testimony of Nora D. Volkow, Director, National Institute on Drug Abuse, at 3.

⁷ Testimony of Bruce D. Johnson, at 4.

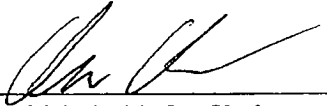
⁸ Testimony of R. Alexander Acosta, United States Attorney, Southern District of Florida 13-14.

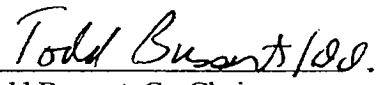
⁹ See Testimony of David Debold, Co-Chair of the Practitioners’ Advisory Group to the United States Sentencing Commission, at 2.

CONCLUSION

On behalf of the our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer our input on the proposed amendments and issues for comment. We look forward to discussing some of these topics at the hearing on March 20, and we hope that our perspective is useful as the Commission continues to carry out its responsibilities under the Sentencing Reform Act.

Sincerely,


David Debold, Co-Chair
Gibson Dunn & Crutcher, LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036
(202) 955-8551 telephone
(202) 530-9682 facsimile
ddebald@gibsondunn.com


Todd Bussert, Co-Chair
103 Whitney Avenue, Suite 4
New Haven, CT 06510-1229
(203) 495-9790 telephone
(203) 495-9795 facsimile
tbussert@bussertlaw.com

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner Edward F. Reilly, Jr.
Commissioner Benton J. Campbell
Kenneth Cohen, General Counsel
Judy Scheon, Chief of Staff

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

March 14, 2007

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

**Re: Comments on Proposed Amendments Relating to Terrorism and
Transportation**

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment under the headings of Terrorism and Transportation that were published January 30, 2007.

I. Terrorism

**A. Foreign terrorist organizations, terrorist persons and groups, 21
U.S.C. § 960a**

The Commission proposes two options for implementing the new offense at 21 U.S.C. § 960a, each of which would make the base offense level 4 or 6 plus the offense level specified in the Drug Quantity Table, and would allow the 12-level increase/32-level minimum/Criminal History Category VI under § 3A1.4 to apply in addition. It is also suggested that it may be appropriate to exclude the mitigating role cap and the safety valve reduction in such cases.

We oppose these proposals because they would result in punishment far in excess of what the statute requires, would punish the same conduct twice, and would unjustifiably assume that no defendant convicted under this statute is deserving of a mitigating role cap or safety valve reduction. We recommend that the Commission adopt one of two alternative proposals.

1. Defender Proposals

Proposal 1. Congress did not direct the Commission to amend the guidelines in any way to implement the new offense set forth at 21 U.S.C. § 960a. Accordingly, our first proposal is to allow § 5G1.1(b) to operate. It would rarely if ever have to operate because § 3A1.4 would apply in most, and probably all, cases. This would accomplish only what the new statute requires, which is a term of imprisonment of not less than twice the statutory minimum that would apply under 21 U.S.C. § 841(b)(1).

Proposal 2. In the alternative, we recommend a separate offense guideline at § 2D1.14. If § 3A1.4 applied, the base offense level would be the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a minimum offense level of 32, 34 or 36 and a Criminal History Category of VI in any case without an applicable statutory minimum. See footnote 1, *infra*. In the unlikely event § 3A1.4 did not apply, the base offense level would be 4 plus the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This too would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a 34-100% increase in cases without an applicable statutory minimum. In the few cases in which the guideline range fell below the minimum required by § 960, that minimum would trump under § 5G1.1(b).

§2D1.14. Narco-Terrorism

(a) Base Offense Level

- (1) If § 3A1.4 (Terrorism) applies, the base offense level is the offense level from § 2D1.1 applicable to the underlying offense.
- (2) Otherwise, the base offense level is 4 plus the offense level from § 2D1.1 applicable to the underlying offense.

2. What the Statute Requires

Title 21 U.S.C. § 960a states: "Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section 841(b)(1) of this title, and not more than life"

That is, defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(A) receive a sentence of no less than 20 years, defendants convicted

of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(B) receive a sentence of no less than 10 years, and defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(C) receive no minimum sentence. Precisely what the statute requires can be accomplished by allowing § 5G1.1(b) to operate.

3. The Proposed Amendments Exceed What the Statute Requires.

Even without the effect of § 3A1.4, the addition of six levels to the base offense level is clearly excessive because it results in a range for defendants in Criminal History Category I with no specific offense characteristics that exceeds the statutory minimum at 16 of 17 levels. At only one level ($32 + 6 = 38$) does it simply include the statutory minimum. Thus, it is not accurate to say, as the proposed note does, that "[a]dding six levels . . . establishes a guideline range with a lower limit as close to twice the statutory minimum as possible."¹

Normal Base Offense Level = Range in months in CHC I	Sentence required by 21 USC 960a	Guideline Range Under Normal Base Level if 3A1.4 Applies (CHC VI)	Base Offense Level +4 = Range in months in CHC I	Base Offense Level +6 = Range in months in CHC I	Base Offense Level +4 + 3A1.4 = Range in months in CHC VI	Base Offense Level +6 + 3A1.4 = Range in months in CHC VI
38 = 235-293	20 years	50 = life	42 = 360-life	44 = life	54 = life	56 = life
36 = 188-235	20 years	48 = life	40 = 292-365	42 = 360-life	52 = life	54 = life
34 = 151-188	20 years	46 = life	38 = 235-293	40 = 292-365	50 = life	52 = life
32 = 121-151	20 years	44 = life	36 = 188-235	38 = 235-293	48 = life	50 = life
30 = 97-121	10 years	42 = 360-life	34 = 151-188	36 = 188-235	46 = life	48 = life
28 = 78-97	10 years	40 = 360-life	32 = 121-151	34 = 151-188	44 = life	46 = life
26 = 63-78	10 years	38 = 360-life	30 = 97-121	32 = 121-151	38 = 360-life	44 = life
24 = 51-63	0	36 = 324-405	28 = 78-97	30 = 97-121	40 = 360-life	42 = 360-life
22 = 41-51	0	34 = 262-327	26 = 63-78	28 = 78-97	38 = 360-life	40 = 360-life
20 = 33-41	0	32 = 210-262	24 = 51-63	26 = 63-78	36 = 324-405	38 = 360-life
18 = 27-33	0	32 = 210-262	22 = 41-51	24 = 51-63	34 = 262-327	36 = 324-405
16 = 21-27	0	32 = 210-262	20 = 33-41	22 = 41-51	32 = 210-262	34 = 262-327
14 = 15-21	0	32 = 210-262	18 = 27-33	20 = 33-41	32 = 210-262	32 = 210-262

The addition of four levels also is excessive even without the effect of § 3A1.4 because it results in a range that exceeds the statutory minimum for defendants in Criminal History Category I with no specific offense characteristics at 14 of 17 levels. At two levels ($34 + 4 = 38$, and $26 + 4 = 30$) it includes the statutory minimum. At one ($32 + 4 = 36$) it is 5 months shy of the statutory minimum, in which case the sentence would be the statutory minimum. See USSG § 5G1.1(b).

If the Commission rejects our Proposal #1, an increase that exceeds the minimum at 14 of 17 levels and never results in a sentence less than the minimum would be preferable to an increase that exceeds the minimum at 16 of 17 levels.

4. Application of § 3A1.4 in Addition to an Elevated Base Offense Level Would Constitute Exceedingly Harsh Double Punishment for the Same Conduct.

With a four-level increase in the base offense level, the effect of § 3A1.4 (adding 12 levels, minimum offense level 32, criminal history category VI) would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, a guideline sentence ranging from 360 months to life for defendants subject to a ten-year statutory minimum, and a guideline sentence of life for defendants subject to a twenty-year statutory minimum. With a six-level increase in the base offense level, the effect of § 3A1.4 would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, and a guideline sentence of life for all other defendants.

We have been told that this would not punish defendants twice for the same conduct because § 3A1.4 requires intent to coerce, intimidate or retaliate against government conduct, while a conviction under § 960a requires intent to provide a thing of value to those engaging in terrorism.

Even if it is theoretically possible that a person convicted of knowingly or intentionally providing terrorists with a thing of value would not be found to have acted with intent to promote the terrorists' goals, the fact is that the plain language and the courts' interpretation of § 3A1.4 do not require a finding that the defendant himself acted with intent to coerce, intimidate or retaliate against government conduct.

Section 3A1.4 applies to a "felony that involved, or was intended to promote, a federal crime of terrorism," as defined in 18 U.S.C. § 2332b(g)(5)(b). A "federal crime

12 = 10-16	0	32 = 210-262	16 = 21-27	18 = 27-33	32 = 210-262	32 = 210-262
10 = 6-12	0	32 = 210-262	14 = 15-21	16 = 21-27	32 = 210-262	32 = 210-262
8 = 0-6	0	32 = 210-262	12 = 10-16	14 = 15-21	32 = 210-262	32 = 210-262
6 = 0-6	0	32 = 210-262	10 = 6-12	12 = 10-16	32 = 210-262	32 = 210-262

of terrorism” is one of a list of enumerated federal offenses, including 21 U.S.C. § 960a that is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” According to Application Note 2, it also includes “(A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism.” See USSG § 3A1.4, comment. (n.2). Neither harboring or concealing a terrorist who committed a federal crime of terrorism, nor obstructing an investigation of a federal crime of terrorism, nor 18 U.S.C. § 2339 or § 2339A for that matter, require that the defendant acted with a state of mind “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”

As interpreted by the courts (and as clearly indicated by Application Note 2), because § 3A1.4 applies if the offense of conviction “involved” or “was intended to promote” a federal crime of terrorism, the adjustment applies if the “defendant’s felony conviction or relevant conduct has as one purpose the intent to promote a federal crime of terrorism.” *United States v. Arnaout*, 431 U.S. 994, 1002 (7th Cir. 2005). Accord *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004) (“the phrase ‘intended to promote’ means that if a goal or purpose was to bring or help bring into being a crime listed in 18 U.S.C. § 2332b(g)(5)(B), the terrorism enhancement applies. . . . [I]t is the defendant’s purpose that is relevant, and if that purpose is to promote a terrorism crime, the enhancement is triggered.”). “A defendant who intends to promote a federal crime of terrorism has not necessarily completed, attempted, or conspired to commit the crime; instead the phrase implies that the defendant has as one purpose of his substantive count of conviction or his relevant conduct the intent to promote a federal crime of terrorism.” *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003). Relevant conduct includes all acts aided or abetted by the defendant, all reasonably foreseeable acts of others in furtherance of jointly undertaken activity, all acts of others in the same course of conduct or common scheme or plan, all harm that resulted from such acts, and all harm that was the object of such acts. See § 1B1.3.

Thus, a defendant convicted under 21 U.S.C. § 960a of knowingly or intentionally providing something of value to a person or organization that engaged or engages in terrorism will also qualify for the terrorism enhancement by virtue of the offense conduct, relevant conduct, or both. Indeed, in a closely analogous case, a defendant convicted of “knowingly provid[ing] material support or resources” to a terrorist organization under 18 U.S.C. § 2339B was held to have properly received the § 3A1.4 adjustment because he gave \$3500 to Hizballah while being “aware of [its] terrorist activities and goals.” *United States v. Hammoud*, 381 F.3d 316, 356 (4th Cir. 2004). The state of mind required for a violation of 18 U.S.C. § 2339B is “knowingly” provides. The state of mind required for a violation of 21 U.S.C. § 960a is “knowing or intending” to provide. Under both statutes, the defendant must be aware of the recipient’s terrorist activities and goals. Application of § 3A1.4 would seem to inexorably follow.

Thus, applying § 3A1.4 to defendants convicted under 21 U.S.C. § 960a would punish the defendant twice -- and quite harshly -- for the same conduct. Accordingly, when § 3A1.4 applies, the elevated offense level should not apply. In a rare case in which § 3A1.4 did not apply, the elevated offense level would apply.

5. Mitigating Role Cap and Safety Valve

It is not appropriate to exclude defendants convicted under 21 U.S.C. § 960a from the mitigating role cap or the safety valve reduction. First, Congress did not direct the Commission to do so. Second, that a few defendants could conceivably end up with a guideline range less than the statutory minimum, which would be trumped by the statutory minimum in any event, is no reason to deny these reductions to all defendants convicted under this statute. Third, the mitigating role cap and safety valve reduction do not conflict with federal law because both were directed by Congress and no defendant convicted under 21 U.S.C. § 960a could receive less than the statutory minimum based as a result of these guideline reductions.

B. Border Tunnels, 18 U.S.C. § 554

In response to the new offense at 18 U.S.C. § 554, the Commission has proposed to add 4 levels to the offense level for the underlying smuggling offense with a minimum of 16 for violations of subsection (c) (use of a tunnel to smuggle an alien, goods, controlled substances, weapons of mass destruction, or a member of a terrorist organization), a base offense level of 16 for violations of subsection (a) (constructing or financing a tunnel), and a base offense level of 8 or 9 for violations of subsection (b) (knowing or reckless disregards of the construction or use of a tunnel on land the person owns or controls).

Issue for Comment 2 asks if any of the offense levels should be higher. The offense levels should not be higher. It is difficult to tell how the proposed amendment will play out, but adding 4 levels to an alien smuggling offense is clearly too much, given the numerous increases under the alien smuggling guideline, § 2L1.1.

C. Aids to maritime navigation, 18 U.S.C. § 2282B

We recommend that the base offense level under subsection (a)(3) apply "if the offense of conviction is 18 U.S.C. § 2282B," rather than "if the offense involved the destruction of or tampering with aids to maritime navigation."

D. Smuggling goods into the United States, 18 U.S.C. § 545; Removing goods from customs custody, 18 U.S.C. § 549

Issue for Comment 1 asks whether the current referenced guidelines for 18 U.S.C. §§ 545 and 549 are sufficient given new statutory maximums for those offenses.

The current guidelines are sufficient, as demonstrated by the fact that the courts sentence below the guideline range and not above it in these cases. According to Table 4 of the Quarterly Data Report, of the ten cases sentenced under § 2B1.5, three sentences were below the range (one pursuant to government motion) and none were above it; of the 28 cases sentenced under § 2Q2.1, four sentences were below the range (one pursuant to government motion) and none were above it; and of eight cases sentenced under § 2T3.1, the only sentence outside the guideline range was pursuant to a government motion.

In general, the Commission should not react to changes in statutory maxima by increasing guideline ranges because the statutory maxima for various offenses do not reflect their relative seriousness and are the result of politics or happenstance. If a case arises under one of these statutes that is particularly serious, the judge can sentence above the guideline range.

E. Public employee insignia and uniform, 18 U.S.C. § 716

Section 1191 of the Violence Against Women Act expanded 18 U.S.C. § 716 to prohibit the transfer, transportation or receipt of any public employee insignia or uniform² that is either counterfeit or intended to be given to a person not authorized to possess it, *see* 18 U.S.C. § 716(a), and added a statutory defense. *See* 18 U.S.C. §§ 716(b) and (d).

In addition, Congress directed the Commission to “make appropriate amendments to sentencing guidelines, policy statements, and official commentary to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor.” *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, 3129 (2006).

Section 716 violations are Class B misdemeanors punishable by up to six months imprisonment. As such, they are petty offenses to which the guidelines do not apply. *See* 18 U.S.C. § 19; U.S.S.G. § 1B1.9.

Issue for Comment 3 asks whether the Commission should add a Chapter Three adjustment that would apply in any case in which a uniform or insignia received in

² The statute previously applied only to police badges. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, 3128-29. A Westlaw search reveals only one case under § 716. *See United States v. Sash*, 396 F.3d 515 (2d Cir. 2005). In that case, the defendant pled guilty to violating 18 U.S.C. § 1028, 18 U.S.C. § 1029, and 18 U.S.C. § 716 in connection with producing, receiving and transferring unauthorized and counterfeit police badges. He was sentenced under § 2B1.1, and received an enhancement under what is now § 2B1.1(b)(10)(C)(ii) for possessing five or more means of identification that were produced by or obtained from another means of identification.

violation of 18 U.S.C. § 716 was worn or displayed during the commission of the offense; provide a new upward departure in Chapter Five; or provide an application note in § 1B1.9 (Class B or C Misdemeanors and Infractions) recognizing the directive but explaining that the guidelines do not apply to Class B misdemeanors.

We recommend either that the Commission take no action, or at most provide an application note recognizing the directive but explaining that the guidelines do not apply to Class B misdemeanors. The Commission need not clutter up the manual with items unlikely ever to be used in response to directives that make no sense.

Further, a Chapter Three adjustment is unnecessary because the unlawful use of a public employee uniform or insignia in the commission of a crime is already subject to a 2-level enhancement for abuse of trust. See U.S.S.G. § 3B1.3, comment. (n.3) ("This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of public or private trust when, in fact, the defendant does not."); *United States v. Bailey*, 227 F.3d 792, 802 (7th Cir. 2000) ("Police officers occupy positions of public trust, and individuals who have apparent authority of police officers when facilitating the commission of an offense abuse the trust that victims place in law enforcement.").

An upward departure is not necessary first, because there is already the Chapter Three adjustment just described, and second, if the adjustment somehow did not apply in a case where the display or wearing of a uniform or insignia somehow made the crime more serious, the court would be free to vary from the guideline range.

II. Transportation

We join in and adopt the comments of the Practitioners Advisory Group on the proposed amendments and issues for comment relating to Transportation.

We hope that these comments are useful. Please do not hesitate to contact us if you have any questions or concerns, or would like additional information.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Kathleen Grilli, Deputy General Counsel
Pam Barron, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
112 Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Honorable Lance M. Africk
Honorable Julie E. Carnes
Honorable Richard A. Ensten
Honorable José A. Fusté
Honorable Henry M. Herlong, Jr.
Honorable Cindy K. Jorgenson
Honorable Theodore A. McKee
Honorable Norman A. Mordue
Honorable Charles R. Norgle, Sr.
Honorable William J. Riley
Honorable Thomas J. Rueter
Honorable Reggie B. Walton

TELEPHONE
(801) 524-3005

FACSIMILE
(801) 526-1185

Honorable Paul Cassell, Chair

March 16, 2007

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

Re: Comments on Sentencing Commission Amendments: Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006

Dear Chairman Hinojosa,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2007.¹ While the Committee recognizes that the Commission is considering several important revisions to the guidelines, we would like to focus on one issue that we believe impacts the fair administration of justice. Specifically, the Committee believes that when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute.

¹ 72 Fed. Reg. 4372-4398 (Jan. 30, 2007).

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 into law.² Among the many provisions in the Act were several new or increased mandatory minimum terms of imprisonment. The Commission has offered four options to harmonize the new and enhanced mandatory penalties with the base offense levels of the guideline system:

First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months).

Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months).

Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act.

Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.³

The Criminal Law Committee has considered each of the options offered by the Commission, and believes that Option Four, with a slight modification, is the preferred method to employ when promulgating guidelines to be used in conjunction with mandatory minimum terms of imprisonment. The Committee believes that the Commission should set the base offense level, irrespective of the mandatory minimum, and furthermore encourages the Commission to review each base offense level affected by the Adam Walsh Child Protection and Safety Act of 2006 to ensure that, in the Commission's own expert opinion, the levels adequately address the seriousness of the offenses.

² Public Law No. 109-248 (July 27, 2006).

³ 72 Fed. Reg. 4382 (Jan. 30, 2007).

The Judicial Conference has a long history of opposing mandatory minimum terms of imprisonment.⁴ The basis of the Conference's position is that not only do mandatory minimums unnecessarily limit judicial discretion, but that they interfere with the operation of the Sentencing Reform Act and may, in fact, create unwarranted sentencing disparity.⁵ The Conference supports the Sentencing Commission's role as an independent commission in the judicial branch charged with establishing sentencing policies for the federal criminal justice system.⁶ The Conference, like the Commission, has opposed efforts by the Congress to directly amend the sentencing guidelines, and favors allowing the Commission to amend the guidelines based on its own expert opinion.⁷ While the Commission must respect the intent of Congress when promulgating guidelines, the Conference believes that the Commission is also obligated to make an independent assessment of what the appropriate sentence should be. For these reasons, the Committee does not support Options One or Two.

Likewise, the Committee can not support Option Three. Although the Commission does not propose to set the base offense level to correspond to the mandatory minimum term of imprisonment, the Commission explains that the intent is to still arrive at a guideline range at or above the mandatory minimum term of imprisonment by combining the base offense level with several frequently anticipated specific offense characteristics. The Commission has noted that this was the method used to promulgate guideline amendments in 2004, following the passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act).⁸ However, in a March 8, 2004, letter, then Committee Chair, Hon. Sim Lake, informed the Commission that the Committee opposed such an approach. While the Committee

⁴ See, e.g., JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13.

⁵ See JCUS-MAR 90, p. 16 (paraphrasing the recommendation of the Criminal Law Committee to "reconsider the wisdom of mandatory minimum sentencing statutes and restructure them in such a way that the Sentencing Commission may uniformly establish guidelines for all criminal statutes in order to avoid unwarranted sentencing disparity" as contemplated by the Sentencing Reform Act); see also Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), reprinted at 11 FED. SENT. REP. 180 (1999):

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.

Id. at 184-85.

⁶ 28 U.S.C. § 991.

⁷ JCUS-SEP 03, pp. 5-6

⁸ Public Law No. 108-21.

acknowledged the need to address proportionality concerns as a result of the PROTECT Act's many mandatory minimum provisions and direct amendments, the Committee stated that it believed that "the goal of proportionality should not become a one-way ratchet for increasing sentences."⁹ The Commission should not feel obligated to follow the approach it used following the enactment of the PROTECT Act since even Congress contemplated the need to revisit the implementation of the Act after some time.¹⁰

It is the view of the Criminal Law Committee that Option Four represents the best approach to harmonizing what are essentially two competing approaches to criminal sentencing (i.e., a matrix of a comprehensive sentencing guideline system and a collection of powerful but indiscriminate blunderbuss of mandatory minimum sentences). Where mandatory minimum sentences are applicable, they must be imposed, of course, thereby trumping the guideline system. But it is the view of the Judicial Conference that mandatory minimum sentences are less prudent and less efficient than guideline sentencing,¹¹ and that a system of sentencing guidelines, developed and promulgated by the expert Commission, should remain the foundation of punishment in the federal system. The guideline system should operate as the principal means of establishing criminal penalties for violations of federal law, and the Sentencing Reform Act's principles of parity, proportionality, and parsimony should be observed wherever possible. Thus, Option Four appears to best preserve the primacy of the guidelines as a coherent system, and to avoid injustices that may stem from efforts to engraft meaningful guidelines upon a framework of mandatory minimum sentences.

There is another rationale for establishing meaningful base offense levels without keying these to applicable mandatory minimum sentences: the need to provide meaningful benchmarks for cases in which mandatory minimum penalties do not apply. Setting the base offense level at or near the guideline range that includes the mandatory minimum, as is often seen in drug cases, often leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply. For example, for mandatory minimum offenses covered by §2D1.1, the Commission has set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum; however, in cases where either §§5K1.1 or 5C1.2 apply, the courts are left with little guidance on what the appropriate sentence should be. If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply.

⁹ Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

¹⁰ See, Public Law No. 108-21, Title IV, § 401(j)(2), authorizing the Commission to promulgate amendments after May 1, 2005, to certain sections of the sentencing guidelines revised by the PROTECT Act.

¹¹ See, JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

Of course, the fact that Congress has raised a mandatory minimum sentence for a particular offense is something that the Sentencing Commission must consider, along with all other relevant factors, in exercising its expert judgment on what an appropriate sentence for an offense might be. In raising a mandatory minimum, Congress may be signaling its view that existing guidelines have, at least in some cases, produced sentences that were too low. It is also frequently the case that in raising a mandatory minimum sentence, Congress will have held hearings or published reports explaining the seriousness of a particular offense. These materials will often provide useful information to the Sentencing Commission in reviewing Guideline levels and should be given careful consideration.

Accordingly, the Committee recommends that the Commission should make an assessment of the adequacy of the existing guidelines, independent of any potentially applicable mandatory minimums and adjust the guidelines as the Commission deems appropriate. If the resulting guideline is less than any potentially applicable mandatory minimum sentence, §5G1.1(b) should be utilized to allow for imposition of that statutorily-required sentence.

We appreciate the opportunity to present our views. If you need additional information, please feel free to contact me at (801) 524-3005, or Judge Reggie B. Walton at (202) 354-3290.

Sincerely,

A rectangular stamp containing a handwritten signature in dark ink. The signature appears to read "Paul Cassell".

Paul Cassell

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission



Vacant, 1st Circuit
Vacant, 2nd Circuit
Joan Leiby, 3rd Circuit
Elisabeth F. Ervin, 4th Circuit
Vacant, 5th Circuit
Vacant, 6th Circuit
Lisa Wirick, 7th Circuit
- Vacant, 8th Circuit
Felipe A. Ortiz, 9th Circuit
Phillip Munoz, 10th Circuit
Suzanne Ferreira, 11th Circuit
P. Douglas Mathis, Jr., 11th Circuit
Deborah Stevens-Panzer DC Circuit
Timothy Johnson, FPPOA Ex-Officio
John Fitzgerald, OPPS Ex-Officio

February 26, 2007

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 21 and 22, 2007 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2007.

Sex Offenses Pursuant to the Adam Walsh Act

Discussion of the proposed sexual offender registration guideline at §2A3.5 raised potential application issues. First, the proposed guideline references Tier I through III offenses. As 42 U.S.C. § 16911 is not included in the Federal Criminal Code and Rules and therefore not readily available to probation officers, POAG would request that the commentary to this guideline include definitions of each tier. Regarding the proposed guideline, the consensus of POAG is that Option One provides a clearer format and ease of application. In both options, there is a specific offense characteristic (SOC) increase for committing a sex offense while in a failure to register status. POAG is requesting clarification as to whether a conviction is required to apply this increase or if officers are to apply a preponderance of evidence standard.

Both options also contain a SOC with a decrease if "the defendant voluntarily attempted to correct

the failure to register." POAG finds this SOC problematic in that there are states currently unable to register sex offenders as required by the Adam Walsh Act. Further, although POAG recognizes the burden lies with the defendant in proving he or she attempted to register, probation officers will address this SOC in preparation of the presentence report. POAG questions how a probation officer or defendant can confirm, for example, that an unsuccessful telephone call or visit was made in an attempt to register. The group asks that specific examples be provided as to what is and is not a voluntary attempt to comply, i.e., severe infirmity, mental impairment, etc. POAG also requests specific instruction advising whether a decrease for voluntarily attempting to correct the failure to register should be applied for a defendant who receives an increase for the proposed SOC at §2A3.5(b)(1) of Option One.

Lastly, POAG suggests the proposed guideline at §2A3.6 specifically state that the guideline term of imprisonment is the minimum term required by the statute if the intent is to mirror the application in §2K2.4 for a conviction for a violation of 18 U.S.C. § 924(c).

Drug Offenses

POAG recognizes the ease in application of the proposed two-level enhancement at §§2D1.1(b)(5) and 2D1.11(b)(5) for a defendant convicted of 21 U.S.C. § 865. If the Commission references an enhancement in either of Chapters Two or Three for the use of a facilitated entry program to import drugs in addition to methamphetamine and methamphetamine precursor chemicals, POAG would request inclusion of the definition and/or examples of a facilitated entry program in the corresponding application notes.

While Option 1 referencing 21 U.S.C. § 841(g) would be the easiest to apply, POAG recommends Option 2 as it also requires a conviction of 21 U.S.C. § 841(g), and addresses the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. POAG is concerned that Option 3, the tiered approach, could result in numerous objections in trying to differentiate between "knew" and "had reasonable cause to believe" that a drug would be used to commit criminal sexual conduct.

POAG recommends Option 1 regarding 21 U.S.C. § 860a as it provides straightforward application instructions. The group believes Option 2 will prove more difficult to apply as the proposed SOC at 2D1.1(b)(10)(D) are similar in nature and have the potential to produce incorrect application.

Immigration

The group concentrated on Option 6 for §2L1.2 which eliminates the "categorical approach" to determine offense severity and replaces it with "term of imprisonment imposed" as the measure of offense severity. POAG supports the change to an imprisonment imposed approach. However, the group has concerns with the application as presented in Option 6. POAG would recommend the reexamination of the imprisonment terms proposed which trigger the increased offense levels. The group is concerned the lower level imprisonment terms, specifically sentences of imprisonment of

at least 60 days, may capture too many minor offenses for which the increases in the offense levels appear too severe, resulting in application disparity. For example, in many courts, a 60-day jail term may be imposed in multiple driving without a license or with a revoked or suspended license offenses, which may not warrant a 16 or 12 level increase in the offense level. POAG would also urge the Commission to avoid using “actual time served” as a measure of offense severity, as the records are not readily available and in many instances, unobtainable.

The group also recommends language be modified in Option 6, §2L1.2, comment. (n.1)(B)(iii) similar to the language found in §4B1.4, comment (n.1), indicating that the time periods for the counting of prior sentences under §4A1.2 are not applicable when applying the SOC.

Criminal History

Minor Offenses

POAG discussed the use of the misdemeanor and petty offenses listed in §4A1.2(c)(1) in determining a defendant’s criminal history score. The group recognizes that certain of these offenses are sentenced differently in various jurisdictions resulting in inequity in criminal history scores. Specifically, in many courts, sentences of at least one year of probation or thirty days of imprisonment are routinely imposed for careless or reckless driving, driving without a license or with a revoked or suspended license, fish and game violations, leaving the scene of an accident and local ordinance violations. Further, if a defendant is serving a probationary sentence for one of these offenses at the time they are arrested for a federal drug offense, they are precluded from application of the safety valve. The group concluded, due to jurisdictional differences in sentencing these specific offenses, criminal history scores often over represent the seriousness of a defendant’s past criminal conduct and their propensity to commit further crimes. As such, POAG recommends consideration of eliminating these specific offenses from the list at §4A1.2(c)(1) and including them in the “never counted” list at §4A1.2(c)(2). This shift should reduce the disparity in criminal history application and may also decrease the number of downward departures pursuant to §4A1.3, Inadequacy of Criminal History Score.

The group also recommends that the language found at §4A1.2(c)(1)(B) regarding prior offenses that are similar to the instant offense be deleted. This subsection is rarely if ever relied upon as the misdemeanor and petty offenses generally do not mirror federal offenses.

Related Cases

As noted in past position papers, the definition for related cases is still a source of confusion for practitioners and results in numerous objections regarding criminal history computations. In an effort to reduce confusion, POAG recommends the second sentence at §4A1.2, comment. (n.3), beginning with the word “Otherwise,” be revised to read “*If there was no intervening arrest, prior sentences are considered related if they resulted from offenses that...*” This should help eliminate the continuing effort by practitioners to proceed to the second prong even when cases are separated by

an intervening arrest. POAG also requests the Commission resolve the circuit conflict regarding formal versus functional consolidation as another measure to reduce confusion. Another area of confusion resulting from the related cases instruction is the application of criminal history points for multiple probation or parole revocations for the same violation conduct, as outlined in §4A1.2(k), comment (n.11).

Pretexting

POAG thinks violations of 18 U.S.C. § 1039 should be referenced to §2H3.1 as it is proposed to be amended in the Miscellaneous Laws section. The group would not recommend including these offenses under §2B1.1, nor do we recommend an expansion of the definition of victim in §2B1.1 to include non-pecuniary harm. Probation officers experience great difficulty in determining specific financial harm and believe any attempt by officers to determine loss for theft of a means of identification, invasion of privacy, reputation damage or inconvenience would be problematic with disparity likely in application.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have questions or need clarifications, please do not hesitate to contact us.

Respectfully,

2007 Probation Officers Advisory Group

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 6, 2007

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

Re: Comments on Proposed Amendments Relating to Adam Walsh Act, Pub.
L. No. 109-248

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments relating to the Adam Walsh Act published January 30, 2007.

I. Failure to Register, §§ 2A3.5, 2A3.6

A. Directives 1 and 2 Should be Implemented Based on a Convicted Offense.

Directives 1 and 2 (stating that the Commission should consider whether the defendant committed "another sex offense" or "offense against a minor" "in connection with, or during, the period for which the person failed to register") should be implemented based on a convicted offense, not on an unconvicted "offense."

1. A Common Sense Reading of the Directives Supports a Convicted Offense Approach.

As a matter of common sense, it appears that Congress had in mind the situation where a person is picked up for a sex offense, at which time it is discovered that s/he is required to register but has not, and is prosecuted for both the sex offense and for the failure to register. Attached in Appendix A are two proposed alternatives based on a common sense reading of the directives.

Option 1, which is modeled on a draft we received from staff on February 20, would implement the directives through a specific offense characteristic that would add

points if the defendant was convicted, in either state or federal court at any time before sentencing for the failure to register, of a sex offense that occurred while in the failure to register status. The sex offense could be prosecuted with the failure to register in the same federal case, or it could be prosecuted separately in state court (for example, because there is no federal jurisdiction) or in a different federal jurisdiction (for example, because of venue requirements).

Option 2 would encourage upward departure if the defendant was convicted under 18 U.S.C. § 2250(c) and the crime of violence was a sex offense as defined in 42 U.S.C. § 16911(5). The government could charge § 2250(c) (in which case the defendant would receive a 5-year mandatory minimum for a crime of violence plus an upward departure), or § 2250(a) and § 2250(c)¹ (in which case the defendant would receive a guideline sentence for failure to register plus a 5-year mandatory minimum for a crime of violence plus an upward departure), or § 2250(a) and a federal sex offense (in which case the guideline range would be the higher range applicable to the sex offense plus points under the grouping rules).

2. A Convicted Offense Approach is Consistent with Principles of Statutory Construction.

Directives 1 and 2 use the word “committed.” Congress used the word “committed” in section 2250(c) and also in section 2260A, where it clearly refers to a convicted offense. Directive 1 uses the term “another sex offense,” referring to a “sex offense” as defined in SORNA. SORNA defines a “sex offender” as “an individual who was convicted of a sex offense.” 42 U.S.C. § 16911(1). Since Congress meant a convicted offense when it used the words “committed” and “offense” elsewhere in the relevant statutes, there is every reason to believe it meant the same thing in the directives and no reason to believe otherwise. “The interrelationship and close proximity of these provisions of the statute ‘presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.’” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990)).

We have searched the U.S. code and the bills introduced in the 110th Congress and have been unable to find any legislation in which Congress used the word “commit” or “offense” to refer to an “offense” of which a person was not convicted.

3. A Convicted Offense Approach Avoids Vexing Practical Problems for the Courts.

An unconvicted offense approach would result in serious practical problems for the courts. As defined in the SORNA, a “sex offense” can be an offense under the law of any jurisdiction. The PSR would have to allege, and the judge would have to find, the elements of state, tribal and foreign offenses. Further, the government or the Probation

¹ We understand that the staff contemplates that § 2250(a) and (c) could be charged in separate counts. We note that this may violate the Double Jeopardy Clause.

Officer may contend that the defendant should receive an enhancement because his conduct was a "sex offense" under the law of some jurisdiction, or because it just seems like a "sex offense," though the defendant could not actually be prosecuted for it in any court with jurisdiction over him.² How judges would resolve these problems would depend on the defense attorney, the prosecutor, the probation officer and the judge, creating unwarranted disparity. These problems are avoided by requiring a conviction.

If the proposed definition of "minor" to include fictitious minors is used despite the fact that it conflicts with Congress' definition, *see* 42 U.S.C. § 16911(14), it will be particularly problematic if applied in reference to an unconvicted "offense." That definition conflicts with the definition of "minor" under certain federal and state statutes relating to child pornography, *e.g.*, *United States v. Iles*, 384 F.Supp.2d 901 (E.D. Va. 2005) (definition of "minor" in § 2G2.2 may not be used to expand the definition of "minor" in 18 U.S.C. § 2256(1) for purposes of chapter 110 to enhance a term of imprisonment based on distribution of child pornography to an adult undercover officer), *State v. Hazlett*, 205 Ariz. 523 (2003) (statute prohibiting depiction of adults as minors overly broad), and in some instances with the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (statute criminalizing sexually explicit speech that is not obscene and does not depict a real child is overbroad). Further, it cannot apply to other types of sex crimes unless an attempt to commit the crime is an offense under the law of the jurisdiction. Use of the fictitious "minor" definition in connection with unconvicted conduct would allow circumvention of narrower definitions required for conviction.

4. A Convicted Offense Approach Avoids Unwarranted Disparity.

After twenty years of experience, we know that guidelines based on unconvicted "offenses" permit prosecutors to control sentencing and create unwarranted disparity. Under an unconvicted offense approach here, prosecutors could double or triple the sentence without obtaining an indictment or proving the "offense" to a jury beyond a reasonable doubt. Prosecutors would decide whether or not to present information of varying reliability to the court. Judges would resolve factual disputes with varying degrees of care. This would result in different guideline ranges for similarly situated defendants.³ In rare cases, like the one in the margin, the unfair disparity created by this

² For example, the PSR may allege that the defendant had consensual sex with his girlfriend who is four years and a day younger, but this is not an offense under the law of the state where it occurred and there is no federal jurisdiction. Or, the PSR may allege that the defendant had indecent thoughts about a child. This is an offense under North Carolina law, but it is not an offense in the state where it occurred or under federal law.

³ As Judge O'Toole recently noted in a case in which PSRs prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant:

The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines' manner of addressing "relevant conduct." Moreover, because the "relevant conduct" inquiry is

structural problem is exposed because it occurs between co-defendants in the same case. In most cases, it remains hidden and unremedied. The Commission should not promulgate another guideline based on unconvicted "offenses."

5. A Convicted Offense Approach Avoids Constitutional Litigation and Promotes Respect for the Guidelines.

A majority of the Supreme Court has strongly disapproved of sentencing based on crimes of which the defendant was never charged or convicted. This played a central role in the Court's decisions in *Blakely* and in *Booker*, and may play a role in the Court's decision in *Rita*. The Commission has announced that it is going to reconsider the relevant conduct rules. The Commission should not add new unconvicted "offenses" to the guidelines. Doing so here would spawn further litigation and criticism of the Guidelines.

6. The 6-level enhancement should not be expanded to any non-sexual offense against a minor.

In response to Issue for Comment #2, the Commission should not expand the proposed 6-level enhancement to any non-sexual offense against a minor. In context, Directive 2 probably meant a "specified offense against a minor," 42 U.S.C. § 16911(7), and surely did not mean any offense beyond those specified in the SORNA.

B. If an SOC Approach is Used, the 24- or 28-level Minimum for a Sex Offense Against a Minor Should Be Removed.

As proposed, there would be a 24- or 28-level minimum for any sex offense against a minor while in a failure to register status. The 8-level increase alone, without the proposed floor, would triple the sentence. Sex offenses against minors vary widely in seriousness, from consensual sex between a teenaged boy and his girlfriend who is four years and a day younger, 42 U.S.C. § 16911(5)(C), to forcible rape. Even for the least serious offense for a defendant in CHC I, a level 24 would result in a 5-year guideline sentence, and a level 28 in a 7-year guideline sentence.⁴ This would exacerbate the

adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of "relevant conduct" on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant's past illegal activities. . . . The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.

United States v. Quinn, __ F.Supp.2d __, 2007 WL 330132 **5-6 (D.Mass. Feb. 6, 2007).

4 The following chart shows the effect of the SOC without and with the proposed minimum. The number of months assumes a criminal history category of II or more, given that persons required to register will by definition have a prior offense.

unwarranted uniformity inherent in a set number of points for offenses of varying seriousness. It is disproportionate to the 5-year statutory mandatory minimum for a crime of violence in a failure to register status under § 2250(c). It would defeat Directive 4 by making the guideline sentence the same regardless of the tier level of the offense that gave rise to the duty to register. And, it seems a useless exercise and inconsistent with simplification to require the court to add 8 to 12, 14 or 16 when the result would always be 24 or 28 levels.

Keeping in mind that the offense is a failure to register subject to a ten-year statutory maximum (the same as the statutory maximum for unauthorized release of fingerprint information under 42 U.S.C. § 16962), a tripling of the sentence is sufficiently harsh. If the government believes otherwise in a particular case, it has many other tools to obtain a higher sentence, including additional charges under statutes with mandatory minimums, consecutive mandatory minimums, and higher guideline ranges. The floor should be deleted.

C. If an SOC Approach is Used, Congress' Definitions Should Be Used.

The stated purpose of the SORNA is to "protect the public from sex offenders and offenders *against children*, and in response to the vicious attacks by violent predators *against the victims* listed below," which were, of course, real victims, not fictitious persons or law enforcement agents. Pub. L. 109-248 § 102. Congress instructed the Commission to consider "(1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register," and "(2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register." Congress defined "minor" as "an individual who has not attained the age of 18 years." 42 U.S.C. § 16911(14). Directive 2 is clearly aimed at the possibility of extra punishment based on an offense against a real minor.

Proposed § 2A5.3 would implement these directives by adding 6 levels based on a new sex offense against an adult or kidnapping or false imprisonment of a minor, or 8 levels based on a new sex offense against a minor. However, proposed § 2A5.3 disregards Congress' definition of "minor," broadens it to include false representations by law enforcement agents that a minor can be provided for sexually explicit conduct, and agents posing as minors (collectively, "fictitious minors"), and increases the punishment by 8 levels for an offense "against" not only a real minor but a fictitious minor. There is

	Without SOC	With SOC	With 24-level floor	With 28-level floor
Tier I	Level 12 = 12-37 months	Level 20 = 37-87 months	57-125 months	87-175 months
Tier II	Level 14 = 18-46 months	Level 22 = 46-105 months	57-125 months	87-175 months
Tier III	Level 16 = 24-57 months	Level 24 = 57-125 months	57-125 months	87-175 months

no statutory authority for this definition of minor, or any reason to believe that Congress intended the most severe sentences for sex offenses “against” persons who do not exist or are not really minors.

Further, the proposed guideline, perhaps unintentionally, does not reflect the exclusion of kidnapping and false imprisonment if committed by a parent or guardian. *See* 42 U.S.C. § 16911(7)(A), (B).

In order to follow congressional intent as expressed in the statutory definitions, our proposed Option 1 would result in a 6-level enhancement for a sex offense “against” a fictitious minor, a 6-level enhancement for kidnapping or false imprisonment of a minor but only if committed by a person other than a parent or guardian, and an 8-level enhancement for a sex offense against a real minor.

D. Directive 4 Regarding the Seriousness of the Offense that Gave Rise to the Duty to Register Should Be More Fully Implemented.

Directive 4 instructs the Commission to consider “the seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense.” In the SORNA, Congress adopted a blunt categorical approach by classifying offenders in Tier I, II or III based solely on the type of offense, rather than the risk assessment model used by many states, with the result that very few will be in Tier I, the vast majority will be in Tier II or III, and most will be in a higher category than warranted by their actual dangerousness and risk of re-offense.⁵ One version of the bill would have left it to the states to determine tier level. That version did not pass, but Congress was aware that the categorical approach would subject more offenders than necessary to lengthy registration and notification requirements. Directive 4 reflects that recognition, and seeks to ameliorate the problem in the failure to register context.

We propose two specific offense characteristics to more fully implement Directive 4. (Under Option 2, these could be converted to downward departures.) First, we propose a two-level reduction if the sentence served for the offense that gave rise to the requirement to register was less than 13 months. The 13-month threshold comes from USSG §4A1.1(a). Sentence served is the most accurate indicator of the seriousness of the offense because it reflects the real deprivation of liberty intended by the sentencing authority. Sentence imposed over-represents offense seriousness in states that have parole and similar devices that result in a substantially lower sentence than the one nominally imposed, and which judges intend when they “impose” the higher sentence. The statutory maximum is an inaccurate measure of offense seriousness and creates

⁵ *See* 9/1/2005 Letter of Patricia Garin at 2 (at the end of 2004, 28% of registered sex offenders in Massachusetts were Level One (low risk), 57% were Level Two (moderate risk), and only 15% were Level Three (high risk); 3/7/06 Letter of ATSA at 2-5 (discussing relatively low risk of re-offense of most sex offenders and advantages of risk assessment model); 2/6/06 Letter of New Jersey Public Defender at 12-16 (160 of 10,000 offenders in New Jersey are high risk, discussing advantages of risk assessment model); 9/1/05 Letter of Massachusetts Committee for Public Counsel Services at 5-6 (discussing devastating consequences for the 85% of offenders who are not high risk).

unwarranted disparity. While it is sometimes said that it would be too difficult to determine the sentence served, this is hard to credit, since Probation Officers must determine when the defendant was released from prison to determine recency points under §4A1.1(e).

Second, we propose a two-level reduction if the defendant had a “clean record,” as defined in 42 U.S.C. § 16915, for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the duty to register and the date of the instant failure to register offense, excluding any periods the defendant was in custody or civilly committed for the offense that gave rise to the requirement to register. This reduction is based on research showing that most sex offenders do not recidivate and are less likely to recidivate than non-sex offenders, and are less likely to recidivate as time passes and if they successfully complete supervision and treatment.⁶ See 3/7/06 Letter of ATSA at 3-4. The reduction would not apply if the specific offense characteristic for conviction of a new offense applied. Under the SORNA, the duration of the duty to register is reduced for Tier I and certain Tier III offenders if they had a “clean record” for a certain period.⁷ See 42 U.S.C. § 16915. The specific offense characteristic we propose, of course, would not reduce the duration of the period anyone is required to register, but would reduce the guideline range for failure to register by two levels if the defendant met the requirements for a “clean record,” as defined in 42 U.S.C. § 16915, for ten years or more. In practice, the reduction would not apply to a Tier I offender because Tier I offenders are not required to register after ten years with a clean record, so they could not be prosecuted for failure to register at that point.

E. Voluntary Attempt to Correct Failure to Register

The guideline should provide for a four-level reduction to implement the congressional directive to consider “[w]hether the person voluntarily attempted to correct the failure to register.” The purpose of this directive presumably is to encourage registration and to recognize reduced culpability when a person voluntarily attempts to correct a failure to register. The guideline therefore should reward such attempts. In

6 Looman, Jan et al., *Recidivism Among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario)*, Journal of Interpersonal Violence 3, at 279-290 (Mar. 2000) (reduction from 51.7 percent to 23.6 percent with treatment); *Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases*, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming); Center for Sex Offender Management, *Recidivism of Sex Offenders* 12-14 (May 2001) (charts showing 18% with treatment v. 43% without treatment; 7.2% with relapse prevention treatment v. 13.2% of all treated offenders v. 17.6% for untreated offenders); Orlando, Dennise, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group treatment; a Vermont Department of Corrections study showed 7.8% recidivism rate for those who participated in treatment, .5% for those who completed treatment).

7 The fifteen-year period for a Tier I offender is reduced to 10 years, and the lifetime period for a Tier III offender is reduced to 25 years if the offense was a delinquent adjudication.

response to Issue for Comment #3, the reduction should not be precluded if there are any aggravating specific offense characteristics, such as conviction of another offense. This is a mitigating circumstance and an incentive, separate and apart from whether there was a new offense.

A defendant may voluntarily attempt to correct a failure to register, but be turned away by the registry. Registry officials may say, correctly or incorrectly, that the person is not required to register, as in two of the case descriptions we have provided. Or, the registry may turn the person away because he did not make an appointment to register on the one day a week registrations are accepted, as in another case description we provided. The SORNA says a person must register in his work state, but that state may have opted out. If a state has opted out, there will be no "appropriate official" to "(1) inform the sex offender of the duties of a sex offender under this title and explain those duties; (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and (3) ensure that the sex offender is registered." See 42 U.S.C. § 16917(a).

Or, the person may knowingly fail to register, change his mind, attempt to register, but the registry makes a clerical error that results in him not being properly registered. Or, the person may be on his way to register when he is in a car accident and then hospitalized. Or, the person may show up at the registry one minute after closing time, get arrested the following day, and then not be able to register unless and until he is released.

The affirmative defense does not cover these situations because it requires that "the individual complied as soon as such circumstances ceased to exist." In none of these situations did the circumstances cease to exist.

We do not believe that the guideline should give examples of voluntary attempts to correct a failure to register, because judges are likely to view the examples as exclusive. There has not yet been enough experience with these prosecutions to predict or describe every situation that would constitute a voluntary attempt to correct a failure to register. Nonetheless, we agreed to provide some language in response to Issue for Comment #3. Here is a suggestion:

In applying subsection (b)(4), the court must consider all facts pertaining to the defendant's attempt(s) to register, including but not limited to disparate or conflicting state and federal registration requirements and/or regulations; whether the defendant was properly registered in at least one of the required jurisdictions; whether the defendant has been properly registered in the past; any circumstances, not intentionally created by the defendant and not amounting to a defense under 18 U.S.C. § 2250(b), that prevented or hindered the defendant's compliance with registration requirements such as illness, accident, homelessness, mental illness, location and hours of place(s) where the defendant must register, and the advice of authorities charged with advising and registering sex offenders.

In extraordinary circumstances an additional downward departure for attempt(s) to correct a failure to register may be warranted.

F. Downward Departures

1) There should be an application note stating that a "downward departure may be warranted if the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute." This would cover situations in which the defendant cannot meet the affirmative defense because the "uncontrollable circumstances" never "ceased to exist," and did not "voluntarily attempt to correct the failure to register" because of similar ongoing circumstances to which he did not intentionally contribute.

This departure ground is necessary to account for the complexity and confusion of the SORNA, the various differing requirements under different state laws, the certainty that mistakes will be made in informing people whether, where or how to register, and various practical difficulties confronting persons subject to the Act.

State practitioners with long experience representing persons subject to state sex offender registry laws report situations in which clients were (1) mentally retarded, (2) unable to read, (3) homeless, (4) misinformed or never informed regarding whether, where or how to register, (5) adjudicated delinquent of a sex offense that did not require registration at the time and many years later a mail notice of a duty to register was sent to a non-existent address, (6) lost their jobs, homes, families, mental health and community support after being posted on a sex offender website, thus making updating changed information difficult or impossible. See 9/1/05 Letter of Massachusetts Committee for Public Counsel Services at 6-7; 9/1/05 Letter of Patricia Garin at 3-7; 2/6/06 Letter of New Jersey Public Defender at 2-17.

We can expect that some federal cases involving a failure to register based on convictions that pre-dated SORNA will be particularly problematic. SORNA does not apply by its terms to people who were convicted before it was enacted or before it was implemented in their jurisdiction (leaving the determination of whether it applies to such persons to regulations to be promulgated by the Attorney General). Further, it clearly recognizes the need for notice (by requiring an appropriate official to "(1) inform the sex offender of the duties of a sex offender under this title and explain those duties; (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and (3) ensure that the sex offender is registered"), and requires the Attorney General to promulgate regulations to ensure that people who were convicted before SORNA was enacted or before it was implemented in their jurisdiction (if they are deemed to be covered) receive such notice.

For seven months, no regulation issued, yet, as the cases we have provided demonstrate, people have been prosecuted based on convictions that pre-date SORNA and its implementation in their jurisdictions. None of these people were informed of the

duties of a sex offender under SORNA, read or signed a form stating that the duty to register under SORNA had been explained and that they understood the requirements, or were registered by an official in compliance with SORNA. In one of those cases, the defendant was not in fact required to register in his state of conviction or in the state to which he moved many years later, was not given notice that he was required to register under SORNA, and believed that he was not required to register. Many people whose offenses are of a type covered by SORNA are not required to register in their states because their offenses are not of a type subject to registration in the state, the duration of the registration requirement has run its course, or they have been found to be of such low risk that they have been released from the requirement to register. The absence of a mechanism for notice and registration is quite problematic.

On February 28, 2007, the Attorney General published an "interim ruling" decreeing that the law is retroactive. The purpose of the "ruling" is to permit the government to continue to prosecute people based on convictions that pre-date SORNA. *See* Federal Register, Vol. 72, No. 39, p. 8896 ("sex offenders with predicate convictions predating SORNA . . . have not been barred from attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued. This rule forecloses such claims by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."). Yet the "ruling" provides no clue or assistance as to how such people will be notified or registered. *Id.* ("The purpose of this interim rule is not to . . . carry out the direction . . . to interpret or implement SORNA as a whole.").

Native Americans will have particular difficulty complying with the SORNA's complex requirements. If the offense is a tribal offense, it will usually be the case that the person did not have a lawyer. Many states, including New Mexico, do not require sex offender registration for tribal offenses for that reason. Without a lawyer or a state official, who will inform Native Americans convicted of a tribal offense of SORNA's requirements, have them sign a form stating they understand, and assure that they are registered? Further, there are basic practical difficulties due to the extreme poverty on reservations. Most Native Americans will be required to register at the state or county registry in which the reservation is located, not on the reservation. This will often be very far away, even hundreds of miles, as in one of the case descriptions we provided, where, to make matters worse, the county allows registration only one day a week with an appointment in advance. For people without transportation or telephones, it will be quite difficult to comply on the required timetable.

In response to DOJ's contention that the affirmative defense will take care of any problems, first, this is not true as demonstrated by the fact patterns described above, and second, there are several downward departures in the Guideline Manual that are based on defenses that did not quite succeed at trial, *i.e.*, Victim's Conduct (5K2.10), Lesser Harms (5K2.11), Coercion and Duress (5K2.12), and Diminished Capacity (5K2.13).

2) The Commission asked how it should account for the situation where the defendant is registered in some but not all jurisdictions. If a person registers in some but

not all four jurisdictions, he should be sentenced less harshly than a person who registers nowhere. That person is less culpable than a person who registers nowhere. He knows, regardless of whether he registers in one or four jurisdictions, that he will be posted on a national website (with a current photograph, physical description, text of the law defining the offense, criminal history, etc.). Further, as a practical matter, registering in some but not all jurisdictions will not interfere with keeping track of the person. As demonstrated in the cases we have provided, state and federal authorities had a variety of ways of tracking a person once registered in one location even before the SORNA, and the SORNA sets up further networks and systems for doing so

The Commission could state in an application note that a “downward departure may be warranted if the defendant was registered in at least one but fewer than all jurisdictions in which the defendant resided, was employed, and/or was a student.” The note would make clear the departure would not be warranted when the defendant moved to a new address and knowingly failed to inform at least one of the jurisdictions where the defendant was required to register of the change of address.

At least until there are more cases, the Commission should leave it to the courts to determine based on the circumstances of the particular case whether this factor is mitigating and how much.

G. Section 2A3.6 Should Provide a Particular Sentence and Prevent Double Counting.

Section 2A3.6, like other guidelines that cover mandatory minimums that can be imposed alone or consecutively to a sentence for another offense (*i.e.*, §§ 2B1.6 and 2K2.4), should provide for a particular sentence and should prohibit double counting.

In order to provide for a particular sentence for a conviction under 18 U.S.C. § 2250(c), the guideline should state that “the guideline sentence is the minimum term of imprisonment required by statute.” This is because the statute provides for a range of five to thirty years. Section 2K2.4, which applies to convictions under 18 U.S.C. § 924(c), which similarly provides for various ranges, uses that language. *See* USSG § 2K2.4(b). For convictions under 18 U.S.C. § 2260A, “the term of imprisonment required by statute” provides for a particular sentence because § 2260A states that the sentence is ten years.

Sections 2B1.6 and 2K2.4 specifically prohibit application of a specific offense characteristic for the same conduct that forms the basis of the consecutive mandatory minimum when the guideline is applied in conjunction with an underlying offense. *See* §2B1.6, comment. (n.2) (when this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession or use of a means of identification when determining the sentence for the underlying offense); §2K2.4, comment. (n.4) (if a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an

explosive or firearm when determining the sentence for the underlying offense).

Section 2250(c) provides that the mandatory minimum for conviction of a crime of violence while in a failure to register status shall be consecutive to the punishment for failure to register. As we understand it from our meeting with staff, there would be no punishment for the underlying failure to register unless there was a separate charge and conviction under section 2250(a). If a defendant was convicted under both sections 2250(a) and 2250(c),⁸ the offense used to apply the specific offense characteristic under §2A3.5(b)(1) and the crime of violence that forms the basis of the prosecution under § 2250(c) may be one and the same. Thus, an application note is needed stating: "If a sentence under this guideline is imposed for a conviction under 18 U.S.C. § 2250(c) in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the same offense that forms the basis of conviction of a crime of violence under 18 U.S.C. § 2250(c) when determining the sentence for the underlying offense."

Section 2260A provides that the mandatory minimum for committing an enumerated felony involving a minor while "being required by Federal or other law to register as a sex offender" shall be consecutive to the punishment for the conviction of the enumerated felony. This does not appear to present a double counting issue if the only convictions are under the statute defining the enumerated felony and under 18 U.S.C. § 2260A.

H. Disparate Impact of § 2250(c) and § 2260A on Native Americans

We did not have a chance to fully answer the Commission's question at the February 14 hearing about what impact sections 2250(c) and 2260A will have on Native Americans.

Section 2250(c) will have a disparate impact on Native Americans. It applies to a person "described in subsection (a) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States." Obviously it will apply to crimes of violence under tribal law. If "under Federal law" is read to require that there be federal jurisdiction over the crime of violence itself (as it apparently is intended, since it does not include "under state law"), then that provision too would be applied to Native Americans more often than people of other races, since Native Americans make up a larger percentage than any other race in the crime of violence categories. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2006) (39.5% murder, 79.7% manslaughter, 53.2% sexual abuse, 37.3% assault, with lower percentages in each category for Whites, Blacks and Hispanics).

A problem particular to the application of section 2250(c) to Native Americans is

⁸ This may violate the Double Jeopardy Clause.

that the crime of violence might be proved with a certified judgment from a tribal court where the person had no lawyer. As the Sentencing Commission recognizes by excluding tribal convictions from criminal history, this is a problem.

Section 2260A also will have a disparate impact on Native Americans. Violations of 18 U.S.C. §§ 2241, 2242, 2243, and 2244, are sentenced under U.S.S.G. §§ 2A3.1-2A3.4. While Native Americans comprise only 4.0 percent of all federal defendants, they are 53.2 percent of those sentenced under §§ 2A3.1-2A3.4. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2006). According to the FY 2006 Preliminary Quarterly Data Report, the average sentence for sexual abuse is 101.1 months, twice the average for all offenses and the third highest of all, with only murder and kidnapping higher. U.S. Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through September 30, 2006). In November 2003, the Native American Advisory Group reported (based on data obtained by the Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months. See Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003). Violations of 18 U.S.C. § 2245 are sentenced under §2A1.1, along with any other kind of first degree murder. Native Americans make up 39.5% of federal defendants sentenced for murder, though how many of these are prosecutions under 18 U.S.C. § 2245 is not publicly available.

II. Guidelines Applicable to Sex Offenses

A. The Guidelines and New Mandatory Minimums

Issue for Comment # 1 requests comment on how the Commission should incorporate the mandatory minimums created or increased by the Adam Walsh Act into the guidelines, suggesting four choices: (1) set the base offense level above the mandatory minimum as in the drug guidelines, (2) set the base offense level at the lowest level that reaches the mandatory minimum, (3) set the base offense level below the mandatory minimum anticipating that frequently applied SOCs will result in a guideline range that encompasses the mandatory minimum, or (4) allow USSG § 5G1.1(b) to operate.

In our view, none of the options other than #4 is defensible unless either Congress instructed the Commission to increase the guideline range to incorporate a mandatory minimum (which it did not in the Adam Walsh Act), or the Commission, acting as an independent expert body, determines that a particular mandatory minimum is good policy rather than the product of politics. In the event the Commission makes the latter determination, it should follow option #3.

There is no empirical support for raising guideline sentences for sex crimes. The Commission's data shows that average sentence length in the categories covered by the Adam Walsh Act has nearly doubled over the past five years.⁹ And, not even counting

⁹ This table was prepared from Table 13 of the Sourcebooks for FY2002-FY2006.

government sponsored departures under §§ 5K1.1 and 5K3.1, judges and prosecutors conclude that sentences for sexual abuse are too high slightly more often than that they are too low, and they frequently conclude that sentences in pornography, prostitution and kidnapping cases are too high while infrequently concluding that they are too low.¹⁰

Mandatory minimums interfere with proportionality by treating different offenses and offenders the same. *See* Brief Amicus Curiae of Senators Kennedy, Hatch and Feinstein, *United States v. Claiborne*, 2007 WL 197103 **13, 28-29 (Jan. 22, 2007). The Commission's choice to incorporate mandatory minimums into the drug guidelines across the board has resulted in disproportionately severe sentences and unwarranted uniformity contrary to the goals of the Sentencing Reform Act. *Id.* at ** 21, 29. Based on that experience, the Commission should not increase guideline sentences based on mandatory minimums when Congress has not directed it to do so. Instead, it should allow § 5G1.1(b) to operate when necessary.

Likewise, the Commission should not raise sentences for offenses that are not subject to mandatory minimums to keep pace with sentences for offenses that are subject to mandatory minimums. It would be a perverse notion of proportionality to spread the problem to areas where it is not required. Nor should the Commission, as suggested at the hearing on February 14, set the base offense level higher than the mandatory minimum so that defendants will have to plead guilty in order to get acceptance of responsibility points in order to ensure that victims will not have to testify. Our adversary system is designed to function through the presentation of evidence in court. We do not think that it is appropriate for the Commission to consciously design penalties to ensure that that does not happen. It is especially inappropriate because Native Americans will bear the brunt of the most severe mandatory minimum created by the

Average Sentence Length	Sexual Abuse (§§ 2A3.1-2A3.4) (months)	Pornography Prostitution (§§ 2G1.1-2G3.2) (months)	Kidnapping (§ 2A4.1) (months)
2006	100.8	96.7	216.6
2005	75.4	75.0	149.3
2004	95.2	63.0	119.8
2003	73.0	63.5	160.1
2002	56.1	49.7	177.7

10 The following chart was prepared from Table 4 of the Preliminary Quarterly Data Report (FY 2006 through September 30, 2006), excluding government sponsored below range sentences based on §§ 5K1.1 and 5K3.1, but including other government sponsored below range sentences.

Total number cases	Number/% below range	Number/% above range
Sexual abuse (§§ 2A3.1-2A3.4)		
221	22/10%	20/9%
Kidnapping (§ 2A4.1)		
72	12/17%	1/1%
Pornography/Prostitution (§§ 2G1.1-2G3.2)		
1279	270/21%	53/4%

Adam Walsh Act.

B. Sexual Abuse, § 2A3.1

The Adam Walsh Act created a mandatory minimum of 30 years for a conviction under 18 U.S.C. § 2241(c). Because this mandatory minimum will have a disproportionate impact on Native Americans and for the other policy reasons noted in the preceding section, no change should be made in the base offense level and § 5G1.1(b) should be allowed to operate when necessary.

Failing that, we have two recommendations. The proposed amendment starts with a base offense level of 40 for a conviction under 18 U.S.C. § 2241(c), so that a defendant in Criminal History Category I would start with a range of 292-365 months. The proposed amendment appropriately avoids additional increases for conduct described in section 2241(a) or (b), and for age of the victim, but includes all other specific offense characteristics.

- 1. The guideline should ensure that the vulnerable victim adjustment will not be applied based on age alone.**

The proposed amendment, apparently inadvertently, would result in a 2-level enhancement under §3A1.1(b) (vulnerable victim) based on age alone. The vulnerable victim adjustment does not apply based on age alone "if the offense guideline provides an enhancement for the age of the victim." §3A1.1, comment. (n.2). The proposed offense guideline does not apply the enhancement for age (subsection (b)(2)) if the defendant was convicted under section 2241(c). This is appropriate because age under 12 is inherent in the mandatory minimum upon which the guideline is based, but it falls outside the exception as a result. Thus, the guideline should make clear that the vulnerable victim enhancement does not apply based on age alone when the defendant is convicted under 18 U.S.C. § 2241(c).

- 2. The base offense level should be set at 38 to ensure that frequently applied SOC's will result in a guideline range that does not exceed the mandatory minimum in most cases.**

The proposed amendment would result in a sentence above the guideline range in virtually every case in which the defendant was convicted under § 2241(c). It would add 2 levels if the victim was in the defendant's custody, care or supervisory control; 4 levels if the victim was abducted; or 2 levels if the defendant misrepresented his identity or used a computer. It would seem that one of these would have to apply, since either the child will be in the defendant's care, custody or supervisory control ("broadly defined," see § 2A3.1, comment. (n. 3(A))), or the defendant will be a stranger who abducts the child, or the defendant will be a stranger who entices the child by misrepresenting his identity or using a computer, or the defendant will use a computer to entice or facilitate interstate travel of a "minor" who is not real or is a law enforcement officer. This is in fact the case

as confirmed by the cases involving convictions under § 2241(c) and applying § 2A3.1.¹¹ Thus, under the proposed amendment, a level 42 (360-life) or 44 (life) would be virtually automatic. Thus, the Commission should set the base offense level at no more than 38 anticipating that at least one 2-level SOC will apply and result in a guideline range of 292-365 months in CHC I, which meets the mandatory minimum.

C. Sexual Abuse of a Ward, § 2A3.3

The Adam Walsh Act increased the statutory maximum for sexual abuse of a ward under 18 U.S.C. § 2243(b) from one to 15 years, the same as that for sexual abuse of a minor under 18 U.S.C. § 2243(a). The proposed amendment would either retain the base offense level of 12 or raise it to 14, 16, 18 or 20.

1. The base offense level should remain at 12.

As the Commission has recognized all along, sexual abuse of a ward is less serious than sexual abuse of a minor (which has a base offense level of 18). Since non-consensual sexual acts are prosecuted under 18 U.S.C. §§ 2241 or 2242, the offenses described in § 2243(a) and (b) are consensual sex acts that are illegal for reasons other than lack of consent. Sexual abuse of a minor is illegal because of the victim's age and the difference in age. Sexual abuse of a ward is illegal because of the custodial relationship. The former is with a child at an age that is deemed too young for consent. The latter is consensual sex with an adult. The latter obviously is less serious.

According to Table 28 of the 2006 Sourcebook, there were only 5 such cases in FY 2006, and the courts sentenced within the guideline range in each case. Courts are free to sentence above the guideline range if warranted.

2. The fictitious minor definition is inapposite in this guideline and therefore contrary to the goal of simplification.

The proposed guideline would add the expanded definition of "minor," including "(B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement

¹¹ The search term, da(2006) & 2241(c) & 2a3.1!, produced seven cases, five of which involved convictions under § 2241(c) and described the facts of the case. In three of the cases, the victim was a young relative of the defendant. In two of those, the defendant got the care, custody or supervisory control enhancement. *United States v. Sylvester Norman Knows His Gun III*, 438 F.3d 913 (9th Cir. 2006); *United States v. Ricks*, 166 Fed. Appx. 37 (4th Cir. 2006). The third could have received that enhancement but did not for reasons that were unexplained. *United States v. Levering*, 441 F.3d 566 (8th Cir. 2006). The fourth case involved a fictitious child and the defendant got the enhancement for use of a computer to facilitate interstate travel. *United States v. DeCarlo*, 434 F.3d 447 (6th Cir. 2006). In the fifth case, the defendant was a stranger to the victim, and the defendant would have received the abduction enhancement but for a plea agreement in which the prosecutor agreed it would not apply. *United States v. Preacher*, slip op., 2006 WL 2095320 (D.Idaho July 27, 2006).

officer who represented to a participant that the officer had not attained the age of 18 years." This seems entirely inapposite here and thus contrary to the goal of simplification.

Cases involving other offenses that use the definition of "minor" in (B) involve agents posing as parents offering fictitious minor children for sex, usually on the Internet or telephone, but occasionally in person. Cases using the definition of "minor" in (C) involve agents posing as minors on the Internet and/or on the telephone.

Section 2243(b) prohibits "knowingly engag[ing] in a sexual act with another person who is-- (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempt[ing] to do so . . . in the special maritime and territorial jurisdiction of the United States or in a Federal prison." Section 2243(a), the subject of a different guideline, criminalizes sex with inmates who are minors.

Not surprisingly, the only reported cases under section 2243(b) involve prison guards having sex with adult inmates. *United States v. Vasquez*, 389 F.3d 65 (2d Cir. 2004); *United States v. Alter*, 985 F.3d 105 (2d Cir. 1993). It is difficult to imagine how an agent could represent to a defendant that a person under the defendant's custodial authority was a minor who could be provided for sex, or how an agent could pretend to be a minor under the defendant's custodial authority, much less that the defendant could somehow misrepresent his identity to or use a computer to persuade an agent engaged in such a subterfuge. Unless the Commission is aware of cases demonstrating that the expanded definition could sensibly apply to sexual abuse of a ward, it should not be added to this guideline.

D. Abusive Sexual Contact or Attempt, § 2A3.4

The Adam Walsh Act raised the statutory maximum in 18 U.S.C. § 2244(a)(5) for sexual contact that would have violated section 2241(c) if it had been a sexual act from ten years to life. The proposed amendment would increase the minimum offense level from 20 to 22 if the victim was under 12. The Commission seeks comment in Issue # 4 on whether it should amend the guideline or whether the current guideline is adequate.

The current guideline is adequate. There is no mandatory minimum and no directive even to consider raising the guideline range. Twenty-five cases were sentenced under this guideline in FY 2006, 20 within the guideline range, two above the guideline range, and three below the guideline range. See U.S.S.C., 2006 Sourcebook, Table 28. Judges are able and willing to sentence outside the guideline range when appropriate. Further, the proposed amendment, which would apply to Native Americans far more frequently than to defendants of any other race, is not narrowly focused on convictions under section 2244(a)(5), but could also apply to convictions under section 2244(1), (2) or (3).

E. Commercial Sex Act with an Adult, § 2G1.1

The Adam Walsh Act created a mandatory minimum of 15 years in 18 U.S.C. § 1591(b) for sex trafficking involving an adult. Again, no change should be made in the base offense level and § 5G1.1(b) should be allowed to operate if necessary. We have reviewed all of the cases on Westlaw involving a prosecution under 18 U.S.C. § 1591, and found only one in which any alleged victim was an adult. *See United States v. Powell*, slip op., 2006 WL 1155947 (N.D. Ill., Apr. 28, 2006). If the Commission rejects our recommendation and creates a separate base offense level for convictions under 18 U.S.C. § 1591 involving an adult, then it should be a level 34 (not a level 36) because a level 34 results in 151-188 months for a defendant in CHC I, the first level to include the mandatory minimum.

F. Commercial Sex Act, Coercion and Enticement, Transportation Involving Minors, § 2G1.3

The Adam Walsh Act created a mandatory minimum of 15 years (180 months) in 18 U.S.C. § 1591(b)(1) for sex trafficking if the person was under 14; created a mandatory minimum of 10 years (120 months) in 18 U.S.C. § 1591(b)(2) for sex trafficking if the person was between the ages of 14 and 17; and increased the mandatory minimum from 5 to 10 years (120 months) in 18 U.S.C. § 2422(b) (coercion or enticement of a person under 18) and 18 U.S.C. § 2423(a) (transportation of a person under 18).

The proposed amendment would create a new base offense level at or above 15 years (151-188 months or 188-235 months in CHC I) for convictions under 18 U.S.C. § 1591 in which the “offense involved conduct” in which the victim was under 14; a new base offense level at or above 10 years (97-121 months or 121-151 months in CHC I) for convictions under 18 U.S.C. § 1591 in which the “offense involved conduct” in which the victim was 14-17; and a new base offense level at or below 10 years (78-97 months or 97-121 months in CHC I) if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a). The guideline would retain all of the existing specific offense characteristics, except that the increase for a minor under 12 in (b)(5) would not apply to convictions under 18 U.S.C. § 1591 where the victim was under 14. For other offenses, that specific offense characteristic would be decreased to 4 or 6 levels or retained at 8 levels.

1. **The base offense levels for convictions under 18 USC §§ 1591, 2422(b) and 2423(a) should be set sufficiently below the mandatory minimums so that frequently applied SOC's result in a guideline range that does not exceed the mandatory minimum in most cases.**

Again, we believe that the base offense levels should remain unchanged and USSG § 5G1.1(b) allowed to operate when necessary. Failing that, the Commission should set the base offense levels sufficiently below the mandatory minimums so that frequently applied SOC's will result in a guideline range that does not exceed the mandatory minimum in most cases.

According to the recently published Guideline Application Frequencies for Fiscal Year 2006 at 32, there were 194 cases sentences under USSG § 2G1.3 and 292 SOC were applied in those cases. This data indicates that at least one SOC applied in all cases and that more than one applied in up to half the cases. However, the data does not reveal which SOC were applied to which offenses of conviction. (This guideline applies to convictions under 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, 2422, 2423 and 2425.) And, even if broken down in that manner, the data would not reveal which SOC could have applied regardless of whether they were applied (due to a plea agreement or otherwise). This would be the relevant inquiry in determining whether the proposed base offense levels result in guideline ranges that only meet, or rather exceed, the mandatory minimum in the majority of cases.

We have reviewed all appeals court cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a) and sentenced under USSG § 2G3.1, or the applicable guideline before November 1, 2004, USSG § 2G1.1, to see which of the SOC under the proposed guideline would apply in cases involving convictions under 18 U.S.C. §§ 1591, 2422(b) and 2423(a). *See* Appendix B. In every case, the defendant was either a parent or had supervisory control over a real minor so that (b)(1) would apply, and/or exercised “undue influence” over a real minor so that (b)(2) would apply, or used a computer to entice a fictitious minor so that (b)(3) would apply. *See* Appendix B, Table 1. Thirteen of fifteen cases under § 2422(b) involved a fictitious minor and all cases under §§ 1591 or 2423(a) involved a real minor. In every case involving a real minor, the “undue influence” SOC would apply. In every case involving a fictitious minor, the computer enhancement would apply. In every case in which the SOC for parent or supervisory control would apply, the “undue influence” SOC would also apply. In only one case was the minor under 12 years old. *Id.*

a. The base offense level under subsections (a)(1) and (a)(2) should be set at 30 and 26 respectively.

Convictions under 18 U.S.C. § 1591 must involve real minors because there is no such thing as an attempt to violate the statute. Since a “commercial sex act” is an element, the “commercial sex act” SOC would apply in every case. And, given the broad definition of “undue influence,” *see* Application Note 3(B), that SOC would also apply in every case.

Thus, in the least aggravated case involving a minor less than 14 years old, the guideline range resulting from a base offense level of 34 for a defendant in CHC I would be 235-293 months, *i.e.*, nearly five years above the mandatory minimum. If the base offense level was 36, the range would be 292-365 months, *i.e.*, nearly ten years above the mandatory minimum. To ensure that the guideline range does not exceed the mandatory minimum, the Commission should set the base offense level under subsection (a)(1) at 30, resulting in a guideline range of 151-188 months for a defendant in CHC I. *See* Appendix B, Table 2.

Similarly, in the least aggravated case in which the minor was at least 14 but under 18, the guideline range resulting from a base offense level of 30 for a defendant in CHC I would be 151-188 months, *i.e.*, nearly three years above the mandatory minimum. If the base offense level was 32, the range would be 188-235 months, *i.e.*, more than 5 ½ years above the mandatory minimum. Thus, the base offense level under subsection (a)(2) should be set at 26, resulting in a guideline range of 97-121 months for a defendant in CHC I. *See* Appendix B, Table 2.

b. The base offense level for conviction under § 2422(b) should be set at no more than 28.

In the thirteen cases under § 2422(b) involving fictitious minors, the computer enhancement would apply; in the two cases that involved real minors, the sex act or commercial sex act and undue influence SOCs would apply. *See* Appendix B, Table 1. Thus, in the least aggravated case involving a fictitious minor, the guideline range resulting from a base offense level of 28 for a defendant in CHC I would be 97-121 months. If the base offense level was 30, the range would be 121-151 months. In the least aggravated case involving a real minor, the guideline range resulting from a base offense level of 28 for a defendant in CHC I would be 121-151 months. If the base offense level was 30, the range would be 151-188 months. The Commission should set the base offense level for convictions under § 2422(b) at no more than 28, resulting in a guideline range of 97-121 months in most cases, and 121-151 months in some cases. *See* Appendix B, Table 2.

c. The base offense level for conviction under § 2423(a) should be set at 26.

In every case under § 2423(a), at least two SOCs would apply. *See* Appendix B, Table 1. Thus, in the least aggravated case, the guideline range resulting from a base offense level of 28 for a defendant in CHC I would be 121-151 months. If the base offense level was 30, the range would be 151-188 months. The Commission should set the base offense level for convictions under § 2423(a) at level 26, resulting in a guideline range of 97-121 months for a defendant in CHC I. *See* Appendix B, Table 2.

2. Subsections (a)(1) and (a)(2) should be revised to ensure that those base offense levels apply only if the mandatory minimum applies.

As written, subsection (a)(1) can be read to apply even if the offense of conviction is not subject to the applicable mandatory minimum. For example, suppose the indictment alleges that the defendant transported a person in interstate commerce, knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act, and the person had attained the age of 14 years but not the age of 18 years, citing 18 U.S.C. §§ 1591(a)(1), (b)(2). The evidence at trial is that the defendant transported a fifteen-year-old for prostitution and he is convicted. At sentencing, the government contends that the base offense level under subsection (a)(1)

should apply because the offense allegedly “involved” another minor who was 13. The mandatory minimum would not apply in that case, and so the higher base offense level should not apply either. We propose the following language:

- (1) 30, if the defendant was convicted under 18 U.S.C. § 1591 and the mandatory minimum under 18 U.S.C. § 1591(b)(1) applies;
- (2) 26, if the defendant was convicted under 18 U.S.C. § 1591 and the mandatory minimum under 18 U.S.C. § 1591(b)(2) applies;

3. The SOC for age should be limited to 4 levels.

The proposed guideline states alternatives of 4, 6 or 8 levels for the SOC under (b)(5) for a minor under the age of 12. Issue for Comment # 8 asks if the SOC should be reduced to 4 levels if age is an element of the offense, but left at 8 levels otherwise. We recommend that the SOC be reduced to 4 levels for all cases. The relevant inquiry would seem to be what the guideline range is likely to be as a result of SOC's that will frequently be applied if the offense involved a minor under 12, whether or not age is an element of the offense.

Cases Involving Real Minors According to our analysis of convictions under §§ 2422(b) and 2423(a), two of thirteen cases under § 2422(b), and all of eighteen cases under § 2423(a) involved real minors, and in each case involving a real minor, at least two 2-level increases would apply. See Appendix B, Table 1. Under our proposal of a base offense level of 28 for convictions under § 2422(b), and a base offense level of 26 for convictions under § 2423(a), adding two 2-level increases and 4 levels for age results in two cases at level 36 (188-235 months in CHC I, *i.e.*, 5 ½ to 9 ½ years above the mandatory minimum), and eighteen cases at level 34 (151-188 months in CHC I, *i.e.*, 2 ½ to 5 ½ years above the mandatory minimum).

We have not analyzed cases involving convictions under the other statutes to which this guideline applies, but we think it would be extremely conservative to say that only one SOC other than age would apply to any conviction under any of these statutes if the victim was a real minor under the age of 12. With a base offense level of 24, one 2-level SOC for a factor other than age, and a 4-level SOC for the victim being under 12, the total offense level would be at least 30, *i.e.*, 97-121 months in CHC I. More likely, there would be two SOC's for factors other than age, resulting in a base offense level of 32, *i.e.*, 121-151 months in CHC I. This seems severe enough for offenses with no mandatory minimum and statutory maxima of ten, twenty or thirty years.

Further, in any case under any statute involving interstate travel with intent to engage in a sexual act with a minor under 12, or a sexual act with a minor under 12, the cross-reference to § 2A3.1 would apply, resulting in at least a level 36 (BOL 30 + 4 for age under (b)(1) + 2 under (b)(3), (5) or (6)), *i.e.*, 188-235 months in CHC I, 5 ½ to 9 ½ years above the mandatory minimum under §§ 2422(b) or 2423(a), and well above the statutory maximum under most of the other statutes.

Cases Involving False Minors According to our analysis of convictions under §§ 2422(b) and 2423(a), eleven of thirteen cases under § 2422(b), and no cases under § 2423(a) involved false minors, and in each case involving a false minor, at least the 2-level increase under subsection (b)(3) would apply. See Appendix B, Table 1. Under our proposal of a base offense level of 28 for convictions under § 2422(b), adding one 2-level increase and 4 levels for age results in a level 34 (151-188 months in CHC I, *i.e.*, 2 ½ to 5 ½ years above the mandatory minimum).

If the conviction is under any other statute, the total offense level would be 30 (24 + 2 under (b)(3) + 4 for age), *i.e.*, 97-121 months in CHC I, a sentence which is sufficiently severe for offenses with no mandatory minimum involving false minors. Further, agents control the age of the “minor” in these cases. The incentive to manipulate sentence outcomes, which is a “significant source of continuing disparity in the federal system,” 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* at 82 (2004), should be minimized when possible.

In any case under any statute involving interstate travel with intent to engage in a sexual act with a minor under 12 (even if false), the cross-reference to § 2A3.1 would apply, resulting in at least a level 36 (BOL 30 + 4 for age under (b)(1) + 2 under (b)(6)), *i.e.*, 188-235 months in CHC I, 5 ½ to 9 ½ years above the mandatory minimum under §§ 2422(b) or 2423(a), and well above the statutory maximum under most of the other statutes.

Issue for Comment #9 This issue for comment asks about the interaction of the cross reference in § 2G1.3(c)(3) and § 2A3.1 in cases involving a minor under the age of 12. First, it appears to ask if offense levels should be raised even further than in the proposed amendments under either guideline in order to provide “proportionality” between § 2G1.3 and § 2A3.1, taking into account the new mandatory minimums. We are unsure what this means, but if it means increasing sentences for offenses that are not subject to new mandatory minimums in order to make those sentences “proportional” to mandatory minimums, our answer would be “No.” Mandatory minimums interfere with proportionality by treating different offenses and offenders the same, and the Commission should therefore confine the damage and not raise sentences for other offenses to keep pace with mandatory minimums.

Second, the issue for comment says that if the cross reference applied, the resulting offense level under § 2A3.1 would be 34 (base offense level of 30 plus 4 for age), and that if it did not apply but the victim was under 12, the resulting offense level under § 2G1.3 (using a base offense level of 28 or 30 for conviction under §§ 2422(b) or 2423(a) plus 8 for age) would be 36 or 38, then asks if the Commission should provide higher base offense levels in § 2G1.3. This would seem to counsel in favor of *lowering* the base offense levels or the age SOC in § 2G1.3, since the cross reference would never be used if the sentence under § 2G1.3 was higher than under § 2A3.1. Under our proposal (*i.e.*, a base offense level of 28 for cases under § 2422(b), a base offense level of 26 for cases under § 2423(a), 4 levels for age in § 2G1.3(b)(5), and taking into account

the minimum other SOC that would apply), the resulting offense level in the vast majority of cases under §§ 2422(b) or 2423(a) would be 34 under § 2G1.3, and 36 under § 2A3.1. This seems right if the cross-referenced guideline is intended to result in a higher sentence than the original guideline.

4. The guidelines should resolve a circuit split by clarifying that the “undue influence” SOC does not apply in cases involving fictitious minors.

Subsection (b)(2)(B) adds two levels if a participant “unduly influenced a minor to engage in prohibited sexual conduct.” Application note 3(B) states that the “court should closely consider the facts of the case to determine whether a participant’s influence over the minor *compromised the voluntariness of the minor’s behavior*,” and that there is a rebuttable presumption of undue influence if the participant is at least 10 years older than the minor. The same SOC and application note appears in USSG § 2A3.2.

There has been a circuit split since 2003 as to the applicability of this SOC under USSG § 2A3.2 when the “minor” is not real. The Seventh Circuit has held that since it focuses on the impact of the defendant’s conduct on the victim’s behavior, it cannot apply where the “minor” was not real. *United States v. Mitchell*, 353 F.3d 552, 556-561 (7th Cir. 2003). Similarly, the Sixth Circuit has held that the SOC does not apply because a false “minor” is not persuaded at all in thought or deed and therefore cannot be “unduly influenced.” *United States v. Chriswell*, 401 F.3d 459, 469 (6th Cir. 2005). Only the Eleventh Circuit has held otherwise. *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). The SOC was not applied or mentioned in eleven of the thirteen cases sentenced under USSG § 2G3.1 or the previous version of USSG § 2G1.1 in which there was no real minor. See cases listed in Appendix B involving false minors. However, the Eleventh Circuit said in one case that the enhancement could have been applied but was not. *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003). In another case, the court mentioned in passing that the Probation Officer had added the enhancement, but the defendant did not challenge it so whether it properly applied was not discussed. *United States v. Armendariz*, 451 F.3d 352 (5th Cir. 2006).

The Commission should make clear, in both USSG §§ 2A3.2 and 2G1.3, that the Eleventh Circuit’s strained interpretation is wrong, and that the Sixth and Seventh Circuits are correct that this SOC applies only when there was a real victim who had not attained the age of 18. This is the right result because the voluntariness of a fictitious minor’s behavior cannot be compromised. The Commission should resolve the circuit split to avoid unwarranted disparities between the Eleventh and other circuits, and to minimize the impact of factor manipulation by law enforcement agents.

5. The guideline should make clear that the vulnerable victim enhancement does not apply based on age alone for convictions under 18 U.S.C. § 1591.

Like proposed § 2A3.1, proposed § 2G1.3 would, apparently inadvertently, result in a 2-level enhancement under §3A1.1(b) (vulnerable victim) based on age alone if the defendant was convicted under 18 U.S.C. § 1591. The vulnerable victim adjustment does not apply based on age alone only if the offense guideline provides an enhancement for the age of the victim. § 3A1.1, comment. (n.2). Under the proposed guideline, the enhancement for age would not apply if subsection (a)(1) applied (according to application note 5), and would not apply if subsection (a)(2) applied (because the minor would never be under 12). Thus, the guideline should make clear that the vulnerable victim enhancement does not apply based on age alone when the defendant is convicted under 18 U.S.C. § 1591.

G. Recordkeeping, § 2G2.5

The Adam Walsh Act added a statute containing certain recordkeeping requirements for simulated sexual conduct and made it a misdemeanor subject to imprisonment for not more than one year to violate those requirements in one of five specified ways. *See* 18 U.S.C. § 2257A(f), (i). The Commission has proposed adding this offense to § 2G2.5, and seeks comment in Issue #5 on whether it should encourage an upward departure or instruct the court to apply an obstruction of justice enhancement if the defendant refuses to allow inspection of records.

The Commission should not add an upward departure or refer the court to obstruction of justice. Congress treated a refusal to allow inspection the same as the other four ways of violating § 2257A(f). There are many reasons a business would not allow inspection of its records other than to obstruct justice. The cross references in § 2G2.5 already cover efforts to conceal a substantive offense. The other offenses covered by this guideline are felonies subject to imprisonment of five years. The cross references will far exceed the one-year statutory maximum for a violation of 18 U.S.C. § 2257A(f).

H. Child Exploitation Enterprise, § 2G2.6

The Commission proposes base offense levels of 34, 35, 36 or 37 for this new offense, 18 U.S.C. § 2252A(g), and asks what the base offense level should be given that the statute requires a mandatory minimum of twenty years, and whether an increase for use of a computer should be added especially if the base offense level is at the lower end of the proposed options.

Without knowing what kinds of fact patterns will give rise to prosecutions under this statute, the Commission should not build any enhancement into the base offense level, as the result would be unwarranted punishment every time the built-in factor did not exist. If the Commission adds a computer enhancement, then in most cases, there would be at least 2 levels for age, and another 2 levels for either a computer or parent/guardian/supervisory control. A total offense level of 37 reaches the mandatory minimum in CHC I. Thus, the base offense level should be no more than 33.

The Commission should not provide a specific offense characteristic, or expand a

proposed offense characteristic, to cover offenses under § 1591 with adult victims. The statute is entitled “Child Exploitation Enterprises.” If there is ever a conviction in which the only victims are adults (which seems doubtful, *see* Part E, *supra*), that case should be treated less severely than cases involving children. Further, the SOC’s are not only targeted at children. Subsection (b)(3), adding two levels for conduct described in § 2241(a) or (b) could very well apply to adults. In any event, in a rare case involving only adult victims, if the guideline range is less than the mandatory minimum, § 5G1.1(b) will operate.

This guideline should provide a decrease, or an invited downward departure, if the defendant’s conduct was limited to possession, receipt, or *solicitation* of child pornography and the defendant did not intend to traffic in such material. The statute could be used to prosecute a defendant using an Internet chat room to solicit images of sexually explicit depictions of children, even if the defendant never possessed or received any such images. *See* 18 U.S.C. §§ 2252A(a)(3), 2252A(g)(2).

This guideline should also provide a decrease, or an invited downward departure, if the only “victims” are not real minors but an agent posing as a minor or an agent’s false representation that a “minor” is available for sexually explicit conduct.

I. Embedding Words or Digital Images, § 2G3.1

The proposed amendment would cover the new offense prohibiting knowingly embedding words or digital images into the sourcecode of a website, 18 U.S.C. § 2252C, by revising subsection (b)(2) to provide an enhancement if either a misleading domain name (as prohibited by 18 U.S.C. § 2252B) or embedded words or digital images were used with intent to deceive a minor into viewing material that is harmful to minors. The enhancement should remain at 2 and not be raised to 4. There is no discernible difference between a misleading domain name and an embedded word or image, and no reason has been given for raising the enhancement from 2 to 4 levels.

It is appropriate that there be no enhancement for use of a misleading domain name or embedded words or images to mislead an adult into viewing obscene material. The Commission has never done so with respect to misleading domain names, and no reason appears for doing so now with respect to either misleading domain names or embedded words or images.

If the Commission feels it is necessary to increase the SOC at subsection (b)(2) and/or add an enhancement for intent to mislead an adult based on the mere fact that the new statute applicable to embedding words or digital images has higher statutory maximums than the old statute applicable to misleading domain names, then it should create a new guideline for embedding words or images rather than raising penalties for misleading domain names.

J. False Statements in connection with a Sex Offense Investigation, § 2J1.2

The Adam Walsh Act amended 18 U.S.C. § 1001(a) to add that “[i]f the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years,” thus raising the statutory maximum from 5 to 8 years. The proposed guideline suggests an increase of anywhere from 2 to 12 levels.

Unlike the congressional directive that led to the extreme 12-level increase reaching or exceeding the statutory maximum for every conviction under 18 U.S.C. § 1001 for a false statement in connection with a terrorism investigation, *see* Pub. L. 108-458 § 6703(b), there is *no* congressional directive here. Congress obviously knows how to tell the Commission to increase the guideline sentence for a false statement in connection with an investigation of the crime *du jour*. It did not do so here.

A policy of increasing the guideline sentence any time a statutory maximum is increased is one the Commission does not consistently follow and should not follow because the statutory maxima for various offenses do not reflect their relative seriousness, but are more often than not the result of politics or mere happenstance. If a judge wants to increase a sentence because a false statement in the course of a sex offense investigation caused a serious problem, she can do so. The Commission should not reach out to increase the guideline range here.

K. Repeat and Dangerous Sex Offenders Against Minors, § 4B1.5

The proposed amendment adds an offense against a minor under 18 U.S.C. § 1591 to the list of covered sex crimes, and states that an attempt to commit that offense is covered, but there is no offense of attempt to violate 18 U.S.C. § 1591. We recommend that the text be changed as follows: “(B) an attempt to commit any offense described in subdivisions (A)(i) through (iii) of this note; or (C) a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.”

We hope that these comments are helpful.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Kelley Land, Assistant General Counsel
Alan Dorhoffer, Senior Staff Attorney

APPENDIX A

Option 1

§2A3.5. Failure to Register as a Sex Offender

(a) Base Offense Level:

- (1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;
- (2) 14, if the offense that gave rise to the requirement to register was a Tier II offense;
- (3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics

- (1) If, before sentencing, the defendant is convicted of an offense that occurred during the failure to register status which is (A)(i) a sex offense against an individual other than a minor; or (ii) kidnapping or falsely imprisoning a minor (unless committed by a parent or guardian), increase by 6 levels; or (B) a sex offense against a minor, increase by 8 levels.
- (2) If the sentence served for the offense that gave rise to the requirement to register was less than 13 months, decrease by two levels.
- (3) If (A) subdivision (b)(1) does not apply and (B) for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the requirement to register and the date of the instant failure to register offense (excluding any periods the defendant was in custody or civilly committed for that offense), the defendant (i) was not convicted of an offense punishable by more than one year, (ii) was not convicted of a sex offense, and (iii) successfully completed any supervised release, probation, parole or sex offender treatment in connection with the offense that gave rise to the requirement to register, decrease by two levels.
- (4) If the defendant voluntarily attempted to correct the failure to register, decrease by 4 levels.

Application Notes

1. Definitions

“Minor” is an individual who had not attained the age of 18 years.

“Individual other than a minor” is (A) an individual who had attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to the defendant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to the defendant that the officer had not attained the age of 18 years.

“Sex offense” has the meaning given that term in 42 U.S.C. § 16911(5), except that kidnapping and false imprisonment are not included.

“Tier I offense,” “Tier II offense,” and “Tier III offense” have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4) respectively.

2. Departures

(A) A downward departure may be warranted if the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute.

(B) The Sex Offender Registration and Notification Act requires that a person convicted of a sex offense register in each jurisdiction in which the person currently resides, is employed, and/or is a student, and in the jurisdiction in which the person was convicted if different from the jurisdiction in which the person resides. *See* 42 U.S.C. §§ 16911(11), (12), (13), 16913(a). A downward departure may be warranted if the defendant was registered in at least one but fewer than all jurisdictions in which the defendant resided, was employed, and/or was a student. The departure would not be warranted if the defendant moved to a new address and knowingly failed to inform at least one of the jurisdictions where the defendant was required to register of the change of address.

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

- (a) If the defendant is convicted under 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) If the defendant is convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Application Notes

1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.
2. Inapplicability of Chapter Two Enhancement. If a sentence under this guideline is imposed for a conviction under 18 U.S.C. § 2250(c) in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the same offense that forms the basis of conviction of a crime of violence under 18 U.S.C. § 2250(c) when determining the sentence for the underlying offense.
3. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

Option 2

§2A3.5. Failure to Register as a Sex Offender

(a) Base Offense Level:

- (1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;
- (2) 14, if the offense that gave rise to the requirement to register was a Tier II offense;
- (3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics **[in Option 2, some or all of these SOC's could be converted to encouraged downward departures]**

- (1) If the sentence served for the offense that gave rise to the requirement to register was less than 13 months, decrease by two levels.
- (2) If, for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the requirement to register and the date of the instant failure to register offense (excluding any periods the defendant was in custody or civilly committed for that offense), the defendant (A) was not convicted of an offense punishable by more than one year, (B) was not convicted of a sex offense, and (C) successfully completed any supervised release, probation, parole or sex offender treatment in connection with the offense that gave rise to the requirement to register, decrease by two levels.
- (3) If the defendant voluntarily attempted to correct the failure to register, decrease by 4 levels.

Application Notes

1. Definitions

“Sex offense” has the meaning given that term in 42 U.S.C. § 16911(5).

“Tier I offense,” “Tier II offense,” and “Tier III offense” have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4) respectively.

2. Departures

(A) A downward departure may be warranted if the defendant did not comply or attempt to comply with the requirement to register because of circumstances to which he did not intentionally contribute.

(B) The Sex Offender Registration and Notification Act requires that a person convicted of a sex offense register in each jurisdiction in which the person currently resides, is employed, and/or is a student, and in the jurisdiction in which the person was convicted if different from the jurisdiction in which the person resides. *See* 42 U.S.C. §§ 16911(11), (12), (13), 16913(a). A downward departure may be warranted if the defendant was registered in at least one but fewer than all jurisdictions in which the defendant resided, was employed, and/or was a student. The departure would not be warranted if the defendant moved to a new address and knowingly failed to inform at least one of the jurisdictions where the defendant was required to register of the change of address.

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

- (a) If the defendant is convicted under 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) If the defendant is convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Application Notes

- 1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.
- 2. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).
- 3. Upward Departure. If the defendant was convicted under 18 USC § 2250(c), an upward departure may be warranted if the crime of violence was a sex offense as defined in 42 U.S.C. § 16911(5).

APPENDIX B

TABLE 1							
	Statute of Conviction	Real or False Minor	Facts that Would Support Enhancements under Proposed 2G1.3				
Case			(b)(1) (A) parent; (B) supvy control	(b)(2) (A) misrep identity; (B) undue influence	(b)(3) computer (A) to entice minor; (B) to solicit another	(b)(4) (a) sex act; (B) commercial sex act	(b)(5) under 12
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591	Real (unstated but at least 12 and not yet 16)		undue influence		commercial sex act	N/A
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591	Real (appears to be 16 or more)		undue influence		commercial sex act	N/A
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591	Real (14 & 16)		undue influence		commercial sex act	N/A
US v. Bohannon, 2007 WL 273473 (11th Cir. 2/1/07)	18 USC 2422(b)	False			entice minor		
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	False			entice minor		
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	False			entice minor		
US v. Riccardi, 405 F.3d 852	18 USC 2422(b)	Real		undue influence		sex act	

(10 th Cir. 2005)							
US v. Pipkins, 378 F.3d 1281 (11 th Cir. 2004)	18 USC 2422(b)	Real		undue influence		commer- cial sex act	
US v. Murrell, 368 F.3d 1283 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Morton, 364 F.3d 1300 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Orrega, 363 F.3d 1093 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor	-	
US v. Miranda, 348 F.3d 1322 (11 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Payne, 77 Fed. Appx. 772 (6 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Panfil, 338 F.3d 1299 (11 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Angle, 234 F.3d 326 (7 th Cir. 2000)	18 USC 2422(b)	False			entice minor		
*US v. Sutherland, 191 Fed. Appx. 737 (10 th Cir. 8/11/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Diaz, 170 Fed. Appx. 884 (5 th Cir. 3/15/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
*US v. Sims, 161 Fed. Appx. 849 (11 th Cir. 1/4/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. York, 428 F.3d 1325 (11 th Cir. 2005)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
*US v. Wild, 143 Fed. Appx. 938 (10 th Cir. 8/4/05)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Elliott, 130 Fed. Appx. 365 (11 th Cir. 5/4/05)	18 USC 2423(a)	Real		undue influence		sex act	
US v. Jeakins, 116 Fed. Appx. 909 (9 th Cir. 12/2/04)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	under 12
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	Real	supvy control	undue influence			
US v. Long,	18 USC	Real	supvy	undue		sex act	

328 F.3d 655 (D.C. Cir. 2003)	2423(a)		control	influence			
US v. Hersh, 297 F.3d 1233 (11 th Cir. 2002)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Spruill, 296 F.3d 580 (7 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Williams, 291 F.3d 1180 (9 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act -	
US v. Evans, 285 F.3d 664 (8 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Evans, 272 F.3d 1069 (8 th Cir. 2001)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Willard, 8 Fed. Appx. 743 (9 th Cir. 2001)	18 USC 2423(a)	Real	parent	undue influence		sex act possible	
US v. Lawrence, 187 F.3d 638 (6 th Cir. 1999)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Anderson, 139 F.3d 291 (1 st Cir. 1998)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Vang, 139 F.3d 902 (7 th Cir. 1998)	18 USC 2423(a)	Real		undue influence		sex act	

This chart contains cases resulting from the following Westlaw search in the CTA database. (1591! 2422(B) 2423(A)) & (2G1.3! 2G1.1!) The search resulted in 38 cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a). Three of the cases contained insufficient facts about the case to tell which SOC's would have applied. The three cases marked with an asterisk (*) involved convictions under both section 1591 and 2423(a).

TABLE 2					
	Statute of Conviction	Applicable Mandatory Minimum	Guideline Range in CHC I, USSC Alternative 1	Guideline Range in CHC I, USSC Alternative 2	Defenders' Proposed Alternative
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Bohannon, 2007 WL 273473	18 USC 2422(b)	120 months	$28 + 2 = 30 = 97-121$ months	$30 + 2 = 32 = 121-151$ months	$28 + 2 = 30 = 97-121$ months

(11 th Cir. 2/1/07)					
US v. Armendariz, 451 F.3d 352 (5 th Cir. 2006)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Sims, 428 F.3d 945 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Searcy, 418 F.3d 1193 (11 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Thomas, 410 F.3d 1235 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Crayton, 143 Fed. Appx. 77 (10 th Cir. 6/8/05)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Riccardi, 405 F.3d 852 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Pipkins, 378 F.3d 1281 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Murrell, 368 F.3d 1283 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Morton, 364 F.3d 1300 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Orrega, 363 F.3d 1093 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Miranda, 348 F.3d 1322 (11 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Payne, 77 Fed. Appx. 772 (6 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Panfil, 338 F.3d 1299 (11 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Angle, 234 F.3d 326 (7 th Cir. 2000)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10 th Cir. 8/11/06)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Diaz, 170 Fed. Appx. 884 (5 th Cir. 3/15/06)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Sims, 161 Fed. Appx. 849	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months

(11 th Cir. 1/4/06)					
US v. York, 428 F.3d 1325 (11 th Cir. 2005)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 = 151 - 188$ months	$30 + 2 + 2 + 2 = 36 = 188 - 235$ months	$26 + 2 + 2 + 2 = 32 = 121 - 151$ months
US v. Wild, 143 Fed. Appx. 938 (10 th Cir. 8/4/05)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Elliott, 130 Fed. Appx. 365 (11 th Cir. 5/4/05)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Jeakins, 116 Fed. Appx. 909 (9 th Cir. 12/2/04)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 + [4, 6 \text{ or } 8] = 38 \text{ or } 40 \text{ or } 42 = 235 - 293, 292 - 365 \text{ or } 360 - \text{life}$	$30 + 2 + 2 + 2 + [4, 6 \text{ or } 8] = 40 \text{ or } 42 \text{ or } 44 = 292 - 365, 360 - \text{life, life}$	$26 + 2 + 2 + 2 + 4 = 36 = 188 - 235$ months
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Long, 328 F.3d 655 (D.C. Cir. 2003)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 = 151 - 188$ months	$30 + 2 + 2 + 2 = 36 = 188 - 235$ months	$26 + 2 + 2 + 2 = 32 = 121 - 151$ months
US v. Hersh, 297 F.3d 1233 (11 th Cir. 2002)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 = 151 - 188$ months	$30 + 2 + 2 + 2 = 36 = 188 - 235$ months	$26 + 2 + 2 + 2 = 32 = 121 - 151$ months
US v. Spruill, 296 F.3d 580 (7 th Cir. 2002)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Williams, 291 F.3d 1180 (9 th Cir. 2002)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Evans, 285 F.3d 664 (8 th Cir. 2002)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Evans, 272 F.3d 1069 (8 th Cir. 2001)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Willard, 8 Fed. Appx. 743 (9 th Cir. 2001)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 = 151 - 188$ months	$30 + 2 + 2 + 2 = 36 = 188 - 235$ months	$26 + 2 + 2 + 2 = 32 = 121 - 151$ months
US v. Lawrence, 187 F.3d 638 (6 th Cir. 1999)	18 USC 2423(a)	120 months	$28 + 2 + 2 + 2 = 151 - 188$ months	$30 + 2 + 2 + 2 = 36 = 188 - 235$ months	$26 + 2 + 2 + 2 = 32 = 121 - 151$ months
US v. Cavallo, 185 F.3d 875 (10 th Cir. 1999)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Anderson, 139 F.3d 291 (1 st Cir. 1998)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months
US v. Vang, 139 F.3d 902 (7 th Cir. 1998)	18 USC 2423(a)	120 months	$28 + 2 + 2 = 32 = 121 - 151$ months	$30 + 2 + 2 = 34 = 151 - 188$ months	$26 + 2 + 2 = 30 = 97 - 121$ months

APPENDIX B

TABLE 1							
	Statute of Conviction	Real or False Minor	Facts that Would Support Enhancements under Proposed 2G1.3				
Case			(b)(1) (A) parent; (B) supvy control	(b)(2) (A) misrep identity; (B) undue influence	(b)(3) computer (A) to entice minor; (B) to solicit another	(b)(4) (a) sex act; (B) commercial sex act	(b)(5) under 12
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
*US v. Sutherland, 191 Fed. Appx. 737 (10 th Cir. 8/11/06)	18 USC 1591	Real (unstated but at least 12 and not yet 16)		undue influence		commercial sex act	N/A
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591	Real (appears to be 16 or more)		undue influence		commercial sex act	N/A
*US v. Sims, 161 Fed. Appx. 849 (11 th Cir. 1/4/06)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
US v. Wild, 143 Fed. Appx. 938 (10 th Cir. 8/4/05)	18 USC 1591	Real (14 & 16)		undue influence		commercial sex act	N/A
US v. Bohannon, 2007 WL 273473 (11 th Cir. 2/1/07)	18 USC 2422(b)	False			entice minor		
US v. Armendariz, 451 F.3d 352 (5 th Cir. 2006)	18 USC 2422(b)	False			entice minor		
US v. Sims, 428 F.3d 945 (10 th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Searcy, 418 F.3d 1193 (11 th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Thomas, 410 F.3d 1235 (10 th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Crayton, 143 Fed. Appx. 77 (10 th Cir. 6/8/05)	18 USC 2422(b)	False			entice minor		
US v. Riccardi, 405 F.3d 852	18 USC 2422(b)	Real		undue influence		sex act	

(10 th Cir. 2005)							
US v. Pipkins, 378 F.3d 1281 (11 th Cir. 2004)	18 USC 2422(b)	Real		undue influence		commer- cial sex act	
US v. Murrell, 368 F.3d 1283 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Morton, 364 F.3d 1300 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Orrega, 363 F.3d 1093 (11 th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Miranda, 348 F.3d 1322 (11 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Payne, 77 Fed. Appx. 772 (6 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Panfil, 338 F.3d 1299 (11 th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Angle, 234 F.3d 326 (7 th Cir. 2000)	18 USC 2422(b)	False			entice minor		
*US v. Sutherland, 191 Fed. Appx. 737 (10 th Cir. 8/11/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Diaz, 170 Fed. Appx. 884 (5 th Cir. 3/15/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
*US v. Sims, 161 Fed. Appx. 849 (11 th Cir. 1/4/06)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. York, 428 F.3d 1325 (11 th Cir. 2005)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
*US v. Wild, 143 Fed. Appx. 938 (10 th Cir. 8/4/05)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Elliott, 130 Fed. Appx. 365 (11 th Cir. 5/4/05)	18 USC 2423(a)	Real		undue influence		sex act	
US v. Jeakins, 116 Fed. Appx. 909 (9 th Cir. 12/2/04)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	under 12
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	Real	supvy control	undue influence			
US v. Long,	18 USC	Real	supvy	undue		sex act	

328 F.3d 655 (D.C. Cir. 2003)	2423(a)		control	influence			
US v. Hersh, 297 F.3d 1233 (11 th Cir. 2002)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Spruill, 296 F.3d 580 (7 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Williams, 291 F.3d 1180 (9 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Evans, 285 F.3d 664 (8 th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Evans, 272 F.3d 1069 (8 th Cir. 2001)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Willard, 8 Fed. Appx. 743 (9 th Cir. 2001)	18 USC 2423(a)	Real	parent	undue influence		sex act possible	
US v. Lawrence, 187 F.3d 638 (6 th Cir. 1999)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Anderson, 139 F.3d 291 (1 st Cir. 1998)	18 USC 2423(a)	Real		undue influence		commer- cial sex act	
US v. Vang, 139 F.3d 902 (7 th Cir. 1998)	18 USC 2423(a)	Real		undue influence		sex act	

This chart contains cases resulting from the following Westlaw search in the CTA database. (1591! 2422(B) 2423(A)) & (2G1.3! 2G1.1!) The search resulted in 38 cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a). Three of the cases contained insufficient facts about the case to tell which SOC's would have applied. The three cases marked with an asterisk (*) involved convictions under both section 1591 and 2423(a).

TABLE 2					
	Statute of Conviction	Applicable Mandatory Minimum	Guideline Range in CHC I, USSC Alternative 1	Guideline Range in CHC I, USSC Alternative 2	Defenders' Proposed Alternative
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(1)	180 months	$34 + 2 + 2 = 38 = 235-293$ months	$36 + 2 + 2 = 40 = 292-365$ months	$30 + 2 + 2 = 34 = 151-188$ months
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(2)	120 months	$30 + 2 + 2 = 34 = 151-188$ months	$32 + 2 + 2 = 36 = 188-235$ months	$26 + 2 + 2 = 30 = 97-121$ months
US v. Bohannon, 2007 WL 273473	18 USC 2422(b)	120 months	$28 + 2 = 30 = 97-121$ months	$30 + 2 = 32 = 121-151$ months	$28 + 2 = 30 = 97-121$ months

•(11 th Cir. 2/1/07)					
US v. Armendariz, 451 F.3d 352 (5 th Cir. 2006)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Sims, 428 F.3d 945 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Searcy, 418 F.3d 1193 (11 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Thomas, 410 F.3d 1235 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Crayton, 143 Fed. Appx. 77 (10 th Cir. 6/8/05)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Riccardi, 405 F.3d 852 (10 th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Pipkins, 378 F.3d 1281 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Murrell, 368 F.3d 1283 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Morton, 364 F.3d 1300 (11 th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
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US v. Miranda, 348 F.3d 1322 (11 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Payne, 77 Fed. Appx. 772 (6 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Panfil, 338 F.3d 1299 (11 th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Angle, 234 F.3d 326 (7 th Cir. 2000)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121- 151 months	28 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10 th Cir. 8/11/06)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Diaz, 170 Fed. Appx. 884 (5 th Cir. 3/15/06)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Sims, 161 Fed. Appx. 849	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months

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US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
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US v. Evans, 272 F.3d 1069 (8 th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Willard, 8 Fed. Appx. 743 (9 th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151- 188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Lawrence, 187 F.3d 638 (6 th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151- 188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Cavallo, 185 F.3d 875 (10 th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Anderson, 139 F.3d 291 (1 st Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months
US v. Vang, 139 F.3d 902 (7 th Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97- 121 months

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

March 13, 2007

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

Re: Comments on Proposed Amendments Relating to Miscellaneous Laws

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendment relating to the statute criminalizing unapproved demonstrations at national cemeteries and the issues for comment regarding Internet gambling.

I. Demonstrations at National Cemeteries, Military Funerals

Pub. L. 109-228 created a new offense prohibiting unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery, and created a no-protestor zone around military funerals that begins one hour before a funeral and ends one hour after its conclusion. *See* 38 U.S.C. § 2413. The statutory maximum is one year, *see* 18 U.S.C. §1387, making it a Class A misdemeanor.

Understandably, there is no guideline for sentencing defendants for engaging in political speech. Thus, we agree that the offense should be referred to §2B2.3 (Trespass).

We oppose the 2-level enhancement under subsection (b)(1) for this offense. Currently, that specific offense characteristic applies if the trespass was on a secured government installation, a nuclear energy facility, on a U.S. vessel or aircraft, in a secured airport, at a residence, or on a critical computer system. *See* U.S.S.G.

§2B2.3(b)(1). Those locations are not ordinarily open to the public and involve special security concerns. Engaging in a demonstration at a national cemetery does not entail any similar potential for security breach or injury to anyone. The core offense is trespassing. Adding two levels based on naming the place, a public cemetery with no special security or safety concerns, is unjustified.

II. Internet Gambling, Issues for Comment

Public Law 109-347 created a new offense at 31 U.S.C. § 5363, entitled “Prohibition on acceptance of any financial instrument for unlawful internet gambling.” The offense should be referenced to USSG § 2E3.1 (Gambling Offenses) because it covers the conduct prohibited by § 5363.

The Commission should not add a cross reference to § 2S1.1 or 2S1.3. The statute does not prohibit money laundering or structuring. Rather, it prohibits a person engaged in the business of betting or wagering from knowingly accepting payment by credit card, electronic funds transfer, check, and other financial instruments from a person engaging in unlawful Internet gambling. The purpose of the law, according to its sponsors, is to protect families from devastating losses through Internet gambling. *See* Conference Report on H.R. 4954, Safe Port Act at H8029 (House of Representatives - September 29, 2006). The “Congressional findings and purpose” also mentions debt collection problems, but mentions nothing about money laundering or structuring. *See* 31 U.S.C. § 5361. Indeed, Congress admittedly does not know whether or not Internet gambling is used to launder money. *See* Pub. L. No. 109-347 § 803 (encouraging United States government in deliberations with foreign countries to study *whether* Internet gambling is used to launder money). Thus, after a careful review of the record, Congress did not direct or suggest that the guideline for this offense should punish Internet gambling operators for money laundering. Accordingly, there is no justification for adding a cross reference to § 2S1.1 or 2S1.3.

Further, the Commission should not add cross references that permit a person convicted of one offense to be punished for another. Cross references allow defendants to be sentenced for offenses that cannot be proved with reliable evidence beyond a reasonable doubt, create unwarranted disparity, result in unfairness, and are a primary source of criticism of the Guidelines. If Internet gambling operators launder money, they can be charged and convicted of that offense.

We hope that these comments are useful. Please do not hesitate to contact us if you have any questions or concerns, or would like additional information.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Tom Brown, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

March 12, 2007

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

Re: Comments on Proposed Amendments Relating to Intellectual Property and
Pretexting

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment relating to Intellectual Property and Pretexting published January 30, 2007.

I. Intellectual Property, § 2B5.3

A. "Anti-Circumvention Devices"

Congress directed the Commission to review and amend § 2B5.3 "if appropriate" after determining whether the definition of "infringement amount" was adequate to address situations in which the defendant was convicted under 18 U.S.C. §§ 2318 or 2320 and the item in which the defendant trafficked was not an infringing item but "was intended to facilitate infringement, such as an anti-circumvention device."¹ For three

¹ The directive states:

(c) SENTENCING GUIDELINES-

(1) Review and amendment- Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code. . . .

(3) RESPONSIBILITIES OF UNITED STATES SENTENCING COMMISSION- In carrying out this subsection, the United States Sentencing

reasons, we believe the directive is too ambiguous (at best) to warrant Commission action without clarification from Congress. First, neither section 2318 nor 2320 imposes criminal liability for trafficking in any device. (Sections 1201 and 1204 of the Copyright Act do impose such liability, *see* 17 U.S.C. §§ 1201, 1204, but the directive does not mention those sections.) Second, no federal statute—not even 17 U.S.C. §§ 1201, 1204—imposes liability (civil or criminal) for trafficking in an *anti-circumvention* device. (Sections 1201, 1204 criminalize trafficking in *circumvention* devices.) Third, trafficking in a circumvention device is not a form of or equivalent to fraud or theft, making any recourse to the table in §2B1.1 inappropriate. Until Congress clarifies its intent, no amendment is warranted.

Failing that, we offer our thoughts on the proposed options. 17 U.S.C. § 1201(b)(1) involves trafficking in devices designed to “circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright holder,” with the phrase “circumvent protection afforded by a technological measure” defined in 17 U.S.C. § 1201(b)(2). A “right of a copyright holder,” with respect to a work which could be protected by a technological measure (*i.e.*, software, a DVD, recorded music) is the right to exercise one of copyright’s exclusive entitlements, such as copying or distribution.² 17 U.S.C. § 1201(a)(2) involves trafficking in devices designed to “circumvent[] a technological measure that effectively controls access,” with the phrase

Commission shall determine whether the definition of ‘infringement amount’ set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations **in which the defendant has been convicted of one of the offenses listed in paragraph (1)** and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, **such as an anti-circumvention device**, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as *U.S. v. Sung*, 87 F.3d 194 (7th Cir. 1996).

Pub. L. No. 109-181 § 1(c) (emphasis supplied).

² A copyright owner has “exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106.

“circumvent a technological measure” defined in 17 U.S.C. § 1201(a)(3). As we understand it, “accessing” a copyrighted work means using it as intended (*i.e.*, using software, watching a DVD, listening to music), and does not necessarily involve copying or distributing. Violating either subsection of § 1201, if “willfully and for purposes of commercial advantage or private financial gain,” is a crime subject to a statutory maximum of five years for a first offense. *See* 17 U.S.C. § 1204.

Option 1 would make the “infringement amount” for a defendant convicted under 17 U.S.C. § 1201 the “price the user would have paid to access lawfully the copyrighted work” times the number of “accessed works,” and would add two levels and require a minimum offense level of 12 if the conviction was under 17 U.S.C. § 1201(b). Option 2 would make the “infringement amount” the retail value of the device times the number of devices for any conviction under 17 U.S.C. § 1201. Option 3 would make the “infringement amount” the greater of the retail value of the device times the number of devices, or the “price a person legitimately using the device to access or make use of a copyrighted work would have paid” times the number of devices for a conviction under 17 U.S.C. § 1201(b).

Options 1 and 3 are both too complex. Under Option 1, the court would have to determine the price a user would have paid to “access lawfully” the copyrighted work.³ Under Option 2, the court would have to determine the price a person would have paid to “legitimately us[e] the device to access or make use of” the copyrighted work. Option 3 is even more complex and confusing than Option 1 because it would require two calculations in every case, and what is meant by the “price a person legitimately using the device to access or make use of a copyrighted work would have paid” is entirely unclear. Option 1 may well result in sentences that exceed the seriousness of the offense, because not every such conviction will necessarily involve actual copying or distribution. With no case law involving an offense under 17 U.S.C. § 1201(b), a conclusion that every such case deserves a minimum of 12 levels seems unjustified—a single distribution of a circumvention device, such as a software program, hardly seems to call for so high an offense level.

We support Option 2 because it is the simplest of the three options. If the Commission wishes to add punishment for a conviction under § 1201(b) that involved copying or distribution, we suggest that it add a specific offense as follows:

If the defendant was convicted under 17 U.S.C. § 1201(b) and also copied or distributed the copyrighted work, increase by two levels.

³ If the Commission uses Option 1, it should provide some examples of what is meant by “the price the user would have paid to access lawfully the copyrighted work.” Based on discussions with staff, in the case of software, this would be the cost of adding another user to a software license.

B. Downward Departure

In response to Issue for Comment #1, there should be a downward departure for cases in which the infringement amount overstates the seriousness of the offense. We proposed such a departure in 2005. There has been an invited upward departure since 2000 but no invited downward departure. There have been zero upward departures and a consistently high rate of downward departures. In 2006, the rate of within-guideline sentences under § 2B5.3 reached an all-time low of 47%, with none above the guideline range, 66 non-government sponsored below-guideline range, and 38 government-sponsored below-guideline range. *See* 2006 Sourcebook, Table 28.

The history, and the fact that this guideline is concerned with rapidly changing technology, counsels in favor of flexibility that goes both ways. This guideline can easily overstate the seriousness of the offense for a variety of reasons, including that (1) the vast majority of infringements do not result in anywhere near a one-to-one displacement of sales, (2) studies show that infringement can actually benefit trademark and copyright holders, consumers and the economy, and (3) victims submit the alleged loss amount directly to the Probation Officer rather than to the prosecutor who would otherwise weed out false, misleading, unsupported, inflated or legally irrelevant amounts. *See* 8/3/05 Letter of Jon M. Sands to Kathleen Grilli at 3-6 at 3-6 (attached). There will be situations under new Application Note 2(A)(vii) where there is insufficient evidence that some number of the labels, stickers, boxes, etc., would ever have been affixed to an infringing item.

We recommend the same language we recommended in 2005 for a downward departure:

There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

C. Special Skill

In response to Issue for Comment #2, the Commission should delete Application Note 3 based on the information it has received that not every de-encryption or circumvention case involves a "special skill" not possessed by members of the general public that requires substantial education, training or licensing. There is no need to modify the note to re-state what is already stated in § 3B1.3. The new information is reason enough to delete the note. In addition, where there has been actual circumvention, the offense level is a minimum of 12 under (b)(3) or more than that through (b)(1) and (b)(2). If the Commission adopts any of the three options involving trafficking in devices used to circumvent a technological measure, de-encryption or circumvention will receive additional points there as well.

II. Pretexting, § 2H3.1; Proposed Expansion of "Victim," § 2B1.1

We join the Practitioners Advisory Group's comments on the proposed guideline for the new offense at 18 U.S.C. § 1039, fraudulent acquisition or disclosure of confidential telephone records. USSG § 2H3.1 is more appropriate than USSG § 2B1.1 because the harm is non-monetary and it would be impractical for courts to translate an invasion of privacy into pecuniary loss, and because the additional 3 levels in the base offense level when there is no pecuniary loss (9 versus 6) is sufficient punishment for an invasion of privacy.

We also agree that the best way to implement the mandatory consecutive penalties for aggravated forms of the offense is to require a conviction under 18 U.S.C. § 1039(d) or (e) in order for the cross reference in § 2H3.1(c) to apply. In order for the additional punishment to apply, there will have to be a conviction under subsection (d) or (e) of the statute. The guideline should follow the same course. This offense of conviction approach would avoid a Sixth Amendment violation and would be consistent with the approach the Commission has taken with respect to other statutes requiring consecutive additional punishment with no minimum and only a maximum. See USSG § 2D1.2, applicable to convictions under 21 U.S.C. §§ 859, 860 and 861. An application note should explain how to attribute a portion of the total sentence determined under 18 U.S.C. § 3553(a) to the conviction under 18 U.S.C. § 1039(d) or (e).

We do not believe any specific offense characteristics should be added. There have been no prosecutions under the new statute. The courts can sentence above or below the guideline range if they find the range to be insufficient or greater than necessary to satisfy the purposes of sentencing.

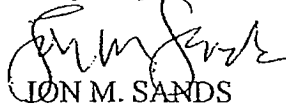
We strongly oppose the proposal by the President's Task Force on Identity Theft to expand the definition of "victim" in USSG § 2B1.1 (or anywhere in the Guidelines) to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, and inconvenience." There is already a specific offense characteristic for identity theft, see § 2B1.1(b)(10), and invited upward departure for non-monetary harm. *Id.*, comment. (n.19).

Because the guideline already accounts for these factors, the sole effect of changing the definition of "victim" to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, [or] inconvenience" would be to expand the reach of the Crime Victim's Rights Act, 18 U.S.C. § 3771. Courts would be inundated with assertions of a right to be heard at sentencing by persons and entities claiming perceived damage to their reputations, emotional distress, the inconvenience of a few telephone calls, a headache or loss of a few hours sleep, and then disruptive petitions for mandamus if the court denied the asserted right. Prosecutors would be required to confer with all such persons and entities. Defendants would have to defend against all such persons and entities. The proposed definition would create a practical nightmare in the courts, would

turn a solemn proceeding into a spectacle, and would jeopardize the foundations of our adversary system.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,



ION M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Kathleen Grilli, Deputy General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

ATTACHMENT

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

August 3, 2005

Kathleen Grilli, Esq.
Assistant General Counsel
United States Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109-9);
Intellectual Property Protection and Courts Amendment Act of 2004 (Pub.
L. 108-482); CAN SPAM Warning Label Offense (Pub. L. 108-187
section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work whenever we believe it would be useful.¹ We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

¹ 28 U.S.C. § 994(o).

The FECA directs the Commission to “review and, if appropriate,” amend the guidelines and policy statements applicable to intellectual property offenses,² in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is “sufficiently stringent” to “deter, and adequately reflect the nature of” such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet – regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of “financial gain” to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was “sufficiently stringent to deter such a crime,” and required that the guideline provide for “consideration of the retail value and quantity” of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

² See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,³ i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid \$192,000 for the infringing items, and the total retail value of the infringed items was \$1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over \$1 million as well as an uploading enhancement, resulting in a range of 46-57 months.⁴ Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.⁵ See U.S. Sentencing Commission, No

³ U.S.S.G. App. C, Amendment 593.

⁴ See "Texas man pleads guilty to felony copyright infringement for selling more than \$1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

⁵ Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer “during the preparation of the pre-sentence report” a statement on “the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact.”⁶ This seems clearly to invite the Probation Officer to use the victim’s estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of “loss” in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that “the impact of downloads on sales continues to be small and statistically indistinguishable from zero,”⁷ which is inconsistent with industry claims that file sharing explains the decline in music sales

loss or gain due to the offense,” U.S.S.G. § 2B5.3, comment. (backg’d.) (1999), because not every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

⁶ See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

⁷ See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter “Harvard Study”), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

between 2000 and 2002.⁸ Unlike other studies, which rely on surveys, this study directly observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.⁹

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.¹⁰ For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.¹¹ This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.¹² In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.¹³ Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.¹⁴

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.¹⁵

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.¹⁶

⁸ File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. *Id.* at 1-2.

⁹ *Id.* at 6, 11.

¹⁰ *Id.* at 22.

¹¹ *Id.* at 23, 25.

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at <http://www.ecommercetimes.com/story/3837.html>.

¹⁵ See RIAA 2004 Yearend Statistics (Exhibit A).

¹⁶ Harvard Study at 1, 24.

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment, a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.¹⁷

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.¹⁸

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.¹⁹ Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).²⁰ Without knowing the specific departure reasons, it at least appears

¹⁷ Id. at 24.

¹⁸ Id. at 2, 25.

¹⁹ See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

²⁰ Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.²¹ Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an “enhancement” is appropriate for the “display, performance, reproduction or distribution of a copyrighted work,” in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry’s representation that “a significant factor” in its “estimated \$3.5 billion in annual losses . . . because of hard-goods piracy” stems from the situation where “an offender attends a pre-opening ‘screening’ or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie,” and then sells the recording as DVDs or posts it on the Internet for free downloading.²²

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of \$9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.²³ The

²¹ See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

²² H.R. Rep. No. 109-033.

²³ See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.²⁴

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.²⁵ The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is \$20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

²⁴ See RIAA 2004 Yearend Statistics (Exhibit A).

²⁵ U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called “warez scene” were indicted for copyright infringement. According to the press release and indictments, “warez” groups are at the “top of the copyright piracy supply chain” and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.²⁶ These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect “any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.”

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.²⁷ Files are shared for free using file transfer protocol (“FTP”) or peer-to-peer (“P2P”) networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. “Warez” groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their “signature mark” on the infringing items they send out into the world. In the case mentioned above, the government removed “more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels,” and

²⁶ See “Justice Department Announces Eight Charged in Internet Piracy Crackdown,” www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Ermeef (attached as Exhibit C).

²⁷ See “Texas man pleads guilty to felony copyright infringement for selling more than \$1 million of copyright protected software and video games over the Internet,” www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.²⁸ Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.²⁹ The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.³⁰

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

- 2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

- (A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

²⁸ See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeeff (attached as Exhibit C).

²⁹ See Harvard Study at 7-8.

³⁰ See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement. - If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

We believe a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and, (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples. A one-level enhancement amply addresses the concerns of Congress.

Further, we propose an application note to define “materially false.” This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes “sexually oriented” material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. “Sexually oriented” has the definition of “sexually explicit” in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a “victim,” and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

March 30, 2007

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Re: **Comments on Proposed Amendment 5 to Sentencing Guidelines Relating to Criminal
Copyright Infringement**

Dear Judge Hinojosa:

The Entertainment Software Association ("ESA") thanks the Sentencing Commission for the opportunity to comment on the January 30, 2007 amendments of the Sentencing Guidelines, specifically Amendment 5 "Re-Promulgation of Emergency Intellectual Property Amendment" ("Amendment"). The Amendment is being proposed, pursuant to the directive in the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-181, to address, among other things, the adequacy of the Sentencing Guidelines' definition of "infringement amount" to cover situations where "the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement," such as a circumvention device.

With the increased incidence of circumvention of the security technologies of video game consoles, we believe it is indeed timely to assess whether current criminal penalties for violations of the anti-circumvention provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §1201, are adequate to deter those who facilitate video game piracy through circumvention activities. We welcome this opportunity to offer our perspective.¹

A. The ESA and the Video Game Industry

The ESA serves the business and public affairs interests of companies that publish interactive games for video game consoles, personal computers, handheld devices, and the Internet. ESA members published more than 90 percent of the \$7.4 billion in entertainment software sold in the United States in 2006. In addition, ESA's member companies produced billions more in exports of American-made entertainment software, helping to power a global game software market estimated to be approaching \$30 billion in sales. The entertainment software industry is one of the nation's fastest growing economic sectors, more than doubling in size since the mid-1990s and in so doing, has generated thousands of highly skilled jobs in the creative and technology fields.

The entertainment software industry makes a tremendous investment in its intellectual property. For an ESA member company to bring a top game to market, it often requires a team of 40 to 50 professionals—sometimes twice that number—working for two or three years to fuse together the work of writers, animators, musicians, sound engineers, software engineers, and programmers into an end product

¹ I testified on behalf of the ESA at the March 20, 2007 hearing before the Sentencing Commission.

which, unlike any other form of entertainment, is interactive, allowing the user to direct and control the outcome of the experience. On top of several million dollars in research and development costs, a publisher will invest millions more to market and distribute a video game. The reality is that only a small percentage of these titles actually achieve profitability, with many never even recovering their front-end R&D costs. Moreover, the commercial life of a video game is quite short compared to other entertainment content, as the average video game is estimated to earn roughly 75% of its total revenues in the two-month period following its release. In this type of market, it is easy to understand how devastating piracy can be as it siphons off the revenue required to sustain the high creative costs necessary to produce successful products.

B. The DMCA and Video Game Piracy

Congress recognized the important role that technological measures play in controlling the piracy of digital content when it enacted the DMCA in 1998. The DMCA discourages the development and dissemination of technological burglars' tools that threaten the copyright industries. The DMCA implements two 1996 World Intellectual Property Organization ("WIPO") treaties: the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. The purpose of this measure was to make digital networks safe places to disseminate copyrighted works for the benefit of consumers, the global economy, and copyright owners. The DMCA prohibits the circumvention of technological protection measures and criminalizes the activities of those engaged in the manufacture or trafficking of devices used to circumvent such measures, with "access protection" measures covered under §1201(a)(2) and "copy protection" measures covered under §1201(b).

Notwithstanding the enactment of the DMCA, because of the strong appeal of video games and the business opportunity that the popular demand for games fosters, the "hacker" community has targeted the technological protection measures used by the game software industry. Hackers are skilled programmers and technicians who are adept at breaching security systems and gaining unauthorized access to software and other content. Once they discover the way into a system or protected content, they often share this knowledge with other hackers, amplifying the potential damage to the victim. Many of these "hackers" are resident abroad and are thus beyond the purview of the DMCA's prohibitions. With few exceptions, almost every game console system launched since the early 1990's has had its protection technology compromised within six to nine months of its release, sometimes sooner. As an example, the popular Wii game console, launched by Nintendo just this past November, has seen its security measures hacked in just a few months. This track record is not a function of the low robustness or sophistication of the technological protection measures used in these systems, as most of these protections are quite advanced, particularly the ones found in recent consoles. It is, rather, a result of the illicit profits to be made from the creation and commercialization of circumvention devices that bypass such measures and permit pirated versions of games to be played on these consoles.

Indeed, in the wake of each and every "hack" of a console's security technology, there inevitably follows widespread dissemination and sale of circumvention devices that exploit that hack. This, in turn, leads to a mushrooming of pirated games infesting the marketplace. For every step removed from the original hack, there is an ever widening circle of economic damage to the copyright owner. This is why it is vital to focus on the punishing and deterring of those who distribute piracy-enabling technologies.

The most prevalent forms of circumvention devices are semi-conductor chips that modify the lock-out systems incorporated into the consoles.² Each game console system has its own proprietary technological measures, so that the measures used in the Microsoft Xbox are different from the ones used in the Sony PlayStation 2. In addition, with each successive generation of consoles, the console makers have designed and incorporated into their console systems the latest access-control technologies, so that the Xbox 360 has a different, more sophisticated set of protection measures from the Xbox. Unfortunately, despite the enormous and continual investments made in state-of-the-art technological protections, hackers have succeeded in compromising each of these systems through the development of chips that, when installed in the console (by either the console owner or any number of back alley chip jockeys who will do so for a fee), modify the console's processes to bypass its authentication system and thereby enable it to play illegal copies of games.

These modification chips are commonly referred to as "mod chips." Once installed in a game console, a mod chip will allow that console to play an unlimited number of pirated copies of the games designed for that, and in some instances, other console(s). Different mod chips are designed and made to work on different game consoles. Mod chips are engineered as custom-tailored workarounds for a particular video game system's copy protection and access control systems and, as such, play a crucial role in furthering piracy.

Since the enactment of the DMCA, the entertainment software industry has supported enforcement of its provisions against individuals and enterprises in the United States engaged in the trafficking of mod chips and other circumvention devices. In most cases, when the defendants have been engaged in pirate activities in addition to the sale and installation of circumvention devices, federal prosecutors have charged defendants with both DMCA violations and copyright infringement. Recently, ESA's investigations into game piracy across the United States have seen an increase in the number of enterprises that will offer to sell mod chips or modify game consoles, without directly engaging in copyright infringement. This may be attributable to a perception among such illegal businesses that installing mod chips is less likely to attract the attention of law enforcement than enterprises that engage in more direct forms of software piracy. So, there appear to be an increasing number of individuals and enterprises engaging only in circumvention activities with respect to game consoles and thus subject only to charges of violating the DMCA. While these enterprises are usually not large, there are many of them and they tend to be very active, with many of these businesses estimated to take in several thousands of dollars in sales per month.

Thus, the Sentencing Commission's Amendment to enhance the level of punishment recommended for individuals convicted of DMCA violations is very timely and could serve to increase the level of deterrence against mod chip enterprises.

² Mod chips are only one of the tools used to circumvent console copy-protection and access controls. Unauthorized bypass may also be accomplished through the assistance of software, such as Swap Magic, that tricks the console into thinking that a bootleg copy is legitimate. Creating the bootleg copies themselves involves yet other software used to replicate the disc embodying the game.

C. Option 1

Of the three options outlined in the Amendment, the ESA believes Option 1 offers the best approach for determining the level of punishment for trafficking in circumvention devices. Option 1 provides for a two or more level enhancement (to a minimum level of 12) for anyone convicted of “trafficking in devices used to circumvent a technological measure.” Trafficking in circumvention devices inevitably results in more pirated copies of games making their way into the stream of commerce. Thus, we agree that trafficking in circumvention devices warrants an elevated penalty comparable to that which currently applies to those who upload, manufacture, or import infringing copies. We also agree that establishing a minimum sentencing level of 12 will provide a useful benchmark for judges.

The Sentencing Commission’s approach to calculating the “infringement amount” under Option 1 is conceptually attractive. It involves multiplying the number of accessed works by the “price the user would have paid to access lawfully the copyrighted work.” In theory, this would provide a straightforward means of assessing the economic harm to the copyright owner. But arriving at the correct data points to insert into that calculation could be problematic, particularly where the person has sold mod chips or modified consoles but has not “accessed” pirated copies of games.

In the context of someone convicted of trafficking in mod chips, such a calculation would require that a federal judge make a judgment on how many pirated games a person using a mod chip would play and then multiply that figure by the retail value the person would have paid for legitimate versions of those games. This is a difficult and conjectural calculation, as it requires an assessment of how many pirated games are played by those using mod chips and then requiring a deep knowledge and understanding of retail game software prices. ESA fears that such a formulation will often result in an infringement amount that is disproportionately low. That being said, we agree with the Sentencing Commission that the two-level enhancement and a “floor” offense level of 12 are necessary to establish the gravity of the offense, regardless of the infringement amount.

We suggest one modification to Option 1. It should be expanded to embrace all of §1201, and not just §1201(b). That particular section of the DMCA covers only trafficking in devices that circumvent copy-protection controls. It does not reach those who circumvent access controls, which is covered under §1201(a)(2) of the DMCA. Through its parallel prohibitions, the DMCA recognizes that the circumvention of access controls (the means by which mod chips further piracy) is just as damaging to copyright owners as circumvention of copying controls.

A bootleg copy of a game played upon a modified console requires the infringer to bypass both the copy-control/access control features of the game as well as the copy-control/access control features of the playback hardware. For this reason, both forms of circumvention facilitate copyright infringement.³ The Sentencing Guidelines should reflect this reality,⁴ just as the DMCA does.

Technologies that protect games also benefit consumers. For example, protection technologies permit publishers to distribute "try before you buy" game demos. These allow consumers to experiment with playing a game to see if they like it before purchasing it. Absent the ability to protect the conditional access technology that permits such sampling of game content, these free offerings to consumers might vanish. Additionally, unlike any other type of software, consumers enjoy the opportunity to rent video games. This would not be economically feasible were it not for security technologies that mitigate the risk of rampant piracy resulting from such rentals.⁵

D. Options 2 & 3

Options 2 and 3 are problematic and therefore less preferable than Option 1.

Option 2 understates the value of the "infringement amount" as it uses a calculation that factors the retail value of the circumvention device multiplied by the number of such devices. As most mod chips retail for \$30-50, equivalent to the retail value of one legitimate game, such a calculation produces a minimal infringement amount. Given that the installation of a mod chip in a game console facilitates dozens of infringements (i.e., the number of pirated games played on a console after it has been

³ Infringement does not benefit rights holders, consumers, and the economy, as some have claimed. Money paid for pirated copies does not go to copyright owners. Sales of pirated software depress demand for genuine copies. The less revenue a game publisher earns, the less money it has for hiring new people, investing in new equipment, and bankrolling further projects. Also, these off-the-book transactions deprive states and localities of tax revenues.

⁴ Some have argued that the penalty imposed by Option 1 may result in criminal penalties even absent actual copying or distribution of a copyrighted work. But this assertion fails to recognize that actual copying or distribution is not an element of a violation under Section 1201. It also does not account for the reality that most people use these circumvention technologies for infringing purposes.

⁵ Under federal law, video games are the only form of software that may be rented without the permission of the copyright holder, and over the years video game rentals have become a huge business, generating over \$558 million in 2006. The threat of significant criminal penalties for circumvention is a necessary deterrent to discourage the unauthorized use of rental copies as source material for the creation of infringing copies, which would require circumvention of technological protection measures.

modified), the retail value of each mod chip is a fraction of the value of the damage it inflicts on legitimate game sales.⁶

One commenter suggested that the Sentencing Commission could expand Option 2 to include enhanced punishment for those convicted under §1201(b) who also copied or distributed the copyrighted work. We see no sound reason to limit any such enhancement only to those who have engaged in copying or distribution of a copyrighted work. To impose an actual infringement requirement would leave out a large swath of culprits: those who put piracy-enabling technologies into the hands of bootleggers. Traffickers are no less culpable than bootleggers. Besides, the DMCA “de-links” circumvention from actual infringement. It would frustrate the purpose of that statute to adopt a contrary view in the Sentencing Guidelines.

While Option 3 attempts to address the understatement problem by offering an alternative formulation, it does so in a way that makes it very difficult to calculate the “infringement amount.” Option 3 specifies that the infringement amount is the greater of the amount calculated under Option 2’s formula or the number of circumvention devices “multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.” These calculations suffer from the same ambiguities we cited in our comments to Option 1. If, in any event, the Sentencing Commission adopts Option 3, at the very least it should expand its scope to cover all of §1201.⁷

E. Issues for Comment

ESA would also like to take this opportunity to address the two issues raised for comment at the end of the proposed amendment.

The Sentencing Commission has requested comment on whether it should “provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense.” ESA would suggest that no such provision is required as it is ESA’s experience that, in most cases involving intellectual property infringement, the infringement amount *understates* the seriousness of the offense, rather than the opposite. In the rare instance, where the seriousness of the case might be overstated by the infringement amount, ESA believes that federal judges already factor this into their

⁶ See, e.g., Press Release, Department of Justice, Game Store Owners Charged with Copyright Infringement for Selling Modified Xbox Systems with Pirated Games (Dec. 19, 2005) (defendant agreed to install a mod chip and new hard drive on an Xbox console and load it with 77 pirated games for \$265) available at <http://www.cybercrime.gov/jonesCharge.htm>.

⁷ Before moving on to the “Issues for Comment,” ESA takes this opportunity to address one final point with respect to the calculation of the infringement amount. The suggestion offered by one commenter that prosecutors are uninvolved in reviewing industry’s figures when computing the “infringement amount” is inaccurate. In our experience, a prosecutor is deeply involved in collecting and reviewing industry data for a case well in advance of sentencing. It is the prosecutor, not the video game industry, who is responsible for calculating the infringement amount.

determination of the punishment to be imposed. ESA does not see the need for any additional provision in the Sentencing Guidelines embodying a principle already being applied in practice.

The Sentencing Commission has also asked for comment on Application Note 4 providing for an adjustment to be made under §3B1.3 "in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item." The Sentencing Commission has received comment that not every de-encryption or circumvention requires a "special skill" as defined in §3B1.3. The ESA's comment is that the Sentencing Commission should not make any change to Application Note 4 as it sees this as applying to de-encryptions and circumventions of technological measures to gain "initial" access to protected content. Such instances of de-encryption and circumvention, where initial access to protected content is achieved, generally refers to situations where hackers have achieved the first breakthrough in compromising a technological measure. As opposed to some less complex acts of circumvention, these "cracks" in security measures invariably do require "special skills."

In the game software context, these initial "cracks" of protected game software are performed by groups of individuals working together through the Internet, commonly known as "warez" groups. These groups will "crack" the copy protection of a newly released game (sometimes, even prior to release), strip out the protection technology, and then release an unprotected downloadable version for dissemination on the Internet. Within days, if not hours, thousands of copies are being copied and downloaded throughout the Internet. The "crackers" in these groups are individuals with high technological skills who are able to figure out how to penetrate the security measures in order to access the digital content of game software and would thus meet the "special skills" requirements of §3B1.3. As ESA believes that Application Note 4 is intended to cover such activity, in accordance with the original statutory purposes of the No Electronic Theft (NET) Act, it would recommend that the Sentencing Commission not make any change in such Application Note.

ESA is grateful for the Sentencing Commission's efforts reflected in the Amendment to address this important aspect of the law governing enforcement against digital piracy. ESA is appreciative of this opportunity to provide its comments on such efforts.

Sincerely,

A handwritten signature in black ink, appearing to read "Ric Hirsch", written in a cursive style.

Ric Hirsch
Sr. Vice President, Intellectual Property Enforcement
Entertainment Software Association

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, AZ 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 12, 2007

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

Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to drug offenses (including crack but not including 21 U.S.C. § 960a) that were published on January 30, 2007.

I. New Offenses Under the Combat Methamphetamine Epidemic Act of 2005

A. *Using a Facilitated Entry Program to Import Methamphetamine, §§ 2D1.1, 2D1.11*

The Commission has published for comment a proposal for sentencing defendants who use a facilitated entry program (e.g., FASTPASS) to import methamphetamine in violation of 21 U.S.C. § 865. The proposal would amend U.S.S.G. §§ 2D1.1 and 2D1.11 to add a two-level enhancement for a conviction under 21 U.S.C. § 865. It would also add an application note instructing courts how to impose the sentence so as to ensure that the portion of the sentence relating to the enhancement will be served consecutively. The proposal appears to implement Congress's intent and adequately reflects the seriousness of the offense.

In response to Issue for Comment 3(a), the increase should not be more than two levels and there should not be a minimum offense level. A defendant who imports methamphetamine and is not a minor or minimal participant is already subject to a two-level enhancement under § 2D1.1(b)(4). Proposed § 2D1.1(b)(5) would add another two-level increase for using a facilitated entry program in order to do so, thereby resulting in a four-level increase for any such defendant. Similarly, those in charge of any vessel that uses a facilitated entry program to commit a methamphetamine-related offense would

receive a four-level increase and a minimum offense level of 28 (in addition to the number of levels specified in the Drug Quantity Table) under the combined effect of §2D1.1(b)(2) and proposed § 2D1.1(b)(5).

Issue for Comment 3(b) asks whether the proposed enhancement should be expanded to reach defendants who are not convicted of methamphetamine-related offenses. It should not. 21 U.S.C. § 865 was enacted as part of the Combat Methamphetamine Epidemic Act of 2005. *See* Pub. L. 109-177, Title VII, section 731. The statute specifically applies only to defendants who use facilitated entry programs to commit offenses involving methamphetamine or the chemicals required to manufacture it. By requiring a conviction under § 865, the proposed enhancement is properly limited to methamphetamine-related cases, which is what Congress intended. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (“This section of the conference report creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.”). Given Congress’ clear intent to target only defendants who use facilitated entry programs to import methamphetamine, there is no reason to expand the enhancement to reach offenses involving other drugs.

Issue for Comment 3(c) asks whether the Commission should amend § 3B1.3 to require a two-level increase for offenses that involve use of a facilitated entry program. Such an amendment would double count the offense conduct for convictions under 21 U.S.C. § 865, once under §§ 2D1.1 or 2D1.11 and again under § 3B1.3. One increase in Chapter Two is sufficient. Moreover, there is no justification for amending § 3B1.3 to reach any offense that involves use of a facilitated entry program. Congress has suggested no such broad concern, and such an amendment would stretch § 3B1.3 well beyond its meaning. Section 3B1.3 is intended to reach defendants who hold a position of public or private trust characterized by a special skill or by professional or managerial discretion. *See* 3B1.3, comment. (n. 1). People authorized to use a facilitated entry program do not have any special skill and do not exercise any discretion whatsoever. Nor are they subject to any less scrutiny than other travelers. Facilitated entry programs simply permit participants to reduce the amount of time they spend when entering the United States by providing much of the information required by U.S. Customs ahead of time. *See* United States Customs and Border Patrol, Secure Electronic Network for Travelers Rapid Inspection (SENTRI) available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler/sentri/sentri.xml. In other words, the programs do not reduce border requirements for participants but merely provide an administratively easier method for meeting them. Program participants continue to be held to the same standards as all other travelers, including being subject to further inspection at border crossings. *See id.* There is no principled basis for concluding that use of a facilitated entry program is equivalent to holding a position of trust or having a special skill.

B. Manufacturing, Distributing or Possessing Methamphetamine on Premises Where a Minor Is Present or Resides, § 2D1.1

In addition to 21 U.S.C. § 865, section 734 of the Combat Methamphetamine Epidemic Act of 2005 created 21 U.S.C. § 860a, which provides an additional penalty for

manufacturing, distributing, or possessing with intent to manufacture or distribute methamphetamine on premises in which an individual who is under the age of 18 years is present or resides.

The Commission has proposed two alternatives for sentencing defendants convicted under § 860a. Option One would maintain the six-level enhancement with a floor of 30 under § 2D1.1(b)(8)(C) for any defendant who manufactured methamphetamine under circumstances that created a substantial risk of harm to the life of a minor, and would add a two-level enhancement for any defendant convicted under § 860a where the offense conduct did not create such a risk. Option Two would add an enhancement of six levels or to level 29 (whichever is greater) for § 860a convictions involving manufacturing or possessing with intent to manufacture, and an enhancement of two or three levels or to level 15 (whichever is greater) for § 860a convictions involving distributing or possessing with intent to distribute. Under the second option, the actual risk of harm to the minor would be irrelevant.

Issues for Comment 2. Both proposals are appropriately based on the offense of conviction and not relevant conduct rules. Relevant conduct (contrary to its original purpose) permits prosecutors to control sentencing, creates unwarranted disparity, results in unfairness, and is the primary source of criticism of the Guidelines. The Commission only recently announced that it was going to reconsider the relevant conduct rules. It should not add new unconvicted offenses to the Guidelines.

The proposed enhancements are also properly limited to the methamphetamine offenses addressed by § 860a, rather than covering all drug offenses. The Commission should not create new sentence enhancements not directed or even suggested by Congress. As discussed in Part I(A), *supra*, the Combat Methamphetamine Epidemic Act of 2005 is specifically focused, according to both the statutory language and the legislative history, on offenses involving methamphetamine.

Sentence enhancements solely for methamphetamine-related offenses are nothing new. In section 102 of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Congress specifically directed the Commission to add what is now § 2D1.1(b)(8)(C) only for crimes involving the manufacture of amphetamine and methamphetamine. *See* Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. 106-310 (Dec. 16, 2000). It did so because of the drugs' unique manufacturing process, which involves combining chemicals in a manner that is unstable, volatile, highly combustible, and leaves toxic residue behind. *See* H.R. Rep. 106-878 (Sept. 21, 2000). Nothing in any subsequent legislation, including the Combat Methamphetamine Epidemic Act of 2005, has suggested that Congress believes § 2D1.1(b)(8)(C) should be expanded to reach other drugs. Nor has there been any suggestion that sentences for drug offenses are generally too low; to the contrary, the Commission's own reports reflect that, if anything, the drug guidelines are too harsh. There is thus no need and no justification to expand either § 2D1.1(b)(8)(C) or the proposed § 860a-based enhancements to apply to offenses involving any drug other than methamphetamine.

With respect to the specific proposals, we believe that Option One, which focuses on the actual risk of harm to a minor resulting from the manufacturing process, is more consistent with congressional intent and better reflects appropriate distinctions in culpability. It would result in significant increases in cases where a minor is actually put at substantial risk by the manufacturing process, which is the specific harm that Congress intended § 860a's enhanced penalties to address. *See* H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 2005, 2006 U.S.C.C.A.N. 184, 208. It would also permit variations depending on the risk of harm attendant to the crime. For § 860a convictions involving possession or distribution, or where the defendant manufactured methamphetamine in such a way as to not create a substantial risk of harm, Option One permits a two-level enhancement, which is consistent with § 860a.

We oppose Option Two because it does not permit courts to take into account the risk of harm to the minor when sentencing a defendant convicted under § 860a conviction. Option Two would require a floor of 29 for any defendant convicted under § 860a of manufacturing or possessing with intent to manufacture methamphetamine. Given that § 860a does not require either that the minor actually be present during the commission of the crime or that the defendant knew that a minor was present or resided on the premises, the 29-level floor would vastly overstate the potential seriousness of the offense in many cases and would create unwarranted uniformity. Suppose, for example, there are two defendants, each with a criminal history category of I, who are each convicted under § 860a of manufacturing between 2.5 and 5 grams of methamphetamine. The first defendant committed the crime in an acquaintance's house while the minor resident was on vacation. The second defendant committed the crime while the minor resident was in the room. Under Option Two, these defendants would be treated equally, despite the clear differences in their culpability and the risk to the respective minors.

Option Two is explicitly premised on the assumption that manufacturing methamphetamine "poses an inherent danger to minors" in all cases. This assumption is not justified in all cases. As § 2D1.1, comment. (n. 20) recognizes, the danger posed by manufacturing methamphetamine can vary significantly depending upon numerous factors, including the quantity of chemicals or toxic substances, the manner in which such substances were stored and/or disposed, the duration of the offense, the extent of the operation, the location of the laboratory, and the number of people placed at substantial risk of harm. Unwarranted uniformity and other unintended consequences of lumping a variety of cases together should be avoided.

Additional Issues. Although not addressed in the Issues for Comment section, the Commission has also proposed to raise sentences for ketamine across the board by eliminating the 20-level cap in the Drug Quantity Table for ketamine, a Schedule III drug. This proposal appears to have been based on the mistaken assumption that ketamine distribution is covered under § 860a. *See* 72 Fed. Reg. 4372-01, 4390 (Jan. 30, 2007) (proposing to eliminate offense level cap for ketamine because "[i]f a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years"). As noted above, § 860a applies only to manufacturing and distributing offenses involving "methamphetamine, or its salts,

isomers, or salts of isomers.” See 21 U.S.C. § 860a. Ketamine does not fall within those categories and hence is not covered under § 860a. It may be that the Commission intended to refer to § 841(g), which does cover ketamine and which carries a twenty-year statutory maximum for convictions under that particular statute. The proposed amendments addressing § 841(g) are discussed in Part II, *infra*.

II. Using the Internet to Distribute Date Rape Drugs, § 2D1.1

Section 201 of the Adam Walsh Act created a new offense at 21 U.S.C. § 841(g), prohibiting knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. The Commission has proposed three options for sentencing defendants convicted under § 841(g). Under Option One, the sentence would increase by either two or four levels for a § 841(g) conviction. Option Two would impose a four-level increase if the defendant was convicted of knowing or having reasonable cause to believe that the drug would be used in the commission of criminal sexual conduct. Option Three would impose a six-level increase and a floor of 29 if the defendant knew the drug would be used to commit criminal sexual conduct, a three-level increase and a floor of 26 if the defendant had reasonable cause to believe the drug would be so used, and a two-level increase for all other § 841(g) convictions. Issue for Comment 1 seeks input on these proposals or alternative methods.

Option One is unsatisfactory because it is overbroad and would create unwarranted disparity. This option would require an enhancement for a defendant convicted under § 841(g)(1)(B) of using the Internet to distribute a date rape drug to an unauthorized purchaser. However, distributing drugs to unauthorized purchasers is the basis of every distribution charge. Section 2D1.1 already results in substantial sentences for unauthorized sales of date rape drugs over the Internet,¹ including a two-level enhancement for distributing a controlled substance through mass marketing over the Internet. See 2D1.1(b)(5). Accordingly, sentences under § 841(g)(1)(B) should not be subject to additional enhancement, particularly in light of the Commission’s priority of simplifying the Guidelines.

Option Three is unsatisfactory because it too would require a two-level enhancement for distributing a date rape drug to an unauthorized purchaser under § 841(b)(1)(B). In addition, Option Three’s increases and minimum offense levels would result in excessive sentences and unwarranted uniformity. A defendant in Criminal History I convicted under § 841(g)(1)(A) of selling even one pill classified as a date rape drug or one unit of a drug analogue would be subject to a minimum offense level of 26 (63-78 months in CHC I) or 29 (87-108 months in CHC I). A minimum sentence of 5 ¼

¹ See, e.g., DEA Press Release, *Missouri Mother and Son Are Sentenced to Lengthy Prison Terms on Drug Conspiracy Charges* (Jan. 30, 2004) (reporting sentences of 168 months and 100 months for selling date rape drugs over the Internet), available at <http://www.dea.gov/pubs/states/newsrel/stlouis013004.html>.

to 9 years for distributing a single unit of a drug over the Internet would overstate the seriousness of the offense.

Defenders' Proposal. We propose that the Commission adopt a variant of Option Two, which would not add an enhancement for defendants convicted under § 841(g)(1)(B) for distributing a date rape drug to an unauthorized purchaser. For defendants who fall under the "criminal sexual conduct" aspect of § 841(g), we propose that the Commission use the following language:

If the defendant was convicted under § 841(g)(1)(A), increase by 2 levels.

A 2-level increase would sufficiently reflect the increased culpability of defendants convicted under § 841(g)(1)(A). *Accord* U.S.S.G. § 2D1.1(e)(1) (requiring 2-level increase under § 3A1.1(b)(1) where defendant committed or attempted to commit a sexual offense against another by distributing a controlled substance to that individual). Any defendant who distributed the drug by using the Internet to solicit a large number of purchasers would receive an additional 2-level increase under § 2D1.1(b)(6).

If, however, the Commission wishes to distinguish between the greater culpability of a defendant who acted with knowledge and the lesser culpability of a defendant who acted "with reasonable cause to believe," we propose the following language:

If the defendant was convicted under § 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 3 levels, or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level.

Again, the additional enhancement under § 2D1.1(b)(6) would apply if the defendant distributed the drug by using the Internet to solicit a large number of purchasers.

The Commission should not provide a cross reference to the criminal sexual abuse guidelines for defendants convicted under 21 U.S.C. § 841(g)(1)(A) first, because a defendant convicted under 21 U.S.C. § 841(g)(1)(A) did not commit criminal sexual abuse, and second, because defendants should not be sentenced for crimes of which they were not convicted.

Additional Issues. Ketamine is listed along with gamma hydroxybutyric acid ("GHB") and flunitrazepam in § 841(g)'s definition of a "date rape drug." Accordingly, selling ketamine over the Internet in violation of § 841(g) is subject to a 20-year statutory maximum. Ketamine, however, is a Schedule III drug, which is different from both GHB (Schedule I) and flunitrazepam (Schedule IV²). As such, unlike GHB and flunitrazepam, the number of levels added in the Drug Quantity Table is capped at 20:

² Although flunitrazepam is a Schedule IV substance, it is treated the same as a Schedule I depressant under 21 U.S.C. § 841(b)(1)(C) and is subject to significantly higher offense levels under U.S.S.G. § 2D1.1.

The Commission should not remove this cap for ketamine. When Congress enacted § 841(g), it was fully aware that ketamine is a Schedule III drug and that guideline sentences for ketamine-related offenses are capped. Congress has been very clear when it intends to generally increase penalties for offenses involving date rape drugs. It did not do so here.

In 1996, Congress amended 21 U.S.C. § 841(b)(1)(C)³ to include flunitrazepam, which increased the statutory maximum to twenty years, or thirty years with a prior felony drug conviction. *See Drug-Induced Rape Prevention and Punishment Act of 1996*, Pub. L. 104-305, 110 Stat. 3807, 3807-08 (Oct. 13, 1996). At the same time, Congress directed the Commission to ensure “that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses.” *See id.*

In 2000 and 2003, Congress took identical steps with respect to GHB. *See Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000*, Pub. L. 106-172, 114 Stat. 7, 9 (Feb. 18, 2000). First, it amended § 841(b)(1)(C) to include GHB, thereby increasing the statutory maximum for GHB offenses to twenty years (or thirty with a prior), and directed the Attorney General to reclassify the drug. *See id.* at 8-9. Then it directed the Commission to “consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them.” *See Illicit Drug Anti-Proliferation Act of 2003*, Section 608(e)(2), Pub. L. 108-21, 117 Stat. 650, 691-92 (April 30, 2003).

Here, when passing § 841(g), Congress did not indicate any dissatisfaction with ketamine sentences generally, nor did it amend § 841(b)(1) to provide for harsher treatment of ketamine. Ketamine stills falls under § 841(b)(1)(D), which carries a statutory maximum of five years’ imprisonment (ten with a prior). *See* 21 U.S.C. § 841(b)(1)(D). Congress did not direct that ketamine be reclassified as a Schedule I or Schedule II substance, which would have had the effect of both increasing the statutory maximum under § 841(b)(1) and removing the 20-level cap (which applies only to Schedule III drugs). And it did not issue any directive to the Commission to review or amend the ketamine guidelines.

The federal drug laws have been repeatedly criticized as the primary cause of prison overcrowding. A large part of that criticism has been focused on the Guidelines, which often require lengthy sentences for nonviolent offenders, which are not connected to the risk of recidivism or dangerousness. As a matter of policy, the Commission should not raise drug sentences when there is no directive and no need to do so. That general principle is particularly applicable here, where Congress has explicitly increased sentences for other date rape drugs but has said nothing about raising ketamine sentences.

³ The offense levels set forth in § 2D1.1(c) are based on the statutory penalties for the drug as set forth in 21 U.S.C. § 841(b)(1). *See* U.S.S.G. § 2D1.1 application note 10 (“The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences.”).

Even if removing the cap for convictions under § 841(g) involving ketamine were justified, which it is not, there is no basis for raising ketamine sentences across the board, as the proposed amendment would do. A simpler and more rational approach would be to withdraw the proposed amendments to the Drug Quantity and Drug Equivalency Tables, and instead add an application note to § 2D1.1 stating:

In any case in which a defendant is convicted of violating 21 U.S.C. § 841(g) by distributing ketamine, the Drug Quantity Table levels and quantities for Schedule III substances should not be used for purposes of determining the offense level. Instead, ketamine should be treated under the Drug Quantity Table as though it is a Schedule I or II Depressant for purposes of determining the offense level for the § 841(g) violation.

We emphasize, however, that even this step is unnecessary. We oppose any change to the ketamine guideline.

III. Crack/Powder Cocaine Disparity

The Commission has offered to receive additional comments on the proper approach to remedying the disparate treatment of crack and powder cocaine under the Guidelines. We continue to urge the Commission to amend the Guidelines to remove the unwarranted and unjustifiable 100:1 ratio for cocaine and crack sentences, and to replace it with a retroactive guideline establishing a 1:1 ratio that ensures equal penalties for equal amounts of crack and powder cocaine.⁴ In addition, we urge the Commission to follow Judge Sessions' suggestion and add a downward adjustment or a recommended downward departure for successful completion of a drug treatment program.

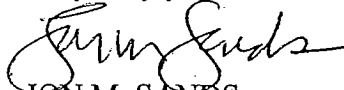
There is no justification for maintaining the disparity between crack and powder cocaine sentences. The disparity has had a detrimental effect on families and communities and increased exponentially the costs of our criminal justice and penal systems. As stated by Senators Kennedy, Hatch and Feinstein in a recent amicus brief to the Supreme Court, "the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine - a ratio currently incorporated in the sentencing guidelines - demonstrate that the guidelines do not always reflect objective data or good policy." *See* Br. of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein, *Claiborne v. United States*, 2007 WL 197103, *21

⁴ We incorporate by reference all of the letters and testimony provided by us to the Commission in the past year in support of our position on this issue. *See* Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Follow-Up on Commission Priorities (Nov. 27, 2006); Testimony of A.J. Kramer Before the United States Sentencing Commission Public Hearing on Cocaine and Sentencing Policy (Nov. 14, 2006); Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 (July 19, 2006); Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Re: Report on Federal Sentencing Since *United States v. Booker* (Jan. 10, 2006).

(Jan. 22, 2007). Noting that the crack-powder disparity would be a principled basis for a sentence below the guideline range, the Senators stated, "Attention to this problem . . . is long overdue." *Id.* at **27-28. It is time for the Commission to repair this injustice.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Louis Reedt, Acting Deputy Director for the Office of Research and Data
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

2167 UNITED STATES COURTHOUSE

75 SPRING STREET, S.W.

ATLANTA, GEORGIA 30303-3309

CHAMBERS OF

JULIE E. CARNES

JUDGE

March 30, 2006

Via Federal Express

The Honorable Ricardo H. Hinojosa
Chair, Sentencing Commission
U.S. District Court
Bentson Tower
1701 W. Business Hwy 83, Ste. 1028
McAllen, Texas 78501

Commissioner John R. Steer
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002

Commissioner Michael E. Horowitz
Cadwalader, Wickersham & Taft LLP
1201 F Street NW, Suite 1100
Washington, DC 20004

Commissioner Edward F. Reilly Jr.
Ex Officio
Chairman, U.S. Parole Commission
5550 Friendship Blvd., Ste. 500
Chevy Chase, MD 20815

The Honorable Ruben Castillo
U.S. District Court
Everett McKinley Dirksen
Federal Building
219 S. Dearborn St., Room 2378
Chicago, Illinois 60604

Honorable William K. Sessions III
U.S. District Court, Fed. Bldg.
11 Elmwood Avenue, 5th Floor
Burlington, VT 05401

Commissioner Beryl A. Howell
Stroz Friedberg LLC
1150 Connecticut Ave., NW
Suite 200
Washington, D.C. 20036

Michael J. Elston, *Ex Officio*
Criminal Division
Department of Justice
950 Pennsylvania Ave. NW
Room 4210
Washington, DC 20530

Dear Judge Hinojosa and Members of the
United States Sentencing Commission:

I am writing to indicate my respectful disagreement with parts of the proposed amendments to the Immigration guidelines. I apologize for missing the March 28th deadline. I had mistakenly thought that March 31st was the deadline, and learned of my error when I reviewed the web site last night. I hope you will be willing to consider my concerns and

observations, notwithstanding that this letter missed your deadline by a few days. Further, I wish to emphasize that I make these remarks in my individual capacity as an interested federal district judge, and not as a representative of any group.

I. § 2L1.2(b)(1) Enhancements Based on Prior Convictions

My strongest concerns relate to the proposed amendments to § 2L1.2, which addresses the offense of illegal reentry by an alien who had previously been deported. Section 2L1.2 provides for a base offense level of 8, and then enhances that level based on the seriousness of the criminal conviction that preceded or led to the alien's deportation. The proposed amendment would, as a practical matter, substantially reduce the sentences of those deported illegal aliens who have committed the most serious offenses and, who, by their reentry into this country in violation of a clear command not to do so, evidence their continuing disdain for our law and pose the greatest continuing threat to the American communities in which they reside. Respectfully, I cannot understand why such a result would be considered to be a good development.

Specifically, the present Guideline awards a 16-level enhancement for a deported alien who had incurred a felony conviction for one of seven serious, enumerated offenses.¹ Thus, for example, an alien who has

¹ These offenses are a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, an alien smuggling offense, and a drug trafficking offense for which the defendant received at least a 13-month sentence. § 2L1.2(b)(1)(A).

stolen back into this country after being deported, and after having sustained a conviction for rape, or child molestation, or robbery, or attempted murder, or aggravated assault, or a terrorism offense, in his previous sojourn here, will receive a total offense level of 24 (8+16) and, postulating a 3-level reduction for acceptance of responsibility (for a final offense level of 21), and a Criminal History Category II, the sentencing range would now be 41-51 months.

The proposed amendments, however, would not necessarily confer on such a defendant the above 16-level enhancement. Rather, unless the alien defendant had actually received at least a 13-month sentence [Option 1] or a 2-year sentence [Option 2] for one of his prior convictions, the 16-level enhancement would not apply. Instead, the defendant would receive only an 8 or a 12-level enhancement, depending on the iteration adopted. The theory, apparently, is that by insisting that at least a 13-month [2-year] sentence had been previously imposed for one of the defendant's prior crimes, the Guidelines insure that the prior crime was actually a serious offense.

Unfortunately, as anyone who has dealt with overburdened state criminal justice systems knows, the latter rarely impose sentences on illegal aliens that reflect the seriousness of the crimes committed. In my experience, those systems are revolving doors, and the defendant often receives a short, time-served sentence, no matter how serious and repeated are his crimes. In fairness, many local governments have been beleaguered by many forces, including the huge numbers of illegal aliens

in their communities and the corresponding strain on the budgets of public health services, schools, and law enforcement that this influx has caused. Perhaps, these local entities have concluded that it is the job of the federal government to remove people who are here illegally and that the locals should not have to expend their scarce resources housing criminal aliens in state-supported jails. Whatever the reason, and with no intention to cast blame, the fact is that the sentence imposed on such an alien is rarely going to be a reliable proxy for the seriousness of the crime or the danger that the alien's continued presence in the country poses.²

In addition, the premise reflected in the proposed amendment is rather counterintuitive: an alien who was fortunate enough to receive a light sentence for his assault, robbery, or child molestation conviction continues to be able to utilize that generosity in perpetuity to receive more lenient treatment for future crimes.³

Although it appears that a desire to lower sentences for illegally reentering aliens is the primary impetus behind the proposed amendment,

² In the many prosecutions before me of defendants for illegal reentry, the defendant has typically been discovered in a local jail, having been arrested for committing another crime since his illegal reentry. Indeed, while I may have had some cases that do not meet this general rule, I cannot specifically recall them.

³ I recognize that the criminal history sections operate on this premise as well, but, for a variety of reasons, the criminal history provisions are not truly analogous to the enhancement provision in 2L1.2. For example, an underrepresentation of criminal history in the criminal history calculation will have much less impact on the resulting sentence than will an undercalculation of prior convictions in 2L1.2, because the enhancement for prior convictions is what powers that guideline.

the synopsis accompanying the proposal suggest another reason to abandon the "categorical approach." Specifically, the synopsis indicates that the "categorical analysis" "is often complicated by lack of documentation, competing case law decisions, and the volume of cases." I don't really understand what this sentence means, as I do not believe our district has experienced any problems applying the guideline. While we are not a border state, we have had a goodly number of these cases.

If there are competing case law decisions, the Commission should settle those conflicts. If there is a lack of documentation, that lack will exist no matter what methodology is used. Moreover, an absence of documentation supporting the enhancement will mean that the defendant will not receive the enhancement anyway. If there is a high volume of cases, there will still be a high volume of cases after the amendment is passed. In short, the explanation does not seem sufficient to me to warrant making the change.

Likewise, the Interim Staff Report indicates that there is some support for lowering the immigration guidelines because some border districts have "fast-track" programs that allow the imposition of substantially lower sentences to pleading defendants, and other districts do not have these sanctioned programs. I do not see this phenomenon as warranting a reduction of what should otherwise be an appropriate guidelines sentence, however. Admittedly, I am not totally clear on the thinking behind "fast-track" programs. If one has a lot of a particular kind of crime in a geographic area, lowering the sentence for that

offense will not likely reduce its incidence. To the contrary, criminals can rationally be expected to flock to places where the sentences are lower. Presumably, the basis for these programs is not principled, however, but pragmatic: there are so many immigration cases, and the border districts have been so inadequately supported and staffed, that they need some carrot to encourage the hundreds of illegal reentrants who appear before them to quickly dispose of their cases.

Yet, to work, that principle means that the border districts have to have some differential between the sentences that they impose under a fast-track plan and the sentences that would otherwise be imposed if the defendant went to trial. If the Guidelines sentencing ranges are lowered across the board, then necessarily the fast-track districts will have to further lower the sentences that they impose on their alien defendants, to make a guilty plea worthwhile for the defendant, until one reaches a point where the crime of reentry, itself, has been effectively decriminalized. In short, if, on a national level, everyone tries to emulate the border districts, it will be a race for the bottom, in terms of sentencing ranges.⁴

II. Making a Distinction Between a Probationary Sentence and Other Sentences, for Purposes of an Enhancement

Whatever the Commission decides to do regarding the "categorical approach" versus this new proposed approach, I implore you not to make

⁴ In the Northern District of Georgia, we do not need such an incentive. In thirteen years on the bench, I have only had one defendant go to trial on an illegal reentry charge. Everyone else pled guilty.

a distinction between a probationary sentence and other sentences, for purposes of pegging the level of an enhancement, because such a distinction is nonsensical. That is, under the proposed iterations, a reentering alien who had previously gotten a 10-day time served sentence for an assault would get a 12-level bump as a result of this conviction. Yet, if this same defendant had happened to see a judge immediately upon his arrest, and had instead gotten a probationary sentence (which, going forward, is effectively what a time-served sentence is), that defendant would receive only an 8-level bump. That a sentence is a probationary sentence versus a sentence for a relatively short term tells one nothing about the severity of the underlying offense. As Peter Hoffman, the principal drafter on the Commission in its early days, used to say, you might as well base the enhancement on the defendant's weight or his zodiac sign.

Moreover, to the extent one is concerned about the administrative burdens on sentencing judges, this suggestion would be very burdensome. Defendants would forever litigate this matter and, if document scarcity is a true problem, it would create a real problem in resolving this factor.

III. Suggestion

My suggestion is that the Commission defer doing anything radical this year in terms of changing the enhancements for illegal reentry. Before proceeding on the new approach for enhancements set out in the proposed amendments, I think that it would be useful to run the data to

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see how much sentences would be shortened under the Guidelines. Moreover, Congress may well be enacting new immigration laws this year, and waiting until the dust settles might be prudent. However much reasonable minds might differ about the wisdom of this change, from a policy point of view, there can be little disagreement that it would not be helpful for there to be a perception that the Commission is lowering sentences for the most dangerous reentering illegal aliens.

It may well be that the guideline, as written, sometimes sweeps too broadly. Likely, there are cases where there is an isolated 20-year old conviction or other substantially mitigating circumstances as to the facts underlying the conviction. If that is so, I believe that the Commission should collect those anecdotes and see if it can determine a way to carve out those situations, either through departure language or language in the guideline, itself. Yet, throwing out the enhancement, itself, seems to me to be too broad-brushed a way to handle a factor that could suggest great dangerousness on the part of many defendants. Further, it seems to me that the Commission should consider creating an enhancement based on repeated reentries. Many of my defendants have had two or more reentry convictions. Such conduct suggests a dogged determination to violate the law and should be accounted for by the Guidelines.

Thank you for considering my comments. I offer them in a constructive spirit. You have an enormous responsibility in these post-Booker days and are an institution that all look to in the upcoming

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debates. I greatly respect the work, time, and thought that you all bring to the task. Please let me know if I can ever be of service.

Sincerely,



Julie E. Carnes
U.S. District Court Judge

JEC/ghh

FEDERAL PUBLIC DEFENDER

District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 2, 2007

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

Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to immigration that were published on January 30, 2007.

The proposed amendments would substantially increase the prison sentences for individuals convicted of immigration offenses, *i.e.*, smuggling of undocumented aliens, trafficking in immigration documents, and returning to the United States illegally. These enhancements are not justified by any new legislation, current sentencing practices, the nature of immigration offenses, reliable data, or the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). As a matter of structure, Option 6 of the proposed amendment to § 2L1.2 is of interest as it endeavors to further the Commission's overarching goal of simplifying the guidelines. However, we are hesitant to support or oppose that option without further data.

I. Number of Aliens and Number of Documents, §§ 2L1.1, 2L2.1

A. § 2L1.1 (Smuggling, Harboring, Transporting Aliens)

Section 2L1.1(b)(2) currently provides a 3-level enhancement for offenses involving 6 to 24 aliens, a 6-level enhancement for offenses involving 25 to 99 aliens,

and a 9-level enhancement for 100 or more aliens. In Option 1, the Commission proposes additional increases for larger groups of aliens. Last year, the Commission attempted to justify an identical proposal based on the concerns of prosecutors regarding the adequacy of punishment for those defendants who smuggle a large number of illegal aliens. *See* Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines at 7 (hereinafter "Interim Report"). The Commission also referred to two bills introduced in the House that contained directives to the Commission to increase penalties associated with the number of aliens smuggled. *See id.* at 8. However, these bills were never passed, and Congress did not enact any new legislation that would in any way support this amendment. Most significantly, the Commission's own data reveals that less than 2% of the cases involve more than 100 aliens. *See id.* Increasing penalties in the absence of supporting legislation, directive, data or analysis runs contrary to the Commission's role as an independent expert body. It would appear that it is more appropriate to continue to allow courts to vary from the Guidelines in cases involving significantly larger groups of aliens.

Option 2, with its additional calibrations, will result in substantially higher sentences not only for those defendants whose offense involves more than 24 aliens, but also for an unknown number of the nearly 46% of defendants whose offenses involved 6 to 24 illegal aliens. *See id.* Unlike the purported justification for increasing penalties when 100 or more aliens are involved, the proposed three-level increase in sentences for offenses involving 16 to 24 aliens and 50 to 99 aliens is lacking justification. Indeed, the Commission's data reveals that the vast majority of cases involve fewer than 25 aliens and that courts sentence defendants within the advisory guideline range in more than 64% of cases and *below* the guideline range in nearly 34% of cases. *See id.* at 4. There is no indication that higher sentences are warranted for these cases.

The current advisory guideline allows the court flexibility to account for differences in the number of aliens and any related differences in culpability. Under this advisory system, the courts have ample ability to account for the number of aliens smuggled by either the organization or the individual. At a time when the Commission has committed itself to simplifying the guidelines, the Commission should not be making them more complex with unnecessary and unjustified numerical calibrations.

B. § 2L2.1 (Trafficking in Immigration Documents)

The Commission proposes to add enhancements for trafficking in large numbers of documents parallel to the alien smuggling enhancements with a ratio of one document to one alien. Counting documents on a par with aliens overstates the harm in document cases, and appears to be animated by little more than historical consistency with the structure of § 2L1.1 and its method of measuring culpability by counting aliens. *See*

Interim Report at 15-16. As the Department of Justice representatives emphasized at various roundtables, and as we stressed at the February 14 hearing, one of the harms of alien smuggling is the inhumane handling of human beings. Aliens are often transported in dangerous, over-crowded vehicles and kept in substandard housing. *See also* Interim Report at 11. In contrast, the major harm with respect to documents is in their potential use for illegal activity, but more often they are used for otherwise lawful employment. Thus, the harm would appear to be less aggravated. One document is not the same harm as one person. The ratio of documents to aliens should be the subject of study to arrive at a more suitable ratio.

Further, the Commission's data reveal that the majority of cases involve five or fewer documents, which range among a wide variety of different types of documents. *See id.* at 15, 18. Unlike human beings, immigration documents are relatively easy to produce and transport in bulk. They may also be counterfeit, which would suggest that the potential harm is more fairly measured not by how many documents are involved but by how well the documents are likely to pass as authentic. To count obviously counterfeit documents at the same rate as real human beings ignores the fundamental distinctions at play. Rather, the Commission should trust courts to measure the real harm involved and use the advisory guidelines to arrive at the appropriate punishment.

The effect of Option 2 in the proposed amendment is the same as the effect of Option 2 in the proposed amendment for § 2L1.1, adding unnecessary specificity and complexity and essentially increasing potential penalties in almost every category. Especially in light of the new enforcement initiatives enacted in recent times, the Commission should not increase these penalties absent data and analysis to support them. The Commission should instead study and observe the broader trends as they play out over the next several years, while allowing courts to utilize the flexibility already present in the advisory guidelines.

II. § 2L1.2 (Illegal Reentry)

A. Options 1 through 5

Our previous comments regarding Options 1 through 5 can be summarized as follows:

- **The Commission has never justified the 16-level enhancement, which is far greater than similar increases in other guidelines that depend on prior convictions and does not fairly correspond to the potential danger to the community.**

- The term “aggravated felony” is over-broad and ambiguous, and its use would drastically increase sentences for all manner of individuals convicted of non-violent offenses and even misdemeanors. Indeed, current practice reveals that even the Department of Justice believes that lower sentences are appropriate for most of these individuals.
- Option 5 would be unconscionable and probably unconstitutional in that it places the burden of proof on the party least able to sustain it.
- Option 4 would appear to be the least ill-advised with certain modifications, including increasing the requisite sentence imposed for the 16-level enhancement and limiting the definition of “crime of violence.”
- We would support an amendment that would subject prior convictions used to increase a defendant’s offense level to the same remoteness rules in Chapter 4.

We submitted a proposed guideline for illegal reentry offenses that we believe more accurately reflects the severity of the offense. This proposed guideline is similar in structure to the firearms guideline, providing enhancements based on the nature and number of prior felony convictions and limiting consideration to convictions within the time limits set forth in Chapter Four. Although our proposal does not define “crime of violence” as it is defined in § 8 U.S.C. § 16, it is premised on retaining the structure of linking offense level increases to prior “aggravated felonies” and “crimes of violence.” This proposal still merits consideration.

B. Option 6

By largely eliminating the need for the court to engage in the categorical approach in determining whether to apply an enhancement based on a prior conviction, Option 6 appears to be a simpler way to calculate sentences under this guideline. Simplicity, though, is not a substitute for fairness. The proposed triggers for the steepest increases remain unjustified by any policy or analysis and may still result in extremely steep increases based on relatively minor prior offenses.

Further, Option 6 includes severe consequences for very short prior sentences. Such short sentences are frequently not a result of culpability, but a result of poverty. As written, the proposal provides for a 16-level increase if the defendant has “three prior convictions resulting in sentences of imprisonment of at least 60 days”; a 12-level increase for a “conviction resulting in a sentence of at least six months, or two prior

convictions resulting in sentences of imprisonment of at least 60 days"; an 8-level increase for a "conviction resulting in a sentence of imprisonment of at least 60 days."

Thus, although we continue to believe that Option 6 holds promise, we are hesitant to take a position without data that demonstrates its potential impact. Sentences should not be increased overall, and in fact should be decreased. We offer the following thoughts:

1. The 16-level enhancement should be fairly correlated to previous sentence served of 10 years or more.

Congress sought to increase penalties for reentry crimes in order to target the worst of the worst, *i.e.*, those individuals who are involved in very serious crimes such as murder and organized drug trafficking of the highest order, and who return to the United States illegally in order to continue their criminal activities. *See, e.g.*, Robert J. McWhirter and Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases*, 8 Fed. Sent. R. 275 (1996). The 16-level increase in the guideline for this federal offense has never been justified by data or analysis, a source of constant bedevilment and frustration for those of us who regularly experience its harsh results. The increase applies unevenly due to state law differences and is routinely applied to relatively minor state offenses, demonstrating that there is no reasonable relationship between the steep increases and the previous sentence.

While we acknowledge that the 16-level increase should be used as a measure of culpability for these offenses, we believe that the measure should be the same in the federal system as in the system that imposed the previous sentence. Because the increase in the federal sentence for the immigration offense is directly tied to the seriousness of a prior offense, it should be a direct reflection -- not a categorical approximation -- of the seriousness of the prior offense. In other words, the federal sentence should be roughly the same or slightly less than the sentence served for the prior offense, taking into account that the current offense is one of illegal reentry, itself not a violent or aggravated crime in terms of actual conduct.

For example, applying the 16-level increase for a defendant falling in Criminal History Category IV results in an advisory sentence of roughly 8 years. A defendant convicted of illegal reentry should receive 8 years only when he previously served a sentence of 10 years or more. Similarly, the 12-level increase should be reserved for those who previously served a sentence of 5 years. This approach would more fairly, consistently, and accurately correlate the increases for the reentry offense to the readily measurable time served for the previous offense.

The Commission should adopt this approach and its principled justification that the 16-level increase would then reflect a real relationship in relative culpability by effectively doubling the punishment for the previous offense.

2. **The Commission should take the existence of fast-track programs into account by lowering the advisory guidelines to reflect the true value of the danger presented by immigration offenses.**

Now that fast-track programs have received Congressional imprimatur, the Commission should adjust the guidelines to take them into account as it did for the mandatory minimum guidelines. In other words, the Commission should recognize that reductions under fast-track programs reflect the value of the danger presented by individuals who commit offenses amenable to fast-track disposition. *See, e.g.,* Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517 (2006). The Commission should use fast-track dispositions as a guide for setting lower offense levels in order to capture the true danger and to eliminate unwarranted disparity in those districts without a fast-track program. The guideline should reflect the present value of the danger by lowering the advisory guideline levels to correspond with the sentences imposed in fast-track jurisdictions, leaving fast-track dispositions up to the Department of Justice. At the February 14 hearing, the Department of Justice indicated that it does not want to see sentences increase, which suggests that it tacitly endorses guidelines set at levels that correspond to fast-track dispositions.

3. **The Commission should use "sentence served" instead of "sentence imposed."**

Given the manifest disparity in state sentencing practices, "sentence served" is a truer marker of culpability than "sentence imposed" because it reflects the real deprivation of liberty intended by the state sentencing authority. "Sentence imposed" does not account for those jurisdictions with parole where, for example, the judge sentences a defendant to "ten years at 35%," fully intending the actual punishment of incarceration for 42 months to be the appropriate reflection of the seriousness of the crime. The difficulty created by relying on the categorical approach in order to measure culpability derives from the fact that state labels do not always mean what they should in the context of federal sentencing. The natural implication of the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), is that grave consequences in federal sentencing arising from standardized classifications -- such as those advised by the Commission in § 2L1.2 -- should not rise or fall on a state's misleading label or

unique sentencing practice. *See id.* at 632-33. Thus, "sentence served" represents the most accurate method of capturing the actual harm as punished by the state.

Although using "sentence served" would not eliminate disparity in state sentences, it would certainly lessen the disparate impact of differing state practices on federal sentencing for illegal reentry. It would also lessen the effect of triple counting of prior offenses, first for increasing the statutory maximum for "aggravated felony," second for criminal history, and third for recency. Finally, using "sentence served" would not be complicated or difficult; probation officers already use this measure for determining recency.

4. The decay factor should be incorporated into § 2L1.2.

As the Commission has recognized, a prior conviction that is twenty or more years old, although not countable for criminal history purposes under Chapter 4, can be used to increase a defendant's offense level. *See Interim Report* at 28. First, as a matter of simplicity, prior convictions used to increase the offense level under this guideline should be first subject to the Chapter Four – Criminal History Rules. Second, keeping in mind Congress's intent to deter and increase punishment for those individuals who were convicted of very serious crimes such as murder and major drug trafficking but who then return to this country to continue their illegal activities, it is highly unlikely that a prior offense committed over twenty years earlier bears any palpable relationship to the defendant's reason for committing the current reentry offense. Particularly in the context of an offense whose measure of culpability is directly linked to a prior offense, the relationship between the offenses should be subject to temporal limitations.

5. Status and recency points should be excluded from § 2L1.2 cases.

Under § 2L1.2, prior convictions are double-counted when a prior conviction is used both to increase the offense level and in the calculation of the criminal history score.

As the Commission has recognized, the situation is often further aggravated by the fact that many defendants are found to be in the country illegally while they are serving a prison sentence. *See Interim Report* at 28. As a result, these defendants often receive an additional increase of up to three criminal history points under § 4A1.1(d) and (e) for being under a criminal justice sentence at the time of the offense and for committing the offense less than two years after release. *Id.* The resulting sentencing range in such situations is driven almost entirely by the double- and triple- weighting of the same conduct. In order to avoid this result, the Commission should at the very least exclude status and recency points in the criminal history calculation for § 2L1.2 offenses when they arise from these situations. The ordinary justification for status and recency

points -- that the defendant has not learned his lesson from a previous encounter with the criminal justice system -- is simply not present when the "continuing" reentry offense occurs both *before and after* the previous offense at issue.

6. The Commission should add an application note suggesting bases for downward departure.

At the very least, the Commission should add an application note to § 2L1.2 suggesting the following basis for departure:

Over-representation of criminal history

If the Commission recommends an upward departure if the categorical approach under-represents severity of previous offenses (as in Options 1, 2, 3, and 4 and as courts are already using), then fairness mandates a corresponding downward departure if the categorical approach over-represents severity, as in § 4A1.3. The following examples illustrate the need for a suggested departure on this ground.

- Client was convicted at age 17 of aggravated assault for punching a fellow high school student and breaking his nose. In the following 15 years, his only violations of the law were for illegal reentry. The 16-level enhancement applied.
- Client was convicted of robbery for pushing the security guard who stopped him for shoplifting. Although a seven-year sentence was imposed, he only served a few months. The 16-level enhancement applied.

III. Issues for Comment

The Commission seeks comment regarding the Supreme Court's decision in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). As that decision relates to the statutory definition of "aggravated felony," it would seem that the Commission is seeking comment as it would relate to § 2L1.2 if it decides to retain the reference to the statutory definition of "aggravated felony" in 18 U.S.C. § 1101(a)(43), either because it does not amend the guideline after all or because it chooses an amendment that refers to "aggravated felony." The Commission should not amend the guideline to "account" for *Lopez*. The Supreme Court has spoken, and the Commission should defer to it and its reading of Congress's intent on this point.

Lopez is consistent with all other guidelines that do not use possession of a controlled substance for offense level enhancements, *i.e.*, felon in possession and career offender. If Congress thinks that all drug felons should be treated harshly, Congress can

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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say so. As in other categorical approach cases, the court can currently consider the facts in deciding whether to impose the guideline sentence. And Justice Souter got it right: possession is not drug trafficking in any ordinary sense. *See id.* at 629-30. Addicts or mere users do not pose the same threat as traffickers.

Further, it would seem that any amendment that would reinstate an enhancement for possession that is not an aggravated felony under § 1101(a)(43) would only add to the complexity of the guideline. If the justification is that a majority of the courts interpreted "aggravated felony" to include such state offenses, it is enough to say that the Supreme Court said they were wrong. In reaching its conclusion, the court reasoned that Congress could not have intended for federal sentencing to depend on varying state criminal classifications. As the Court stated, "[i]t is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Id.* at 633. As such, the Commission should not take any action that would run directly counter to congressional intent and interpreted by the Supreme Court.

We appreciate the opportunity to comment on the Commission's proposed amendments relating to immigration. We would be happy to provide any further insights as requested.

Sincerely,



JON M. SANDS
Federal Public Defender
District of Arizona

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Judy Scheon, Chief of Staff
Kenneth Cohen, General Counsel
Martin Rickey, Legal Staff Attorney

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FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 16, 2007

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

Re: Comments on Proposed Option 7 for Amendment of § 2L1.2

Dear Judge Hinojosa:

Thank you for providing us with the Proposed Option 7 for Amendment of § 2L1.2. We have had a chance to review it, and look forward to more in-depth analysis once we are able to examine the data on how this impacts cases. With that in mind, and to help the Commission in addressing the need to rationalize and simplify the guideline, we provide the following comments on behalf of the Federal Public and Community Defenders.

One persistent and across-the-board criticism of the current guideline has been its complexity. This issue of complexity arises whenever a guideline seeks to enumerate offenses, or uses enumerated past convictions for enhancements. The Commission recognizes this, and has moved in Option 7 to an acknowledgment that the sentence imposed on past convictions serve as an equally effective barometer for seriousness while at the same time eliminating the uncertainties inherent in the categorical approach. The Commission should adopt this approach completely and dispense with enumeration except for national security and terrorism convictions, with the definition of terrorism offenses revised as below.

The reasons the Commission should adopt this approach are the same as the reasons the Commission saw the need to move to an Option 7, that is, to avoid the complexities associated with any categorical approach. There are myriad potential problems with the proposed definitions of the offenses, the elements of which they are comprised, and the danger of disparity as the various states inevitably have quite different definitions. Enumeration is categorization and hence a return to complexity, uncertainty, and disparity.

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Most of all, the enumerations are not necessary. A serious prior conviction of a true "murder," forcible rape, serious offense of child sexual abuse or child pornography cannot be a murder, forcible rape or the most serious sex offense if it was not punished by at least 48 months. A true serious offense will be punished severely, and will fit easily into the 48-month sentence imposed category, subject to 16 levels. A less serious offense will fall in the 24-month sentence imposed category, subject to 12 levels.

One example will work well to illustrate the unnecessary complexity and potential overbreadth of the enumerated offense approach in (A). The definition of "offense of child sexual abuse" has numerous problems. First, it would result in a 16-level increase, the same as for murder and forcible rape, for generic "statutory rape" (*see, e.g., United States v. Eusebio-Giron*, 2006 WL 1735866 (5th Cir. 2006) (17-year-old defendant, who later married his 14-year-old girlfriend, received a 57-month sentence for "statutory rape" under current definition of "crime of violence"), and for federal statutory rape ("sexual abuse of a minor" is statutory rape, *see* 18 U.S.C. § 2243(a)), *i.e.*, a 19-year-old boy who has consensual sex with his 14-year-old girlfriend). Second, it is repetitive in including both generic and federal statutory rape. Third, the age of 18 is not the cutoff for statutory rape under federal law, *see* 18 U.S.C. § 2243(a) (under 16 years of age), or the law of the majority of states.

The second area in Option 7 in need of modification is the threshold of "at least 12 months" for the 16 level increase at § 2L1.2 (b)(1)(B) ("two prior convictions each resulting in a sentence of imprisonment of at least 12 months"), and the 8 level increase at § 2L1.2 (b)(1)(D) ("a prior conviction resulting in a sentence of imprisonment of at least 12 months"). It is imperative that the Commission use "a sentence of imprisonment exceeding one year and one month," not "at least 12 months," in (B) and (D). A choice of twelve (12) months is a decision to write in disparity. This is because a sentence of 12 months means vastly differently things across the 50 states. In one, it is the sentence that is pronounced when the result is to have someone released on that day after serving two months to effectuate time-served. Because it is the sentence *imposed* (not served), in another state, it carries 10 months in jail - no questions asked. In others, it is the reflexive sentence of judges and prosecutors for very low-level crime with no discernible harm or victim. It paints with too broad a brush, capturing a disparately wide range of criminal conduct. A *meaningful* cutoff is "a sentence of imprisonment exceeding one year and one month," as in USSG §4A1.1(a). To comport with both simplification and consistency across the guidelines, it should read exactly as in §4A1.1(a). This definition and application are well-settled.

A similar improvement should be made in §2L1.2(b)(1)(D) ("three prior convictions resulting in a sentence of imprisonment of at least 90 days, increase by 8 levels") and §2L1.2(b)(1)(E) ("a prior conviction resulting in . . . a sentence of imprisonment of at least 90 days, increase by 4 levels"). This proposed change violates the stated premise of Option 7-sentence neutrality. Currently, there must be three prior convictions of crimes of violence or drug trafficking offenses in order to receive a 4-level increase; otherwise, there is no increase. Option 7 would give an 8-level increase for three prior convictions of any kind if they resulted in a sentence of imprisonment of at

least 90 days, and a 4-level increase for one prior conviction resulting in a sentence of imprisonment of at least 90 days. Option 7 would obviously raise sentences in this respect. A middle ground can be achieved by requiring a 4-level increase for three prior convictions each resulting in a sentence of imprisonment of at least 60 days. Such a change represents a measured attempt to hold sentences steady while maintaining consistency with the cutoffs in Chapter Four, namely § 4A1.1(b).

Further, the Commission should use “felony,” *i.e.*, punishable by more than one year, in (A)-(D) (as distinguished from “any” offense in the alternative in (D)). This requirement ensures that the punishment is for offenses that are “punishable” by more than one year across the board and across the nation, reflecting a general recognition of seriousness, and again, does not invite disparity by sweeping in a wide range of possibilities for much less serious conduct. In an appropriate case, the court can take offenses punishable by a year or less into account.

Finally, if the Commission retains “terrorism offense” as an enumerated offense, it should simplify the definition. As written, it is defined as “any offense involving, or intending to promote, a ‘Federal crime of terrorism,’ as that term is defined in 18 U.S.C. § 2332b(g)(5).” *See* Application Note 1(B)(vii). This is the same definition used in § 3A1.4, the upward adjustment in Chapter Three. In applying this definition, the courts do not simply look to the offense of conviction. Rather, they engage in a complex case-by-case factual inquiry: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant is responsible involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003). This is particularly inappropriate since it is a prior conviction that is at issue. The Commission should adopt the following offense of conviction definition: “‘Terrorism offense’ means a ‘Federal crime of terrorism’ as defined in 18 U.S.C. § 2332b(g)(5),” first, because it is straightforward and simpler to apply, and second, because to do otherwise would permit a 20-level increase for offenses that are not terrorism offenses.

These comments are made, as noted above, without access to the data on Option 7. We propose an Option 8, attached, that incorporates our suggestions. We request that the Commission run the data using our proposal to see how it compares on a system-wide level.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Judith Sheon, Staff Director
Ken Cohen, General Counsel
Martin Richey, Visiting Assistant Federal Public Defender

[Option 7 (New):

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
- (1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

- (A) a prior felony conviction for a national security offense or terrorism offense, increase by 20 levels;
- (B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by 16 levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by 12 levels;
- (D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by 8 levels;
- (E) a prior felony conviction not covered by subdivisions (A) through (D) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

Deleted: a prior conviction for murder, rape, a child pornography offense, or an offense of child sexual abuse; (ii)

Deleted: i

Deleted: of at least 12 months

Deleted: of at least 12 months or three prior convictions each resulting in a sentence of imprisonment of at least 90 days

Deleted: f

Deleted: E

Deleted: for any felony

Deleted: a

Deleted: [any other sentence of imprisonment]

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Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

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- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

- (i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.
- (ii) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).
- (iii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.
- (vii) "Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.
4. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.
5. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

Deleted: (i) . "Child pornography offense" means an offense (I) described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States. ¶

Deleted: i

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Deleted: (iii) . "Murder" means an offense (I) covered by §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder); or (II) under state or local law consisting of conduct that would have been an offense under 18 U.S.C. § 1111 if the offense had taken place within the territorial or maritime jurisdiction of the United States. ¶

Deleted: iv

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(v) . "Offense of child sexual abuse" means an offense in which the victim had not attained the age of 18 years and that is any of the following: (I) an offense described in 18 U.S.C. § 2242; (II) a forcible sex offense; (III) statutory rape; or (IV) sexual abuse of a minor. . ¶

Deleted: vi

Deleted: any offense involving, or intending to promote,

Deleted: ,

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[Option 8 (New):

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
 - (1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

- (A) a prior felony conviction for a national security offense or terrorism offense, increase by 20 levels;
- (B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by 16 levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by 12 levels;
- (D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by 8 levels;
- (E) a prior felony conviction not covered by subdivisions (A) through (D) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

- (A) In General.—For purposes of subsection (b)(1):
 - (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
 - (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) Definitions.—For purposes of subsection (b)(1):

(i) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.*

(ii) *"National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).*

(iii) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.*

(vii) *"Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).*

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.

4. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.

5. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 30, 2007

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

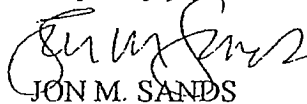
Re: Unlawfully Entering or Remaining in the United States

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to propose an Option 9 for §2L1.2. Since we proposed Option 8, H.R. 1645 was introduced in the House. Its penalty structure is identical to that in S. 2611, passed by the Senate last year. If Congress passes an immigration bill, it appears there will not be compromise on the penalty structure. As explained in our letter dated March 29, 2007 at pp. 2-4, the penalty structure in the pending legislation is less severe and less complex than DOJ's Option 7. It is also less severe than our Option 8.

If the Commission amends §2L1.2 before Congress enacts legislation, the guideline should at least be consistent with the legislation that is pending. We therefore offer Option 9.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

[170]

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Martin Richey, Visiting Assistant Federal Public Defender
Judith Sheon, Staff Director
Ken Cohen, General Counsel

Option 9:

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
 - (1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

- (A) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 60 months; or (ii) three prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by 16 levels;
- (B) a prior felony conviction resulting in a sentence of imprisonment of at least 30 months, increase by 12 levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by 8 levels;
- (D) a prior felony conviction not covered by subdivisions (A) through (C) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

- (A) In General.—For purposes of subsection (b)(1):
 - (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
 - (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
 - (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued

after a conviction, regardless of whether the removal order was in response to the conviction.

- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

- (i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.
- (ii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.

- 2. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.
- 3. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4 Beacon Street,
Ste. 602
Boston, MA 02108
Phone 617 227 9727
Fax 617 227 5495

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Rogelio Nuñez, Chair
Harlingen, TX

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Paromita Shah
Associate Director

March 29, 2007

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

Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, the National Immigration Project of the National Lawyers Guild (National Immigration Project) and the National Council of La Raza (NCLR) provides comments to the proposed amendments relating to immigration that were published on January 30, 2007.

I. General Concerns

1. Proposed options are inconsistent with pending legislation

Without any apparent justification, the proposed amendments would substantially increase the potential prison sentences for noncitizens convicted of illegally reentering the United States. There is no new legislation, or authoritative research to justify these harsher amendments. Moreover, all of the published options are out of sync with current legislative proposals. The Sentencing Commission should refrain from publishing a new Guideline, which may well be out of date very soon.

Legislation pending in the House (H.R. 1645) and the Senate (S. 2611) provides maximum statutory sentences of 20, 15, 10 and 2 years for illegal re-entry. Under section 236 of H.R. 1645 and section 207 of S. 2611, a defendant cannot receive a 20-year sentence unless she or he has:

- a felony conviction for which a court sentenced the defendant to at least sixty months,
- 3 felony convictions, or
- a conviction murder, rape, kidnapping, a felony relating to slavery or peonage, or a felony relating to terrorism.

2. Sentencing Commission should republish notice to allow meaningful opportunity for public comment

Section 994(x) of Title 28 U.S.C.A. subjects the United States Sentencing Commission to the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C.A. § 553. Under 5 U.S.C.A. § 553, subject to exceptions that do not apply in this instance, an agency must publish proposed rules in the Federal Register and give the public a meaningful opportunity to comment. The Sentencing Commission is considering an additional Option 7 for U.S.S.G. § 2L1.2 that the Commission did not publish in the Federal Register. The Commission did provide the National Immigration Project and NCLR with a copy of Option 7, for which we are grateful. However, the good graces and the helpfulness of the Commission staff cannot compensate for a failure to publish Option 7 in the Federal Register. Principles of good government and the obligations under 5 U.S.C.A. § 553 made binding on the Sentencing Commission by 28 U.S.C.A. § 994(x) require that the Commission not amend 2L1.2 until it gives the entire public notice and the opportunity to comment on Option 7 and any other amendments that the Commission is considering. The National Immigration Project and NCLR are not offering comment on Option 7 because to do so would be inconsistent with the letter and spirit of 28 U.S.C.A. § 994(x) and with principles of good government.

3. Existing and proposed penalties are inappropriate for seriousness of the offense

The proposed and existing penalties for unlawfully entering and remaining in the United States are disproportionate to the seriousness of the offense. Other federal offenses that enhance a sentence based on a defendant's criminal record are much less severe than the proposed options under U.S.S.G. § 2L1.2. For example, a felon in possession of a firearm receives an enhancement of six levels for having a prior conviction for a crime of violence, U.S.S.G. § 2K2.1(a)(4)(A), as opposed to an eight or sixteen level increase under Options 1-4 of U.S.S.G. § 2L1.2.

The disproportionately harsh consequences are especially problematic because the definition of aggravated felony under 8 U.S.C. § 1101(a)(43) is so broad and overarching that it includes offenses that are neither aggravated nor felonies. The definition of aggravated felony includes federal and state nonviolent offenses and individuals who serve no prison time whatsoever. *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (treating as an aggravated felony a conviction for misdemeanor petty theft with a one-year suspended sentence). Therefore, defendants will be included under these harsh Guidelines who are not guilty of serious criminal offenses.

4. Sentence served is a more reliable indicator of seriousness of predicate offense than sentence imposed

If the Sentencing Commission were to use the sentence a defendant served rather than the sentence a court imposed, it would be better able to sentence harshly those defendants who warrant more serious sentences. Using the time a defendant served is more consistent with the overall sentencing purposes of 18 U.S.C.A. § 3553(a)(2) than using sentence imposed. A common thread among the great variety of state sentencing schemes is that the time a defendant actually serves is the best measure of the seriousness of her or his offense. As a result, using the sentence served would reduce the uneven impact that flows from the variety of state sentencing schemes and promote a more uniform federal treatment of defendants charged with illegal reentry. This approach also would be consistent with the Supreme Court's view in *Lopez v. Gonzales*, 127 S.Ct. 626 (2006) that Congress did not want a state's label to decide a federal concern.

II. General Concerns Regarding Commentary and Application Notes

The Commentary under the United States Sentencing Guidelines has the force of law unless contrary to the Constitution, a statute, or inconsistent with the Guideline that it interprets. *Stinson v. United States*, 508 U.S. 36 (1993). As a result, the National Immigration Project and NCLR note its concern regarding the proposed Commentary to U.S.S.G. § 2L1.2, because it includes material, which does not deserve the force of law, and thus should not be included in the Commentary.

1. Provisions of Federal Juvenile Delinquency Act should govern treatment of persons under 18

The proposed Commentary to all six options to U.S.S.G. includes offenses committed by a person under 18 if the law of the jurisdiction treated the defendant as an adult. The Sentencing Commission should heed the reasoning behind the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), and not make an enhancement dependent on the vagaries of local law. The National Immigration Project and NCLR suggest that the test be whether the defendant would have faced mandatory treatment as an adult under the Federal Juvenile Delinquency Act. Using a federal test would avoid disparities based on state law and promote uniformity.

2. Application notes should include downward departure considerations

The proposed options lack provisions that take into account the motivation for a substantial number of reentering noncitizens in returning to the United States, including such factors as: (1) extended length of residence in the United States, (2) the presence of family members in the United States who need them, and (3) the fear of persecution in their home country. Many reentering noncitizens are not being motivated by a desire to commit new crimes in the United States. Courts have recognized that a reduction in sentence is appropriate for defendants who are culturally assimilated or who return because of family medical needs. *See, e.g., United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001) (recognizing availability of downward departure for cultural assimilation); *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998) (same); *United States v. Singh*, 224 F. Supp.2d 962 (E.D. Pa. 2002) (granting downward departure for defendant who reentered to visit his dying mother).

III. Specific Comments to Proposed Options

1. Continued use of categorical approach

Options 1-4 would still require the categorical approach. The Supreme Court created the categorical approach in connection with the Armed Career Criminal Act. In 2007, the Supreme Court endorsed this approach to establish whether an offense is an aggravated felony. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007). The term "aggravated felony" means the same thing whether used in the civil or criminal contexts. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004); *Lopez v. Gonzales*, 127 S.Ct. 626 (2006). According to the Fifth Circuit, "*Lopez* ineluctably applies with equal force to immigration and criminal cases." *U.S. v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir. 2007).

The synopsis to the immigration proposal raises the concern that the "lack of documentation" makes difficult implementation of the existing 2L1.2. 72 FR 4372, 4393 (Jan. 30, 2007). While it may make sense to switch from a Guideline that is based on proving the existence of an aggravated felony to a Guideline based on the time a defendant served for her or his predicate offense, the lack of documentation is not a good reason on which to base a switch.

In the United States' criminal justice system, one price of having the rule of law paramount is that the lack of evidence sometimes means the truly guilty go unpunished. The Supreme Court has historically emphasized that justice is best served by promoting respect for the rule of law even if it is more difficult for prosecutors or law enforcement officials to obtain a confession, conviction, or an appropriate sentence. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (preventing interrogation of arrested person until right to counsel waived); *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding race-based preemptory challenges) *Blakely v. Washington*, 542 U.S. 296 (2004) (requiring proof beyond a reasonable doubt of any fact, other than recidivism, that increases a defendant's punishment). That the categorical approach is the Court's preferred method should be a sufficient response to the government's concerns that the proof requirement to establish an enhancement is too exacting.

2. Option five is fundamentally unfair

Section 1326(b) of Title 8 U.S.C.A adds punishment for having an aggravated felony or three misdemeanor convictions involving crimes against the person or drugs or both or a felony other than an aggravated felony. The Supreme Court has repeatedly put the burden on the government to prove an enhancement. *See Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). In *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007), the Supreme Court applied the *Shepard* and *Taylor* categorical approach to whether a noncitizen was deportable for an aggravated felony. In *Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004), the Court made clear that the test for whether an offense is an aggravated felony is the same, regardless of whether the term is interpreted in the context of a civil removal proceeding or a criminal sentence enhancement:

Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

In *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), the Supreme Court abrogated both illegal reentry cases and civil immigration cases. Taken together, *Leocal*, *Duenas-Alvarez*, and *Lopez* mean that the Supreme Court intends for principles in *Shepard* and *Taylor* to apply to sentencing enhancements under 2L1.2. Since Option 5 puts the burden on the defendant to get a lower sentence, it is inconsistent with Supreme Court

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
March 29, 2007
Page 6

law. In addition, it is inconsistent with notions of fundamental fairness to put the burden on the defendant, who is the least able to meet the burden.

IV. Issue for Comment

The United States Sentencing Commission specifically seeks input regarding what changes, if any, the Commission should make to U.S.S.G. § 2L1.2 in light of *Lopez v. Gonzales*, 126 S.Ct. 625 (2006). The National Immigration Project and NCLR urges the Sentencing Commission to treat differently a defendant who has an aggravated felony based a state misdemeanor. For purposes of the existing 2L1.2 or proposed Options 1-4, which maintain an eight level enhancement for any aggravated felony, the Commission should include in the Commentary an exception for a defendant whose aggravated felony conviction is a state misdemeanor.

In *Lopez*, the Court acknowledged that defendants convicted of a misdemeanor under state law might have an aggravated felony for purposes of 8 U.S.C.A. § 1101(a)(43)(B). *Lopez v. Gonzales*, 126 S.Ct. 625, 633 (2006). In a post-*Lopez* decision, the Southern District Court for the District of Texas has held that a state misdemeanor can constitute an aggravated felony. *U.S. v. Castro-Coello et al*, 2007 WL 397496 (S.D. Tex. Feb. 6, 2007) (treating second possession conviction as a recidivist offense despite lack of equivalent notice to that provided under 21 U.S.C.A. § 851). An eight level increase for someone with a misdemeanor prior as the predicate offense is disproportionate to the seriousness of the offense.

Under principles of "fair notice," this exception should apply to all misdemeanor aggravated felony convictions, not just those under *Lopez*. Should the Commission decide not to exclude misdemeanor offenses completely from 2L1.2(b), then the National Immigration Project and NCLR suggests that the Commission provide a reduction of six levels for any misdemeanor that is treated as an aggravated felony.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,

Dan Kesselbrenner
Executive Director
National Immigration Project

Janet Murguia
President and CEO
National Council of La Raza

[179]

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

| March 13, 2007

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

Re: **§ 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director
of Bureau of Prisons (Policy Statement)**

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.¹

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating that the Commission:

shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

¹ We thank Steven Jacobson, AFD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the district court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.¹ However, Congress also recognized that post-sentencing developments could provide appropriate grounds to reduce a sentence. Using § 4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments. This section of the SRA is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(i) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the Sentencing Commission, also created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

¹ See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The legislative history of these provisions demonstrates the Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of the legislative history, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment. . . .the bill . . . provides for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.²

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.³

² S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

³ See, Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001); John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions “in particularly meritorious or unusual circumstances which could not have reasonably been foreseen by the court at the time of sentencing,” including “if there is an *extraordinary change in an inmate’s personal or family situation* or if an inmate becomes severely ill.” 28 C.F.R. § 572.40 (1980) (emphasis added); see 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, “extraordinary and compelling circumstances,” but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fed. Reg. 1238 (Jan. 7, 1994); see USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing “the standards to evaluate the early release remain the same,” though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department’s standards for filing such motions:

The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department’s standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate’s ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed “extraordinary and compelling reasons” to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would "more accurately reflect our authority under these statutes and our current policy," the rules rename the section "Reduction in Sentence for Medical Reasons," and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP's proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe "extraordinary and compelling" beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem. Declaring anything the Commission does to define "extraordinary and compelling reasons" as a *dead letter* if it is broader than the government's chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of "extraordinary and compelling reasons," the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current "Issue for Comment" are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation "alone" is not sufficient).

We submit that the Commission should take a "combination" approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons' role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Tom Brown, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 29, 2007

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

Re: Follow-Up on March 20 Hearing

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to follow up on some of the issues that arose at the March 20th hearing relating to the Guideline Manual, Immigration, Criminal History, Mandatory Minimums, and Sentence Reduction.

I. The Guideline Manual

The Guideline Manual should correctly represent current sentencing law. As the Commission has said, *United States v. Booker*, 543 U.S. 220 (2005) is "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta*." Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006. When we again urged the Commission to amend the Manual to take the *Booker* decision into account, the response was that judges and practitioners know the law and so, apparently, there is no need for the Commission to change the Manual.

The Supreme Court announced over two years ago that the mandatory guideline system established by 18 U.S.C. § 3553(b), and echoed throughout the Guideline Manual, violated the Constitution. The Manual has yet to mention the case. This is not a matter of formality – it goes to the integrity of the Manual itself. A new practitioner reading the Manual has no way of discerning that the Guidelines no longer represent the final word on the appropriate sentence, and that 18 U.S.C. § 3553(a) is now the governing sentencing law. The Manual offers no understanding of this framework or of the advisory role of the Guidelines within it, as constitutionally mandated. To the contrary, the mandatory language of the Manual would lead one to believe, wrongly, that the

Guidelines continue to represent the sum total of appropriate considerations in any sentencing.

The Manual is not only silent about *Booker*, but in numerous instances recommends a course of action that is in direct conflict with the *Booker* decision and the Constitution. As one example, § 5K2.0 continues to rely explicitly on 18 U.S.C. § 3553(b)(1), which was excised as unconstitutional over two years ago. See U.S.S.G. § 5K2.0(a)(1), (c). As another, the Manual states that numerous aspects of the defendant's history and characteristics are never or not ordinarily relevant, though such matters "shall" be considered under § 3553(a)(1).

We would be happy to work with Commission staff on how to harmonize these and other guideline provisions with the state of the law post-*Booker*, as well as how and where to insert *Booker*'s holding and citation as is done with other cases in the Manual, even those the Supreme Court has since questioned, such as *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997). See *Booker*, 543 U.S. at 240 & n.4.

We would also welcome the opportunity to work with staff on improving the procedural advice set forth in U.S.S.G. § 6A1.3. *Watts*, for example, is cited for the proposition that a court may consider any information with "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3, comment., but the Court said no such thing. See 519 U.S. at 157. It said that a preponderance of the evidence standard is generally permissible, though a clear and convincing standard may be required under some circumstances, and said nothing to denigrate the quality of the evidence required at sentencing.

II. Immigration

Since our last communication with the Commission, we have studied the immigration legislation that is currently under consideration by Congress. Unlike the Department, which has urged the Commission to amend § 2L1.2 without waiting to hear from Congress, we urge the Commission to proceed with caution and with respect for congressional intent.

If the Commission amends § 2L1.2 this year, it must avoid promulgating a guideline that conflicts with legislation the 110th Congress is likely to enact. H.R. 1645, introduced in the House on March 22, 2007, and S. 2611, passed by the Senate last term, have identical penalty structures. The Commission must not promulgate a guideline that is more severe, more complex, or creates more unwarranted disparity than this penalty structure.

The Department suggests that its proposal is consistent with what Congress is considering, and maintains that it merely seeks simplicity and not increased severity. See 3/20/07 Testimony of John C. Richter at 5. This is not accurate. Option 7 is more complex, more severe, and would create more unwarranted disparity than the penalty

structure set forth in H.R. 1645 and S. 2611, and in some respects is more severe than current § 2L1.2.

H.R. 1645 and S. 2611 set forth statutory maxima of 20, 15, 10 and 2 years for illegal re-entry. Predicates for the 20-year maximum are (1) a "felony" for which the defendant was sentenced to not less than 60 months, (2) three "felonies," or (3) murder, rape, kidnapping, a "felony" described in chapter 77 (relating to peonage or slavery), or a "felony" described in chapter 113B (relating to terrorism). See H.R. 1645, § 236; S. 2611, § 207. In contrast, Option 7:

- would not require the prior offense to be a felony;
- would set a lower threshold of 48 months for the length of sentence imposed;
- would treat two prior convictions sentenced to as little as 12 months the same as one prior conviction sentenced to 48 months (in contrast with H.R. 1645 and S. 2611, which treat three "felonies" the same as one prior "felony" sentenced to at least 60 months)
- would add numerous specific *and* categorical offenses in the areas of child pornography and child sexual abuse;¹
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "terrorism offenses" than for any other kind of offense (except "national security"), and would use a definition of "terrorism offense" that requires a complex factual inquiry far afield of the offense of conviction;²
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "national security offenses" than for any other kind of offense (except "terrorism"), and would define "national security offense" as any offense "covered" in Chapter 2, Part M, which includes offenses that bear no resemblance to terrorism with offense levels as low as 6, 13, 14 and 18.

¹ Those are (1) an offense described in 18 USC 2251, 2251A, 2252, 2252A, or 2260, (2) any offense under state or local law consisting of "conduct" that would have been such an offense had it been committed within the special maritime or territorial jurisdiction, (3) an offense in which the victim had not attained the age of 18 and is "an offense described in 18 USC 2242," (4) an offense in which the victim had not attained the age of 18 and is a "forcible sex offense," (5) an offense in which the victim had not attained the age of 18 and is "statutory rape," (6) an offense in which the victim had not attained the age of 18 and is "sexual abuse of a minor."

² Under the case law interpreting the same definition in § 3A1.4, the inquiry is: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant can be held accountable involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? See *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003).

The predicate for the 15-year maximum in H.R. 1645 and S. 2611 is a "felony" sentenced to not less than 30 months. See H.R. 1645, § 236; S. 2611, § 207. For a 12-level increase, Option 7 would not require the prior offense to be a felony, and would set a lower threshold – of 24 months – for the length of sentence imposed.

Predicates for the 10-year maximum in H.R. 1645 and S. 2611 are (1) three or more misdemeanors, or (2) a "felony." See H.R. 1645, § 236; S. 2611, § 207. Current § 2L1.2 requires an 8-level increase for an aggravated felony not covered by previous subsections, and a 4-level increase for any other felony or three or more misdemeanor crimes of violence or drug trafficking offenses. Option 7 would require an 8-level increase for any offense sentenced to as little as 12 months (even if a misdemeanor) or any three offenses sentenced to at least 90 days, and a 4-level increase for a felony not covered by previous subsections or any one offense sentenced to at least 90 days. As explained in our letter of March 16, Option 7 would result in an 8- or 4-level increase in some instances where currently there would be no increase.

Again, we urge the Commission to provide us with the data runs for Options 7 and 8. If we receive the data in sufficient time before the April 18 meeting at which the Commission plans to vote, we will submit further comments, and probably an Option 9 that more closely mirrors congressional intent than any of the options proposed thus far.

III. Criminal History

During the hearing, the Department asserted that the criminal history score is already "a very good indicator of the risk of recidivism," and that "excluding more offenses will not improve the ability of criminal history score to identify those offenders who provide a greater risk of recidivism." See Tr. 3/20/07, Testimony of Jonathan Wroblewski at 9, 11.

These assertions are not statistically supportable. For example, according to the Commission's statistics, defendants with two criminal history points have a *lower* risk of recidivism of any kind – including being rearrested or violating the terms of supervised release or probation – than defendants with one criminal history point, yet they are lumped into Criminal History Category II irrespective of the reason for those two points. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 23; U.S.S.G., Ch. 5, Pt. A, Sentencing Table. Thus, a defendant with two prior convictions for driving without insurance could receive two criminal history points, be placed into Criminal History Category II, and denied safety valve under the current rules.

There is no data of which we are aware that shows that minor offenses are a good predictor of recidivism. The Fifteen Year Report states that including minor traffic offenses in the criminal history calculation may have an "unwarranted adverse impact" on minorities "without clearly advancing a purpose of sentencing," and that there are many other such possibilities. See *Fifteen Years of Guideline Sentencing: An Assessment*

of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform at 134 ("Fifteen Year Report"). Here, the Fifteen Year Report cites a 2003 paper by Blackwell, which would shed further light on the subject, but we are told it is not available to the public. And though a study on the relationship between recidivism risk and minor offenses is mentioned in one of the recidivism reports, that study either has not been completed or has not been published. See U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004).

Assigning only half a point for countable minor offenses would not alleviate the current problems with U.S.S.G. § 4A1.2(c). In our experience, convictions for the minor offenses listed in subsection (c)(1) reflect conduct that does not indicate either a need to protect the public or a likelihood of recidivism. For this reason, counting such offenses in the criminal history score – even by a fraction of a point – results in an unwarranted inflation of the criminal history score of many defendants. The addition of even a half point for such offenses would likely have a disparate impact on minorities, in some cases making them ineligible for safety valve treatment. As we noted in our previous letter and at the hearing, motor vehicle offenses frequently reflect the limited financial circumstances of the defendant. Adding even a half point for such offenses would result in harsher treatment, under the guidelines, for economically strained defendants.

Assigning even a half a point to these offenses will also perpetuate the unwarranted disparity caused by the current version of § 4A1.2(c), which depends upon the various state statutory schemes. Our earlier letter provided some examples of states in which some of the minor offenses are always counted because they carry a maximum sentence of more than one year. Set forth below is a more comprehensive account of misdemeanor offenses that would be excluded under subsection (c)(1) but for the fact that the state authorizes punishment of imprisonment for more than one year. We also note that, in addition to those states mentioned in our previous letter, Colorado permits sentences of more than one year for some of the minor offenses.

Colorado: Each of the following offenses is a misdemeanor under state law punishable by a maximum of eighteen months of imprisonment, *see* Colo. Rev. Stat. § 18-1.3-501:

- Driving after revocation of license, Colo. Rev. Stat. § 42-2-206;
- Professional gambling, Colo. Rev. Stat. § 18-10-103;
- Fish and game violations – e.g., illegal taking of black bears, Colo. Rev. Stat. § 33-4-101.3.

Iowa: Each of the following offenses is a misdemeanor under state law punishable by a maximum of two years imprisonment:

- Gambling, Iowa Code § 725.7 (if the amount involved exceeds \$100);
- Prostitution, Iowa Code § 725.1.

Maryland: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Gambling: playing "thimbles," "Little Joker," "Craps," etc. for money, Md. Code Ann., Crim. Law § 12-103(a) (up to 2 years);
- Insufficient funds check ("Misdemeanor Bad Check"), less than \$500, Md. Code Ann., Crim. Law §§ 8-103, 8-106(b) (up to 18 months);
- Non-support, Md. Code Ann., Fam. Law § 10-203 (up to 3 years);
- Resisting or interfering with arrest, Md. Code Ann., Crim. Law § 9-408 (up to 3 years).

Massachusetts: Each of the following offenses is a misdemeanor under state law and is punishable by up to two-and-a-half years in the house of correction:

- Reckless driving, Mass. Gen. Laws ch. 90 § 24(2)(a);
- Leaving the scene of an accident (with or without injury or property damage), Mass. Gen. Laws ch. 90 § 24(2)(a), (a1/2)(1);
- Resisting arrest, Mass. Gen. Laws ch. 268 § 32B.

Pennsylvania: The following are misdemeanors under state law and punishable by up to five years:

- Misdemeanor offenses relating to gambling and pool selling, 18 Pa. Cons. Stat. Ann. §§ 5513, 5514.

South Carolina: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Failure to obey a police officer by failing to stop for siren or flashing light, S.C. Code § 56-750(B)(1) (up to three years);
- Fishing or trespassing in private fish or oyster breeding ponds, S.C. Code Ann. § 50-13-350 (up to three years);
- Insufficient funds check over \$1000, S.C. Code Ann. § 34-11-90(b) (up to two years);
- Hunting bears out of season or in violation of the law, S.C. Code Ann. 50-11-430 (up to two years);
- Trespass upon state park property, S.C. Code Ann. § 51-3-150 (up to two years).

In contrast to these states where the current version of U.S.S.G. § 4A1.2(c) requires that certain minor offenses are always counted, other jurisdictions have statutory schemes that insure that the offenses listed in § 4A1.2(c)(1) are never counted because the state does not authorize a term of probation or imprisonment for 30 days or more.

Thus, under the current version of the guidelines, a defendant convicted of reckless driving in Massachusetts will always have that conviction counted (because it carries a possible sentence of more than one year imprisonment), while a defendant

convicted of *the exact same conduct* across the state line in New Hampshire will *never* see that conviction counted because the maximum sentence in New Hampshire for reckless driving (unless injury or death result) is a fine and loss of license, N.H. Rev. Stat. Ann. § 265:79.

In Texas, the maximum punishment for gambling offenses and fish and game violations is a fine. *See* Tex. Penal Code §§ 12.23 & 47.02 (gambling offense punishable up to a maximum fine of \$500); Tex. Parks & Wild. Code § 66.019 (offense relating to fishing reports punishable by a maximum fine of \$500); Tex. Parks & Wild Code § 90.011 (maximum fine of \$ 500 for offenses relating to access to protected freshwater areas).

In New Hampshire, the maximum sentence for disorderly conduct (unless committed after a request to desist) is a fine of \$1,000, N.H. Rev. Stat. Ann. §651:2III-a. Driving without a license (first offense) carries a fine of \$1,000; N.H. Rev. Stat. Ann. § 263:1; and fish and game violations (where no human injury or death result) are punished by a fine and/or loss of hunting or fishing license, N.H. Rev. Stat. Ann. § 207:46.

In Pennsylvania, certain fish and game violations can only be punished by a fine. For example, a violation of 30 Pa. Cons. Stat. § 2703 (fish license violation) carries a fine of up to \$50. *See* 30 Pa. Cons. Stat. § 923(a)(3). A violation of 34 Pa. Cons. Stat. § 2711 (unlawful acts concerning licenses) carries a fine of up to \$200. *See* 34 Pa. Cons. Stat. § 925.

In Alabama, driving without a license is a misdemeanor punishable by a maximum fine of \$100. Ala. Code Ann. § 32-6-18.

In South Carolina, a first offense of driving with a license that has been suspended for failure to pay a motor carrier property tax is punishable by a maximum fine of \$50, and a second offense carries a maximum punishment of a fine of \$250. S.C. Code Ann. § 12-37-2890.

To resolve these and other problems inherent in the current guideline structure, U.S.S.G. § 4A1.2(c) should be amended as we proposed in our March 13th letter.

IV. Mandatory Minimums

Mandatory minimums create unwarranted uniformity and interfere with proportionality by treating different offenses and offenders the same. *See* Brief Amicus Curiae of Senators Kennedy, Hatch and Feinstein, *United States v. Claiborne*, 2007 WL 197103 **13, 28-29 (Jan. 22, 2007). When the Commission reflexively builds mandatory minimums into offense guidelines, the resulting sentences are not based on the purposes of sentencing but on politics. The Commission's choice to build mandatory minimums into the drug guidelines without independent study has resulted in disproportionately severe sentences and unwarranted uniformity, contrary to the goals of the Sentencing Reform Act. *Id.* at ** 21, 29. We fully agree with the Judicial

Conference that the Commission should not repeat this mistake with other offenses, but should develop guidelines irrespective of the mandatory minimum and allow § 5G1.1(b) to operate when necessary.

Exacerbating the lack of a sound policy basis, the guidelines spawned by mandatory minimums do not just meet mandatory minimum levels, but exceed them. As we noted in our testimony, the Commission has acknowledged that "[o]ver 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels." *Fifteen Year Report* at 54. This is true for all drug offenders, not just crack offenders. *Id.* It was suggested that this may no longer be accurate because of the effect of the safety valve and the mitigating role cap since 2001. However, the analysis done for the Fifteen Year Report controlled for safety valve by excluding cases in which it was applied. *Id.* at D-9. Moreover, the safety valve does not successfully apply to all low-level offenders as Congress intended. See Jane L. Froyd, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). We expect that the mitigating role cap has had little effect in ameliorating the excess, since the extent of the reduction was sharply cut back only two years after it was promulgated. See App. C, amend. 640 (Nov. 1, 2002), amend. 668 (Nov. 1, 2004).

The proposed sex offense amendments would continue on the same misguided course. Examining the facts of all of the reported cases involving a conviction under the four statutes with new mandatory minimums under the Adam Walsh Act (18 U.S.C. §§ 2241(c), 1591, 2422(b), and 2423(a)), we found that the guideline range under the published proposals for offenders in Criminal History Category I would exceed the mandatory minimum in every case, not in an aggravated case or an unusual case, but the standard case, because of specific offense characteristics that are inherent in the basic unadorned offense. See 3/6/07 Comments on Proposed Amendments Relating to Adam Walsh Act at 15-16, 18-24.

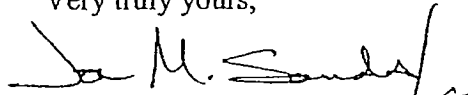
We urge the Commission to publish a current report on mandatory minimums, including data on the extent to which guideline sentences exceed mandatory minimum levels. The Commission's report is sixteen years old. Congress is seriously questioning the wisdom of both the crack/powder disparity and mandatory minimums generally. A current report would be of particular interest to Congress, the criminal justice community, and the public at this time.

V. Sentence Reduction

We join in the letter of the American Bar Association responding to the Commission's questions at the hearing on the topic of standards and examples for a motion for sentence reduction under § 3582(c)(1).

As always, we hope that our comments and testimony have been helpful.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Martin Richey, Visiting Assistant Federal Public Defender
Alan Dorhoffer, Senior Staff Attorney
Kelley Land, Assistant General Counsel
Tom Brown, Assistant General Counsel
Judith Sheon, Staff Director
Ken Cohen, General Counsel



March 19, 2007

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

Re: Issue for Comment: Reduction in Sentence Based on BOP Motion

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) offers these comments concerning the new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter sets out FAMM's position on early release, addresses matters raised by the Department of Justice in its submission of July 14, 2006, and answers the Commission's specific questions in the Issue for Comment.

FAMM welcomes the Commission's continued interest in this area. We have long championed a reading of the early release authority consistent with congressional intent that it be used in cases including, but not limited to, impending death or debilitating circumstances. In 2001 we proposed specific language to the Commission that, in our view, would further Congress's intent that there be a way to take account of extraordinary and compelling circumstances that were not or could not be addressed at sentencing.¹

Our concern was motivated by, among other things, the many stories we had heard from or about prisoners whose circumstances had changed so dramatically that continued service of their sentences would be unjust or meaningless. We began to assist prisoners in their petitions and were stunned to learn how seldom the Director of the Bureau of Prisons exercised the authority to seek sentence reductions.

Our examination of the practice revealed that the Bureau takes a very narrow view of its mandate. Although 18 U.S.C. § 3582 (c)(1)(A) speaks of "extraordinary and compelling reasons," in practice, the Director has moved for a reduction in a mere handful of cases each year and only on behalf of terminally ill prisoners, or more recently, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."² In the years since our letter, and despite the significant growth in the

¹ See Letter to Honorable Diana J. Murphy and Commissioners (June 25, 2001).

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federal prison population, it appears that the Bureau has used the authority even more sparingly.³ This may be due to a more stringent set of criteria enunciated by the Department of Justice in its recent submission to the Commission on this matter.⁴ The Bureau of Prisons has recently published for public comment a proposed rulemaking that would limit early release motions to those on behalf of prisoners within 12 months of death or who suffer a medical condition so debilitating that the prisoner cannot attend to fundamental bodily functions and personal care.⁵

FAMM certainly agrees with the Department that prisoners who are terminally ill and those debilitated by physical or mental illness merit consideration for early release under 18 U.S.C. § 3582(c)(1)(A)(i). However, there are other classes of extraordinary and compelling reasons that merit consideration as well, including but not limited to cases where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children, or where the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence. FAMM endorses the approach taken by the American Bar Association in its recommendations to the United States Sentencing Commission, as you consider adopting a policy statement to guide courts considering early release motions.⁶

² See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. R. 191, Exhibit II (Vera Inst. Just.).

³ See Testimony of Stephen A. Saltzburg on Behalf of the American Bar Association (March 20, 2007) at 7 n.4 (The Bureau of Prisons has filed between 15 and 25 early release motions annually since 2000.). While the federal prison population has more than tripled, from 58,838 in 1990 to 195,623 today, the number of motions has remained fairly constant, never exceeding 30 in any given year. See U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2000*, August 2001, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf>.

⁴ Letter from Michael J. Elson, Senior Counsel to the Attorney General to The Honorable Ricardo H. Hinojosa at 1 (July 14, 2006) (DOJ Letter).

⁵ See 71 Fed. Reg. 76619-01 (Dec. 21, 2006) ("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our authority under these statutes and our current policy." See 71 Fed. Reg. at 76619-01.

⁶ See letter from Denise Cardman, Governmental Affairs Office, American Bar Association to Honorable Ricardo H. Hinojosa (March 12, 2007) attachment, Proposed

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Congress intended that early release authority be broad.

Congress and, until recently, the Department, have consistently enunciated a generous view of the breadth of the early release authority, contemplating its use for changed circumstances beyond serious or terminal illness. The Bureau's existing authority to seek early release dates from the 1976 Parole Commission and Reorganization Act.⁷ The BOP issued its § 4205(g) regulations in 1980. Those rules provided that early release motions under 18 U.S.C. § 4205(g) were to be brought "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."⁸

Significantly, when Congress in the Sentencing Reform Act (SRA), eliminated parole in 1984, it kept intact the courts' existing authority to reduce sentences for a range of reasons. 18 U.S.C. § 3582(c)(1)(A)(i). Congress crafted 18 U.S.C. § 3582(c)(1)(A)(i) in 1984 fully aware of the Bureau's existing regulations, which provided a relatively broad use of sentence reductions in extreme cases

The SRA thus in no way limited the courts' existing authority. This conclusion is supported by the legislative history, demonstrating that Congress embraced a broad view of the potential underlying reasons to bring an early release motion. The Senate Judiciary Committee's Report on the Sentencing Reform Act states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of

Policy Statement, § 1B1.13 (Revised March 9, 2007). FAMM's most recent letter on this subject was one of several that collectively endorsed the ABA's approach. *See* Letters from Julie Stewart and Mary Price (July 14, 2006); Mark Flanagan and David Debold (PAG) (July 13, 2006); and Jon Sands (Federal Public and Community Defenders) (July 14, 2006).

⁷ 18 U.S.C. § 4205(g).

⁸ 28 CFR § 572.40 (1980).

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imprisonment.⁹

By not limiting the courts' existing sentence reduction authority, Congress signaled its intention that the authority be used broadly, if sparingly, to reduce a determinate sentence in appropriate circumstances. Had Congress wanted to limit the new law prisoners' access to sentence reductions, it would have stated conditions in the SRA, or indicated something in the legislative history. It did not.

Further support for broad authority is found in another part of the SRA. Congress charged the newly created United States Sentencing Commission (not the Bureau of Prisons) with the task of issuing policy statements to guide courts considering early release motions brought to them by the Bureau.¹⁰ The only limitation the SRA made to existing authority was to instruct that rehabilitation alone could not constitute a sufficiently extraordinary or compelling circumstance. Congress did not eliminate rehabilitation as a reason, but required that it be combined with others. It is clear that Congress considered rehabilitation a reason for early release if found in combination with at least one other reason.

Unwarranted restrictions on the early release mechanism would subvert congressional intent that courts be able to entertain early release motions for a variety of circumstances, provided they are extraordinary and compelling and reflect more than rehabilitation alone.

The Department of Justice has long endorsed a broad view of the sentence reduction authority.

The Bureau of Prisons, a DOJ agency, recognized that Congress intended that it take a robust approach to the discretion given it in the Sentencing Reform Act when considering early release for prisoners serving determinate sentences. In the ten years following the passage of the SRA, the BOP operated under the 1980 rule to bring early release motions under 18 U.S.C. § 3582(c)(1)(A)(i). Those regulations covered sentence reduction motions under both § 4205(g) and § 3582(c)(1)(A)(i), making early release available "in particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. This section may be used, for example, *if there is an extraordinary change in an inmate's personal or family situation*

⁹ S. Rep. No. 98-225, at 55, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3132, 3238-39 (emphasis added.).

¹⁰ See 28 U.S.C. § 994(t).

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*or if an inmate becomes severely ill.”*¹¹

Following the SRA, the Bureau published new regulations in 1994 “to include provisions applicable to inmates who were sentenced under the new law sentencing guidelines that eliminated parole.” 59 Fed. Reg. 1238. The new rules thus were inclusive, crafted to bring new law prisoners into the program and treat them much as the old law prisoners were treated. The Bureau affirmed existing policy in important respects and even added specific provisions to underscore that the authority could be used in medical and in non-medical cases.¹²

Significantly, the Bureau did not publish the 1994 rule for notice and comment before adopting it. “Because the revised rule *imposes no additional burdens or restrictions* on inmates, the Bureau finds good cause for exempting the provisions of the Administrative Procedures Act (5 U.S.C. [§] 553) [APA] requiring notice of proposed rulemaking”¹³ Further underscoring the continuity of authority to exercise discretion, the Bureau stated in the final rule that “the standards to evaluate the early release *remain the same.*”¹⁴

That the Bureau eschewed notice and comment because no additional restrictions were placed on prisoners and because the evaluation standards remained the same means that according to the Bureau, the new rule did not change the ability of a prisoner to seek and the Bureau to move for a sentence reduction in the event there is an “extraordinary [and compelling] change in an inmate’s personal or family situation *or if an inmate*

¹¹ 48 FR 48972-01, 48973, 1983 WL 105766 (emphasis added).

¹² See 28 C.F.R. § 571.61 (directing prisoner to describe release plan and “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment.”); *id.* at § 571.62(a) – (c) (describing different processes to follow in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

¹³ 59 Fed. Reg. 1238, 1994 WL 3184 (emphasis added). The Bureau did eliminate “prison overcrowding” as one of the acceptable bases for a sentence reduction motion, added the “extraordinary and compelling” language and required a release plan for prisoners. 59 Fed. Reg. 1238.

¹⁴ 59 Fed. Reg. 1238 (emphasis added).

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becomes severely ill.” Eliminating consideration of extraordinary changes in a personal or family situation would have imposed an additional restriction on inmates, who previously would have been able to seek a sentence reduction for other than imminently terminal or debilitating conditions. Such a restriction would have in turn required notice and comment under the Administrative Procedures Act. The Bureau did not intend to eliminate those conditions and thus saw notice and comment as unnecessary. Put another way, if the Bureau intended to eliminate extraordinary changes to a personal or family situation, this would represent a new restriction and thus trigger the notice and comment requirement.

The Department's New Position is Unwarranted, Insupportable, and Unduly Restrictive

We address several of the Department's points set forth in its letter of July 14, 2006: (1) its concern that a proposal broader than that urged by the Department would contravene congressional intent to abolish parole and establish a system of determinate sentencing; (2) its warning that it would be futile for the Commission to adopt a policy statement broader than that urged by the Department; and (3) its recommendation that the resulting sentence reduction be determined by the Department.

(1) The Department of Justice warns the Commission that to take a broad view of the early release authority would be akin to subverting congressional intent to establish determinate sentencing through the elimination of parole and truth in sentencing reforms ushered in by the SRA.¹⁵ It urges the Commission to take a very narrow view of the authority, limited to cases where the prisoner is expected to die within twelve months or is suffering a medical condition that is “irreversible and irremediable and prevents the prisoner from attending to basic bodily functions and personal care without substantial assistance from others.”

Crafting a policy statement consistent with congressional intent will hardly subvert the goals of the SRA. Congress specifically provided for a sentence reduction authority for extraordinary and compelling circumstances in the SRA. It included only one specific limitation: rehabilitation alone would not be sufficient. Had Congress been concerned that sentence reductions for extraordinary and compelling circumstances would undermine the goal of determinate sentencing, it would not have specifically provided for such a broad view of the potential reasons for sentence reductions.

(2) The Department warns in its submission that a Commission policy statement that is broader than the Department's practice will be ignored as a “dead letter.” The Department cites no authority for its extreme position. The Commission should not consider itself limited by this warning. The SRA does not commit the definition of what constitutes extraordinary and compelling circumstances to the Department or to the

¹⁵ DOJ Letter at 3.

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Bureau. It commits the job of defining the contours of sentence reductions motions to the U.S. Sentencing Commission. We submit that the Bureau has no authority to categorically eliminate from judicial consideration all cases except those presenting terminal illness and debilitating conditions. The Bureau is charged with at most considering whether individual prisoner circumstances meet the criteria and if so, submitting the motion to the sentencing court. It cannot categorically limit the conditions and criteria without implicating separations of powers concerns.¹⁶

Further, and as evidenced by the discussion of how the Department has treated the authority in BOP regulations thus far, future Departments of Justice, just like previous ones, may not take so restrictive a view of when to bring sentence reduction motions. The Commission should not indulge the current Department's view of the matter.

(3) FAMM opposes limiting the extent of the reduction upon resentencing to that recommended by the Bureau. There is no indication in the statute, the legislative history, or elsewhere, that courts can be limited in the extent of reduction. Courts are competent to consider the BOP's submission on the matter of extent, but should not be considered bound by the recommendation.

Finally, we note that the circumstances proposed by the Bureau of Prisons (impending death or near complete incapacitation), while certainly appropriate early release precursors, do not express the breadth of medical and mental health conditions that would warrant early release. We find the personal hygiene limitation to be particularly curious. There are certainly changed medical conditions that render a prisoner physically or psychologically damaged that do not limit the prisoner's ability to bathe or use the bathroom. The limitations suggest that contours of extraordinary and compelling circumstances should be defined by the amount of staff trouble and time taken up by the personal hygiene needs of incontinent prisoners.

Issue for Comment Questions

FAMM believes that changed circumstances can include those that were known to the court at the time of sentencing but have changed significantly, such as an autoimmune disease in remission at the time of sentencing that subsequently is diagnosed; or a significant change in an existing medical condition, such as total blindness brought on

¹⁶ See Testimony of Steven A. Saltzburg at 14-15 & n.10 ("Because the Commission is an agency of the judicial branch, any effort by the executive . . . to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimensions . . ."); see also Letter from John Sands (March 13, 2007) at page 5-6 (pointing out that "[u]nilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem.").

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by pre-existing diabetes or pre-existing glaucoma; or a subsequent change in the law that the court was forbidden from taking into account at the time of sentencing and by its nature presents a compelling and extraordinary case for reduction.

As discussed above and evidenced in our endorsement of the ABA's model guideline, FAMM does not believe that the authority should only be used to respond to medical conditions. Nor does FAMM believe that only conditions that are considered terminal within twelve months should be accounted for. For example, a failure to diagnose a medical condition may render an otherwise treatable condition terminal but not necessarily terminal within twelve months. Such a situation is extraordinary and compelling and courts should be able to address it.

The Commission should provide for a combination approach. Such an approach was contemplated by Congress in 28 U.S.C. § 994 (rehabilitation alone is insufficient).

The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances.

Thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

Attachment:

February 20, 2007

Office of General Counsel
Bureau of Prisons
320 First Street, NW
Washington, D.C. 20534

Re: Proposed Rule
Reduction in Sentence for Medical Reasons
28 CFR Parts 571 and 572

To Whom It May Concern:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to comment on the proposed rule published on December 21, 2006, entitled "Reduction in Sentence for Medical Reasons." The ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering."

Significantly for present purposes, in 2004 the ABA House urged the Department of Justice to make greater use of the federal sentence reduction authority in motions under §§ 3582(c)(1)(A)(i). It also asked the United States Sentencing Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." It is against this background of strong and consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances that we consider the proposed BOP regulation.

The proposed regulation would categorically restrict the circumstances in which the Bureau of Prisons will move for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) to two classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." The proposed regulation represents a significant curtailment of the policy reflected in BOP's existing regulations, as we explain in greater detail in the following section, which BOP makes little effort to justify.¹

Insofar as the proposed regulation would impose strict limits on the kinds of cases that will qualify for sentence reduction under § 3582(c)(1)(A), we believe it is beyond BOP's authority, for three reasons. First, the proposed regulation would place unwarranted substantive limitations on the circumstances in which a prisoner may be considered for sentence reduction. Second, the proposed regulation would render nugatory the United States Sentencing Commission's statutory policy-making authority, raising questions of constitutional dimension. Third, the proposed regulation would effectively prevent sentencing courts from even considering sentence reduction in a variety of situations, frustrating congressional intent and raising similar constitutional concerns. The following discussion elaborates these three points in turn.

I.

For more than 30 years, BOP has been the gatekeeper for courts considering prisoner requests for sentence reduction under § 3582(c)(1)(A)(i) and its old law predecessor 18 U.S.C. § 4205(g). And for more than 25 years, BOP's published regulations have given it broad latitude to ask courts to reduce a prisoner's sentence in a variety of extraordinary situations. In its first regulations under the old law analogue to § 3582(c)(1)(A)(i), BOP asserted that sentence reduction may be sought in "particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. *This section may be used, for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill.*" 28 C.F.R. § 572.40 (1980), 45 Fed. Reg. 23365-66 (Apr. 4, 1980). *See also* 48 Fed. Reg. 48972-01, 48973, 28 CFR § 572.40(c)(1983)(adding "to relieve prison overcrowding" as a basis for seeking sentence reduction).

After enactment of the Sentencing Reform Act ("SRA") in 1984, BOP processed sentence reduction motions for new law sentences under the same set of regulations and policies it used for sentence reduction motions under the analogous old law authority. When in 1994 BOP crafted a new set of regulations, they specifically applied to both old

¹ In the introductory summary of the proposed regulation, BOP explains the proposed revision of its regulations as a "more accurate[] reflect[ion of] our authority under these statutes and our current policy." Without some more extended attempt to reconcile the broad statutory language with the crabbed eligibility criteria in the proposed regulation, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or § 4205(g), much less on the authority Congress intended to give courts under these statutes.

and new law prisoners. 28 C.F.R. § 571.61 et seq., 59 Fed. Reg. 1238 (Jan. 7, 1994) (emphasizing “the standards to evaluate the early release remain the same” while adding provisions for those inmates “sentenced under the new law sentencing guidelines that eliminated parole”). *See also* BOP Program Statement 5050.44, Compassionate Release: Procedures For Implementation of 18 U.S.C. 3582 (c)(1)(A) & 4205(g) (Jan. 7, 1994).² The 1994 regulations affirmed existing policy in important respects and even added specific procedural provisions underscoring that sentence reduction could be sought in both medical and non-medical cases.³ So sure was BOP that its discretion could be exercised much as before, that it did not even publish the new rules for notice and comment.⁴ The blanket restrictions BOP now proposes to place on its own ability to seek sentence reduction in a broad range of equitable circumstances thus represent a significant change in BOP’s existing regulations, and fly in the face of an unbroken line of regulatory policy dating back to 1980.

Moreover, the new blanket restrictions on BOP’s ability to seek sentence reduction are inconsistent with Congress’ clear intention to allow sentence reduction in a broad range of extraordinary equitable circumstances. When BOP’s authority to seek sentence reduction was first enacted more than 30 years ago, it was designed to expedite BOP requests for relief in behalf of a prisoner that theretofore required a request for clemency to be submitted to the President through the Office of the Pardon Attorney.⁵ In the SRA, besides providing that motions for sentence reduction be predicated on “extraordinary and compelling reasons,” Congress did not otherwise constrain BOP’s existing discretion to bring motions to the sentencing court in cases warranting a gesture of compassion. In

² The revised policy continued the same description of potentially eligible cases, except that “prison overcrowding” was eliminated as an appropriate basis, and the legislative language “extraordinary and compelling” was added. Prisoners or their proxies were also required to provide a release plan. 59 Fed. Reg. 1238. Significantly for present purposes, applicable case-processing procedures underscored the propriety of petitioning courts in both medical and non-medical cases. *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment.”) (emphasis added); *id.* § 571.62(a)–(c) (describing different processes to follow in medical versus non-medical-based requests from prisoners).

³ *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment.”); *id.* at § 571.62(a) – (c) (describing different processes to following in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

⁴ Announcing the final rule without resort to the notice and comment process ordinarily applicable to regulatory changes, the Bureau stated that “the standards to evaluate the early release remain the same. . . . Because the revised rule imposes no additional burdens or restrictions on inmates, the Bureau finds good cause for exempting the provisions of the [APA] requiring notice of proposed rulemaking” 59 Fed. Reg. 1238.

⁵ *See U.S. v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978)(same).

fact, Congress embraced a generous view of the breadth of that discretion, contemplating its use for changed circumstances beyond serious illness. *See, e.g.*, S. Rep.No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (release authority can be used to address “the unusual case in which the defendant’s circumstances are so changed . . . that it would be inequitable to continue . . . confinement. . . .”) *id.* at 55 (reduction may be justified for “changed circumstances” including “severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction . . .”).

There is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court’s authority to reduce a sentence under § 3582(c)(1)(A)(i), or BOP’s authority to seek such a reduction, to be limited to medical cases, much less cases in which a person is a year or less from death, or so severely disabled as to be incontinent and unable to care for themselves. And neither the courts nor BOP itself have to date understood it so narrowly. The specific reference to a prisoner’s “rehabilitation” in 28 U.S.C. § 994(t) as being insufficient “alone” to warrant sentence reduction is further evidence that Congress did not intend that the courts’ authority in § 3582(c)(1)(A)(i) should be limited to the two narrow categories of cases identified in the proposed BOP regulation, where “rehabilitation” is surely irrelevant, “alone” or otherwise.

II.

We also object to the proposed regulation because of its evident intent to preempt the United States Sentencing Commission from making policy for the courts considering motions filed under § 3582(c)(1)(A)(i), as Congress authorized it to do under 28 U.S.C. § 994(t). As previously noted, the ABA has recognized the primacy of the policy-making role entrusted to the Commission by Congress under § 994(t). It has also urged the Sentencing Commission to “promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances.” As recently in July of 2006, the ABA urged the Commission to develop “the criteria to be applied and a list of specific examples [of extraordinary and compelling reasons],” as contemplated by 28 U.S.C. § 994(t), rather than defer to case-by-case decision-making by the Bureau of Prisons. It is gratifying that in the past year the Commission has turned to this policy-making task, and it is presently seeking additional comment regarding appropriate criteria for sentence reduction under recently promulgated § 1B1.13 of the Sentencing Guidelines (“Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons”). However, the Department of Justice has warned the Commission that any policy it adopts that is inconsistent with BOP’s operating sentence reduction policy (the same policy that BOP now proposes to formalize in a regulation) will be a “dead letter.” *See* Letter from Michael Elston, Criminal Division, to Chairman Hinojosa, July 14, 2007 (“DOJ letter”).

We do not doubt that, as a practical matter, BOP can choose to frustrate the Commission’s policy-making role through case-by-case decision-making. It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if

BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present "extraordinary and compelling reasons," and that have in the past been thought to present them. *See, e.g.*, the 1980 BOP regulations discussed in section I, and the cases cited in note 4, *supra*. The development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under 28 U.S.C. § 994(t), not to the Bureau of Prisons. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the original sentence, so too is BOP bound to comply with such policies in connection with the reduction of that sentence. While BOP is free to interpret and administer Commission policy as it deems most appropriate, it cannot declare it in advance a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position avoids.

III.

Our final objection to the proposed regulation relates to the limitations it places on the authority of courts under § 3582(c)(1)(A)(i). Because a motion by BOP is a jurisdictional predicate for exercise of a court's authority under § 3582(c)(1)(A)(i), any restrictions that BOP places on its own authority in the proposed regulation would at the same time necessarily also impose analogous restrictions on the authority of courts, restrictions that the ABA believes are unwarranted.⁶ We do not question here that Congress may have intended to make a court's authority *in a particular case* depend upon a BOP motion. But it plainly did not intend BOP to use its regulatory power to foreclose judicial consideration of sentence reduction on an across-the-board blanket basis in a wide variety of situations that arguably present "extraordinary and compelling reasons." As noted above, there is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court's sentence reduction authority in § 3582(c)(1)(A)(i) to be limited to medical cases only, much less the small universe of medical cases defined in the proposed regulation. There is every indication, starting with the broad statutory language and confirmed by specific references in the legislative history, of the SRA and of the Parole Reorganization Act before it, that Congress intended a much broader eligibility criterion. And, to the extent BOP's decision to limit sentence reduction motions to two narrow classes of medical cases would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of constitutional concerns as were noted in the foregoing section. The ABA's position on the authority of the Sentencing Commission to promulgate general policy for courts considering sentence reduction motions would avoid these concerns.

⁶ It is not clear whether BOP intends in the proposed regulations to suggest an opinion about the legal limits of a court's authority under § 3582(c)(1)(A)(i), *see* note 1, *supra*, much less impose its views in this regard upon the judiciary. But because only a BOP motion can trigger judicial authority under § 3582(c)(1)(A)(i), its administrative decision will as a practical matter have exactly this result.

We appreciate the opportunity to provide these comments and hope that they will be helpful.

Respectfully submitted,

Robert D. Evans

Robert D. Evans

President
Martin Pinales
Cincinnati, OH

PRESIDENT ELECT
Carmen D. Hernandez
Washington, DC

FIRST VICE PRESIDENT
John Wesley Hall, Jr.
Little Rock, AR

SECOND VICE PRESIDENT
Stephen R. Glassroth
Montgomery, AL

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Denver, CO

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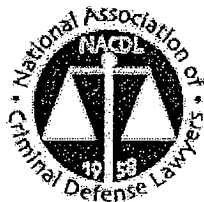
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Chicago, IL

Yi Young

San Francisco, CA

EXECUTIVE DIRECTOR
Norman Reimer



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 20, 2007

Office of the General Counsel - Rules Unit
Bureau of Prisons
320 First Street NW
Washington, D.C. 20534

RE: Proposed Rule re: Reduction in Sentence For Medical Reasons
28 CFR Parts 571 and 572

To Whom It May Concern:

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 13,000 direct members — and 30,000 affiliate members from 92 state, local, and international organizations — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Through this letter, we join in the comments submitted separately today by the American Bar Association, the Federal Defenders and Families Against Mandatory Minimums concerning the Bureau of Prisons' proposed limitations on the exercise of its authority under 18 U.S.C. § 3582(c)(1)(A)(i). The Bureau's Central Office processes applications for relief pursuant to this provision on behalf of less than one-tenth of one percent of federal prisoners each year. Accordingly, in terms of administrative efficiency, nothing is to be gained through diminution of the agency's ability to petition courts on behalf of individual prisoners in appropriate circumstances. However, much may be lost needlessly in terms of serving legitimate penological interests.

Given the importance of this issue, the suggested departure from established practices, and the potential abdication of vested statutory responsibility, we ask that a hearing(s) be held regarding the rule change. We also ask that the Bureau publish for the administrative record those studies and reports that support or otherwise pertain to the purported need for modification, as well as any non-confidential written materials (*i.e.*, letters, memoranda, electronic mail) by agency staff and/or between agency and Department of Justice personnel regarding this issue.

Respectfully submitted,

/s/ Todd Bussert

Todd A. Bussert
Co-Chair, Corrections Committee

[211]

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

March 13, 2007

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

Re: Comments on Criminal History Issues

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the two issues for comment relating to criminal history that were published on January 30, 2007.

I. MINOR OFFENSES

In its current formulation, U.S.S.G. § 4A1.2(c) directs a sentencing court to count all felony offenses for purposes of calculating a defendant's criminal history score. A felony offense is defined as "any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed." § 4A1.2(o). Misdemeanor and petty offenses are generally counted except that the fifteen offenses listed in subsection (c)(1) and offenses similar to them, "by whatever name they are known," are counted only if they resulted in a sentence of a term of probation of at least one year or a term of imprisonment of at least thirty days. This list includes the common minor offenses of disorderly conduct, driving without a license or with a revoked or suspended license, insufficient funds check, local ordinance violations, and resisting arrest. *See* § 4A1.2(c)(1). A number of other offenses, such as truancy and minor traffic infractions, are never counted. *See* § 4A1.2(c)(2).

It appears that the Commission intended that the most common petty offenses that tend to be summarily disposed of by the sentencing authority should not increase a defendant's criminal history score unless the circumstances surrounding the violation resulted in a sufficiently severe deprivation of liberty by the jurisdiction whose interests were at stake. In operation, however, § 4A1.2(c) routinely operates to sweep in misdemeanor and petty offenses for which little or no real punishment or active

supervision was imposed, in a manner that both creates unwarranted disparity and defies common sense.

A study on the recidivism rates for defendants whose previous convictions were for minor offenses is mentioned in one of the recidivism reports, but that study either has not been completed or the data has not been published. See U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004). Meanwhile, our experience tells us that § 4A1.2 consistently over-captures minor and petty offenses that likely do not accurately reflect a defendant's risk of recidivism but affect thousands of defendants across the country by significantly increasing their sentences through elevated criminal history categories and loss of eligibility for the safety valve. In addition, the application of the guideline has become a labor- and time-intensive exercise, difficult for judges, probation officers, and defense attorneys alike. The complexity created by this guideline promotes less accurate decision-making at the time of both plea and sentencing, generates confusion about the sentence a given defendant faces, and gives rise to more appeals.

We believe that misdemeanor and petty offenses should never be counted, even if they are considered felonies under subsection (o) because they are punishable by more than one year of imprisonment. The Commission also should adopt an expansive test for "offenses similar to them," one that encourages common sense judgments and discourages exclusive reliance on a strict elemental analysis. We offer the following proposed amendment to § 4A1.2(c):

Proposal 1:

(c) Sentences Excluded

Sentences for the following prior offenses and for offenses similar to them are not counted:

- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Fare evasion
- Fish and game violations
- Gambling
- Hindering or failure to obey a police officer
- Hitchhiking
- Insufficient funds check
- Juvenile status offenses and truancy
- Leaving the scene of an accident
- Local ordinance violations
- Loitering
- Minor traffic infractions (e.g., speeding)
- Motor vehicle offenses, other than drunk driving or driving while intoxicated

Non-support
Panhandling
Possession of marijuana
Prostitution
Public intoxication or open container
Resisting arrest
Shoplifting
Trespassing
Vagrancy.

Application Note: Because of the differences among state statutory schemes, some minor offenses may carry labels or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.

By eliminating reliance on the sentence imposed as the dividing line between minor offenses that are counted and minor offenses that are not counted, this approach would draw a bright line that is easily applied. It would eliminate the disparity caused when an offense defined by a state as a misdemeanor is counted as a felony under the guideline and the disparity reflected in the sentences imposed for the same offense in different courts. It would eliminate the time-consuming efforts devoted to determining the impact of myriad minor state offenses, which do not often correlate in any meaningful way to the defendant's culpability for the federal offense or risk of recidivism. It would eliminate the need for defendants to depend on a judge's willingness to grant a downward departure for overrepresentation of criminal history in § 4A1.3, the denial of which is insulated from review. It would set forth an appropriately expansive test for similarity. It would streamline federal sentencing and allow sentencing courts to dedicate their time to other, more relevant issues in determining the appropriate sentence.

In the alternative, we offer the following proposal:

Proposal 2:

(c) Sentences Counted and Excluded

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the prior conviction was for an adult offense committed after the defendant had attained the age of 18; (B) the sentence actually served was a term of imprisonment for more than 60 days;

and (C) the offense was committed within three years prior to the commencement of the instant offense:

- False information to a police officer
- Hindering or failure to obey a police officer
- Resisting arrest.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- Fare evasion
- Fish and game violations
- Gambling
- Hitchhiking
- Insufficient funds check
- Juvenile status offenses and truancy
- Leaving the scene of an accident
- Local ordinance violations
- Loitering
- Minor traffic infractions (*e.g.*, speeding)
- Motor vehicle offenses, other than drunk driving or driving while intoxicated
- Non-support
- Panhandling
- Possession of marijuana
- Prostitution
- Public intoxication or open container
- Shoplifting
- Simple possession of marijuana
- Trespassing
- Vagrancy.

Application Note: Because of the differences among state statutory schemes, some minor offenses may carry a label or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.

Although this proposal does not set forth the bright-line approach of Proposal 1, it addresses the unwarranted disparities and unnecessary complexities that § 4A1.2(c) currently produces. We discuss below the current state of § 4A1.2 and explain why the Commission should make the changes we propose.

A. State misdemeanor offenses punishable by more than one year in prison

Some states have misdemeanor offenses that are counted under subsection (c)(1) only because they are punishable by more than one year. As the guidelines currently read, these convictions are always counted as felonies, regardless of the sentence imposed. For example, in Pennsylvania, resisting arrest is a misdemeanor punishable by up to two years in prison. *See* 18 Pa. C.S. §§ 1104, 5104. In Iowa, resisting arrest can be charged as a misdemeanor aggravated assault even when there is no intent to injure and no injury, and is punishable by up to two years in prison. *See* Iowa Code §§ 708.3A(3)-(4), 903.1(2); *State v. Dawdy*, 533 N.W. 2d 551, 556 (Iowa 1995). In South Carolina, "failure to stop for a blue light" is a misdemeanor punishable by 90 days to three years. *See* S.C. Code Ann. § 56-5-750. In Maryland, passing a bad check to obtain goods or services is a misdemeanor punishable by up to eighteen months in prison. *See* Md. Code Ann. § 8-106. And in Massachusetts, leaving the scene of an accident with property damage, Mass. Gen. L. c. 90, § 24(2)(a), operating to endanger (analogous to careless or reckless driving), Mass. Gen. L. c. 90 § 24(2)(a), and resisting arrest, Mass. Gen. L. c. 268 § 32B, are misdemeanors punishable by up to two-and-a-half years in the house of correction. Because a previous conviction for any of these offenses in states that do not punish the offense with imprisonment for more than one year are not counted unless the sentence was a term of probation of at least a year or a term of imprisonment of at least thirty days, while a conviction for the same offenses under the law of the states described above always count, the guidelines institutionalize the unwarranted disparity that the Commission aims to avoid in implementing its statutory directives.

The same problem has even more dire consequences with respect to predicates for the career offender guideline, U.S.S.G. §§ 4B1.1 and 4B1.2, and for enhancements based on prior felony convictions under § 2K2.1(a)(1)-(4). In these states, a misdemeanor conviction for resisting arrest is usually considered a felony conviction for a crime of violence, and convictions for assault and battery routinely count as career offender predicates. We look forward to an opportunity to address this distressing anomaly when the Commission addresses the career offender guidelines next amendment cycle.

In the meantime, the Commission should prevent convictions for minor offenses from being counted solely because they arose in a state where misdemeanors are punishable by more than one year.

In a case currently pending in the District of Massachusetts, the defendant pled guilty in state court to trespassing, disorderly conduct, and resisting arrest. He was fined \$100. The conviction for resisting arrest will drastically increase the defendant's guideline range from 57-71 months to 262-327 months, solely because it is punishable by

two and a half years. In another Massachusetts case, a defendant was convicted of possessing with intent to distribute 6.4 grams of cocaine base. He had been previously convicted in Massachusetts of drug trafficking and, on two separate occasions, resisting arrest. The latter convictions resulted from a diagnosed mental condition. In one of the resisting arrest cases, the defendant was fined \$100; in the other, he was given six months probation. In the federal case, the defendant's guideline range without the career offender enhancement would have been 70 to 87 months. But because his Massachusetts convictions for resisting arrest counted as convictions for felony crimes of violence, he was classified as a career offender and his guideline range jumped to 262 to 237 months.

In Pennsylvania, a defendant was convicted of possession with intent to distribute 10 grams of heroin. He had two prior second-degree misdemeanor convictions, punishable by a maximum of two years. One was a "walkaway" escape and the other resisting arrest.¹ Both are considered crimes of violence for career offender purposes. Together, these prior misdemeanor offenses increased the defendant's sentencing range from 30-37 months to 151-188. He was sentenced to 151 months.

These examples are far from unusual in states that authorize imprisonment of more than one year for misdemeanors.

B. Driving without a license or with a suspended or revoked license

There are several problems with including motor vehicle offenses, particularly if they can be excluded only if the sentence was probation of less than a year or imprisonment of less than thirty days. One is that some states impose virtually automatic sentences of more than thirty days' imprisonment or probation of at least one year. For example, for a number of years, Tennessee punished any second offense of driving on a suspended license with a mandatory minimum sentence of forty-five days' imprisonment. *See, e.g.,* Tenn. Code Ann. § 55-7-116 (1986). The statute was later amended so that a mandatory term of imprisonment now applies only when the previous suspension resulted from certain enumerated vehicular offenses, *see* Tenn. Code Ann. § 55-50-504(a)(2) (2006), but many defendants whose only countable criminal history was a second conviction for driving on a suspended license under the prior state law received at least one criminal history point, and if they were on probation when they committed the instant offense, they were ineligible for safety valve relief.

Another problem is the very common scenario for many of our clients where they fail to pay a minor traffic ticket or fine, which results in a suspended license. Driving on a suspended license then becomes an occupational hazard: they must work to earn the money to get their license reinstated, but they must drive to get to work. As a result, it is typical for clients to have one or more convictions for driving with a suspended license, for which a typical sentence is probation for one year. If the defendant was under that term of probation – even if it was unsupervised – at the time he committed a federal drug

¹ The "walkaway escape" arose during a police encounter at a friend's house. The defendant was handcuffed and told to stay put while the police officers looked for a stolen stereo. When the officers went outside, he walked away.

offense, he would be ineligible for safety valve, even though his only conviction was for driving with a suspended license. This is especially common in smaller cities and rural areas, where a car is essential to employment and basic daily living needs. In jurisdictions that levy substantial fines, such as California, the cost of getting a suspended or revoked license reinstated is beyond the financial reach for many of our clients, even those who are regularly employed, resulting in a vicious cycle of minor, regulatory convictions.

Further, as the Commission has recognized, the inclusion of non-moving violations in the criminal history score may have an unwarranted adverse impact on minorities without clearly advancing sentencing purposes. See U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 134 (Nov. 2004). Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, a phenomenon often called "driving while black." See Letter from Jon Sands to the Honorable Ricardo Hinojosa, United States Sentencing Commission, July 19, 2006, Memorandum Regarding Priorities at 19 (collecting authorities).

Driving without a license or with a revoked or suspended license should never be counted. These offenses do not reflect the type of conduct that bears on a defendant's likelihood of recidivism or danger to the community. The Commission should exclude all motor vehicle offenses other than drunk driving and driving while intoxicated.

C. Diversionary dispositions for minor offenses

Some states use diversionary dispositions that do not involve findings of guilt and that involve no actual supervision during the diversionary period. For example, in Massachusetts, a disposition of "continuance without a finding" is routinely imposed for minor offenses. This disposition results in an ultimate dismissal without a finding of guilt. The First Circuit has held that when this disposition includes an admission of facts sufficient to warrant a finding of guilt, it is a "criminal justice sentence" for purposes of § 4A1.1(d). See, e.g., *United States v. Fraser*, 388 F.3d 371, 374-75 (1st Cir. 2004) (citing *United States v. Nicholas*, 133 F.3d 133, 135 (1st Cir. 1998)). District courts, in turn, treat continuances without a finding as sentences of probation that are countable under subsection (c)(1). As a result, a defendant whose entire criminal record consists of a minor offense such as operating with a suspended license, for which he or she received a one year continuance without a finding, and who committed a federal offense while that continuance was in effect (even if unsupervised) would receive three criminal history points and be ineligible for safety valve treatment.

New York uses a similar diversionary disposition, referred to as a "one-year conditional discharge." N.Y. Penal Law § 65.05. A conditional discharge does not require supervision by a probation officer or other supervisory authority and is one of the most lenient dispositions permissible under New York law. These diversionary sentences are given for the overwhelming majority of misdemeanor offenses prosecuted in New York. See 2000-2001 Crime and Justice Annual Report, http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec3.pdf (80,000 such

dispositions in the year 2000 and nearly 70,000 in the year 2001). The Second Circuit has held that a one-year conditional discharge is equivalent to a one-year sentence of probation. *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005). This interpretation, which produces illogical results, can have a devastating impact on federal defendants in New York.

In *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), the maximum allowable prison sentence for the offenses at issue (disorderly conduct and driving without a license) was fifteen days. *Id.* at 165. Had the defendant been sentenced to the maximum prison term, the offenses would not have counted for federal sentencing purposes. But because the defendant was sentenced to the more lenient one-year conditional discharge -- which has no condition except to stay out of trouble -- the offenses pushed him into a higher criminal history category.

The Second Circuit's interpretation means that a prior trespassing conviction in New York will receive no points if the defendant is sentenced to fifteen days' jail time. But if the defendant was given a one-year conditional discharge for the offense, which is not probation and does not require active supervision, he would receive at least one criminal history point and possibly more. This outcome not only defies common sense, but also the Commission's apparent intent to count only those offenses listed in subsection (c)(1) that result in a significant deprivation of liberty.

Other circuits have held that similar dispositions are the equivalent of "probation," regardless of the absence of supervision. See *United States v. Miller*, 56 F.3d 719, 722 (6th Cir. 1995) (holding that conditional discharge under Kentucky law is the "functional equivalent" of an unsupervised term of probation under U.S.S.G. § 4A1.1(d)); *Harris v. United States*, 204 F.3d 681, 682-83 (6th Cir. 2000) (Ohio's equivalent of a "conditional discharge" sentence qualifies as a term of probation of at least one year under § 4A1.2(c)(1)); *United States v. Lloyd*, 43 F.3d 1183, 1188 (8th Cir. 1994) (same for unsupervised conditional discharge under Illinois law for driving with suspended license); *United States v. Caputo*, 978 F.2d 972, 977 (7th Cir. 1992) (holding that although Illinois conditional discharge is "probation without the probation officer," this is a "distinction without a difference so far as the guideline exception is concerned"); *United States v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990) ("The guidelines make no provision for treating 'unsupervised' probation as less than probation.").

In *United States v. Rollins*, 378 F.3d 535 (6th Cir. 2004), the defendant was convicted of driving without insurance in violation of Kentucky law. The only sentence available under state law for that offense was a fine. The court suspended most of the fine, and sentenced the defendant to a two-year conditional discharge. Had the defendant violated the terms of the conditional discharge, all the Kentucky courts could do would be to impose the balance of the fine, plus court costs. Under those circumstances, the conviction would not have counted under subsection (c)(2). But because most of the fine was suspended and the defendant received a conditional discharge instead, a majority of a Sixth Circuit panel held that the conditional discharge was the "functional equivalent of unsupervised release" and therefore countable. *Id.* at 538.

Significantly, the *Rollins* majority recognized that its interpretation has a “seemingly odd consequence,” in that, had the defendant paid the fine, his sentence would not have been counted. *Id.* at 539. The court went on to state that “[i]t is not clear whether the Sentencing Commission anticipated this specific development when it imposed this bright-line rule about sentences of probation of a year or more.” *Id.* at 539-40. The court suggested that any overrepresentation might have been rectified through a downward departure under § 4A1.3, but noted the unlikelihood that the district court would have granted such a request.

The absurd results in these cases is aggravated by the fact that defendants who receive diversionary dispositions typically are told by their state court lawyers that this disposition will not result in a conviction, and so readily agree to this resolution even when there is a viable claim of innocence. The possibility of a discretionary downward departure under § 4A1.3 is insufficient, as this “insulates the district court’s decision from review and further limits the ability of wrongfully sentenced defendants to appeal to this court for legal correction.” *Id.* at 583 (Moore, J., dissenting). Further, a downward departure, even if granted, cannot render a defendant eligible for safety valve relief.

The Guidelines should not count minor offenses based on the fact that a term of probation was imposed. At the very least, the Commission should amend § 4A1.2(c) so that diversionary dispositions, in whatever form, are never counted for minor offenses. This could be accomplished by adding the following language at the end of the section:

Diversion from the judicial process for offenses listed in (c)(1) or those similar to them are never counted.

In the alternative, the Commission should replace the language in § 4A1.2(c)(1)(A) so that it reads, “the sentence was a term of supervised probation of more than one year,” and clarify that “supervision” means active supervision by a probation office or other supervisory authority.

D. Offenses “similar” to those listed in subsection (c)(1)

In several cases, courts have found an offense to be dissimilar to the offenses listed in subsection (c)(1) (and therefore countable), by engaging in legal acrobatics that defy the Commission’s apparent intent to allow for relatively broad *categories* of similarity. For example, in *United States v. Laureano*, No. 05-2078, 162 Fed. Appx. 188 (3d Cir. Jan. 17, 2006), the defendant had been previously convicted under Pennsylvania law for operating a motor vehicle while possessing an open 22-ounce bottle of “Silver Thunder” malt liquor. The open container violation was punishable under state law by a fine, but not imprisonment, *id.* at 190, n.1, and the defendant’s sentence was a fine and costs totaling \$217. The district court counted the conviction, finding that it was not similar to any of the offenses listed in § 4A1.2. This conclusion increased the defendant’s guideline range from 18 to 24 months to 24 to 30 months. Using an approach borrowed from the First Circuit, the Third Circuit held that operating a motor vehicle while possessing an open container is not similar as a matter of elemental comparison to “public intoxication” as defined under Pennsylvania law. *Id.* at 4

(applying *United States v. Elmore*, 108 F.3d 23, 27 (3d Cir. 1997)). “Public place,” the court held, is not similar to “presence in a ‘motor vehicle’ . . . located on a highway in this Commonwealth.” *Id.* at 6. Further, being “under the influence of alcohol or a controlled substance” is not sufficiently similar to “possession of an open alcoholic beverage container or consum[ption] of a controlled substance.” *Id.*

Defendants in the Middle District of Pennsylvania are routinely assessed points for truancy violations where the *parent* is convicted and fined in a local magistrate court. According to the Third Circuit, because the truancy offense arose out of the defendant’s “status as an adult responsible for a child, [it] was not ‘similar’ to a juvenile status offense or truancy in any meaningful way.” See *United States v. Jackson*, 169 Fed. Appx. 120, 123 (3d Cir. 2006).

Some courts have thus transformed the meaning of “similar” in § 4A1.2(c)(1) from the common-sense reading of shared characteristics into a tortured exercise requiring elemental identity and approaching the close statutory parsing that one might expect from a court applying the test for determining whether offenses are the same for purposes of double jeopardy. See *Blockburger v. United States*, 284 U.S. 299 (1932). As a result, what should be a common-sense exercise in judgment to determine whether an offense is “similar” has become a restrictive examination leaving little room for exclusion of offenses that are not listed.

In *United States v. Martinez (Clyde)*, 905 F.2d 251 (9th Cir. 1990), the majority used a different approach, one that examines the comparative levels of culpability and the degree to which the unlisted offense indicates a likelihood of recurring criminal conduct. The Ninth Circuit later adopted a second test, defining the phrase “similar to” as “whether the activity underlying the prior offense is similar to the activities underlying the listed offenses.” *United States v. Martinez (Carlos)*, 69 F.3d 999 (9th Cir. 1995). Recently, the Ninth Circuit suggested that the two tests applied in the alternative. See *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005).

The Fifth Circuit in *United States v. Hardeman*, 933 F.2d 278 (5th Cir. 1991), adopted “a common sense approach,” holding that the courts should inquire into “all possible factors of similarity,” in determining whether an unlisted offense is “similar” to a listed offense. These factors include:

a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

Id. at 281. Under this test, none of these factors is dispositive, and each comparison is fact-specific. *Id.*

Under these varying approaches, an offense may be counted in some jurisdictions because it fails a strict categorical or culpability analysis but excluded in another because

it passes a more expansive test examining all possible factors of similarity. The resulting disparity is unwarranted and defeats a primary purpose of federal sentencing policy.

The Commission should clarify that "similar" does not mean "elementally the same." It should reject the restrictive approach used by some courts, and adopt a common sense approach similar to the one adopted by the Fifth Circuit. We have adapted the Fifth Circuit's approach in our proposed Application Note.

E. Other minor offenses that should never be counted

In addition to the offenses now listed, there are other minor offenses that do not advance any sentencing purpose. Offenses such as fare evasion, open container violations, panhandling, shoplifting, simple possession of marijuana, and vagrancy should be placed in subsection (c)(2). At the very least, these latter offenses should be added to the list in subsection (c)(1) so that only those sufficiently serious sentences are counted.

Local ordinance violations should never be counted, even when the offense is also a state criminal offense. First, a defendant convicted of a local ordinance violation was not convicted of a state criminal offense. The fact that the offense is similar to a state criminal offense does not necessarily make it more serious, and is otherwise irrelevant.

Second, some courts do not hesitate to expand the category as written in order to count the most minor of local offenses. For example, in the Middle District of Pennsylvania, federal defendants regularly receive criminal history points for local occupancy tax violations arising from failure to pay a \$10 yearly occupancy tax. Although failure to pay a local occupancy tax is not a state criminal offense, district courts have held that, because a state statute enables localities to impose the tax, failing to pay the tax is akin to violating a state criminal law. In this way, courts have expanded the language "that are also criminal offenses under state law" to mean "that are authorized by state law."

Third, the varying interpretations of the local ordinance category injects uncertainty into the process, undermining counsel's ability to advise a client regarding criminal history. In a case prosecuted in the District of Iowa, the defendant worked in a bar where he sold alcohol after the bar was closed, a prohibited alcohol sale in violation of a city ordinance. He was charged with violating two separate ordinances, only one of which is similar to a state criminal statute. He pled guilty to that charge, and the other was dismissed. He was sentenced to pay a \$120 fine. As a result of this \$120 fine and the unintended consequence of pleading to the charge that was similar to a state statute, the defendant's guideline range was increased by fourteen months.

F. "Sentence served" of more than 60 days as proper measure of "real sentence"

If the Commission decides not to eliminate a distinction among minor offenses based on the sentence imposed, it should apply a "sentence served" test for minor

offenses and increase the minimum term of imprisonment that triggers inclusion to more than sixty days. First, "sentence served" more accurately reflects the seriousness of the offense by reflecting the real punishment imposed. In many jurisdictions, defendants routinely receive a sentence pronounced of 30 days' or more imprisonment for a minor offense, but they actually serve only three or four days. Second, given the potentially grave federal consequences of prior minor offenses, a "sentence served" of more than sixty days is a truer indication of the relative seriousness of the prior offense. Many of these minor offenses are disposed of as part of a package deal, when a defendant in state court is motivated to plead guilty to a number of minor offenses by the promise of a "time served" disposition. This may occur when a defendant is facing a revocation of probation or is unable to post bail for financial reasons. For example, a defendant may face more serious charges in a separate or related case, in which the prosecution encounters difficulties and therefore offers a favorable "time served" disposition alone or in combination with dismissal of a more serious charge.

Setting a higher bar for the type of sentence that will translate a minor offense into criminal history points will ensure that these types of summary dispositions will not inflate a criminal history category. Just as the Commission uses the concept of "real offense conduct" to measure culpability with respect to the appropriate offense level, it should use the concept of "real sentence" for purposes of calculating criminal history.

E. Minor offenses over three years old or committed prior to age 18

The Commission should amend § 4A1.2(d) so that minor offenses are not counted if they were committed more than three years before the instant offense. Given their nature, minor offenses over three years old are not likely to contribute in any manner to a defendant's future risk of recidivism. At the very least, the Commission should publish its data on this subject so that meaningful dialogue on the subject is possible.

The Commission should also amend subsection (e) so that minor offenses committed before the defendant reached the age of eighteen are never counted. There is no conceivable policy reason why such convictions should increase a defendant's federal criminal history score, and common sense about a juvenile's immature ability to form sound judgments counsels against it. The average adolescent operates with an "underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions." See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation omitted). "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* Juveniles are more vulnerable than adults to negative influences and peer pressure, due in part to the "prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Given that the actions of a juvenile often result from an unfixed character and "transitory personality traits," see *id.*, prior juvenile convictions for minor offenses should not be counted without the clearest empirical evidence of their predictive value.

II. RELATED CASES

The Commission expected that there would be instances in which the definition of “related cases” in Application Note 3 of § 4A1.2 would be “overly broad.” In practice, the opposite is true: the provision has been interpreted so narrowly by the courts that it is now virtually impossible to convince a sentencing judge that two prior sentences were “related.” In addition, the various formulations for determining whether two cases are related adds unnecessary complexity to the Guidelines. The current definition is both far too restrictive and far too complex. Principles of fairness and simplicity suggest that the definition of “related cases” should be aligned with the more expansive definition of “relevant conduct” in § 1B1.3, and the meaning of “consolidated for trial or sentencing” should be clarified.

The Commission should amend Application Note 3 by replacing “no intervening arrest” with “no intervening conviction” and replacing (A) and (B) with a cross-reference to the definition of “relevant conduct” under the provisions of § 1B1.3(a)(2) and Application Note 9 to that guideline, so that prior sentences are “related” if they would constitute relevant conduct *with respect to each other* under those provisions. The Commission should retain (C), but add the term “functionally consolidated for trial or sentencing” and define it as proposed below. In addition, because § 4A1.1(f) does not predict increased risk of recidivism, the Commission should eliminate subsection (f) and the reference to it in Application Note 3.

We propose the following language:

Related Cases. Prior sentences are not considered related if they were for offenses that were separated by an intervening conviction (i.e., the defendant was convicted of the first offense prior to committing the second offense). Otherwise, prior sentences are considered related (A) if they resulted from conduct that would be considered relevant conduct with respect to each other under the provisions of § 1B1.3(a)(2) and comment (n. 9) (Relevant Conduct), or (B) if they were consolidated for trial or sentencing or functionally consolidated for trial or sentencing. “Functionally consolidated for trial or sentencing” includes prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding.

Our proposed amendment sets forth a streamlined approach, allowing courts to bypass the potentially more complicated “relevant conduct” inquiry whenever consolidation can be readily ascertained, while leaving open the opportunity for a fair assessment of whether the conduct reflected in two convictions is related when necessary.

In addition, this approach is a more accurate measure of assessing past patterns of criminal behavior. By providing that prior offenses are not related if they were separated by an intervening conviction, our proposal ensures that convictions will not be considered related if they demonstrate that conviction and punishment failed to deter repeated criminal behavior. At the same time, it would reflect that repeated arrests within a short period of time – which may result from police harassment – do not necessarily show an

increased risk of recidivism. This approach also would further the goal of simplification by reducing the number of different tests for similar concepts.

By tying the definition of related cases to the relevant conduct rules, our proposal would alleviate the disconnect between the use of uncharged or acquitted conduct to increase punishment under § 1B1.3 and the treatment of the same kind of conduct as “unrelated” for purposes of criminal history.

Unlike the use of relevant conduct rules in setting offense levels, which we continue to oppose, the rules we propose would not increase offense levels based on conduct that did not result in a criminal charge or conviction, but instead would result in a more realistic calculation of criminal history based on actual convictions. Unlike relevant conduct, this will not implicate due process concerns. Indeed, if the expansive meaning of relevant conduct can be used to increase offense levels, then it should be available to limit the impact of prior sentences in determining criminal history.

Finally, our proposal addresses the complexities, disparities, and restrictive interpretations created by current Application Note 3, which we discuss more fully below.

A. “Occurred on the same occasion”

Some of the cases interpreting subsection (A) have emphasized a temporal aspect that requires something akin to simultaneity. The passage of a mere ninety minutes between seemingly related offenses often will mean that they did not “occur on the same occasion.” See, e.g., *United States v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990), *overruled on other grounds*, *United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (*en banc*) (robbery attempts at two different locations within one-and-one-half hours of each other did not occur on the same occasion).

In another case, the Fifth Circuit engaged in unduly extensive and complex analysis before concluding that three offenses occurring on the same day – drunk driving, driving with a suspended license, and failure to identify oneself to a police officer – were related. The court examined temporal proximity, spatial proximity, and the timing of the formation of *mens rea* in order to reach the conclusion that the offenses were related. *United States v. Johnson*, 961 F.2d 1188, 1189 (5th Cir. 1992). In a later case, the Fifth Circuit engaged in a similarly extensive analysis because “the extent of the temporal separation between commissions [is] controlling for purposes of the same-occurrence prong, and even then such separation must be viewed in light of other factors such as spatial separation, identity or non-identity of offenses, and the like.” *United States v. Moreno-Arredondo*, 255 F.3d 198, 207 (5th Cir. 2001).

These cases demonstrate that the test is so restrictive that it is either impossible to meet or requires the court to engage in ludicrously complex maneuvers to reach a conclusion that would go without saying if the question were whether the offenses were “relevant conduct.” Our proposal avoids these problems by replacing subsection (A) with a reference to Application Note 9 of § 1B1.3.

B. "Single common scheme or plan"

Cases are related under subsection (B) if the prior sentences resulted from offenses that "were part of a single common scheme or plan." Differing interpretations of the meaning of this term have resulted in a circuit split. In *United States v. Irons*, 196 F.3d 634 (6th Cir. 1999), the Sixth Circuit joined the Third, Fifth, and Ninth Circuits in following the Seventh Circuit's interpretation that crimes are part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. *Id.* at 828 (following *United States v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992)). Under this view, offenses committed during a "crime spree" are not related unless (1) they were jointly planned at their inception, or (2) the commission of one offense entailed the commission of another. *See Irons*, 196 F.3d at 637-38.

In *United States v. Carter*, 283 F.3d 755 (6th Cir. 2002), however, the Sixth Circuit recognized that this cramped view of relatedness under subsection (B) for purposes of criminal history conflicts with the liberal and expansive view of relevant conduct under § 1B1.3. *Id.* at 758. According to the court, "the goal of reasonable uniformity sought by the Sentencing Guidelines is undermined with regard to the differing applications of U.S.S.G. § 4A1.2(a)(2). The treatment of the issue by the various Courts of Appeal evidences the lack of consistency and, therefore, the lack of uniformity in the application of this provision of the Sentencing Guidelines. This Court urges the Sentencing Commission to review U.S.S.G. § 4A1.2(a)(2) with regard to the concerns herein expressed." *Id.* at 761.

The Seventh Circuit has also acknowledged the illogic in the differing interpretations of the phrase "common scheme or plan" in §§ 4A1.2 and 1B1.3(a)(2). *See United States v. Walls*, 59 Fed. Appx. 876 (7th Cir. 2003). Because its own precedent foreclosed applying the same interpretation, the court suggested that the Commission should clarify the matter. *Id.* at 879 ("Although the application of the career offender provision can lead to harsh results, and has done so here, it is a matter that the Sentencing Commission might want to address.").

Some courts have opposed interpreting "common scheme or plan" the same way in §§ 4A1.2 and 1B1.3 based on the view that "different considerations" animate the two provisions, and noting that the word "single" appears in § 4A1.2, but not in § 1B1.3. *See, e.g., United States v. Berry*, 212 F.3d 391, 394-95 (8th Cir. 2000) (elaborating the "different considerations"). The *Berry* court explained: "Addition of the word 'single' suggests an intent to narrow the concept of 'common scheme or plan.' It points strongly in the direction of the Seventh Circuit's view that two prior offenses must have been jointly planned to be 'related sentences' under § 4A1.2(a)(2)." *Id.* at 395.

Other circuits have held that subsection (B) should be given the same meaning as relevant conduct under § 1B1.3. *See United States v. LaBarbara*, 129 F.3d 81, 86 (2d Cir. 1997); *United States v. Breckenridge*, 93 F.3d 132, 139 (4th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995)). In *Breckenridge*, the Fourth Circuit

summarized the factors considered by courts: "In deciding whether offenses are part of a common scheme or plan, courts have looked to whether the crimes were committed within a short period of time, in close geographic proximity, involved the same substantive offense, were directed at a common victim, were solved during the course of a single criminal investigation, shared a similar modus operandi, were animated by the same motive, and were tried and sentenced separately only because of an accident of geography." See *Breckenridge*, 93 F.3d at 139; see also *United States v. Brothers*, 316 F.3d 120, 123-24 (2d Cir. 2003) (summarizing factors).

These differing interpretations produce unwarranted inconsistency in sentences, and engender confusion. Our proposal adopts the fairer and more sensible approach of those courts that have interpreted the phrase "common scheme or plan" to mean the same thing in subsection § 4A1.2, comment. (n.3(B)) as it does under § 1B1.3(a)(2).

C. "Consolidated for trial or sentencing"

Subsection (C) provides that prior sentences are "related" if they were "consolidated for trial or sentencing." Some courts have held that this includes cases that were "functionally consolidated," but that term has been narrowly construed over the years. Courts now very rarely (if ever) find cases consolidated for sentencing absent a formal order of consolidation. Such an order is uncommon or nonexistent in many states, making such a finding impossible. In *Buford v. United States*, 532 U.S. 59 (2001), the Supreme Court suggested that the Commission might bring some consistency into the determination of "functional consolidation." In rejecting the petitioner's argument that consistency would result from *de novo* review of the district court's finding that her prior sentences were not functionally consolidated, the Court stated:

[T]he Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts. Insofar as greater uniformity is necessary, the Commission can provide it.

Id. at 66. In the absence of overarching guidance from the Commission, defendants face what has become an impossible hurdle.

Some circuits require formal consolidation in the form of an order or some other "indiciu[m] of formal consolidation" and do not recognize functional consolidation for arguably related cases. See, e.g., *United States v. Martins*, 413 F.3d 139 (1st Cir. 2005); *United States v. Mills*, 375 F.3d 689, 691 n.4 (8th Cir. 2004); *United States v. Piggie*, 789, 796 (8th Cir. 2003). Unfortunately, several jurisdictions, including Massachusetts and New Hampshire, do not employ any form of formal consolidation. For defendants whose prior convictions arise in these jurisdictions, relatedness can never be proven under this prong. As a result, the guidelines institutionalize a categorical disparity.

In other circuits, “functional consolidation” exists in theory, but can hardly be proven. For example, in the Fifth Circuit, cases will be considered consolidated if there is “some factual connexity between them, or else a finding that the cases were merged for trial or sentencing.” *United States v. Huskey*, 137 F.3d 283, 288 (5th Cir. 1998). Courts there have consistently required either a formal order of consolidation or the listing of two offenses in the same indictment under the same docket number. *See, e.g., United States v. Hayes*, 341 F.3d 385 (5th Cir. 2003); *United States v. Metcalf*, 898 F.2d 43, 46 (5th Cir. 1990); *United States v. Kates*, 174 F.3d 590, 584 (5th Cir. 1999). However, Texas courts rarely enter formal orders of consolidation, likely due to the fact that under Texas law, such orders are unnecessary. If multiple counts arising out of a single “criminal episode” are presented in a single trial or plea proceeding, then they are considered under Texas law to be consolidated. *See LaPorte v. State*, 840 S.W.2d 412 415 (Tex. Crim. App. 1992).

For reasons apparently connected to the tumultuous history of Texas state law on joinder and defects in charging instruments, it is not unusual in multi-count cases in Texas state court to see a separate charging instrument with a separate docket number for each individual count, even in cases in which the offenses could have been joined in a single charging instrument. These cases are commonly disposed of in a single plea proceeding before the same judge, thus resulting in consolidation under state law and concurrent sentences. *See* Aff. of El Paso Public Defender, July 14, 2006, attached as Exhibit 1. Despite this, the Fifth Circuit does not consider the cases consolidated for purposes of determining whether they are related.

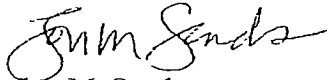
Although other circuits do not require a formal order of consolidation, they have nevertheless developed a stringent test for finding “functional consolidation” that approaches a requirement of a formal indication of consolidation. These courts hold that “there is no functional consolidation when offenses proceed to sentencing under separate docket numbers, cases are not factually related, and there was no order of consolidation[.] There must be some explicit indication that the trial court intended to consolidate the prior convictions.” *United States v. Carson*, 469 F.3d 528, 531 (6th Cir. 2006) (internal citations and quotations omitted). Even after *Buford*, the Seventh Circuit has held that simultaneous disposition merely for the sake of administrative convenience is not consolidation, and that “in the absence of a formal order of consolidation, we will deem sentences functionally consolidated only where there is a showing on the record of the sentencing hearing that the sentencing judge considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions.” *United States v. Best*, 250 F.3d 1084, 1095 (7th Cir. 2001).

In the absence of uniform state policies and practices, the Commission should set forth a simpler and more flexible test for consolidation in Application Note 3 so that, at the very least, prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding will be considered “related” under § 4A1.2. Where such circumstances do not exist, courts should be permitted to take a number of factors into account, such as consecutive indictment or complaint numbers, or same day scheduling of a plea hearing, trial or sentencing hearing, to determine whether cases are related.

D. Uncounted crimes of violence

As set forth in Part I, some state misdemeanor offenses are counted as felony crimes of violence because they are punishable by a term of imprisonment greater than one year. The harsh and disparate effects of this are felt throughout the guidelines, including the determination of whether cases are related. The Commission adds one point for each prior conviction of a crime of violence that is otherwise uncounted because it is "related" under Application Note 3 of § 4A1.2. U.S.S.G. § 4A1.1(f). In contrast, the Parole Commission's Salient Factor Score, which is a better predictor of recidivism than Criminal History Score under the guidelines, has no violence component. *See U.S. Sentencing Commission, A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* at 7. Not only does § 4A1.1(f) unfairly inflate some defendants' criminal history scores, but its predictive power is statistically insignificant. *See id.* at 7, 11 n. 40, 15. Therefore, it should be deleted.

Very truly yours,



Jon M. Sands

Federal Public Defender

Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Alan Dorhoffer, Senior Staff Attorney
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

JAMES T. SEARCY

672 Magnolia Lane
Nashville, Tennessee 37211

March 30, 2007

The United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

The Honorable Ricardo H. Hinojosa, Chair
The Honorable Ruben Castillo, Vice Chair
The Honorable William K. Sessions III, Vice Chair
The Honorable John R. Steer, Vice Chair
The Honorable Dabney Friedrich, Commissioner
The Honorable Beryl A. Howell, Commissioner
The Honorable Michael E. Horowitz, Commissioner

**RE: Proposal for Consideration -
Recommendations for Simplifying the Scoring of Criminal History**

Dear Distinguished Members of the Commission:

While I am currently employed as a probation officer for the U.S. District Court for the Middle District of Tennessee, the opinions and recommendations I forward for your consideration do not necessarily represent the Courts I serve, the U.S. Probation Office, or the Administrative Office for the U.S. Courts.

With that disclaimer, I personally urge the Commission to place high priority in addressing the need to simplify the scoring of criminal history at Chapter 4 of the guidelines.

Though the current scoring schemata is based on reasonable theory concerning severity of criminal behavior based on actual sentences imposed, I believe the current procedures are unduly cumbersome and have the potential to introduce unwarranted sentencing disparity from inadvertent errors caused in attempting to track cases from opening to close.

Some of the difficulties in tracking cases include:

Non-standardized case management procedures across state and local jurisdictions.
A major concern toward properly scoring criminal history is related to the incompleteness of case records subsequent to initial case settlement. I have personally scored convictions that exceed the 13 months' imprisonment threshold and later find that the sentence was ultimately suspended and a probationary term imposed. Some jurisdictions may simply note on the case

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file that the sentence was suspended upon granting of a motion to suspend without entering a subsequent order which modifies the original judgment. In these situations, if not caught by astute counsel, a detriment to the defendant.

Difficulty in tracking violations and subsequent rulings related to probation/parole.

A similar problem encountered is accurately capturing subsequent violation outcomes due to a lack of systematic record keeping. In order to address potential changes in scoring due to subsequent sanctions and violations, contact may be required of several different agencies to calculate "in/out" time served related to violation petitions, sanctions, and ultimately, revocations. This is increasingly a very complicated process for offenders caught in the "revolving doors" of our state and local criminal justice systems. This is particularly exacerbated in cases with lengthy criminal histories as we are experiencing with the Department of Justice's Project Safe Neighborhood (PSN) initiative.

The Proposal for Simplification.

With limited resources for gathering, analyzing, and scoring criminal history within the presentence investigation process, I believe there is an urgent need to modify the current scoring schemata to ease the time demands in assessing criminal convictions. First, I suggest any new procedure considered enable scoring decisions to be completed from review of a single source document rather than searching for multiple documents or records maintained by law enforcement and correctional agencies. In fact, I recommend a scoring schemata that would enable scoring be satisfied by review of the original judgment alone.

By focusing on the original conviction rather than the cumulative time served for any sentence, less error will be introduced into the scoring process. I believe this could be easily accomplished by making slight changes to subsections (a) through (c) to § 4A1.1, by focusing on the type of conviction rather than the actual sentence received plus any additional time imposed due to subsequent sanctions and revocations. Attached to this letter is a sample of what I propose the Commission consider.

Thank you in advance for your consideration. The work you do on behalf of the federal justice system, and more importantly, the citizenry of our nation, is greatly appreciated.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "James T. Searcy". The signature is written over the typed name and address.

James T. Searcy
672 Magnolia Lane
Nashville, TN 37211

[03]

Proposal for Modifying Criminal History Scoring Procedures at Chapter 4 -

§ 4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add 3 points for each prior (felony conviction) ~~sentence of imprisonment exceeding one year and one month~~ (for any crime of violence or a controlled substance offense.)
- (b) Add 2 points for each prior (felony conviction) ~~sentence of imprisonment of at least 60 days~~ not counted in (a).
- (c) Add 1 point for each prior (misdemeanor conviction) ~~sentence~~ not counted in (a) or (b), up to a total of 4 points for this item.

NOTE 1: As to § 4A1.1(a), the terms of “crime of violence” and “controlled substance offense” are defined at U.S.S.G. § 4B1.2(a) and (b), respectively.

NOTE 2: As to § 4A1.1(c), exclusions to counting are covered at U.S.S.G. § 4B1.2(c)(1) and (2), respectively.

PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERB KOHL, WISCONSIN
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JOHN CORNYN, TEXAS
SAM BROWNBACK, KANSAS
TOM COBURN, OKLAHOMA

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

We appreciate the important work of the U.S. Sentencing Commission in preparing its 2007 report to Congress on Crack Cocaine and Federal Sentencing Policy and we look forward to your report next month.

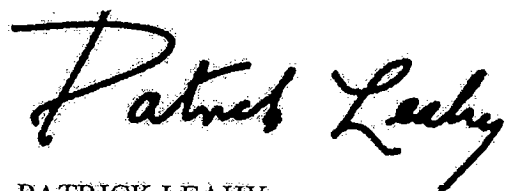
Last year marked the twentieth anniversary of the passage of the law mandating disparate treatment for crack and powder cocaine offenders. In 1986, Congress enacted the Anti-Drug Abuse Act, which established much tougher sentences for crack cocaine offenses than for powder cocaine. As a result, it takes 100 times more powder cocaine than crack cocaine to trigger the 5- and 10-year mandatory minimum sentences.

Two decades ago, our nation knew little about crack other than the fear that it was more dangerous than the powder form and would greatly increase drug-related violence. Since that time, the matter has been studied extensively by the Commission.

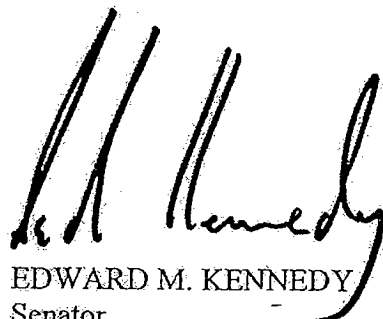
The Commission now has another opportunity to work with Congress to eliminate or reduce this disparity, as well as the disparate impact on minorities that can result. We welcome the Commission's guidance and recommendations that could improve the fairness of federal sentencing. We hope that the 2007 report will assist Congress by continuing to update the scientific literature on the issue. Please help us by including recommendations that cover statutory and non-statutory remedies, such as the promulgation of a Guideline Amendment in the current amendment cycle, that can assist us in eliminating or reducing the crack-powder disparity without further delay.

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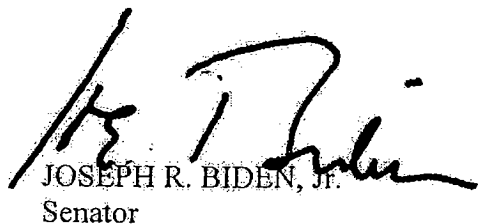
Sincerely,



PATRICK LEAHY
Chairman



EDWARD M. KENNEDY
Senator



JOSEPH R. BIDEN, JR.
Senator



DIANNE FEINSTEIN
Senator



RICHARD J. DURBIN
Senator

United States Senate

WASHINGTON, DC 20510-0104

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

I appreciate the hard work both you and the U.S. Sentencing Commission have devoted to the issue of Federal sentencing policy regarding crack and cocaine. I look forward to the Commission's report to Congress on Crack Cocaine and Federal Sentencing Policy next month.

As you know, I was the lead sponsor of the Drug Sentencing Reform Act of 2006 in the 109th Congress and identical legislation in 2001, both of which would have reduced the disparity for crack and powder cocaine from 100-to-1 to 20-to-1 by reducing the mandatory penalty for crack cocaine and increasing the mandatory penalty for powder cocaine. The underlying goal of the bill was fairness – treating similar drugs more equally when it comes to sentencing. Senators Cornyn, Pryor and Salazar co-sponsored this legislation in a bi-partisan effort to address this inequity in federal law.

In 1986, Congress passed statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking 500 grams of powder cocaine or 5 grams of crack and a 10-year mandatory minimum for trafficking 5,000 grams of powder or 50 grams of crack. The 100-to-1 ratio of crack to powder cocaine was enacted largely to prevent the spread of crack cocaine across America, especially into minority neighborhoods. Despite that goal, crack cocaine has spread across the country and into minority neighborhoods. A recent U.S. Sentencing Commission report said that 83% percent of offenders sentenced for crack violations were African Americans. And a Bureau of Prisons study revealed that weapons use and violence are more accurate indicators of recidivism than drug use.

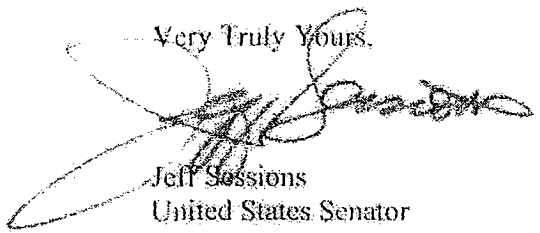
In three separate reports to Congress, in 1995, 1997, and 2002, the Sentencing Commission has urged Congress to reconsider the statutory penalties for crack cocaine. Once again, the Commission has an opportunity to work with Congress and help improve these statutory mandatory minimums by reducing the harsh disparity that currently exists. By reducing the disparity, we can strengthen the criminal justice system, reduce judicial manipulation, and restore confidence in the system's fairness.

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It is my hope that the Commission's 2007 report will include an update to its 2002 Report on Federal Cocaine Sentencing Policy, specifically its data, literature review, and medical chapters. Furthermore, I would also like to see a specific recommendation to Congress about how it should amend the 100:1 statutory ratio that governs cocaine sentencing. Legislation I introduced would reduce this ratio to 20:1, and I believe that to be a sound and justified ratio based on the nature and disparate impact of crack and cocaine. This legislation is directly in line with the Commission's 2002 recommendation that the statutory ratio be no more than 20:1.

I believe these recommendations would provide a measured and balanced approach to improving the statutory and guidelines system that governs the sentencing of federal drug offenders. A more dramatic change that results in a substantial reduction in drug sentences is not consistent with sound public policy and could jeopardize the bi-partisan effort that is now underway. I believe the time has come for Congress to exercise a legislative change in this area, and I look forward to working with the Commission to get this accomplished.

Very Truly Yours,



Jeff Sessions
United States Senator

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Congress of the United States

Washington, DC 20515

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Chairman Hinojosa and Commission Members:

We, the undersigned Members of Congress, believe it is important that the United States Sentencing Commission ("the Commission") understand that we support equalization of the penalties for crack and powder cocaine at the current penalty level of powder cocaine.

Under current federal law, mere possession of just 5 grams of crack cocaine requires a 5-year mandatory minimum federal prison sentence, while it takes distribution of at least 500 grams of powder cocaine before a 5-year sentence is required. This 100-to-1 disparity in penalties for crack versus powder may be the only instance in the code where mere possession of a small portion of a diluted form of a drug is punished much more severely than trafficking in a much higher quantity of a purer form of the drug. For example, trafficking in "ICE", a purer form of methamphetamine, is punished more severely than trafficking in meth mixture, a less pure form of the drug. The crack/powder penalty disparity is certainly the only instance where the racial impact of trafficking in variations of the same drug is so severe.

Between 1994 and 1995, the Commission conducted an extensive study of the pharmacological, sociological, marketing and other aspects attendant to these two variations of the same drug. The Commission found no pharmacological differences in these variations, but found substantial differences in the sociological impact and the marketing process associated with the two forms. The Commission also found a severe racial impact in the sentencing of crack versus powder in that approximately 88% of offenders prosecuted and sentenced for crack offenses were Black with another 7% Hispanic, whereas with powder, most offenders were White and sentenced to much less for illegal involvement with the same amount of cocaine. Moreover, still today, while 95% of those held accountable for abuse of crack are Black and Hispanic, the evidence reveals that 2/3 of crack users are White.

As a result of the absence of a pharmacological distinction between crack and powder, the extreme racially disparate impact between the two variants of the same drug, and the fact that aggravations associated with either could be punished as add-ons on a case-by-case basis, the Commission recommended equal treatment of crack and powder at the outset of sentencing, adding any aggravating factors applicable. Although the recommendation was rejected for

The Honorable Ricardo H. Hinojosa
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political reasons, the first rejection in the history of Commission recommendations, nothing of a more compelling scientific or policy rationale has been presented to the Congress since as a basis for addressing the disparity.

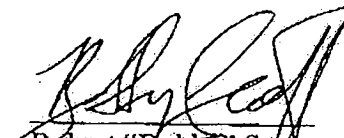
The great disparity in punishments for crack and powder was not reached on a reasoned and scientifically based foundation. Instead, it was based on political hysteria following the death of Maryland star basketball player, Len Bias, some 20 years ago, from what was then thought to be crack, but later shown to be powder, use.

It is clear that no one anticipated the severe racially disparate impact from punishing crack more severely than powder. Many of those who led the effort to create the penalty disparity now disavow the move, including current House Ways and Means Committee Chairman, Charles Rangel, who is a signatory to this letter.

Some suggest that the most politically feasible way out of what virtually all agree is the unreasonable and intolerable sentencing disparity between crack and powder is by a face-saving compromise solution lowering the disparity from 100 to 1 to some other disparate level such as 20 to 1. Given the lack of pharmacological differences in the two variations of the same drug, and the extreme, unintended racial impact from the disparate punishments between them, we believe that continuing any such disparate treatment is morally indefensible. If political realities recommend some compromise, that ought to be a legislative assessment. We rely on the Sentencing Commission for decisions based on research-based facts and evidence, and morally sound reasoning. A 20 to 1 sentencing disparity between crack and powder reflects neither. Unless there is a rational, informed, basis for changing the Sentencing Commission's original recommendation of a 1 to 1 ratio based on science and morality, we would expect the Commission's advice to remain the same.

Sincerely,

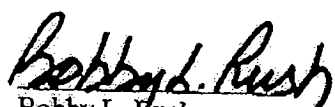

John Conyers, Jr.
Member of Congress


Robert "Bobby" Scott
Member of Congress


Charles B. Rangel
Member of Congress

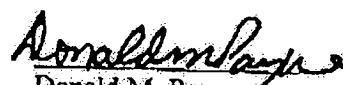
The Honorable Ricardo H. Hinojosa
March 30, 2007
Page 3

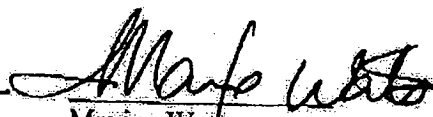

Sheila Jackson-Lee
Member of Congress

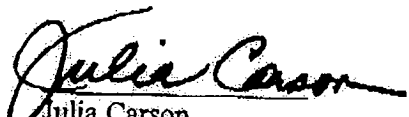

Bobby L. Rush
Member of Congress

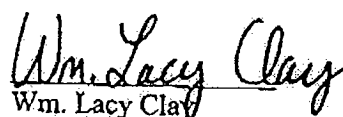

William Jefferson
Member of Congress


Keith Ellison
Member of Congress


Donald M. Payne
Member of Congress


Maxine Waters
Member of Congress


Julia Carson
Member of Congress


Wm. Lacy Clay
Member of Congress


Yvette D. Clarke
Member of Congress



March 16, 2007

VIA EMAIL pubaffairs@ussc.gov
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1661
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

CERS AND DIRECTORS
JUDINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we submit comments pursuant to the U.S. Sentencing Commission's (USSC) request for public comments, as noticed in the Federal Register on January 30, 2007. We thank the Commission for providing us the opportunity to submit comments on the Commission's November 14, 2006 hearing on cocaine sentencing policy in order to rectify the 20-year sentencing disparity between powder and crack cocaine.

The ACLU has been deeply involved in advocacy regarding race and drug policy issues for more than a decade.¹ Recently, in 2002, we urged the Commission to amend the guidelines to equalize the crack and powder cocaine sentencing structure. Five years later, we continue to urge this body to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level for powder cocaine. Currently, simple possession or distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while for powder cocaine, distribution of 500 grams – 100 times the amount of crack cocaine – carries the same sentence.² This disparate sentencing regime has serious implications for due process and equal protection, and puts at risk our citizens' freedom of association and freedom from disproportionate punishment.

We are not alone in this sentiment. In 2001, then President-elect George W. Bush stated that the sentencing disparity between crack and powder cocaine "ought to be addressed by making sure powdered cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory."³ Moreover, in 2004, this body said, "[r]evising the crack cocaine thresholds" would do more to reduce the sentencing gap "than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."⁴

We agree with both statements and hope that this Commission will once again make a recommendation to Congress that this sentencing disparity is unjustified. Below we address four areas which caution against the continuation of this arbitrary system: 1) racial disparities and the deterioration of African American communities; 2) the unfounded perceptions of violence and crack use; 3) the myth of crack's chemical effects; and 4) the failure to focus on high-level drug traffickers.

[240]

I. Racial Disparities and the Deterioration of African American Communities

In the twenty years that have passed since the Anti-Drug Abuse Act of 1986 was enacted,⁵ many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100:1 sentencing disparity between crack and powder cocaine. Accordingly, on three separate occasions, this body has urged Congress to reconsider the statutory penalties for crack cocaine. Judges, commentators, federal prosecutors, medical professionals, and other experts have all concurred with this assessment.

A. Racial Disparities

One of the most egregious problems with the current 100:1 drug quantity ratio is that it promotes unwarranted disparities based on race.⁶ Because of its relative low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans. Conversely, powder cocaine is much more expensive and tends to be used by more affluent white Americans. Nationwide statistics compiled by USSC reveal that African Americans are more likely to be convicted of crack cocaine offenses, while whites are more likely to be convicted of powder cocaine offenses.⁷ Thus, the sentencing disparities punishing crack cocaine offenses more harshly than powder cocaine offenses unjustly and disproportionately penalize African American defendants as compared to white defendants.

Compounding the problem is the fact that whites are disproportionately less likely to be prosecuted for drug offenses in the first place; when prosecuted, are more likely to be acquitted; and even if convicted, are much less likely to be sent to prison.⁸ Recent data indicates that African Americans make up 15% of the country's drug users, yet they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.⁹ Specifically with regard to crack, in fiscal year 2006, more than 80% of the defendants sentenced for crack offenses were African American,¹⁰ despite the fact that in 2005 only 24% of crack users were African American and 72% of crack users were white or Hispanic.¹¹

Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2003, which was 123 months, was 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug.¹² Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 77%, compared to an increase of 28% for white drug offenders.¹³ African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months.¹⁴ The fact that African American defendants received mandatory minimum sentences more often than white defendants who were also eligible for mandatory minimum sentences, further supports the racially discriminatory impact of these penalties.

Over the last 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.¹⁵ The growing number of women who are incarcerated

disproportionately impacts African American and Hispanic women. African American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.¹⁶ Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.¹⁷

B. Deterioration of Communities

Department of Justice officials have argued before this body that crack has been uniquely responsible for the deterioration of communities justifying the sentencing disparities with powder cocaine. Studies of the neighborhoods where crack was visible in the 1980s indicate, however, that the economic conditions were "hopeless" – declining employment, reduced social services, and out-migration of successful community members.¹⁸ This economic and social deterioration made possible the new market forces needed for crack. It is too simple to say this drug *caused* the deterioration of communities, increased prostitution, or higher rates of victimization without examining the lack of economic and educational opportunities already missing in some of these predominately African American communities.

As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher.¹⁹ In 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were 603,032 African American men enrolled in higher education.²⁰ The fact that there are more African American men under the jurisdiction of the penal system than in college has lead scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.²¹

These racial disparities are even more troubling considering the devastating impact that the nation's drug policy and mandatory minimums have on the African American family. Indeed, it is the punitive measures themselves that contribute to the deterioration of communities.²² The effects of mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in an overwhelmed child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps, and access to public housing.²³ For example, one of every 14 African American children has a parent locked up in prison or jail today,²⁴ and African American children are 9 times more likely to have a parent incarcerated than white children.²⁵ In terms of financial effects, incarcerated black parents significantly reduce the aggregate income of African American families, further preventing many African American children from rising above the gross

poverty they face.²⁶ Incarceration on such a massive scale leads to more unemployed and unemployable parents, more poverty, and more deterioration of communities.

Exacerbating the problem, the damaging impact of incarceration continues after a family member's release from prison. Approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.²⁷ In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision.²⁸ The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for the entire community.

The ACLU is concerned that the desire to appear “tough on crime” is substituting for sound policymaking – policymaking that should, by contrast, be focused on equity and proper alternatives. In addition to diverting funds from social programs, harsh mandatory minimums and prison expansion have imposed a particular social cost on African American families. The best way to respond to the drug problem may not be to lock up thousands of young African Americans by over-punishing crack in relation to powder, but rather consider fairness in sentencing and building structures to help families – job training, drug treatment, housing, adequate health care, better schools, welfare reform, and sufficient family support.²⁹ Countries that do provide such services to their poorest members suffer less crime and drug abuse than does the United States.³⁰

II. Unfounded Perceptions of Violence and Crack Use

The 100:1 drug quantity ratio was designed in part to account for certain harmful conduct believed to be associated to a greater degree with crack cocaine offenses than with powder cocaine offenses. In particular, crack was said to cause particularly violent behavior in those who used the drug. In 1988, a study of homicides in New York City found that in all of the 414 homicide cases that year, there were only 3 homicides associated with behavior caused by using crack and in 2 of those cases the crack user was the victim.³¹ The study also found that 85% of all crack-related deaths resulted from the nature of the illegal drug market and not from the actual use of the drug.³² This violence occurred between dealers or between dealers and users in an illegal drug market that is inherently violent, regardless of what drug is being bought or sold. When crack began to permeate cities across the country in the mid to late 80s, much of the violence was associated with the territorial disputes between low-level street corner drug dealers.³³ Therefore, most violence associated with crack is the result of being part of an illegal market, similar to violence associated in trafficking of other drugs.³⁴

According to Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research at Carnegie Mellon University, any violence associated with the crack trade could be attributable to the venue of the market (open-air, street crack markets compared to closed powder markets) or to the dispute resolution culture of the communities in which the market is located.³⁵ The assertion that crack physiologically causes violence has not been found to be true, and the violence that was once associated with the intense competition of a new drug market has

abated.³⁶ Differences that might appear between cocaine and crack markets, Blumstein concludes, has nothing to do with the difference between the drugs themselves.

Sociologist Katherine Beckett made a similar conclusion in her recent study of arrest practices in Seattle, Washington.³⁷ In her study she examined the popular explanations for higher arrest rates for African Americans involved in the crack market – explanations which include the idea that the targeting of outdoor markets is a priority of law enforcement and the idea that crack is more associated with violence than other drugs.³⁸ In 2005, Beckett found, however, that while only 33% of outdoor serious drug transactions (also including heroin, methamphetamine, and powder), involved crack, 75% of all arrests were for crack.³⁹ Moreover, the study found that crack was also much less associated with violence than the other drugs; crack arrests were only 10% as likely as heroin arrests to involve guns.⁴⁰ Beckett concluded that the patterns had to do with a racially polarized conception of who and what comprises the drug trade in Seattle.⁴¹

Certainly, recent data confirms that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000: 1) 64.8% of overall crack offenses did not involve weapons with regard to any participant; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.3% of crack offenders actively used a weapon.⁴² In 2006, available statistics in crack offenses stayed relatively constant – 74% of drug offenders had no weapons involvement.⁴³ Moreover, in 2000, death, resulting from violence rather than drug use itself, occurred at the exact same rate, 3.4%, for both forms of cocaine.⁴⁴

The fear that crack manifested violent behavior embedded a problematic assumption into the sentencing structure that a crack defendant also committed a concurrent serious crime.⁴⁵ By treating crack so much more severely than powder, Congress codified the now refuted belief that all crack defendants manifest violent behavior.⁴⁶ This means that for individuals who have not engaged in any violent behavior, the penalty scheme subjects crack offenders to punishment based on acts they did not commit. Moreover, for defendants charged with a concurrent offense, the sentencing differences then “double count” the charged conduct relative to a powder defendant.⁴⁷ In other words, an offender caught with 5 grams of crack and a holstered firearm could be punished for double the time in prison due to the presumption of serious violence-related conduct already part of the drug’s mandatory minimum.⁴⁸ The practical effect of this sentencing disparity is that a crack offender is held responsible for conduct in which he or she did not engage or is penalized for the same conduct twice.

In 2002, Dr. Blumstein testified that it would be more rational to use sentencing enhancements to punish individuals who use violence, regardless of the drug type, rather than to base sentencing disparities on the chemical itself. Such enhancements should also account for an offender’s role in the distribution hierarchy. Blumstein saw no reason why there should be any difference in sentencing guidelines between crack cocaine and powder cocaine offenses.⁴⁹ He also noted that the 100:1 drug quantity disparity suggests racial discrimination.⁵⁰

The federal sentencing scheme already provides two alternative means for increasing sentences for weapons possession in drug trafficking offenses. Federal drug offenders with weapons may either be statutorily convicted under 18 U.S.C. § 924(c) (possession of a firearm in relation to a

drug trafficking offense), or alternatively they may be subjected to application of the weapons enhancement in the drug trafficking guidelines.⁵¹ Thus, the mandatory minimum sentences implemented by the Anti-Drug Abuse Act of 1986 sweep far too broadly by treating all crack cocaine offenders as if their offenses involved weapons or violence, even though the evidence demonstrates that most crack cocaine offenses have not.

III. The Myth of Crack's Chemical Effects

Despite many of the misconceptions at the time of the 1986 Act, numerous scientific and medical experts have determined that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine – the effects on users are the same regardless of form.⁵² In 1996, the Journal of the American Medical Association published a study that found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.⁵³ The study concluded that the propensity for dependence varied by the method of use, amount used and frequency, not by the form of the drug.⁵⁴ The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.⁵⁵

In both 2002 and 2006, the Commission had hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.⁵⁶ Among those experts was Dr. Glen Hanson, then Acting Director of the National Institute on Drug Abuse, who, in 2002, testified before the Commission stating that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine. He noted that although cocaine in any form produces the same effects, the onset, intensity, and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain.⁵⁷

In addition, research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure.⁵⁸ The media stories that appeared in the late 1980s of crack-addicted mothers giving birth to “crack babies” are now considered greatly exaggerated.⁵⁹ In many cases, the mothers are low income and use various drugs, both of which are factors that affect a child's development. In 2002, Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.⁶⁰ According to Dr. Chasnoff, the studies found that a child's home environment is the single most influential factor in determining whether a child will be healthy.⁶¹ In fact, the children of drug-abusing mothers who develop poorly, may be suffering from a combination of factors that often correlate with this environment, including poor nutrition, smoking, and lack of prenatal care.⁶²

IV. Failure to Focus on High Level Traffickers

Finally, the federal law's goal of targeting high-level drug traffickers has failed. Congress made explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target “serious” and “major” drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply in the vast majority of crack cases to offenders who are low-level participants in the drug trade.

Indeed, if Congress wanted to send a message by enacting mandatory minimums that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms.⁶³ This Commission has reported that only 15% of federal cocaine traffickers can be classified as high-level, while 73% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.⁶⁴ And because the mandatory minimums prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, we have seen the emergence of the "girlfriend problem" – women who are low-level participants in the drug trade, but subject to the same or harsher sentences as the major dealers in a drug organization.⁶⁵

Even judges and those prosecuting these cases have stood up against mandatory minimums, arguing such penalties are arbitrary and excessive. For example, U.S. District Judge Robert Sweet for the Southern District of New York has argued that the administration of mandatory minimums in crack cases "has resulted in Jim Crow justice," noting the 100:1 disparity between crack and powder cocaine.⁶⁶ Similarly, former prosecutor and U.S. District Judge Cassell for the District of Utah has condemned the legal disparity between crack and powder cocaine, contending that "apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant."⁶⁷ Moreover, in 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both mandatory minimum statutes and the guidelines, can not be justified and results in sentences that are unjust and do not serve society's interest."⁶⁸

Recommendations

The ACLU commends the Commission for re-examining the Anti-Drug Abuse Act of 1986 and the harmful consequences of this legislation. Although there are more white crack cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the targeting of inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans, and because of the sentencing disparities, these African Americans are disproportionately given longer sentences than powder users. The sentences for low-level drug crimes are wasteful in terms of both tax dollars and human lives, and have had devastating collateral consequences for African American men, women, and families. Changing these policies would dramatically help African American families by removing the harsh penalties that currently disproportionately affect them and severely limit their opportunities.

After the 2002 hearings, the Sentencing Commission issued its third report on crack and powder cocaine disparities and once again found that the 100:1 ratio between the drugs was unjustified.⁶⁹ In so stating, the Commission made the following findings: 1) the current penalties exaggerate the relative harmfulness of crack cocaine; 2) the current penalties sweep too broadly and apply most often to lower level offenders; 3) the current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; 4) the current penalties' severity mostly impacts minorities.⁷⁰ This body made

clear that it “firmly and unanimously” believed the ratio to be unjustified.⁷¹

Therefore, the ACLU urges the Commission make the following recommendations to Congress in the Commission’s 2007 report:

- The quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine. As demonstrated above, there is no rational medical or penological reason for the 100:1 disparity between crack and powder cocaine sentences, and instead it causes an unjustified racial disparity in our penal system.
- In order for judges to exercise appropriate discretion and consider mitigating factors in sentencing, mandatory minimums for crack and powder offenses must be eliminated, including the mandatory minimum for simple possession.
- Federal prosecutions must be properly focused on the high-level traffickers of both crack and powder cocaine.

Thank you once again for re-visiting this very important policy matter.

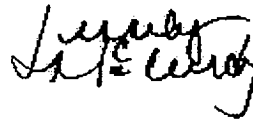
Sincerely,



Caroline Fredrickson,
Director



Deborah J. Vagins
Policy Counsel for
Civil Rights and Civil Liberties



Jesselyn McCurdy
Legislative Counsel

¹ For example, in 1993, the ACLU assisted in convening the first national symposium that examined the disparity in sentencing between crack and powder cocaine, entitled *Racial Bias in Cocaine Laws*. The conclusion, more than a decade ago, of the representatives from the civil rights, criminal justice, and religious organizations that participated in the symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. Most recently, in 2006, the ACLU authored a detailed report on the inequities of the crack/powder sentencing disparity at the twentieth anniversary of the Anti-Drug Abuse Act of 1986, as well as submitted testimony for the Commission’s November 2006 hearing. See DEBORAH J. VAGINS AND JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), available at <http://www.aclu.org/drugpolicy/sentencing/27181pub20061026.html>; Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission, (Nov. 14, 2006) (Written statement of Jesselyn McCurdy, ACLU Legislative Counsel), available at <http://www.aclu.org/crimjustice/gen/27357leg20061114.html>.

² 21 U.S.C. § 841(b) (2000). In 1988, Congress created a 5-year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. See 21 U.S.C. § 844 (2000).

³ MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 83 (2006) (citing interview with Candy Crowley, CNN, Jan. 18, 2001) [hereinafter RACE TO INCARCERATE].

⁴ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004).

- ⁵ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).
- ⁶ See U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-103 (2002) [hereinafter 2002 USSC REPORT].
- ⁷ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 156, 161 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).
- ⁸ Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266 (2002).
- ⁹ Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.
- ¹⁰ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 34 (2006).
- ¹¹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, Table 1.43a (2006) : see also Clarence Page, *Legacy Hijacked, 20 Years Later*, THE WASHINGTON TIMES, June 24, 2006, available at <http://198.65.148.234/commentary/20060623-085057-3629r.htm>.
- ¹² U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Figure J, at 91 (2003).
- ¹³ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, Table 6.11, at 85 (1998); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).
- ¹⁴ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).
- ¹⁵ ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 1 (2005), available at <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf> [hereinafter CAUGHT IN THE NET] (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, (30th ed. 2002)).
- ¹⁶ *Id.* at 17 (citing SUSAN BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY 208-09 (2004)).
- ¹⁷ *Id.* at 4.
- ¹⁸ Michael Agar, *The Story of Crack: Towards a Theory of Illicit Drug Trends*, 11 ADDICTION RESEARCH AND THEORY, No. 1, 2003, at 25.
- ¹⁹ Drug Policy Alliance, *Race and the Drug War*, <http://drugpolicy.org/communities/race/index.cfm?printpage=1>; B.S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCE IMPOSED 20 (1992).
- ²⁰ JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 10 (2002), available at <http://www.justicepolicy.org/coc1/corc.htm>.
- ²¹ See Common Sense for Drug Policy, *Drug War Facts: Race, Prison, and the Drug Laws*, <http://www.drugwarfacts.org/racepris.htm>; see also Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 AMERICAN PSYCHOLOGIST, No. 7, July 1998, at 716 (stating that at the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college).
- ²² See generally, E. Michelle Tupper, Note, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL'Y 325, 336 (2005).
- ²³ See generally, Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances:" Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255 (2004); CAUGHT IN THE NET, *supra* note 15, at 47-55.
- ²⁴ See also Marc Mauer, *Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 321, 324 (2001).
- ²⁵ CAUGHT IN THE NET, *supra* note 15, at 49.
- ²⁶ Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1490 (2000).
- ²⁷ HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 8 (1998); see also Mauer, *supra* note 24, at 324.
- ²⁸ THE SENTENCING PROJECT, DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM 6 (2001).
- ²⁹ David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L. J. 2547, 2569-70 (1995).
- ³⁰ *Id.* at 2570 (citing ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 166, 180 (1993)).

³¹ Paul J. Goldstein et al., *Crack and Homicides in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 118 (Craig Reinerman & Harry G. Levine eds., 1997).

³² *Id.* at 119-120.

³³ *Id.*

³⁴ *Id.* at 120.

³⁵ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research, Carnegie Mellon University, at 6).

³⁶ *See id.*

³⁷ *RACE TO INCARCERATE*, *supra* note 3, at 165 (citing Katherine Beckett, "Race and Law Enforcement in Seattle," May 3, 2004).

³⁸ *Id.* at 165-66.

³⁹ *Id.* at 166.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 2002 USSC REPORT, *supra* note 6, at 54, 100, Table 17.

⁴³ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 39 (2006).

⁴⁴ 2002 USSC REPORT, *supra* note 6, at 57.

⁴⁵ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Ryan S. King, Policy Analyst, The Sentencing Project, at 6).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 7.

⁴⁹ 2002 USSC REPORT, *supra* note 6, at E-4.

⁵⁰ *Id.*

⁵¹ *Id.* at 55.

⁵² *Id.* at Appendix E, E-1-E-6.

⁵³ D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 279 JOURNAL OF THE AMERICAN MEDICAL ASSN., No. 19, Nov. 1996, at 1580.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 2002 USSC REPORT, *supra* note 6, at Appendix E, E-1-E-6; *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission*, (Nov. 14, 2006).

⁵⁷ 2002 USSC REPORT, *supra* note 6, at E-3.

⁵⁸ *Id.* at 94.

⁵⁹ *See also Crack in Context: America's Latest Drug Demon*, in *CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 4 (Craig Reinerman & Harry G. Levine eds., 1997).

⁶⁰ 2002 USSC REPORT, *supra* note 6, at E-4.

⁶¹ *Id.*

⁶² *RACE TO INCARCERATE*, *supra* note 3, at 171.

⁶³ Eric E. Sterling & Julie Stewart, *Undo This Legacy of Len Bias' Death*, THE WASHINGTON POST, June 24, 2006, at A21.

⁶⁴ *Id.*; *see also* 2002 USSC REPORT, *supra* note 6, at 38, 99.

⁶⁵ *See generally* CAUGHT IN THE NET, *supra* note 15, at 4.

⁶⁶ *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>.

⁶⁷ *How Judges are Properly Implementing The Supreme Court's Decision in United States v. Booker: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 109th Cong. 68 (2006) (statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law, Judicial Conference of the United States), available at <http://www.uscourts.gov/testimony/Cassell031606.pdf#search=%22paul%20g%20cassell%20%22mandatory%20minimum%22>.

⁶⁸ Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), in 10 FED. SENT'G RPTR. 195 (No. 4, Jan./Feb. 1998).

⁶⁹ 2002 USSC REPORT, *supra* note 6, at v.

⁷⁰ *Id.* at v-viii.

⁷¹ *Id.* at 91-92.



MAINE CIVIL LIBERTIES UNION

March 30, 2007

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Chairman Hinojosa and Commissioners:

The Maine Civil Liberties Union (MCLU) appreciates this opportunity to file comments with the United States Sentencing Commission, in accordance with notice in the Federal Register seeking recommendations concerning sentencing laws for crack and powder cocaine offenses. The MCLU urges the Commission to strongly recommend sentencing reform in order to reduce the severity of penalties for crack offenses to the level of penalties currently prescribed for offenses relating to powder cocaine.

In 18 U.S.C. § 3553(a), Congress instructed the courts to impose a sentence sufficient, but not greater than necessary to meet the following purposes:

- (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (2) to afford adequate deterrence to criminal conduct;
- (3) to protect the public from further crimes of the defendant; and
- (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining specific sentences, Congress has instructed courts to consider the following factors in imposing a reasonable sentence:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the kinds of sentences available;

Crack and Powder Cocaine are Substantially the Same Substance and Have Identical Effects on the Brain

As the Commission knows, powder cocaine is made from coca paste, which is derived from the leaves of the coca plant. Crack cocaine is simply made by taking powder cocaine and cooking it with baking soda and water until it forms a hard rocky substance. These "rocks" are then broken into pieces and sold in small quantities¹. Apparently, Congress believed, at the time of the legislation creating the enormous crack/powder sentencing disparity, that crack was fifty times more addictive than powder cocaine². However, two decades later, there is little controversy about the falseness of that assumption and there is no legislative history that demonstrates that Congress used any rational basis to arrive at a 100: 1 sentencing ratio. Certainly, given what is known today, there can be no rational basis for adhering to the current policy³.

The Increased Violence Associated with Crack's Appearance on the Drug Market Was Not Associated With Inherent Properties of the Drug

To the extent that an increase in crime in the 1980s was associated with the widespread distribution of the crack form of cocaine, that increased violence was related to the lower price of crack and the nature and geography of its market, rather than any relationship with the properties of the substance itself or to any differential effects on the brain⁴. As in any market, the lower price of the product increased the demand for it in neighborhoods that were already associated with higher crime rates. Moreover, the increased violence is now widely seen as a function of a nascent market for crack, as new dealers competed for street distribution territory. However this violence has since subsided and therefore, can no longer represent even a pretense that would support the current sentencing disparity.⁵

Two Decades of Experience Reveals Unacceptable and Perverse Racial Effects Under Current Crack Sentencing Policy

Regardless of the presumed race-neutral intent of drug legislation creating the crack/powder sentencing disparity, the result has been an unambiguous and

¹ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

² For example, a 1996 study published in the *Journal of the American Medical Association* finds analogous effects on the body for both crack cocaine and powder cocaine. Similarly, Charles Schuster, former Director of the National Institute on Drug Abuse and Professor of Psychiatry and Behavioral Sciences, found that once cocaine is absorbed into the bloodstream and reaches the brain, its effects on brain chemistry are identical regardless of whether it is crack or powder.

³ As the ACLU stated in *Cracks in the System, Twenty Years of the Unjust Federal Crack Cocaine Law*, despite the hyped media reports of the death of Len Bias (which triggered a huge media-based anti-drug campaign and helped to motivate Congress to enact the new harsh crack penalties), "The ultimate irony of this anniversary is that Len Bias did not die of a crack overdose, but rather from snorting powder cocaine and alcohol" (October, 2006).

⁴ This Commission, in 2002, has already reported that the adoption of the current penalties for crack offenses were based on inaccurate beliefs concerning the association between crack and violence.

⁵ See Coyle, *Race and Class Penalties in Crack Cocaine Sentencing*, and *Federal Crack Cocaine Sentencing*, The Sentencing Project, February, 2007

serving unjustifiably long sentences. Finally, the large increase in the incarceration rates of non-white women as a result of harsh crack sentences, has resulted in substantial harm to children and families, especially in minority communities.

A legitimate goal of harsh sentencing would be to target large violent drug distributors. In order to accomplish that, the Commission should urge Congress to enact laws with a much sharper focus, replacing the current large net that results in long sentences for low-level offenders and tangential participants in drug offenses. A good start would be to reduce the penalty for crack offenses to the level prescribed for powder cocaine offenses.

Respectfully submitted,
Shenna Bellows
Executive Director
Maine Civil Liberties Union

DRUG POLICY ALLIANCE

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Reason. Compassion. Justice.

Ethan A. Nadelmann

Executive Director

Ira Glasser

President

March 30, 2007

United States Sentencing Commission
Attn: Public Officer
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Commissioners:

Thank you for the opportunity to comment on this significant crisis in criminal justice policy. In my previous capacity as a sentencing advocate working in public defender offices, and as the former Research Director at the Justice Policy Institute, a criminal justice think tank, I have witnessed firsthand the negative repercussions of these unjust sentencing laws. Therefore, I suggest that the commission should take action to equalize the sentencing guidelines between crack cocaine and powder cocaine at the current level of powder cocaine and refocus efforts to target high-level traffickers rather than low-level offenders.

When considering the application of the 100-to-1 crack/powder cocaine sentencing law, it is disconcerting to note that a person who possesses or sells *one pound (only 454 grams)* of powder cocaine would still not fall under the same mandatory minimum sentence of 5 years that a crack cocaine seller possessing just *5 grams* would receive. This is due to the fact that it takes *500 grams* of powder cocaine to beget the same five-year mandatory minimum sentence for just *5 grams* of crack cocaine. That one pound of powder cocaine could be converted into enough crack cocaine to provide up to 64 sellers each with an eighth of an ounce. Simply because the powder cocaine seller had not altered the state of the drug, s/he is not subject to the same punishment as a crack cocaine seller.¹

925 15th Street NW, 2nd Floor Washington, DC 20005
drugpolicy.org (202) 216 0035 fax (202) 216 0803

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Ethan A. Nadelmann

Executive Director

Ira Glasser

President

Crack Cocaine and Powder Cocaine are made from the same substance

As this body has previously determined, powder cocaine and crack cocaine are pharmacologically the same substance and "cause identical effects."ⁱⁱ In fact, one gram of powder cocaine yields less than one gram of crack cocaine. Understandably, cocaine *in either form* has a euphoric, energizing feeling and can be addictive. In fact, a typical dose of crack cocaine lasts a shorter period of time than a typical dose of powder cocaine.

Twenty years ago when the crack cocaine sentencing laws were first passed by Congress, the United States faced a panic about the alleged "crack epidemic" Congress responded under the impression that crack had inherent properties that made it infinitely more dangerous than powder cocaine. There were reports that crack cocaine was instantly addicting, invoked violent behavior and criminal activity in users, and had devastating effects on fetuses. These reports, which served as the basis for the huge disparity, have since been found to be fundamentally flawed, rendering the 100-to-1 disparity arbitrary and capricious. Further, these laws have proven ineffective in reducing drug use or distribution and have instead exacerbated racial disparity and injustices in our criminal justice system.

Crack cocaine sentencing policy has had an overwhelmingly disparate effect on people of color and the poor

Crack cocaine laws disproportionately target members of lower socio-economic and minority groups, particularly blacks. This body, in the previously mentioned 2002 report, noted "sentences appear to be harsher and more severe for racial minorities..." In 2003, blacks constituted 80% of those sentenced under federal crack cocaine laws while whites constituted only 7.8% despite the fact that more than 66% of people who use crack cocaine are white.ⁱⁱⁱ Perhaps the most blatant example of the racism inherent in these laws are statistics from a prison in Virginia. In 1983, prior to the hysteria surrounding crack cocaine and the subsequent introduction of sentencing laws, 63% of prison-sentenced drug offenders were white and 37% were minorities. By 1989, a mere 3 years after the laws

925 15th Street NW, 2nd Floor Washington, DC 20005
drugpolicy.org (202) 216 0035 fax (202) 216 0803

Drug Policy Alliance

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Ethan A. Nadelmann

Executive Director

Ira Glasser

President

were passed, 34% of offenders were white and 65% were minorities, although racial use rates did not change.^{iv} This extreme inverse can be attributed to the harsher crack cocaine sentences which are disproportionately applied to blacks and other minorities.

People convicted on nonviolent drug offenses have been disproportionately affected by crack cocaine sentencing policy

While mandatory minimum sentencing may have originally been intended to target high-level drug traffickers, members of organized crime rings and the violence associated with the crack cocaine market, this body's 2002 report found that 73% of crack cocaine defendants had low-level involvement in drug activity and *only 0.5%* were importers or high-level suppliers.^v Laws intended to decrease availability of crack cocaine and powder cocaine should target large-scale distribution networks rather than low-level sellers who have little to do with trafficking or distribution on a larger scale. According to the Department of Justice, individuals convicted of trafficking less than 25 grams of crack cocaine received an average sentence of almost 65 months, while individuals convicted of trafficking less than 25 grams of powder cocaine received an average of almost 14 months, a difference of four years.^{vi}

Furthermore, the current sentencing policy, and the targeting of low-level offenders, has proven to be devastating for families and communities that suffer high incarceration rates. According to a 2006 report by the American Civil Liberties Union, 1 in 14 black children has a parent in prison and 1.4 million black men are disfranchised because of felony drug convictions. Single-parent homes, unemployment, disillusionment with the justice system and stigmas from felony convictions and incarceration can contribute to the degradation of already disadvantaged communities which serves only to increase crime rates. Again, this body has noted the damage, stating even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

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Ethan A. Nadelmann

Executive Director

Ira Glasser

President

Recommendations

The United States Sentencing Commission should continue to advocate for reforming the laws as it has for the last decade. Although Congress has continuously rejected this body's recommendation in this matter, we support you in your efforts to right this gross wrong in criminal justice policy. In 2004, this body asserted that, "[r]evising the disparity in sentences for crack and powder would do more to reduce the sentencing disparity 'than any other single policy change' and would 'dramatically improve the fairness of the federal sentencing system.'"^{vii}

We urge you to continue your efforts, and specifically ask that you recommend the following to the 110th U.S. Congress:

1. **Revise the crack cocaine and powder cocaine sentencing to a more equitable ratio of 1-1 by raising the crack cocaine quantity threshold, not lowering the quantity triggers for powder cocaine.** To engender vastly different sentences for the same substance, albeit in different forms, is a nonsensical and an extremely harmful policy. However, lowering the powder cocaine threshold would not remedy the injustice and only compound the crisis facing our overcrowded prison system. While past Congresses of past may have limited this body's recommendation language, we believe that you all have the power to voice your collective belief and recall the 1-1 recommendation made over a decade ago.
2. **Refocus law enforcement priorities to target cocaine traffickers.** Law enforcement time and money should be invested in targeting, and apprehending, individuals that traffic and/or import high levels of either form of cocaine. This change would have a two-fold benefit: it would impact the quantity of cocaine products on our streets and lessen the excessive sentences handed down to minorities and/or individuals convicted of low level, nonviolent offenses.

925 15th Street NW, 2nd Floor Washington, DC 20005
drugpolicy.org (202) 216 0035 (202) 216 0803

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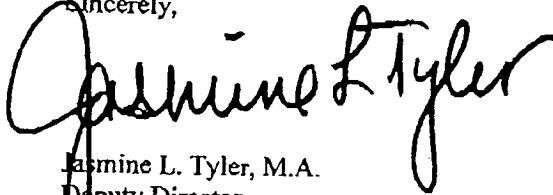
Reason. Compassion. Justice.

Ethan A. Nadelmann

Ira Glasser

Thank you for your dedicated and deliberate attention to this very important issue.

Sincerely,

Jasmine L. Tyler, M.A.
Deputy Director
Office of National Affairs

ⁱ Caulkins, Johnathan P., Peter C. Rydall, William L. Schwabe, and James Chiesa. Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers Money? Drug Policy Research Center: Rand, 1997.

ⁱⁱ United States Sentencing Commission. Cocaine and Federal Sentencing Policy. May 2002.

ⁱⁱⁱ Vagins, Deborah J., and Jesselyn McCurdy. "Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law." American Civil Liberties Union. October 2006.

^{iv} Duster, Troy. "Pattern, Purpose and Race in the Drug War: The Crisis of Credibility in Criminal Justice." Crack in America, Berkeley: University of California Press, 1997.

^v United States Sentencing Commission. Cocaine and Federal Sentencing Policy. May 2002.

^{vi} ibid

^{vii} Vagins, Deborah J., and Jesselyn McCurdy. "Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law." American Civil Liberties Union. October 2006.

925 15th Street NW, 2nd Floor Washington, DC 20005
drugpolicy.org (202) 216 0035 (202) 216 0803

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TOTAL P.06



MARC MAUER
EXECUTIVE DIRECTOR

March 10, 2007

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs

Re: Public Comment on Notice of Proposed Amendments to Sentencing Guidelines,
Policy Statements, and Commentary – Issue for Comment 12: Cocaine Sentencing
Policy

To the Commission:

I am pleased to have the opportunity to write on behalf of The Sentencing Project in regard to the issue of federal cocaine sentencing policy. The Sentencing Project is an independent criminal justice policy organization that has been engaged in research and advocacy related to federal cocaine laws for more than a decade. We welcome this opportunity to lend our insight as a means of assisting the Commission to digest the broad range of issues raised in the public hearing of November 14, 2006.

To this end, we wish to use this letter to briefly discuss two important points highlighted in those hearings that merit further attention:

- First, the perceived association between the sale and use of crack cocaine and violent behavior has been profoundly exaggerated. Consequently, the current penalty structure is too broad and overreaches in the persons for whom the punishment is ostensibly intended.
- Second, this overly punitive sentencing scheme has had a harmful impact on the African American community both through unnecessarily lengthy terms of incarceration that are imposed and through a delegitimization of law enforcement efforts in those neighborhoods most acutely affected by these laws.

We applaud the Commission's initiative to revisit the federal cocaine laws and we urge the members to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current amount for powder cocaine.

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The comments delivered before the Commission by The Sentencing Project staff at the public hearing in November 2006 outlined four key reasons why it is imperative for the Commission to address the weight differential between powder and crack cocaine. These were:

- The current sentencing structure is flawed by design and is incorrectly calibrated to target low-level defendants.
- Drawing a link between a sentence for a crack cocaine offense and its perceived association with heightened violent conduct amounts to “double charging” for the purpose of sentencing.
- The current punishment scheme has produced no appreciable impact on use patterns of crack cocaine.
- The punitive emphasis of current policy is out of step with the evolving national consensus that a supply-side approach to drug abuse emphasizing law enforcement is ineffective and that resources should be focused on demand-side investments in prevention and treatment.

In this letter we will address two key issues relating to the current penalty structure for cocaine offenses: the relationship between crack cocaine and violence, and the effect of crack cocaine penalties on the African American community.

Crack Cocaine and Violence

While the issue of the perceived relationship between crack cocaine and violence is central to the 100-to-1 weight differential structure, a careful analysis of existing data reveals that there is no justification for this disparity. First, in 2006, a substantial majority of both crack (74%) and powder cocaine (87%) defendants did not have a weapon involved in their offense. Further, data from 2000 indicate that only 1.2% of powder cocaine offenders and 2.3% of crack cocaine offenders actually used a weapon in their offense. Over time, the rates of weapon involvement have remained relatively stable. Since 1996, the proportion of crack cocaine defendants who did not have a weapon involved in their offense has ranged from a low of 69% (pre-*Booker* 2004) to a high of 81% (1998). While there are slightly higher rates of weapon involvement for crack cocaine offenses than for powder cocaine offenses, it is critical to note that during the last decade, at least 7 out of 10 crack cocaine defendants *did not* have a weapon associated with their offense. However, because of the heightened punishment for a crack cocaine offense resulting from its preconceived association with violence, these defendants face a punishment disproportionately severe to their charged conduct.

A better response is to rely upon the statutorily created enhancement for drug trafficking crimes that are accompanied by the presence of a weapon. Section 18 U.S.C. 924(c) is clearly intended to punish defendants harshly for the presence and/or use of a weapon during the commission of a drug crime. For example, §§924(c)(1)(A)(i-iii) create a series

of mandatory minimum sentences for the use, brandishing, or discharge of a firearm during the commission of a drug trafficking crime. Subsequent offenses can result in consecutive 25-year mandatory sentences.

In the November 2006 hearings, Assistant U.S. Attorney R. Alexander Acosta argued that harsh crack cocaine penalties are necessary to address violent drug gang activity that plagues communities in his district. Despite this contention, he was unable to identify a single instance in which the federal crack cocaine laws were used to target high-level sellers or traffickers.

Harsh punishments already exist for drug offenses in which a weapon is present and were obviously intended by Congress for just this scenario – violent drug gangs. Claims by the Department of Justice that it needs tough crack cocaine laws to break up violent drug gangs ignore the reality that the current approach overreaches the population for whom it is intended to target. Because the current penalty structure for crack cocaine presumes a link between the drug and violent behavior, and has internalized this presumption into the penalty itself, both perpetrators of violence and drug sales *as well as* low-level users with no associated violent conduct are subject to the same punishment for the narcotics element of their charge. The result is the absence of proportionality in the penalty structure.

In the case of violent drug activity, 21 §841(b)(1)(A-B) and 18 U.S.C. §924(c) should be used in concert with one another to ensure that the enhanced penalties are only applied to deserving individuals. Increasing the crack cocaine weight thresholds in 21 U.S.C. §841(b)(1)(A-B) will not undermine law enforcement or prosecutorial efforts to combat violent drug activity because stiff penalty enhancements already reside in 18 U.S.C. §924(c). Thus, the Commission should call upon Congress to repeal the 100-to-1 statutory weight ratio and equalize the penalty triggers for both types of cocaine at the current powder level. Subsequently, the Commission should drop the floor of the guideline range for crack cocaine offenses to the level of the reformed statutory minimum.

Crack Cocaine Penalties and the African American Community

An additional area of concern that emerged in the November hearings was the impact of the crack cocaine penalty scheme as it pertains to the African American community. This is an issue of paramount importance considering that 8 in 10 of the persons convicted in federal court each year for a crack cocaine offense are African American. Some proponents of the current structure argue that the consequences of the drug sales that occur in the African American community are the very reason for the harsh penalties, and as a result, there is a net benefit for these neighborhoods. However, a review of the history and impact of these policies demonstrates that the severe penalties are both unnecessary for law enforcement purposes and are counterproductive for police-community relations.

While there are higher rates of victimization in the African American community, leaders in the black community have repeatedly called not for harsh punishments but rather for fair and effective law enforcement and social service interventions. Drug policies in general, and the crack penalties in particular, have resulted in an erosion of legitimacy for law enforcement agents in many affected neighborhoods and a lack of confidence in many institutions of governance. This can manifest itself in a disruption of law enforcement efforts to investigate other types of crime and a hampering of court procedures, such as jury selection.

In his November 2006 testimony, United States District Judge Reggie Walton stated that he has had conversations with practitioners who bemoan the impact that the crack cocaine sentencing disparity has had on the ability to adjudicate cases fairly. "[P]eople in the community are astute enough to know about the disparity, and they bring concerns into the courtroom as potential jurors and, as a result of that, many times will say they can't serve as jurors in these cases and many times will serve with the intent of not convicting . . ." Judge Walton reflected on conversations with individuals in those communities most acutely affected by crack cocaine laws, and noted that the impact has left many residents "feel[ing] that the system of justice in America is racist." There is little more serious threat to a system of justice than a population which perceives that laws are illegitimate and their implementation unjust.

The federal crack cocaine laws pervert the court process in other ways as well. Overly punitive mandatory minimum sentences are frequently used to compel defendants to accept offers of a plea bargain. The threat of a mandatory minimum sentence deters the pursuit of the constitutional right to have a case heard before a jury of one's peers by establishing a "trial penalty." The choice many defendants face is to either take a plea or take a chance before the court and face a harsher penalty. For many, this is a gamble that is simply not worth taking. We can only speculate in regard to how many cases of misconduct, illegal search and interrogation, misidentification, or absolute innocence have gone unaired before a court of law because of the specter of a mandatory minimum sentence hanging in the balance? As noted above, all of these concerns fall disproportionately upon the African American community.

Judge Walton also observed the catastrophic impact of these harsh mandatory laws on the younger generation of African American men and their families. Walton cautioned that "as long as we continue to lock up the number of young black men that we continue to lock up, we're going to leave many of our boys and girls without fathers, and without fathers, I think, children end up having significant problems." Walton's concerns are evidenced by the fact that 1 in 14 African American children has a parent in prison. For many families, generational involvement in the criminal justice system is a stark reality, and there is little question that the punitiveness of the federal crack cocaine laws has contributed to this problem.

The severe crack cocaine penalties also divert limited resources into the prison system. Funds devoted to the prosecution and incarceration of crack cocaine defendants reduces the potential for investments in education, urban renewal, economic development, and health care. Finally, mandatory minimum sentences for low-level drug users, such as those targeted by federal crack cocaine laws, conflict with efforts to expand drug treatment options. Despite a wealth of empirical evidence supporting the efficacy of drug treatment and the substantial savings it offers over incarceration, mandatory minimum sentences continue to incarcerate thousands of persons suffering from drug addiction while offering little in terms of services to address their underlying illness. In the African American community, this misallocation of resources magnifies other failures in the provision of social services and subverts efforts to overcome the consequences of drug abuse.

In light of inherent disproportionalities present in current federal cocaine sentencing laws, as well as the particularly harmful impact that they have had in the African American community, we strongly urge the Commission to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current level for powder cocaine. The Sentencing Project appreciates this opportunity to address the Commission and would welcome a future conversation to discuss any of the points raised in this letter in additional detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Mauer", written in a cursive style.

Marc Mauer
Executive Director



March 30, 2007

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

Re: Issue for Comment: Cocaine Sentencing Policy

Dear Judge Hinojosa:

We write on behalf of the board and members of Families Against Mandatory Minimums (FAMM). For twenty years the 100:1 ratio has punished low-level crack offenders, many of whom are first-time offenders, far more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. The Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and interstate crack sellers receive average sentences longer than international powder cocaine traffickers¹. Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what The Sentencing Reform Act of 1984 intended to stem the tide of crack cocaine abuse.

We recognize that two decades ago little was known about crack other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analysis by the Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect. Four previous inquiries, reaching back to 1995, produced research and findings from diverse fields. You have heard, repeatedly and most recently in November 2006, from psychologists, criminologists, law enforcement personnel, pharmacologists, treatment providers, defense and prosecuting attorneys, prisoners' families, and interest groups such as ours. For the most part they do not support the current penalty structure. Your reports, most recently the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, exhaustively detail their findings and in all your reports you have reached the same conclusion "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."²

¹ U.S. Sentencing Commission, 104th Congress, 2nd Session, Special Report to Congress: Cocaine and Federal Sentencing Policy (1995) at 175-77 (Figures 10 & 11).

² U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing 132 (2004).

Honorable Ricardo H. Hinojosa

March 30, 2007

• Page 2

The documentation could not be more complete. That opposition to the unbalanced penalty structure for crack cocaine is widespread and unsurprising; your work has done so much to demonstrate that the penalty structure is unconscionable, unsupportable and its demise is years overdue.

And yet, year after year, the Commission and all of us who struggle to dismantle the crack penalty structure, have failed. We have failed because ultimately, amending the crack guideline rests in the hands of Congress. The Sentencing Reform Act of 1984 provided that amendments sent it by the Commission would become law unless disapproved by an Act of Congress.³ In 1995 the Commission proposed to raise the crack penalty triggers to correspond with those for powder cocaine. Congress exercised its §994(p) option and disapproved the amendment.⁴ In that Act, Congress directed the Commission to report on the crack cocaine penalty and address a series of considerations. The ensuing research resulted in the April 1997 report to Congress that included recommendations in lieu of a proposed amendment.⁵ That report and the one from 2002 were met by a deafening silence on the Hill.

But today, it might have a chance. The new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences. You have built an impressive battery of evidence to support an amendment. And, we believe you could gain bi-partisan support for amending the crack penalty. We are not naïve enough to think that a Congress controlled by Democrats is the panacea for a broken sentencing system. We do believe however that there is a fresh opportunity to develop bi-partisan support on the Hill for a new look at one of the most broken penalty structures. And we think the Commission is best suited to lead off with a proposed guideline.

FAMM supports an end to the sentencing disparity between crack and powder cocaine. We believe that the penalty structure for crack cocaine should not differ from the penalty structure for powder cocaine. The overwhelming impact of the evidence points to the correctness of parity indexed at the current powder cocaine penalty structure.

We urge you to propose an amendment that promises genuine relief, promotes justice and brings an end to the unconscionable results produced by the current penalty structure. If you do so, you will not be alone going to the Hill. Given the right amendment, you could be joined by many of the groups that have written and testified and conducted research and come to Commission meetings and sat through congressional debates year after year.

Thank you for considering our views.

³ 28 U.S.C. § 994(p).

⁴ See Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

⁵ See Special Report to Congress: Cocaine and Federal Sentencing Policy – April 29, 1997.

Honorable Ricardo H. Hinojosa
March 30, 2007
Page 3

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

[awb]

HUMAN RIGHTS WATCH

100 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

HUMAN
RIGHTS
WATCH

www.hrw.org

U.S. PROGRAM

Michelle Fellner, Director
Jennifer Daskal, Advocacy Director
Ashoka Mukpo, Associate
Jason Lombardo, Associate
Sherine Newell Bieman, Counsel on Counter Terrorism
Jason Parker, Senior Researcher
John ToRe, Researcher

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John Olson, Chair, Board of Directors

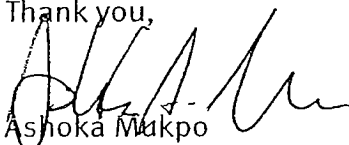
March 20, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

Please replace the enclosed letter with the one that was inadvertently sent to you last week. Unfortunately, due to a processing error that version had not been fully proofed and finalized. Please accept my apologies.

Thank you,


Ashoka Mukpo
Associate, US Program

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
E: hrwnyc@hrw.org

HUMAN
RIGHTS
WATCH

www.hrw.org

U. S. PROGRAM

Jamie Fellner, *Director*
Jennifer Daskal, *Advocacy Director*
Mie Lewis, *Aryeh Neier Fellow*
Ashoka Mukpo, *Associate*
Allison Lombardo, *Associate*
Katherine Newell Bierman, *Counsel on Counter Terrorism*
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Debra Saunders, *Deputy Program Director*
Hilder Tayler, *Legal and Policy Director*
Jane Olson, *Chair, Board of Directors*

March 14, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

We welcome the Commission's continued efforts to eliminate the current disparities in sentences for crack cocaine and powder cocaine offenses. As the Commission's prior reports have revealed and as testimony at the Commission's November 2006 hearings on federal cocaine sentences reaffirmed, there is no empirical or principled basis for the far harsher sentences for crack cocaine offenders than for powder cocaine offenders. Arbitrarily severe sanctions cannot be justified. The unjustifiable becomes unconscionable when, as is the case here, the sentences disproportionately burden a racial minority.

Human Rights Watch acknowledges the public's legitimate interest in curtailing the sale and use of dangerous drugs. But the importance of drug control should not be permitted to override fundamental principles of justice and equality. These universally accepted principles are affirmed in international human rights treaties to which the United States is a party, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

By seeking to eliminate the sentencing disparity between crack and powder cocaine offenses, the Commission upholds the US commitment to protect fundamental human rights.

Arbitrarily and Disproportionately Severe Sentences.

Imprisonment is a legitimate sanction for violent or dangerous conduct. Yet, prison sentences that are arbitrarily severe and disproportionate to the gravity of the offender's specific conduct and his or her personal culpability are inconsistent with respect for the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty.

Federal crack offenders face sentences that are far more severe than those levied on persons convicted of federal powder cocaine offenses, drug offenders sentenced for cocaine offenses under state law, and drug offenders convicted in other constitutional democracies. In 2006, the average sentence for a powder cocaine offender was 84.7 months, while the average sentence for a crack cocaine offender was 121.5 months, or 43% percent higher.¹ The sentencing disparity is particularly egregious for the low level offenders, street level dealers and couriers, who constitute the preponderance of crack cocaine (68.9%) and powder cocaine (59.9%) offenders.² For example, the average sentence of a street-level dealer of crack cocaine is 104 months, almost double the 56 months that the average powder cocaine dealer received.³ Yet they are engaged in the same activity—selling illicit and addictive substances to individuals for their own consumption. Similarly, although crack cocaine and powder cocaine couriers perform the same basic transportation function, the average sentence for a crack cocaine courier/mule is 107 months, again just about double the 55 months for a powder cocaine courier.⁴

Federal sentences for low level crack cocaine offenders are also much longer than those given equivalent offenders sentenced in state courts. The average maximum prison sentence length for offenders convicted of drug trafficking in state courts is 55 months.⁵ Among European countries, the average length of sentences for persons convicted of drug trafficking is 33 months.⁶

Congress established the 100-to-one sentencing ratio for crack and powder cocaine in the Anti-Drug Abuse Act of 1986. That legislation established five- and ten-year mandatory minimum sentences for cocaine offenses in which it took one hundred times as much powder cocaine to trigger the same sentence as for crack cocaine.

¹ United States Sentencing Commission (USSC), "2006 Sourcebook of Federal Sentencing Statistics," March 2007, <http://www.ussc.gov/ANNRPT/2006/figi.pdf> (accessed March 14, 2007), Fig. J.

² United States Sentencing Commission, "Report to Congress – Cocaine and Federal Sentencing Policy," May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007), p.39, Fig. 6.

³ Ibid, p.43, Fig. 9.

⁴ Ibid.

⁵ Bureau of Justice Statistics (BJS), "2002 Felony Sentences in State Courts," December 2004, <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssco2.pdf> (accessed March 14, 2007), p.4, Table 3.

⁶ Martin Killias et al., "Sentencing in Switzerland in 2000," *Overcrowded Times* vol. 10, no. 6 (1999), p. 1, 18-19, citing figures from the Council of Europe's 1990 *Bulletin d'information Pénologique*, no. 15.

The Commission then used this 100-to-one ratio to develop sentencing guidelines for the full range of other powder and crack cocaine offenses. By all accounts, Congress simply picked the 100-one ratio out of the air, and it is this ratio which is the prime cause of the far more severe sentences crack offenders receive.

Supporters of current cocaine sentences claim that crack poses uniquely serious harms compared to powder cocaine; that long prison sentences for low level crack offenders offer prosecutors necessary leverage for securing their cooperation in the investigation of higher level offenders; and that the sentences deter prospective offenders and enhance community safety and well being. Yet, as evidenced during testimony at the November 2006 hearings, supporters of the status quo are unable to marshal much empirical evidence to support their claims.⁷ To the contrary, as witnesses at the hearings pointed out and as the Commission has itself noted in its reports,⁸ there is an abundance of empirical data showing that the inherent pharmacological dangers of crack are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack—e.g. crack babies—turn out to be myths, and that harsh federal sentences have had little impact on the demand for or the availability of the drug. In addition, the drug gang violence that accompanied the emergence of distribution and marketing of crack in the 1980s as well as the number of new crack users have dramatically declined. This decline is not the result of the sentencing differential, but of stabilization in the crack distribution markets and the inherent rise and fall in demand that is characteristic of new illicit drugs. Even if concerns about violence and increased use of crack cocaine had warranted sentencing differentials two decades ago, the changed realities have undermined any basis for those differentials now.⁹

The principle difference between the two forms of cocaine is that they are used by different socio-economic groups. Powder cocaine is relatively expensive. In contrast, crack cocaine (which is produced from powder cocaine) is sold in “rocks” that can be bought in small, cheap quantities. While people with financial resources can and do use crack as well as powder cocaine, people with limited funds who want to use cocaine can only afford it in the form of crack. Crack’s low price thus contributed to the rapid rise in its use in the 1980s.

⁷ United States Sentencing Commission, “Written Statements of Witnesses and Hearing Transcript: Hearing on Cocaine and Federal Sentencing Policy,” November 2006, http://www.ussc.gov/hearings/11_15_06/testimony.pdf (accessed March 14, 2007).

⁸ United States Sentencing Commission, “Report to Congress – Cocaine and Federal Sentencing Policy,” May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” April 1997, http://www.ussc.gov/r_congress/NEWCRACK.PDF (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” February 1995, <http://www.ussc.gov/crack/exec.htm> (accessed March 14, 2007).

⁹ USSC, “Transcript: Hearing on Cocaine,” November 2006.

- In essence, federal law penalizes the sale of a substance to poor people more than the sale of the equivalent substance to the affluent. It is the equivalent, were alcohol illegal, of imposing higher punishments on the sale of jug wine than on the sale of chateau neuf du pape. Similarly, by dictating far higher sentences for the possession of crack than for the possession of powder, the law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form.

The Commission has correctly concluded in the past that there is no justification for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine and it has recommended elimination of the 100-one ratio.¹⁰ Nothing that has happened in the five years since the Commission's last report changes that conclusion.

The Racially Discriminatory Impact of Crack Sentences.

Arbitrarily severe sentences should have no place in federal sentencing structures. But they are particularly objectionable when they are imposed primarily on a racial minority. According to the Commission's 2006 statistics, 81 percent of the men and women convicted of federal crack cocaine offenses are African American, a proportion that has not varied significantly over the past decade.¹¹

The discriminatory impact of crack sentences cannot be squared with international treaty obligations of the United States. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has signed and ratified, prohibits conduct that has the "*purpose or effect*" of restricting fundamental rights on the basis of race.¹² That is, laws that are racially neutral on their face will constitute prohibited racial discrimination if they have an unwarranted disparate impact upon a group distinguished by race, even in the absence of any discriminatory intent. In the case of federal cocaine sentences, the racially disproportionate burden of longer sentences on African Americans is utterly unwarranted.

¹⁰ USSC, "Report to Congress on Cocaine," May 2002; USSC, "Special Report to Congress on Cocaine," April 1997; USSC, "Special Report to Congress on Cocaine," February 1995.

¹¹ USSC, "2006 Sourcebook," March 2007, Table 34.

¹² International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. Article 1 (1) states:

In this convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

If most of the people who sell and use crack cocaine in the United States were African American, it would be more understandable that most crack defendants are African American. Yet contrary to public assumptions, the average crack offender is white not black. According to federal data for 2005, an estimated 1,392,000 African Americans have used crack cocaine at least once in their lifetime, and 218,000 have used it in the past month. In contrast, an estimated 5,210,000 whites have used crack at least once in their lifetime, and 358,000 used it in the past month.¹³ There is no national data on the racial breakdown of dealers and distributors of crack cocaine, but the limited data that does exist suggests whites constitute a preponderance of crack dealers as they do of crack users. For example, researchers have found that drug users identify their main drug sources as members of the same racial or ethnic background as they are. In addition, a large study conducted in the Miami, Florida metropolitan area of powder and crack cocaine users revealed that over 96 percent of users in each ethnic/racial category were also involved in street-level drug dealing—which also suggests a racial profile of sellers that is comparable to users.¹⁴

In short, differences among the racial groups in drug offending do not account for the marked racial disparities in drug offender arrests and ultimately imprisonment. Instead, most criminal justice analysts believe black crack cocaine offenders are more likely to be arrested than their white counterparts because people buying, using and selling drugs in poor, primarily minority, urban communities are more likely to be arrested than people buying, using and selling drugs in more affluent and predominantly white neighborhoods.¹⁵

We do not believe any honest observer of the public response to crack, including that of federal legislators, can ignore the role of race. Inner city minority neighborhoods did suffer because of the increased drug dealing on the streets, increased crimes by addicts seeking to finance their addiction, and violence by competing drug gangs that came with the advent of crack. But the dismay of local residents was more than matched by the censure, outrage, and concern from outsiders fanned by incessant and sensationalist media stories, by politicians seeking electoral advantage by being “tough on crime,” and by some politicians who were—consciously or otherwise—playing the “race card” in advocating harsh responses to crack. When crack spread throughout low-income minority

¹³ US Department of Health and Human Services Substance Abuse and Mental Health Statistics Agency (SAMHSA), “2005 National Survey on Drug Use & Health,” September 2006, <http://oas.samhsa.gov/2k5/NSDUH/tabs/Section1to66.htm#Tab1.47A> (accessed on March 14, 2007), Table 1.47A. A somewhat higher percentage of African Americans than whites have used crack at least once in their lifetime—5.6 percent compared to 3.4 percent; Ibid. Table 1.47B.

¹⁴ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, “Crack Use, Crime by Crack Users, and Ethnicity,” in Darnel F. Hawkins, ed., *Ethnicity, Race and Crime* (New York: State University of New York Press, 1995), p. 21.

¹⁵ Human Rights Watch, *United States – Punishment and Prejudice: Racial Disparities in the War on Drugs* (and sources cited therein), Vol. 12, No. 2 (G), May 2000, <http://www.hrw.org/reports/2000/usa/>.

neighborhoods that white Americans already saw as dangerous and threatening, it galvanized a complicated set of racial, class, political, social, and moral dynamics that resulted in extensive drug law enforcement in those neighborhoods as well as uniquely punitive federal sentences for crack offenders.

The greater number of black crack defendants and Congress's choice of harsher sentences for crack offenders may be explained. But explanation is not justification. Congress has many ways to protect minority communities and address drug abuse besides dictating uniquely severe penalties for crimes that are prosecuted disproportionately against African Americans.

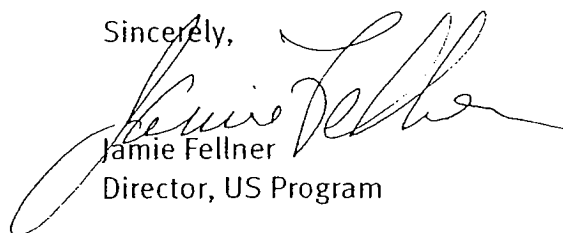
By seeking to eliminate the crack/powder sentencing differential, the Commission affirms the principles of justice and equal protection of the laws that should be the bedrock of US law. As the Commission has recognized in the past and as witnesses at the November 2006 hearing also acknowledged, the crack/powder cocaine sentencing disparities reinforce the perception in African American communities that the US criminal justice system is biased and unfair. Absent change, federal crack sentences will continue to deepen the country's racial fault lines and to belie the nation's commitment to equal justice for all.

Human Rights Watch believes the disparities in the guidelines and legislation should be eliminated by increasing the threshold quantities of crack required for a given sentence to those required for powder cocaine offenses. The disparity should not be eliminated by reducing the quantity of powder cocaine required, which would have the effect of increasing powder cocaine sentences. No one argues that federal sentences for powder cocaine offenses are too low. The injustice caused by the current 100-to-one ratio should not be cured by an arbitrary change to powder cocaine sentences.

Conclusion.

We urge the Commission to seek to restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by submitting to Congress amended guidelines that eliminate the 100-one ratio in the quantities of crack and powder cocaine required to trigger equivalent sentences. We also urge the Commission to recommend to Congress that it eliminate crack and powder cocaine sentencing disparities in existing mandatory minimum sentencing legislation.

Sincerely,



Jamie Fellner
Director, US Program

[273]



April 2, 2007

Member Organizations

National Bar Association
Association of
Black Psychologists
National Association of
Black Social Workers, Inc.
Howard University
School of Law
Congressional Black Caucus
Foundation, Inc.
National Dental Association
National Black Caucus of
State Legislators
Association of
Black Sociologists
National Black Nurses
Association, Inc.
National Organization of
Black Law Enforcement
Executives
National Association of
Blacks in Criminal Justice
National Black Alcoholism &
Addictions Council, Inc.
Black Administrators in
Child Welfare, Inc.
Association of
Black Health-System
Pharmacists
National Medical Association
National Black Police
Association
National Alliance of Black
School Educators
National Institute for Law and
Equity
National Conference of Black
Political Scientists
Black Psychiatrists of
America, Inc.
National Black Prosecutors
Association
National Organization of
African Americans in
Housing
Thurgood Marshall Action
Coalition

Honorable Ricardo Hinojosa
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002
pubaffairs@ussc.gov

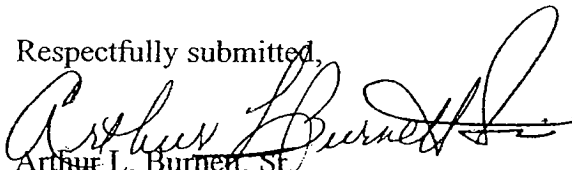
Dear Mr. Chairman:

On behalf of the National African-American Drug Policy Coalition, Inc. I submit this letter in further support of the views expressed in the Written Statement we submitted for the Record in connection with the Public Hearing held on November 14, 2006 on the issue of obtaining parity in sentencing for crack cocaine and powder cocaine, by lowering the sentence levels for a quantity of crack cocaine to the same level as for an equivalent quantity of powder cocaine. With that Written Statement we submitted also a copy of the Report and Recommendations of our Blue Ribbon Commission on Racial Disparities in Substance Abuse Policies which had been released September 8, 2006.

We now wish to advise you and all of the Commissioners of the United States Sentencing Commission that both our Board of Directors and our Advisory Board of Directors from our twenty-three (23) member organizations met at Howard University School of Law on Thursday, March 29, 2007 and reviewed the contents of the letter recently submitted by Deborah Peterson Small on behalf of Break the Chains: Communities of Color and the War on Drugs, copy enclosed, and unanimously adopted the views stated therein as the views and position of the National African American Drug Policy Coalition, Inc. These views are fully consistent with and supportive of the views we expressed in our initial submission and provide further support and elaboration for those views.

Accordingly, we fully join in the views and comments set forth in the enclosed statement and adopt them also as the views and comments of the National African American Drug Policy Coalition, Inc.

Respectfully submitted,


Arthur L. Burnett, Sr.
National Executive Director

Enclosure

Justice Delayed is Justice Denied:
A Plea to Reform Federal Cocaine Sentencing Laws
Submitted by Break the Chains: Communities of Color and the War on Drugs

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002
pubaffairs@ussc.gov

Dear Commissioners:

Twenty-years ago, in response to what appeared at the time to be a serious epidemic of crack cocaine abuse, Congress enacted laws singling out offenses involving crack cocaine for more severe penalties than other drug crimes including a mandatory five year minimum for sale of as little as 5 grams of crack cocaine. Under these provisions crack cocaine offenses are punished 100 times more severely than crimes involving powder cocaine, consequently the threshold amount that would trigger a five year mandatory sentence for powder cocaine is 500 grams. Congress further singled out crack cocaine for special punishment when it required a mandatory minimum sentence of five (5) years for a first offense of mere *possession* of five grams or more of crack cocaine.¹ There is no federal mandatory minimum sentence for first time possession of powder cocaine or any other currently illicit drug.

In the years since the passage of these laws, there has been a growing chorus of criticism regarding their impact, particularly on African-American defendants and the continuing validity of the 100:1 sentencing disparity. In 1986, before mandatory minimums for crack cocaine offenses became effective, the average federal sentence for black drug offenders was 11% higher than for whites. Four years following the implementation of the crack-powder cocaine sentencing disparity, the average federal sentences for black drug offenders was 49% higher than for whites.² According to the Sentencing Project, between 1994 and 2002, the average time served by African Americans for a drug offense increased by 73%, compared to an increase of 28% for white drug offenders.³ The stiff sentences imposed by these laws were ostensibly intended to provide incentive for federal prosecutors to target major drug traffickers that manage large scale operations moving large amounts of drugs. However, their implementation has had the opposite effect. Because the threshold level quantity of crack cocaine needed to trigger a 5 or 10-year mandatory sentence is so low, prosecutions have focused disproportionately on low-level crack cocaine cases. Between 1995 and 2000 the percentage of federal crack cocaine convictions of street-level dealers rose from almost half (48.4%) to more than two thirds (66.5%).⁴

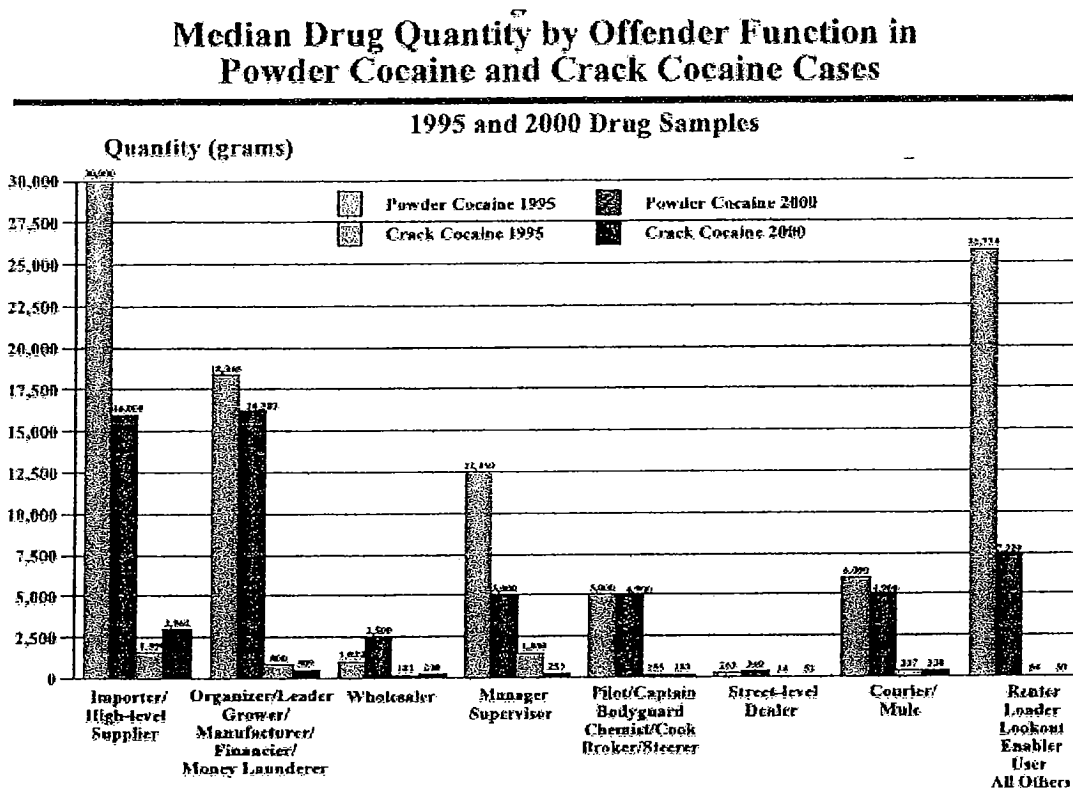
¹Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 and Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

² Mierhoefer, Barbara S., *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* (Washington DC: Federal Judicial Center, 1992).

³ The Federal Prison Population: A Statistical Analysis, The Sentencing Project, January 2006, <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=502>

⁴ USSC Report to Congress Cocaine Sentencing Policy, May 2002, p. 53.
http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm

Because crack cocaine sentences are based primarily on the amount of drugs involved, the 100:1 disparity affects not only street level offenders but also those prosecuted as major distributors or traffickers. The following chart illustrates the disparity in the median amount of drugs involved in various levels of federal cocaine prosecutions.



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

As the chart above clearly shows, the 5 grams of crack cocaine threshold set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less “serious” drug traffickers. The median crack cocaine street level dealer was arrested holding 52 grams of crack cocaine enough to trigger a 10-year mandatory sentence. For powder cocaine, the median street level dealer is charged with holding 340 grams of powder cocaine, not enough even to trigger the 5-year mandatory sentence.⁵ In its 2002 Report to Congress, the Commission recognized the adverse effects of the 100:1 sentencing disparity for crack cocaine offenses — “it has resulted in severely long prison terms for low-level crack cocaine offenders and because sentences are based primarily on the quantity of drugs involved, defendants with different levels of culpability are lumped together.” No where is this effect more pronounced and injurious than in the case of women who are prosecuted as mules or co-conspirators. The problem has become so pervasive that it’s known colloquially as “the girlfriend problem”.

Federal sentencing laws punish not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs. A woman charged with conspiracy in a drug crime is held legally responsible for the total amount of drugs possessed or sold by

⁵ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

everyone in the operation rendering her vulnerable to extremely long mandatory sentences. As a result, even when they have minimal or no involvement whatsoever in the drug trade, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity. The experience of Sandra Lavonne Rucker is illustrative:

At the time of her arrest Sandra was in relationship with a man who ran a drug operation, and allegedly brought a weapon into Sandra's apartment. Although the testimony of a codefendant established that Sandra was not a principal organizer of the operation and she provided credible testimony that she had never sold drugs and was just the man's girlfriend, she was nevertheless convicted of involvement in the drug conspiracy and was held liable for the total amount of drugs involved in the operation – in this case 50 grams or more of crack cocaine – Sandra received a sentence of life imprisonment.⁶

The impact of federal drug sentencing policy on women has been dramatic. Women are now the fastest growing segment of the prison population. Women are now six times more likely to spend time in prison than they were before the passage of mandatory minimum drug sentencing. As a result of federal mandatory minimum drug sentences including the crack-powder sentencing disparity, African-American women are entering prison at rates that are 2 ½ times higher than Hispanic women and 4 ½ times higher than white women.

Sentences for crack cocaine offenses are grossly disproportionate when compared with sentences for other crimes that don't have mandatory minimums. Five grams of crack cocaine is worth about \$400 and represents one fifty-millionth of annual U.S. cocaine consumption, or about two weeks supply for the average user. Compare the five year mandatory sentence for possession of five grams of crack cocaine with the national average time served for homicide of about five years and four months.⁷

Accumulating evidence demonstrates that the punitive sentencing structure enacted two decades ago to combat crack cocaine abuse has not produced benefits commensurate with the harms it is inflicting. Extensive ethnographic and governmental evidence show that despite increased law enforcement focus on cocaine, the street prices of crack and powder cocaine have remained the same over the past decade. Moreover, cocaine purities are as high as they were at the height of the crack era which demonstrates that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.⁸

In 1994, Congress directed the Commission to study the impact of the crack-powder disparity in federal cocaine sentencing. In 1995 the Commission recommended a revision of the crack-powder 100:1 sentencing disparity, based on its finding the differential was not justified by any differences between the two forms of the drug and implementation of the laws was having a severely disparate effect on African-American cocaine offenders. The Commission

⁶ Hameefah Jackson, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 How.L.J. 517, 520-521 (2003); *United States v. Riley*, 215 F.3d 1323 (4th Cir. 2000).

⁷ Caulkins, Jonathan P., Reuter, Peter, *Reorienting U.S. Drug Policy*, Issues in Science and Technology, Fall 2006 www.issues.org/23.1/caulkins.html

⁸ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

recommended that Congress equalize the ratio to 1:1 based on the quantities set to trigger mandatory sentences for powder cocaine offenses and repeal the 5 year mandatory sentence for possession of crack cocaine. The Commission suggested that Congress could accomplish its goal of punishing violent crime related to crack cocaine distribution more severely by using criteria other than drug type or amount to enhance sentences based on specific behavior (e.g. use of weapon; sales to minors or use of minors in transactions; gang-related drug activity). For the first time in the Commission's history, Congress rejected its recommendation in its entirety and refused to consider any changes to the penalties.⁹

In 1997 the Commission again recommended that Congress reduce the crack-powder sentencing disparity, again by changing the weight amounts that would trigger a mandatory sentence except this time the Commission provided a ratio range of 2:1 – 15:1 to choose from. However, again Congress refused to act on the recommendation. The issue came up again in 2002. This time the Commission recommended reducing the crack-powder disparity ratio to 20:1. Each time the Commission also recommended that Congress repeal the mandatory minimum for simple possession of crack cocaine. Once again, Congress refused to act on the recommendation.

Which brings us to the present. Once again the Commission is holding hearings on the crack-powder sentencing disparity and again experts from the judiciary, academia, criminal defense and prosecution as well as drug treatment and drug policy reform advocates have testified in favor of reforming these laws. Much has already been said regarding the racially disparate impact of these laws. Government surveys have consistently shown that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.¹⁰ Research demonstrates that the majority of drug users purchase their drugs from people who are of the same racial or ethnic background as they are which means that the majority of crack cocaine sellers in the U.S. are white.¹¹ Despite these well known facts African-Americans continue to comprise the bulk of federal crack cocaine defendants. Indeed in 2005, 82.3% of federal crack cocaine defendants were African-American. If these numbers were referencing prosecutions for murder, arson, burglary or car theft, there would be no question of racially skewed law enforcement as there is broad acknowledgment that these crimes cut equally across racial, ethnic and class groupings but when it comes to drug crimes – especially crack cocaine - we are all too willing to accept a racialized view of who the offenders are.

Supporters of the current laws claim that crack cocaine offenses are deserving of harsher penalties because there is greater criminality and violence associated with crack cocaine than with powder cocaine. Furthermore, they argue that crack cocaine sellers tend to congregate in poor inner-city communities, turning neighborhoods into war zones that drive businesses away and leave residents in fear.

Testimony the Commission received in November 2006, from experts in drug addiction treatment, criminology and ethnographic research made it clear that whatever validity that position may have had in 1986, it no longer holds today. Dr. Nora Volkow, Director of NIDA testified that there is *"no evidence that crack [cocaine] is associated with more violent behavior than intravenous drug use [of cocaine]."* *"Now can cocaine produce violent behavior?.....yes,*

⁹ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

¹⁰ Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995 (Washington, DC: Sept. 2005), Table 1.43a.

¹¹ Dorothy Lockwood, Anne E. Pottinger, and James Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnell F. Hawkins, ed. Ethnicity, Race and Crime, New York: State University of New York Press, 1995. p. 21.

cocaine can be associated with violence very much in part driven by the fact that it can induce paranoid thinking in the individual taking the drug. That occurs whether you inject or you smoke, and it even occurs with snorting. The more repeatedly you are doing it, the more likely you are to become paranoid from cocaine."¹²

Dr. Bruce Johnson of NDRI testified that inner-city African-American youth – especially males – have voluntarily eschewed crack cocaine use which has become heavily stigmatized. He also testified that only a small minority of crack cocaine users in New York City carried guns or used weapons during the past six years. They also had very low incidences of aggravated assault or otherwise caused physical harm to people. It is our belief that similar studies in other jurisdictions would demonstrate the same findings. Another study of criminal activity among heavy or regular crack cocaine users found that their illegal income generating activities were sporadic and tended to be crimes of opportunity as opposed to crimes that involved planning or organized action.¹³

The claim by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade is belied by the available evidence. Two recent studies are of particular note:

In Seattle, Washington, African-Americans account for about 8% of the population but comprised 57% of those arrested for drug crimes in the city. A report analyzing the reasons for such dramatic racial disparities in arrests reached the following conclusions¹⁴:

1. Drug enforcement practices focus on visible street-level markets, which tend to disproportionately involve persons of color, but are not necessarily reflective of all drug markets or even the majority of drug markets.
2. Crime and other ancillary effects are related to all drugs, including those that fall outside the radar of local police. While drug enforcement since the crack epidemic is often characterized as targeting the violence associated with drug markets, it appears that the violence associated with the crack trade has declined significantly and the focus of local policing is more on the quality of life effects of public drug use and markets.
3. Police often claim that they are responding to community complaints and concerns, but the geographic distribution of formal narcotics complaints did not necessarily reflect the concentration of drug arrests – while only 12.5% of drug complaints emanated from the predominantly African-American section of the city, more than 50% of all drug arrests took place there.

Another report by Drs. Bruce Johnson and John C. Cross begins with the following provocative hypothetical:

"Two young men are selling on the sidewalk on a street in upper Manhattan. Both are hoping to make a sale soon so that they can use the money for something they need. Both are selling a product that they purchased from someone with whom they have a personal

¹² U.S.S.C. Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, p. 193.

¹³ Cross, J. et al., *Supporting the habit: income generation activities of frequent crack users compared with frequent users of other hard drugs*, Drug and Alcohol Dependence 64 (2000) 191-201.

¹⁴ Beckett, Kathleen. et al. *A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, John F. Kennedy School of Government, Harvard University April 2001. <http://www.defender.org/projects/rdp/>

relation. Neither one has a license or a permit to sell products on the street, nor has any plans to pay taxes on their earnings. Both keep an eye out for the police. Despite all these similarities, however, there is a world of difference in the type of product they are selling. One is selling sweaters imported from Peru and if he is caught he will probably be placed under administrative arrest for a few hours and fined. The other is selling crack cocaine: if he is caught he could face from five to ten years in prison."¹⁵

The report ends with the following conclusions:

"In many ways our research on crack [cocaine] dealers showed that they behaved in ways very similar to informal street vendors. Both had marginal skills for primary sector jobs (low social capital); both put in long hours in public locations during which it was often not clear whether they were working or socializing; both used social networks to further their selling repertoire; and in other ways both used similar techniques for risk management used in the legal informal sector.

While illegality may be for some people a form of entrepreneurship, most of the persons immersed in the illegal drug trade did not and could not squeeze a profit out of the commodity they sold. Rather, most were victims of many forms of exploitation by others in the market..... While people make choices about their actions, the available choices are radically different for different members of our society. Moreover, those choices are structured by our very legal system. For those who have been excluded from the legal formal economic system, the rules of formality and legality create two disparate paths, fraught with the risk of capture but open with the semblance of opportunity. Thus choices deemed to be negative by society are actually made valuable to these marginal populations by the very legal system itself. If crack were a legal drug, very few people currently involved in its production, distribution and sales would be employed by it".¹⁶

The disparate focus of drug law enforcement on poor inner-city communities and particularly on young men in those communities only exacerbates the endemic problems of poor performing schools, high unemployment, dysfunctional families and persistent poverty. One recent study of crack cocaine sellers found that "the vast majority of respondents engaged in crack [cocaine] selling were raised in severely distressed households. Their career 'choices' and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside."¹⁷ A fundamental problem facing American society is how to develop appropriate social responses and supports for a whole generation of inner-city youth from severely distressed families and communities who have "said no" to heroin injection and crack smoking but will still find integration into mainstream society impossible. From their vantage point, they have no opportunities or supports to gain access to decent jobs or conventional roles. Locking up an ever larger number of young black male residents of inner-city neighborhoods constitutes a cost to society, and this cost must be placed alongside the alleged benefits of the policy to determine its effectiveness. The fact that inner-city drug sellers are not choirboys does not mean that imprisoning them at ever increasing rates for long periods of time is an effective way to deal with the drug problem.

¹⁵ Cross, J., Johnson, B. et al. *Expanding Dual Labor Market Theory: Crack Dealers and the Informal Sector*, International Journal of Sociology and Social Policy, Vol. 20 November 1/ 2 2000, P. 96-133.

¹⁶ Id.

¹⁷ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

In fact there is evidence to suggest that high incarceration rates can actually increase crime. Research by Todd Clear examining a geographically distinct section of Tallahassee, Fl that had a high percentage of its residents cycling through the prison system demonstrated that the effect of this was to increase family and community instability which had a criminogenic effect on the neighborhood. It would appear that rather than protecting communities as asserted by the representative from the Fraternal Order of Police (FOP).

Dr. Alfred Blumstein of Carnegie Mellon testified that a significant amount of the violence associated with crack cocaine markets during its early advent was related to the following factors:

- The crack cocaine market in inner city communities was predominantly a street market – making it more visible and vulnerable to violence in comparison to the powder cocaine market which tended to be more indoors, controlled and less prone to violence;
- The rapid popularity of crack cocaine led to increased competition among street level dealers including turf battles and disputes over drugs and/or money.
- Increased law enforcement combined with long mandatory minimums led to a “replacement effect” where young men with minimal impulse control and ready access to guns were recruited to replace older, more experienced dealers.

He further testified that the past ten years have seen a steady decrease in crime and violence related to crack cocaine distribution. Distribution roles in crack cocaine and other drug markets are well known, and easy to access by inner-city youth. For many, participating in the drug trade appears to be the only available economic option. Yet, these youth are apprehensive. Selling drugs requires a wide range of skills they lack, including the ability to recognize undercover police, possess and use guns and deal with rivals.

Dr. Blumstein provided a very salient basis for eliminating the crack-powder sentencing disparity in particular and mandatory minimums in general when he noted: *“the appropriateness of mandatory [minimums] decays over time, as I believe it clearly has in the difference between crack and powder cocaine. So that it would appear that mandatory [minimums] are acts of the moment that, when incorporated into statute, keep on forever. It would be desirable, obviously to not impose them on the future. It would be desirable, at a minimum to sunset the mandatory on this particular law and it would be desirable generally to sunset mandatory [minimums] more widely....”*¹⁸

Only **six** states have separate statutorily-based penalties for crack and powder cocaine possession offenses and only **nine** states’ statutes specify separate penalties for crack and powder cocaine sale offenses. Such data suggest that what is of significant importance at the federal level may be considerably less important at the state level if similar differences do not exist in state sentencing guidelines. This is particularly noteworthy since traditionally crime fighting has been the primary purview of state and local governments and local public officials are generally considered to be more responsive to community concerns regarding crime. This would suggest that the anti-crack hysteria that gripped Congress in the mid-1980s and led to the passage of these draconian sentences was not reflected on a state and local level where one would have expected to hear the most vigorous calls for action from communities most affected by the crack outbreak.

¹⁸ U.S. Sentencing Commission Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, Pgs. 206- 211.

The severity of punishment for crack cocaine offenses was based in large part on the perception of crack as the most “powerfully addictive” and “dangerous” drug that posed a significant threat to communities and society. However, the past decade has witnessed the re-emergence of a drug that is almost unanimously considered to be more addictive and dangerous than crack cocaine – that drug is methamphetamine. Methamphetamine is a powerful stimulant drug that can be injected, smoked, inhaled or swallowed. In most areas of the country methamphetamine is cheaper than cocaine and for some users more desirable because it metabolizes slowly so the high lasts longer, generally between four to six hours after which users often turn to other drugs to ease the crash that follows.

As was true when crack cocaine first emerged, media outlets around the country have reported on methamphetamine as “the most dangerous and addictive drug” in the United States. Unlike prior drug outbreaks that were generally identified with urban inner city communities, methamphetamine abuse has spread from the biker and trucker communities of California to the Pacific Northwest, Mountain states and the rural heartland. Communities that previously had little experience with illicit drug addiction or drug-related crime have seen significant increases in many of the direct and collateral consequences of addiction. As was true with crack cocaine, many of those who have become addicted to methamphetamine are women, often with devastating impact on their lives and families. Methamphetamine abuse is associated with crime, domestic violence, child abuse, erratic behavior, paranoid delusions and rapid physical deterioration. Methamphetamine is comprised of synthetic chemicals that can be easily obtained and “cooked”. These chemicals are extremely volatile, particularly in the hands of non-chemists, consequently areas of methamphetamine production are marked by an increase in chemical explosions of unstable labs causing damage to humans, wildlife and the environment.

Methamphetamine is considered by both scientists and public officials to be more addictive and dangerous than crack cocaine, but so far the Congressional response to rising methamphetamine abuse has not been as punitive as it was towards crack. As noted in a Congressional Quarterly story last year, the primary response to methamphetamine production and use has not focused on punishing and incarcerating low level sellers and users. Instead, according to Rep. Elijah Cummings, *“There seems to be more of an emphasis on shutting down these methamphetamine labs and trying to figure out ways to treat these addicts and then get them back into the flow of society”*.¹⁹

Unfortunately, thus far that compassion has not carried over to our treatment of men and women involved with crack cocaine. Many believe this difference in attitude is because of the demographics of the affected communities. Unlike crack, -- which is associated with poor, inner-city communities of color – methamphetamine is primarily used by white men and women in small cities and rural communities. While crack cocaine is now generally regarded as less dangerous than methamphetamine, crack offenses are still punished more severely. We prefer to think that this time Congress is acting in accordance with evolving knowledge and growing compassion.

¹⁹ Stern, Seth, *Meth vs. Crack – Different Legislative Approaches*, Congressional Quarter Weekly, June 5, 2006 – Page 1548

However, for Congress to continue to maintain the crack-powder sentencing disparity in the face of overwhelming evidence of its ineffectiveness as a strategy and the unfairness in its application would have to be viewed as racist. It would be the criminal justice equivalent of the decision to withhold treatment from syphilis infected black farmers in Alabama, when a cure was available and being provided to others. We know that we cannot incarcerate our way out of the problem of illicit substance abuse. This knowledge is being applied by state and local governments (with considerable support from federal authorities) as they craft their coordinated responses to the outbreak of methamphetamine abuse in their communities. To do any less for those communities that have suffered over two decades from the inequities of racially disparate sentencing policies for crack and powder cocaine would be manifestly unjust.

There is now a Congressional Methamphetamine Caucus with about 135 members. This development along with the recent change in leadership in the House of Representatives and Senate gives us hope that Congress may be ready to give serious consideration to recommendations from the Commission regarding changes in federal cocaine sentencing. Rep. John Conyers, Chair of the House Judiciary Committee has been a long time advocate for the repeal of mandatory minimum drug sentencing in general and the crack powder sentencing disparity in particular. I have no doubt he would welcome a recommendation from the Commission that would address at least part of those concerns.

Reforming the current crack cocaine sentencing scheme would allow federal judges the flexibility in at least some cases to give shorter sentences to street level drug sellers; police to de-emphasize the arrest of users for simple possession; and government to shift some resources from punishment into prevention and treatment. The federal drug budget has for decades been heavily weighted in favor of law enforcement in relation to funding drug treatment and drug abuse prevention. The fear of appearing "soft" on crime or the drug issue has had a deleterious effect on the quality of public debate in this area. The research illustrates that for many white crack cocaine users and sellers drugs are already effectively decriminalized since the risk of apprehension and incarceration for them is negligible. Hopefully, Congress will decide to rethink its adherence to drug enforcement strategies that do little to impact drug use and crime but cause considerable harm to communities of color.

Human Rights Watch spoke to the consequences of continued failure to act to correct what is rightfully perceived as a racist policy:

"The racially disproportionate nature of the war on drugs is not just devastating to black Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as a land of opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation."²⁰

²⁰ Key Recommendations from *Punishment and Prejudice: Racial Disparities in the War on Drugs* (Washington, DC: Human Rights Watch, June 2000), <http://www.hrw.org/campaigns/drugwar/key-reco.htm>

We urge the Commission to reaffirm its 1995 recommendation - repeal of the mandatory five year sentence for simple crack possession, and eliminating the crack-powder cocaine sentencing disparity by raising the threshold amount that triggers a mandatory minimum for crack cocaine offenses to equal the amount established for powder cocaine offenses. Let's demonstrate compassion for people caught in the net of drugs and addiction regardless of their drug of choice. Twenty years of racial injustice is too long - **justice delayed is justice denied.**



March 20, 2007

United States Sentencing Commission
One Columbus Circle, NE,
Suite 2-500,
Washington, DC 20002-8002

Attention: Public Affairs Officer

On behalf of the National Council of La Raza¹ (NCLR), and the Mexican American Legal Defense and Educational Fund² (MALDEF), we are respectfully submitting public comments to the U.S. Sentencing Commission (USSC) on federal sentencing laws for crack and powder cocaine offenses.

NCLR and MALDEF believe that the elimination of the threshold differential that exists between crack and powder sentences is the only fair solution to eradicating the disparity. This should be achieved by raising the crack threshold to the levels of powder. Current federal law punishes crack cocaine offenders much more severely than any other drug offenders. This subjects low-level participants, like lookouts, to the same or more severe sentences as major dealers. Current federal law has had a disproportionate impact on communities of color and low-income communities.

The Anti-Drug Abuse Act of 1986 intended to curb the "crack epidemic" by focusing on "major traffickers." This resulted in the conviction of individuals found in possession of only 5 grams of crack cocaine triggering a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to trigger the same sentence. And while possession of 50 grams of crack cocaine triggers a ten-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence.

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to persistent racial imbalances in the justice system, affecting mainly African Americans but increasingly Latinos.³ Although the spirit of the law was to go after the

¹ NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health.

² Founded in 1968, MALDEF, the nation's leading Latino legal organization, promotes and protects the rights of Latinos through advocacy, litigation, community education and outreach, leadership development, and higher education scholarships.

³ According to the Sentencing Project, *Hispanic Prisoners in the United States*, the number of Hispanic in federal and state prisons rose by 219% from 1985 to 1995, with an average annual increase of 12.3%.

Please accept this letter as public comment. A PDF version with relevant citations can be found at <http://www.ssdp.org/campaigns/ussc-cocaine-letter.pdf>

Thanks,
Tom Angell
Students for Sensible Drug Policy

March 26, 2007

Attention: Public Affairs
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Re: USSC Federal Register notice requesting public comment on cocaine sentencing

As an organization representing thousands of American college students concerned with the negative impact that both drug abuse and overly-punitive drug policies have on our campuses and communities, Students for Sensible Drug Policy (SSDP) strongly urges the U.S. Sentencing Commission to equalize sentencing for crack and powder cocaine to the current level for the latter.

As you know, the amount of crack that currently triggers an automatic felony charge and a mandatory minimum sentence upon conviction (5 grams) is 100 times lower than the amount necessary to trigger a felony charge and mandatory minimum for powder cocaine (500 grams).

Students have a particular interest in seeing these penalties equalized because the current sentencing scheme can hamper their eligibility for the Hope Scholarship Credit. The credit, which is unavailable to taxpayers with felony drug convictions, can be applied to the first \$1,000 of a student's education expenses and half of the next \$1,000 over the first two years of college. In 2003 alone, just under 3.5 million taxpayers took advantage of the credit.

By equalizing the penalties for crack and powder cocaine, fewer students convicted of possessing relatively small amounts of crack cocaine for personal use will be deemed ineligible for the Hope Credit. Low- to middle-income students who are unable to take advantage of the credit may be more likely to leave school and never return. Such individuals are increasingly disposed to develop serious drug problems, commit crimes, or rely on costly social service programs, instead of becoming law abiding and productive members of society.

Young people also suffer collateral damage when their parents are convicted of drug offenses. Youth whose parents are incarcerated are often left without the familial grounding and/or financial resources needed to get accepted to, and stay enrolled in, college. Adolescents and children can also lose access to housing, food stamps, or other government assistance programs

when their parents are convicted of drug offenses.

Students are also very concerned with the racial implications of the sentencing disparity. In 2000, there were more African American men incarcerated in prisons and jails than there were enrolled in colleges and universities, thanks in large part to our nation's drug sentencing policies.

In 2003, 80% of defendants sentenced under crack cocaine laws were African Americans, despite the fact that greater than 66% of crack cocaine users in the United States are Hispanic or white.

The disparity in sentencing between powder and crack cocaine has had a devastating impact on African American individuals, communities, and families by inhibiting educational opportunity and by breaking up families through incarceration.

For these and other reasons, we respectfully urge the Commission to eliminate the disparity between sentences for powder and crack cocaine by aligning both penalties to the current level of the former.

Sincerely,
Kris Krane, Executive Director
Students for Sensible Drug Policy

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Tom Angell, Government Relations Director
Students for Sensible Drug Policy
1623 Connecticut Ave. NW; Suite 300
Washington, DC 20009
phone: (202) 293-4414
cell: (202) 557-4979
fax: (202) 293-8344
e-mail: tom@ssdp.org
web: <http://www.SchoolsNotPrisons.com>
blog: <http://www.DAREgeneration.com>
AIM: ThisIsTomAngell
Facebook: <http://www.facebook.com/profile.php?id=14310710>

**LETTER FROM LAW SCHOOL PROFESSORS REGARDING
REFORM OF THE 100:1 CRACK AND POWDER COCAINE
FEDERAL SENTENCING DISPARITY**

March 30, 2007

VIA EMAIL

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

Re: USSC Federal Register notice requesting public comments, January 30, 2007

We, the undersigned law school professors, write to express our deep concern with the current 100:1 federal sentencing disparity between crack and powder cocaine. Distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine—100 times the amount of crack cocaine—carries the same sentence. October 2006 marked the twentieth anniversary of the Anti-Drug Abuse Act of 1986, the law establishing much tougher sentences for crack cocaine offenses than for powder cocaine offenses. During the last two decades this law has had a disparate impact on minorities and women. In addition, over the past twenty years, experts have established that there is no penological or scientific rationale for such vastly different treatment under law for the two forms of the drug. We urge the United States Sentencing Commission (USSC) to make a formal recommendation to Congress that equalizes the trigger for federal prosecution of crack offenses at the current levels for powder cocaine.

The current 100:1 drug quantity ratio promotes unwarranted racial disparities in sentencing. African Americans comprise the overwhelming majority of those convicted for crack cocaine offense, while the majority of those convicted for powder cocaine offenses are white.¹ This is startling given that whites and Hispanics make up the majority of crack users in the country. For example, in 2003 whites represented 7.8% and African Americans represented more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.² The 100:1 disparity between crack and

¹ Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

² U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

powder cocaine has resulted in African Americans serving considerably longer prison terms than whites for drug offenses. The average sentence for a crack cocaine offense in 2003 was 123 months, 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug.³ African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months.⁴

Judges, federal prosecutors, medical professionals, and other experts have all joined the USSC in calling for a reassessment of the current standards. Recently, federal judges across the country in roughly two dozen district courts have issued lower sentences than those suggested by the 100:1 ratio, thus questioning the wisdom of the sentencing guidelines set forth by this Commission.

During the November 2006 Sentencing Commission hearing, witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity, which continues to produce racially disparate levels of incarceration. The quantities of crack cocaine that trigger federal prosecution and sentencing should be equalized with and increased to the current levels for powder cocaine. Thank you for your time and attention to this very important matter.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

Ty Alper
Associate Director, Death Penalty Clinic
Clinical Instructor
Boalt Hall School of Law
University of California, Berkeley

Fran Ansley
Professor of Law
University of Tennessee

Annette Ruth Appell
William S. Boyd Professor of Law
Associate Dean for Clinical Studies
William S. Boyd School of Law
University of Nevada, Las Vegas

³ Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85 (1998); Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

⁴ Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

Elvia R. Arriola
Associate Professor of Law
Northern Illinois University

Michael Avery
Professor
Suffolk Law School

Milner S. Ball
Emeritus Caldwell Professor of
Constitutional Law
University of Georgia School of Law

Taunya Lovell Banks
Jacob A. France Professor of Equality
Jurisprudence
University of Maryland School of Law

Robin Barnes
Professor of Law
University of Connecticut

Professor Susan J. Becker
Cleveland-Marshall College of Law
Cleveland State University

Brenda Bratton Blom
Director, Clinical Law Programs
University of Maryland School of Law

Peter Blum
Legal Writing Instructor
Howard University School of Law

Pamela D. Bridgewater
Professor of Law
American University
Washington College of Law

David A. Brennan
Professor of Law
University of Georgia School of Law

Darryl Brown
Class of 1958 Alumni Professor
Washington & Lee University Law
School

Maxine Burkett
Associate Professor of Law
University of Colorado School of Law

Professor Paul Butler
Carville Dickinson Benson Research
Professor of Law
George Washington University Law
School

Deborah J. Cantrell
Lecturer in Law
Director of the Arthur Liman Public
Interest Program
Yale Law School

Susan Carle
Professor of Law and Associate Dean for
Scholarship
American University
Washington College of Law

J. Dean Carro
Professor of Clinical Education
University of Akron School of Law

Erwin Chemerinsky
Alston & Bird Professor of Law and
Political Science
Duke University Law School

Gabriel "Jack" Chin
Chester H. Smith Professor of Law
Professor of Public Administration and
Policy
Director, Law, Criminal Justice and
Security Program
University of Arizona, James E. Rogers
College of Law

Carol Chomsky
Professor of Law
University of Minnesota Law School

Rebecca A. Cochran
University of Dayton School of Law

Marsha N. Cohen
University of California,
Hastings College of the Law

Liz Ryan Cole
Professor & Director
SiP/ESW
Vermont Law School

David Cole
Professor of Law
Georgetown University Law

Malina Coleman
Associate Professor of Law
University of Akron School of Law

Lisa A. Crooms
Professor
Howard University School of Law

André Douglas Pond Cummings
Associate Professor of Law
West Virginia University College of
Law

Professor Angela J. Davis
American University
Washington College of Law

Christine Desan
Professor of Law
Harvard Law School

Melvyn R. Durchslag
Professor of Law
Interim Associate Dean for Academic
Affairs
Case Western Reserve University School
of Law

Jules Epstein
Associate Professor of Law -
Widener Law School

Arlene Rivera Finkelstein
Director, Public Interest Resource
Center
Professor of Legal Methods
Widener University School of Law

Professor Stanley Z. Fisher
Boston University School of Law

James Forman, Jr.
Associate Professor of Law
Georgetown University Law

Mary Louise Frampton
Lecturer in Residence; Director, Center
for Social Justice
Boalt Hall School of Law
University of California, Berkeley

Eric M. Freedman
Maurice A. Deane Distinguished
Professor of Constitutional Law
Hofstra Law School

Professor Theresa Glennon
James E. Beasley School of Law
Temple University

Rashmi Goel
Assistant Professor of Law
The University of Denver College of
Law

Susan L. Goldberg
Associate Dean of Student Affairs
Widener University School of Law

David Goldberger
Professor of Law
c/o The Ohio State University College of
Law

Anne B. Goldstein
Professor of Law
Western New England College School
of Law

Leigh Goodmark
Assistant Professor
University of Baltimore School of Law

David J. Gottlieb
Professor and Associate Dean of Clinical
Programs
University of Kansas School of Law

Ariela J. Gross
Professor of Law & History
Director, Center for Law, History &
Culture
The Law School
University of Southern California

Phobe A. Haddon
Professor of Law
Temple University, Beasley School of
Law

Lawrence A. Hamermesh
Professor of Law
Widener University School of Law

Vivian Hamilton
Associate Professor of Law
West Virginia University College of
Law

David A. Harris
Balk Professor of Law and Values
University of Toledo College of Law

Bernadette W. Hartfield
Associate Professor
Georgia State University College of Law

Enid Trucios-Haynes
Professor of Law
Brandeis School of Law
University of Louisville

Lawrence Herman
President's Club Professor Emeritus
Moritz College of Law
The Ohio State University

K. Babe Howell
Acting Assistant Professor
NYU School of Law

Renée M. Hutchins
Assistant Professor
University of Maryland School of Law

Ann L. Iijima
Vice Dean for Academic Affairs -
Programs
William Mitchell College of Law

Christine L. Jones
Associate Professor of Law
University of the District of Columbia
Law School

Olatunde Johnson
Associate Professor
Columbia Law School

Amy Kastely
Professor of Law
St. Mary's University School of Law

Professor Rachel King
Howard University School of Law

Professor Richard Klein
Bruce Gould Distinguished Professor of
Law
Touro Law School

Professor Margery Koosed
University of Akron School of Law
Christopher N. Lasch
Robert M. Cover Clinical Teaching
Fellow
Jerome N. Frank Legal Services
Organization
Yale Law School

Brant T. Lee
Associate Professor of Law
University of Akron School of Law

Donna H. Lee
Associate Professor of Law
CUNY School of Law

John Levy
Chancellor Professor of Law, Emeritus
College of William and Mary

Professor Ian F. Haney López
Boalt Hall School of Law
University of California, Berkeley

David Lyons
Professor of Law and of Philosophy
Boston University

Deborah Maranville
Professor of Law
Director, Clinical Law Program
and Unemployment Compensation
Clinic
University of Washington School of
Law

Russell A. McClain
Visiting Law School Assistant Professor
University of Maryland School of Law

Martha McCluskey
Professor of Law
State University of New York at Buffalo

Deborah M. Mostaghel
The University of Toledo College of
Law

H. Geoffrey Moulton, Jr.
Associate Professor
Widener University School of Law

Athena D. Mutua
Associate Professor of Law
University at Buffalo Law School

Odeana R. Neal
Associate Professor
University of Baltimore School of Law

Eva S. Nilsen
Associate Clinical Professor
Boston University School of Law.

Ana M Novoa
Professor of Law
Director, Clinical Program
St. Mary's University School of Law

Angela Onwuachi-Willig
Associate Professor of Law
University of Iowa College of Law

Hari M. Osofsky
Assistant Professor
University of Oregon School of Law

Stefan J. Padfield
Assistant Professor
University of Akron School of Law

Gary Palm
Retired Professor of Law

Michael Pinard
Assistant Professor of Law
University of Maryland

Professor Lee A. Pizzimenti
University of Toledo College of Law

Nancy D. Polikoff
Professor of Law
American University
Washington College of Law

Harry G. Prince
Professor of Law
University of California, Hastings

Professor Myrna Raeder
Southwestern Law School

Vernellia R. Randall
Professor of Law
The University of Dayton

Martha Rayner
Associate Clinical Professor of Law
Fordham University School of Law

L. Song Richardson
Assistant Professor
DePaul University College of Law

Judith L. Ritter
Professor of Law
Widener University School of Law

Jenny Roberts
Assistant Professor of Law
Director, Criminal Defense Clinic
Syracuse University College of Law

Richard A. Rosen
Professor of Law
University of North Carolina School of Law

Professor Susan Rutberg
Director, Criminal Litigation Clinic
Golden Gate University School of Law

Elizabeth J. Samuels
Associate Professor of Law
University of Baltimore School of Law

Sudha Setty
Assistant Professor of Law
Western New England College School of Law

Ann Shalleck
Professor of Law & Carrington Shields
Scholar
American University
Washington College of Law

Marjorie A. Silver
Professor of Law
Touro Law Center

Steve Simon
Clinical Professor
University of Minnesota Law School

Kenneth W. Simons
Professor of Law
The Honorable Frank R. Kenison
Distinguished Scholar in Law
Boston University School of Law

Robert D. Sloane
Associate Professor of Law
Boston University School of Law

Joan Steinman
Distinguished Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology

Michael E. Tigar
Research Professor, Washington College
of Law
Visiting Professor, Duke Law School

Gerald F. Uelmen
Professor of Law
Santa Clara University School of Law

Reynaldo Anaya Valencia
Professor of Law
St. Mary's University School of Law

Kathleen Waits
Professor
University of Tulsa College of Law

Serena M. Williams
Professor of Law
and Assistant Dean of Student Affairs
Widener University School of Law

Prof. Richard J. Wilson
Director, Int'l Human Rights Law Clinic
American University
Washington College of Law -

Professor Patricia M. Worthy
Howard University School of Law

Larry Yackle
Professor of Law
Basil Yanakakis Faculty Research
Scholar
Boston University School of Law

***LETTER FROM UNIVERSITY PROFESSORS AND SCHOLARS
REGARDING REFORM OF THE 100:1 CRACK AND POWDER
COCAINE FEDERAL SENTENCING DISPARITY***

March 30, 2007

VIA EMAIL

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

Re: USSC Federal Register request for public comment, January 30, 2007

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine—about 11 pounds—to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the *Journal of the American Medical Association* found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.¹

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicates that significantly less trafficking-related violence is associated with crack than was previously assumed.

¹ D. K. Hatsukami & M. W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are The Differences Myth or Reality?*, 279 *Journal Of American Medicine*, No. 19, Nov. 1996, at 1580.

For example, in 2000 only 2.3% of crack offenders actively used a weapon.² As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.³ This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.⁴

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.⁵ Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,⁶ and access to public housing⁷ that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are

² See U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

³ Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

⁴ U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34 (2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

⁵ ACLU Et Al., *Caught In The Net: The Impact of Drug Policies on Women and Families* 17 (2005) (Citing Susan Boyd, *From Witches To Crack Moms: Women, Drug Law, And Policy* 208-09 (2004)).

⁶ P.L. 104-193, sec.115, 42 USC 862a.

⁷ P.L. 100-690, sec. 5101, 102 Stat. 4300.

disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.⁸

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.⁹ Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

Howard Abadinsky, Ph.D.
Professor
Division of Criminal Justice & Legal Studies
St. John's University

Celesta A. Albonetti
Professor of Sociology,
ZTA, College of Law
University of Iowa

Tammy L. Anderson, Ph.D.
Associate Professor
Department of Sociology and Criminal Justice
University of Delaware

Gaylene S. Armstrong, Ph.D.
Southern Illinois University
Center for the Study of Crime, Delinquency and Corrections

⁸ Human Rights Watch & The Sentencing Project, *Losing The Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

⁹ Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002).

Jose B. Ashford, MSW, PhD
Professor and Associate Director
ASU School of Social Work and
Affiliate Professor of Criminology and
Criminal Justice and Justice and Social
Inquiry

Mary W. Atwell
Professor of Criminal Justice
Radford University

Kathleen Auerhahn, PhD
Associate Professor
Department of Criminal Justice
Temple University

Rachel Bandy
Instructor, Doctoral Candidate
Department of Sociology
University of Colorado-Boulder

Gregg Barak, Ph.D.
Professor of Criminology & Criminal
Justice
AAUP Grievance Officer
Eastern Michigan University

Rosemary Barberet
Associate Professor
Sociology Department
John Jay College of Criminal Justice

Dr. Deborah R. Baskin
California State University-Los Angeles
School of Criminal Justice and
Criminalistics

Kristin A. Bates, Ph.D.
Associate Professor of Sociology and
Criminology and Justice Studies
Department of Sociology
California State University San Marcos

Julie Anne Beicken
Graduate Student, Sociology
University of Maryland, College Park

Barbara Belbot, J.D., Ph.D.
Associate Professor of Criminal Justice
University of Houston-Downtown

Alexander Benitez, Ph.D
Assistant Professor of Sociology in the
Department of Sociology and
Anthropology
George Mason University -

Yolanda Marie Bergstrom-Lynch
Doctoral Candidate
The University of Michigan
Department of Sociology

Donna M. Bishop, Professor
College of Criminal Justice
Northeastern University

Ashley Blackburn, Ph.D.
Assistant Professor
Department of Criminal Justice
University of North Texas

Kristie R. Blevins, Ph.D.
Assistant Professor
Department of Criminal Justice
University of North Carolina at
Charlotte

Alfred Blumstein
J. Erik Jonsson University Professor
H. John Heinz III School of Public
Policy and
Management
Carnegie Mellon University

Jeb A. Booth, Ph.D.
College of Criminal Justice
Northeastern University

Nicole L. Bracy, M.A.
Graduate Student
Department of Sociology and Criminal
Justice
University of Delaware

Sarah Britto, Ph.D.
Associate Professor
Central Washington University
Department of Law and Justice

Lisa M. Broidy, Ph.D.
Director, Institute for Social Research
Associate Professor
Department of Sociology
University of New Mexico

Marilyn M. Brown, Ph.D.
Assistant Professor Sociology
University of Hawaii at Hilo

Michelle Brown
Assistant Professor
Department of Sociology and
Anthropology
Ohio University

Christopher Bruell
Doctoral student
Northeastern University

Hoan N. Bui, Ph. D.
Assistant Professor
Department of Sociology
University of Tennessee, Knoxville

Fran Buntman, Ph.D.
Assistant Professor (Criminal Justice)
The George Washington University

Keri B. Burchfield, Ph.D.
Assistant Professor
Department of Sociology
Northern Illinois University

Meghan A. Burke
Course Instructor
Loyola University Chicago

Frank Butler, JD, PhD
Assistant Professor
La Salle University
Department of Sociology, Social Work,
& Criminal Justice

Jeffrey A. Butts
Research Fellow
University of Chicago

Loretta Capeheart, Ph.D.
Associate Professor
Justice Studies
Northeastern Illinois University

Gail A. Caputo
Assistant Professor of Criminology
Department of Sociology,
Anthropology, and Criminal Justice
Rutgers University

Susan M. Carlson, Ph.D.
Associate Professor
Department of Sociology
Western Michigan University

Peter Cassno
Adjunct Professor of sociology and
criminology
Suffolk University
Ph.D. candidate - sociology
Northeastern University

Dr. Tammy Castle
Assistant Professor
University of West Florida
Department of Criminal Justice
and Legal Studies
Emerald Coast Campus

Shannon Cavanagh
Assistant Professor, Department of
Sociology
University of Texas at Austin

William Chambliss
Professor of Sociology
George Washington University

Dr. Dean J. Champion
Texas A & M International University
Department of Applied, Behavioral
Sciences, and Criminal Justice

Rosa E. Chang
PhD Candidate/Teaching Assistant
Department of Sociology
University of Miami

Dale D. Chitwood, Ph.D., Professor
Department of Sociology
University of Miami

Todd R. Clear
Distinguished Professor
John Jay College of Criminal Justice
The City University of New York

Mark Coe, Ph.D.
Assistant Professor of Psychology
University of South Carolina at
Lancaster

Sue Carter Collins, J.D., Ph.D.
Assistant Professor
Georgia State University
College of Health and Human Sciences
Department of Criminal Justice

John E. Conklin
Professor of Sociology
Tufts University

Cavit Cooley
Assistant Professor of Criminal Justice
Mercer County Community College

Phyllis Coontz, PhD
Coordinator
Doctoral Studies
Graduate School of Public and
International Affairs
University of Pittsburgh

Michael Costelloe, Ph.D.
Department of Criminal Justice
Northern Arizona University

Dawn Titus Couture, J.D.
Associate Professor
Coordinator, Criminal Justice Program
Dean College

Dr. Concetta C. Culliver
Full Professor, Department of Criminal
Justice and Law Enforcement
Coppin State University

Richard Culp, Ph.D.
Department of Public Management
John Jay College of Criminal Justice

G. David Curry
Professor of Criminology & Criminal
Justice
University of Missouri-Saint Louis

Dean Dabney
Georgia State University
Department of Criminal Justice

John Dale, Ph.D.
Assistant Professor of Anthropology in
the Department of Sociology and
Anthropology
George Mason University

Kelly R. Damphousse, PhD
Associate Dean, College of Arts and
Sciences
Associate Professor of Sociology
University of Oklahoma

Janet T. Davidson
Assistant Professor of Criminology &
Criminal Justice
Chaminade University of Honolulu

Miriam A. DeLone, Ph.D.
Associate Professor
School of Criminology and Criminal
Justice
University of Nebraska at Omaha

Richard Dembo, Ph.D.
Criminology Department
University of South Florida

Stephen Demuth
Associate Professor of Sociology
Bowling Green State University

Elizabeth Q. DeValve, Ph.D.
Assistant Professor
Department of Criminal Justice
Fayetteville State University

Michael J. DeValve, Ph.D.,
Graduate Coordinator,
Department of Criminal Justice
Fayetteville State University

Danielle Dirks
Doctoral Student
Department of Sociology
University of Texas at Austin

Rhonda R. Dobbs
Assistant Professor
Department of Criminology and
Criminal Justice
The University of Texas at Arlington

Molly Dragiewicz
Assistant Professor
Faculty of Criminology, Justice, and
Policy Studies
University of Ontario Institute of
Technology

Joshua Dressler
Frank R. Strong Chair in Law
Michael E. Moritz College of Law
The Ohio State University

Robert Duran, Ph.D.
Assistant Professor
Department of Criminal Justice
New Mexico State University

Steven A. Egger, Ph.D.
Associate Professor of Criminology
Consultant on Serial Murder, Violent
Crime,
and Criminal Investigation
University of Houston - Clear Lake

Chris Eskridge
Professor of Criminology
School of Criminology & Criminal
Justice
University of Nebraska

John E. Farley
Professor Emeritus of Sociology
Southern Illinois University
Edwardsville

Florence S. Ferguson, Ph.D.
Dean- School of Criminal Justice
American InterContinental University-
Dunwoody Campus

Luis Fernandez
Assistant Professor
Northern Arizona University

Jeanne Flavin, PhD
Associate Professor
Fordham University

James O. Finckenauer
Professor II (Distinguished)
Rutgers University

Mark J. Fischler, J.D.
Assistant Professor of Criminal Justice
Plymouth State University

Wanda D. Foglia, J.D., Ph.D.
Professor of Law and Justice Studies
Coordinator, M.A. in Criminal Justice
Program
Rowan University

Carl Franklin
Assistant Professor
Political Science & Criminal Justice
Southern Utah University

Natasha A. Frost, Ph.D.
Assistant Professor
College of Criminal Justice
Northeastern University

Gennifer Furst, Ph.D.
Assistant Professor
Sociology Department
William Paterson University

Emily Gaarder, Assistant Professor
Sociology/Anthropology
University of Minnesota-Duluth

Jeannine Gailey, Ph.D.
Assistant Professor
Department of Sociology, Criminal
Justice, and Anthropology
Texas Christian University

Randy Gaaney, PhD.
Associate Professor and Graduate
Program Director
Sociology and Criminal Justice
Old Dominion University

Jessica Davis Ganao, Ph.D.
Assistant Professor
Graduate Program Coordinator
Department of Criminal Justice
North Carolina Central University

Louis F. Garzarelli
Assistant Professor
Department of Law and Justice
Administration
Mount Aloysius College

Stephen Gibbons, PhD
Professor of Criminal Justice
Western Oregon University-

Mary H. Glazier, Chair
Sociology/Anthropology Department
Millersville University

Nellie Goepferich MS, Ph.D. Student
Adjunct Instructor and Research
Associate
Department of Criminal Justice,
Sociology and Anthropology
University of Missouri-Kansas City

Zenta Gomez, M.A.
Doctoral Student
University of Florida

Mark Goodale, Ph.D
Assistant Professor of Conflict Analysis
and Anthropology
Institute for Conflict Analysis and
Resolution
George Mason University

Sara Goodkind
Assistant Professor
University of Pittsburgh

Marc Gopin, Ph.D
James H. Laue Professor of World
Religions, Diplomacy and Conflict
Resolution
& Director, Center for World Religions,
Diplomacy and Conflict Resolution
George Mason University

Dr. Cecil Greek
Associate Professor of Criminology
Florida State University

Gary S. Green, Ph.D.
Associate Professor of Government

David F. Greenberg
Professor of Sociology
New York University

Rosann Greenspan, Ph.D.
Executive Director, Center for the Study
of Law and Society
University of California, Berkeley
(Former Research Director, Police
Foundation, 1997-2000)

Tanya Golash-Boza
Assistant Professor
Department of Sociology and
Program in American Studies
University of Kansas

Mark H. Haller
Professor of History and Criminal
Justice
Temple University, Philadelphia.

Michael Hallett, Ph.D.
Professor and Chair
Department of Criminology & Criminal
Justice
University of North Florida

Lana Harrison, Ph.D.
Professor and Senior Scientist
University of Delaware

Richard D. Hartley, Ph. D.
Department of Criminal Justice
Texas A&M International University

Dr. Kraig Hays
Assistant Professor
Justice Department
University of Alaska Fairbanks

Ronald Helms
Associate Professor
Department of Sociology
Western Washington University

Craig Hemmens
Professor
Department of Criminal Justice
Administration
Boise State University

Kay Henriksen, J.D.
Professor of Criminal Justice
MacMurray College

Carly M. Hilinski
Instructor
Indiana University of Pennsylvania
Department of Criminology

Terrence D. Hill, Ph.D.
Assistant Professor
Department of Sociology
The University of Miami

Susan Hirsch, Ph.D
Associate Professor of Conflict
Resolution and Anthropology
Institute for Conflict Analysis and
Resolution
George Mason University

Paul Hirschfield, Ph.D.
Assistant Professor
Department of Sociology
Rutgers University

Jessica Hodge
Instructor
University of Delaware

Heath C. Hoffmann
Assistant Professor of Sociology
College of Charleston

Kristi Holsinger, Ph.D.
Associate Professor, Criminal Justice &
Criminology
University of Missouri--Kansas City

Trina L. Hope, Ph.D.
Associate Professor of Sociology
The University of Oklahoma

C. Ireland, Ph.D.
Assistant Professor
Department of Criminal Justice
California State University, Long Beach

Timothy Ireland, Chair
Department of Criminology and
Criminal Justice
Niagara University

Dr. Arrick Jackson
Department of Criminal Justice and
Sociology
Southeast Missouri State University

David Jacobs
Professor of Sociology and (by courtesy)
Political Science
Ohio State University

Joseph E. Jacoby, Professor
Department of Sociology
Bowling Green State University

Jackie Jebens
Doctoral Student/TA
Sociology Department
Texas A&M University – College
Station

Eric Jefferis, Ph.D.
Department of Justice Studies and the
Institute for the Study and Prevention of
Violence
Kent State University

Elizabeth E. Joh
Acting Professor of Law
University of California, Davis
School of Law

Brian D. Johnson, PhD
Assistant Professor
Criminology and Criminal Justice
University of Maryland

David M. Jones, Professor
Department of Public Affairs
University of Wisconsin Oshkosh

Marlyn J. Jones, Ph.D.
Division of Criminal Justice
California State University-Sacramento

Nikki Jones
Assistant Professor
Department of Sociology
University of California
Santa Barbara, CA

Peter R. Jones
Associate Professor
Department of Criminal Justice
Temple University

Delores Jones-Brown
Professor and Interim Director of the
Center on Race, Crime and Justice
John Jay College of Criminal Justice,
City University of New York

Don A. Josi, Ph.D.
Professor and Chair
Department of Criminal Justice
South University

George F. Kain
Professor
Division of Justice and Law
Administration
Western CT State University

Stephen F. Kappeler
Criminal Justice and Police Studies
Coordinator of Extended Campuses
Eastern Kentucky University
College of Justice and Safety
Department of Criminal Justice and
Police Studies

David R. Karp, Ph.D.
Associate Professor of Sociology
Chair, Department of Sociology,
Anthropology, and Social Work
Director, Program in Law and Society
Skidmore College

Joanne M. Kaufman, Ph.D.
Assistant Professor
University at Albany, SUNY

Kimberly Kempf-Leonard
Professor of Criminology, Sociology &
Public Policy
School of Economics, Political Science,
& Policy Sciences
University of Texas at Dallas

David P. Keys
Associate Professor & Chair
Department of Sociology & Criminal
Justice
State University of New York-
Plattsburgh

David N. Khey, M.S., M.A.
Doctoral Candidate
Graduate Research Assistant
Department of Criminology, Law, and
Society
University of Florida

Christopher A. Kierkus, Ph.D.
Assistant Professor
School of Criminal Justice
Grand Valley State University

Beau Kilmer
Doctoral Candidate in Public Policy,
Harvard University
Adjunct Staff, RAND

Kate King, Ph.D.
Professor and Director of Criminal
Justice
Department of Social Work, Criminal
Justice and Gerontology
Murray State University

John W. King, Ph.D.
Lecturer in Sociology
Baldwin-Wallace College

Rodney Kingsnorth
Professor of Sociology
California State University, Sacramento

Gary Kleck
Professor in the College of Criminology
and Criminal Justice
Florida State University
Member of the U.S. Sentencing
Commission's
Drugs-Violence Task Force, 1994-1996

Candace Kruttschnitt, Professor
Department of Sociology
University of Minnesota

Charis E. Kubrin
Associate Professor
Department of Sociology
George Washington University

Karel Kurst-Swanger, PhD
Associate Professor
Department of Public Justice
State University of New York at Oswego

Joan B. Landes
Walter L. and Helen Ferree Professor of
Early Modern History and Women's
Studies
Department of History
The Pennsylvania State University

Janet L. Lauritsen
Professor of Criminology & Criminal
Justice
University of Missouri-St. Louis

Kristen Lavelle
Doctoral Candidate, Sociology
Texas A&M University

Jodie M. Lawston
Assistant Professor of Sociology and
Criminology and Justice Studies
California State University-San Marcos

Lisa Leduc, Phd
Associate Professor of Criminal Justice
University of Maine at Presque Isle

Lynette C. Lee, Ph.D.
Professor of Criminal Justice
California State University, Sacramento

Matthew T. Lee, Ph.D.
Associate Professor of Sociology
University of Akron

Anthony J. Lemelle, Jr.
Professor
Department of Sociology
John Jay College of Criminal Justice
City University of New York

Thomas W. Lenahan
Professor of Criminal Justice
Herkimer County Community College

Chrysanthi Leon, JD
Jurisprudence & Social Policy
University of California, Berkeley

Carl Leukefeld
Professor
Center on Drug and Alcohol Research
Department of Behavioral Science
University of Kentucky

Ladel Lewis
Sociology Department
Graduate Student
Western Michigan University

Bin Liang, Ph.D./J.D.
Assistant Professor
Department of Sociology
Oklahoma State University

Lee Libby
Seattle Police Dep., ret.,
Professor Emeritus
Shoreline Community College

Eric Ling, Ph.D.
Associate Professor of Criminal Justice
York College of Pennsylvania

Edith Linn, Ph.D.
Department of Criminal Justice
Kean University

Ann M. Lucas
Associate Professor
Justice Studies Department
San José State University

Wayne L. Lucas, Ph.D.
Professor
Sociology, Criminal Justice &
Criminology Department
University of Missouri-Kansas City

Karol Lucken, Ph.D
Associate Professor of Criminology
Department of Criminal Justice and
Legal Studies
University of Central Florida

Patricia Masters, Ph.D
Term Assistant Professor;
Undergraduate Director for Sociology
and Anthropology
George Mason University

Jason Matejkowski, M.S.W.
Doctoral Student
School of Social Policy & Practice
University of Pennsylvania

Patricia L. McCall
Professor of Sociology
Department of Sociology and
Anthropology
North Carolina State University

Dr. Jill McCorkel
Assistant Professor of Sociology and
Criminology
Villanova University

Jerome McKean, Ph.D.
Associate Professor of Criminal Justice
and Criminology
Ball State University

Danielle McGurrin
Assistant Professor
Department of Sociology and
Criminology
Stonehill College

Kevin E. Meehan, Ph.D.
Associate Professor
Department of Criminal Justice
California State University, Fullerton

Josh Meisel, PhD
Department of Sociology
Humboldt State University

Alida V. Merlo, Ph.D.
Professor, Department of Criminology
Indiana University of Pennsylvania

Dr Alexis Miller
Associate Professor of Criminal Justice
Middle Tennessee State University

Holly Ventura Miller, Ph.D.
Assistant Professor of Criminal Justice
University of Texas at San Antonio

Kirk Miller
Assistant Professor
Department of Sociology
Northern Illinois University

Michelle Hughes Miller
Associate Professor
Department of Sociology
Southern Illinois University Carbondale

Jessica Mitchel
University of South Florida

Barbara Morrell, PhD
Associate Professor
Social Sciences Department
St. Joseph's College

Jennifer Mueller, MS
Doctoral Student
Department of Sociology
Texas A&M University

Ed A. Munoz, Ph.D.
Director of Chicano Studies
Assistant Professor Criminal Justice
University of Wyoming

Professor Michael Musheno
Director, Program in Criminal Justice
Studies
San Francisco State University

Brad Myrstol, PhD
Assistant Professor
Department of Sociology & Criminal
Justice
University of Arkansas

Amie L. Nielsen, Ph.D.
Associate Professor
Department of Sociology
University of Miami

Thomas Nolan, Ed.D.
Associate Professor in Criminal Justice
Faculty Director, On-line Master of
Criminal Justice Program
Boston University, Department of
Applied Social Sciences

Michael Norris
Associate Professor of Sociology
Wright State University

Anne M. Nurse
Chair and Associate Professor
Department of Sociology and
Anthropology
The College of Wooster

Trish Oberweis
Assistant Professor
Southern Illinois University
Edwardsville
Dept. of Sociology and Criminal Justice
Studies

Patricia O'Brien, Ph.D.
Associate Professor
Jane Addams College of Social Work
University of Illinois at Chicago

Tara O'Connor Shelley
Assistant Professor
Department of Sociology
Colorado State University

Sarah O'Keefe
Assistant Director, Criminal Justice
Program
Doctoral Candidate & Instructor,
Sociology Department
University of Massachusetts-Amherst

Brian E. Oliver, PhD Student
University of Missouri-St. Louis
Department of Criminology and
Criminal Justice

Pamela E. Oliver
Conway-Bascom Professor of Sociology
University of Wisconsin – Madison

I.D. Onwudiwe, Ph.D.
Associate Professor
Texas Southern University

Emmanuel Onyeozili, Ph.D.
Associate Professor, Criminal Justice
University of Maryland Eastern Shore

Robert Nash Parker, PhD
Professor of Sociology
Co Director of the Presley Center
for Crime and Justice Studies
University of California, Riverside

Dr. Rebecca Paynich
Associate Professor of Criminal Justice
Curry College

Nickie D. Phillips
Assistant Professor
St. Francis College

C. Allen Pierce, Ph.D.
Professor of Criminal Justice
Department of Criminal Justice
Youngstown State University

Dr. Nathan W. Pino
Assistant Professor
Department of Sociology
Texas State University - San Marcos

William C Pizio
Assistant Professor of Justice and Policy
Studies
Guilford College

Joycelyn M. Pollock, Ph.D., J.D.
Professor of Criminal Justice
Texas State University-San Marcos

Judy Porter, Ph.D.
Rochester Institute of Technology
Department of Criminal Justice

Dr. Tony G. Poveda
Professor of Sociology & Criminal
Justice
Plattsburgh State University

Dr. Doris Marie Provine
Professor and Director, School of Justice
& Social Inquiry
Arizona State University.

James Ptacek, Ph.D.
Associate Professor
Master's Program in Criminal Justice
Department of Sociology
Suffolk University

Mae C. Quinn
Associate Professor of Law
University of Tennessee College of Law

Geoffrey W. Rab, M.A.
Student, Doctoral Program in Criminal
Justice
John Jay College of Criminal Justice

Victoria Rader, Ph.D.
Associate Professor of Sociology in the
Department of Sociology and
Anthropology
George Mason University

Alexandria Walton Radford
Ph.D. Candidate, Sociology
Princeton University

Polly Radosh
Chair, Department of Women's Studies
Western Illinois University

Nicole F. Rafter
College of Criminal Justice
Northeastern University

Cesar J. Rebellon
Assistant Professor
Sociology Department
University of New Hampshire

Sarah Joanna Reed
Ph.D. Candidate
University of Texas at Austin

Craig Reinerman
Professor of Sociology and Legal
Studies
University of California, Santa Cruz

Xin Ren, Ph.D.
Professor
Criminal Justice Division
California State University, Sacramento

Dr. George F. Rengert, Professor
Department of Criminal Justice
Temple University

Samuel M. Richards, Ph.D.
Senior Lecturer in Sociology
Co-Director, Race Relations Project
The Pennsylvania State University

Kimberly D. Richman, Ph.D.
Professor of Sociology and Criminal
Justice
University of San Francisco

Dr. Susan Ritter, Chair
Criminal Justice Department
UTB/TSC

Dr. Matthew Robinson
Associate Professor of Criminal Justice
Appalachian State University

Ann Marie Rocheleau
Lecturer
Stonehill College

Orlando Rodriguez
Professor, Sociology/Anthropology
Department
Fordham University

Mary Romero, Professor
School of Justice & Social Inquiry
Arizona State University

Wendy Roth
Assistant Professor of Sociology
University of British Columbia

Dawn L. Rothe, PhD.
Assistant Professor of Criminology
University of Northern Iowa

Deirdre A. Royster
Associate Professor
Department of Sociology
College of William and Mary

Richard Rubenstein J.D.
Professor of Conflict Resolution and
Public Affairs
Institute for Conflict Analysis and
Resolution
George Mason University

Jesse Rude
PhD Candidate
Department of Sociology
University of California, Davis

Lisa L. Sample, Ph.D.
Associate Professor
University of Nebraska at Omaha
Department of Criminal Justice

Dennis Sandole, Ph.D.
Professor of Conflict Resolution and
Present International Relations
Institute for Conflict Analysis and
Resolution
George Mason University

Joanne Savage, Ph.D.
Associate Professor
Department of Justice, Law and Society
American University

Joachim J. Savelsberg
Professor of Sociology
University of Minnesota

Amie R. Scheidegger, Ph.D.
Criminal Justice Program Coordinator
Associate Professor of Criminal Justice
Brevard College

Traci Schlesinger, PhD
Assistant Professor of Sociology
DePaul University

Heather Schoenfeld
Lecturer, Northwestern University
Department of Sociology

Paul Schupp, Ph.D.
Assistant Professor
Department of Criminal Justice
Niagara University

Jason D. Scott, Ph.D.
Assistant Professor
Department of Criminal Justice
Rochester Institute of Technology

Julia E. Scott
Associate Instructor
Department of Criminal Justice
Indiana University

Bonnie Semora
Graduate Teaching Assistant
University of Georgia - Athens
Sergeant, Retired
Houston Police Department
Houston, TX

Eric L. Sevigny, Ph.D.
Visiting Assistant Professor
School of Criminal Justice
Michigan State University

Susan F. Sharp
Associate Professor & Graduate Liaison
Department of Sociology
University of Oklahoma

Carla Shedd, Ph.D.
Andrew W. Mellon Post-Doctoral
Fellow
Department of Sociology
Bryn Mawr College

Jane A. Siegel, Ph.D.
Associate Professor of Criminology
Chair, Department of Sociology,
Anthropology and Criminal Justice
Rutgers University – Camden

Pete Simi, Ph.D.
Assistant Professor
School of Criminology & Criminal
Justice
University of Nebraska, Omaha

Jonathan Simon
Associate Dean for Jurisprudence and
Social Policy
Professor of Law
School of Law (Boalt hall)
University of California, Berkeley

Simboonath Singh
Assistant Professor of Sociology
Department of Behavioral Sciences
University of Michigan-Dearborn

Lee Ann Slocum
Doctoral Candidate
Department of Criminology and
Criminal Justice
University of Maryland, College Park

Brian J. Smith, PhD
Associate Professor of Sociology
Central Michigan University

Steven Smith
Administration of Justice
Gavilan College

Stephen T. Smith, Ph.D.
Assistant Professor
Department of Criminal Justice
Westfield State College

Tony R. Smith, Ph.D.
Assistant Professor
Department of Law & Justice Studies
Rowan University

Diane R. Soles
Assistant Professor
Department of Sociology
University of Wisconsin – Whitewater

Cynthia Neal Spence, Ph.D.
Associate Professor of Sociology
Spelman College

Dr. Robyn C. Spencer
Assistant Professor of African and
African American Studies and History
The Pennsylvania State University

Cassia Spohn, PhD
Professor and Director of Graduate
Programs
School of Criminology and Criminal
Justice
Arizona State University

Ryan Spohn
Assistant Professor of Sociology
Kansas State University

David W. Springer, Ph.D., LCSW
Associate Dean for Academic Affairs
University Distinguished Teaching
Professor
The University of Texas at Austin
School of Social Work

Stephen Steinberg
Professor
Queens College, CUNY

Eric E. Sterling, J.D.
Adjunct Lecturer in Sociology
The George Washington University

James Stewart, Ph.D.
Professor of Labor Studies and Industrial
Relations, African and African
American Studies, and Management and
Organization
The Pennsylvania State University

Mary K. Stohr, Ph.D.
Professor
Department of Criminal Justice
Boise State University

Lisa Stolzenberg
Director
Florida International University

Dr. Jim Stone
Professor and Chair
Department of Criminal Justice and
Sociology
Jamestown College

Susan Squier
Brill Professor of Women's Studies,
English, and STS
The Pennsylvania State University

Hung-En Sung, Ph.D.
Associate Professor
Department of Law and Police Science
and Criminal Justice Administration
John Jay College of Criminal Justice

Christine Tartaro, Ph.D.
Associate Professor of Criminal Justice
The Richard Stockton College of NJ

David B. Taylor, Ph.D.
Associate Professor
Department of Criminal Justice
Niagara University, NY

Faye S Taxman, Ph.D.
Professor
VCU Wilder School of Govt & Public
Affairs

Brent Teasdale, Ph.D.
Assistant Professor
Department of Sociology
The University of Akron

Stephen G. Tibbetts, PhD
Associate Professor
Department of Criminal Justice
California State University

Pietro Toggia, Ph.D.
Associate Professor
Department of Criminal Justice and
Social Work
Kutztown University of Pennsylvania

Donald Tomaskovic-Devey
Professor and Chair of Sociology
University of Massachusetts, Amherst

Michael Tonry
Professor of Law and Public Policy
University of Minnesota

Sam Torres, PhD.
Professor, Former U.S. probation Officer
(CDC)
California State University, Long Beach

Martin W. Totzke ABD
Criminal Justice Instructor
Fox Valley Technical College

Sheryl Van Horne
Instructor
Penn State University

Seneca Vaught, Ph.D.
Assistant Professor of Africana Studies
Department of History
Niagara University

Alex S. Vitale
Department of Sociology
Brooklyn College-CUNY

William J Vizzard
Professor & Chair
Div of Criminal Justice
California State University-Sacramento

Elizabeth Waggoner, Instructor
Department of Criminal Justice &
Criminology
Ball State University

Dr. Melissa M. Wagner
Lecturer
San Francisco State University, Program
in Criminal
Justice Studies

Zachary Walsh, Master of Science
Ph.D. Candidate, Clinical Psychology
Rosalind Franklin University of
Medicine and Science

Geoff Ward
Assistant Professor
College of Criminal Justice
Northeastern University

Barbara D. Warner, Ph.D.
Associate Professor
Department of Criminal Justice
Georgia State University

Mark Warr
Professor
Department of Sociology
University of Texas at Austin

Robert R. Weidner, Ph.D.
Associate Professor
Department of Sociology-Anthropology
University of Minnesota Duluth

Michael L. Weiss, M.A.
Doctoral Student
University of Miami
Department of Sociology

Ronald Weitzer
Professor of Sociology
George Washington University

Kelly Welch, Ph.D.
Assistant Professor of Sociology &
Criminal Justice
Villanova University

Kideste M. Wilder
Adjunct Lecturer, Sociology and
Law, Police Science, and Criminal
Justice Administration
John Jay College of Criminal Justice

Deanna L. Wilkinson, Ph.D.
Associate Professor
Human Development and Family
Science
The Ohio State University

David R. Williams
Florence & Laura Norman Professor of
Public Health
Professor of African and African
American Studies and of Sociology
Department of Society, Human
Development and Health
Harvard School of Public Health

Frank P. Williams III, Ph.D.
Professor of Criminal Justice
University of Houston - Downtown

James Herbert Williams, Ph.D.,
Foundation Professor of Youth and
Diversity
College of Public Programs
School of Social Work
Arizona State University

James A. Wilson, Ph.D.
Assistant Professor of Sociology
Fordham University - Lincoln Center

Vincent C. Wincelowicz, Ph.D.
Associate Professor
Department of Criminal Justice Studies
College of Business
Johnson & Wales University

Nancy Wonders, Ph.D.
Professor and Chair
Department of Criminal Justice
Northern Arizona University

Robert D. Woodberry
Assistant Professor
Sociology
University of Texas at Austin

Laurie Woods, MS, MA, MLAS
Candidate for PhD, Dept of Sociology
Vanderbilt University
Retired Special Agent in Charge
California Bureau of Narcotic
Enforcement

Tryon P. Woods
Dept. Criminology & Criminal Justice
Sonoma State University

Jesse Wozniak
Graduate Teaching Assistant
University of Minnesota -- Crime, Law,
and Deviance program

Richard G. Wright
Assistant Professor
Department of Criminal Justice
Bridgewater State College

Bohsiu Wu, Ph.D.
Associate Professor
Department of Sociology
California State University, Sacramento

Sara Yeatman
Doctoral Student, Sociology &
Demography
Population Research Center
University of Texas at Austin

Stephen J. Ziegler, PhD, JD
School of Public & Environmental
Affairs
Indiana University - Purdue University

Lisa Anne Zilney, Ph.D.
Assistant Professor
Montclair State University
Justice Studies Department

Matthew Zingraff
Associate Dean for Research
College of Humanities and Social
Sciences
George Mason University

John F. Zipp
Professor and Chair
Department of Sociology
The University of Akron



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March 20, 2007

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

Re: USSC Federal Register request for public comment, January 30, 2007

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine—about 11 pounds—to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the Journal of the American Medical Association found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.[1]

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.[3] This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from

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1986, compared to an increase of 400% for women of all races for the same period.[5] Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,[6] and access to public housing[7] that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.[8]

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.[9] Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

Bill Sanders, PhD
Assistant Professor of Pediatrics, USC
The Saban Research Institute, CHLA

Footnotes:

- [1] D.K. Hatsukami & M.W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 276 Journal of The American Medical Association, No.19, Nov.1996 at 1580.
- [2] See U.S. Sentencing Commission, Report To The Congress: Cocaine And Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.
- [3] Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).
- [4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.
- [5] ACLU et al., *Caught In The Net: The Impact of Drug Policies On Women And Families* 17 (2005). (Citing Susan Boyd, *From Witches to Crack Moms: Women, Drug Law, And Policy* 208-209 (2004)).
- [6] P.L. 104-193, sec.115, 42 USC 862a.
- [7] P.L. 100-690, sec. 5101, 102 Stat. 4300.
- [8] Human Right Watch & The Sentencing Project, *Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States* 8 (1998).
- [9] Justice Policy Institute, *Cellblocks or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men* 10(2002).

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(732) 548-6000 • FAX (732) 494-8244

March 30, 2007

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

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Re: USSC Federal Register request for public comment, January 30, 2007

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The myths of crack babies, instant addiction, and super-violent users and traffickers---which in great part led to the 1986 Act---have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

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despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

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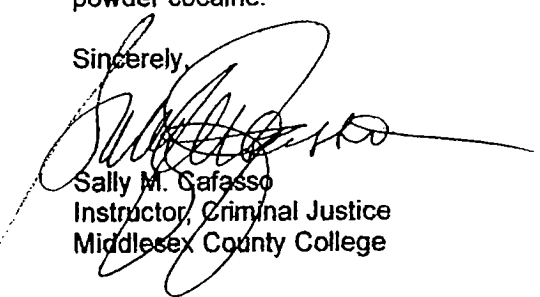
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Sincerely,



Sally M. Cafasso
Instructor, Criminal Justice
Middlesex County College

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[1] D.K. Hatsukami & M.W. Fischman, /Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?/, 276 Journal of The

American Medical Association, No.19, Nov.1996 at 1580.

[2] /See/ U.S. Sentencing Commission, Report To The Congress: Cocaine And Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

[3] Nkechi Taifa, /The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?/ (American Constitution Society for Law and Policy, May 2006).

[4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

[5] ACLU et al., /Caught In The Net: The Impact of Drug Policies On Women And Families/ 17 (2005). (Citing Susan Boyd, /From Witches to Crack Moms: Women, Drug Law, And Policy/ 208-209 (2004)).

[6] P.L. 104-193, sec.115, 42 USC 862a.

[7] P.L. 100-690, sec. 5101, 102 Stat. 4300.

[8] Human Right Watch & The Sentencing Project, /Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States/ 8 (1998).

[9] Justice Policy Institute, /Cellblocks or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men/ 10(2002).