It is our view that § 1037 offenses are properly referenced in Appendix A to § 2B1.1, the fraud, theft, and property destruction guideline. Spammer falsification and hacking tactics are most closely related to conduct covered in this guideline, and particularly to the penalty offense levels provided for computer hacking set forth in § 2B1.1(b)(13) that were implemented after the passage of the Homeland Security Act. On the other hand, the penalties for the more serious § 1037 offenses, including those involving highly organized sophisticated business operations and massive volumes, may deserve more severe penalties than those available for many of the hacking offenses. At the same time, some of the violations may be minor in nature. As a result, the guidelines provisions should not be so inflexible as to prevent probation sentences in some instances.

The trespass guideline, § 2B2.3, is far less suitable since the offense levels within this guideline are low and do not properly reflect the seriousness of § 1037 violations. There certainly may be situations where § 1037 offenses may be linked to offenses involving sexual exploitation of minors and obscenity (§§ 2G1.1, 2G1.2 and 2G1.3) and offenses involving criminal enterprises and racketeering (§ 2E1.1).

(b) What is the appropriate base offense level for the new offense(s)?

We believe that the base offense level of 6, which is used for § 2B1.1, would be an appropriate starting point for § 1037 offenses. This is particularly the case as just noted because there will be minor offenses that would properly be dealt with by probationary sentences.

(c) Should the offense level vary depending on the seriousness of the offense (for example, should the base offense level for a regulatory violation under 18 U.S.C. § 1037 be the same as the base offense level for a more serious violation under that statute)?

The statute makes it clear that offense levels should vary depending upon the seriousness of the offense and provides the Commission with clear directions in this regard. We take no position with reference to regulatory violations.

(d) If 18 U.S.C. § 1037 is referenced to § 2B1.1, should special offense characteristics be added to that guideline that ensures application of the multiple victim enhancement at § 2B1.1(b)(2)(A)(I) or the mass marketing enhancement at § 2B1.1(b)(2)(A)(ii) to a defendant convicted of 18 U.S.C. § 1037? Should a defendant convicted under 18 U.S.C. § 1037 receive an enhancement under § 2B1.1(b)(2)(A)(i) or (ii) based on a threshold quantity of email messages involved in the offense, and if so, what is that threshold quantity? Another option which might be better is to create special offense characteristics for § 1037 offenses.

We strongly recommend that special offense characteristics be used to enhance sentences for more serious and sophisticated violations of § 1037. First of all, the statute reflects Congress' intent that a threshold quantity of email messages – 2,500 per day, 25,000 per month or 250,000 per year – should be taken into account in determining enhancement of the defendant's sentence.

In order for Internet Service Providers to protect their network and subscribers, they have developed sophisticated techniques to eliminate spam messages before they get into the service.

Spammers typically destroy as much of the technical trail of their spamming as possible in order to avoid detection. Additionally, most ISPs along the trail through which a spam message travels typically do not preserve the relevant transmission logs for an extended period, due to the massive volumes of data involved in keeping track of the communications that cross their networks every day. Some companies (like AOL) may be able to provide evidence of the violation only by obtaining and storing consumer complaints, which have proven to be only a small fraction of the volume of email that a professional spammer actually transmitted or attempted to transmit. In AOL's experience, the volume of email actually sent by a spammer is several orders of magnitude larger than the volume of complaints received about that spammer. Recognizing these factors, Congress set the appropriate felony trigger for volume at 2,500 per day/25,000 per month and 250,000 per year. Proof of a continuing pattern of violations above this level should trigger an enhancement of the sentence beyond the baseline felony level.

Section 1037(a) and (b)(2) offenses should include at least the following special offense characteristics:

1. Increases to the base offense level for each of the factors listed in the statute: offense committed in furtherance of felonies; prior convictions; use of false account or domain name registrations; message volume; proof of victim loss or offender gain, including injuries to consumers caused by loss of access to accounts or equipment or because of identity theft; and major leadership role in the offense;

2. Increases to the base offense level for the use of sophisticated means; and

3. The addition of language to § 2B1.1(b)(8) (the provision which increases the offense level for relocating operations to evade law enforcement) to include specific language addressing evasion techniques spammers use to evade detection.

The sophisticated means enhancement should include using methods that evade secure email systems under development that authenticate senders or Internet domains used by a senders as legitimate by means of digital certificates. If a defendant cracks the security of a sender authentication technology or shares that information with others, or steals the identity of a trusted sender of email in order to send spam, an enhancement of at least 2 levels is warranted, and similar to the provisions of § 2B1.1(b)(9), if the resulting offense level is less than level 12, there should be an increase to that level.

(e) Under what circumstances shall an offense under 18 U.S.C. § 1037 be considered to involve sophisticated means?

As just noted, in light of the serious problems created by "professional spammer" falsification tactics, use of sophisticated means should trigger an enhancement.
Section 1037(b) sets out a series of factors that reflect sophisticated means for committing the offense and that merit an enhancement for sophisticated means. These include sending a high volume of email and supervising others in the offense. Presence of these factors might trigger an enhancement to level 14 (15-21 months).

In addition, several other factors not specified in the statute reflect efforts to conceal the offense and would merit enhancements that might be similar to § 2B1.1(b)(8) of the Guidelines. These include:

(a) destruction of email records by a spammer;

(b) use of computer facilities outside the boundaries of the United States, a common method by which sophisticated spammers attempt to evade enforcement in the U.S.; and

(c) use of shell corporations or multiple bank accounts to evade detection.

Each of these factors are sufficiently serious to warrant enhancements of 2 levels.

(f) Consistent with the directive in section 4(b)(2) of the CAN-SPAM Act of 2003, should § 2B1.1 contain an enhancement for defendants convicted under 18 U.S.C. § 1037 who (I) obtain e-mail addresses through improper means, including the harvesting of e-mail addresses from the users of a website, proprietary service, or other online public forum without authorization and the random generating of e-mail addresses by computer; or (ii) knew that the commercial e-mail messages involved in the offense contained or advertised an internet domain for which the registrant of the domain had provided false registration information?

In our view, each of these factors also should trigger enhancements.

1. Harvesting email addresses by automated means, in violation of the rules of the online service or online forum where those addresses are posted, is a significant source of unwanted spam that penalizes the use of public fora such as personal or professional web pages, online marketplaces and Internet discussion fora. It chills free speech on the Internet and chills e-commerce in public fora.

2. Dictionary attacks occur through several ways. The first is a "phone book attack," in which a spammer generates email addresses corresponding to all possible name and first initial combinations in the phone book of one or more large metropolitan areas. The second is a pure random alphanumeric attack—the spammer sends to every alphanumeric combination permitted, for example, in a 16 character AOL address prefix. The third method is sending email to "culled" lists originally generated using any of the two previous techniques, but where the spammer has run the list once and culled out the invalid addresses based on records of undeliverable emails. Dictionary attacks are in effective methods used to obtain a password to which to send spam and thereby to access target accounts for illicit purposes. Such attacks generate a very large number of emails sent to false addresses and significantly burden networks with returned emails. Given the seriousness of dictionary attacks, enhancements should be increases of up to 6 levels, comparable to § 2B1.1(b)13(A)(iii) offenses.

3. Advertising or including an Internet domain with false registration information is a common tool by which the spam kingpins who pay for spam to be sent out on their behalf evade detection. Use of any of these means might result in an increase of 5 offense levels.

(g) Which adjustments should be considered directly pertinent to § 1037 offenses?

There are adjustments in Chapter 3 that could be pertinent to § 1037 offenses. These include the vulnerable victim adjustment under § 3A1.1; the role in the offense aggravating and mitigating adjustments under §§ 3B1.1 and 3B1.2; the abuse of trust or use of special skill adjustment under § 3B1.3; and the obstruction or impeding the administration of justice adjustment under § 3C1.1. Unless they are utilized as special offense characteristics in § 2B1.1, these adjustments should be used to significantly increase offense levels (and, in the case of an individual with a minor role in the offense, or a minor duped into spamming activity by a sophisticated spammer, to decrease the levels). In order to ensure that the factors are used in calculating penalties, it might be preferable to incorporate these adjustments as special offense characteristics.

The vulnerable victim adjustment should apply, for example, where spammers impersonate an innocent person in the course of the violation—e.g., by hacking into another person's account and sending spam, falsely placing that person's email address in the "from" line of spam emails, or using another person's identification information in registering for an email account, domain name or to obtain their Internet Protocol address space. Such tactics smear another person's name, can cause that other person to lose good will or to lose access to the Internet, and even to receive death threats from outraged recipients of offensive spam.

(2) What are the appropriate guideline penalties for offenses other than 18 U.S.C. § 1037 (such as those specified by section 4(b)(2) of the CAN-SPAM Act of 2003, i.e., offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children) that may be facilitated by the sending of a large volume of unsolicited e-mail?

Specifically, should the Commission consider providing an additional enhancement for the sending of a large volume of unsolicited email in any of the following: § 2B1.1 (covering fraud generally and identity theft), the guidelines in Chapter Two, Part G, Subpart 2, covering child pornography and the sexual exploitation of children, and the guidelines in Chapter Two, Part G, Subpart 3, covering obscenity? Alternatively, should the Commission amend existing enhancements, or the commentary pertaining thereto, in any of these guidelines to ensure application of those enhancements for the sending of a large volume of unsolicited email? For example, should the Commission amend the enhancements, or the commentary pertaining to the enhancements, for the use of a computer in the child pornography guidelines, §§ 2G2.1, 2G2.2, and 2G2.4, to ensure that those enhancements apply to the sending of a large volume of unsolicited email?

As reflected earlier, violations of § 1037 that involve violations of other serious felony statutes should trigger an enhancement of the § 1037 that makes the offense level comparable to what it would have been if the sentencing guidelines for the other provisions would have been used.

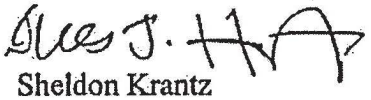
(4) What types of penalties should be considered for violations by corporations?

Section 1037 does not provide specific fine provisions for corporations. If § 2B1.1 will be utilized as the pertinent guideline, corporations will be sentenced under the provisions of §§ 8C2.3-8C2.9 in the absence of other directives. If these provisions are utilized for calculating organizational fines, it will be necessary to specify special offense characteristics for organizations in § 2B1.1 that will increase fine levels to appropriate levels. For large corporate violators, this will require that the total offense level would need to be set at levels of 20 or higher.

In ICC members' experience suing spammers, spammers who engage in conduct that violates § 1037 incorporate as part of a strategy of evading detection. There are usually few employees, all of whom are principals in the act of sending spam. More sophisticated outlaw spammers sometimes use corporate shells to transfer assets (e.g. e-mail lists) in the wake of civil lawsuits. Some spammers also cycle through lots of corporate identities to avoid the effects of recipient opt outs. Use of incorporation as a further form of falsification is very different than questions of whether a legitimate corporate entity has complied with this provision of law. Use of this falsification method should be treated as an enhancing factor, and should under no circumstances entitle a defendant to lesser punishment.

The provisions of § 8C1.1 should be used in situations where an entity has been created entirely or primarily for criminal purposes or to operate primarily by criminal means. Under § 8C1.1, when this occurs, the fine level is set at an amount that divests the entity of all of its net assets.

Respectfully submitted,



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Counsel to the Internet Commerce Coalition

Families Against Mandatory Minimums
FOUNDATION

MEMORANDUM

TO: Mike Courlander
FR: Mary Price
RE: Comments to Commission
DA: March 2, 2004
CC:

Attached please find our comments to the Commission. They are to replace those I filed electronically yesterday (I made two small changes to the text). Please let me know if you want me to send this newer version by e-mail to you.

Thank you as always.

1612 K Street, NW • Suite 700 • Washington, D.C. 20006 • (202) 822-6700 • fax (202) 822-6704 • FAMM@famm.org • http://www.famm.org

Families Against Mandatory Minimums
FOUNDATION

March 1, 2004

By Hand
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 6 to the Sentencing Guidelines and Issue for Comment 10.

Dear Commissioners:

I write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to urge that you leave undisturbed for now the mitigating role cap and the aberrant conduct departure. Both provide necessary relief for the very small number of people who qualify. Morever, both the cap and changes to the aberrant conduct departure are so recent that it is too soon to tell if the concerns that motivated them have been addressed or how well they are presently working. Finally, built-in mechanisms ensure correct sentences when the operation of the guidelines fails to properly account for culpability: upward departure in the case of a capped sentence that is too low and either denial of the aberrant conduct departure or, in the case it is invoked, appellate review of the aberrant conduct departure if it is used inappropriately.

Proposed Amendment 6: Mitigating Role

The guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense. FAMM's case files are filled with defendants serving unconscionably long sentences for drug offenses. Many are first-time, non-violent offenders. The relevant conduct rules and severe mandatory minimums drive these low-level participants' sentences well beyond those warranted. Many of their stories are truly disturbing. The mitigating role cap provides some limited relief to defendants like them. Below are a few examples of defendants who received mitigating role reductions. They are meant to illustrate the kinds of defendants this cap is designed to assist.[1]

Lori Gibson's boyfriend, Larry Copeland, was a drug dealer. Ms. Gibson had heard that Mr. Copeland dealt drugs but had never discussed his business with him. He had never included her in his illegal activities and had never, to her knowledge, brought the drug trade home with him. He was also alcoholic and abusive. She was used to doing as she was told. Once, while out of town, Mr. Copeland called Ms. Gibson and asked her to pick up something from a man named

[1] None of these defendants received the cap as it was instituted after they were sentenced and has not been made retroactive.

Eric McKinnon. Unaware of what she was picking up or why, Ms. Gibson did as she was asked. She met Mr. McKinnon, who she did not know, in a parking lot and received $3,600 from him. She did not know that the money was intended to settle a debt from a sale by Larry Copeland of 113 grams of cocaine base. At Mr. McKinnon's direction, she called Mr. Copeland, told him she had the money, and gave the telephone to Mr. McKinnon. They arranged another drug deal, but in coded language that Ms. Gibson did not understand. Mr. McKinnon was an informant and Ms. Gibson was arrested within minutes of leaving her meeting with him.

Ms. Gibson went to trial and was found not guilty of conspiracy but guilty of one count of possession with intent to distribute cocaine base. She was originally sentenced at level 34 to 151 months (for the crack cocaine from the prior sale as well as that arranged while she was in the car) and did not receive a mitigating role adjustment despite counsel's arguments. Her case was affirmed but remanded for resentencing by the Eleventh Circuit Court of Appeals. In 1998, she was resentenced to 126 months, receiving a reduction of 2 levels in recognition of her minor role in the offense. Ms. Gibson has two children, now 11 and 18 years old. Their 66-year-old grandmother cares for them. Ms. Gibson will be released in early 2005.

Tammi Bloom's husband of 15 years distributed cocaine from an apartment that he shared with his mistress in Ocala, Florida. Ms. Bloom testified at her trial that she was unaware of her husband's affair or the sales in Ocala. A confidential informant said that she was present for other sales at her own home with Mr. Bloom in Miami and counted money for him.

After Ronald Bloom and his mistress were arrested, the police searched the home he shared with Ms. Bloom and discovered cocaine, cocaine base, 3 firearms and drug ledgers. Besides a small bag of cocaine on her husband's nightstand, she did not know about the other evidence as it was hidden, even from her, in a septic tank and in a part of the house used primarily by her husband.

The PSI identified Mr. Bloom as the most culpable defendant in the case because he exercised decision-making authority over his wife and others. Ms. Bloom was held accountable for drugs distributed from the home in Miami on three occasions for a total of 2.41 kilograms of cocaine and 510.05 grams of cocaine base. She received a two-level enhancement for the guns and a two-level obstruction of justice enhancement for testifying, allegedly falsely, to her innocence at trial. While she received a two-level reduction for minor participant, she still received the longest sentence of anyone convicted in the conspiracy: 235 months or19 years and seven months. Her husband received 210 months, or 17.5 years, his mistress 78 months and another asociate, 168 months.

Ms. Bloom has two children, 16 and 18, who are being raised by their maternal grandmother. Ms. Bloom's father died in 2002 and her mother is struggling to keep the family going without him.

Tammi Bloom will leave prison in late 2015.

In October 1990, **Daisy Diaz** accompanied her husband and others on a boat trip to several Caribbean islands. She believed the trip was for pleasure. After 41 kilograms of cocaine were discovered on an island the boat had just departed, the boat was searched by Bahamian police. The party was arrested and a gun found in a bag carried by Ms. Diaz. She and the boat's captain, Antonio Mateau, said he placed the gun there as he anticipated being arrested. (Mr. Mateau later provided an affidavit to that effect after he was finally captured, years later.) The party was released but later detained again. The vessel was searched and found to contain 176.1 kilograms of cocaine hidden near the fuel tank. Ms. Diaz denied knowledge of the drugs, which were so well hidden it took more than a day to locate them. She was considered, even by the prosecuting attorney, to be merely a decoy to make the trip appear not a drug smuggling run but a family vacation. She was charged with the amount of drugs found on the boat as well as the 41 kilograms found on the island. Ms. Diaz was convicted and sentenced to 235 months, a base offense level of 38, with an enhancement for Mr. Mateau's gun.

The two-level downward adjustment was warranted, according to the Probation Officer, who agreed with the AUSA that she was merely a decoy.

Ms. Diaz, who had no criminal history, received the longest sentence of the party -- with the exception of Mateau who died in prison -- including that of her husband, who received 12 years. She maintains her innocence to this day. She will not be released in September 2008.

The mitigating role cap is an effort to account for a defendant's minor or mitigating role by establishing a realistic base offense level. It is an explicit recognition that quantity alone is relied on to such an extent in the guideline drug calculations that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct. Some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

Senator Jeff Sessions (R-Al), speaking for himself and Senator Orrin Hatch (R-UT), recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. The bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved.

He remarked, when introducing the bill that "the primary focus of the mandatory minimums and the Sentencing Guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement." 178 Cong. Rec. S13962 (daily ed. Dec. 20, 2001). First-time, non-violent offenders were least likely to be rearrested and the presence of violence or a dangerous weapon, he concluded, were better predictors of recidivism than drug quantity.

Sen. Sessions called for a cap on base offense levels of down to level 30 for those

receiving minimal role adjustments:

> This is very significant because couriers, who are often low-level participants in a drug organization, can have disproprotionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession. By capping the impact of drug quantity on the minimal role offenders, the bill allows a greater role for the criminality, or lack of criminality, of their conduct in determining their ultimate sentences.
>
> For example, the bill provides a decrease for the super-mitigating factor of the girlfriend or child who plays a minimal role in the offense. These are often the most abused victims of the drug trade, and we should not punish them as harshly as the drug dealer who used them.

178 Cong. Rec. S13964 (daily ed. Dec. 20, 2001).

Defendants receive reductions for minor or minimal participation in fewer than 15 percent of drug distribution cases. In 2001 for example, only 2.3 percent of defendants received a minimal role reduction, 10 percent received a minor role reduction and .9 percent received one in between. No data is publicly available since the institution of the cap, but these numbers do not suggest an excess of leniency on the part of sentencing judges prior to its adoption.

It is particularly disturbing that the Commission chooses to revisit the cap, which it passed unanimously, so soon after it was instituted. There is simply no basis to judge whether and how it is affecting sentences, whether mitigating role adjustments are being invoked more or less frequently, and whether the government is appealing the adjustments. Furthermore, it is unclear how judges are handling cases where they believe a defendant warrants a mitigating role adjustment but may not warrant a reduction to level 30. Presumably, those sentences are subject to upward departure where the weight attached to the mitigating role adjustment is excessive. The better course would be to study how the cap is working before eliminating it or reducing its impact.

In light of the terrible outcomes that quantity-driven guideline sentencing guarantee, the recency of the amendment, and the few sentences it affects, we urge you to exercise restraint and neither eliminate nor adjust the role cap for the time being. Of course, if you choose to go forward with an amendment, we strongly encourage you to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

Issue for Comment 10 Regarding Aberrant Behavior

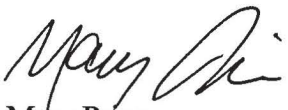
FAMM urges that the Commission not eliminate or amend the ability of courts to depart on the basis of aberrant conduct at this time. Not only was the departure significantly amended and its use restricted recently, the Commission has not completed its study and recommendations concerning criminal history. It strikes us as at least premature to remove an entire ground for downward departure on limited information The Commission can make a significant contribution to understanding the place that criminal history plays and should play at sentencing by staying its hand and studying the impact of the various changes to the departure made so far.

Departures from the guidelines were fashioned in part to provide feedback on the operation of the guidelines. That a departure is invoked teaches that judges feel the need to account for a factor or feature not adequately accounted for in the guidelines. That the departure is invoked, should never automatically lead to the conclusion that it ought to be eliminated, even in this post-Feeney era.

We urge you to wait until you have complete information before you eliminate this important ground for departure.

Thank you for considering our views.

Sincerely,



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FILE NO:

March 1, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Dear Commissioners:

This letter is sent on behalf of the Association of Oil Pipelines (AOPL). The AOPL writes in response to the Commission's request for comments regarding possible revisions to the guideline treatment for the illegal transportation of hazardous materials.

The AOPL is an unincorporated nonprofit organization started in 1947. AOPL represents 49 common carrier oil pipeline companies. AOPL members carry nearly 80% of the crude oil and refined petroleum products moved by pipeline in the United States. Among other things, the AOPL represents its members on legislative and regulatory matters and in the federal courts.

The Commission has sought comments in response to the August 1, 2003 Department of Justice submission which alleges that the sentencing guideline applicable for hazardous materials, § 2Q1.2 is not adequately suited to illegal transportation of hazardous materials. The Department of Justice suggests two grounds to justify changes to the guidelines: first, that illegal transportation of hazardous material is different from typical pollution offenses covered by § 2Q1.2 and has characteristics not addressed by that guideline; and, second, that the specific offense characteristics set forth in § 2Q1.2 are not characteristic of illegal transportation of hazardous materials. For the reasons set forth below, the AOPL urges the Commission to reject the structure of the Department's approach and offers an alternative approach more closely tailored to the stated need.

The AOPL supports the Department's effort to obtain enhancement of penalties where hazardous materials and/or the hazardous material transportation infrastructure are used to commit (or attempt to commit) acts of terrorism. As described in the attached summary of

industry security efforts[1], the pipeline industry has entered into close cooperation with federal law enforcement and regulatory agencies to address shared concerns about the integrity and security of the nation's critical private infrastructure. In addition, the AOPL support the Department's effort to obtain enhancement of penalties where violations involve controlled substance manufacturing or trafficking offenses.

As set forth below, there are existing provisions of the Guidelines that address the potential misuse of the nation's hazmat transportation infrastructure as a weapon. To the extent further revision is considered appropriate, there is precedent within the guidelines for a much more straightforward approach to this issue.

To address "one-time, catastrophic occurrences," involving illegal hazardous materials transportation by terrorists, the guidelines already provide for a "victim related enhancement" at § 3A1.4 for crimes which involved or were intended to promote terrorism.

If further revision is thought to be necessary, a direct and simple precedent is found in § 2B1.1(b)(12)(B)(i) which provides for a specific offense characteristic in crimes involving theft and embezzlement if:

> the offense (i) substantially jeopardized the safety and soundness of a financial institution . . .[2]

Using this model to address illegal hazardous material transportation by those with the intent to commit acts of terrorism, or to engage in controlled substance manufacturing or trafficking offenses, the guidelines could add a new specific offense characteristic to § 2Q1.2 as follows:

> (7) If the offense: (i) involved, or was intended to promote a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32; (ii) involved, or was intended to promote a controlled substance manufacturing or trafficking offense, increase by 2 levels, but if the resulting offense level is less than level 14, increase to level 14.

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[1] See Attachment 1, "Security Planning and Preparedness in the Oil Pipeline Industry," API-AOPL Environmental and Safety Initiative, August, 2003, available at: http://www.aopl.org/pubs/reports.html.

[2] United States Sentencing Guidelines, § 2b1.1(b)(12)(B)(i) (January, 2003).

This would provide additional specific offense characteristics that would be consistent with the model utilized in § 2B1.1, and with the language for victim-related adjustments for crimes involving terrorism in § 3A1.4 and for transportation offenses involving drugs in § 2D1.12(a)(12)and(b).

The Department correctly notes that § 2Q1.2 was not originally designed to cover hazardous material transportation violations. However, as the Department also notes, since 1993, hazmat crimes were added to § 2Q1.2.

Thus, illegal transportation of hazardous material *is* covered by § 2Q1.2.[3] Further, almost all of the offense characteristics proposed for comment for illegal transportation of hazardous material are covered by the existing guidelines. Thus, a violation of the legal limits on hazardous material transportation results in a base offense level of 8. If there is a release, a four-level enhancement may apply, and if there is a related evacuation or disruption of public utilities or a significant clean up, then another four-level enhancement would apply. Should the offense result in a substantial likelihood of death or serious bodily injury, a nine-level enhancement would apply.[4] The Department has long noted that these sanctions available under § 2Q1.2 provide serious punishments for environmental violations.

Moreover, the use of criminal enforcement of environmental laws has proceeded step-wise, with criminal enforcement following the gradual clarification of regulatory requirements and as a support and enhancement to the government's other enforcement tools of administrative and civil enforcement.

In that context, it should be considered that hazardous material transportation regulation is in a remarkable state of change. In response to 9/11, new partnerships have developed between the private sector and federal, state and local governments to devise the means to identify the areas of greatest potential risk and develop the strategies most likely to address those risks. To the extent that the Department's proposal seeks to increase penalties as a means of reducing those risks, the effort is premature, as the government itself is still determining what acts (or failures

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[3] United States Sentencing Guidelines, Appendix A (November 2002) Listing Statutory Provisions found at title 49.

[4] Of course other enhancements could apply as well, such as those dealing with the offenders role in the offense in Chapter 3B and for acts of obstruction under 3C.

to act) in the area of hazardous material transportation constitute the greatest potential risk (and which therefore might receive greater sanctions should they be violated).[5]

A recent Congressional Research Service Report for Congress noted that after the terrorist attacks:

> Pipeline operators reviewed procedures, tightened security, rerouted transportation patterns, closely monitored visitors and made capital improvements to harden key facilities. The Association of Oil Pipelines (AOPL) and the American Petroleum Institute (API), working together, provided guidance to member companies on how to develop a recommended pipeline security protocol analogous to an existing protocol on managing pipeline integrity.[6]

Ninety-five percent of AOPL operators had developed new security plans and instituted appropriate security procedures by February 2003. Pipeline operators have joined with the Department Homeland Security to establish a cooperative, industry-directed database to provide real-time threat alerts, cyber alerts and solutions. AOPL members have also worked with the Department of Homeland Security to identify critical facilities that warrant government protection should they be threatened and have responded to requests by the DOT's Office of Pipeline Safety and DHS's Transportation Security Administration to conduct vulnerability assessments. These are only a few of the ways that the AOPL and its members have moved to respond to security threats and to increase government-industry partnerships to enhance the protection of the nation's critical infrastructure. These efforts to identify risks and problems in the hazardous material transportation industry are still in process.

In the context of these efforts, most of the suggested revisions to § 2Q1.2 are not focused on the utility of this guideline provision as a means of addressing national security threats or drug trafficking. Guidelines revisions have generally flowed from the careful study of empirical information. Outside of the approach noted above to address acts of terrorism against our nation's critical private infrastructure or drug related offenses, the small number of criminal

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[5] For example, in a proposed rulemaking, the DOT and the Transportation Security Administration are evaluating the need to require further security enhancements on materials or categories of materials that present the most serious security risks in transportation. 68 Fed. Reg. 37,470, 34,477 (June 9, 2003).

[6] CRS Report for Congress, "Pipeline Security: An Overview of Federal Activities and Current Policy Issues," updated February 5, 2004, p. CRS-11.

hazmat cases do not provide a basis for the non-security focused proposals on § 2Q1.2. There is simply too little "additional information and . . . firm empirical basis" which the Commission itself considers a necessary basis for revisions to the guidelines.[7]

* * *

While not the main focus of these comments, the reference to possible changes to the Chapter Eight guidelines to specifically cover hazmat compliance appears to conflict with the past design of Chapter Eight and the Commission's current proposal to revise Chapter Eight. As the Commission is well aware, Chapter Eight provides leniency for effective programs to prevent and detect violations of law. Chapter 8 has long served an outsize role in determining the shape and content of corporate compliance plans. Following the October 2003 report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, the Commission has published proposed amendments to Chapter Eight which propose a new standalone guideline focused on compliance programs.

The provisions of the Chapter Eight guidelines that address compliance programs have been crafted to have broad application. Notably, some concerns over the proposed changes focus on whether or not expanding the specificity of the definition of an effective compliance program is beyond the Committee's purview or expertise. This concern would be amplified should the Commission begin developing industry specific criteria. What is considered to be the most effective compliance program for a given industry is subject to a vast number of economic, technological and other factors. It would undermine the broad impact of the Chapter Eight guidelines in this area should the Commission attempt to make such narrow prescriptions.

* * *

The AOPL hopes that these comments are useful to the Commission. The AOPL would appreciate the opportunity to send a representative to testify before the Commission's public hearing on March 17, 2004.

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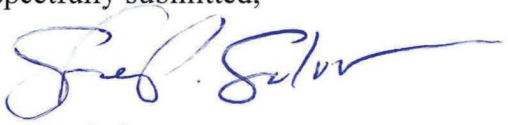
[7] United States Sentencing Commission, Guidelines Manual, Chapter 1, Part A, Introduction and General Application Principles, "A Concluding Note."

Respectfully submitted,



Steven P. Solow

SPS/kmm
cc: Lisa Rich, Esq.
Staff Counsel, United States Sentencing Commission

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February 27, 2004

SENT BY EMAIL AND UNITED STATES MAIL

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Michael Courlander, Public Affairs Officer
United States Sentencing Commision
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment Regarding Proposed Amendments to Chapter Eight (Sentencing of Organizations)

Dear Commission:

The following sets forth our Public Comment relating to Proposed Amendment 2: Effective Compliance Programs in Chapter Eight.

Public Comment Overview

After carefully reviewing the Public Comments I have submitted over the past years relating to Chapter Eight, the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines' Report and Proposed Amendment 2, organizations will now have greater guidance for the design, implementation and enforcement of organizational compliance programs. With that said, I must still express my concerns surrounding the amendments relating to ***reduction with effective program*** AND ***waiver of the attorney-client privilege***.

My extensive professional experience in corporate criminal liability compliance stems from years and years of involvement in all angles of corporate compliance even BEFORE the Organizational Guidelines were implemented in 1991, excluding prosecutorial enforcement. Having this practical experience and expertise BOTH internally and externally with employers, employees and administrative agencies alike provides me a broader view of the EFFECT of regulations within organizations. INTERNAL DETECTION AND APPROPRIATE REMEDIAL ACTION are KEY components in any organizational compliance program. Therefore, I must urge the Commission to reevaluate Amendment 2 as follows:

Section 8C2.5(f):

"(f) Effective Program to Prevent and Detect Violations of Law

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points."

AMENDED TO READ

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points ONLY if the organization took appropriate remedial action once the offense was discovered.

Commentary to 8C2.5(Application Notes):

"If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation."

AMENDED TO READ

If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation ONLY after considering the defendant's efforts relating to appropriate remedial action.

Commentary to 8C4.1(Note 2):

"2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure."

AMENDED TO READ

2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for downward departure ONLY after considering the defendant's efforts relating to appropriate remedial action.

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

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February 27, 2004

SENT BY EMAIL AND UNITED STATES MAIL

United States Sentencing Commission
Attention: Public Affairs
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Washington, DC 20002-8002

Michael Courlander, Public Affairs Officer
United States Sentencing Commision
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

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AMENDED TO READ

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PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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March 5, 2004

United States Sentencing Commission
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Dear Commissioners:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 3 and 4, 2004 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments published for comment January 13, 2004. We are submitting comments relating to the following proposed amendments.

Proposed Amendment #1 - Child Pornography and Sexual Abuse of Minors

POAG strongly supports the consolidation of §§2G2.2 and 2G2.4. It is the experience of the group that the current cross references create a tremendous amount of confusion and disparity in application, often resulting in lengthy sentencing hearings. When viewing the new combined guideline, POAG chose Option 1 for ease of application and notes that Option 2 could produce the same issues in the existing cross reference applications.

Issue for Comment #1

POAG thinks it is appropriate to consider relevant conduct and recognizes that this approach is consistent with guideline application as a whole. There does not appear to be any compelling reason to justify treating child pornography cases differently from those defendants who commit bank robberies, drug crimes, or fraud.

Issue for Comment #2

POAG suggests the proposed definitions would assist the field in guideline application. There are continuing concerns as to the lack of instruction for counting the number of images and POAG would request more guidance in the form of an application note. In addition, if the existing specific offense characteristics (SOCs) regarding an increase for the number of items as well as the number of images remain, the group would request an application note explaining whether this is "permissible double counting" or whether these SOCs should be applied in the alternative.

Issue for Comment #3

The group does not think the Commission should include definitions for sadistic or masochistic or other depictions of violence (which may include bestiality or excretory functions). It is our experience that this SOC is factually based and not difficult to apply given the existing case law. POAG suggests the interpretation for these definitions should remain with the courts.

Issue for Comment #4

POAG supports the creation of a new guideline for "travel act" offenses at §2G1.3 with specific offense characteristics to distinguish these acts from other crimes. In addition, the group recommends Option 1A as it provides ease of application by remaining in a "travel act guideline." Option 2A is preferable to the group as Option 2B could pose ex post facto problems if there are changes to the statutory definitions. In addition, there may be some confusion over whether a conviction of 18 U.S.C. § 2423(d) is required for this enhancement.

Issue for Comment #5

POAG proposes there should be some proportionality between the §2A3.1-2A3.3 guidelines and the §2G guidelines. In §2A3.1, there is a concern regarding a potential double counting issue between Option 1 and §2A3.1(b)(2) as this SOC already provides for increases based on the age of the minor. If Option 1 is chosen, the group would request an instruction as to whether this is "permissible double counting."

POAG recognizes the Native American Advisory Group has concerns about the interaction between the new definition for pattern of activity enhancement at §4B1.5 and offenses sentenced under § 2A3.2. POAG defers to their judgement on this issue.

Issue for Comment #6

While recognizing that incest cases may be more egregious than other types of sexual assaults due to the loss of trust issue, POAG believes a significant problem could arise if the Commission attempted to define "incest." The group discussed whether it is worse to be sexually assaulted by an "absent" blood relative versus a live-in step parent who has had a long term relationship with the victim. Perhaps the relationship between the abuser and the victim is the more critical factor than the familial bloodline.

Other Application Issues

During our meeting, POAG agreed that the guidelines for production of child pornography should be higher than mere receipt or possession of child pornography. In addition, POAG noted no application difficulties with the proposed SOCs in the production guideline.

In addition, as to §2A3.3, we would recommend an application note be added directing whether or not a Chapter Three adjustment for Abuse of Position of Trust should apply.

POAG recognizes conditions of probation and supervised release are an area of increasing litigation and suggest a complete ban of computer use would be inappropriate. However, in an attempt to safeguard the public, a limit on the defendant's use of a computer needs to be established. This is best left to the Court's discretion at sentencing hearings when imposing limited restrictions.

Proposed Amendment #3 - Body Armor

In viewing the January 13, 2004 draft of this proposed amendment, POAG believes the active employment of body armor should be included in the commentary notes. Otherwise, there are no application difficulties associated with this new guideline.

Proposed Amendment #4 - Public Corruption

POAG agrees with the proposal to consolidate §§2C1.1 and 2C1.7, and §§2C1.2 and 2C1.6, with the inclusion of attempts and conspiracies under these guidelines. The group also reviewed the cross reference in §2C1.1 and noted no application issues rising to a level warranting removal. We take no position on Issue for Comment #3 as our experience reveals that offense conduct varies widely in public corruption cases.

In analyzing Issue for Comment #4, POAG suggests there may be a double counting concern if both SOCs at (b)(3) and (b)(4) regarding public officials are applied. POAG would not recommend tiered enhancements based on the degree of public trust held by the public official involved in the offense as application difficulties could arise in establishing the defendant's actual job duties. The proposed SOC at (b)(5) was discussed, with the group not reaching a consensus. Another double counting concern was raised as to why a specific group of individuals and documents were identified as warranting the increase at (b)(5) or whether this conduct was already included in the base offense level (BOL).

According to staff, based on the quoted percentages, raising the BOL to accommodate multiple incidents could unduly punish as many as one-third of the defendants sentenced under these guidelines. Therefore, POAG suggests not increasing the BOL as the enhancement at (b)(1) is a preferable way to sanction this conduct.

Lastly, the group is appreciative of the proposed definitions and examples contained in the application notes as inclusion of these should decrease disputed application issues.

Proposed Amendment #5 - Drugs (Including GHB)

Issue for Comment #2

In discussing this issue, the group had concerns with this concept. For example, a person who is publicizing the sale of drugs over the Internet in an attempt to create a larger distribution network is easier to factually distinguish from an individual who may be a lower level purchaser of the drugs but who then redistributes the drugs to a friend using the Internet. Potentially both could receive an increase for use of the Internet in the distribution drugs. It is suggested that a mass marketing approach may be more appropriate method to sanction distributors using the Internet to sell drugs. The definition and the resulting increase in offense levels could be similar to that found in §2B1.1.

Issue for Comment #3

In discussing this issue with staff, it appears these cases are minimal and POAG suggests an encouraged upward departure be added to include this conduct. This would allow the sentencing court discretion in imposing an appropriate sentence.

Issue for Comment #4

POAG encourages the Commission to resolve the circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. The group did not reach consensus on this issue.

Proposed Amendment #6 - Mitigating Role

POAG generally agrees with the tiered approach to the mitigating role cap, however, we suggest unless the language is modified, application difficulties will result. Applying a Chapter Three adjustment based on a Chapter Two offense level may be confusing in itself. As currently proposed, §3B1.2(b) refers to "the defendant's Chapter Two offense level." This leaves open the possible application of the reduction after specific offense characteristics have been added or subtracted. POAG suggests that the language be explicit in that the reduction should be premised on the "base offense level" with clear instructions including an example to be added in the commentary at §3B1.2.

Currently, defendants sentenced using the §2D1.2 guideline receive the benefit of the mitigating role cap, however, under this new provision, they would not receive this reduction. Similar application problems might also be present at §§2D1.6, 2D1.7, 2D1.10, and 2D1.11. There may be other guidelines that also contain a cross reference instruction to the 2D1.1 guideline where this issue may arise. Perhaps if the word "pursuant" was changed to "using" this issue would be resolved. A separate issue was discussed whereby a defendant was a minor participant for behavior accounted for at §2D1.1, but a full participant for behavior accounted for at the original guideline. POAG requests some clarification regarding these application issues.

Historically, POAG has requested guidance and examples in application of role reductions. This also extends to the current mitigating role cap issue.

Proposed Amendment #7 - Homicide and Assault

The Chapter Two Homicide and Assault guidelines as written and the current proposals will produce appropriate punishment and pose little application difficulty. In fact, the group recognizes these guidelines along with the robbery guideline to be among the easiest to apply. As to the Chapter Three

issue for comment, POAG does not recommend a tiered approach in application of §3A1.2 as additional fact-finding issues would be required and could increase the number of contested sentencings.

Proposed Amendment #8 - Miscellaneous Amendment Package

(D) USSG §2X6.1 -Use of a Minor

POAG noted some concerns with the guideline as written in the January 13, 2004 version. In particular, a question arose as to how multiple counts of this offense would be grouped and suggest a commentary note be added regarding grouping instructions. In addition, POAG found the language in §2X6.1, comment. (n.1) to be confusing and we had difficulty interpreting the wording "the offense of which the defendant is convicted of using a minor." POAG noted a problem in applying role adjustments to this guideline absent additional instruction.

Proposed Amendment #12 - Immigration

Members of POAG suggest gathering the facts to warrant the proposed enhancements at §2L1.1(b)(4) may be difficult for the probation officer to obtain. This issue may be resolved if the language tracks the provisions found in 8 U.S.C. § 1327 wherein the charging document would outline the specifics of the conduct.

POAG supports an enhancement for multiple deaths noting there are certainly several cases in which more than one illegal alien has died while being smuggled into the United States. However, there would seem to be problems in applying a multiple count calculation from Chapter Three. Therefore, an encouraged upward departure either in the commentary at §2L1.1 or in §5K2.1 could address this issue.

The group found no application problems if the table for the number of aliens smuggled is amended.

POAG opposes an enhancement in the case of a fugitive from another country. Probation officers have a difficult time obtaining criminal record information within the United States and foresee greater difficulty in timely obtaining foreign arrest information. In addition, there are concerns about defendants who are fugitives from countries who are escaping political or religious persecution. There also seem to be inherent conflicts within the guideline structure in that a defendant is prohibited from receiving criminal history points for foreign convictions, but may receive an increase for a mere warrant. POAG takes no position with regard to fugitive status from a United States jurisdiction but notes a potential conflict with Chapter Four in that mere arrests cannot be considered in determining an upward departure in a defendant's criminal history category.

Remaining Amendments

POAG takes no position on remaining amendments and relies on the expertise of the Commission staff and other working groups.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed

amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarifications, please do not hesitate to contact us.

Sincerely,

Cathy Battistelli

Cathy A. Battistelli
Chair

COMMITTEE ON CRIMINAL LAW
of the
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9535 Bob Casey United States Courthouse
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Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable A. David Mazzone
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Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

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March 8, 2004

Members of the United States Sentencing Commission
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One Columbus Circle, NE, Suite 2-500
Washington, DC 20002

Dear Sentencing Commissioners:

The Judicial Conference Committee on Criminal Law reviewed with great interest all of the proposed amendments to the sentencing guidelines published on January 13, 2004, for public comment. We offer the following general and specific comments to the amendment proposals.

The Committee fully supports the proposal to consolidate U.S.S.G. §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) and §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). We also support the proposal to consolidate all four sections of U.S.S.G. §2C1.1 with §2C1.7, and §2C1.2 with §2C1.6. We believe such consolidation efforts may simplify sentencing guideline applications in these cases.

As you may know, in 1995, recognizing the complexity of the sentencing guideline system, the Committee urged the Commission to undertake an extensive assessment of the sentencing guidelines to determine how they might be streamlined or simplified. We understand this effort stalled after extensive Sentencing Commissioner turnover and a prolonged period of vacancies on the Commission. In any event, we support any new efforts in this regard.

With respect to whether the Commission should provide an enhancement in U.S.S.G. §2C1.1 for solicitation of a bribe, and in §2C1.2 for solicitation of a gratuity, the Committee believes that the Commission should not include such an enhancement because it is likely to invite protracted disputes at sentencing over which party initiated the solicitation, which we do not view as vital in terms of relative culpability.

The Committee also opposes any attempt to modify the mitigating role cap. As you know, in November of 2002, after receiving input from the Committee, the Commission created a sentencing cap at a base offense level 30 for drug traffickers who receive a mitigating role adjustment under U.S.S.G. §3B1.2. The Committee does not believe that the current application of this guideline is problematic, and we are unaware of any need to change it.

Likewise, the Committee opposes any attempt to further limit the courts' discretion with respect to aberrant behavior departures. As you may recall, in December of 1999 the Committee determined that the majority view of the circuits was correct that for this departure to apply there must be some element of abnormal or exceptional behavior: "[a] single act of aberrant behavior...generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable."

United States v. Carey, 895 F.2d 318, 326 & n.4 (7th Cir. 1990). Responding to this circuit conflict, in November of 2000 the Commission amended the guidelines by attempting to slightly relax the "single act" rule in some respects and provide guidance and limitations regarding what can be considered aberrant behavior. The Commission also determined that this departure is available only in an extraordinary case.

On October 8, 2003, the Commission adopted emergency amendments, effective October 27, 2003, implementing a number of PROTECT Act directives. Included in these amendments were newly prohibited grounds for departure relative to aberrant behavior. For example, the Commission determined that an aberrant behavior downward departure is not warranted if the defendant has any significant prior criminal behavior, even if the prior behavior was not a federal or state felony conviction. The Commission also determined that an aberrant behavior downward departure is not warranted if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the "safety valve" criterial at §5C1.2. As you know, studies conducted after the enactment of the PROTECT Act show that judges are not abusing their departure authority. As a result, the Committee believes that further downward departure limitations are unwarranted.

The Committee recognizes the need to address proportionality concerns as a result of newly enacted mandatory minimum sentences or direct amendments to the sentencing guidelines by Congress. It appears that some of the proposed amendments, for example, the proposal to increase the offense levels for "date rape" drugs, second-degree murder, voluntary manslaughter, and involuntary manslaughter, are intended to address such concerns. Unfortunately, it appears that the Commission's remedy for these proportionality issues is to increase the penalties for these offenses.

The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes. The Committee continues to believe that the honesty and truth in sentencing intended by the guidelines is compromised by mandatory minimum sentences. The Committee also believes that the goal of proportionality should not become a one-way ratchet for increasing sentences, especially in light of data showing that the majority of guideline sentences are imposed at the low end of the applicable guideline range. This data indicates that in most cases judges find the existing guidelines more than adequate to allow significant punishment.

The Committee takes no position in response to the directive to the Commission in the PROTECT Act to increase the penalty for child pornography offenses based on the number of images involved. With respect to defining the term "image" or how such images should be counted, the Committee has no position, but would be willing to review any proposals developed in this regard. Also, the Committee takes no position with respect to the appropriate guideline for a new offense that prohibits access to or use of a protected computer to transmit multiple commercial electronic messages (18 U.S.C. § 1037). Likewise, the Committee takes no position with respect to the proposals to provide greater penalties for offenses involving official victims.

With respect to immigration offenses, the Commission has already made revisions to U.S.S.G. §2L1.2 in 2001, 2002, and 2003. Since acts of terrorism can be separately charged by the government, we support the delay in any revisions to the immigration guidelines until a comprehensive package can be developed.

Finally, the Committee reviewed the proposed revisions to the organizational guidelines. The Committee opposes the elimination of the prohibition for the three-point reduction in the culpability score for an effective compliance program if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The Committee believes that the claim to have an effective compliance program is inconsistent with unreasonable delay in reporting the offense after its detection. The Committee generally supports the increase in the reduction of the culpability score under §8C.25(f) for an effective compliance program.

We appreciate the opportunity to present our views. If you need any additional information, please feel free to contact me at (713) 250-5177, or Judge William T. Moore, Jr., Chair of the Committee's Sentencing Guidelines Subcommittee, at (912) 650-4173.

Sincerely,

Sim Lake

Sim Lake

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

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March 16, 2004

Honorable Ruben Castillo
Vice Chair
United States Sentencing Commission
One Columbus Circle NE
Washington, D.C. 20002-8002

Re: Guideline Calculations for Bringing In and Harboring Certain Aliens

Dear Judge Castillo:

We write to express our personal views regarding the need for certain amendments to the guidelines.

We share an abiding concern about the absence of appropriate guideline adjustments for the crime of bringing in and harboring certain aliens, in violation of 8 U.S.C. § 1324, when young children are being transported by strangers.

We have noticed an alarming increase in cases in which very young children are being smuggled into the United States by strangers who have no connection to the children's parents. In brief, they do not know what awaits these young children after the smugglers deliver them to their destination points.

Currently, the guidelines provide for no specific enhancement for this factual scenario. The smuggling, transporting, or harboring of unaccompanied children is not sufficiently addressed under the present two- to four-level increase for intentional or reckless creation of substantial risk of death or serious bodily injury. At most, a two point enhancement might arguably be assessed based upon vulnerable victim status. However, even as to that minimal enhancement, it is probably an open-question as to whether, for purposes of the crime of transportation of illegal aliens, the children being transported are "victims." Since these children are in a displaced condition, offenses involving unaccompanied children raise the level of severity of the criminal conduct.

Last month, we imposed sentences in four such cases.

On February 10, 2004, sentence was imposed in *United States v. Anna Quintero*, CR 03-2119-TUC-JMR. The defendant had attempted to bring two infants, ages 4 years and 8 months respectively, into the United States. The two infants appeared to be drugged. She had two birth certificates, but she noticed that the ages on those certificates did not correspond to the ages of the children she was transporting. The defendant was to be paid $150.00. She did not know the parents of the children or to whom she was delivering the children.

On February 11, 2004, sentences were imposed in *United States v. Bertha Tomasa Rabago and Cecilia A. Montano-Garay*, CR 03-1642-TUC-JMR. There, the defendants, with Rabago's two children and Montano's one child, attempted to transport two young girls, five and seven years old respectively, into the United States. When arrested, Montano said she did not know the names of the children, had received them at a hotel in Mexico, and was to bring them to her

home in Arizona, where they would be picked up. Rabago invoked her rights. When the Probation Officer interviewed the two defendants, Rabago told the probation officer that a friend of her sister wanted her to pick up the children. Montano said her friend had asked Montano to pick up his children. The friend, when contacted by agents, denied knowing anything about Montano's story. He is the not related to the two children.

On February 19, 2004, sentence was imposed in *United States v. Silvia Ayala*, CR 03-2108-TUC-CKJ. There, the defendant attempted to smuggle a six year old boy through the Douglas Port of Entry on September 24, 2003. She stated a man and woman she had never met before gave her the child to deliver to a man at a gas station in Douglas, Arizona. She did not know if these people were the parents of the child and therefore had no idea if she was participating in a kidnapping attempt. The child appeared to be lethargic and began to hyperventilate when talking to inspectors. The child stated that he had been given medication by a man he did not know.

On February 23, 2004, sentence was imposed in *United States v. Chrystal Salazar,* CR 03-2297-TUC-CKJ. There, the defendant attempted to smuggle a one year old infant into the United States at the Douglas Port of Entry. She admitted to inspectors that she was hired by "Luis" to transport the child from Agua Prieta, Mexico to Douglas, Arizona for $300.00. Luis provided her with a car and another man loaded the child into the car. The defendant had no knowledge as to whether either of these men had any legal relationship to the child.

The sentencing guidelines for alien smuggling do not adequately take into consideration the heightened danger to young children smuggled by strangers having no connection to the parents of the smuggled children. We respectfully urge that you consider a significant upward adjustment for such conduct.

It is noteworthy that two of these cases involved evidence that very young children had been drugged before being transported. This factor, also, does not appear to be adequately considered by the sentencing guidelines.

We are enclosing a draft revision to §2L1.1 of the Sentencing Guidelines reflecting how we would envision a specific offense characteristic could operate to address our concerns. Thank you for your consideration of this matter.

Sincerely,

Cindy K. Jorgenson
District Court Judge

John M. Roll
District Court Judge

JMR:kh/mb

Enclosure

cc: Honorable Ricardo H. Hinojosa, United States District Judge and Commissioner, United States Sentencing Commission
All District Judges in Arizona
Magdeline E. Jensen, Chief United States Probation Officer
Paul K. Charlton, United States Attorney
Jennifer C. Guerin, Chief Assistant United States Attorney

Draft Revision to §2L1.1
Smuggling, Transporting, or Harboring an Unlawful Alien

(b) Specific Offense Characteristics

insert new specific offense characteristic between the current (b)(1) and (b)(2):

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

Annotations to Draft Language

In the analysis below, sections of the above draft text appear in red. The reference to an analogous guideline or explanation for the red-lined language appears immediately below each section.

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

The same introductory text as §2L1.1(2); however, "minor unlawful alien" is substituted for "six or more unlawful aliens."

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

In determining what age to use, this draft language is analogous to §2A3.1(b)(2) pertaining to Criminal Sexual Abuse. It reads, "(A) If the victim had not attained the age of twelve years, increase by 4 levels; or (B) if the victim had not attained the age of sixteen years, increase by 2 levels." Since this guideline determines an age distinction, presumably on the issue of consent, it makes sense to follow this logic and use "under the age of 12."

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

This text tracks the guideline language at §2A4.1(b)(6), Kidnapping, Abduction, Unlawful Restraint which provides, "If the victim was a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by 3 levels." Since the conduct drafted for §2L1.1 is similar, an analogous increase of 3 levels was drafted.

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

If the minor is under the age of 5, the child is unusually vulnerable because of the child's inability to effectively communicate regarding his/her parentage, family, or destination. We did not locate a guideline with analogous language for this consideration.

Commentary to 8C4.1(Note 2):

"2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure."

AMENDED TO READ

2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for downward departure ONLY after considering the defendant's efforts relating to appropriate remedial action.

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

COMMENTS TO PUBLISHED AMENDMENTS

Federal Public and Community Defenders

As the Commission embarks on this amendment cycle, we are reminded of that old adage, "the more things change, the more they remain the same ... only worse." Despite our bulging prison population, each of the proposed amendments responds to a new offense or otherwise ratchets up the sentences on existing offenses. Recognizing that we are simply stating what you already know, Defenders are nevertheless compelled to ask the Commission to be mindful of Justice Anthony M. Kennedy's recent exhortation:

> Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.
>
> We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.
>
> While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about $26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system.[1]

With this amendment cycle, our *race to incarcerate* will continue to fill federal prisons disproportionately with Latinos, who now make up the largest group of federal prisoners, African Americans, and nonviolent, first time offenders, who are being sentenced to prison terms that were once reserved for only the most serious and violent offenders.[2] Admittedly, this upward spiral in

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[1] Speech at the American Bar Association Annual Meeting, by Associate Justice Anthony M. Kennedy, Supreme Court of the United States, August 9, 2003.

[2] In 2001, Hispanics made up 40.6% of the prison population, whites were 30.4% and blacks were 25.3%. 2001 Sourcebook of Federal Sentencing Statistics, Table 4 at 14. In 1995, Hispanics were 27.3%, whites were 39.2% and blacks were 29.2%. USSC, 1995 Annual Report, Table 11 at 45. More than three quarters of all federal offenders sentenced in 2001 had no prior countable

federal sentencing is driven in large part by Congressional mandates, many in response to Department of Justice initiatives. Yet, without evidence that longer prison terms are necessary to impose just punishment, deter criminal conduct or safeguard the public, the Commission should not add to this upward spiral. Indeed, without such evidence, any increased penalties would be inconsistent with the Commission's statutory mandate to establish guidelines that "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1).

I. PROMULGATE ONLY ESSENTIAL AMENDMENTS

In light of this state of affairs, Defenders recommend that the Commission step back and allow the substantial changes made during the last few years to take hold before making any non-essential changes, including even small adjustments that leave basic problems unresolved. In 2003, Congress and the Commission made substantial changes to federal sentencing, particularly in the area of departure jurisprudence; five separate sets of amendments were promulgated. The extent of the changes, coming on top of the economic crime package and other recent changes, have left the Commission with insufficient time for the thoughtful analysis that should accompany federal sentencing policy and threatens the ability of the criminal justice system to assimilate the changes. It would be wise for the Commission to allow time for these changes to be absorbed into the system. This would reduce application errors and attendant litigation; maintain uniformity; and avoid confusion and prejudice to defendants in the shuffle of new and old concepts.

Defenders recommend, therefore, that during this amendment cycle, the Commission promulgate only essential amendments – those amendments required by statutory mandates or new legislation and those that based on irrefutable empirical evidence, are necessary to protect the public or correct an injustice.

A. Piecemeal Changes Subvert the Legitimacy of the Guidelines

Piecemeal amendments make the guidelines less cohesive and a more complicated labyrinth than necessary and make the Commission's amendment process unsound. Defendants who commit identical crimes with identical backgrounds face substantially different sentences from year to year or season to season, as in the case of the 2003 amendments. In addition to the difficulties for counsel, probation officers and courts of remaining proficient, when the stated reason for an amendment is seemingly ignored without explanation only one or two years after its promulgation,

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sentences of 60 days or greater. 2001 Sourcebook of Federal Sentencing Statistics at Table 20 (77.3% or 39,170 of 50,665 cases). Almost ninety percent of all drug cases involved no weapon. Id. at Table 39 (87.6% or 19,766 of 22,552 drug cases). More than a third of all convictions involved white collar, non violent offenses or immigration offenses. Id. at Table 3 & 46 (approximately 13,000 cases were fraud, theft, embezzlement, tax and similar offenses and 8,969 were immigration offenses). Drugs, white collar and immigration offenses -- all nonviolent offenses – make up approximately three fourths of all federal cases.

the amendment process and the Commission's legitimacy as an expert body is undermined.

For this very reason, two amendments under consideration – aberrant conduct and mitigating role cap – should not be promulgated. With respect to aberrant conduct, there is no reason to once again limit or otherwise amend the policy statement (§ 5K2.20), which was first adopted in November 2000 and again amended just a few months ago during the Departure Review completed in October 2003. Case law reflects that this departure is being applied appropriately by courts, particularly in light of the new de novo standard of review.[3]

There is also no reason to address the overstatement of culpability in the drug guideline with a new approach that "compresses" rather than "caps" the effect of drug quantity. The drug role cap adopted in November 2002 (§ 2D1.1(c)(3)) has barely had a chance to work itself through the courts, with fewer than a dozen cases applying the cap found in a recent Westlaw search. In each of the cases found, the cap functioned as intended -- giving the defendant's role in the offense greater consideration -- with the result that the sentence was more proportional without compromising the goals of deterrence or incapacitation.[4] Unless it has empirical evidence that the role cap is creating

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[3] See e.g., United States v. May, __ F.3d __, No. 03-4589, 2004 WL 396279, *7 (4th Cir. 2004) (reversing aberrant conduct departure under de novo standard: "Weighing these factors both individually and in the aggregate, May's case is not exceptional, and a downward departure based on aberrant behavior is not justified."); United States v. Castellanos, 355 F.3d 56, 60 (2d Cir. 2003) (affirming denial of aberrant conduct departure, court held that while spontaneity is not determinative, "it is a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of section 5K2.20 has been met" so that district court properly denied departure for defendant convicted of conspiring to distribute more than 100 grams of heroin, where defendant had a week's notice of the crime, was carrying the money to purchase drugs at the time of arrest, and had attempted to evade responsibility for her role in the drug transaction by lying on the stand and suborning the perjury of others.); United States v. Patterson, 281 F. Supp. 2d 626, 628 (E.D. N.Y. 2003) (granting unopposed aberrant conduct departure to defendant, whose criminal act involved no planning and was of limited duration, amounting to putting friend in touch with trafficker, after refusing to take part in drug transaction and expected and received no payment for arranging meeting; defendant had otherwise been a hard-working woman and supportive daughter and fully cooperated with government).

[4] See e.g., United States v. Ferreira, 239 F. Supp.2d 849, 850, 857 (E.D. Wis. 2002) (applied role cap to impose a 41-month sentence on a 39-year old, safety valve defendant, married, with five children, who had been a lawful permanent resident alien for 25 years, whose involvement was limited to transporting cocaine and had been recruited because he was a truck driver; court would have granted a 3-level downward departure but reduced it to 1-level to offset the role cap reduction); United States v. Ruiz, 246 F. Supp.2d 263, 265 (S.D. NY. 2002) (applied role cap in a case involving a 30-year old first time ecstasy courier, imposing 97-month high end sentence of the

unjustified disparity or endangering the public, the Commission ought to give this option more time before scrapping it in favor of a different approach that provides no assurance of more just sentences nor a more welcome reception in Congress.[5] If the Commission is concerned with Congressional opposition to the role cap, it should review its application, report problems and suggested solutions, if any, and explain, through empirical evidence, how the role cap advances or detracts from the purposes of sentencing.

B. Sentence Increases Drive Unintended Increases in Other Guidelines to Maintain Consistent and Proportionate Sentences

Each time the Commission raises one offense level or increases the magnitude of an offense adjustment there are consequent pressures to increase other guidelines to "maintain consistent and proportionate sentencing," the reason stated for a number of the proposed amendments. Hence, each time the Commission proposes what appears to be a minor adjustment to a single guideline, it ought to take into account how that change will impact future sentencing policy. There is no question, that this year's increases establish the seeds of next year's increases for similar offenses and for dissimilar offenses that are regarded more harmful to society.

Harsh drug sentences originally intended to be applied to midlevel dealers and major traffickers – the kingpins and managers who control the flow of drugs – are applied disproportionately to minorities and to street-level dealers, particularly in crack cocaine cases despite repeated attempts by the Commission and Congress to correct the unintended disparity.[6] Yet these same drug sentences drive up sentences for economic crimes even for the "blue-collar" defendant who commits an offense that is not otherwise serious notwithstanding the dictates of 28 U.S.C. § 994(j) ("The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first time offender who has not been convicted of a crime of violence or an otherwise serious offense..."). Now that first-time white collar defendants who commit more serious offenses can be sentenced to terms once reserved for armed career criminal cases, a life sentence across the board at offense level 43 appears to be the only end in sight to the need to maintain "consistent and proportionate sentencing."

A number of the homicide amendments under consideration fall into this trap of proposing increased penalties to maintain consistent and proportional sentencing. Where amendments are driven primarily by a need to maintain a seeming consistency with recent increases, it is important

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78-97 month range; absent role cap sentencing range would have been 235-293 months).

[5] While the House of Representatives voted to disapprove the role cap when first promulgated, the Senate did not go along with the disapproval.

[6] See *Report to Congress:* Cocaine and Federal Sentencing Policy, Executive Summary at v-viii, USSC (May 2002).

for the Commission to determine whether there truly exists a lack of proportionality or whether there are significant differences which make the increase unnecessary.

C. Double Counting Harms & Enhancements of a Large Magnitude Are Inconsistent With a Graduated Guideline System

Another problem with a number of the current proposals is the double and triple counting of the same conduct that occurs when the Commission adopts a new specific offense characteristic to capture harm already taken into account in the base offense level or in existing adjustments. Also problematic are enhancements of more than 2 levels. These methods create sharp and generally unjustified differences between defendants whose conduct falls just below the threshold for the particular enhancement, obscuring slight gradations in a defendant's culpability and the seriousness of the offense. Moreover, these methods result in guidelines that are appropriate for the most severe form of an offense but overstate culpability for the majority of defendants sentenced under the guideline.

Steep enhancements of 4-levels or more are particularly objectionable creating the cliffs and tariff effects that pervade mandatory minimum sentences and obscuring important distinctions between gradations of offenses and culpability.[7] The immigration guideline for reentry cases has clearly shown that adjustments of a large magnitude introduce unwarranted disparity into the sentencing calculation, which is adjusted by *ultra vires* methods. The Commission should return to basic guideline principles, using one- and two-level adjustments that provide more graduated, proportional differentiation among defendants whose conduct and prior record are similar rather than the marked difference created by steep enhancements.

A number of the proposals under consideration suffer from these problems. For example, there is little justification to add an upward adjustment for public corruption offenses that involve false identification documents or border entry situations on the basis of a speculative national security risk when the overwhelming majority of cases to be sentenced under these guidelines will not involve such risks. More importantly, there already exists a substantial enhancement in Chapter 3, which applies whenever the government can prove by a mere preponderance of the evidence that the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4.[8] There is thus no need to add an enhancement that will apply to all border entry

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[7] See generally *Special Report to Congress:* Mandatory Minimum Penalties in the Federal Criminal Justice System, USSC at 23-34 (Aug 1991).

[8] The Terrorism adjustment in § 3A1.4 applies if "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." In such cases, an upward adjustment of 12 levels applies, with a minimum offense level of 32; and the criminal history category is enhanced to category VI. This results in a range of 210 - 262 months, or 151-188, with a 3-level reduction for acceptance of responsibility.

situations or involving false identification documents, when the overwhelming majority of cases prosecuted will pose no national security risk. For those cases that do involve a national security risk, the Chapter 3 terrorism adjustment will adequately capture the harm.

Similarly, a number of the amendments in the pornography guidelines propose increases for conduct which the Commission had already taken into consideration in existing specific offense characteristics making the increases unnecessary.

D. Ratcheting Up Sentences Corrupts the Criminal Justice System

Sentences that are continuously ratcheted up shift discretion from Article III judges to prosecutors, driving sentencing decisions from the public arena of the courtroom to the back rooms of a prosecutor's office. Prosecutors use unreviewable discretion to exact guilty pleas in return for waivers of Constitutional and procedural rights, creating unjustified disparities in the bargain.[9] Penalties deemed too harsh, even by the government which sought the severe sentences in the first place, are then reduced through fast track programs and charge bargains available at the sole discretion of the prosecuting attorney.

These methods exact too steep a cost. They impair the truth-seeking function of courts, jeopardize the defendant's Fifth and Sixth Amendment rights to effective assistance of counsel and to present a defense, and introduce disproportional and unjust punishment. As fast track practices become normalized, moreover, they also have a corrupting effect on the whole criminal justice system; waivers of constitutional rights become standard terms inserted into all plea bargains, even in the absence of deeply reduced sentences. A more just response that does less damage to our principles is to set sentences for all such offenses at the lower ranges that the government deems appropriate for fast track cases. The current proposals move us farther away from this solution.

In the face of a morally perverse upward sentencing spiral that is not tied to protecting the public nor establishing just punishment and that seemingly ignores the human costs of imprisonment, the Commission must faithfully adhere to its statutory mission to ensure that courts can impose sentences that are "sufficient, but not greater than necessary" to meet the purposes of sentencing.

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[9] Guilty plea rates have increased from 88.1% in 1989 to 96.6% in 2001. A defendant continues to receive a more severe sentence for asserting his innocence and exercising his constitutional right to have a jury determine his guilt, even when acquitted of some or even most of the charges. The PROTECT Act imposes even more burdens on the exercise of constitutional rights for now a defendant who litigates pretrial motions challenging constitutional violations risks loss of the third point for acceptance of responsibility, even when he thereafter pleads guilty, at the sole discretion of a prosecutor.

18 U.S.C. § 3553(a).[10] Anything else makes for sentencing policy that rather than reflecting the "advancement in knowledge of human behavior as it relates to the criminal justice process" as required by 28 U.S.C. § 991(b)(1)(C), devolves to constant and unjustified increased punishment.

Proposed Amendment #1 – Child Pornography:

While a number of the proposed changes are required to implement statutory changes enacted in the PROTECT Act, many of the proposals go beyond the requirements of the Act and ought not be promulgated. In relevant part, The PROTECT Act increased statutory maximum penalties and created or increased the statutory mandatory minimum for a number of the offenses covered by these guidelines. The PROTECT Act also included four directives that are relevant to the proposed amendments:

- **Section 401(i)(2):** the Commission "shall amend ... to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b), 2244(a)(4), and 2244(b)," sexual abuse of a minor, abusive sexual contact, and unwanted sexual contact, respectively. This directive affects guidelines **§2A3.3 and §2A3.4.**

- **Section 504(c):** Directs the use of U.S.S.G. § 2G2.2 (or other guideline if such does not result in "sentencing ranges that are lower than those that would have applied under" 2G2.2) for violations of 18 U.S.C. § 1466A, engaging in the business of selling or transferring obscene matter. This directive affects guidelines **§2G3.1 and §2G2.4.**

- **Section 512:** the Commission "shall review, and as appropriate amend . . . to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of [18 U.S.C. § 2423] to deter and punish such conduct." This directive affects guideline **§2G1.1.**

- **Section 513:** the Commission "shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of [18 U.S.C. § 2252A(a)(3)(B) or 2252A(a)(6)] as created by this Act. With respect to the guideline for section 2252A(a)(3)(B) the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such materials. This directive affects guidelines **§2G2.2** and **§2G2.4.**

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[10] In "Race to Incarcerate," Marc Mauer concludes with the moving appeal to stop "caging the least fortunate among us to solve our problems." See Marc Mauer, Race to Incarcerate (The Sentencing Project, 2001).