**National Association of Criminal Defense Lawyers**

The National Association of Criminal Defense Lawyers joins in all arguments raised by the ABA, the Federal Defenders and the FAMM.

**Various Concerned Citizens**

With respect to the Commission's description of what should be considered an "extraordinary and compelling reason" for a sentence reduction under 18 U.S.C. § 3582(c), one citizen urges the Commission to include situations in which there has been a change in the law that would have resulted in a significantly lower prison term had the law been in effect at the time of the prisoner's original sentencing. He emphasizes situations in which inmates are, in his view, stranded in prison having been sentenced under an unconstitutional regime. He also expresses his view that § 3582(c)(1)(A) was intended by Congress to function as a safety net for unforeseen circumstances, and that whether a person does or does not spend a significant amount of his or her life in jail should not turn on a legal technicality like the timing of his or her prosecution.

Two other citizens, whose brother is a federal inmate, urge the Commission to define the term "extraordinary and compelling reasons" to include a situation in which the defendant's prior state convictions (upon which his federal sentence was based) are not vacated until after the defendant's § 2255 petition has become final. They seek to have this reduction of sentence limited to defendants who exercised due diligence in having their state convictions vacated prior to filing their federal direct appeals or § 2255 petitions. They note the pre-AEDPA case *Custis v. United States*, 511 U.S. 485 (1994), permitting such attacks on federal sentences, as well as various circuit law interpreting the "second or successive" provision of section 2255. According to them, AEDPA inadvertently denied relief to defendants who, despite their exercise of due diligence, were unable to have their state court sentences overturned before the expiration of their initial section 2255 petition. They argue that imposing the "due diligence" requirement would bring the provision into compliance with *Johnson v. United States*, 544 U.S. 295 (2005). They assert that their brother is serving a sentence beyond that required by law because he was unable to assert his section 2255 claim. They attach a copy of the panel opinion from the Court of Appeals from the Eleventh Circuit denying their brother's section 2255 petition, and close by asking the Commission not to limit the definition of "extraordinary and compelling reasons" to medical reasons.

## 10. Issues for Comment: Criminal History

**U.S. Department of Justice (DOJ)**
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

The DOJ believes that the criminal history sentencing guidelines are workable as they currently stand. Before the Commission elects to exclude additional offenses from a defendant's criminal history score, the DOJ recommends that the proposed exclusion maintain or improve the guidelines' effectiveness in identifying and appropriately punishing offenders who have a high risk of recidivism.

The DOJ contends that certain records' unavailability does not preclude one from determining the recidivism risk of a particular offender, based on those records that can be easily obtained.

Finally, specifically addressing "driving while suspended" offenses, the DOJ suggests that the Commission may want to examine whether the basis for the suspension is an important criterion for consideration.

**Practitioners' Advisory Group (PAG)**
David Debold & Todd Bussert, Co-Chairs

Minor Offenses

The PAG recommends that §4A1.2(c)(1) be amended to provide that the listed offenses never count for criminal history computation purposes except in the rarest and most limited of circumstances: where there are aggravated, recent minor offenses involving lengthy terms of incarceration.

The PAG supports the proposals suggested by the FPD. The FPD's Proposal 1 provides that sentences for these offenses are never counted. The PAG feels this is the best proposal because it provides a practical bright line rule.

The FPD's Proposal 2 recommends the elimination of the counting of offenses at §4A1.2(c)(1)(A) if the sentence "was a term of probation of at least one year." The PAG believes that eliminating this qualifier is appropriate and would ensure that only sufficiently stiff and serious punishments trigger the counting of the minor offense. If the Commission does decide to keep the current structure of §4A1.2(c)(1)(A), the PAG strongly urges it to modify this subsection to provide that the minor offense counts only if "the sentence was a term of *supervised* probation of at least one year...."

Related cases

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

**The Probation Officers Advisory Group (POAG)**

Minor Offenses

The POAG is concerned that there are jurisdictional differences in sentences for defendants convicted for misdemeanor and petty offenses listed in §4A1.2(c)(1). This results in a disparity in criminal history scores, it argues. The POAG contends that because of this disparity, criminal history scores often over represent the seriousness of a defendant's past criminal conduct and their propensity to commit further crimes. Furthermore, the POAG argues, if defendants are serving a probationary sentence for one of these offenses and are then arrested for a federal drug offence, they are precluded from applying for the safety valve. The POAG therefore recommends that the Commission eliminate the specific offense list of §4A1.2(c)(1), and include these offenses in the "never counted" list at §4A1.2(c)(2). The POAG feels that this recommendation would reduce the disparity in criminal history scores and may also decrease the number of downward departures pursuant to §4A1.3.

The POAG also recommends that the language regarding prior offenses in §4A1.2(c)(1)(B) be deleted if it is similar to the language regarding the instance offense. The POAG recommends this deletion because §4A1.2(c)(1)(B) is rarely ever relied upon, because, in its opinion, misdemeanor and petty offenses generally do not mirror federal offenses.

Related Cases

The POAG is concerned that the definition for related cases is still a source of confusion for practitioners. This results in numerous objections for criminal history computations. The POAG therefore suggests that the Commission revise the second sentence at §4A1.2, comment. (n.), beginning with the word "Otherwise," and it be revised to read "*If there was no intervening arrest*, prior sentences are considered related if they resulted from offenses that . . ." The POAG believes that this will help eliminate practitioners proceeding to the second prong even when cases are separated by an intervening arrest.

The POAG also requests that the Commission resolve two other issues which result in confusion for practitioners. The POAG requests that the Commission resolve the circuit conflict regarding formal versus functional consolidation. It also requests that the Commission resolve the confusion regarding application of criminal history points for multiple probation or parole revocations for the same violation conduct, as outlined in §4A1.2(k), comment (n.11).

**Federal Public and Community Defenders (FPD)**
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

## I. Minor Offenses

According to the FPD, §4A1.2(c) frequently results in assignment of points to misdemeanor and petty offenses that did not result in real punishment or active supervision, creating unwarranted disparities and defying common sense. In so doing, the FPD says, thousands of defendants nationwide are subjected to longer sentences via higher criminal history categories and loss of eligibility for safety valve relief. Furthermore, the FPD says, these offenses are not likely to correlate with an increased risk of recidivism for the defendant in question. Additionally, the FPD says, the current structure of §4A1.2 is overly complex and is difficult for judges, probation officers, and defense attorneys to apply, and therefore jeopardizes the accuracy of plea and sentencing decisions, complicates the process of determining a defendant's potential sentence, and leads to more appeals.

The FPD proposes that §4A1.2 be modified to (i) eliminate criminal history points for misdemeanor and petty offenses regardless of the length of time by which they are punishable under relevant law; and (ii) endorse a broad test for determining whether an offense is similar to one of the listed misdemeanor and petty offenses, relying on common sense judgments and moving away from simply analogizing the elements. The FPD presented two proposals for amending §4A1.2(c).

The FPD's Proposal 1 consolidates the lists of offenses currently in §4A1.2(c)(1) and (2), and amends the application note to instruct courts to examine all possible factors of similarity between the offense in question and the listed offenses. The proposed application note lists a number of such factors, including comparing the maximum authorized punishment for the two offenses, the perceived seriousness of the unlisted offense as expressed in the punishment actually imposed or served for that offense, the elements, the level of culpability involved in the unlisted offense, and the risk of recidivism indicated by the commission of the unlisted offense. The proposed application note emphasizes that no one factor is dispositive of this inquiry and that a court should err on the side of treating the unlisted offense as a minor offense if the conduct underlying it is analogous to the kinds of offenses listed.

The FPD characterizes this proposal as providing an easily-applied "bright line test," eliminating a federal-state disparity in the treatment of certain offenses, and eliminate defendants' reliance on a §4A1.3 downward departure, the denial of which is not reviewable on appeal.

The FPD's Proposal 2 would shift all but three of the offenses currently listed in §4A1.2(c)(1) into §4A1.2(c)(2), thereby removing the possibility of their receiving points. Remaining in §4A1.2(c)(1) would be the offenses of providing false information to a police officer, hindering or failure to obey a police officer, and resisting arrest. Under the proposal, these offenses would receive points only if: (i) they were not juvenile offenses; (ii) the sentence actually served was a term of imprisonment longer than 60 days; and (iii) the offense was committed within three years of the commencement of the instant offense. The proposed application note would be

substantially the same as the one discussed in Proposal 1.

The FPD says that this proposal, although not a "bright-line" approach, would address the disparities and complexities it believes arise from the current §4A1.2(c).

In support of these proposals, the FPD notes several offenses in the current §4A1.2(c)(1) that receive points if committed in some states but not in others, based solely on the statutorily available maximum punishment for those offenses. The FPD highlighted the significance of this distinction in career offender cases, and noted its eagerness to address this during the next amendment cycle's consideration of the career offender guideline.

The FPD also draws attention to motor vehicle offenses, noting especially the situation of a defendant whose license is suspended for failure to pay a fine; this defendant, the FPD says, often must drive to work and must work in order to be able to pay the fine, but risks a driving with a suspended license conviction by doing so. The FPD further noted that a term of probation is a common sentence for such convictions, and that this frequently gives rise to criminal history points and removes a defendant from safety valve consideration. The FPD also discussed the potentially disparate racial impact of assigning points to non-moving traffic violations, and concluded that the only traffic violations that should receive points are drunk driving and driving while intoxicated violations.

With respect to diversionary offenses, the FPD discusses several circuits' approaches to a defendant who commits a federal crime during the pendency of a diversionary disposition, noting cases from the First, Second, Sixth, Seventh, and Eighth circuits addressing this issue. The FPD emphasizes that, although a §4A1.3 downward departure could be available in such situations, safety valve relief would still not be available. The FPD recommends that §4A1.2(c) be amended to specify that diversionary sentences are never counted, or that §4A1.2(c)(1)(A) be amended to require supervised probation, and to explain that this requires active supervision by a probation office or other supervisory authority.

The FPD then discusses the issue of determining whether an offense is "similar" to one of the offenses listed in §4A1.2(c)(1). The FPD discusses cases from several circuits determining whether various offenses were or were not similar, and argues that the tests applied in those cases were closer to a double jeopardy-type analysis than the broader categorical similarity that, the FPD says, was intended under the guidelines. The FPD then highlights a Fifth Circuit case, *United States v. Hardeman*, 933 F.2d 278 (5th Cir. 1991), which adopted an approach similar to the one the FPD advocates in its proposed amendment to the application note discussed in proposal 1 above.

The FPD advocates adding several additional minor offenses to the lists of those not receiving points, including fare evasion, open container violations, panhandling, shoplifting, simple possession of marijuana, and vagrancy, or to at least add them to the list currently in §4A1.2(c)(1) to limit the situations in which a defendant receives points based on those convictions. The FPD also says that local ordinance violations, even when the offense is also a state criminal offense, should not be counted.

With respect to the §4A1.2(c)(1) offenses, the FPD advocates a change in the guideline to condition the imposition of points on the "real sentence" - i.e., the actual sentence served by the defendant rather than the sentence announced by the court. The FPD analogizes this to the "real offense conduct" concept applied in the offense level determination.

The FPD recommends that the Commission impose a recency requirement of 3 years on minor offenses, arguing that minor offenses more than three years old are not likely to be good indicators of a defendant's future risk of recidivism. The FPD further recommends that minor offenses committed before the defendant's eighteenth birthday never be counted, noting a juvenile's diminished ability to employ good judgment and resist negative influences.

## II. Related Cases

According to the FPD, Application Note 3 of §4A1.2 (dealing with related cases) has been interpreted in a manner which is too restrictive in application and too complex in determination. To remedy this, the FPD suggests that the Commission define "related case" in a manner bringing it closer to "relevant conduct" as defined in §1B1.3, and that the Commission clarify the meaning of "consolidated for trial or sentencing."

In order to achieve the former, the FPD recommends that the Commission replace the "no intervening arrest" requirement with a "no intervening conviction" requirement, and replace subsections (A) and (B) of the application note with a direct reference to §1B1.3. As to the latter, the FPD recommends that the "consolidated for trial or sentencing" requirement be changed to include the situation of functional consolidation and to explicitly include sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding.

The FPD argues that these changes would simplify the process in that (i) a court would be able to skip the relevant conduct analysis where consolidation is clear from the record; and (ii) it would reduce the number of different tests to be used in making conceptually similar determinations. According to the FPD, linking the related cases determination to the relevant conduct determination would also prevent the unfair situation in which uncharged or acquitted conduct both increases the offense level under §1B1.3 and is considered unrelated for purposes of §4A1.2.

In support of its assertion that the concept of a "related case" has been too narrowly interpreted by the courts, the FPD discusses cases from the Eleventh and Fifth Circuits. The FPD also discusses the circuit conflict in interpretation of the "common scheme or plan" language from subsection (B) and its relationship to §1B1.3, noting some courts' conclusions that the relationship undermines the goal of uniformity.

With respect to the "consolidated for trial or sentencing" provision, the FPD notes what it considers the relative scarcity of a finding of consolidation, and discusses Supreme Court language relating to Commission action on this issue. The FPD notes that some states do not issue formal orders of consolidation, and that in Texas, for example, it is not uncommon for a separate docket number to accompany each count of a single indictment. Given the variety

among states and differing federal circuit precedent on these issues, the FPD recommends that the Commission employ a broader definition of consolidation.

The FPD also recommends that the Commission remove §4A1.1(f), which it argues is a poor predictor of recidivism and therefore improperly leads to longer sentences for some defendants.

### III. Comments Regarding the Commission's March 2007 Hearing

The FPD states that during the hearing in March, the DOJ asserted that the criminal history score is already "a very good indicator of the risk of recidivism," and that "excluding more offenses will not improve the ability of criminal history score to identify those offenders who provide a greater risk of recidivism." In the FPD's view, these assertions are not statistically supportable. The FPD cites to Commission statistics that defendants with two criminal history points have a lower risk of recidivism of any kind, including being rearrested or violating the terms of supervised release or probation, than defendants with one criminal history point. Additionally, the FPD argues there is no data that shows that minor offenses are a good predictor of recidivism. It notes that the Fifteen Year Report states that including minor traffic offenses in the criminal history calculation may have an unwarranted adverse impact on minorities "without clearly advancing a purpose of sentencing" and that there are many other such possibilities.

In its opinion, assigning only half a point for countable minor offenses would not alleviate the current problem with §4A1.2(c). It states in its experience, convictions for the minor offenses listed in subsection (c)(1) reflect conduct that does not indicate either a need to protect the public or a likelihood of recidivism. For this reason, it explains, counting such offenses in the criminal history score, even by a fraction of a point, results in an unwarranted inflation of the criminal history score of many defendants. Further, the FPD explains that assigning even half a point to these offenses will also perpetuate the unwarranted disparity caused by the current version of §4A1.2(c) which depends upon the various state statutory schemes. The FPD sets forth an account of misdemeanor offenses that would be excluded under subsection (c)(1) but for the fact that the state authorizes punishment of more than one year, including gambling, playing "thimbles," "Little Joker," and "craps" for money, in Maryland; leaving the scene of an accident, in Massachusetts; and trespass upon state park property, in South Carolina. The FPD asserts to resolve these and other problems inherent in the current guideline structure, §4A1.2(c) should be amended as it proposed in its previous March letter.

**James Searcy**
Nashville, Tennessee

Mr. Searcy is a United States Probation Officer but writes in his personal capacity to urge the Commission to place high priority in addressing the need to simply the scoring of criminal history at Chapter Four. Mr. Searcy believes the current procedures are unduly cumbersome and have the potential to introduce unwarranted disparity from inadvertent errors caused in attempting to track cases from opening to close.

Mr Searcy states a major concern toward properly scoring criminal history is related to the incompleteness of case records subsequent to initial case settlement, noting that he has personally scored convictions that exceed 13 months' imprisonment threshold and later found that the sentence was ultimately suspended and a probationary term imposed. He explains that some jurisdictions simply note on the case file that the sentence was suspended upon granting a motion to suspend without entering a subsequent order which modified the original judgment.

In addition, Mr. Searcy states a similar problem is accurately capturing subsequent violation outcomes due to a lack of systematic recordkeeping. In his view, in order to address potential changes in scoring due to later sanctions and violations, contact may be required of several different agencies to calculate "in/out" time served related to violation petitions, sanctions, and ultimately, revocations. This is particularly exacerbated in cases with lengthy criminal histories as he has experienced with the DOJ's Project Safe Neighborhood, he asserts.

Mr Searcy offers a few suggestions, including stating that any new procedure considered enable scoring decisions to be completed from review of a single source document rather than searching for multiple documents or records maintained by law enforcement and correctional agencies. Mr. Searcy recommends a scoring schemata that would enable scoring to be satisfied by review of the original judgment alone. In his view, by focusing on the original conviction rather than the cumulative time served for any sentence, less error will be introduced into the scoring process.

Mr. Searcy proposes the following recommendation:

§4A1.1 Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior felony conviction for any crime of violence or a controlled substance offense.

(b) Add 2 points for each prior felony conviction not counted in (a).

( c) Add 1 point for each prior misdemeanor conviction not counted in (a) or (b), up to a total of 4 points for this item.

Application Note 1. As to §4A1.1(a), the terms of "crime of violence" and "controlled substance offense" are defined at U.S.S.G. §4B1.2(A) and (b) respectively.

Application Note 2. As to §4A1.1(c), exclusions to counting are covered at U.S.S.G. §4B1.2(c)(1) and (2), respectively.

11. **Issue for Comment: Implementation of the Telephone Records and Privacy Protection Act of 2006**

**U.S. Department of Justice (DOJ)**
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

**USSG §2H3.1 (18 U.S.C. § 1039) (Pretexting)**

The DOJ supports the proposal to refer 18 U.S.C. § 1039 to §2H3.1, but recommends that the guideline be modified to take the victims of these offenses into greater consideration.

First, the DOJ notes that pretexting has the potential to violate many individuals' privacy (i.e., via a computer intrusion). The DOJ comments that, in general, the seriousness of the offense is directly related to the number of victims; consequently, the DOJ recommends adding a victim table to §2H3.1 similar to that currently found at §2B1.1, to ensure that pretexters (and others committing privacy-related offenses under §2H3.1) are sentenced based on the scope of their offenses. The DOJ believes that the use of a table similar to that in §2B1.1 would be a more appropriate approach to sentencing than the current proposal, which provides for an upward departure in cases where the offense involves "a large number of customers." In the DOJ's opinion, pretexting crimes are similar to financial crimes, in that the offenses become progressively more serious as the number of victims increases.

Finally, the DOJ suggests adding a definition of "victim" to §2H3.1, to include those who suffer privacy invasions whether or not they suffer a measurable monetary loss. According to the DOJ, because §2H3.1 is applied to offenses (including pretexting) where the core harm is invasion of privacy, existing definitions of "victim" that require pecuniary loss would fail to account for much of the damages caused by privacy offenders. The DOJ notes that a revised definition would be easy for courts to apply to 18 U.S.C. §1039 and other privacy offenses – the DOJ believes that courts will readily be able to identify a "victim" under the suggested definition, since it is easy to determine whose confidential records were disclosed.

**Practitioners' Advisory Group (PAG)**
David Debold & Todd Bussert, Co-Chairs

The PAG believes that §2H3.1 is a better guideline than §2B1.1 for the new statute criminalizing the fraudulent acquisition and disclosure of confidential telephone records. In its opinion §2H3.1 is a good fit because unauthorized access to telephone records is principally an invasion of privacy. It notes, however, the privacy interest at stake does not readily equate to a dollar amount. PAG advocates the use of § 2H3.1 because this guideline provides a higher base offense level than §2B1.1 (9 versus 6) to account for the harm caused in the absence of pecuniary loss.

The PAG is concerned about the Sixth Amendment implications in the event a cross reference applies when the telephone records offense is committed in its aggravated form. If a cross reference is applicable, the PAG believes that the Commission should require a conviction under

either subsection (d) or (e). The PAG recommends that an application note be included explaining that some portion of the total sentence determined under 18 U.S.C. § 3553(a) be apportioned to the consecutive enhancement under subsection (d) or (e).

The PAG suggests that it would be premature to add specific offense characteristics to §2H3.1. The PAG recommends that the Commission let courts vary from the guideline range in those cases where the base offense level does not adequately account for an aggravating or mitigating circumstance.

The PAG does not agree with the proposed expansion of the definition of "victim" under § 2B1.1 to include persons who suffer non-monetary harm. The PAG believes that §2B1.1 is complicated enough without requiring courts to identify the number of non-monetary-harm victims and assess the extent to which the offense harmed them in a non-monetary manner. It also suggests that the proposed definition is too broad and vague, and it would result in larger categories of people being interviewed and more entities from which the government subpoenas or otherwise requests records.

**The Probation Officers Advisory Group (POAG)**

The POAG thinks violations of 18 U.S.C. § 1039 should be referenced to §2H3.1 as proposed in the Miscellaneous Laws section. The POAG does not support including these offenses under §2B1.1 or expanding the definition of victim in §2B1.1 to include non-pecuniary harm. The POAG recommends this because probation offers have great difficulty in determining specific financial harm, it asserts.

**Federal Public and Community Defenders (FPD)**
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

Pretexting, §2H3.1

The FPD joins with the Practitioners Advisory Group in suggesting that §2H3.1 is more appropriate than §2B1.1 because the harm caused by an invasion of privacy is non-monetary and it would be impractical for courts to translate such harm into pecuniary loss. The FPD also believes that the base level offense of §2H3.1 is sufficient.

The FPD writes that the best way to implement the mandatory consecutive penalty provision is to require a conviction under 18 U.S.C. § 1039(d) or (e) in order for the cross reference in §2H3.1(c) to apply.

The FPD does not believe any specific offense characteristics need to be added to the guideline as the courts can sentence above or below the range if needed.

The FPD writes that they "strongly oppose" any expansion of the definition of "victim" under

§2B1.1 (or anywhere in the guidelines) to include a person or entity who suffered no pecuniary harm. The FPD believes that the existing invited upward departure for non-pecuniary harm already serves this purpose and such an expansion of the definition would cause "a practical nightmare" in sentencing courts.

12. **Issue for Comment: Cocaine Sentencing Policy**

**U.S. Department of Justice (DOJ)**
Benton J. Campbell, Acting Deputy Assistant Attorney General and Chief of Staff

The DOJ emphasizes that the existing penalties for crack cocaine offenses – including statutory mandatory minimum penalties and sentencing guidelines – have been an important part of the Federal government's efforts to hold crack and powder cocaine traffickers accountable for their actions.

Notwithstanding that fact, the DOJ recognizes that many view the 100:1 ratio as an example of unwarranted racial disparity in sentencing. The DOJ believes that it may be appropriate to address the ratio. Over the next few months, the DOJ hopes to work with the Commission, the Administration, and the Congress to determine whether any changes are necessary in the drug weight triggers for mandatory minimums and guidelines sentences for crack and powder cocaine trafficking.

The DOJ stresses that only Congress can definitively alter Federal cocaine sentencing policy, by modifying the existing statutes that define the penalty structure for Federal cocaine offenses. However, the DOJ believes that the Commission still plays a critical role in informing Federal sentencing policy. Specifically, the DOJ suggests that the Commission continue to provide Congress, the DOJ, and the general public with updated research and data that will assist in the development of Federal cocaine sentencing policy, including updated information on the current sentencing environment, and on crack and powder cocaine sentences being imposed in Federal district courts. The DOJ reiterates its desire to continue its work with the Commission, and states that the Department would oppose any sentencing guideline amendments that do not adhere to the statutes which currently set forth the penalty structures for Federal cocaine offenses.

**United States Senate, Committee on the Judiciary**
Senator Patrick J. Leahy, Chairman
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Dianne Feinstein
Senator Richard J. Durbin

The Senators express their appreciation for the important work the Commission has undertaken in preparing its report to Congress on Crack Cocaine and Federal Sentencing Policy and they looks forward to receiving the report in next month.

The Senators note that last year marked the twentieth anniversary of the passage of the Anti-Drug Abuse Act of 1986, which established much tougher sentences for crack cocaine offenses than for powder cocaine. They acknowledge that our nation knew little about crack other than the fear that it was more dangerous than the powder form and would greatly increase drug-related violence and recognize that since that time, the matter has been studied extensively by the Commission.

The Senators observe that the Commission now has another opportunity to work with Congress to eliminate or reduce this disparity, as well as the disparate impact on minorities that can result. They welcome the Commission's guidance and recommendations that could improve the fairness of federal sentencing and hope that the 2007 report will assist Congress by continuing to update the scientific literature on the issue. The Senators ask the Commission to please help them by including recommendations that cover statutory and non-statutory remedies, such as the promulgation of a Guideline Amendment in the current amendment cycle, that can assist the Senators in eliminating or reducing the crack-powder disparity without further delay.

**United States Senate**
Senator Jeff Sessions

Senator Sessions expresses his appreciation for the hard work the Chair, Judge Ricardo H. Hinojosa, and the Commission have devoted to the issue of Federal cocaine sentencing policy and looks forward to the Commission's report to Congress next month.

He reminds the Commission that he was the lead sponsor of the Drug Sentencing Reform Act of 2006 in the 109th Congress and identical legislation in 2001, both of which would have reduced the current disparity to 20-to-1 by reducing the mandatory penalty for crack cocaine and increasing the mandatory penalty for powder cocaine. Senator Sessions notes that the underlying goal of the bill was fairness and that the legislation was a bi-partisan effort.

Senator Sessions recounts the history of the current crack cocaine sentencing law and how it was intended to prevent the spread of crack across America, especially into minority neighborhoods. Lamenting the fact, the Senator acknowledges that crack did spread across the country. He cites a Commission's report which states that 83% of offenders sentenced for crack violations were African American and a Bureau of Prisons' study that reveals that weapons' use and violence are more accurate indicators of recidivism than drug use.

The Senator recognizes that in three separate reports to Congress, the Commission has urged Congress to reconsider the statutory penalties for crack cocaine. He notes that once again the Commission has the opportunity to work with Congress and help improve the statutory mandatory minimums by reducing the harsh disparity that currently exists. Doing so, Senator Sessions asserts, will strengthen the criminal justice system, reduce judicial manipulation, and restore confidence in the system's fairness.

Senator Sessions expresses the hope that the Commission's 2007 report will include an update to the 2002 report's data, literature review, and medical chapters. He would also like to see a specific recommendation to Congress about how it should amend the 100:1 statutory ratio. The Senator notes that the legislation he has introduced would reduce this ratio to 20:1, which is directly in line with the Commission's 2002 recommendation, and he believes this to be a sound and justified ratio based on the nature and disparate impact of crack cocaine.

Senator Sessions believes that the recommendations he has made in the legislation he has

introduced and the Commission's recommendations would provide a measured and balanced approach to improving the statutory and guideline systems which govern cocaine sentencing policy. The Senator cautions that a more dramatic change that results in substantial reductions in drug sentences would not be consistent with sound public policy and could jeopardize the bi-partisan effort that is now underway. Senator Sessions closes by stating that the time has come for Congress to exercise a legislative change in the area of cocaine sentencing policy and he looks forward to working with the Commission to get this accomplished.

**United States Congress, House of Representatives**
Representative John Conyers, Jr.
Representative Robert "Bobby" Scott
Representative Charles B. Rangel
Representative Sheila Jackson-Lee
Representative Bobby L. Rush
Representative William J. Jefferson
Representative Keith Ellison
Representative Donald M. Payne
Representative Maxine Waters
Representative Julia Carson
Representative Wm. Lacy Clay
Representative Yvette D. Clarke

Twelve Members of the House of Representatives write to the Commission to express their support for the equalization of the penalties for crack and powder cocaine at the current penalty level of powder cocaine. The Members state that the 100:1 disparity in penalties for crack versus powder may be the only instance in the criminal code where mere possession of a small portion of a diluted form of a drug is punished much more severely than trafficking in a much higher quantity of a purer form of the drug.

The Members remind the Commission that between 1994 and 1995 it conducted an extensive study of the pharmacological, sociological, marketing and other aspects attendant to these variations of the same drug and found no pharmacological differences in the variations but found substantial differences in the sociological impact and the marketing process associated with the two. The Members also remind the Commission it found a severe racial impact in the sentencing of crack versus powder. Further, the Members recall that as a result of the absence of a pharmacological distinction between crack and powder, the extreme racial disparate impact between the two variants of the same drug, and the fact that aggravations associated with either could be punished as add-ons on a case-by-case basis, the Commission recommended equal treatment of crack and powder at the outset of sentencing, adding any aggravating factors when applicable. Although in the Members' opinion, the Commission's recommendation was rejected for political reasons, they state nothing of a more compelling scientific or policy rational has been presented to the Congress since as a basis for addressing the disparity.

In the Members' view, no one anticipated the severe racially disparate impact from punishing

crack more severely than powder and the Members assert that many of those who led the effort to create the penalty disparity now disavow the move, including current House Ways and Means Committee Chairman Charles Rangel, one of the Members submitting comment.

Given the lack of pharmacological differences in the two variations of the same drug and the extreme, unintended racial impact from the disparate punishments between them, the Members believe that continuing any such disparate treatment is morally indefensible. The Members state that they rely on the Commission for decisions based on research-based facts and evidence and morally sound reasoning and a 20:1 disparity between crack and powder reflects neither. Therefore, the Members assert that unless there is a rational, informed, basis for the Commission to change their original recommendation of 1:1 ratio based on science and morality, they expect the Commission's advice to remain the same.

**Practitioners' Advisory Group (PAG)**
David Debold & Todd Bussert, Co-Chairs

The PAG stands by the recommendation it made at the Commission's November, 2006, hearing on cocaine sentencing policy that the Commission should equalize crack and powder cocaine sentences at the current powder cocaine levels. It believes that the testimony at the hearing confirmed that equalization is appropriate in light of the lack of evidence supporting the current penalty structure. The PAG believes that crack cocaine sentencing policy is fundamentally unsound and that there is no legitimate justification for continuing the policy, and many reasons to abandon it.

The PAG notes that many witnesses testified that the current crack cocaine penalty structure creates racial disparity in sentencing. The PAG acknowledges that the Commission has long identified the perception of racial bias as a reason to abandon the current penalty scheme. The PAG contends that the disparity in sentencing that result from the starkly different penalties and their correspondence to race undermines confidence in our criminal justice system.

The PAG finds, along with a number of witnesses, that the various justifications cited in the Anti-Drug Abuse Act of 1986 have been found baseless or no longer exist. It is not aware of any compelling evidence presented at the Commission hearing to overcome the wealth of evidence for eliminating the distinction. The PAG continues to urge the Commission that the better course is to equalize the penalties and address added harms, defendant by defendant, at sentencing by using appropriate offense characteristics.

The PAG urges the Commission to bring its investigation to a close and to act now to eliminate the current penalty for crack cocaine and equalize the two penalty structures. The PAG closes by emphasizing that there is no justification for further delay.

**Federal Public and Community Defenders (FPD)**
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

The FPD urges the Commission to amend the federal sentencing guidelines to remove the 100:1 ratio for powder cocaine and crack cocaine sentences. It recommends that the Commission replace the current ratio with a retroactive 1:1 ratio to ensure equal penalties for equal amounts of powder and crack cocaine. The FPD also advocates an additional downward departure for the successful completion of a drug treatment program. It maintains the disparity in the current cocaine sentencing policy lacks justification and has a detrimental effect on families and communities, as well as the federal criminal justice system.

**American Civil Liberties Union (ACLU)**

The ACLU urges the Commission to recommend that Congress amend federal law to equalize the penalty for powder and crack cocaine at the current level for powder cocaine. According to the ACLU, no distinction between powder and crack cocaine is justified in the context of sentencing. In support of this recommendation, the ACLU cites previous Commission findings and emphasizes support for this change in cocaine sentencing policy among its members, academics, federal judges, prosecutors, and President Bush. In the ACLU's view, the "disparate sentencing regime has serious implications for due process and equal protection, and puts at risk our citizens' freedom of association and freedom from disproportionate punishment." The sentencing disparity, according to the ACLU, must be halted for the following four reasons.

First, the ACLU states the drug quantity ratio for crack and powder cocaine promotes unwarranted sentencing disparities based on race. The ACLU reports that empirical studies reveal that African Americans are more likely to be convicted of crack cocaine offenses than any other racial group and that African Americans serve substantially more time in prison for drug offenses than any other racial group. The ACLU asserts that this outcome is particularly disturbing and discriminatory because statistics show that the majority of all crack users and all drug users are not African American. African American families and communities have been hit hard by the cocaine sentencing policy, says the ACLU, because incarceration on such a massive scale leads to more unemployed or unemployable parents, broken families, more poverty, and more deterioration of communities. Thus, the ACLU concludes that the cocaine sentencing policy has a discriminatory impact in its application and should therefore be equalized.

Second, the ACLU attacks the perceived relationship between crack use and violence. Studies have shown that crack does not physiologically cause violence, it asserts. Moreover, it opines, the violence that was once associated with intense competition of a new drug market has abated. The ACLU also cites other studies showing that most crack offenses do not involve weapons. However, this problematic assumption that crack manifests violent behavior is now embedded into the sentencing structure, according to the ACLU. Making matters worse, in the view of the ACLU, is the potential for double-counting in cases where an offender possesses both crack and a weapon because he accordingly faces a firearm enhancement under the drug trafficking guideline or under 18 U.S.C. § 924(c) in addition to the presumption of serious violence-related

conduct embedded within the drug quantity ratio. In sum, the ACLU finds that the mandatory minimum sentences implemented by the Anti-Drug Abuse Act of 1986 sweep far too broadly by treating all crack offenders as if their offenses involved weapons or violence, even though evidence shows otherwise.

Third, the ACLU attempts to debunk the myth of crack's distinctive chemical effects. According to the ACLU, there is no valid scientific or medical distinction between powder and crack cocaine. Studies have shown that powder cocaine is equally harmful as crack cocaine and that the physiological and psychoactive effects of cocaine are similar regardless of form, it argues. In addition, the AVLU states, studies have shown that the negative effects of prenatal crack cocaine exposure are identical to those of prenatal powder cocaine exposure.

Finally, the ACLU asserts that the federal law's goal of targeting high-level drug traffickers has failed in the context of crack cocaine penalties. In the view of the ACLU, low-level drug quantities currently trigger lengthy mandatory minimum terms, and low-level participants in the drug trade often become subject to harsh sentences that should generally be reserved for major dealers. The ACLU describes the emergence of the so-called "girlfriend problem," where women who are low-level offenders become subject to the same or harsher sentences as major dealers in a drug organization. The mandatory minimums prevent judges from considering the individual circumstances of women who remain silent about drug activity in the home, it suggests.

In conclusion, the ACLU urges the Commission to recommend to Congress that 1) the quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with the current levels of powder cocaine, 2) mandatory minimums for crack and powder offenses should be eliminated, and 3) federal prosecutions must be properly focused on high-level traffickers.

**Maine Civil Liberties Union (MCLU)**
Shenna Bellows, Executive Director, MCLU

The MCLU urges the Commission to strongly recommend sentencing reform to reduce the severity of penalties for crack cocaine offenses to the levels currently used for powder cocaine offenses.

The MCLU asserts that the current disparity between crack and powder cocaine sentencing is substantially inconsistent with the sentencing goals set forth in 18 U.S.C. § 3553(a), and that the current statutory scheme governing crack cocaine is directly at odds with the principles underlying the guidelines. For example, the MCLU believes that with respect to the "history and characteristics of a defendant" that should be considered during sentencing, crack penalties reveal a racial result – perhaps even a racial bias – that is a type of personal characteristic impermissibly factored into the sentence. The MCLU adds that the current crack/powder sentencing disparity fails to reflect a difference in the seriousness of the two crimes, fails to provide greater deterrence, fails to enhance public safety, fails to support a legitimate sentencing policy, and has resulted in both social and economic harm.

The MCLU comments that while Congress may have believed a 100:1 ratio in 1986/1988 was necessary, the legislature relied on incorrect factual assumptions when they adopted that penalty; according to the MCLU, today's evidence demonstrates that the policy has been counterproductive. The MCLU suggests that the Commission recommend immediate action to eliminate the sentencing disparity, based on the following claims:

**1. Crack and powder cocaine are substantially the same substance and have identical effects on the brain.** The MCLU believes that at the time Congress enacted the current 100:1 sentencing ratio, it mistakenly believed that crack was fifty times more addictive than powder cocaine. After citing a lack of legislative history demonstrating that Congress used any rational basis for the ratio, the MCLU opines that given the current evidence showing similar chemical and addictive properties for both substances, there is no longer any rational basis for adhering to the current sentencing scheme.

**2. The increased violence associated with crack's appearance on the drug market was not associated with inherent properties of the drug.** The MCLU maintains that any increase in crime in the 1980s associated with widespread crack distribution was not related to any of crack's chemical properties, or any differential effects on the brain; rather, any increased violence was related to the lower price of crack, and the nature and geography of the market, in its view. The MCLU insists that regardless of the underlying reasons for the increased violence, such violence has subsided and can no longer serve as support for the current sentencing disparity.

**3. Two decades of experience reveals unacceptable and perverse racial effects under current crack sentencing policy.** The MCLU suggests that regardless of the presumed race-neutral intent of the drug legislation that created the 100:1 ratio, nevertheless the disparity has had an unjustifiably harsh impact on minority populations. Specifically, the MCLU cites statistics from the Interfaith Drug Policy Initiative showing that while the majority (66%) of crack users are white or Hispanic, the vast majority (80%) of those convicted for crack offenses are African American (7.8% of those convicted for crack offenses and the majority of those convicted for powder cocaine offenses are white). In terms of all drug offenses, the MCLU cites that African Americans comprise 15% of the nation's drug users, 37% of those arrested for drug offenses, 59% of those convicted for drug offenses, and 74% of those imprisoned for drug offenses. The MCLU notes that harsh crack sentencing has also caused an explosion in incarceration rates among African American and Hispanic women.

**4. Current sentencing laws squander limited resources by failing to target major traffickers, as intended by Congress, rather than users of small quantities of crack.** According to the MCLU, harsh crack penalties – especially the associated mandatory minimum sentences – have resulted in non-violent crack offenders receiving unjustifiably long sentences (in some cases, spending as much time in prison as other violent offenders). On average, the MCLU continues, crack offenders spend an average of 3.5 additional years in prison than do powder cocaine offenders. The MCLU also expresses its concern that the large increase in the incarceration rates among non-white women due to harsh crack sentences has resulted in substantial harm to children and families, particularly among minority communities.

**Drug Policy Alliance**

The Drug Policy Alliance asks the Commission to take action to equalize the guidelines between crack cocaine and powder cocaine at the current level of powder cocaine, and to refocus its efforts on targeting high-level traffickers rather than low-level offenders.

When considering the application of the 100:1 crack/powder cocaine sentencing law, the Drug Policy Alliance notes that it takes 500 grams of powder cocaine to beget the same five-year mandatory minimum for just 5 grams of crack cocaine. The Drug Policy Alliance lists several reasons why the Commission should equalize the sentencing guidelines between crack cocaine and powder cocaine:

*Crack Cocaine and Powder Cocaine are made from the same substance*
The Drug Policy Alliance understands that powder cocaine and crack cocaine are pharmacologically the same substance and "cause identical effects." It reports that the crack cocaine sentencing laws were first passed when the United States faced a panic about the alleged "crack epidemic." Congress responded under the impression that crack had inherent properties that made it infinitely more dangerous than powder cocaine. The Drug Policy Alliance believes that this law has proven ineffective in reducing drug use or distribution and has instead exacerbated racial disparity and injustices in our criminal justice system.

*Crack cocaine sentencing policy has had an overwhelmingly disparate effect on people of color and the poor*
The Drug Policy Alliance reports that crack cocaine laws disproportionately target members of lower socio-economic and minority groups, particularly blacks. It notes that in 2003, blacks constituted 80% of those sentenced under federal crack cocaine laws while whites constituted only 7.8%, despite the fact that more than 66% of people who use crack cocaine are white.

*People convicted on nonviolent drug offenses have been disproportionately affected by crack cocaine sentencing policy*
The Drug Policy Alliance believes that mandatory minimum sentencing targets low-level offenders although it states it was originally intended to target high-level drug traffickers, members of organized crime rings and the violence associated with the crack cocaine market. It believes that laws intended to decrease availability of crack cocaine and powder cocaine should target large-scale distribution networks rather than low-level sellers who have little to do with trafficking or distribution on a larger scale, in its view.

The Drug Policy Alliance notes that the targeting of low-level offenders has proven devastating for families and communities that suffer high incarceration rates. It believes that high incarceration rates produce single-parent homes, unemployment, disillusionment with the justice system and stigmas from felony convictions and incarceration which contribute to the degradation of already disadvantaged communities. This only serves to increase crime rates, in its opinion. It also notes that even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

*Recommendations*
The Drug Policy Alliance recommends that the Commission continue to advocate for reforming the laws as it has for the last decade. It supports the Commission in its efforts to right this gross wrong in criminal justice policy. It specifically asks the Commission to recommend the following to the 110th U.S. Congress:

1. Revise the crack cocaine and powder cocaine sentencing to a more equitable ratio of 1-1 by raising the crack cocaine quantity threshold, not lowering the quantity triggers for powder cocaine.

2. Refocus law enforcement priorities to target cocaine traffickers.

**The Sentencing Project**
Marc Mauer, Executive Director

The Sentencing Project appreciates the Commission's initiative regarding crack cocaine policy. It recommends the Commission call upon Congress to repeal the 100:1 ratio between powder and crack cocaine, along with a guidelines adjustment reflecting an equalization between the substances at the current amount for powder cocaine.

The Sentencing Project addresses two issues relating to the current penalty structure: the association between the sale and use of crack cocaine with violent behavior, and the disparate effect on the African American community from the current sentencing scheme. The Sentencing Project believes defendants charged with crack cocaine offenses receive disproportionately severe sentences due to an incorrect association between crack cocaine and violence. It notes that a majority of both crack (74 percent) and powder cocaine (87 percent) defendants did not have a weapon involved in their offense. It asserts that the enhancements under 18 U.S.C. § 924(c) can more accurately capture the violence associated with drug use. The Sentencing Project proposes that in the case of violent drug activity 21 U.S.C. § 841 (b)(1)(A-B) and 18 U.S.C. § 924(c) should be used in concert to ensure enhanced penalties are only applied to deserving individuals.

The Sentencing Project also notes the impact the current crack cocaine penalty scheme has on the African American community. It reports that 8 in 10 of the persons convicted in federal court each year for a crack cocaine offenses are African American. The Sentencing Project suggests that the harsh crack cocaine penalties have created distrust for law enforcement within African American communities, as well as creating a general lack of confidence in many government institutions. The Sentencing Project observes that leaders in the African American communities do not call for harsh punishments but rather for fair and effective law enforcement. The Sentencing Project suggests that the lack of trust it attributes in part to crack cocaine sentencing policy can result in the deliberate obstruction of investigations for all crimes and may also hinder the jury selection process. According to the Sentencing Project, 1 in 14 African American children has a parent in prison and many members of the African American community have some interaction with the criminal justice system. The Sentencing Project believes that the federal crack cocaine laws contribute to these phenomena.

The Sentencing Project asserts that crack cocaine penalties are diverting resources from important social programs (such as education, urban renewal, economic development, and health care) and into the prison system. The Sentencing Project believes that this misallocation of resources magnifies other failures in the provision of social services and subverts efforts to overcome the consequences of drug abuse.

The Sentencing Project urges the Commission to call upon Congress to repeal the 100:1 ratio between powder and crack cocaine, along with adjusting the guidelines to reflect an equalization between the two substances at the current level for powder cocaine.

**Families Against Mandatory Minimums (FAMM)**
Julie Stewart / President, Mary Price / Vice President and General Counsel

The FAMM opines that the 100:1 powder-crack cocaine ratio punishes low-level crack cocaine offenders far more severely than the wholesale drug suppliers who provide the low-level offenders with powder cocaine needed to produce the crack. According to the FAMM, among all drug defendants, crack defendants are most likely to receive a sentence of imprisonment, as well as the longest average period of incarceration.

The FAMM states that the crack-powder ratio has not resulted in any appreciable impact on the cocaine trade. They believe (citing the Commission's 2002 report to Congress) that "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."

The FAMM comments that while opposition to the current crack cocaine penalty structure is widespread, attempts to change the penalties have failed because Congress has not supported either a crack guideline amendment or the Commission's alternate recommendations. Noting that the new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences, the FAMM believes that with the new Congress comes a fresh opportunity to develop bipartisan support for amending the crack penalty. The FAMM urges the Commission to propose a guideline amendment that ends the sentencing disparities between crack and powder cocaine. The FAMM supports an crack penalty structure equivalent to the current penalty structure for powder cocaine. The FAMM closes its comment by adding that – should the Commission propose an amendment – it will not be going to the Hill alone. Instead, the FAMM suggests that the Commission will likely find support among the groups that have researched the issues, written to, and testified before the Commission in years past.

**Human Rights Watch (HRW)**
Jamie Fellner, Director, U.S. Program

The HRW urges the Commission to eliminate the sentencing disparity between crack and powder cocaine offenses, citing crack sentences' arbitrary and disproportionate severity as compared to powder cocaine, and the sentences' racially discriminatory impact.

**Arbitrarily & Disproportionately Severe Sentences**

The HRW emphasizes that federal crack offenders receive more severe sentences than: persons convicted of federal powder offenses; persons sentenced for state cocaine offenses; and persons sentenced for drug trafficking in European countries (where the average sentence length is 33 months).

The HRW opines that the current 100:1 ratio, which it believes "Congress simply picked . . .out of the air," is the cause of the severe crack sentences. In response to those who defend the current ratio, the HRW asserts that "supporters of the status quo are unable to marshal much empirical evidence to support their claims" (referencing testimony received at the Commission's November 2006 hearings). Instead, comments the HRW, "there is an abundance of empirical data showing that the inherent pharmacological dangers of crack are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack . . .[are] myths, and that harsh federal sentences have had little impact on the demand for or availability of the drug." According to the HRW, the declines in both drug gang violence and the number of new crack users are due to a stabilization in the crack distribution market. In short, the HRW believes that historical concerns about violence and the increased use of crack cocaine that may have warranted sentencing differentials twenty years ago are outdated; rather, today's circumstances do not warrant any sentencing differential.

The HRW maintains that by "dictating far higher sentences for the possession of crack than for the possession of powder, [federal] law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form." HRW agrees with the Commission's conclusion in its earlier reports to Congress that "there is no justification for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine." The HRW also supports the Commission's recommendation to eliminate the 100:1 ratio.

**Racially Discriminatory Impact of Crack Sentences**

The HRW states that crack sentences have a discriminatory impact because they are imposed primarily on African Americans, a racial minority. In support of its position, the HRW cites statistics indicating that the average crack offender is white, not black. The HRW adds that "limited data" about crack dealers and distributors suggest that whites constitute a preponderance of crack dealers and crack users. The HRW suggests that racial differences among drug offenders do not account for the "marked racial disparities in drug offender arrests" and imprisonment. According to the HRW, most criminal justice analysts believe black crack cocaine offenders are more likely to be arrested than their white counterparts, because people buying, using and selling drugs in poor, primarily minority, urban communities are more likely to be arrested than the same offenders in more affluent, predominantly white communities. Again pointing to the November 2006 testimony, the HRW comments that "the crack/powder cocaine sentencing disparities reinforce the perception in African American communities that the U.S. criminal justice system is biased and unfair."

**Recommendations**

The HRW recommends that sentencing disparities be eliminated by increasing the crack threshold to those quantities currently required for powder cocaine offenses. The HRW adds that the Commission should not attempt to eliminate the differential by recommending a reduction in the quantity of powder cocaine required to trigger a sentence (which would effectually increase powder cocaine sentences).

The HRW concludes by urging the Commission to "restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by submitting to Congress amended guidelines that eliminate the 100:1 ratio in the quantities of crack and powder cocaine required to trigger equivalent sentences." The HRW also exhorts the Commission to recommend to Congress that it eliminate crack and powder cocaine sentencing disparities in existing mandatory minimum sentencing legislation.

**National African American Drug Policy Coalition (NAADPC)**
Arthur L. Burnett, Sr., National Executive Director

The NAADPC submits a letter on behalf of Break the Chains: Communities of Color and the War on Drugs, and unanimously adopts the views stated therein.

The NAADPC asserts there is no federal mandatory minimum sentence for first time possession of powder cocaine or any other currently illicit drug, but that Congress singled out crack cocaine for a special punishment when it required a mandatory minimum sentence of five years for a first offense of mere possession of five grams of or more of crack cocaine in response to what appeared to be a serious epidemic of crack cocaine abuse.

Citing to a chart attached to the submission, the NAADPC states the median crack cocaine street level dealer was arrested holding 52 grams of crack cocaine, enough to trigger a 10 year mandatory sentence, but for powder cocaine, the median street level dealer is charged with holding 340 grams of powder cocaine, not enough to even trigger the 5 year mandatory sentence. In its view, this problem has become so pervasive, it is known as "the girlfriend problem." The NAADPC notes that women are now six times more likely to spend time in prison than they were before the passage of mandatory minimum drug sentencing and as a result of federal mandatory minimum drug sentences including the crack-powder sentencing disparity, African-American women are entering prison at rates that are 2 ½ times higher than Hispanic women and 4 ½ times higher than white women.

In addition, the NAADPC reminds the Commission that it recommended a revision of the crack-powder 100:1 sentencing disparity in 1995 and again in 1997 and 2002. With respect to the current hearings, the NAADPC notes that much has already been raised by others, including that government surveys have consistently shown that drug use rates are similar among all racial and ethnic groups. It cites that for crack cocaine, two-thirds of users in the U.S. are white or Hispanic and that research shows that the majority of drug users purchase their drugs from people of the

same ethnic background. However, it asserts, African Americans continue to comprise the bulk of federal crack cocaine defendants, notably in 2005 when 82.3% of federal crack cocaine defendants were African American.

The NAADPC asserts that claims by law enforcement that stronger penalties against crack cocaine are warranted due to higher levels of violence associated with the crack trade is belied by the available evidence. It cites several reports, including one by Dr. Alfred Blumstein of Carnegie Mellon University, which appear to support its argument that the level of violence associated with the crack cocaine trade has declined during the past decade.

The NAADPC compares the pharmacological characteristics of crack cocaine to methamphetamine ("meth") and notes that while meth is generally accepted to be more addictive and more devastating in its affects on users and society, Congress has not responded to meth in the same punitive fashion as it did to crack cocaine. Rather, it contends, the response has been to help addicts off their addiction to meth. The NAADPC laments that this more compassionate response has not carried over to people addicted to crack cocaine.

The NAADPC concludes that for Congress to continue to maintain the crack cocaine sentencing disparity in the face of overwhelming evidence of its ineffectiveness as a strategy and the unfairness of its application would have to be viewed as racist. It urges the Commission to reaffirm its 1995 recommendation - repeal of the mandatory five year sentence for simple crack possession, and eliminating the crack-powder cocaine sentencing disparity by raising the threshold amount that triggers a mandatory minimum for crack cocaine offenses to equal the amount established for powder cocaine offenses.

**National Council of La Raza (NCLR) and Mexican American Legal Defense and Educational Fund (MALDEF)**

The NCLR and MALDEF propose raising the crack cocaine threshold to the current powder cocaine levels (equalizing the ratio to 1:1), to eliminate the threshold differential between crack and powder sentences. According to the NCLR and MALDEF, the current 100:1 powder-crack sentencing ratio has a disproportionate impact on communities of color and low-income communities. The NCLR and MALDEF (citing The Sentencing Project statistics) assert that these racial imbalances in the justice system, while mainly affecting African Americans, are also increasingly affecting Latinos.

**Anti-Drug Abuse Act of 1986.**

The NCLR and MALDEF note that while the Anti-Drug Abuse Act of 1986 was intended to curb the crack epidemic by targeting major traffickers, the majority of imprisoned drug offenders are low-level, mostly nonviolent offenders. The NCLR and MALDEF also point out similar trends in drug use rates per capita among minorities and White Americans.

**Drug Laws' Disparate Impact on Latinos.**

According to 2000 U.S. Census data, Latinos constituted 12.5 percent of the U.S. population, but the Commission's 2000 sentencing data indicate that Latinos comprised 43.4 percent of the drug offenders. Commission data show a sharp increase between 1992 and 2000 in the number of Hispanic drug offenders convicted for possession/trafficking of both powder and crack cocaine – from 39.8 percent to 50.8 percent for powder, and from 5.3 percent to 9 percent for crack. The NCLR and MALDEF assert that the disproportionate number of Latino drug offenders appears to be the result of a combination of factors, but not due to the fact that Latinos commit more drug crimes or have higher rates of drug use than other segments of the U.S. population. Rather, the NCLR and MALDEF contend that "Latinos encounter significant inequalities in the U.S. criminal justice system."

Citing the NCLR 2004 study on Latinos in the federal criminal justice system, the NCLR and MALDEF explain that Latinos are: more likely to be arrested and charged with drug offenses; less likely to be released before trial; less likely to receive "light" sentences (even though the majority of Hispanic offenders do not have a criminal history); "severely over represented in the federal prison system, particularly for drug offenses;" and less likely to receive substance abuse treatment once incarcerated.

**The NCLR and MALDEF's Recommendations**

The NCLR and MALDEF believe that the Commission can play a critical role in reducing unnecessary and excessive incarceration rates among Latinos in the U.S., and urge the Commission to consider the following recommendations:

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.**

2. **Resist proposals that recommend lowering powder thresholds in order to equalize the crack-powder ratio.**

3. **Support wider availability of alternative penalties, including substance abuse treatment, for low-level, nonviolent drug offenders.**

4. **Support a renewed focus on prosecuting high-level drug kingpins, and stopping importation of large levels of powder cocaine into the U.S.**

The NCLR and MALDEF conclude their submission by urging that any new thresholds recommended by the Commission be "medically justified" and that the thresholds directly correlate to the penalties' impact on individual defendants and society as a whole.

**Students for Sensible Drug Policy (SSDP)**
Kris Krane, Executive Director

The SSDP expresses concern with the negative impact that both drug abuse and overly-punitive drug policies have on campuses and communities. It urges the Commission to equalize the crack/powder cocaine disparity by conforming crack sentences to powder sentences.

The SSDP emphasizes the effect that the disparity has on students' eligibility for certain scholarships conditioned upon the student's lack of a felony conviction. It cites a study for its conclusion that students who leave school and do not return are more likely to develop serious drug problems, commit crimes, or rely on costly social service programs, instead of becoming law abiding and productive members of society.

The SSDP also notes that youth whose parents are incarcerated are often left without the familial grounding and/or financial resources needed to get accepted to, and stay enrolled in, college, and that they can also lose access to housing, food stamps, or other government assistance programs.

Finally, the SSDP also expresses concern with the racial implications of the disparity, particularly its impact on African-Americans. It notes the overall number of African-American men who have been incarcerated and observes that a significant percentage of those sentenced for crack offenses are African-Americans.

**108 Law Professors (the Professors)**
Various Law Schools

The professors write to express their deep concern with the current 100:1 federal sentencing disparity between crack and powder cocaine. They note that October 2006 marked the twentieth anniversary of the Anti-Drug Abuse Act of 1986, which established the tougher sentences for crack cocaine offenses, and contend that for the last two decades this law has had a disparate impact on minorities and women. The professors urge the Commission to make a formal recommendation to Congress that equalizes the trigger for federal prosecution of crack offenses at the current levels for powder cocaine.

The professors believe that the current 100:1 drug quantity ratio promotes unwarranted racial disparities in sentencing. They report that African Americans comprise the overwhelming majority of those convicted for crack cocaine offense, while the majority of those convicted for powder cocaine offenses are white. The professors find this startling given statistics which show that whites and Hispanics make up the majority of crack users. They also note that the 100:1 disparity between crack and powder cocaine results in African Americans serving considerably longer prison terms than whites for drug offenses.

The professors recall that judges, federal prosecutors, medical professionals, and other experts have all joined the Commission in calling for a reassessment of the current standards and note

that federal judges across the country have issued lower sentences for crack offenses than those suggested by the 100:1 ratio.

The professors conclude by stating that the quantities of crack cocaine that trigger federal prosecution and sentencing should be equalized with and increased to the current levels for powder cocaine.

**310 University Professors and Scholars (the Professors)**
Various Centers of Learning

The professors write to express their concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. They support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

The professors believe the current 100:1 ratio creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug, when two decades of research has uncovered that the effects of the two forms of cocaine are the same. The professors note that th myths of crack babies, instant addiction, and super-violent users and traffickers, which in great part led to the 1986 Act, have been dispelled.

They contend that the crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans, which they find particularly disturbing given that whites and Hispanics make up the majority of crack users in the country.

The professors further contend that drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. They note that in 2003, more than half of the women in federal prison were there for drug offenses. The professors call to the Commission's attention that African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.

The professors also express their concern regarding mandatory minimums, which they assert result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. They note that felony convictions prohibit previously incarcerated people from receiving social services and result in massive disfranchisement.

They state that perhaps most jarring statistic of all is that, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country. Standing alone, they assert, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

**Various Concerned Citizens**

A number of concerned citizens responded to the Commission's issue for comment regarding cocaine sentencing policy. The general consensus of the respondents is that the sentencing laws create a racial disparity within the African American community. The citizens generally assert that the 100:1 ratio is flawed since scientific and medical experts have determined the pharmacological effects of cocaine are the same regardless of the substance's form. Many of the responding citizens request that the Commission support an equalization of both forms of cocaine at the levels currently used to sentence powder cocaine offenses. Some citizens also urge greater emphasis be placed on high-level traffickers and distributors, rather than users. Some of the citizens also advocate for the elimination of the mandatory minimums for crack and powder cocaine offenses to allow judges to exercise more discretion at sentencing. Finally, one of the citizen respondents suggests sentences should include more treatment options for drug addicts.

13. Comment on Other Issues

**Federal Public and Community Defenders (FPD)**
Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee

### I. *Booker* and the Sentencing Guideline Manual

The FPD asserts the guideline manual should correctly represent current sentencing law, and reminds the Commission the Supreme Court announced over two years ago that the mandatory guideline system established by 18 U.S.C. § 3553(b) violated the Constitution, in *United States v. Booker*, but that the manual has yet to mention the case. In the FPD's view, this is not a matter of formality, it goes to the integrity of the manual itself.

Further, the FPD states the manual offers no understanding of this framework or of the advisory role of the guidelines within it, as constitutionally mandated. To the contrary, the FPD argues, the mandatory language of the manual would lead one to believe, wrongly, that the guidelines continue to represent the sum total of appropriate considerations in any sentencing.

Additionally, the FPD notes the manual is not only silent on *Booker*, but in numerous instances, it states, the manual recommends a course of action that is in direct conflict with the *Booker* decision and the Constitution. The FPD points to §5K2.0, stating it continues to rely explicitly on 18 U.S.C. § 3553(b)(1) which was excised as unconstitutional over two years ago.

The FPD states it would be happy to work with the Commission staff on how to harmonize the guidelines with the state of the law post-*Booker*, as well as how and where to insert *Booker*'s holding and citation as is done with other cases in the manual. It would also welcome the opportunity to work with staff on improving the procedural advice set forth in §6A1.3.

### II. Mandatory Minimums

The FPD asserts that when the Commission reflexively builds mandatory minimums into offense guidelines, the resulting sentences are not based on the purposes of sentencing but on politics. It fully agrees with the Judicial Conference that the Commission should not repeat the mistake it made with the drug guidelines with other offenses, but should develop guidelines irrespective of the mandatory minimum and allow §5G1.1 to operate when needed.

The FPD urges the Commission to publish a current report on mandatory minimums, including data on the extent to which guideline sentences exceed mandatory minimum levels. The FPD notes that the Commission's report is sixteen years old. It states that Congress is seriously questioning the wisdom of both the crack/powder disparity and mandatory minimums in general, and the FPD argues a current report would be of particular interest to Congress, the criminal justice community, and the public at this time.

**Concerned Citizen**

A citizen comments that applying §3B1.4 (Use of a Minor to Commit a Crime) to a conspiracy offender should not be a legal debate among the circuits and that it creates a constitutional issue because he believes some offenders are being held illegally and some offenders are allowed to be free based on whether or not that offender is "confined in the Circuits [where] judges wish to aggrandize their arbitrary authority." The citizen requests the Commission clarify §3B1.4 to avoid unnecessary lawsuits.

**U.S. Department of Justice**
Criminal Division

*Office of the Assistant Attorney General* *Washington, DC 20530-0001*

March 30, 2007

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

Dear Judge Hinojosa:

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

## 1. Transportation

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

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

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

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

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

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

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

## 2. Sex Offenses

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

Additionally, this guideline should reflect the ten year maximum penalty for this offense by providing a guideline sentence that would encompass ten years' imprisonment for an aggravated offense. For example, assuming an offender was in criminal history category III, was required to register for a Tier III offense, and committed an offense against a minor while not registered, that offender should face a guideline range encompassing 120 months before acceptance of responsibility. We believe this can be accomplished by increasing the specific offense characteristic for a defendant, who was required to be registered for a Tier III offense and committed an offense against a minor, to12 levels which would mean a total offense level of 28, with a range of 97-121 months.

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

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

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

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

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

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

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

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

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

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

(b) If the defendant was convicted under 18 U.S.C. § 2250(c):

(1) Base Offense Level: 25

(2) Specific Offense Characteristics:

(i) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.

(ii) If the offender committed a crime of violence against a minor while not registered, increase by 6 levels; if the minor sustained bodily injury as a result, increase by 9 levels; if the minor sustained serious bodily injury as a result, increase by 12 levels.

(iii) If the offender committed a sex offense against someone other than a minor while not registered, increase by 10 levels.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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