NEW YORK COUNCIL OF DEFENSE LAWYERS

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March 21, 2016

VIA Email and U.S. Mail
Honorable Patti B. Saris
Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comments of the New York Council of Defense Lawyers Regarding 2016 Proposed Amendments to the Sentencing Guidelines

Dear Judge Saris:

This letter is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York. The NYCDL's members thus have gained familiarity with the Federal Sentencing Guidelines (the "Guidelines") both as prosecutors and as defense lawyers.

We appreciate this opportunity to submit comments to the Commission regarding the proposed amendments to the Guidelines. In the pages that follow, we address a few of these proposed amendments. The contributors to these comments include members of the NYCDL's Sentencing Guidelines Committee, Catherine M. Foti (Chair), Richard F. Albert, Michael Bachner, Laura Grossfield Birger, Christopher P. Conniff, James M. Keneally, Brian Mass, and Marjorie J. Peerce. In addition, the following individuals helped the Committee in their review and consideration of the amendments: Molly Booth, Daniel Bromwich, and Tyler Maulsby.

I. Comments on Proposed Amendments to Policy Statement on Compassionate Release

The United States Sentencing Commission (the "Commission") has requested comment on whether the current Policy Statement on compassionate release set forth in Note 1(A) to § 1B1.13 (the "Policy Statement") should be amended to revise the definition of "extraordinary and compelling reasons" and, if so, whether the amendment should "closely track the criteria set forth by the U.S. Bureau of Prisons in its program statement." The Commission also has raised for comment whether the Policy Statement should be revised to address the recommendations from the Office of the Inspector General promulgated in its May 2015 report (the "OIG Report"). *See* U.S. Department of Justice, Office of the Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons, E-15-05 (May 2015), available at https://oig.justice.gov/reports/2015/e1505.pdf. The Commission also has included a proposed amendment that revises the list of "extraordinary and compelling reasons" by replacing the criteria that would qualify an inmate for compassionate release.

The NYCDL submits this letter to request that the Sentencing Commission reject the proposed amendments to the Policy Statement. The NYCDL proposes that Application Note (1)(A)(iv) be amended to additionally state, "This Policy Statement is not intended to be more restrictive than Bureau of Prisons Compassionate Release guidelines." Potential further amendments to the Policy Statement may be advisable should the U.S. Bureau of Prisons ("BOP") make changes to its compassionate release statement in response to the OIG report.

The NYCDL believes that the Compassionate Release Program is an important mechanism to address issues that arise with inmates within the U.S. prison population for whom incarceration may no longer be appropriate for reasons including those currently included in the definition of "extraordinary and compelling reasons." The NYCDL also believes that it is unfair that the BOP has become the sole gatekeeper in determining who may be considered for compassionate release, as noted in testimony by the Practitioner's Advisory Group on this subject (*see* Margaret Colgate Love, Nonvoting Member, Practitioner's Advisory Group, Testimony Before the United States Sentencing Commission (Feb. 17, 2016), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/PAG.pdf), as well as by Kate Stith, Professor of Law, Yale Law School (Testimony Before the United States Sentencing Commission (Feb. 17, 2016), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/stith.pdf), and Marianne Mariano, Federal Public Defender for the Western District of New York in their testimony before the Commission (Testimony Before the United States Sentencing Commission (Feb. 17, 2016), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/FPD.pdf)).

The NYCDL believes that an expansion of the criteria that would be covered by "extraordinary and compelling reasons" would be appropriate to address both concerns of the Bureau of Prisons and hardships faced by inmates and their families. However, the Commission should defer expanding the release criteria in the Policy Statement until the BOP determines

whether it will expand its criteria based on the recommendations of the OIG Report. Because it is the Director of the BOP to whom the statute confers the responsibility of making a motion for compassionate release, 18 U.S.C. § 3582(c)(1)(A), the Policy Statement should not be narrower than the criteria published by the BOP. The Director currently follows the criteria set forth in Program Statement 5050.49, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Aug. 12, 2013) (the "Program Statement"), to which the BOP currently appears to be considering revisions. As a result, the NYCDL suggests that it would be more prudent to wait until the BOP issues revised guidelines before amending criteria for a court to consider, lest the amended criteria serve to limit the number of inmates who could benefit from compassionate release. The current policy statement, especially with respect to its consideration of aging prisoners, provides needed flexibility in determining whether extraordinary and compelling reasons for compassionate release exist.

The NYCDL would disagree with the adoption of the proposed amendments as they stand. The proposed amendments to § 1B1.13 are unnecessarily restrictive and do not adequately reflect the range of circumstances that may constitute extraordinary and compelling reasons for compassionate release. In particular, the proposed amendments mirror the current BOP Program Statement, which the OIG Report has criticized. The OIG Report recommends that the definition of an "aging" inmate should include inmates age 50 and older, whereas the proposed amendments contain a threshold of 65 years of age in Application Note 1(A)(iv)-(v). The 65-age minimum does not acknowledge the impact of incarceration on the physiological condition of inmates—a National Institute of Health report observes that "many estimate that prisoners' physiological age averages 10 to 15 years older than their chronological age." *See* Brie A. Williams et al., "Aging in Correctional Custody: Setting a Policy Agenda for Older Prison Health Care," *Am J Public Health* 102(8): 1475-1481 (Aug. 2012), available at http://www.ncbi.nlm.nih.gov/pubmed/22698042. Based on this report, requiring a threshold age of 65 for certain compassionate release considerations is unnecessary. Thus, the NYCDL recommends that the proposed amendments not be adopted.

II. Comments on Proposed Amendments to the Guidelines on Conditions of Probation and Supervised Release

The Commission also has requested comment on proposed changes to §§ 5B1.3 and 5D1.3. As an initial matter, the NYCDL believes that the standard conditions for probation and supervised release are overly broad. The NYCDL also believes that the suggestion in the Guidelines that these conditions should be imposed in the regular course (*see* §§ 5B1.3(c) and 5D1.3(c) "'standard' conditions are recommended") is contrary to the requirement that the court impose conditions for probation or supervised release that, respectively, are reasonably related to the "nature and circumstances of the offense and the history and characteristics of the defendant" (*see* 18 U.S.C. §§ 3563(b)) or to the specific, individualized factors set forth under 18 U.S.C. §§ 3553 (*see* 18 U.S.C. §§ 3583(d)). The NYCDL, therefore, supports the suggestion that number of standard conditions be reduced and that the Commission amend the Guidelines to provide for the imposition of individualized sentencing conditions. See Marianne Mariano, Federal Public Defender for the Western District of New York in her testimony before the Commission (Testimony Before the United States Sentencing Commission (Feb. 17, 2016),

available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/FPD.pdf). The NYCDL also agrees that the conditions of probation and supervised release are often difficult to understand and applied unfairly. *See, e.g., United States v. Adkins*, 743 F.3d 176 (7th Cir. 2014). Any measure of punishment imposed by a court should be understandable and provide the defendant with notice of the type of conduct that is prohibited or expected. Therefore, the NYCDL supports the Seventh Circuit's suggestion that the conditions of probation or supervised release must be worded simply, provide clear notice of what is required, and include a mens rea requirement. *See United States v. Kappes,* 782 F.3d 828, 848 (7th Cir. 2015).

Additionally, the Commission has sought comment on proposed recommended conditions relating to how a defendant should respond to questions posed by a probation officer. In particular, the Commission has suggested that a proposed condition of probation or supervised release be either that the defendant "must answer truthfully the questions asked by the probation officer" or that the defendant "be truthful when responding to the questions asked by the probation officer." Persons subject to probation or supervised release maintain their rights against self-incrimination. *See Minnesota v. Murphy*, 465 U.S. 420 (1984). A condition requiring that a defendant "answer truthfully" or "be truthful" in his or her responses to a probation officer's questions, suggests that a defendant is required to answer any question posed by a probation officer even if the defendant can legitimately refuse to do so pursuant to the right against self-incrimination. Although a defendant represented in a meeting with a probation officer may be protected against self-incrimination by his or her lawyer, most, if not almost all, meetings after a defendant is put on probation or supervised release occur without the benefit of representation. Therefore, it is imperative that a defendant understand that he or she retains a right not to speak, and not be compelled to answer in order to comply with the conditions of probation. Although the NYCDL does not believe there is a significant difference between the need to "answer truthfully" or the requirement to "be truthful when responding," the latter phraseology appears slightly less intimidating and therefore NYCDL believes it is preferable. However, for the reasons stated above, the NYCDL objects to the inclusion of any condition containing either phraseology unless the condition of probation or supervised release is amended also to include a clear statement that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this special condition.

III. Comments on the Proposed Amendments to the Guidelines on Child Pornography

The Commission has invited comments on proposed amendments to § 2G2.2, the guideline that covers the possession and distribution of child pornography. First, the Commission proposes amending § 2G2.2(b)(3)(F) to apply the 2-level enhancement only when the defendant "knowingly" distributed the material. Second, the Commission proposes amending § 2G2.2(b)(3)(B) to clarify that the 5-level enhancement applies when the defendant distributed in exchange for any valuable consideration other than pecuniary gain.

The NYCDL supports these amendments, both of which deal with issues that typically arise in cases involving peer-to-peer file-sharing programs. These programs "facilitate large collections of child pornography," but offenders often use them to collect child pornography without understanding their distributive properties.[1] U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* (Dec. 2012), at i-ii, *available at* http://www.ussc.gov/sites/default/files /pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf. With respect to the proposed amendment to § 2G2.2(b)(3)(F), a defendant who knowingly distributed child pornography is more culpable than one who distributed inadvertently or without knowledge. For that reason, we support limiting the enhancement to defendants who knowingly distributed; NYCDL does not believe that enhancement should automatically apply whenever an offense involves use of a peer-to-peer file-sharing program, without regard to whether the defendant had knowledge of the distributive aspect of such technology.

Similarly, NYCDL supports reserving the 5-level enhancement under § 2G2.2(b)(3)(B) for those defendants who distributed with the specific intent to obtain something valuable in return – such as other child pornography, access to child pornography, or access to a child. To achieve proportional punishment, that enhancement should not apply across-the-board to all defendants who use a file-sharing program, regardless of whether they intended to obtain valuable consideration in exchange. However, rather than applying the enhancement "[i]f the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain" as proposed, we recommend that the Commission adopt language similar to that used by the Fourth Circuit. Specifically, we propose that the 5-level enhancement apply "[i]f the defendant distributed for the specific purpose of obtaining something of value in return, but not for pecuniary gain." NYCDL submits that this language more closely reflects the appropriate distinction, and the distinction that we believe the Commission intends to draw.

Notwithstanding our support for these amendments, NYCDL urges the Commission to engage in a comprehensive overhaul of § 2G2.2. The proposed amendments highlight the continued emphasis in § 2G2.2 on cumulative and duplicative enhancements, which involve conduct that is "all but inherent to the crime of conviction." *See United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010). These enhancements are applied in the vast majority of child pornography cases and cause sentences to skyrocket for all—with advisory Guidelines ranges that easily reach 500% of the base offense level and exceed the statutory maximum—irrespective of each defendant's relative culpability and danger to the community.[2] We recognize that the

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[1] *See, e.g.*, *US v. RV*, No. 14-CR-316, 2016 WL 270257, at *2 (E.D.N.Y. Jan. 21, 2016) (stating that child pornography offenders "encompass a wide range of individuals with varying degrees of culpability," including "users of peer-to-peer files who passively and unintentionally distribute child pornography received on their computers").

[2] In 2014, 95.4% of sentences involved an image of a victim under 12; 94.9% involved the use of a computer; 83.6% involved sadistic or masochistic conduct or other forms of violence; and 78.3% involved 600 images or more. Nearly all of these statistics are higher than those reflected in the Second Circuit's analysis in *Dorvee*, when the Court cited them as evidence of an "eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results." *Dorvee*, 616 F.3d at 186, 188.

Commission itself has criticized these guidelines and repeatedly requested that Congress review sentencing for these cases.[3] We agree with this criticism and urge the Commission to seek out opportunities for wholesale reform so that these guidelines are better calibrated to distinguish among different levels of defendant culpability and dangerousness.

The NYCDL again thanks the Commission for offering it the opportunity to comment on the proposed amendments. The NYCDL looks forward to continuing dialogue with the Commission as it continues in its efforts to modify and improve the Guidelines.

Very truly yours,

Roland G. Riopelle
President

cc: (by mail) Hon. Charles R. Breyer
Hon. William H. Pryor, Jr., Commissioner
Dabney Friedrich, Commissioner
Rachel Barkow, Commissioner
Michelle Morales., Ex-Officio
Patricia Wilson Smoot, Ex-Officio

(By email) Catherine M. Foti, Esq.
(Chair, NYCDL Sentencing Guidelines Committee)

[3] *See Dorvee*, 616 F.3d at 184–86. *See also Federal Child Pornography Offenses* at xvii; U.S. Sent'g Comm'n, *The History of the Child Pornography Guidelines* (Oct. 2009), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.