Arbitrarily and Disproportionately Severe Sentences.

Imprisonment is a legitimate sanction for violent or dangerous conduct. Yet, prison sentences that are arbitrarily severe and disproportionate to the gravity of the offender's specific conduct and his or her personal culpability are inconsistent with respect for the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty.

Federal crack offenders face sentences that are far more severe than those levied on persons convicted of federal powder cocaine offenses, drug offenders sentenced for cocaine offenses under state law, and drug offenders convicted in other constitutional democracies. In 2006, the average sentence for a powder cocaine offender was 84.7 months, while the average sentence for a crack cocaine offender was 121.5 months, or 43% percent higher.[1] The sentencing disparity is particularly egregious for the low level offenders, street level dealers and couriers, who constitute the preponderance of crack cocaine (68.9%) and powder cocaine (59.9%) offenders.[2] For example, the average sentence of a street-level dealer of crack cocaine is 104 months, almost double the 56 months that the average powder cocaine dealer received.[3] Yet they are engaged in the same activity—selling illicit and addictive substances to individuals for their own consumption. Similarly, although crack cocaine and powder cocaine couriers perform the same basic transportation function, the average sentence for a crack cocaine courier/mule is 107 months, again just about double the 55 months for a powder cocaine courier.[4]

Federal sentences for low level crack cocaine offenders are also much longer than those given equivalent offenders sentenced in state courts. The average maximum prison sentence length for offenders convicted of drug trafficking in state courts is 55 months.[5] Among European countries, the average length of sentences for persons convicted of drug trafficking is 33 months.[6]

Congress established the 100-to-one sentencing ratio for crack and powder cocaine in the Anti-Drug Abuse Act of 1986. That legislation established five- and ten-year mandatory minimum sentences for cocaine offenses in which it took one hundred times as much powder cocaine to trigger the same sentence as for crack cocaine.

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[1] United States Sentencing Commission (USSC), "2006 Sourcebook of Federal Sentencing Statistics," March 2007, http://www.ussc.gov/ANNRPT/2006/figj.pdf (accessed March 14, 2007), Fig. J.
[2] United States Sentencing Commission, "Report to Congress – Cocaine and Federal Sentencing Policy," May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007), p.39, Fig. 6.
[3] Ibid, p.43, Fig. 9.
[4] Ibid.
[5] Bureau of Justice Statistics (BJS), "2002 Felony Sentences in State Courts," December 2004, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf (accessed March 14, 2007), p.4, Table 3.
[6] Martin Killias et al., "Sentencing in Switzerland in 2000," *Overcrowded Times* vol. 10, no. 6 (1999), p. 1, 18-19, citing figures from the Council of Europe's 1990 *Bulletin d'informacion Pénologique*, no. 15.

The Commission then used this 100-to-one ratio to develop sentencing guidelines for the full range of other powder and crack cocaine offenses. By all accounts, Congress simply picked the 100-one ratio out of the air, and it is this ratio which is the prime cause of the far more severe sentences crack offenders receive.

Supporters of current cocaine sentences claim that crack poses uniquely serious harms compared to powder cocaine; that long prison sentences for low level crack offenders offer prosecutors necessary leverage for securing their cooperation in the investigation of higher level offenders; and that the sentences deter prospective offenders and enhance community safety and well being. Yet, as evidenced during testimony at the November 2006 hearings, supporters of the status quo are unable to marshal much empirical evidence to support their claims.[7] To the contrary, as witnesses at the hearings pointed out and as the Commission has itself noted in its reports,[8] there is an abundance of empirical data showing that the inherent pharmacological dangers of crack are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack—e.g. crack babies—turn out to be myths, and that harsh federal sentences have had little impact on the demand for or the availability of the drug. In addition, the drug gang violence that accompanied the emergence of distribution and marketing of crack in the 1980s as well as the number of new crack users have dramatically declined. This decline is not the result of the sentencing differential, but of stabilization in the crack distribution markets and the inherent rise and fall in demand that is characteristic of new illicit drugs. Even if concerns about violence and increased use of crack cocaine had warranted sentencing differentials two decades ago, the changed realities have undermined any basis for those differentials now.[9]

The principle difference between the two forms of cocaine is that they are used by different socio-economic groups. Powder cocaine is relatively expensive. In contrast, crack cocaine (which is produced from powder cocaine) is sold in "rocks" that can be bought in small, cheap quantities. While people with financial resources can and do use crack as well as powder cocaine, people with limited funds who want to use cocaine can only afford it in the form of crack. Crack's low price thus contributed to the rapid rise in its use in the 1980s.

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[7] United States Sentencing Commission, "Written Statements of Witnesses and Hearing Transcript: Hearing on Cocaine and Federal Sentencing Policy," November 2006, http://www.ussc.gov/hearings/11_15_06/testimony.pdf (accessed March 14, 2007).

[8] United States Sentencing Commission, "Report to Congress – Cocaine and Federal Sentencing Policy," May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007); United States Sentencing Commission, "Special Report to the Congress: Cocaine and Federal Sentencing Policy," April 1997, http://www.ussc.gov/r_congress/NEWCRACK.PDF (accessed March 14, 2007); United States Sentencing Commission, "Special Report to the Congress: Cocaine and Federal Sentencing Policy," February 1995, http://www.ussc.gov/crack/exec.htm (accessed March 14, 2007).

[9] USSC, "Transcript: Hearing on Cocaine," November 2006.

In essence, federal law penalizes the sale of a substance to poor people more than the sale of the equivalent substance to the affluent. It is the equivalent, were alcohol illegal, of imposing higher punishments on the sale of jug wine than on the sale of chateau neuf du pape. Similarly, by dictating far higher sentences for the possession of crack than for the possession of powder, the law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form.

The Commission has correctly concluded in the past that there is no justification for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine and it has recommended elimination of the 100-one ratio.[10] Nothing that has happened in the five years since the Commission's last report changes that conclusion.

The Racially Discriminatory Impact of Crack Sentences.

Arbitrarily severe sentences should have no place in federal sentencing structures. But they are particularly objectionable when they are imposed primarily on a racial minority. According to the Commission's 2006 statistics, 81 percent of the men and women convicted of federal crack cocaine offenses are African American, a proportion that has not varied significantly over the past decade.[11]

The discriminatory impact of crack sentences cannot be squared with international treaty obligations of the United States. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has signed and ratified, prohibits conduct that has the "*purpose or effect*" of restricting fundamental rights on the basis of race.[12] That is, laws that are racially neutral on their face will constitute prohibited racial discrimination if they have an unwarranted disparate impact upon a group distinguished by race, even in the absence of any discriminatory intent. In the case of federal cocaine sentences, the racially disproportionate burden of longer sentences on African Americans is utterly unwarranted.

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[10] USSC, "Report to Congress on Cocaine," May 2002; USSC, "Special Report to Congress on Cocaine," April 1997; USSC, "Special Report to Congress on Cocaine," February 1995.

[11] USSC, "2006 Sourcebook," March 2007, Table 34.

[12] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. Article 1 (1) states:

> In this convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

If most of the people who sell and use crack cocaine in the United States were African American, it would be more understandable that most crack defendants are African American. Yet contrary to public assumptions, the average crack offender is white not black. According to federal data for 2005, an estimated 1,392,000 African Americans have used crack cocaine at least once in their lifetime, and 218,000 have used it in the past month. In contrast, an estimated 5,210,000 whites have used crack at least once in their lifetime, and 358,000 used it in the past month.[13] There is no national data on the racial breakdown of dealers and distributors of crack cocaine, but the limited data that does exist suggests whites constitute a preponderance of crack dealers as they do of crack users. For example, researchers have found that drug users identify their main drug sources as members of the same racial or ethnic background as they are. In addition, a large study conducted in the Miami, Florida metropolitan area of powder and crack cocaine users revealed that over 96 percent of users in each ethnic/racial category were also involved in street-level drug dealing—which also suggests a racial profile of sellers that is comparable to users.[14]

In short, differences among the racial groups in drug offending do not account for the marked racial disparities in drug offender arrests and ultimately imprisonment. Instead, most criminal justice analysts believe black crack cocaine offenders are more likely to be arrested than their white counterparts because people buying, using and selling drugs in poor, primarily minority, urban communities are more likely to be arrested than people buying, using and selling drugs in more affluent and predominantly white neighborhoods.[15]

We do not believe any honest observer of the public response to crack, including that of federal legislators, can ignore the role of race. Inner city minority neighborhoods did suffer because of the increased drug dealing on the streets, increased crimes by addicts seeking to finance their addiction, and violence by competing drug gangs that came with the advent of crack. But the dismay of local residents was more than matched by the censure, outrage, and concern from outsiders fanned by incessant and sensationalist media stories, by politicians seeking electoral advantage by being "tough on crime," and by some politicians who were—consciously or otherwise—playing the "race card" in advocating harsh responses to crack. When crack spread throughout low-income minority

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[13] US Department of Health and Human Services Substance Abuse and Mental Health Statistics Agency (SAMHSA), "2005 National Survey on Drug Use & Health," September 2006, http://oas.samhsa.gov/NSDUH/2k5NSDUH/tabs/Sect1peTabs1to66.htm#Tab1.47A (accessed on March 14, 2007), Table 1.47A. A somewhat higher percentage of African Americans than whites have used crack at least once in their lifetime—5.6 percent compared to 3.4 percent; Ibid. Table 1.47B.

[14] Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnel F. Hawkins, ed., *Ethnicity, Race and Crime* (New York: State University of New York Press, 1995), p. 21.

[15] Human Rights Watch, *United States – Punishment and Prejudice: Racial Disparities in the War on Drugs* (and sources cited therein), Vol. 12, No. 2 (G), May 2000, http://www.hrw.org/reports/2000/usa/.

neighborhoods that white Americans already saw as dangerous and threatening, it galvanized a complicated set of racial, class, political, social, and moral dynamics that resulted in extensive drug law enforcement in those neighborhoods as well as uniquely punitive federal sentences for crack offenders.

The greater number of black crack defendants and Congress's choice of harsher sentences for crack offenders may be explained. But explanation is not justification. Congress has many ways to protect minority communities and address drug abuse besides dictating uniquely severe penalties for crimes that are prosecuted disproportionately against African Americans.

By seeking to eliminate the crack/powder sentencing differential, the Commission affirms the principles of justice and equal protection of the laws that should be the bedrock of US law. As the Commission has recognized in the past and as witnesses at the November 2006 hearing also acknowledged, the crack/powder cocaine sentencing disparities reinforce the perception in African American communities that the US criminal justice system is biased and unfair. Absent change, federal crack sentences will continue to deepen the country's racial fault lines and to belie the nation's commitment to equal justice for all.

Human Rights Watch believes the disparities in the guidelines and legislation should be eliminated by increasing the threshold quantities of crack required for a given sentence to those required for powder cocaine offenses. The disparity should not be eliminated by reducing the quantity of powder cocaine required, which would have the effect of increasing powder cocaine sentences. No one argues that federal sentences for powder cocaine offenses are too low. The injustice caused by the current 100-to-one ratio should not be cured by an arbitrary change to powder cocaine sentences.

Conclusion.

We urge the Commission to seek to restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by submitting to Congress amended guidelines that eliminate the 100-one ratio in the quantities of crack and powder cocaine required to trigger equivalent sentences. We also urge the Commission to recommend to Congress that it eliminate crack and powder cocaine sentencing disparities in existing mandatory minimum sentencing legislation.

Sincerely,

Jamie Fellner
Director, US Program

March 20, 2007

United States Sentencing Commission
One Columbus Circle, NE,
Suite 2-500,
Washington, DC 20002-8002

Attention: Public Affairs Officer

On behalf of the National Council of La Raza[1] (NCLR), and the Mexican American Legal Defense and Educational Fund[2] (MALDEF), we are respectfully submitting public comments to the U.S. Sentencing Commission (USSC) on federal sentencing laws for crack and powder cocaine offenses.

NCLR and MALDEF believe that the elimination of the threshold differential that exists between crack and powder sentences is the only fair solution to eradicating the disparity. This should be achieved by raising the crack threshold to the levels of powder. Current federal law punishes crack cocaine offenders much more severely than any other drug offenders. This subjects low-level participants, like lookouts, to the same or more severe sentences as major dealers. Current federal law has had a disproportionate impact on communities of color and low-income communities.

The Anti-Drug Abuse Act of 1986 intended to curb the "crack epidemic" by focusing on "major traffickers." This resulted in the conviction of individuals found in possession of only 5 grams of crack cocaine triggering a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to trigger the same sentence. And while possession of 50 grams of crack cocaine triggers a ten-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence.

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to persistent racial imbalances in the justice system, affecting mainly African Americans but increasingly Latinos.[3] Although the spirit of the law was to go after the "big ring leaders," what we know now is that prisons are filled with low-level, mostly

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[1] NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health.
[2] Founded in 1968, MALDEF, the nation's leading Latino legal organization, promotes and protects the rights of Latinos through advocacy, litigation, community education and outreach, leadership development, and higher education scholarships.

[3] According to the Sentencing Project, *Hispanic Prisoners in the United States,* the number of Hispanic in federal and state prisons rose by 219% from 1985 to 1995, with an average annual increase of 12.3%.

nonviolent drug offenders. Furthermore, the drug use rates per capita among minorities and White Americans has consistently been remarkably similar over the years.[4]

DISPARATE IMPACT OF DRUG LAWS ON LATINOS

In 2000, Latinos constituted 12.5% of the population in the United States, according to the 2000 Census. Yet, according to Sentencing Commission data, Hispanics accounted for 43.4% of the total drug offenders that year; of those, 50.8% were convicted for possession or trafficking of powder cocaine, and 9% for crack cocaine. This is a significant increase from the 1992 figures, which show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine.[5]

Contrary to popular belief and as stated above, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Anglos. Rather, the disproportionate number of Latino drug offenders appears to be the result of a combination of factors, beginning with the phenomenon now widely known as "racial profiling." NCLR's 2004 study,[6] as well as a host of other studies, demonstrates that from the moment of arrest to the pretrial detention phase and the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment, Latinos encounter significant inequalities in the U.S. criminal justice system.

Despite the fact that Latinos are no more likely than other groups to use illegal drugs, they are more likely to be arrested and charged with drug offenses and less likely to be released before trial. Once convicted, Latinos do not tend to receive lighter sentences, even though the majority of Hispanic offenders have no criminal history. As a result, Hispanics are severely overrepresented in the federal prison system, particularly for drug offenses, and once in prison are less likely than others to receive substance abuse treatment. That these sobering statistics are largely the result of irregularities in drug enforcement and sentencing is largely beyond dispute.

Contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first-time offenders, or both. Over the past decade, public opinion research reveals that a large majority of the public is prepared to support more rational sentences, including substance abuse treatment, for low-level drug offenders. The costs of excessive incarceration to the groups affected, and to the broader American society – in terms of reduced current

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[4] According to the Department of Health and Human Services, *2005 National Survey on Drug Use & Health*, illicit drug use associated with race/ethnicity in 2005 was as follows: American Indians or Alaska Natives, 12.8%; persons reporting two or more races, 12.2%; Blacks, 9.7%; Native Hawaiians or Other Pacific Islanders, 8.7%; Whites, 8.1%; Hispanics, 7.6%; and Asians, 3.1%.

[5] *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002, p. 63.

[6] *Lost Opportunities: The Reality of Latinos in the Federal Criminal Justices System,* National Council of La Raza, October 2004.

economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities – are extremely high. MALDEF and NCLR believe that this Commission can play a critical role in reducing unnecessary and excessive incarceration rates of Latinos in the U.S., as discussed below.

RECOMMENDATIONS

In three separate reports to Congress, in 1995, 1997, and 2002, the U.S. Sentencing Commission (USSC) urged Congress to reconsider the statutory penalties for crack cocaine. Judges, federal prosecutors, medical professionals, and other experts have all joined the USSC in calling for a reassessment of the current standards. The elimination of the threshold differential that exists between crack and powder sentences must be equalized as much as possible by raising the crack triggers to the level of powder. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain,[7] equalizing the ratio to 1:1 is the only fair solution to eradicating the disparity. NCLR and MALDEF urge the U.S. Sentencing Commission to consider the following recommendations as the Commission prepares its report to Congress.

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, we call for closing the gap between crack and powder sentences, so that five grams of crack triggers the same exact sentence as five grams of powder.

2. **Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.** NCLR and MALDEF believe that the only proper way of equalizing the ratio is by raising the crack threshold, not by lowering the powder threshold. According to the Commission's data, reducing the powder threshold would have a disproportionate negative impact upon the Latino community. Achieving equalization by lowering the powder threshold might be perceived as reducing sentencing inequalities. In fact, it would have the perverse effect of not reducing high levels of incarceration of low-level, nonviolent African Americans while substantially increasing incarceration of low-level, nonviolent Latinos. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the symbolic value of reducing statutory sentencing ratios.

3. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the

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[7] Instead, it is the way by which the drug is consumed – ingesting, smoking, injecting, or snorting – which causes higher levels of addiction, which in turn calls for a greater demand for the drug. *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002.

defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.

4. **DEA agents and federal prosecutors should concentrate upon deterring the importation of millions of tons of powder cocaine and prosecuting ring leaders with the fullest weight of the law.** Even at the current highest levels for crack (50 grams) and powder (5,000 grams), which trigger the maximum mandatory minimum sentence (ten years), it is a relatively insignificant measure to deter drug trafficking and promote community safety. These low-level actors are easily replaceable by high-level drug kingpins. In the spirit of the 1986 law, the Act should be renewed by investing in training and resources and reserving prison beds for high-level kingpins.

NCLR and MALDEF urge that any new thresholds be scientifically and medically justified and correlated directly to the impact of penalties on both the defendant and the larger society. The current disparities in the criminal justice system and the resulting disproportionate rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, these policies constitute a major barrier to economic opportunity and civic participation; for the nation as a whole, they inhibit economic growth and social cohesion. Finally, they severely undermine the credibility of and confidence in the nation's entire system of criminal justice.

We urge the Commission to seize this unique opportunity simultaneously to narrow drug sentencing disparities and reduce incarceration of low-level, nonviolent offenders.

United States
Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 14, 2007

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

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

Dear Judge Hinojosa:

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

1. TRANSPORTATION

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

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

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

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

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

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

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

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

Bribery Affecting Port Security (Request for Comment 3)

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

2. SEX OFFENSES/ADAM WALSH ACT

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

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

§ 2A3.5/18 U.S.C. § 2250

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

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

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

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

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

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

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

New Offenses and Increased Penalties

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

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

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

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

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

Other Criminal Provisions

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

3. TECHNICAL AND CLARIFYING AMENDMENTS

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

4. MISCELLANEOUS LAWS

Fallen Heroes

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

International Marriage Brokers

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

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

Internet Gambling

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

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

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

5. INTELLECTUAL PROPERTY RE-PROMULGATION

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

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

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

6. TERRORISM/PATRIOT ACT

Narco-terrorism

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

Border Tunnels And Passages (And Request For Comment 2)

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

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

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

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

Displaying insignias and uniforms (Request for Comment 3)

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

7. DRUGS (NOT INCLUDING CRACK COCAINE)

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

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

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

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

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

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

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

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

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

18 U.S.C. § 860a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 U.S.C. § 841(g)

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

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

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

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

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

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

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

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

Ketamine

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

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

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

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

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

8. IMMIGRATION

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

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

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

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

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

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

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

9. BUREAU OF PRISONS MOTION/"COMPASSIONATE RELEASE"

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

10. CRIMINAL HISTORY

Minor Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related cases

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

11. PRETEXTING

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

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

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

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

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

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

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

12. CRACK COCAINE

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

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

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

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

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

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

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

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[1] *See* Testimony of A. J. Kramer, Federal Public Defender for the District of Columbia, at 1-2.
[2] Testimony of Hilary O. Shelton, Director, NAACP Washington Bureau, at 2.
[3] *See* United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* 102-103 (May 2002).
[4] Testimony of Harolyn Beltcher, M.D., M.H.S., Associate Professor of Pediatrics, Johns Hopkins School of Medicine, at 1.
[5] *See* Testimony of Alfred Blumstein, H. John Heinz III School of Public Policy and Management, Carnegie Mellon University, at 3-4; *see also* Testimony of Bruce D. Johnson, Institute for Special Population Research at 4 (ADAM research indicates "violence is relatively rare among current crack/cocaine users.").
[6] *See* Testimony of Nora D. Volkow, Director, National Institute on Drug Abuse, at 3.
[7] Testimony of Bruce D. Johnson, at 4.
[8] Testimony of R. Alexander Acosta, United States Attorney, Southern District of Florida 13-14.
[9] *See* Testimony of David Debold, Co-Chair of the Practitioners' Advisory Group to the United States Sentencing Commission, at 2.

CONCLUSION

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

Sincerely,

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March 12, 2007

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Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additional Issues. Ketamine is listed along with gamma hydroxybutyric acid ("GHB") and flunitrazepam in § 841(g)'s definition of a "date rape drug." Accordingly, selling ketamine over the Internet in violation of § 841(g) is subject to a 20-year statutory maximum. Ketamine, however, is a Schedule III drug, which is different from both GHB (Schedule I) and flunitrazepam (Schedule IV[2]). As such, unlike GHB and flunitrazepam, the number of levels added in the Drug Quantity Table is capped at 20.

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

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

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

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

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

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

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

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

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

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

III. Crack/Powder Cocaine Disparity

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

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

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