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

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

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

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

5. Mitigating Role Cap and Safety Valve

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

B. Border Tunnels, 18 U.S.C. § 554

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

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

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

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

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

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

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

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

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

Section 1191 of the Violence Against Women Act expanded 18 U.S.C. § 716 to prohibit the transfer, transportation or receipt of any public employee insignia or uniform[2] that is either counterfeit or intended to be given to a person not authorized to possess it, *see* 18 U.S.C. § 716(a), and added a statutory defense. *See* 18 U.S.C. §§ 716(b) and (d).

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

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

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

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

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

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

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

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

II. Transportation

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

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

Very truly yours,

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March 16, 2007

Honorable Ricardo H. Hinojosa, Chair
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Re: Comments on Sentencing Commission Amendments: Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006

Dear Chairman Hinojosa,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2007.[1] While the Committee recognizes that the Commission is considering several important revisions to the guidelines, we would like to focus on one issue that we believe impacts the fair administration of justice. Specifically, the Committee believes that when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute.

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

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

> First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months).
>
> Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months).
>
> Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act.
>
> Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.[3]

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

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

[3] 72 Fed. Reg. 4382 (Jan. 30, 2007).

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

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

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

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

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

Id. at 184-85.

[6] 28 U.S.C. § 991.

[7] JCUS-SEP 03, pp. 5-6

[8] Public Law No. 108-21.

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

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

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

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

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

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

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

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

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

Sincerely,

Paul Cassell

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

February 26, 2007

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
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Dear Judge Hinojosa:

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

Sex Offenses Pursuant to the Adam Walsh Act

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

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

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

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

Drug Offenses

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

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

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

Immigration

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

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

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

Criminal History

Minor Offenses

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

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

Related Cases

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

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

Pretexting

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

Closing

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

Respectfully,

2007 Probation Officers Advisory Group

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March 6, 2007

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

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. A Convicted Offense Approach Avoids Unwarranted Disparity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Voluntary Attempt to Correct Failure to Register

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

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

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

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

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

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

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

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

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

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

F. Downward Departures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 This may violate the Double Jeopardy Clause.

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

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

II. Guidelines Applicable to Sex Offenses

A. The Guidelines and New Mandatory Minimums

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

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

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

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

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

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

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

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

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

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

Adam Walsh Act.

B. Sexual Abuse, § 2A3.1

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

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

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

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

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

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

as confirmed by the cases involving convictions under § 2241(c) and applying § 2A3.1.[11] Thus, under the proposed amendment, a level 42 (360-life) or 44 (life) would be virtually automatic. Thus, the Commission should set the base offense level at no more than 38 anticipating that at least one 2-level SOC will apply and result in a guideline range of 292-365 months in CHC I, which meets the mandatory minimum.

C. Sexual Abuse of a Ward, § 2A3.3

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

1. The base offense level should remain at 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the conviction is under any other statute, the total offense level would be 30 (24 + 2 under (b)(3) + 4 for age), *i.e.*, 97-121 months in CHC I, a sentence which is sufficiently severe for offenses with no mandatory minimum involving false minors. Further, agents control the age of the "minor" in these cases. The incentive to manipulate sentence outcomes, which is a "significant source of continuing disparity in the federal system," U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 82 (2004), should be minimized when possible.

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

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

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

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

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

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

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

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

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

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

G. Recordkeeping, § 2G2.5

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

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

H. Child Exploitation Enterprise, § 2G2.6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We hope that these comments are helpful.

Very truly yours,

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APPENDIX A

Option 1

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

(a) Base Offense Level:

(1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;

(2) 14, if the offense that gave rise to the requirement to register was a Tier II offense;

(3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics

(1) If, before sentencing, the defendant is convicted of an offense that occurred during the failure to register status which is (A)(i) a sex offense against an individual other than a minor; or (ii) kidnapping or falsely imprisoning a minor (unless committed by a parent or guardian), increase by 6 levels; or (B) a sex offense against a minor, increase by 8 levels.

(2) If the sentence served for the offense that gave rise to the requirement to register was less than 13 months, decrease by two levels.

(3) If (A) subdivision (b)(1) does not apply and (B) for a period of ten or more years between the date the defendant was convicted of the offense that gave rise to the requirement to register and the date of the instant failure to register offense (excluding any periods the defendant was in custody or civilly committed for that offense), the defendant (i) was not convicted of an offense punishable by more than one year, (ii) was not convicted of a sex offense, and (iii) successfully completed any supervised release, probation, parole or sex offender treatment in connection with the offense that gave rise to the requirement to register, decrease by two levels.

(4) If the defendant voluntarily attempted to correct the failure to register, decrease by 4 levels.

Application Notes

1. Definitions

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

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

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

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

2. Departures

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

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

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

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

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

Application Notes