



Hon. Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

March 21, 2016

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) welcomes the opportunity to submit comments on the Commission’s Proposed Amendments to the Sentencing Guidelines, dated January 15, 2016 (the “Amendments”).

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

1: § 1B1.10 – Compassionate Release

NACDL urges the Commission to amend the policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), to clarify the broad, expansive view of “extraordinary and compelling circumstances” that Congress expressed in its catch-all statutory text. *See* 18 U.S.C. § 3582(c)(1)(A)(i). This expansive view would be best captured by correlating the “extraordinary and compelling circumstances” required under § 1B1.13 to the same “outside the heartland” concepts driving Guidelines departures.

Extraordinary and compelling circumstances are the fact patterns that trigger departure consideration, so sentencing courts – the judges that Congress ultimately charged with deciding whether inmates merit a so-called “compassionate release” reduction in sentence¹ – are already familiar with the term of art. The “outside the

¹ NACDL does not use the “compassionate release” term, but rather refers to § 3582(c)(1) Reduction in Sentence (“RIS”) motions.

heartland” frame of reference would be simple enough for jurists to apply immediately, while better defining “extraordinary and compelling” as “abnormal” rather than “the rarest of cases imaginable by an Executive Branch law enforcement officer.”

Findings of “extraordinary and compelling circumstances” would then not be limited to the narrow and exceedingly rare fact patterns required by the Federal Bureau of Prisons (“BOP”) today, which almost exclusively require terminal or debilitating illness or extreme age. “Extraordinary and compelling circumstances” would also include any reasons, whether specifically enumerated by the Sentencing Commission or the Department of Justice (“DOJ”) in the Code of Federal Regulations or the BOP in its program statements.²

Further, and contrary to the current DOJ regulations (28 C.F.R. § 571.60-571.64) and Bureau of Prisons (“BOP”) program statement (P.S. 5050.49, Change Note 1), the term “extraordinary and compelling circumstances” could also include any affected third parties that would be considered at sentencing, not just the minor children and spouses/registered partners added by the BOP to its considerations after the 2013 Office of Inspector General (“OIG”) report.

Rather than being available only for the death or incapacitation of minors’ caregivers or spouses/registered partners, the Commission’s amendment would include extraordinary hardships on any person about whom inmates might qualify for departure at an original sentencing.³ Both medical and non-medical reasons for filing RIS motions – and letting the sentencing courts decide, rather than the BOP’s Director – should be expanded in § 1B1.13.

The Commission **absolutely should not** cede its authority to the Federal Bureau of Prisons (“BOP”) by adopting its excessively narrow reading of 18 U.S.C. § 3582(c)(1). Congress commanded at 28 U.S.C. § 994(t) that *the Commission* “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” Ceding these determinations to the Executive Branch’s law enforcement agencies, including the BOP, violates the plain language of § 994(t).

² Application Note 1(A)(iv) currently provides – in theory – a catch-all for circumstances other than the examples provided. But this catch-all relief is available only “[a]s determined by the Director of the Bureau of Prisons.” As the Office of Inspector General (“OIG”) report noted, the BOP Director has historically approved a miniscule percentage of RIS requests even under the BOP’s narrow standards, never mind the broad catch-all discussed here.

³ One obvious example would be the “family ties and circumstances” considered under § 5H1.6. The Commission should, however, expressly state that any mitigating grounds involving interested third parties that might be argued at sentencing might constitute “extraordinary and compelling circumstances” for reduction in sentence purposes. *See, e.g., United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995) (“departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees.”).

Moreover, this statutory violation might also violate the constitutional separation of powers doctrine. Congress expressly vested decision-making criteria about, *inter alia*, reductions in sentence with the Sentencing Commission, an independent agency located within the Judicial Branch. See 28 U.S.C. § 991(a); see also *Mistretta v. United States*, 488 U.S. 361, 396-97, 109 S. Ct. 647, 668 (1989) (“Congress’ considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers.”).

Being an independent agency of particular and peculiar institutional expertise, the Commission must exercise independent judgment based on its own decision-making. “[T]he Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” See *Kimbrough v. United States*, 552 U.S. 85, 108-09, 128 S. Ct. 558, 574 (2007) [internal quotation omitted].

Failure to exercise this expertise, by simply deferring to the BOP’s narrow interpretations, improperly delegates to an Executive Branch agency the authority expressly vested in the Commission as a check against, not a rubber-stamp of, that very Executive’s demands.

In exercising its own independent expertise, however, the Justice Department’s OIG excoriated the BOP for failing to substantially provide an adequate program for § 3582 Reductions in Sentence.⁴ NACDL strongly urges that the Commission adopt the recommendations from that OIG report as part of any revision of the policy statement at § 1B1.13.

The BOP has taken a number of steps to address the OIG’s many concerns, and would seem poised to present another revision to its RIS program administration. While we applaud the BOP’s progress, the RIS program remains slow and records regarding its effectiveness remain scarce. Whatever amendment to § 1B1.13 occurs in this cycle, NACDL would urge the Commission to revisit § 1B1.13 within the next two amendment cycles to consider changes in light of the BOP’s policies and practices, and additional available documentation about the RIS program’s results and operations. At that time, the Commission can consider whether it needs to further expand § 1B1.13 to serve the statute’s goals.

Ideally, any future iteration of § 1B1.13 will expressly direct that the BOP’s Director should be filing more petitions than we have observed through March 2016. NACDL believes that an application note is appropriate which states that § 3582(c)(1) motions should be filed *whenever* an inmate meets even one of the examples, or otherwise makes a compelling case that would take the matter “outside the heartland” of normal inmate privations.

⁴ See USDOJ-OIG, *The Federal Bureau of Prisons’ Compassionate Release Program*, I-2013-006 (April 2013).

A new application note should also clearly express that the phrase “extraordinary and compelling circumstances” is broad, and the BOP should be interpreting the circumstances to which this language applies broadly. Congress could have easily narrowed “extraordinary and compelling circumstances” to a set definition. But Congress did not narrow available considerations. The Commission should ensure that the BOP follows a similar, broad reading of the RIS statute.

A broad interpretation of § 3582(c)(1), and amending § 1B1.13 to reflect the broad array of circumstances that should be offered to courts as potentially “extraordinary or compelling,” will correctly implement Congress’ broad approval for such considerations. Expansive amendments will also encourage early releases to the community for offenders found by the court to pose minimal risks – a determination that is ultimately vested in Article III courts, not the BOP, under 18 U.S.C. §§ 3553 and 3582 – which in turns serves the Commission’s long-term goals of reducing BOP overcrowding.

NACDL therefore urges the Commission to reject the BOP’s current, exceedingly narrow interpretations of RIS eligibility, and instead amend § 1B1.13 to clearly express the expansive opportunities to prove extraordinary and compelling circumstances that are plainly authorized by Congress.

2: USSG §§ 2G2.1, 2G2.2 and 2G2.6 (Child Pornography)

The Commission seeks comments on the proposed revisions to the child pornography guidelines, USSG §§ 2G2.1, 2G2.2 and 2G2.6, relating to cases involving very young victims and the use of peer-to-peer file-sharing programs. At the outset, NACDL wishes to reiterate its position that the most commonly imposed of these Guidelines, USSG § 2G2.2, which applies in cases of both possession and distribution, is deeply flawed and should be repealed entirely in light of the Commission’s 2012 report entitled *Federal Child Pornography Offenses*. See, e.g., Letter from NACDL Sentencing Committee Chair Mark Allenbaugh to the Hon. Patti Saris dated July 15, 2013 at 3-5; see also *U.S. v. Dorvee*, 616 F.3d 174, 184-186 (2d Cir. 2010) (§ 2G2.2 is “an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”). The specific offense characteristics in § 2G2.2 are anachronistic given how almost all child pornography proliferates today. To the extent the Commission is considering amendments relating to the use of peer-to-peer computer programs, it should also consider immediately repealing the two-level increase for use of a computer, USSG §2G2.2(b)(6), which unfairly increases the base offense level in virtually every federal child pornography case without any empirical or rational basis.

That said, we address the Commission’s specific proposed amendments in turn, opposing the proposal to permit redundant increases for especially young victims, but supporting the proposals to strengthen the *mens rea* requirements for increases based on distribution where the distribution is solely through file-sharing programs.

A. Young Victims

The proposed amendments to §§ 2G2.1, 2G2.2 and 2G2.6 would provide an exception to the rule that the vulnerable victim adjustment is not applied if the offense guideline already provides an enhancement for age “unless the victim was unusually vulnerable for reasons unrelated to age.” § 3A1.1 comment (n.2). The Commission proposes to apply the vulnerable victim adjustment in addition to the age-based enhancements “if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12, and the defendant knew or should have known this.” NACDL opposes this proposed amendment.

The proposed amendment is unneeded and will not resolve the apparent circuit split that the Commission is concerned about for the reasons stated in the written comments of Neil Fulton on behalf of the Federal Defenders. As Mr. Fulton points out, application of the “unusually vulnerable victim” enhancement is uneven among districts within the circuits that have the rule the Commission proposes to adopt, i.e., those that permit an added vulnerable victim enhancement based on age even where the age-based enhancement already applies. Moreover, the increase is rarely imposed outside those circuits – because it is unnecessary in light of the harshness of the rest of the child pornography guideline and would lead to advisory guideline sentences that are far too high in the majority of cases. NACDL believes that all child victims are highly vulnerable and that the staggering sentences imposed for simple possession under USSG § 2G2.2 more than adequately reflect that fact already. Similar concerns apply with respect to sentences for production and child exploitation enterprises: sentences are so high already that double-counting based on the age of the child is unwarranted, and does not meaningfully enhance sentences based on distinctions in the culpability of different offenders.

B. Distribution

The proposed amendments also change the tiered enhancements for distribution, which increase the base offense level for distribution from two to seven additional levels based on the details of the conduct constituting distribution. USSG § 2G2.2(b)(3)(a)-(f). We agree with the Commission that these tiered increases are outdated and with the Federal Defenders that the proposed changes are a modest step in the right direction with respect to one particularly common problem, peer-to-peer (“P2P”) computer programs such as LimeWire, BitTorrent, and Vuze.

These programs permit computers to connect directly through the internet to other individual computers and download files from them without connecting to a central server. In order to function and grow, P2P programs often automatically make files from a user’s computer available to other users. As the Federal Defenders point out, this automatic feature of the programs means that many users, including child pornography offenders, find themselves making material on their computers available to others without even realizing it.

We submit that using P2P networks in this way is far less culpable than the conduct intended to be reached by the two- to seven-level enhancements in the current guideline. Even our most sophisticated clients may not be aware of settings to disable their own sharing of files.⁵ As a result, they end up distributing child pornography without knowledge -- let alone intent -- to do so. Their punishment should not be substantially increased as a result.

Accordingly, we endorse the Commission's proposed changes but agree with the Federal Defenders that they do not go nearly far enough in ratcheting down the needless increases in sentences for P2P cases.

As to remedies, the addition of a *mens rea* requirement for the lowest distribution increase, USSG § 2G2.2(b)(3)(F) is a minimal safeguard against the absurd result that someone could be punished for distribution of intangible (albeit unlawful) data when she was not even aware that she was distributing anything. The clarification to the definition of distributing "in exchange for any valuable consideration" is welcome but should specify that the agreement must not be mere boilerplate or an automated click; rather, the new guideline should specify that in order to apply this provision, the government must prove the existence of an agreement with another specific human being from whom the consideration is to be obtained. *See* Neil Fulton Testimony at 16.

Finally, we believe that the Commentary to § 2G2.2(b)(3) should specifically state that mere proof that the defendant used a file-sharing program is insufficient to prove "distribution" of any kind. Only knowing, purposeful conduct should be enough to warrant the kind of life-altering increases possible under this subsection.

C. Conclusion

In short, the child pornography guidelines remain eccentric. Permitting a double-increase based on the age of the victims depicted in the images will make them worse, unfairly increasing sentences in nearly every case without meaningful distinctions. The proposed reforms to how the guidelines treat P2P cases would mark a marginal improvement but are insufficient to prevent the predictably unjust results routinely produced by § 2G2.2 and routinely ignored by sentencing judges.

3: U.S.S.G. §§ 2L1.1 and 2L1.2 (Immigration Guidelines)

We have had the opportunity to review the Written Statement of Marjorie Meyers, Federal Public Defender for the Southern District of Texas, prepared on behalf of the Federal Public and Community Defenders. We join the Federal Defenders in their comments and concerns regarding the sweeping proposed amendments to Guideline Sections 2L.1.1 and 2L1.2. As it relates to § 2L1.1, we join the Federal Defenders in their suggested revisions. As it relates to § 2L1.2, below we highlight some of our

⁵ The Federal Defenders point out that elite colleges find it necessary to warn their students about the dangers inherent in P2P programs. *See* Neil Fulton Testimony at 13 (quoting Yale University's warnings to users regarding inadvertent file sharing through P2P programs).

greatest concerns and suggest an additional circumstance in which a downward adjustment to the already-existing Guideline would be warranted.

A. Impropriety of Using Criminal History to Increase Base Offense Level

In 28 U.S.C. § 994(c), the legislature codified what factors the Commission shall take into account in establishing categories of offense for use in the guidelines: the grade of the offense; mitigating or aggravating circumstances under which the offense was committed; the nature and degree of harm caused by the offense; the public concern generated by the offense; the deterrent effect a particular sentence may have; and the current incidence of the offense in the community and the nation as a whole. Notably absent from consideration as an “offense characteristic” is an offender’s criminal history.

Yet, that is exactly what the proposed amendment to U.S.S.G. § 2L1.2 seeks to include as a relevant – even determinative – factor in calculating the applicable base offense level under the proposed scheme. This is problematic for a number of reasons. First, there is already a guideline that directly addresses an offender’s criminal history: U.S.S.G. § 4A1.1. An offender is already subject to a higher Guideline sentence by operation of the Criminal History Category determined by application of U.S.S.G. § 4A1.1, and the corresponding “x-axis” on the Sentencing Table. *See* U.S.S.G. Chapter Five, Part A. Under the new scheme, the “y-axis” of the Sentencing Table would also increase based on an offender’s criminal history because now the base offense level would be increased on the same grounds. This is directly contrary to the Commission’s governing statute and smacks of unfairness.

Moreover, as it directly relates to prior illegal reentry offenses, it is problematic because it will lead to great sentencing disparities based on local jurisdictional practices. As discussed at length in Ms. Meyers’ testimony, *see* pages 15-18, different jurisdictions handle similar situations very differently. For instance, Jurisdiction A may routinely process most individuals who enter the country unlawfully using the Department of Homeland Security’s reinstatement of removal process. However, Jurisdiction B may instead routinely prosecute identical cases under the illegal entry or re-entry statutes. Under the proposed scheme for § 2L1.2, a person who had entered the country twice in Jurisdiction A would start at a base offense level 10; however, a person who engaged in the same conduct in Jurisdiction B would start at a base offense level of 14. There is no justification for this disparity.

As noted by the Federal Defenders, the multiple uses of past convictions in calculating the guidelines and increasing sentence length have long been the subject of criticism by judges and commentators. *See* Testimony of Marjorie Meyers, p. 7, fn. 12. Thus, it is improper and inconsistent with its governing statute for the Commission to use either prior illegal re-entry convictions or any other prior criminal convictions to increase offense conduct.

B. Impropriety of Using USSG to Address National Immigration Concerns

There is no dispute that our country is in conflict over how to address immigration concerns. However, as stated by the Federal Defenders, the Commission must be mindful that its actions taken in relation to § 2L1.1 and § 2L1.2, in particular, will be seen as part of a response to the policy on immigration. There are alternatives to using prior illegal reentry offenses to modify § 2L1.2, *see* Testimony of Marjorie Meyers, Section (C)(6) at p. 22; and, indeed, those alternatives better address the determinative factors that the Commission is to consider as it relates to the offense and, separately, the offender. *See* 28 U.S.C. § 944(c), (d). We join the Federal Defenders in their suggestion that “[r]ather than drive up sentence length for those with a single or multiple illegal reentry offense in order to reduce sentences for those with prior felony convictions, the better course is to look to the individual’s motive in reentering and punish those who reenter and commit serious offenses.” *See* Testimony of Marjorie Meyers, p. 22.

C. Additional Specific Offense Characteristic Warranting Departure

The Federal Defenders set forth many sound suggestions for departures for the Commission’s consideration. *See* Testimony of Marjorie Meyers, Section F at p. 33. In addition to those proposed by the Federal Defenders, NACDL would propose that the Commission include an invited downward departure when the reason for the offender’s reentry is because his family resides in the country; he has strong familial ties to the country; or other comparable situations. Such a departure would allow the court to assess the individual’s motive for reentering and, as discussed above, adjust the sentence accordingly.

Thank you for giving us this opportunity to comment on the Amendments. With respect the proposed Amendments we have not addressed in this letter, we join in the comments submitted by the Federal Defenders.

Sincerely Yours,

NACDL Sentencing Committee

JaneAnne Murray
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