UNITED STATES SENTENCING COMMISSION

WRITTEN TESTIMONY

PUBLIC HEARING
MARCH 20, 2007

U.S. SENTENCING COMMISSION
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WITNESS TESTIMONY

UNITED STATES SENTENCING COMMISSION
WASHINGTON, DC
TUESDAY, MARCH 20, 2007
PUBLIC HEARING

FJC TRAINING ROOMS A - C, CONCOURSE LEVEL
9:00 A.M. - 2:45 P.M.

INTRODUCTORY REMARKS - Chair Ricardo H. Hinojosa

PANEL ONE — 9:05 a.m.
CRIMINAL HISTORY OFFENSES

Jonathan Wroblewski
Acting Director, Office of Policy and Legislation, Criminal Division, United States Department of Justice

Miriam Conrad
Federal Public Defender, District of Massachusetts

Elisabeth Ervin
Deputy Chief Probation Officer, Western District of North Carolina
Member, United States Sentencing Commission Probation Officers Advisory Group

Q&A

PANEL TWO — 10:05 a.m.
PROPOSED AMENDMENTS FOR 2007

John C. Richter
Chairman of the Attorney General's Advisory Subcommittee on Sentencing and the United States Attorney for the Western District of Oklahoma
United States Department of Justice (with Paul Almanza (Deputy Chief, Department of Justice, Criminal Division, Child Exploitation and Obscenity Section), Joe Koehler (Assistant United States Attorney, District of Arizona), and John Morton (Deputy Chief, Department of Justice, Criminal Division, Domestic Security Section))

Jon M. Sands
Federal Public and Community Defenders

Amy Baron-Evans
Federal Public and Community Defenders

David Debold
Chair, United States Sentencing Commission Practitioners Advisory Group

Q&A

BREAK — 11:40 a.m.

PANEL THREE — 11:45 a.m.
PROPOSED AMENDMENTS FOR 2007

Honorable Reggie B. Walton
Member, United States Judicial Conference, Committee on Criminal Law

Q&A

LUNCH — 12:15 p.m.

PANEL FOUR — 1:45 p.m.
COMMUNITY INTEREST REPRESENTATIVES

Eric E. Sterling
President, Criminal Justice Policy Foundation (cocaine sentencing policy)

Deborah Small
Break the Chains (cocaine sentencing policy)

Anne E. Blanchard
Federal Community and Public Defenders (cocaine sentencing policy)

Mary Price
Families Against Mandatory Minimums and Practitioners Advisory Group (BOP reductions in sentence)

Stephen Saltzburg
American Bar Association (BOP reductions in sentence)

Q&A

PANEL FIVE — 2:15 p.m.
INDUSTRY REPRESENTATIVES

Shawn T. Driscoll
American Trucking Association (transportation offenses)

Peter J. Pantuso
American Bus Association (transportation offenses)

Frederic Hirsch
Entertainment Software Association (intellectual property offenses)

Q&A

2:45 p.m. **PUBLIC HEARING ADJOURNS**

MEMORANDUM

To: Testimony Notebook Recipients
From: Public Affairs
Date: March 20, 2007
Subject: Testimony Notebook Inserts from the Federal Public Defenders

The following is provided to update your testimony notebook:

Insert for Panel One

MIRIAM CONRAD – Criminal History Letter

Inserts for Panel Two

JON SANDS – 1) Immigration Letter (includes options 7 & 8);
2) Terrorism/Transportation Letter;
3) IP/Pretexting Letter

AMY BARON-EVANS – 1) Sex offense Letter
2) Miscellaneous Laws Letter

Inserts for Panel Four

ANNE BLANCHARD – 1) Drugs Letter
2) Sentence Reduction Letter

IMPORTANT NOTES

UNITED STATES SENTENCING COMMISSION
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PANEL ONE
CRIMINAL HISTORY OFFENSES

JONATHAN WROBLEWSKI

Jonathan Wroblewski is the Acting Director deputy director of the Office of Policy and Legislation in the Criminal Division of the United States Department of Justice. He leads a team of policy analysts and attorneys in developing, reviewing, and evaluating national crime, sentencing, and corrections policy and legislation. Previously, Mr. Wroblewski was a prosecutor with the Civil Rights Division of the Department of Justice, where he investigated and prosecuted criminal civil rights cases in federal district courts throughout the United States. He has also served as deputy general counsel and as director of legislative affairs at the United States Sentencing Commission. Mr. Wroblewski has been a member of the faculty of the National Law Center at George Washington University and of the George Mason University School of Law. He is a graduate of Stanford Law School and Duke University.

MIRIAM CONRAD
Federal Public Defender
Boston, MA

Miriam Conrad is the Federal Public Defender for the District of Massachusetts, New Hampshire, and Rhode Island. She joined the Boston Federal Public Defender Office in 1992 as an Assistant Federal Public Defender, and was a trial attorney for the Committee for Public Counsel Services from 1988 to 1992. In federal court, she has tried cases charging everything from RICO murder to union corruption. In 2001, she received the Boston Bar Association's John G. Brooks Award for representation of indigent clients. She previously has lectured on federal consequences of state court convictions, motions to dismiss in federal court, and federal sentencing issues.

ELISABETH "BETSY" F. ERVIN
U.S. Probation Officer, Western District of North Carolina

Ms. Ervin was appointed as a U.S. Probation Officer for the Western District of North Carolina, Asheville, NC in September 1991. She worked as a U.S. Probation Officer from 1991 until 1995, and as a Sentencing Guidelines Specialist from 1995 until 2000.

Since 2000, Ms. Ervin has been Supervising U.S. Probation Officer for the Asheville Presentence and Pretrial Units. She served as a District Representative to the Probation Officers Advisory Group from 1995 until 2000. In 2000, she was selected as the Fourth Circuit Representative to the Probation Officers Advisory Group.

IMPORTANT NOTES

JON M. SANDS
Federal Public Defender – Arizona

Jon M. Sands is the Federal Public Defender for the District of Arizona. He graduated from Yale University with honors and a distinction in history. He graduated from U.C. Davis Law School, where he was Editor-in-Chief of the law review and received honors and various legal scholarship awards. He clerked for the Honorable Mary M. Schroeder, United States Court of Appeals for the Ninth Circuit. He worked briefly as an associate at Meyer, Hendricks, Victor, Osborn & Maledon. He became an Assistant Federal Public Defender in 1987.

AMY BARON-EVANS
Federal Public Defender Office
Boston, MA

Amy Baron-Evans is National Sentencing Resources Counsel to the Federal Public and Community Defenders, where she represents Defenders' interests before the United States Sentencing Commission, develops sentencing policy, and provides training in sentencing advocacy. She has authored articles and lectured on a variety of criminal law issues, including computer searches, the federal sentencing guidelines, mental health issues, DNA evidence, and professional ethics for criminal lawyers. Baron Evans is a former Co-Chair of the NACDL Federal Sentencing Guidelines Committee and a former Co-Chair of the Practitioners' Advisory Group to the United States Sentencing Commission.

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PANEL TWO
PROPOSED AMENDMENTS FOR 2007

JOHN C. RICHTER
United States Attorney for the Western
District of Oklahoma;
Chairman of the Attorney General's Advisory Subcommittee on Sentencing

John C. Richter is the Presidentially-appointed United States Attorney for the Western District of Oklahoma. As U.S. Attorney, Mr. Richter leads and manages nearly 40 Assistant U. S. Attorneys (over 90 employees) handling all substantive criminal, civil, and administrative aspects of the U.S. Attorney's Office, including counter-terrorism, economic espionage, violent crime, child pornography, narcotics trafficking, including an OCEDTF drug task force, asset forfeiture, money laundering, economic crime, public corruption, criminal appellate litigation, defensive civil litigation, and affirmative civil enforcement, including procurement and health care civil fraud cases. Mr. Richter was appointed by the U.S. Attorney General in 2005 to serve as the Chairman of the Attorney General's Advisory Subcommittee on Sentencing.

From 2003 to 2005, Mr. Richter served in the senior leadership of Justice Department, including serving as Acting Assistant Attorney General for the Criminal Division at Main Justice in Washington, D.C. He led almost 500 federal prosecutors on a diverse range of national security and criminal matters, including counter-terrorism, counter-espionage, corporate fraud, violent crime, sexual exploitation of children and obscenity, computer crime, international narcotics trafficking, money laundering, public corruption, election fraud, transnational organized crime, and overseas prosecutorial and police training and assistance programs, including in Iraq and Afghanistan. He regularly advised the Attorney General and other senior Department leadership regarding sensitive criminal operations and cases, law enforcement techniques, and policy decisions. He also served as Member of the President's Corporate Fraud Task Force, as Co-Chairman of the Human Trafficking and Smuggling Center, as a Commissioner (*ex officio*) on the U.S. Sentencing Commission.

Mr. Richter previously served as an Assistant United States Attorney in Oklahoma City and Atlanta and as state prosecutor. From 1994 until 1998, he practiced privately at King & Spalding, where he represented individual and institutional clients on a wide range of civil matters. A 1992 graduate of the University of Virginia School of Law, Mr. Richter began his legal career as a law clerk for the Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia.

He is married and has two children.

JOHN C. RICHTER
UNITED STATES ATTORNEY
WESTERN DISTRICT OF OKLAHOMA
CHAIR, ATTORNEY GENERAL'S ADVISORY SUBCOMMITTEE
ON SENTENCING

PRESENTED TO THE
UNITED STATES SENTENCING COMMISSION

MARCH 20, 2007

INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is a pleasure to appear before so many of you with whom I worked. Today I will address just a couple of the issues raised in the "Proposed Amendments" that you issued for comment on January 23rd. As is customary, the Department of Justice will be sending to the Commission, in a few days, a far more comprehensive response to all of the proposals.

I have a team of experienced prosecutors with me today. I ask the Commission's indulgence if I call upon one of them to respond to a particular question that you may have.

I would like to express the Department's appreciation for all of the hard work that your staff has done over the past year - from collecting and analyzing the data contained in the Booker Report and the Supplemental Quarterly Data Reports, to conducting the roundtables on Criminal History and Simplification,

and perhaps most significantly, working with all of the interested parties in developing guideline proposals for your consideration in response to the myriad of new and amended statutes. I believe that this informal but open dialogue has helped everyone in understanding and narrowing the issues. Their expertise has assisted us in being able to frame our suggestions into viable alternatives.

But before I address a specific topics, I would like to note that we are at a unique place in the history of the guidelines. At least for the time-being, the guidelines are advisory and while the Department has suggested some possible legislative responses, it is clear that everyone is waiting for the Supreme Court's decisions in *Rita* and *Claiborne*. In the meantime, the data that the Commission has collected has helped inform the discussions about the impact of *Booker* and its progeny.

The Department believes that in establishing the priorities for this year, the Commission correctly focused on some of the larger, systemic questions that are constantly raised, and decided, except as to immigration, to address only those guidelines that have been impacted by newly enacted or amended statutes.

In recognition of these Commission priorities, the Department is not seeking increases to the guidelines except in response to specific, newly-enacted, mandatory minimums or where the maximum sentence has been raised - i.e., where it is clear that Congress intended that sentences should be increased. In those instances we have been guided by the principle of proportionality with other existing guidelines.

I would now like to highlight some of our positions regarding the proposals that you have under consideration.

I. IMMIGRATION

First let me address immigration and particularly the proposed amendments to 2L1.2. We believe that in contrast to the other guidelines, this one is in dire need of change. The Courts, the probation offices, defense attorneys and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. In FY 2006, the Courts handled over 17,000 immigration cases (24.2% of it cases). We must do more, however, to ensure that we are fully utilizing the resources that have been given to us by Congress to enforce our immigration laws. The simple reality is that the current immigration guidelines provide a significant barrier to doing more. As you are aware, the Department favors a variation of either Option 6 or Option 7.

We do not favor either of these options as a means to increase the overall sentences for illegal re-entry cases. Rather, we favor these as a means to achieving fair sentences more efficiently, thereby allowing us to prosecute more cases. We originally offered the potential triggers in Option 6 as examples only, and recognize that the Commission may need to employ different triggers to develop a balanced Guideline. We have reviewed the changes included in Option 7, and the accompanying data, circulated by your staff last week, and believe that it achieves these goals of increased simplicity and net neutrality in terms of the total number of defendants who would receive the particular adjustments to their base offense level.

In its current form, § 2L1.2 encourages endless litigation over whether

convictions qualify for enhancement under the "categorical approach" outlined in the Supreme Court's *Taylor* decision. This litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the defense. As you know Chairman Hinojosa, this burden falls disproportionately on the five Southwest Border judicial districts, who prosecute the overwhelming majority of immigration related cases.

Making the Guidelines simpler will in turn make the system stronger and allow these cases to be handled more efficiently. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies or trigger specific offense characteristics under § 2L1.2. Defense attorneys must perform the same analysis, and eventually judges must do so as well. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds.

Options 6 and 7 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases – an extremely important consideration given the increasing volume of cases. It is important to emphasize also that the benefit will not be felt in just the cases prosecuted but also in the cases that we review and decline to prosecute criminally because it will make it far easier for prosecutors to ascertain the possible sentence and, therefore, whether the case merits the expenditure of federal resources. The Guideline calculation would be driven primarily by the length of sentence imposed

for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. After all, the present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. We also note that present Guideline 4A1.3, (Criminal History) provides judges with the flexibility to address prior sentences that overstate the seriousness of an underlying offense.

Finally, let me address one question that has been asked - should the Commission wait to amend 2L1.2 until Congress considers again this year possible amendments to the Immigration and Nationalization Act? We would answer emphatically - no. We need relief now. First, as the media has repeatedly reported there is a good chance that nothing will happen and we will be in the same position we were last year at the end of the Commission cycle. Second, even if legislation is passed, it would most likely have little, if any, impact on the changes proposed in option 6 or 7. The compromise Senate bill, S 2611, which was passed by the Senate last year and is the basis for discussions this year, amends the sentencing scheme for illegal entry and re-entry violations so that they are based in most part on the length of sentence imposed for prior convictions rather than the type of offense. We would submit that delaying change to 2L1.2 for another year only prolongs the expenditure of unnecessary resources and continues time consuming litigation.

Let me also address briefly the proposed amendments to the tables in §§ 2L1.1 and 2L2.1, respectively. These tables provide for increases in sentence based on the number of aliens or the number of documents involved in a given offense. As I believe you heard at your hearing last month, the Department strongly supports the idea of amending both tables to cover a broader numerical range. Our experience reveals that the tables do not adequately address the scale of the more serious alien smuggling and immigration fraud offenses we now encounter. The challenges we face in enforcement in this area have grown dramatically since these guidelines went into effect. Offenses involving hundreds of fraudulent immigration documents have become common, and offenses involving a thousand or more documents are not unique. Reform is needed in order to provide a uniform mechanism for handling cases of this size in place of the current undefined upward departure process. This, in our view, serves the twin purpose of proportionality and uniformity.

We think both of the options under consideration are an improvement over the existing Guidelines. We favor option two because it offers a more discriminating approach to the escalating seriousness of offenses involving 6 to 99 aliens or documents. Our experience reveals that the degrees of misconduct between the extremes of 6 and 99 aliens or documents are more significant than the present tables acknowledge. For instance, a smuggling offense involving 23 aliens generally is indicative of greater culpability than one involving 8 aliens, but the current table treats the offenses identically.

Option 2 similarly is superior because it provides greater offense-level increases for smuggling and fraud offenses involving larger numbers of aliens or documents. We welcome such increases because organized alien smuggling and

immigration fraud are two of the most serious enforcement problems we face today.

Finally, let me respond to your request for comment regarding whether the Department believes the base offense levels for §§ 2L1.1, 2L2.1, and 2L2.2 should be increased. With respect to § 2L1.1, we do not believe the Commission should increase the current base offense level of 12, assuming the Commission adopts either option 1 or 2 to amend the table governing the number of aliens involved in the offense. Regarding § 2L2.1, last year we recommended that the Commission raise the current base offense level from 11 to 12 to match the base offense level in 2L1.1, and we stand by that recommendation here. As for § 2L2.2, we believe the base offense level of 8 should be increased, especially for offenses involving immigration or naturalization documents. Under the present Guideline, most offenders face a zone A sentence of 0 to 6 months upon conviction for an offense involving a green card, naturalization certificate, or asylum claim – this is insufficient punishment in light of the seriousness of the offense.

SEX OFFENSES

With regard to sex offenses there are a number of proposed amendments, almost all of which are in response to amendments to various statutes contained in the Adam Walsh Act. I do not intend to discuss all of them in these opening remarks. I will leave those details for our discussions and our letter. I would like to address one issue, however, that was raised at the hearing last month - the issue of failure to register.

In the federal system the Bureau of Prisons and federal probation offices are

required to notify federal sex offenders that they must register as required by the Sex Offender Registration and Notification Act (SORNA) pursuant to 18 U.S.C. § 4042(c). Besides having to register while incarcerated, SORNA requires federal sex offenders to register as a mandatory condition of probation, supervised release, and parole, as provided in 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a), so federal sex offenders become aware of their registration obligations by that route as well. With respect to non-federal sex offenders, all of the states should be informing sex offenders concerning registration obligations when they are released or sentenced. This was already a requirement under the old Jacob Wetterling Act sex offender registration and notification standards, found at 42 U.S.C. § 14071(b)(1)(A), and it is equally a part of the SORNA standards, found in § 117.

Liability under 18 U.S.C. § 2250 is limited to cases in which a person "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act." Consistent with *Lambert v. California*, 355 U.S. 225 (1957), we understand this to require a violation by the offender of a known obligation to register or update a registration. Hence, convictions can occur under 18 U.S.C. § 2250 only where the government has proven beyond a reasonable doubt that the defendant violated a known registration obligation, or he admitted as much through a guilty plea.

Looking forward, we will be providing guidance to the states about notifying sex offenders concerning registration requirements which are new or different from those to which they were previously subject because of the SORNA reforms. This will be part of the general proposed guidance for state implementation of SORNA which we hope to get out for public comment within the next few weeks. But again, this is getting a bit far from sentencing. Suffice it

to say that if a sex offender has not been notified about a registration requirement, and it is not otherwise provable that he is aware of that requirement, then he cannot be convicted under 18 U.S.C. § 2250 for the reasons explained above.

With regard to the specific proposal to create new guideline 2A3.5 "Failure to Register as a Sex Offender," we believe, that it is appropriate to amend the specific offense characteristic for an offense against a minor to track the Congressional directive, and not be limited to sex offenses against a minor. Accordingly, "committed a sex offense against a minor" should be changed to, "committed an offense against a minor" - such offenses could include non sexual assaults, kidnaping, drug distribution and manufacturing, and alien smuggling.

Additionally, we believe that this guideline should reflect the ten year maximum penalty for this offense by providing a guideline sentence that would encompass ten years' imprisonment for an aggravated offense. For example, assuming an offender was in criminal history category III, was required to register for a Tier III offense, and committed an offense against a minor while not registered, that offender should face a guideline range encompassing 120 months before acceptance of responsibility. We believe this can be accomplished by increasing proposed SOC (1)(A) to 12 levels. This result in those whose registration was for a Tier III offense to be at level 28 before acceptance, or a sentencing range of 97 to 121 months.

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

This punishment would be more consistent with the intent of Congress in passing the Act.

With regard to the proposed reduction for a voluntary attempt to correct the failure to register, the revised proposal has two options, in response to the Congressional directive in § 141(b)(3) of the Walsh Act. We recommend that the reduction for voluntary attempts to comply with registration requirements should not apply in cases where offenders actually commit qualifying offenses. Simply put, unregistered offenders who commit these offenses are precisely the reason that the registration requirements are in place, and it would be extraordinarily unjust to provide these offenders – who victimized others yet again – a reduction in their sentences.

In considering these options, the Commission should first recognize the affirmative defense at 18 U.S.C. § 2250(b), which in our opinion would prevent many if not most cases where offenders voluntarily attempted to comply with registration requirements from ever reaching the sentencing phase. The Commission should also recognize that the underlying purpose of this legislation is to provide an incentive for sex offenders to register as required by establishing a meaningful consequence for their failure to do so. Finally, the Commission should recognize that whether an offender voluntarily attempted to correct a failure to register offense is an issue only in cases where the offender knowingly committed that offense. Accordingly, as a completed offense has already occurred, arguably the base offense level would be an appropriate range for a case where, having committed the offense, the offender later attempts to correct his failure to register.

That said, of the two options under consideration we recommend Option 1 with a two level decrease. Option 2, which would allow for a downward

departure, is not limited to cases where the offender does not commit a specified offense while unregistered. Accordingly, it would potentially provide a windfall reduction to offenders who commit specified offenses while unregistered, which is nonsensical as those are the offenders least meriting a sentence reduction. In contrast, Option 1 rightly would deny this reduction to offenders who committed specified offenses while unregistered.

Under our suggestion, an aggravated offender such as one whose registration was for a Tier III offense and who committed an offense against a minor while unregistered would face a guidelines sentence encompassing the maximum statutory penalty, assuming criminal history category III. At the other extreme, a criminal history category III offender whose registration was for a Tier I offense, who did not commit a qualifying offense while unregistered, and who voluntarily attempted to correct his failure to register would be at level 8 (6-12 months) or 10 (10-16 months). In the middle, still assuming the offender is in criminal history category III, an offender who did not commit a qualifying offense while unregistered and whose registration was for a Tier II offense would be at level 14 before acceptance, or 21-27 months. We believe our suggestion appropriately creates a sentencing scheme where aggravated offenders will face sentences encompassing the statutory maximum while also taking into account the relative severity of different types of violations and the mitigating factor of an offender's voluntarily attempting to correct the failure to register before being informed of the violation by law enforcement.

With regard to proposed § 2A3.6 "Aggravated Offenses Relating to Registration as a Sex Offender," the current proposal would simply state that the guideline sentence is that required by statute. This is an appropriate guideline for

§ 2260A, as the sentence for that offense is set at 10 years in addition and consecutive to the penalty for the underlying offense. However, it is not appropriate for § 2250(c), because the statutory sentence has such a broad range – between 5 and 30 years in addition and consecutive to the underlying § 2250(a) offense. In essence, the current proposal would discount Congress's decision to set a minimum and maximum term for § 2250(c) offenses by specifying that the guideline range is the minimum term.

In order to account for the significantly dissimilar penalties under the two statutes, we recommend that the proposed guideline be revised so that it preserves the current formulation for § 2260A offenses and creates a framework for § 2250(c) offenses that would appropriately provide for sentences other than the mandatory minimum term. Our recommended approach would start with a base offense level of 25, the first offense level exceeding the mandatory minimum for category II offenders. We would then suggest having specific offense characteristics that would provide for up to level 41, encompassing 30 years for these offenders, in aggravated cases. In order to have appropriate gradations accounting for injuries to minors in cases where the offender committed a crime of violence against a minor while unregistered, we have considered the enhancements at § 2A2.2(b)(3) in developing this proposal and have incorporated similar enhancements here. While the specific offense characteristics would be similar to those under § 2A3.5, we believe that any possible double-counting concerns would be minimized since Congress specified that the penalty for a § 2250(c) offense is in addition and consecutive to the underlying penalty for the § 2250(a) offense.

II. DRUGS

The Adam Walsh Act created a new offense in 21 U.S.C. § 841(g), which provides a penalty of not more than 20 years for distributing a date rape drug over the internet knowing or with reasonable cause to believe it would be either 1) used to commit criminal sexual conduct or 2) that it was being distributed to any unauthorized purchaser. The Department supports Option Three of the Proposed Amendments. That option provides a six level enhancement with a floor of 29 if the person knew the drug would be used to commit criminal sexual conduct, a three level increase with a floor of 26 if the person had reasonable cause to believe the drug would be used to commit criminal sexual conduct, and a two level increase if the drug were sold to an unauthorized purchaser.

We believe that Option Three is preferable because it establishes a significant sentencing floor (29), whereas Options One and Two do not. The Department believes that situations involving knowing distribution of a drug over the internet to commit a criminal sexual assault require a significant sentencing floor. A mere two or four level increase to what will generally be an extremely low level offense is not sufficient to adequately reflect the severity of the act, namely knowingly facilitating a criminal sexual assault. It also provides for a more appropriate enhancement (six levels) than the smaller enhancements in Options One and Two (two or four levels). A two level increase, which is now used when a defendant distributes an anabolic steroid to an athlete, would not result in a proportionally appropriate sentence. A conviction under 21 U.S.C. § 841(g) requires proof that the defendant distributed the drug knowing or having reasonable cause to believe that it will be used to commit a serious sex offense and

should, thus, be punished more severely than the distribution of steroids.

We also prefer Option Three because it provides a tiered approach that punishes less severe conduct – knowing distribution with reasonable cause to believe the date rape drug would be used for illicit purposes – less severely than distribution knowing the date rape drug would be used for illicit purposes. In general, the Department favors tiered approaches that establish more stringent guidelines for the most culpable, and allow lesser sentences for less culpable individuals.

Finally, Option Three provides the appropriate two level enhancement for illegal distribution to an unauthorized purchaser. This enhancement is similar to the enhancement applicable to those who use the internet for mass marketing.

With regard to the new offense in 21 U.S.C. §860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing (or possession with intent to distribute) methamphetamine on premises in which a minor is present or resides, the Department strongly supports Option Two, which provides a six level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases.

Option Two establishes a tiered, measured response which properly punishes at a significant level offenders who manufacture methamphetamine in the presence of minors, while imposing a lesser offense level for defendants who distribute methamphetamine on premises. In our view, Option Two appropriately reflects the severity of the offense, while protecting the public from further crimes of the defendant.

As recognized by Congress and as I can attest to first-hand given the

experience of Oklahoma with methamphetamine, the manufacture of methamphetamine in a home where a child is present involves inherently a awful risk of harm to that child. These children are exposed to toxic chemicals and vapors and left with not only their parents but all kinds of strangers whose behavior is corrosive to children. Option One only provides a two level increase with no floor in situations in which the Government proved the manufacture of methamphetamine where a child was presented or resided. This minimal enhancement fails to reflect the severity of the offense, e.g., the actual or potential harm caused by manufacturing methamphetamine where children are present, and the intent of Congress that such activity be punished severely.

We also believe that Option One is inadequate in that all distribution convictions under § 860a would only be subject to the two level increase, as opposed to a three level increase with a 15 floor as provide in Option Two. Again, the meager two level enhancement fails to adequately reflect the harm caused by distribution on premises where a child is present and Congressional intent to differentiate between offenses.

In the event the Commission adopts Option One, then at a minimum, the Department respectfully requests that the six level enhancement with a 30 floor be applicable to distribution, and possession with intent to distribute and manufacture cases which would allow the Government to obtain meaningful sentences for § 860a offenses involving distribution and possession with intent to distribute and manufacture cases.

CRACK

Finally let me briefly address the issue of Cocaine Sentencing Policy. In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine offenses. The existing policy – including statutory mandatory minimum penalties and sentencing guidelines – has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. The problems that crack brought to our community have not gone away. As the United States Attorney I have a duty to not only prosecute the large organizations but to protect our neighborhoods from the low level traffickers whose activities prevent law abiding residents from enjoying the full benefits and quality of life they deserve. In my District, therefore, our Oklahoma City Metropolitan Gang Task Force is aggressively pursuing local traffickers and gangs who use violence to protect and expand their sale of crack cocaine and thereby turn neighborhoods into shooting galleries.

That said, the Administration recognizes that the Commission and many others have been especially concerned that the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. We believe it may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum and guidelines sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission,

the Administration, and the Congress will continue its work together to determine whether any changes are indeed warranted. We think this collective work is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We are committed to continuing our participation in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

We continue to stress that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. The Commission, however, has a critical role to play. We think the Commission should continue to provide Congress, the Department of Justice, and the general public updated information on the current overall sentencing environment, crack and powder cocaine sentences being imposed in district courts around the country, and other research and data that will assist in the consideration of federal cocaine sentencing policy. We think all of this information will help ensure that federal policy will be crafted in a way that best achieves the purposes of sentencing. While we look forward to continuing all of this work with the Commission, we reiterate here that we would oppose any sentencing guideline amendments that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

CONCLUSION

That concludes my prepared remarks. The Department will be submitting within a few days a letter responding to many of the other issues raised in the Commission's *Proposed Amendments*. Let me say again how much I appreciate the Commission's time and attention on these important issues. The Department stands ready to assist the Commission in any way.

I will be glad to answer any questions.

Dear Commissioners:

Attached is the Federal Public Defenders' REVISED set of comments on Option 7 and their proposed option 8. It supercedes the comments that were electronically sent to you Friday.

Mike & Jeanne

FEDERAL PUBLIC DEFENDER
District of Arizona
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March 16, 2007

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Option 7 for Amendment of § 2L1.2

Dear Judge Hinojosa:

Thank you for providing us with the Proposed Option 7 for Amendment of § 2L1.2. We have had a chance to review it, and look forward to more in-depth analysis once we are able to examine the data on how this impacts cases. With that in mind, and to help the Commission in addressing the need to rationalize and simplify the guideline, we provide the following comments on behalf of the Federal Public and Community Defenders.

One persistent and across-the-board criticism of the current guideline has been its complexity. This issue of complexity arises whenever a guideline seeks to enumerate offenses, or uses enumerated past convictions for enhancements. The Commission recognizes this, and has moved in Option 7 to an acknowledgment that the sentence imposed on past convictions serve as an equally effective barometer for seriousness while at the same time eliminating the uncertainties inherent in the categorical approach. The Commission should adopt this approach completely and dispense with enumeration except for national security and terrorism convictions, with the definition of terrorism offenses revised as below.

The reasons the Commission should adopt this approach are the same as the reasons the Commission saw the need to move to an Option 7, that is, to avoid the complexities associated with any categorical approach. There are myriad potential problems with the proposed definitions of the offenses, the elements of which they are comprised, and the danger of disparity as the various states inevitably have quite different definitions. Enumeration is categorization and hence a return to complexity, uncertainty, and disparity.

Most of all, the enumerations are not necessary. A serious prior conviction of a true "murder," forcible rape, serious offense of child sexual abuse or child pornography cannot be a murder, forcible rape or the most serious sex offense if it was not punished by at least 48 months. A true serious offense will be punished severely, and will fit easily into the 48-month sentence imposed category, subject to 16 levels. A less serious offense will fall in the 24-month sentence imposed category, subject to 12 levels.

One example will work well to illustrate the unnecessary complexity and potential overbreadth of the enumerated offense approach in (A). The definition of "offense of child sexual abuse" has numerous problems. First, it would result in a 16-level increase, the same as for murder and forcible rape, for generic "statutory rape" (*see, e.g., United States v. Eusebio-Giron*, 2006 WL 1735866 (5th Cir. 2006) (17-year-old defendant, who later married his 14-year-old girlfriend, received a 57-month sentence for "statutory rape" under current definition of "crime of violence"), and for federal statutory rape ("sexual abuse of a minor" is statutory rape, *see* 18 U.S.C. § 2243(a)), *i.e.*, a 19-year-old boy who has consensual sex with his 14-year-oild girlfriend). Second, it is repetitive in including both generic and federal statutory rape. Third, the age of 18 is not the cutoff for statutory rape under federal law, *see* 18 U.S.C. § 2243(a) (under 16 years of age), or the law of the majority of states.

The second area in Option 7 in need of modification is the threshold of "at least 12 months" for the 16 level increase at § 2L1.2 (b)(1)(B) ("two prior convictions each resulting in a sentence of imprisonment of at least 12 months"), and the 8 level increase at § 2L1.2 (b)(1)(D) ("a prior conviction resulting in a sentence of imprisonment of at least 12 months"). It is imperative that the Commission use "a sentence of imprisonment exceeding one year and one month," not "at least 12 months," in (B) and (D). A choice of twelve (12) months is a decision to write in disparity. This is because a sentence of 12 months means vastly differently things across the 50 states. In one, it is the sentence that is pronounced when the result is to have someone released on that day after serving two months to effectuate time-served. Because it is the sentence *imposed* (not served), in another state, it carries 10 months in jail - no questions asked. In others, it is the reflexive sentence of judges and prosecutors for very low-level crime with no discernible harm or victim. It paints with too broad a brush, capturing a disparately wide range of criminal conduct. A *meaningful* cutoff is "a sentence of imprisonment exceeding one year and one month," as in USSG §4A1.1(a). To comport with both simplification and consistency across the guidelines, it should read exactly as in §4A1.1(a). This definition and application are well-settled.

A similar improvement should be made in §2L1.2(b)(1)(D) ("three prior convictions resulting in a sentence of imprisonment of at least 90 days, increase by 8 levels") and §2L1.2(b)(1)(E) ("a prior conviction resulting in . . . a sentence of imprisonment of at least 90 days, increase by 4 levels"). This proposed change violates the stated premise of Option 7-sentence neutrality. Currently, there must be three prior convictions of crimes of violence or drug trafficking offenses in order to receive a 4-level increase; otherwise, there is no increase. Option 7 would give an 8-level increase for three prior convictions of any kind if they resulted in a sentence of imprisonment of at

least 90 days, and a 4-level increase for one prior conviction resulting in a sentence of imprisonment of at least 90 days. Option 7 would obviously raise sentences in this respect. A middle ground can be achieved by requiring a 4-level increase for three prior convictions each resulting in a sentence of imprisonment of at least 60 days. Such a change represents a measured attempt to hold sentences steady while maintaining consistency with the cutoffs in Chapter Four, namely § 4A1.1(b).

Further, the Commission should use "felony," *i.e.*, punishable by more than one year, in (A)-(D) (as distinguished from "any" offense in the alternative in (D)). This requirement ensures that the punishment is for offenses that are "punishable" by more than one year across the board and across the nation, reflecting a general recognition of seriousness, and again, does not invite disparity by sweeping in a wide range of possibilities for much less serious conduct. In an appropriate case, the court can take offenses punishable by a year or less into account.

Finally, if the Commission retains "terrorism offense" as an enumerated offense, it should simplify the definition. As written, it is defined as "any offense involving, or intending to promote, a 'Federal crime of terrorism,' as that term is defined in 18 U.S.C. § 2332b(g)(5)." *See* Application Note 1(B)(vii). This is the same definition used in § 3A1.4, the upward adjustment in Chapter Three. In applying this definition, the courts do not simply look to the offense of conviction. Rather, they engage in a complex case-by-case factual inquiry: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant is responsible involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 U.S. 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003). This is particularly inappropriate since it is a prior conviction that is at issue. The Commission should adopt the following offense of conviction definition: "'Terrorism offense' means a 'Federal crime of terrorism' as defined in 18 U.S.C. § 2332b(g)(5)," first, because it is straightforward and simpler to apply, and second, because to do otherwise would permit a 20-level increase for offenses that are not terrorism offenses.

These comments are made, as noted above, without access to the data on Option 7. We propose an Option 8, attached, that incorporates our suggestions. We request that the Commission run the data using our proposal to see how it compares on a system-wide level.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Judith Sheon, Staff Director
Ken Cohen, General Counsel
Martin Richey, Visiting Assistant Federal Public Defender

[Option 7 (New):

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

(A) a prior felony conviction for a national security offense or terrorism offense, increase by 20 levels;

(B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by 16 levels;

(C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by 12 levels;

(D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by 8 levels;

(E) a prior felony conviction not covered by subdivisions (A) through (D) or any prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

Deleted: a prior conviction for murder, rape, a child pornography offense, or an offense of child sexual abuse; (ii)

Deleted: i

Deleted: of at least 12 months

Deleted: of at least 12 months or three prior convictions each resulting in a sentence of imprisonment of at least 90 days

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Deleted: for any felony

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Deleted: [any other sentence of imprisonment][

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Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) *Definitions.—For purposes of subsection (b)(1):*

(i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.

(ii) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).

(iii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.

(vii) "Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).

3. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.*

4. *Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.*

5. *Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

Deleted: *(i) . "Child pornography offense" means an offense (I) described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States.*¶ ¶

Deleted: *i*

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Deleted: *(iii) . "Murder" means an offense (I) covered by §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder); or (II) under state or local law consisting of conduct that would have been an offense under 18 U.S.C. § 1111 if the offense had taken place within the territorial or maritime jurisdiction of the United States.*¶

Deleted: *iv*

Deleted: ¶ *(v) . "Offense of child sexual abuse" means an offense in which the victim had not attained the age of 18 years and that is any of the following: (I) an offense described in 18 U.S.C. § 2242; (II) a forcible sex offense; (III) statutory rape; or (IV) sexual abuse of a minor. .*¶

Deleted: *vi*

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Deleted: *,*

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(E) a prior felony conviction not covered by subdivisions (A) through (D) or any prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by 4 levels.

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August 3, 2005

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Washington, DC 20002-8002

Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109–9); Intellectual Property Protection and Courts Amendment Act of 2004 (Pub. L. 108–482); CAN SPAM Warning Label Offense (Pub. L. 108-187 section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work whenever we believe it would be useful.[1] We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

[1] 28 U.S.C. § 994(o).

The FECA directs the Commission to "review and, if appropriate," amend the guidelines and policy statements applicable to intellectual property offenses,[2] in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is "sufficiently stringent" to "deter, and adequately reflect the nature of" such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet – regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of "financial gain" to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was "sufficiently stringent to deter such a crime," and required that the guideline provide for "consideration of the retail value and quantity" of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

[2] See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,[3] i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid $192,000 for the infringing items, and the total retail value of the infringed items was $1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over $1 million as well as an uploading enhancement, resulting in a range of 46-57 months.[4] Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.[5] See U.S. Sentencing Commission, No

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[3] U.S.S.G. App. C, Amendment 593.

[4] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

[5] Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer "during the preparation of the pre-sentence report" a statement on "the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact."[6] This seems clearly to invite the Probation Officer to use the victim's estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of "loss" in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that "the impact of downloads on sales continues to be small and statistically indistinguishable from zero,"[7] which is inconsistent with industry claims that file sharing explains the decline in music sales

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loss or gain due to the offense," U.S.S.G. § 2B5.3, comment. (backg'd.) (1999), because not every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

[6] See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

[7] See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter "Harvard Study"), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

between 2000 and 2002.[8] Unlike other studies, which rely on surveys, this study directly observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.[9]

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.[10] For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.[11] This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.[12] In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.[13] Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.[14]

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.[15]

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.[16]

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[8] File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. Id. at 1-2.

[9] Id. at 6, 11.

[10] Id. at 22.

[11] Id. at 23, 25.

[12] Id. at 2.

[13] Id. at 3.

[14] See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at http://www.ecommercetimes.com/story/3837.html.

[15] See RIAA 2004 Yearend Statistics (Exhibit A).

[16] Harvard Study at 1, 24.

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment, a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.[17]

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.[18]

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.[19] Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).[20] Without knowing the specific departure reasons, it at least appears

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[17] Id. at 24.

[18] Id. at 2, 25.

[19] See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

[20] Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.[21] Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

> Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an "enhancement" is appropriate for the "display, performance, reproduction or distribution of a copyrighted work," in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry's representation that "a significant factor" in its "estimated $3.5 billion in annual losses . . . because of hard-goods piracy" stems from the situation where "an offender attends a pre-opening `screening' or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie," and then sells the recording as DVDs or posts it on the Internet for free downloading.[22]

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of $9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.[23] The

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[21] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

[22] H.R. Rep. No. 109-033.

[23] See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.[24]

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.[25] The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is $20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

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[24] See RIAA 2004 Yearend Statistics (Exhibit A).

[25] U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called "warez scene" were indicted for copyright infringement. According to the press release and indictments, "warez" groups are at the "top of the copyright piracy supply chain" and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.[26] These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.[27] Files are shared for free using file transfer protocol ("FTP") or peer-to-peer ("P2P") networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. "Warez" groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their "signature mark" on the infringing items they send out into the world. In the case mentioned above, the government removed "more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels," and

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[26] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[27] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.[28] Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.[29] The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.[30]

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

> 2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**
>
> Application Notes
>
> (20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -
>
> (A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

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[28] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[29] See Harvard Study at 7-8.

[30] See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

We believe a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and, (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples. A one-level enhancement amply addresses the concerns of Congress.

Further, we propose an application note to define "materially false." This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes "sexually oriented" material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. "Sexually oriented" has the definition of "sexually explicit" in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a "victim," and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to immigration that were published on January 30, 2007.

The proposed amendments would substantially increase the prison sentences for individuals convicted of immigration offenses, *i.e.*, smuggling of undocumented aliens, trafficking in immigration documents, and returning to the United States illegally. These enhancements are not justified by any new legislation, current sentencing practices, the nature of immigration offenses, reliable data, or the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). As a matter of structure, Option 6 of the proposed amendment to § 2L1.2 is of interest as it endeavors to further the Commission's overarching goal of simplifying the guidelines. However, we are hesitant to support or oppose that option without further data.

I. Number of Aliens and Number of Documents, §§ 2L1.1, 2L2.1

A. § 2L1.1 (Smuggling, Harboring, Transporting Aliens)

Section 2L1.1(b)(2) currently provides a 3-level enhancement for offenses involving 6 to 24 aliens, a 6-level enhancement for offenses involving 25 to 99 aliens,

and a 9-level enhancement for 100 or more aliens. In Option 1, the Commission proposes additional increases for larger groups of aliens. Last year, the Commission attempted to justify an identical proposal based on the concerns of prosecutors regarding the adequacy of punishment for those defendants who smuggle a large number of illegal aliens. *See* Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines at 7 (hereinafter "Interim Report"). The Commission also referred to two bills introduced in the House that contained directives to the Commission to increase penalties associated with the number of aliens smuggled. *See id.* at 8. However, these bills were never passed, and Congress did not enact any new legislation that would in any way support this amendment. Most significantly, the Commission's own data reveals that less than 2% of the cases involve more than 100 aliens. *See id.* Increasing penalties in the absence of supporting legislation, directive, data or analysis runs contrary to the Commission's role as an independent expert body. It would appear that it is more appropriate to continue to allow courts to vary from the Guidelines in cases involving significantly larger groups of aliens.

Option 2, with its additional calibrations, will result in substantially higher sentences not only for those defendants whose offense involves more than 24 aliens, but also for an unknown number of the nearly 46% of defendants whose offenses involved 6 to 24 illegal aliens. *See id.* Unlike the purported justification for increasing penalties when 100 or more aliens are involved, the proposed three-level increase in sentences for offenses involving 16 to 24 aliens and 50 to 99 aliens is lacking justification. Indeed, the Commission's data reveals that the vast majority of cases involve fewer than 25 aliens and that courts sentence defendants within the advisory guideline range in more than 64% of cases and *below* the guideline range in nearly 34% of cases. *See id.* at 4. There is no indication that higher sentences are warranted for these cases.

The current advisory guideline allows the court flexibility to account for differences in the number of aliens and any related differences in culpability. Under this advisory system, the courts have ample ability to account for the number of aliens smuggled by either the organization or the individual. At a time when the Commission has committed itself to simplifying the guidelines, the Commission should not be making them more complex with unnecessary and unjustified numerical calibrations.

B. § 2L2.1 (Trafficking in Immigration Documents)

The Commission proposes to add enhancements for trafficking in large numbers of documents parallel to the alien smuggling enhancements with a ratio of one document to one alien. Counting documents on a par with aliens overstates the harm in document cases, and appears to be animated by little more than historical consistency with the structure of § 2L1.1 and its method of measuring culpability by counting aliens. *See*

Interim Report at 15-16. As the Department of Justice representatives emphasized at various roundtables, and as we stressed at the February 14 hearing, one of the harms of alien smuggling is the inhumane handling of human beings. Aliens are often transported in dangerous, over-crowded vehicles and kept in substandard housing. *See also* Interim Report at 11. In contrast, the major harm with respect to documents is in their potential use for illegal activity, but more often they are used for otherwise lawful employment. Thus, the harm would appear to be less aggravated. One document is not the same harm as one person. The ratio of documents to aliens should be the subject of study to arrive at a more suitable ratio.

Further, the Commission's data reveal that the majority of cases involve five or fewer documents, which range among a wide variety of different types of documents. *See id.* at 15, 18. Unlike human beings, immigration documents are relatively easy to produce and transport in bulk. They may also be counterfeit, which would suggest that the potential harm is more fairly measured not by how many documents are involved but by how well the documents are likely to pass as authentic. To count obviously counterfeit documents at the same rate as real human beings ignores the fundamental distinctions at play. Rather, the Commission should trust courts to measure the real harm involved and use the advisory guidelines to arrive at the appropriate punishment.

The effect of Option 2 in the proposed amendment is the same as the effect of Option 2 in the proposed amendment for § 2L1.1, adding unnecessary specificity and complexity and essentially increasing potential penalties in almost every category. Especially in light of the new enforcement initiatives enacted in recent times, the Commission should not increase these penalties absent data and analysis to support them. The Commission should instead study and observe the broader trends as they play out over the next several years, while allowing courts to utilize the flexibility already present in the advisory guidelines.

II. § 2L1.2 (Illegal Reentry)

A. Options 1 through 5

Our previous comments regarding Options 1 through 5 can be summarized as follows:

- **The Commission has never justified the 16-level enhancement, which is far greater than similar increases in other guidelines that depend on prior convictions and does not fairly correspond to the potential danger to the community.**

- **The term "aggravated felony" is over-broad and ambiguous, and its use would drastically increase sentences for all manner of individuals convicted of non-violent offenses and even misdemeanors. Indeed, current practice reveals that even the Department of Justice believes that lower sentences are appropriate for most of these individuals.**

- **Option 5 would be unconscionable and probably unconstitutional in that it places the burden of proof on the party least able to sustain it.**

- **Option 4 would appear to be the least ill-advised with certain modifications, including increasing the requisite sentenced imposed for the 16-level enhancement and limiting the definition of "crime of violence."**

- **We would support an amendment that would subject prior convictions used to increase a defendant's offense level to the same remoteness rules in Chapter 4.**

We submitted a proposed guideline for illegal reentry offenses that we believe more accurately reflects the severity of the offense. This proposed guideline is similar in structure to the firearms guideline, providing enhancements based on the nature and number of prior felony convictions and limiting consideration to convictions within the time limits set forth in Chapter Four. Although our proposal does not define "crime of violence" as it is defined in § 8 U.S.C. § 16, it is premised on retaining the structure of linking offense level increases to prior "aggravated felonies" and "crimes of violence." This proposal still merits consideration.

B. Option 6

By largely eliminating the need for the court to engage in the categorical approach in determining whether to apply an enhancement based on a prior conviction, Option 6 appears to be a simpler way to calculate sentences under this guideline. Simplicity, though, is not a substitute for fairness. The proposed triggers for the steepest increases remain unjustified by any policy or analysis and may still result in extremely steep increases based on relatively minor prior offenses.

Further, Option 6 includes severe consequences for very short prior sentences. Such short sentences are frequently not a result of culpability, but a result of poverty. As written, the proposal provides for a 16-level increase if the defendant has "three prior convictions resulting in sentences of imprisonment of at least 60 days"; a 12-level increase for a "conviction resulting in a sentence of at least six months, or two prior

convictions resulting in sentences of imprisonment of at least 60 days"; an 8-level increase for a "conviction resulting in a sentence of imprisonment of at lest 60 days."

Thus, although we continue to believe that Option 6 holds promise, we are hesitant to take a position without data that demonstrates its potential impact. Sentences should not be increased overall, and in fact should be decreased. We offer the following thoughts:

1. **The 16-level enhancement should be fairly correlated to previous sentence served of 10 years or more.**

Congress sought to increase penalties for reentry crimes in order to target the worst of the worst, *i.e.*, those individuals who are involved in very serious crimes such as murder and organized drug trafficking of the highest order, and who return to the United States illegally in order to continue their criminal activities. *See, e.g.*, Robert J. McWhirter and Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases,* 8 Fed. Sent. R. 275 (1996). The 16-level increase in the guideline for this federal offense has never been justified by data or analysis, a source of constant bedevilment and frustration for those of us who regularly experience its harsh results. The increase applies unevenly due to state law differences and is routinely applied to relatively minor state offenses, demonstrating that there is no reasonable relationship between the steep increases and the previous sentence.

While we acknowledge that the 16-level increase should be used as a measure of culpability for these offenses, we believe that the measure should be the same in the federal system as in the system that imposed the previous sentence. Because the increase in the federal sentence for the immigration offense is directly tied to the seriousness of a prior offense, it should be a direct reflection -- not a categorical approximation -- of the seriousness of the prior offense. In other words, the federal sentence should be roughly the same or slightly less than the sentence served for the prior offense, taking into account that the current offense is one of illegal reentry, itself not a violent or aggravated crime in terms of actual conduct.

For example, applying the 16-level increase for a defendant falling in Criminal History Category IV results in an advisory sentence of roughly 8 years. A defendant convicted of illegal reentry should receive 8 years only when he previously served a sentence of 10 years or more. Similarly, the 12-level increase should be reserved for those who previously served a sentence of 5 years. This approach would more fairly, consistently, and accurately correlate the increases for the reentry offense to the readily measurable time served for the previous offense.

The Commission should adopt this approach and its principled justification that the 16-level increase would then reflect a real relationship in relative culpability by effectively doubling the punishment for the previous offense.

2. The Commission should take the existence of fast-track programs into account by lowering the advisory guidelines to reflect the true value of the danger presented by immigration offenses.

Now that fast-track programs have received Congressional imprimatur, the Commission should adjust the guidelines to take them into account as it did for the mandatory minimum guidelines. In other words, the Commission should recognize that reductions under fast-track programs reflect the value of the danger presented by individuals who commit offenses amenable to fast-track disposition. *See, e.g.*, Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517 (2006). The Commission should use fast-track dispositions as a guide for setting lower offense levels in order to capture the true danger and to eliminate unwarranted disparity in those districts without a fast-track program. The guideline should reflect the present value of the danger by lowering the advisory guideline levels to correspond with the sentences imposed in fast-track jurisdictions, leaving fast-track dispositions up to the Department of Justice. At the February 14 hearing, the Department of Justice indicated that it does not want to see sentences increase, which suggests that it tacitly endorses guidelines set at levels that correspond to fast-track dispositions.

3. The Commission should use "sentence served" instead of "sentence imposed."

Given the manifest disparity in state sentencing practices, "sentence served" is a truer marker of culpability than "sentence imposed" because it reflects the real deprivation of liberty intended by the state sentencing authority. "Sentence imposed" does not account for those jurisdictions with parole where, for example, the judge sentences a defendant to "ten years at 35%," fully intending the actual punishment of incarceration for 42 months to be the appropriate reflection of the seriousness of the crime. The difficulty created by relying on the categorical approach in order to measure culpability derives from the fact that state labels do not always mean what they should in the context of federal sentencing. The natural implication of the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), is that grave consequences in federal sentencing arising from standardized classifications -- such as those advised by the Commission in § 2L1.2 -- should not rise or fall on a state's misleading label or

unique sentencing practice. *See id.* at 632-33. Thus, "sentence served" represents the most accurate method of capturing the actual harm as punished by the state.

Although using "sentence served" would not eliminate disparity in state sentences, it would certainly lessen the disparate impact of differing state practices on federal sentencing for illegal reentry. It would also lessen the effect of triple counting of prior offenses, first for increasing the statutory maximum for "aggravated felony," second for criminal history, and third for recency. Finally, using "sentence served" would not be complicated or difficult; probation officers already use this measure for determining recency.

4. The decay factor should be incorporated into § 2L1.2.

As the Commission has recognized, a prior conviction that is twenty or more years old, although not countable for criminal history purposes under Chapter 4, can be used to increase a defendant's offense level. *See* Interim Report at 28. First, as a matter of simplicity, prior convictions used to increase the offense level under this guideline should be first subject to the Chapter Four – Criminal History Rules. Second, keeping in mind Congress's intent to deter and increase punishment for those individuals who were convicted of very serious crimes such as murder and major drug trafficking but who then return to this country to continue their illegal activities, it is highly unlikely that a prior offense committed over twenty years earlier bears any palpable relationship to the defendant's reason for committing the current reentry offense. Particularly in the context of an offense whose measure of culpability is directly linked to a prior offense, the relationship between the offenses should be subject to temporal limitations.

5. Status and recency points should be excluded from § 2L1.2 cases.

Under § 2L1.2, prior convictions are double-counted when a prior conviction is used both to increase the offense level and in the calculation of the criminal history score.

As the Commission has recognized, the situation is often further aggravated by the fact that many defendants are found to be in the country illegally while they are serving a prison sentence. *See* Interim Report at 28. As a result, these defendants often receive an additional increase of up to three criminal history points under § 4A1.1(d) and (e) for being under a criminal justice sentence at the time of the offense and for committing the offense less than two years after release. *Id.* The resulting sentencing range in such situations is driven almost entirely by the double- and triple- weighting of the same conduct. In order to avoid this result, the Commission should at the very least exclude status and recency points in the criminal history calculation for § 2L1.2 offenses when they arise from these situations. The ordinary justification for status and recency

points -- that the defendant has not learned his lesson from a previous encounter with the criminal justice system -- is simply not present when the "continuing" reentry offense occurs both *before and after* the previous offense at issue.

6. The Commission should add an application note suggesting bases for downward departure.

At the very least, the Commission should add an application note to § 2L1.2 suggesting the following basis for departure:

Over-representation of criminal history

If the Commission recommends an upward departure if the categorical approach under-represents severity of previous offenses (as in Options 1, 2, 3, and 4 and as courts are already using), then fairness mandates a corresponding downward departure if the categorical approach over-represents severity, as in § 4A1.3. The following examples illustrate the need for a suggested departure on this ground.

- Client was convicted at age 17 of aggravated assault for punching a fellow high school student and breaking his nose. In the following 15 years, his only violations of the law were for illegal reentry. The 16-level enhancement applied.

- Client was convicted of robbery for pushing the security guard who stopped him for shoplifting. Although a seven-year sentence was imposed, he only served a few months. The 16-level enhancement applied.

III. Issues for Comment

The Commission seeks comment regarding the Supreme Court's decision in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). As that decision relates to the statutory definition of "aggravated felony," it would seem that the Commission is seeking comment as it would relate to § 2L1.2 if it decides to retain the reference to the statutory definition of "aggravated felony" in 18 U.S.C. § 1101(a)(43), either because it does not amend the guideline after all or because it chooses an amendment that refers to "aggravated felony." The Commission should not amend the guideline to "account" for *Lopez*. The Supreme Court has spoken, and the Commission should defer to it and its reading of Congress's intent on this point.

Lopez is consistent with all other guidelines that do not use possession of a controlled substance for offense level enhancements, *i.e.*, felon in possession and career offender. If Congress thinks that all drug felons should be treated harshly, Congress can

say so. As in other categorical approach cases, the court can currently consider the facts in deciding whether to impose the guideline sentence. And Justice Souter got it right: possession is not drug trafficking in any ordinary sense. *See id.* at 629-30. Addicts or mere users do not pose the same threat as traffickers.

Further, it would seem that any amendment that would reinstate an enhancement for possession that is not an aggravated felony under § 1101(a)(43) would only add to the complexity of the guideline. If the justification is that a majority of the courts interpreted "aggravated felony" to include such state offenses, it is enough to say that the Supreme Court said they were wrong. In reaching its conclusion, the court reasoned that Congress could not have intended for federal sentencing to depend on varying state criminal classifications. As the Court stated, "[i]t is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Id.* at 633. As such, the Commission should not take any action that would run directly counter to congressional intent and interpreted by the Supreme Court.

We appreciate the opportunity to comment on the Commission's proposed amendments relating to immigration. We would be happy to provide any further insights as requested.

Sincerely,

JON M. SANDS
Federal Public Defender
District of Arizona

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
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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

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.

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 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

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

> two separate but similar defendants is a structural problem within the Guidelines' manner of addressing "relevant conduct." Moreover, because the "relevant conduct" inquiry is 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

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

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definition have a prior offense.

	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

punishment by 8 levels for an offense "against" not only a real minor but a fictitious minor. There is 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.

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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).

The statutory maximum is an inaccurate measure of offense seriousness and creates 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

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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.

correct a failure to register. The guideline therefore should reward such attempts. In 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).

8This may violate the Double Jeopardy Clause.

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

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

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%

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 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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Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee
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Commissioner *Ex Officio* Edward F. Reilly, Jr.
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Kenneth Cohen, General Counsel
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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

1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.

2. Inapplicability of Chapter Two Enhancement. 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.

3. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

Option 2

§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 **[in Option 2, some or all of these SOCs could be converted to encouraged downward departures]**

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

(2) If, 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 (A) was not convicted of an offense punishable by more than one year, (B) was not convicted of a sex offense, and (C) 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.

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

Application Notes

1. Definitions

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"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

1. In General. Sections 2250(c) and 2260A of Title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to sentences for other offenses. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 2250(c) is the minimum term of imprisonment required by statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 2260A is the term of imprisonment required by statute.

2. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. Upward Departure. If the defendant was convicted under 18 USC § 2250(c), an upward departure may be warranted if the crime of violence was a sex offense as defined in 42 U.S.C. § 16911(5).

APPENDIX B

TABLE 1							
	Statute of Conviction	Real or False Minor	Facts that Would Support Enhancements under Proposed 2G1.3				
Case			(b)(1) (A) parent; (B) supvy control	(b)(2) (A) misrep identity; (B) undue influence	(b)(3) computer (A) to entice minor; (B) to solicit another	(b)(4) (a) sex act; (B) commercial sex act	(b)(5) under 12
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 1591	Real (unstated but at least 12 and not yet 16)		undue influence		commercial sex act	N/A
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591	Real (appears to be 16 or more)		undue influence		commercial sex act	N/A
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591	Real (16)		undue influence		commercial sex act	N/A
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591	Real (14 & 16)		undue influence		commercial sex act	N/A
US v. Bohannon, 2007 WL 273473 (11th Cir. 2/1/07)	18 USC 2422(b)	False			entice minor		
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	False			entice minor		
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	False			entice minor		
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	False			entice minor		
US v. Riccardi, 405 F.3d 852	18 USC 2422(b)	Real		undue influence		sex act	

(10th Cir. 2005)							
US v. Pipkins, 378 F.3d 1281 (11th Cir. 2004)	18 USC 2422(b)	Real		undue influence		commer-cial sex act	
US v Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Morton, 364 F.3d 1300 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Orrega, 363 F.3d 1093 (11th Cir. 2004)	18 USC 2422(b)	False			entice minor		
US v. Miranda, 348 F.3d 1322 (11th Cir. 2003	18 USC 2422(b)	False			entice minor		
US v. Payne, 77 Fed. Appx. 772 (6th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	False			entice minor		
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	False			entice minor		
*US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
*US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
*US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Elliott, 130 Fed. Appx. 365 (11th Cir. 5/4/05)	18 USC 2423(a)	Real		undue influence		sex act	
US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	under 12
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	Real	supvy control	undue influence			
US v. Long,	18 USC	Real	supvy	undue		sex act	

328 F.3d 655 (D.C. Cir. 2003)	2423(a)		control	influence			
US v. Hersh, 297 F.3d 1233 (11th Cir. 2002)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Spruill, 296 F.3d 580 (7th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Williams, 291 F.3d 1180 (9th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Evans, 285 F.3d 664 (8th Cir. 2002)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Evans, 272 F.3d 1069 (8th Cir. 2001)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Willard, 8 Fed. Appx. 743 (9th Cir. 2001)	18 USC 2423(a)	Real	parent	undue influence		sex act possible	
US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	Real	supvy control	undue influence		sex act	
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	Real		undue influence		commer-cial sex act	
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	Real		undue influence		sex act	

This chart contains cases resulting from the following Westlaw search in the CTA database. (1591! 2422(B) 2423(A)) & (2G1.3! 2G1.1!) The search resulted in 38 cases in which the defendant was convicted under 18 U.S.C. §§ 1591, 2422(b) or 2423(a). Three of the cases contained insufficient facts about the case to tell which SOCs would have applied. The three cases marked with an asterisk (*) involved convictions under both section 1591 and 2423(a).

TABLE 2					
	Statute of Convic-tion	**Applica-ble Manda-tory Minimum**	**Guideline Range in CHC I, USSC Alternative 1**	**Guideline Range in CHC I, USSC Alternative 2**	**Defenders' Proposed Alternative**
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591(b)(1)	180 months	34 + 2 + 2 = 38 = 235-293 months	36 + 2 + 2 = 40 = 292-365 months	30 + 2 + 2 = 34 = 151-188 months
US v. Madison, 2007 WL 437680 (11th Cir. 2007)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 6/9/06)	18 USC 1591(b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849 (11th Cir. 1/4/06)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 1591 (b)(2)	120 months	30 + 2 + 2 = 34 = 151-188 months	32 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 = 30 = 97-121 months
US v. Bohannon, 2007 WL 273473	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months

(11th Cir. 2/1/07)					
US v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sims, 428 F.3d 945 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Searcy, 418 F.3d 1193 (11th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Thomas, 410 F.3d 1235 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Crayton, 143 Fed. Appx. 77 (10th Cir. 6/8/05)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Riccardi, 405 F.3d 852 (10th Cir. 2005)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Pipkins, 378 F.3d 1281 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	28 + 2 + 2 = 32 = 121-151 months
US v. Murrell, 368 F.3d 1283 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Morton, 364 F.3d 1300 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Orrega, 363 F.3d 1093 (11th Cir. 2004)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Miranda, 348 F.3d 1322 (11th Cir. 2003	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Payne, 77 Fed. Appx. 772 (6th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Panfil, 338 F.3d 1299 (11th Cir. 2003)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Angle, 234 F.3d 326 (7th Cir. 2000)	18 USC 2422(b)	120 months	28 + 2 = 30 = 97-121 months	30 + 2 = 32 = 121-151 months	28 + 2 = 30 = 97-121 months
US v. Sutherland, 191 Fed. Appx. 737 (10th Cir. 8/11/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Diaz, 170 Fed. Appx. 884 (5th Cir. 3/15/06	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Sims, 161 Fed. Appx. 849	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

(11th Cir. 1/4/06)					
US v. York, 428 F.3d 1325 (11th Cir. 2005)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Wild, 143 Fed. Appx. 938 (10th Cir. 8/4/05)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Elliott, 130 Fed. Appx. 365 (11th Cir. 5/4/05)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Jeakins, 116 Fed. Appx. 909 (9th Cir. 12/2/04)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 + [4, 6 or 8] = 38 or 40 or 42 = 235-293, 292-365 or 360-life	30 + 2 + 2 + 2 + [4, 6 or 8] = 40 or 42 or 44 = 292-365, 360-life, life	26 + 2 + 2 + 2 + 4 = 36 = 188-235 months
US v. Hayward, 359 F.3d 631 (3d Cir. 2004)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Long, 328 F.3d 655 (D.C. Cir. 2003)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Hersh, 297 F.3d 1233 (11th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Spruill, 296 F.3d 580 (7th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Williams, 291 F.3d 1180 (9th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Evans, 285 F.3d 664 (8th Cir. 2002)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Evans, 272 F.3d 1069 (8th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Willard, 8 Fed. Appx. 743 (9th Cir. 2001)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Lawrence, 187 F.3d 638 (6th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 + 2 = 151-188 months	30 + 2 + 2 + 2 = 36 = 188-235 months	26 + 2 + 2 + 2 = 32 = 121-151 months
US v. Cavallo, 185 F.3d 875 (10th Cir. 1999)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Anderson, 139 F.3d 291 (1st Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months
US v. Vang, 139 F.3d 902 (7th Cir. 1998)	18 USC 2423(a)	120 months	28 + 2 + 2 = 32 = 121-151 months	30 + 2 + 2 = 34 = 151-188 months	26 + 2 + 2 = 30 = 97-121 months

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March 12, 2007

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Re: Comments on Proposed Amendments Relating to Intellectual Property and Pretexting

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment relating to Intellectual Property and Pretexting published January 30, 2007.

I. Intellectual Property, § 2B5.3

A. "Anti-Circumvention Devices"

Congress directed the Commission to review and amend § 2B5.3 "if appropriate" after determining whether the definition of "infringement amount" was adequate to address situations in which the defendant was convicted under 18 U.S.C. §§ 2318 or 2320 and the item in which the defendant trafficked was not an infringing item but "was intended to facilitate infringement, such as an anti-circumvention device."[1] For three

[1] The directive states:

> (c) SENTENCING GUIDELINES-
> (1) Review and amendment- Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under **section 2318 or 2320** of title 18, United States Code. . . .
> (3) RESPONSIBILITIES OF UNITED STATES SENTENCING COMMISSION- In carrying out this subsection, the United States Sentencing

reasons, we believe the directive is too ambiguous (at best) to warrant Commission action without clarification from Congress. First, neither section 2318 nor 2320 imposes criminal liability for trafficking in any device. (Sections 1201 and 1204 of the Copyright Act do impose such liability, *see* 17 U.S.C. §§ 1201, 1204, but the directive does not mention those sections.) Second, no federal statute—not even 17 U.S.C. §§ 1201, 1204—imposes liability (civil or criminal) for trafficking in an *anti-circumvention* device. (Sections 1201, 1204 criminalize trafficking in *circumvention* devices.) Third, trafficking in a circumvention device is not a form of or equivalent to fraud or theft, making any recourse to the table in §2B1.1 inappropriate. Until Congress clarifies its intent, no amendment is warranted.

Failing that, we offer our thoughts on the proposed options. 17 U.S.C. § 1201(b)(1) involves trafficking in devices designed to "circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright holder," with the phrase "circumvent protection afforded by a technological measure" defined in 17 U.S.C. § 1201(b)(2). A "right of a copyright holder," with respect to a work which could be protected by a technological measure (*i.e.*, software, a DVD, recorded music) is the right to exercise one of copyright's exclusive entitlements, such as copying or distribution.[2] 17 U.S.C. § 1201(a)(2) involves trafficking in devices designed to "circumvent[] a technological measure that effectively controls access," with the phrase

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> Commission shall determine whether the definition of 'infringement amount' set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations **in which the defendant has been convicted of one of the offenses listed in paragraph (1)** and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, **such as an anti-circumvention device**, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).

Pub. L. No. 109-181 § 1(c) (emphasis supplied).

[2] A copyright owner has "exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106.

"circumvent a technological measure" defined in 17 U.S.C. § 1201(a)(3). As we understand it, "accessing" a copyrighted work means using it as intended (*i.e.*, using software, watching a DVD, listening to music), and does not necessarily involve copying or distributing. Violating either subsection of § 1201, if "willfully and for purposes of commercial advantage or private financial gain," is a crime subject to a statutory maximum of five years for a first offense. *See* 17 U.S.C. § 1204.

Option 1 would make the "infringement amount" for a defendant convicted under 17 U.S.C. § 1201 the "price the user would have paid to access lawfully the copyrighted work" times the number of "accessed works," and would add two levels and require a minimum offense level of 12 if the conviction was under 17 U.S.C. § 1201(b). Option 2 would make the "infringement amount" the retail value of the device times the number of devices for any conviction under 17 U.S.C. § 1201. Option 3 would make the "infringement amount" the greater of the retail value of the device times the number of devices, or the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" times the number of devices for a conviction under 17 U.S.C. § 1201(b).

Options 1 and 3 are both too complex. Under Option 1, the court would have to determine the price a user would have paid to "access lawfully" the copyrighted work.[3] Under Option 2, the court would have to determine the price a person would have paid to "legitimately us[e] the device to access or make use of" the copyrighted work. Option 3 is even more complex and confusing than Option 1 because it would require two calculations in every case, and what is meant by the "price a person legitimately using the device to access or make use of a copyrighted work would have paid" is entirely unclear. Option 1 may well result in sentences that exceed the seriousness of the offense, because not every such conviction will necessarily involve actual copying or distribution. With no case law involving an offense under 17 U.S.C. § 1201(b), a conclusion that every such case deserves a minimum of 12 levels seems unjustified—a single distribution of a circumvention device, such as a software program, hardly seems to call for so high an offense level.

We support Option 2 because it is the simplest of the three options. If the Commission wishes to add punishment for a conviction under § 1201(b) that involved copying or distribution, we suggest that it add a specific offense as follows:

> If the defendant was convicted under 17 U.S.C. § 1201(b) and also copied or distributed the copyrighted work, increase by two levels.

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[3] If the Commission uses Option 1, it should provide some examples of what is meant by "the price the user would have paid to access lawfully the copyrighted work." Based on discussions with staff, in the case of software, this would be the cost of adding another user to a software license.

B. Downward Departure

In response to Issue for Comment #1, there should be a downward departure for cases in which the infringement amount overstates the seriousness of the offense. We proposed such a departure in 2005. There has been an invited upward departure since 2000 but no invited downward departure. There have been zero upward departures and a consistently high rate of downward departures. In 2006, the rate of within-guideline sentences under § 2B5.3 reached an all-time low of 47%, with none above the guideline range, 66 non-government sponsored below-guideline range, and 38 government-sponsored below-guideline range. *See* 2006 Sourcebook, Table 28.

The history, and the fact that this guideline is concerned with rapidly changing technology, counsels in favor of flexibility that goes both ways. This guideline can easily overstate the seriousness of the offense for a variety of reasons, including that (1) the vast majority of infringements do not result in anywhere near a one-to-one displacement of sales, (2) studies show that infringement can actually benefit trademark and copyright holders, consumers and the economy, and (3) victims submit the alleged loss amount directly to the Probation Officer rather than to the prosecutor who would otherwise weed out false, misleading, unsupported, inflated or legally irrelevant amounts. *See* 8/3/05 Letter of Jon M. Sands to Kathleen Grilli at 3-6 at 3-6 (attached). There will be situations under new Application Note 2(A)(vii) where there is insufficient evidence that some number of the labels, stickers, boxes, etc., would ever have been affixed to an infringing item.

We recommend the same language we recommended in 2005 for a downward departure:

> There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

C. Special Skill

In response to Issue for Comment #2, the Commission should delete Application Note 3 based on the information it has received that not every de-encryption or circumvention case involves a "special skill" not possessed by members of the general public that requires substantial education, training or licensing. There is no need to modify the note to re-state what is already stated in § 3B1.3. The new information is reason enough to delete the note. In addition, where there has been actual circumvention, the offense level is a minimum of 12 under (b)(3) or more than that through (b)(1) and (b)(2). If the Commission adopts any of the three options involving trafficking in devices used to circumvent a technological measure, de-encryption or circumvention will receive additional points there as well.

II. Pretexting, § 2H3.1; Proposed Expansion of "Victim," § 2B1.1

We join the Practitioners Advisory Group's comments on the proposed guideline for the new offense at 18 U.S.C. § 1039, fraudulent acquisition or disclosure of confidential telephone records. USSG § 2H3.1 is more appropriate than USSG § 2B1.1 because the harm is non-monetary and it would be impractical for courts to translate an invasion of privacy into pecuniary loss, and because the additional 3 levels in the base offense level when there is no pecuniary loss (9 versus 6) is sufficient punishment for an invasion of privacy.

We also agree that the best way to implement the mandatory consecutive penalties for aggravated forms of the offense is to require a conviction under 18 U.S.C. § 1039(d) or (e) in order for the cross reference in § 2H3.1(c) to apply. In order for the additional punishment to apply, there will have to be a conviction under subsection (d) or (e) of the statute. The guideline should follow the same course. This offense of conviction approach would avoid a Sixth Amendment violation and would be consistent with the approach the Commission has taken with respect to other statutes requiring consecutive additional punishment with no minimum and only a maximum. *See* USSG § 2D1.2, applicable to convictions under 21 U.S.C. §§ 859, 860 and 861. An application note should explain how to attribute a portion of the total sentence determined under 18 U.S.C. § 3553(a) to the conviction under 18 U.S.C. § 1039(d) or (e).

We do not believe any specific offense characteristics should be added. There have been no prosecutions under the new statute. The courts can sentence above or below the guideline range if they find the range to be insufficient or greater than necessary to satisfy the purposes of sentencing.

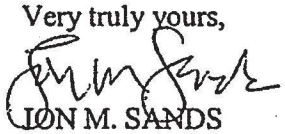
We strongly oppose the proposal by the President's Task Force on Identity Theft to expand the definition of "victim" in USSG § 2B1.1 (or anywhere in the Guidelines) to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, and inconvenience." There is already a specific offense characteristic for identity theft, *see* § 2B1.1(b)(10), and invited upward departure for non-monetary harm. *Id.*, comment. (n.19).

Because the guideline already accounts for these factors, the sole effect of changing the definition of "victim" to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of privacy, reputational damage, [or] inconvenience" would be to expand the reach of the Crime Victim's Rights Act, 18 U.S.C. § 3771. Courts would be inundated with assertions of a right to be heard at sentencing by persons and entities claiming perceived damage to their reputations, emotional distress, the inconvenience of a few telephone calls, a headache or loss of a few hours sleep, and then disruptive petitions for mandamus if the court denied the asserted right. Prosecutors would be required to confer with all such persons and entities. Defendants would have to defend against all such persons and entities. The proposed definition would create a practical nightmare in the courts, would

turn a solemn proceeding into a spectacle, and would jeopardize the foundations of our adversary system.

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

Very truly yours,



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Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Crack/Powder Cocaine Disparity

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

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

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

(Jan. 22, 2007). Noting that the crack-powder disparity would be a principled basis for a sentence below the guideline range, the Senators stated, "Attention to this problem . . . is long overdue." *Id.* at **27-28. It is time for the Commission to repair this injustice.

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

Very truly yours,

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Re: § 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director of Bureau of Prisons (Policy Statement)

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.[1]

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating 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.

[1] We thank Steven Jacobson, AFPD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the district court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.[1] However, Congress also recognized that post-sentencing developments could provide appropriate grounds to reduce a sentence. Using § 4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments. This section of the SRA is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

> The court may not modify a term of imprisonment once it has been imposed except that-
>
> (1) in any case-
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-
>
> (i) extraordinary and compelling reasons warrant such a reduction;.

Congress also mandated that the Sentencing Commission, also created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

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[1] See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 3582(c)(1)(A) of title 18, 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. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The legislative history of these provisions demonstrates the Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of the legislative history, said, in pertinent part:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment. . . .the bill . . . provides . . . . for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.[2]

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.[3]

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[2] S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

[3] See, Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001); John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions "in particularly meritorious or unusual circumstances which could not have reasonably been foreseen by the court at the time of sentencing," including "if there is an *extraordinary change in an inmate's personal or family situation* or if an inmate becomes severely ill." 28 C.F.R. § 572.40 (1980) (emphasis added); *see* 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, "extraordinary and compelling circumstances," but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fe. Reg. 1238 (Jan. 7, 1994); *see* USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing "the standards to evaluate the early release remain the same," though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department's standards for filing such motions:

> The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department's standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

> the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed "extraordinary and compelling reasons" to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would "more accurately reflect our authority under these statutes and our current policy," the rules rename the section "Reduction in Sentence for Medical Reasons," and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP's proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

> shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe "extraordinary and compelling" beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem. Declaring anything the Commission does to define "extraordinary and compelling reasons" as a *dead letter* if it is broader than the government's chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of "extraordinary and compelling reasons," the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current "Issue for Comment" are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation "alone" is not sufficient).

We submit that the Commission should take a "combination" approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons' role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,

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Re: Comments on Proposed Amendments Relating to Miscellaneous Laws

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendment relating to the statute criminalizing unapproved demonstrations at national cemeteries and the issues for comment regarding Internet gambling.

I. Demonstrations at National Cemeteries, Military Funerals

Pub. L. 109-228 created a new offense prohibiting unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery, and created a no-protestor zone around military funerals that begins one hour before a funeral and ends one hour after its conclusion. *See* 38 U.S.C. § 2413. The statutory maximum is one year, *see* 18 U.S.C. §1387, making it a Class A misdemeanor.

Understandably, there is no guideline for sentencing defendants for engaging in political speech. Thus, we agree that the offense should be referred to §2B2.3 (Trespass).

We oppose the 2-level enhancement under subsection (b)(1) for this offense. Currently, that specific offense characteristic applies if the trespass was on a secured government installation, a nuclear energy facility, on a U.S. vessel or aircraft, in a secured airport, at a residence, or on a critical computer system. *See* U.S.S.G.

§2B2.3(b)(1). Those locations are not ordinarily open to the public and involve special security concerns. Engaging in a demonstration at a national cemetery does not entail any similar potential for security breach or injury to anyone. The core offense is trespassing. Adding two levels based on naming the place, a public cemetery with no special security or safety concerns, is unjustified.

II. Internet Gambling, Issues for Comment

Public Law 109-347 created a new offense at 31 U.S.C. § 5363, entitled "Prohibition on acceptance of any financial instrument for unlawful internet gambling." The offense should be referenced to USSG § 2E3.1 (Gambling Offenses) because it covers the conduct prohibited by § 5363.

The Commission should not add a cross reference to § 2S1.1 or 2S1.3. The statute does not prohibit money laundering or structuring. Rather, it prohibits a person engaged in the business of betting or wagering from knowingly accepting payment by credit card, electronic funds transfer, check, and other financial instruments from a person engaging in unlawful Internet gambling. The purpose of the law, according to its sponsors, is to protect families from devastating losses through Internet gambling. *See* Conference Report on H.R. 4954, Safe Port Act at H8029 (House of Representatives - September 29, 2006). The "Congressional findings and purpose" also mentions debt collection problems, but mentions nothing about money laundering or structuring. *See* 31 U.S.C. § 5361. Indeed, Congress admittedly does not know whether or not Internet gambling is used to launder money. *See* Pub. L. No. 109-347 § 803 (encouraging United States government in deliberations with foreign countries to study *whether* Internet gambling is used to launder money). Thus, after a careful review of the record, Congress did not direct or suggest that the guideline for this offense should punish Internet gambling operators for money laundering. Accordingly, there is no justification for adding a cross reference to § 2S1.1 or 2S1.3.

Further, the Commission should not add cross references that permit a person convicted of one offense to be punished for another. Cross references allow defendants to be sentenced for offenses that cannot be proved with reliable evidence beyond a reasonable doubt, create unwarranted disparity, result in unfairness, and are a primary source of criticism of the Guidelines. If Internet gambling operators launder money, they can be charged and convicted of that offense.

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 13, 2007

Honorable Ricardo H. Hinojosa
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Re: Comments on Criminal History Issues

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the two issues for comment relating to criminal history that were published on January 30, 2007.

I. MINOR OFFENSES

In its current formulation, U.S.S.G. § 4A1.2(c) directs a sentencing court to count all felony offenses for purposes of calculating a defendant's criminal history score. A felony offense is defined as "any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed." § 4A1.2(o). Misdemeanor and petty offenses are generally counted except that the fifteen offenses listed in subsection (c)(1) and offenses similar to them, "by whatever name they are known," are counted only if they resulted in a sentence of a term of probation of at least one year or a term of imprisonment of at least thirty days. This list includes the common minor offenses of disorderly conduct, driving without a license or with a revoked or suspended license, insufficient funds check, local ordinance violations, and resisting arrest. *See* § 4A1.2(c)(1). A number of other offenses, such as truancy and minor traffic infractions, are never counted. *See* § 4A1.2(c)(2).

It appears that the Commission intended that the most common petty offenses that tend to be summarily disposed of by the sentencing authority should not increase a defendant's criminal history score unless the circumstances surrounding the violation resulted in a sufficiently severe deprivation of liberty by the jurisdiction whose interests were at stake. In operation, however, § 4A1.2(c) routinely operates to sweep in misdemeanor and petty offenses for which little or no real punishment or active

supervision was imposed, in a manner that both creates unwarranted disparity and defies common sense.

A study on the recidivism rates for defendants whose previous convictions were for minor offenses is mentioned in one of the recidivism reports, but that study either has not been completed or the data has not been published. *See* U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004). Meanwhile, our experience tells us that § 4A1.2 consistently over-captures minor and petty offenses that likely do not accurately reflect a defendant's risk of recidivism but affect thousands of defendants across the country by significantly increasing their sentences through elevated criminal history categories and loss of eligibility for the safety valve. In addition, the application of the guideline has become a labor- and time-intensive exercise, difficult for judges, probation officers, and defense attorneys alike. The complexity created by this guideline promotes less accurate decision-making at the time of both plea and sentencing, generates confusion about the sentence a given defendant faces, and gives rise to more appeals.

We believe that misdemeanor and petty offenses should never be counted, even if they are considered felonies under subsection (o) because they are punishable by more than one year of imprisonment. The Commission also should adopt an expansive test for "offenses similar to them," one that encourages common sense judgments and discourages exclusive reliance on a strict elemental analysis. We offer the following proposed amendment to § 4A1.2(c):

Proposal 1:

(c) Sentences Excluded

Sentences for the following prior offenses and for offenses similar to them are not counted:

Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fare evasion
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Hitchhiking
Insufficient funds check
Juvenile status offenses and truancy
Leaving the scene of an accident
Local ordinance violations
Loitering
Minor traffic infractions (*e.g.*, speeding)
Motor vehicle offenses, other than drunk driving or driving while intoxicated

Non-support
Panhandling
Possession of marijuana
Prostitution
Public intoxication or open container
Resisting arrest
Shoplifting
Trespassing
Vagrancy.

Application Note: *Because of the differences among state statutory schemes, some minor offenses may carry labels or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.*

By eliminating reliance on the sentence imposed as the dividing line between minor offenses that are counted and minor offenses that are not counted, this approach would draw a bright line that is easily applied. It would eliminate the disparity caused when an offense defined by a state as a misdemeanor is counted as a felony under the guideline and the disparity reflected in the sentences imposed for the same offense in different courts. It would eliminate the time-consuming efforts devoted to determining the impact of myriad minor state offenses, which do not often correlate in any meaningful way to the defendant's culpability for the federal offense or risk of recidivism. It would eliminate the need for defendants to depend on a judge's willingness to grant a downward departure for overrepresentation of criminal history in § 4A1.3, the denial of which is insulated from review. It would set forth an appropriately expansive test for similarity. It would streamline federal sentencing and allow sentencing courts to dedicate their time to other, more relevant issues in determining the appropriate sentence.

In the alternative, we offer the following proposal:

Proposal 2:

(c) Sentences Counted and Excluded

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the prior conviction was for an adult offense committed after the defendant had attained the age of 18; (B) the sentence actually served was a term of imprisonment for more than 60 days;

and (C) the offense was committed within three years prior to the commencement of the instant offense:

False information to a police officer
Hindering or failure to obey a police officer
Resisting arrest.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
Fare evasion
Fish and game violations
Gambling
Hitchhiking
Insufficient funds check
Juvenile status offenses and truancy
Leaving the scene of an accident
Local ordinance violations
Loitering
Minor traffic infractions (*e.g.*, speeding)
Motor vehicle offenses, other than drunk driving or driving while intoxicated
Non-support
Panhandling
Possession of marijuana
Prostitution
Public intoxication or open container
Shoplifting
Simple possession of marijuana
Trespassing
Vagrancy.

Application Note: *Because of the differences among state statutory schemes, some minor offenses may carry a label or punish conduct that is not specifically listed in this guideline. In determining whether an offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should examine all possible factors of similarity. These factors include, but are not limited to, a comparison of maximum authorized punishment for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the punishment actually imposed or served for the unlisted offense, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. No single factor is dispositive. If a conviction arises from conduct that is analogous to the types of offenses listed here, a court should err on the side of treating it as a minor offense.*

Although this proposal does not set forth the bright-line approach of Proposal 1, it addresses the unwarranted disparities and unnecessary complexities that § 4A1.2(c) currently produces. We discuss below the current state of § 4A1.2 and explain why the Commission should make the changes we propose.

A. State misdemeanor offenses punishable by more than one year in prison

Some states have misdemeanor offenses that are counted under subsection (c)(1) only because they are punishable by more than one year. As the guidelines currently read, these convictions are always counted as felonies, regardless of the sentence imposed. For example, in Pennsylvania, resisting arrest is a misdemeanor punishable by up to two years in prison. *See* 18 Pa. C.S. §§ 1104, 5104. In Iowa, resisting arrest can be charged as a misdemeanor aggravated assault even when there is no intent to injure and no injury, and is punishable by up to two years in prison. *See* Iowa Code §§ 708.3A(3)-(4), 903.1(2); *State v. Dawdy*, 533 N.W. 2d 551, 556 (Iowa 1995). In South Carolina, "failure to stop for a blue light" is a misdemeanor punishable by 90 days to three years. *See* S.C. Code Ann. § 56-5-750. In Maryland, passing a bad check to obtain goods or services is a misdemeanor punishable by up to eighteen months in prison. *See* Md. Code Ann. § 8-106. And in Massachusetts, leaving the scene of an accident with property damage, Mass. Gen. L. c. 90, § 24(2)(a), operating to endanger (analogous to careless or reckless driving), Mass. Gen. L. c. 90 § 24(2)(a), and resisting arrest, Mass. Gen. L. c 268 § 32B, are misdemeanors punishable by up to two-and-a-half years in the house of correction. Because a previous conviction for any of these offenses in states that do not punish the offense with imprisonment for more than one year are not counted unless the sentence was a term of probation of at least a year or a term of imprisonment of at least thirty days, while a conviction for the same offenses under the law of the states described above always count, the guidelines institutionalize the unwarranted disparity that the Commission aims to avoid in implementing its statutory directives.

The same problem has even more dire consequences with respect to predicates for the career offender guideline, U.S.S.G. §§ 4B1.1 and 4B1.2, and for enhancements based on prior felony convictions under § 2K2.1(a)(1)-(4). In these states, a misdemeanor conviction for resisting arrest is usually considered a felony conviction for a crime of violence, and convictions for assault and battery routinely count as career offender predicates. We look forward to an opportunity to address this distressing anomaly when the Commission addresses the career offender guidelines next amendment cycle.

In the meantime, the Commission should prevent convictions for minor offenses from being counted solely because they arose in a state where misdemeanors are punishable by more than one year.

In a case currently pending in the District of Massachusetts, the defendant pled guilty in state court to trespassing, disorderly conduct, and resisting arrest. He was fined $100. The conviction for resisting arrest will drastically increase the defendant's guideline range from 57-71 months to 262-327 months, solely because it is punishable by

two and a half years. In another Massachusetts case, a defendant was convicted of possessing with intent to distribute 6.4 grams of cocaine base. He had been previously convicted in Massachusetts of drug trafficking and, on two separate occasions, resisting arrest. The latter convictions resulted from a diagnosed mental condition. In one of the resisting arrest cases, the defendant was fined $100; in the other, he was given six months probation. In the federal case, the defendant's guideline range without the career offender enhancement would have been 70 to 87 months. But because his Massachusetts convictions for resisting arrest counted as convictions for felony crimes of violence, he was classified as a career offender and his guideline range jumped to 262 to 237 months.

In Pennsylvania, a defendant was convicted of possession with intent to distribute 10 grams of heroin. He had two prior second-degree misdemeanor convictions, punishable by a maximum of two years. One was a "walkaway" escape and the other resisting arrest.1 Both are considered crimes of violence for career offender purposes. Together, these prior misdemeanor offenses increased the defendant's sentencing range from 30-37 months to 151-188. He was sentenced to 151 months.

These examples are far from unusual in states that authorize imprisonment of more than one year for misdemeanors.

B. Driving without a license or with a suspended or revoked license

There are several problems with including motor vehicle offenses, particularly if they can be excluded only if the sentence was probation of less than a year or imprisonment of less than thirty days. One is that some states impose virtually automatic sentences of more than thirty days' imprisonment or probation of at least one year. For example, for a number of years, Tennessee punished any second offense of driving on a suspended license with a mandatory minimum sentence of forty-five days' imprisonment. *See, e.g.*, Tenn. Code Ann. § 55-7-116 (1986). The statute was later amended so that a mandatory term of imprisonment now applies only when the previous suspension resulted from certain enumerated vehicular offenses, *see* Tenn. Code Ann. § 55-50-504(a)(2) (2006), but many defendants whose only countable criminal history was a second conviction for driving on a suspended license under the prior state law received at least one criminal history point, and if they were on probation when they committed the instant offense, they were ineligible for safety valve relief.

Another problem is the very common scenario for many of our clients where they fail to pay a minor traffic ticket or fine, which results in a suspended license. Driving on a suspended license then becomes an occupational hazard: they must work to earn the money to get their license reinstated, but they must drive to get to work. As a result, it is typical for clients to have one or more convictions for driving with a suspended license, for which a typical sentence is probation for one year. If the defendant was under that term of probation – even if it was unsupervised – at the time he committed a federal drug

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1 The "walkaway escape" arose during a police encounter at a friend's house. The defendant was handcuffed and told to stay put while the police officers looked for a stolen stereo. When the officers went outside, he walked away.

offense, he would be ineligible for safety valve, even though his only conviction was for driving with a suspended license. This is especially common in smaller cities and rural areas, where a car is essential to employment and basic daily living needs. In jurisdictions that levy substantial fines, such as California, the cost of getting a suspended or revoked license reinstated is beyond the financial reach for many of our clients, even those who are regularly employed, resulting in a vicious cycle of minor, regulatory convictions.

Further, as the Commission has recognized, the inclusion of non-moving violations in the criminal history score may have an unwarranted adverse impact on minorities without clearly advancing sentencing purposes. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 134 (Nov. 2004). Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, a phenomenon often called "driving while black." *See* Letter from Jon Sands to the Honorable Ricardo Hinojosa, United States Sentencing Commission, July 19, 2006, Memorandum Regarding Priorities at 19 (collecting authorities).

Driving without a license or with a revoked or suspended license should never be counted. These offenses do not reflect the type of conduct that bears on a defendant's likelihood of recidivism or danger to the community. The Commission should exclude all motor vehicle offenses other than drunk driving and driving while intoxicated.

C. Diversionary dispositions for minor offenses

Some states use diversionary dispositions that do not involve findings of guilt and that involve no actual supervision during the diversionary period. For example, in Massachusetts, a disposition of "continuance without a finding" is routinely imposed for minor offenses. This disposition results in an ultimate dismissal without a finding of guilt. The First Circuit has held that when this disposition includes an admission of facts sufficient to warrant a finding of guilt, it is a "criminal justice sentence" for purposes of § 4A1.1(d). *See, e.g., United States v. Fraser*, 388 F.3d 371, 374-75 (1st Cir. 2004) (citing *United States v. Nicholas*, 133 F.3d 133, 135 (1st Cir. 1998)). District courts, in turn, treat continuances without a finding as sentences of probation that are countable under subsection (c)(1). As a result, a defendant whose entire criminal record consists of a minor offense such as operating with a suspended license, for which he or she received a one year continuance without a finding, and who committed a federal offense while that continuance was in effect (even if unsupervised) would receive three criminal history points and be ineligible for safety valve treatment.

New York uses a similar diversionary disposition, referred to as a "one-year conditional discharge." N.Y. Penal Law § 65.05. A conditional discharge does not require supervision by a probation officer or other supervisory authority and is one of the most lenient dispositions permissible under New York law. These diversionary sentences are given for the overwhelming majority of misdemeanor offenses prosecuted in New York. *See* 2000-2001 Crime and Justice Annual Report, http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec3.pdf (80,000 such

dispositions in the year 2000 and nearly 70,000 in the year 2001). The Second Circuit has held that a one-year conditional discharge is equivalent to a one-year sentence of probation. *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005). This interpretation, which produces illogical results, can have a devastating impact on federal defendants in New York.

In *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), the maximum allowable prison sentence for the offenses at issue (disorderly conduct and driving without a license) was fifteen days. *Id.* at 165. Had the defendant been sentenced to the maximum prison term, the offenses would not have counted for federal sentencing purposes. But because the defendant was sentenced to the more lenient one- year conditional discharge -- which has no condition except to stay out of trouble -- the offenses pushed him into a higher criminal history category.

The Second Circuit's interpretation means that a prior trespassing conviction in New York will receive no points if the defendant is sentenced to fifteen days' jail time. But if the defendant was given a one-year conditional discharge for the offense, which is not probation and does not require active supervision, he would receive at least one criminal history point and possibly more. This outcome not only defies common sense, but also the Commission's apparent intent to count only those offenses listed in subsection (c)(1) that result in a significant deprivation of liberty.

Other circuits have held that similar dispositions are the equivalent of "probation," regardless of the absence of supervision. *See United States v. Miller*, 56 F.3d 719, 722 (6th Cir. 1995) (holding that conditional discharge under Kentucky law is the "functional equivalent" of an unsupervised term of probation under U.S.S.G. § 4A1.1(d)); *Harris v. United States*, 204 F.3d 681, 682-83 (6th Cir. 2000) (Ohio's equivalent of a "conditional discharge" sentence qualifies as a term of probation of at least one year under § 4A1.2(c)(1)); *United States v. Lloyd*, 43 F.3d 1183, 1188 (8th Cir. 1994) (same for unsupervised conditional discharge under Illinois law for driving with suspended license); *United States v. Caputo*, 978 F.2d 972, 977 (7th Cir. 1992) (holding that although Illinois conditional discharge is "probation without the probation officer," this is a "distinction without a difference so far as the guideline exception is concerned"); *United States v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990) ("The guidelines make no provision for treating 'unsupervised' probation as less than probation.").

In *United States v. Rollins*, 378 F.3d 535 (6th Cir. 2004), the defendant was convicted of driving without insurance in violation of Kentucky law. The only sentence available under state law for that offense was a fine. The court suspended most of the fine, and sentenced the defendant to a two-year conditional discharge. Had the defendant violated the terms of the conditional discharge, all the Kentucky courts could do would be to impose the balance of the fine, plus court costs. Under those circumstances, the conviction would not have counted under subsection (c)(2). But because most of the fine was suspended and the defendant received a conditional discharge instead, a majority of a Sixth Circuit panel held that the conditional discharge was the "functional equivalent of unsupervised release" and therefore countable. *Id.* at 538.

Significantly, the *Rollins* majority recognized that its interpretation has a "seemingly odd consequence," in that, had the defendant paid the fine, his sentence would not have been counted. *Id.* at 539. The court went on to state that "[i]t is not clear whether the Sentencing Commission anticipated this specific development when it imposed this bright-line rule about sentences of probation of a year or more." *Id.* at 539-40. The court suggested that any overrepresentation might have been rectified through a downward departure under § 4A1.3, but noted the unlikelihood that the district court would have granted such a request.

The absurd results in these cases is aggravated by the fact that defendants who receive diversionary dispositions typically are told by their state court lawyers that this disposition will not result in a conviction, and so readily agree to this resolution even when there is a viable claim of innocence. The possibility of a discretionary downward departure under § 4A1.3 is insufficient, as this "insulates the district court's decision from review and further limits the ability of wrongfully sentenced defendants to appeal to this court for legal correction." *Id.* at 583 (Moore, J., dissenting). Further, a downward departure, even if granted, cannot render a defendant eligible for safety valve relief.

The Guidelines should not count minor offenses based on the fact that a term of probation was imposed. At the very least, the Commission should amend § 4A1.2(c) so that diversionary dispositions, in whatever form, are never counted for minor offenses. This could be accomplished by adding the following language at the end of the section:

> Diversion from the judicial process for offenses listed in (c)(1) or those similar to them are never counted.

In the alternative, the Commission should replace the language in § 4A1.2(c)(1)(A) so that it reads, "the sentence was a term of supervised probation of more than one year," and clarify that "supervision" means active supervision by a probation office or other supervisory authority.

D. Offenses "similar" to those listed in subsection (c)(1)

In several cases, courts have found an offense to be dissimilar to the offenses listed in subsection (c)(1) (and therefore countable), by engaging in legal acrobatics that defy the Commission's apparent intent to allow for relatively broad *categories* of similarity. For example, in *United States v. Laureano*, No. 05-2078, 162 Fed. Appx. 188 (3d Cir. Jan. 17, 2006), the defendant had been previously convicted under Pennsylvania law for operating a motor vehicle while possessing an open 22-ounce bottle of "Silver Thunder" malt liquor. The open container violation was punishable under state law by a fine, but not imprisonment, *id.* at 190, n.1, and the defendant's sentence was a fine and costs totaling $217. The district court counted the conviction, finding that it was not similar to any of the offenses listed in § 4A1.2. This conclusion increased the defendant's guideline range from 18 to 24 months to 24 to 30 months. Using an approach borrowed from the First Circuit, the Third Circuit held that operating a motor vehicle while possessing an open container is not similar as a matter of elemental comparison to "public intoxication" as defined under Pennsylvania law. *Id.* at 4

(applying *United States v. Elmore*, 108 F.3d 23, 27 (3d Cir. 1997)). "Public place," the court held, is not similar to "presence in a 'motor vehicle' . . . located on a highway in this Commonwealth." *Id.* at 6. Further, being "under the influence of alcohol or a controlled substance" is not sufficiently similar to "possession of an open alcoholic beverage container or consum[ption] of a controlled substance." *Id.*

Defendants in the Middle District of Pennsylvania are routinely assessed points for truancy violations where the *parent* is convicted and fined in a local magistrate court. According to the Third Circuit, because the truancy offense arose out of the defendant's "status as an adult responsible for a child, [it] was not 'similar' to a juvenile status offense or truancy in any meaningful way." *See United States v. Jackson*, 169 Fed. Appx. 120, 123 (3d Cir. 2006).

Some courts have thus transformed the meaning of "similar" in § 4A1.2(c)(1) from the common-sense reading of shared characteristics into a tortured exercise requiring elemental identity and approaching the close statutory parsing that one might expect from a court applying the test for determining whether offenses are the same for purposes of double jeopardy. *See Blockburger v. United States*, 284 U.S. 299 (1932). As a result, what should be a common-sense exercise in judgment to determine whether an offense is "similar" has become a restrictive examination leaving little room for exclusion of offenses that are not listed.

In *United States v. Martinez (Clyde)*, 905 F.2d 251 (9th Cir. 1990), the majority used a different approach, one that examines the comparative levels of culpability and the degree to which the unlisted offense indicates a likelihood of recurring criminal conduct. The Ninth Circuit later adopted a second test, defining the phrase "similar to" as "whether the activity underlying the prior offense is similar to the activities underlying the listed offenses." *United States v. Martinez (Carlos)*, 69 F.3d 999 (9th Cir. 1995). Recently, the Ninth Circuit suggested that the two tests applied in the alternative. *See United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005).

The Fifth Circuit in *United States v. Hardeman*, 933 F.2d 278 (5th Cir. 1991), adopted "a common sense approach," holding that the courts should inquire into "all possible factors of similarity," in determining whether an unlisted offense is "similar" to a listed offense. These factors include:

> a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

Id. at 281. Under this test, none of these factors is dispositive, and each comparison is fact-specific. *Id.*

Under these varying approaches, an offense may be counted in some jurisdictions because it fails a strict categorical or culpability analysis but excluded in another because

it passes a more expansive test examining all possible factors of similarity. The resulting disparity is unwarranted and defeats a primary purpose of federal sentencing policy.

The Commission should clarify that "similar" does not mean "elementally the same." It should reject the restrictive approach used by some courts, and adopt a common sense approach similar to the one adopted by the Fifth Circuit. We have adapted the Fifth Circuit's approach in our proposed Application Note.

E. Other minor offenses that should never be counted

In addition to the offenses now listed, there are other minor offenses that do not advance any sentencing purpose. Offenses such as fare evasion, open container violations, panhandling, shoplifting, simple possession of marijuana, and vagrancy should be placed in subsection (c)(2). At the very least, these latter offenses should be added to the list in subsection (c)(1) so that only those sufficiently serious sentences are counted.

Local ordinance violations should never be counted, even when the offense is also a state criminal offense. First, a defendant convicted of a local ordinance violation was not convicted of a state criminal offense. The fact that the offense is similar to a state criminal offense does not necessarily make it more serious, and is otherwise irrelevant.

Second, some courts do not hesitate to expand the category as written in order to count the most minor of local offenses. For example, in the Middle District of Pennsylvania, federal defendants regularly receive criminal history points for local occupancy tax violations arising from failure to pay a $10 yearly occupancy tax. Although failure to pay a local occupancy tax is not a state criminal offense, district courts have held that, because a state statute enables localities to impose the tax, failing to pay the tax is akin to violating a state criminal law. In this way, courts have expanded the language "that are also criminal offenses under state law" to mean "that are authorized by state law."

Third, the varying interpretations of the local ordinance category injects uncertainty into the process, undermining counsel's ability to advise a client regarding criminal history. In a case prosecuted in the District of Iowa, the defendant worked in a bar where he sold alcohol after the bar was closed, a prohibited alcohol sale in violation of a city ordinance. He was charged with violating two separate ordinances, only one of which is similar to a state criminal statute. He pled guilty to that charge, and the other was dismissed. He was sentenced to pay a $120 fine. As a result of this $120 fine and the unintended consequence of pleading to the charge that was similar to a state statute, the defendant's guideline range was increased by fourteen months.

F. "Sentence served" of more than 60 days as proper measure of "real sentence"

If the Commission decides not to eliminate a distinction among minor offenses based on the sentence imposed, it should apply a "sentence served" test for minor

offenses and increase the minimum term of imprisonment that triggers inclusion to more than sixty days. First, "sentence served" more accurately reflects the seriousness of the offense by reflecting the real punishment imposed. In many jurisdictions, defendants routinely receive a sentence pronounced of 30 days' or more imprisonment for a minor offense, but they actually serve only three or four days. Second, given the potentially grave federal consequences of prior minor offenses, a "sentence served" of more than sixty days is a truer indication of the relative seriousness of the prior offense. Many of these minor offenses are disposed of as part of a package deal, when a defendant in state court is motivated to plead guilty to a number of minor offenses by the promise of a "time served" disposition. This may occur when a defendant is facing a revocation of probation or is unable to post bail for financial reasons. For example, a defendant may face more serious charges in a separate or related case, in which the prosecution encounters difficulties and therefore offers a favorable "time served" disposition alone or in combination with dismissal of a more serious charge.

Setting a higher bar for the type of sentence that will translate a minor offense into criminal history points will ensure that these types of summary dispositions will not inflate a criminal history category. Just as the Commission uses the concept of "real offense conduct" to measure culpability with respect to the appropriate offense level, it should use the concept of "real sentence" for purposes of calculating criminal history.

E. Minor offenses over three years old or committed prior to age 18

The Commission should amend § 4A1.2(d) so that minor offenses are not counted if they were committed more than three years before the instant offense. Given their nature, minor offenses over three years old are not likely to contribute in any manner to a defendant's future risk of recidivism. At the very least, the Commission should publish its data on this subject so that meaningful dialogue on the subject is possible.

The Commission should also amend subsection (e) so that minor offenses committed before the defendant reached the age of eighteen are never counted. There is no conceivable policy reason why such convictions should increase a defendant's federal criminal history score, and common sense about a juvenile's immature ability to form sound judgments counsels against it. The average adolescent operates with an "underdeveloped sense of responsibility," resulting in "'impetuous and ill-considered actions and decisions.'" *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation omitted). "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* Juveniles are more vulnerable than adults to negative influences and peer pressure, due in part to the "prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Given that the actions of a juvenile often result from an unfixed character and "transitory personality traits," *see id.*, prior juvenile convictions for minor offenses should not be counted without the clearest empirical evidence of their predictive value.

II. RELATED CASES

The Commission expected that there would be instances in which the definition of "related cases" in Application Note 3 of § 4A1.2 would be "overly broad." In practice, the opposite is true: the provision has been interpreted so narrowly by the courts that it is now virtually impossible to convince a sentencing judge that two prior sentences were "related." In addition, the various formulations for determining whether two cases are related adds unnecessary complexity to the Guidelines. The current definition is both far too restrictive and far too complex. Principles of fairness and simplicity suggest that the definition of "related cases" should be aligned with the more expansive definition of "relevant conduct" in § 1B1.3, and the meaning of "consolidated for trial or sentencing" should be clarified.

The Commission should amend Application Note 3 by replacing "no intervening arrest" with "no intervening conviction" and replacing (A) and (B) with a cross-reference to the definition of "relevant conduct" under the provisions of § 1B1.3(a)(2) and Application Note 9 to that guideline, so that prior sentences are "related" if they would constitute relevant conduct *with respect to each other* under those provisions. The Commission should retain (C), but add the term "functionally consolidated for trial or sentencing" and define it as proposed below. In addition, because § 4A1.1(f) does not predict increased risk of recidivism, the Commission should eliminate subsection (f) and the reference to it in Application Note 3.

We propose the following language:

Related Cases. Prior sentences are not considered related if they were for offenses that were separated by an intervening conviction (i.e., the defendant was convicted of the first offense prior to committing the second offense). Otherwise, prior sentences are considered related (A) if they resulted from conduct that would be considered relevant conduct with respect to each other under the provisions of §1B1.3(a)(2) and comment (n. 9) (Relevant Conduct), or (B) if they were consolidated for trial or sentencing or functionally consolidated for trial or sentencing. "Functionally consolidated for trial or sentencing" includes prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding.

Our proposed amendment sets forth a streamlined approach, allowing courts to bypass the potentially more complicated "relevant conduct" inquiry whenever consolidation can be readily ascertained, while leaving open the opportunity for a fair assessment of whether the conduct reflected in two convictions is related when necessary.

In addition, this approach is a more accurate measure of assessing past patterns of criminal behavior. By providing that prior offenses are not related if they were separated by an intervening conviction, our proposal ensures that convictions will not be considered related if they demonstrate that conviction and punishment failed to deter repeated criminal behavior. At the same time, it would reflect that repeated arrests within a short period of time – which may result from police harassment – do not necessarily show an

increased risk of recidivism. This approach also would further the goal of simplification by reducing the number of different tests for similar concepts.

By tying the definition of related cases to the relevant conduct rules, our proposal would alleviate the disconnect between the use of uncharged or acquitted conduct to increase punishment under § 1B1.3 and the treatment of the same kind of conduct as "unrelated" for purposes of criminal history.

Unlike the use of relevant conduct rules in setting offense levels, which we continue to oppose, the rules we propose would not increase offense levels based on conduct that did not result in a criminal charge or conviction, but instead would result in a more realistic calculation of criminal history based on actual convictions. Unlike relevant conduct, this will not implicate due process concerns. Indeed, if the expansive meaning of relevant conduct can be used to increase offense levels, then it should be available to limit the impact of prior sentences in determining criminal history.

Finally, our proposal addresses the complexities, disparities, and restrictive interpretations created by current Application Note 3, which we discuss more fully below.

A. "Occurred on the same occasion"

Some of the cases interpreting subsection (A) have emphasized a temporal aspect that requires something akin to simultaneity. The passage of a mere ninety minutes between seemingly related offenses often will mean that they did not "occur on the same occasion." *See, e.g., United States v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990), *overruled on other grounds, United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (*en banc*) (robbery attempts at two different locations within one-and-one-half hours of each other did not occur on the same occasion).

In another case, the Fifth Circuit engaged in unduly extensive and complex analysis before concluding that three offenses occurring on the same day – drunk driving, driving with a suspended license, and failure to identify oneself to a police officer – were related. The court examined temporal proximity, spatial proximity, and the timing of the formation of *mens rea* in order to reach the conclusion that the offenses were related. *United States v. Johnson*, 961 F.2d 1188, 1189 (5th Cir. 1992). In a later case, the Fifth Circuit engaged in a similarly extensive analysis because "the extent of the temporal separation between commissions [is] controlling for purposes of the same-occurrence prong, and even then such separation must be viewed in light of other factors such as spatial separation, identity or non-identity of offenses, and the like." *United States v. Moreno-Arredondo*, 255 F.3d 198, 207 (5th Cir. 2001).

These cases demonstrate that the test is so restrictive that it it is either impossible to meet or requires the court to engage in ludicrously complex maneuvers to reach a conclusion that would go without saying if the question were whether the offenses were "relevant conduct." Our proposal avoids these problems by replacing subsection (A) with a reference to Application Note 9 of § 1B1.3.

B. "Single common scheme or plan"

Cases are related under subsection (B) if the prior sentences resulted from offenses that "were part of a single common scheme or plan." Differing interpretations of the meaning of this term have resulted in a circuit split. In *United States v. Irons*, 196 F.3d 634 (6th Cir. 1999), the Sixth Circuit joined the Third, Fifth, and Ninth Circuits in following the Seventh Circuit's interpretation that crimes are part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. *Id.* at 828 (following *United States v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992)). Under this view, offenses committed during a "crime spree" are not related unless (1) they were jointly planned at their inception, or (2) the commission of one offense entailed the commission of another. *See Irons*, 196 F.3d at 637-38.

In *United States v. Carter*, 283 F.3d 755 (6th Cir. 2002), however, the Sixth Circuit recognized that this cramped view of relatedness under subsection (B) for purposes of criminal history conflicts with the liberal and expansive view of relevant conduct under § 1B1.3. *Id.* at 758. According to the court, "the goal of reasonable uniformity sought by the Sentencing Guidelines is undermined with regard to the differing applications of U.S.S.G. § 4A1.2(a)(2). The treatment of the issue by the various Courts of Appeal evidences the lack of consistency and, therefore, the lack of uniformity in the application of this provision of the Sentencing Guidelines. This Court urges the Sentencing Commission to review U.S.S.G. § 4A1.2(a)(2) with regard to the concerns herein expressed." *Id.* at 761.

The Seventh Circuit has also acknowledged the illogic in the differing interpretations of the phrase "common scheme or plan" in §§ 4A1.2 and 1B1.3(a)(2). *See United States v. Walls*, 59 Fed. Appx. 876 (7th Cir. 2003). Because its own precedent foreclosed applying the same interpretation, the court suggested that the Commission should clarify the matter. *Id.* at 879 ("Although the application of the career offender provision can lead to harsh results, and has done so here, it is a matter that the Sentencing Commission might want to address.").

Some courts have opposed interpreting "common scheme or plan" the same way in §§ 4A1.2 and 1B1.3 based on the view that "different considerations" animate the two provisions, and noting that the word "single" appears in § 4A1.2, but not in § 1B1.3. *See, e.g., United States v. Berry*, 212 F.3d 391, 394-95 (8th Cir. 2000) (elaborating the "different considerations"). The *Berry* court explained: "Addition of the word 'single' suggests an intent to narrow the concept of 'common scheme or plan.' It points strongly in the direction of the Seventh Circuit's view that two prior offenses must have been *jointly* planned to be 'related sentences' under § 4A1.2(a)(2)." *Id.* at 395.

Other circuits have held that subsection (B) should be given the same meaning as relevant conduct under § 1B1.3. *See United States v. LaBarbara*, 129 F.3d 81, 86 (2d Cir. 1997); *United States v. Breckenridge*, 93 F.3d 132, 139 (4th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995)). In *Breckenridge*, the Fourth Circuit

summarized the factors considered by courts: "In deciding whether offenses are part of a common scheme or plan, courts have looked to whether the crimes were committed within a short period of time, in close geographic proximity, involved the same substantive offense, were directed at a common victim, were solved during the course of a single criminal investigation, shared a similar modus operandi, were animated by the same motive, and were tried and sentenced separately only because of an accident of geography." *See Breckenridge*, 93 F.3d at 139; *see also United States v. Brothers*, 316 F.3d 120, 123-24 (2d Cir. 2003) (summarizing factors).

These differing interpretations produce unwarranted inconsistency in sentences, and engender confusion. Our proposal adopts the fairer and more sensible approach of those courts that have interpreted the phrase "common scheme or plan" to mean the same thing in subsection § 4A1.2, comment. (n.3(B)) as it does under § 1B1.3(a)(2).

C. "Consolidated for trial or sentencing"

Subsection (C) provides that prior sentences are "related" if they were "consolidated for trial or sentencing." Some courts have held that this includes cases that were "functionally consolidated," but that term has been narrowly construed over the years. Courts now very rarely (if ever) find cases consolidated for sentencing absent a formal order of consolidation. Such an order is uncommon or nonexistent in many states, making such a finding impossible. In *Buford v. United States*, 532 U.S. 59 (2001), the Supreme Court suggested that the Commission might bring some consistency into the determination of "functional consolidation." In rejecting the petitioner's argument that consistency would result from *de novo* review of the district court's finding that her prior sentences were not functionally consolidated, the Court stated:

> [T]he Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts. Insofar as greater uniformity is necessary, the Commission can provide it.

Id. at 66. In the absence of overarching guidance from the Commission, defendants face what has become an impossible hurdle.

Some circuits require formal consolidation in the form of an order or some other "indicium of formal consolidation" and do not recognize functional consolidation for arguably related cases. *See, e.g., United States v. Martins*, 413 F.3d 139 (1st Cir. 2005); *United States v. Mills*, 375 F.3d 689, 691 n.4 (8th Cir. 2004); *United States v. Piggie*, 789, 796 (8th Cir. 2003). Unfortunately, several jurisdictions, including Massachusetts and New Hampshire, do not employ any form of formal consolidation. For defendants whose prior convictions arise in these jurisdictions, relatedness can never be proven under this prong. As a result, the guidelines institutionalize a categorical disparity.

In other circuits, "functional consolidation" exists in theory, but can hardly be proven. For example, in the Fifth Circuit, cases will be considered consolidated if there is "some factual connexity between them, or else a finding that the cases were merged for trial or sentencing." *United States v. Huskey*, 137 F.3d 283, 288 (5th Cir. 1998). Courts there have consistently required either a formal order of consolidation or the listing of two offenses in the same indictment under the same docket number. *See, e.g., United States v. Hayes*, 341 F.3d 385 (5th Cir. 2003); *United States v. Metcalf*, 898 F.2d 43, 46 (5th Cir. 1990); *United States v. Kates*, 174 F.3d 590, 584 (5th Cir. 1999). However, Texas courts rarely enter formal orders of consolidation, likely due to the fact that under Texas law, such orders are unnecessary. If multiple counts arising out of a single "criminal episode" are presented in a single trial or plea proceeding, then they are considered under Texas law to be consolidated. *See LaPorte v. State*, 840 S.W.2d 412 415 (Tex. Crim. App, 1992).

For reasons apparently connected to the tumultuous history of Texas state law on joinder and defects in charging instruments, it is not unusual in multi-count cases in Texas state court to see a separate charging instrument with a separate docket number for each individual count, even in cases in which the offenses could have been joined in a single charging instrument. These cases are commonly disposed of in a single plea proceeding before the same judge, thus resulting in consolidation under state law and concurrent sentences. *See* Aff. of El Paso Public Defender, July 14, 2006, attached as Exhibit 1. Despite this, the Fifth Circuit does not consider the cases consolidated for purposes of determining whether they are related.

Although other circuits do not require a formal order of consolidation, they have nevertheless developed a stringent test for finding "functional consolidation" that approaches a requirement of a formal indication of consolidation. These courts hold that "there is no functional consolidation when offenses proceed to sentencing under separate docket numbers, cases are not factually related, and there was no order of consolidation[.] There must be some explicit indication that the trial court intended to consolidate the prior convictions." *United States v. Carson*, 469 F.3d 528, 531 (6th Cir. 2006) (internal citations and quotations omitted). Even after *Buford*, the Seventh Circuit has held that simultaneous disposition merely for the sake of administrative convenience is not consolidation, and that "in the absence of a formal order of consolidation, we will deem sentences functionally consolidated only where there is a showing on the record of the sentencing hearing that the sentencing judge considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions." *United States v. Best*, 250 F.3d 1084, 1095 (7th Cir. 2001).

In the absence of uniform state policies and practices, the Commission should set forth a simpler and more flexible test for consolidation in Application Note 3 so that, at the very least, prior sentences imposed pursuant to a single plea agreement or in a single sentencing proceeding will be considered "related" under § 4A1.2. Where such circumstances do not exist, courts should be permitted to take a number of factors into account, such as consecutive indictment or complaint numbers, or same day scheduling of a plea hearing, trial or sentencing hearing, to determine whether cases are related.

D. Uncounted crimes of violence

As set forth in Part I, some state misdemeanor offenses are counted as felony crimes of violence because they are punishable by a term of imprisonment greater than one year. The harsh and disparate effects of this are felt throughout the guidelines, including the determination of whether cases are related. The Commission adds one point for each prior conviction of a crime of violence that is otherwise uncounted because it is "related" under Application Note 3 of § 4A1.2. U.S.S.G. § 4A1.1(f). In contrast, the Parole Commission's Salient Factor Score, which is a better predictor of recidivism than Criminal History Score under the guidelines, has no violence component. *See* U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* at 7. Not only does § 4A1.1(f) unfairly inflate some defendants' criminal history scores, but its predictive power is statistically insignificant. *See id.* at 7, 11 n. 40, 15. Therefore, it should be deleted.

Very truly yours,

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March 14, 2007

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Re: Comments on Proposed Amendments Relating to Terrorism and Transportation

Dear Judge Hinojosa:

With this letter, we provide the comments of the Federal Public and Community Defenders on the proposed amendments and issues for comment under the headings of Terrorism and Transportation that were published January 30, 2007.

I. Terrorism

A. Foreign terrorist organizations, terrorist persons and groups, 21 U.S.C. § 960a

The Commission proposes two options for implementing the new offense at 21 U.S.C. § 960a, each of which would make the base offense level 4 or 6 plus the offense level specified in the Drug Quantity Table, and would allow the 12-level increase/32-level minimum/Criminal History Category VI under § 3A1.4 to apply in addition. It is also suggested that it may be appropriate to exclude the mitigating role cap and the safety valve reduction in such cases.

We oppose these proposals because they would result in punishment far in excess of what the statute requires, would punish the same conduct twice, and would unjustifiably assume that no defendant convicted under this statute is deserving of a mitigating role cap or safety valve reduction. We recommend that the Commission adopt one of two alternative proposals.

1. Defender Proposals

Proposal 1. Congress did not direct the Commission to amend the guidelines in any way to implement the new offense set forth at 21 U.S.C. § 960a. Accordingly, our first proposal is to allow § 5G1.1(b) to operate. It would rarely if ever have to operate because § 3A1.4 would apply in most, and probably all, cases. This would accomplish only what the new statute requires, which is a term of imprisonment of not less than twice the statutory minimum that would apply under 21 U.S.C. § 841(b)(1).

Proposal 2. In the alternative, we recommend a separate offense guideline at § 2D1.14. If § 3A1.4 applied, the base offense level would be the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a minimum offense level of 32, 34 or 36 and a Criminal History Category of VI in any case without an applicable statutory minimum. *See* footnote 1, *infra*. In the unlikely event § 3A1.4 did not apply, the base offense level would be 4 plus the offense level from § 2D1.1 applicable to the underlying § 841(a) offense. This too would result in a sentence greater than twice any applicable statutory minimum from 21 U.S.C. § 841(b)(1), and a 34-100% increase in cases without an applicable statutory minimum. In the few cases in which the guideline range fell below the minimum required by § 960, that minimum would trump under § 5G1.1(b).

§2D1.14. Narco-Terrorism

(a) Base Offense Level

(1) If § 3A1.4 (Terrorism) applies, the base offense level is the offense level from § 2D1.1 applicable to the underlying offense.

(2) Otherwise, the base offense level is 4 plus the offense level from § 2D1.1 applicable to the underlying offense.

2. What the Statute Requires

Title 21 U.S.C. § 960a states: "Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section 841(b)(1) of this title, and not more than life . . . ."

That is, defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(A) receive a sentence of no less than 20 years, defendants convicted

of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(B) receive a sentence of no less than 10 years, and defendants convicted of trafficking in a quantity of drugs set forth in 21 U.S.C. § 841(b)(1)(C) receive no minimum sentence. Precisely what the statute requires can be accomplished by allowing § 5G1.1(b) to operate.

3. The Proposed Amendments Exceed What the Statute Requires.

Even without the effect of § 3A1.4, the addition of six levels to the base offense level is clearly excessive because it results in a range for defendants in Criminal History Category I with no specific offense characteristics that exceeds the statutory minimum at 16 of 17 levels. At only one level (32 + 6 = 38) does it simply include the statutory minimum. Thus, it is not accurate to say, as the proposed note does, that "[a]dding six levels . . . establishes a guideline range with a lower limit as close to twice the statutory minimum as possible."[1]

1

Normal Base Offense Level = Range in months in CHC I	Sentence required by 21 USC 960a	Guideline Range Under Normal Base Level if 3A1.4 Applies (CHC VI)	Base Offense Level +4 = Range in months in CHC I	Base Offense Level +6 = Range in months in CHC I	Base Offense Level + 4 + 3A1.4 = Range in months in CHC VI	Base Offense Level + 6 + 3A1.4 = Range in months in CHC VI
38 = 235-293	20 years	50 = life	42 = 360-life	44 = life	54 = life	56 = life
36 = 188-235	20 years	48 = life	40 = 292-365	42 = 360-life	52 = life	54 = life
34 = 151-188	20 years	46 = life	38 = 235-293	40 = 292-365	50 = life	52 = life
32 = 121-151	20 years	44 = life	36 = 188-235	38 = 235-293	48 = life	50 = life
30 = 97-121	10 years	42 = 360-life	34 = 151-188	36 = 188-235	46 = life	48 = life
28 = 78-97	10 years	40 = 360-life	32 = 121-151	34 = 151-188	44 = life	46 = life
26 = 63-78	10 years	38 = 360-life	30 = 97-121	32 = 121-151	38 = 360-life	44 = life
24 = 51-63	0	36 = 324-405	28 = 78-97	30 = 97-121	40 = 360-life	42 = 360-life
22 = 41-51	0	34 = 262-327	26 = 63-78	28 = 78-97	38 = 360-life	40 = 360-life
20 = 33-41	0	32 = 210-262	24 = 51-63	26 = 63-78	36 = 324-405	38 = 360-life
18 = 27-33	0	32 = 210-262	22 = 41-51	24 = 51-63	34 = 262-327	36 = 324-405
16 = 21-27	0	32 = 210-262	20 = 33-41	22 = 41-51	32 = 210-262	34 = 262-327
14 = 15-21	0	32 = 210-262	18 = 27-33	20 = 33-41	32 = 210-262	32 = 210-262

The addition of four levels also is excessive even without the effect of § 3A1.4 because it results in a range that exceeds the statutory minimum for defendants in Criminal History Category I with no specific offense characteristics at 14 of 17 levels. At two levels (34 + 4 = 38, and 26 + 4 = 30) it includes the statutory minimum. At one (32 + 4 = 36) it is 5 months shy of the statutory minimum, in which case the sentence would be the statutory minimum. *See* USSG § 5G1.1(b).

If the Commission rejects our Proposal #1, an increase that exceeds the minimum at 14 of 17 levels and never results in a sentence less than the minimum would be preferable to an increase that exceeds the minimum at 16 of 17 levels.

4. Application of § 3A1.4 in Addition to an Elevated Base Offense Level Would Constitute Exceedingly Harsh Double Punishment for the Same Conduct.

With a four-level increase in the base offense level, the effect of § 3A1.4 (adding 12 levels, minimum offense level 32, criminal history category VI) would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, a guideline sentence ranging from 360 months to life for defendants subject to a ten-year statutory minimum, and a guideline sentence of life for defendants subject to a twenty-year statutory minimum. With a six-level increase in the base offense level, the effect of § 3A1.4 would be a guideline sentence ranging from 210 months to life for defendants subject to no statutory minimum, and a guideline sentence of life for all other defendants.

We have been told that this would not punish defendants twice for the same conduct because § 3A1.4 requires intent to coerce, intimidate or retaliate against government conduct, while a conviction under § 960a requires intent to provide a thing of value to those engaging in terrorism.

Even if it is theoretically possible that a person convicted of knowingly or intentionally providing terrorists with a thing of value would not be found to have acted with intent to promote the terrorists' goals, the fact is that the plain language and the courts' interpretation of § 3A1.4 do not require a finding that the defendant himself acted with intent to coerce, intimidate or retaliate against government conduct.

Section 3A1.4 applies to a "felony that involved, or was intended to promote, a federal crime of terrorism," as defined in 18 U.S.C. § 2332b(g)(5)(b). A "federal crime

12 = 10-16	0	32 = 210-262	16 = 21-27	18 = 27-33	32 = 210-262	32 = 210-262
10 = 6-12	0	32 = 210-262	14 = 15-21	16 = 21-27	32 = 210-262	32 = 210-262
8 = 0-6	0	32 = 210-262	12 = 10-16	14 = 15-21	32 = 210-262	32 = 210-262
6 = 0-6	0	32 = 210-262	10 = 6-12	12 = 10-16	32 = 210-262	32 = 210-262

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
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Comments on Proposed Option 7 for Amendment of § 2L1.2

Dear Judge Hinojosa:

Thank you for providing us with the Proposed Option 7 for Amendment of § 2L1.2. We have had a chance to review it, and look forward to more in-depth analysis once we are able to examine the data on how this impacts cases. With that in mind, and to help the Commission in addressing the need to rationalize and simplify the guideline, we provide the following comments on behalf of the Federal Public and Community Defenders.

One persistent and across-the-board criticism of the current guideline has been its complexity. This issue of complexity arises whenever a guideline seeks to enumerate offenses, or uses enumerated past convictions for enhancements. The Commission recognizes this, and has moved in Option 7 to an acknowledgment that the sentence imposed on past convictions serve as an equally effective barometer for seriousness while at the same time eliminating the uncertainties inherent in the categorical approach. The Commission should adopt this approach completely and dispense with enumeration except for national security and terrorism convictions, with the definition of terrorism offenses revised as below.

The reasons the Commission should adopt this approach are the same as the reasons the Commission saw the need to move to an Option 7, that is, to avoid the complexities associated with any categorical approach. There are myriad potential problems with the proposed definitions of the offenses, the elements of which they are comprised, and the danger of disparity as the various states inevitably have quite different definitions. Enumeration is categorization and hence a return to complexity, uncertainty, and disparity.

Most of all, the enumerations are not necessary. A serious prior conviction of a true "murder," forcible rape, serious offense of child sexual abuse or child pornography cannot be a murder, forcible rape or the most serious sex offense if it was not punished by at least 48 months. A true serious offense will be punished severely, and will fit easily into the 48-month sentence imposed category, subject to 16 levels. A less serious offense will fall in the 24-month sentence imposed category, subject to 12 levels.

One example will work well to illustrate the unnecessary complexity and potential overbreadth of the enumerated offense approach in (A). The definition of "offense of child sexual abuse" has numerous problems. First, it would result in a 16-level increase, the same as for murder and forcible rape, for generic "statutory rape" (*see, e.g., United States v. Eusebio-Giron*, 2006 WL 1735866 (5th Cir. 2006) (17-year-old defendant, who later married his 14-year-old girlfriend, received a 57-month sentence for "statutory rape" under current definition of "crime of violence"), and for federal statutory rape ("sexual abuse of a minor" is statutory rape, *see* 18 U.S.C. § 2243(a)), *i.e.*, a 19-year-old boy who has consensual sex with his 14-year-oild girlfriend). Second, it is repetitive in including both generic and federal statutory rape. Third, the age of 18 is not the cutoff for statutory rape under federal law, *see* 18 U.S.C. § 2243(a) (under 16 years of age), or the law of the majority of states.

The second area in Option 7 in need of modification is the threshold of "at least 12 months" for the 16 level increase at § 2L1.2 (b)(1)(B) ("two prior convictions each resulting in a sentence of imprisonment of at least 12 months"), and the 8 level increase at § 2L1.2 (b)(1)(D) ("a prior conviction resulting in a sentence of imprisonment of at least 12 months"). It is imperative that the Commission use "a sentence of imprisonment exceeding one year and one month," not "at least 12 months," in (B) and (D). A choice of twelve (12) months is a decision to write in disparity. This is because a sentence of 12 months means vastly differently things across the 50 states. In one, it is the sentence that is pronounced when the result is to have someone released on that day after serving two months to effectuate time-served. Because it is the sentence *imposed* (not served), in another state, it carries 10 months in jail - no questions asked. In others, it is the reflexive sentence of judges and prosecutors for very low-level crime with no discernible harm or victim. It paints with too broad a brush, capturing a disparately wide range of criminal conduct. A *meaningful* cutoff is "a sentence of imprisonment exceeding one year and one month," as in USSG §4A1.1(a). To comport with both simplification and consistency across the guidelines, it should read exactly as in §4A1.1(a). This definition and application are well-settled.

A similar improvement should be made in §2L1.2(b)(1)(D) ("three prior convictions resulting in a sentence of imprisonment of at least 90 days, increase by 8 levels") and §2L1.2(b)(1)(E) ("a prior conviction resulting in . . . a sentence of imprisonment of at least 90 days, increase by 4 levels"). This proposed change violates the stated premise of Option 7-sentence neutrality. Currently, there must be three prior convictions of crimes of violence or drug trafficking offenses in order to receive a 4-level increase; otherwise, there is no increase. Option 7 would give an 8-level increase for three prior convictions of any kind if they resulted in a sentence of imprisonment of at

least 90 days, and a 4-level increase for one prior conviction resulting in a sentence of imprisonment of at least 90 days. Option 7 would obviously raise sentences in this respect. A middle ground can be achieved by requiring a 4-level increase for three prior convictions each resulting in a sentence of imprisonment of at least 60 days. Such a change represents a measured attempt to hold sentences steady while maintaining consistency with the cutoffs in Chapter Four, namely § 4A1.1(b).

Further, the Commission should use "felony," *i.e.*, punishable by more than one year, in (A)-(D) (as distinguished from "any" offense in the alternative in (D)). This requirement ensures that the punishment is for offenses that are "punishable" by more than one year across the board and across the nation, reflecting a general recognition of seriousness, and again, does not invite disparity by sweeping in a wide range of possibilities for much less serious conduct. In an appropriate case, the court can take offenses punishable by a year or less into account.

Finally, if the Commission retains "terrorism offense" as an enumerated offense, it should simplify the definition. As written, it is defined as "any offense involving, or intending to promote, a 'Federal crime of terrorism,' as that term is defined in 18 U.S.C. § 2332b(g)(5)." *See* Application Note 1(B)(vii). This is the same definition used in § 3A1.4, the upward adjustment in Chapter Three. In applying this definition, the courts do not simply look to the offense of conviction. Rather, they engage in a complex case-by-case factual inquiry: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant is responsible involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 U.S. 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003). This is particularly inappropriate since it is a prior conviction that is at issue. The Commission should adopt the following offense of conviction definition: "'Terrorism offense' means a 'Federal crime of terrorism' as defined in 18 U.S.C. § 2332b(g)(5)," first, because it is straightforward and simpler to apply, and second, because to do otherwise would permit a 20-level increase for offenses that are not terrorism offenses.

These comments are made, as noted above, without access to the data on Option 7. We propose an Option 8, attached, that incorporates our suggestions. We request that the Commission run the data using our proposal to see how it compares on a system-wide level.

Very truly yours,

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[Option 8 (New):

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

(A) a prior felony conviction for a national security offense or terrorism offense, increase by **20** levels;

(B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;

(C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by **12** levels;

(D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;

(E) a prior felony conviction not covered by subdivisions (A) through (D) or any prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.

(ii) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).

(iii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.

(vii) "Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.

4. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.

5. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

DAVID DEBOLD
Co-chair, Practitioners' Advisory Group

David Debold joined the Washington, D.C. office of Gibson, Dunn and Crutcher in 2003. He practices in the Litigation Department, and is a member of the firm's Appellate and Constitutional Law, Securities Litigation and Business Crimes and Investigations Practice Groups.

Since joining the firm, Mr. Debold has represented individuals and businesses in a wide variety of matters, including SEC enforcement actions and investigations, corporate internal investigations (including investigations by audit committees), federal criminal investigations and prosecutions, securities class actions, federal appeals (in both civil and criminal cases), petitions for writs of certiorari filed in the United States Supreme Court and merits appeals in the Supreme Court.

Prior to joining the firm, Mr. Debold served as an Assistant United States Attorney in Detroit, Michigan, where he had a distinguished career in government service. As a member of the Appellate Division he argued more than 85 cases in the United States Court of Appeals, involving such matters as multi-million dollar fraud schemes, economic espionage, money laundering, ERISA fraud, racketeering, tax violations, obstruction of justice, federal tort actions and false claims against the government (the False Claims Act). In his years as a trial lawyer for the office, he directed more than 100 grand jury investigations and brought to trial over a dozen felony cases, including a multi-million dollar construction loan fraud, a large-scale investment scam and the attempted murder of a federal agent.

Mr. Debold is co-chairman of the United States Sentencing Commission's Practitioners' Advisory Group, which provides input from private practitioners on a variety of sentencing-related issues including proposed amendments to the Federal Sentencing Guidelines and legislative initiatives. The Federal Sentencing Guidelines are one source for the required elements of an effective corporate compliance program, and Mr. Debold's practice includes advice to corporations on such requirements. He has also testified before the Sentencing Commission on proposed changes to those provisions. Mr. Debold has lectured extensively at national conferences on criminal law and appellate issues, and during his tenure with the government he also served as Special Counsel to the Sentencing Commission.

Mr. Debold graduated *magna cum laude* from Harvard Law School in 1985, and was a law clerk to the Honorable Cornelia G. Kennedy of the United States Court of Appeals for the Sixth Circuit.

Testimony of

David Debold
Co-Chair of the Practitioners Advisory Group to the
United States Sentencing Commission

At the United States Sentencing Commission's
Public Hearing on Proposed Amendments to the Sentencing Guidelines

March 20, 2007
Washington D.C.

* * * * *

Judge Hinojosa and members of the Commission. My name is David Debold and I am currently in private practice at the law firm of Gibson, Dunn & Crutcher, LLP here in Washington D.C. I have been invited to testify today in my capacity as Co-Chair of the Practitioners' Advisory Group to the Commission. On behalf of fellow co-chair Todd Bussert and the other members of that standing advisory group, it is always a pleasure to offer our input on matters being considered by the Commission. We have recently sent the Commission two letters, one dealing with Section 1B1.13 – governing motions for reduction in sentence based on extraordinary and compelling circumstances – and the other dealing with the balance of the proposed amendments and issues for comment this amendment cycle.

My testimony today will be limited to five of the categories addressed in our letters: Transportation; Intellectual Property, the PATRIOT Act (also referred to in some of the materials as Terrorism); Drugs; and the Telephone Records and Privacy Protection Act (dealing with pretexting).

Before I begin with the first of these five topics, I wanted to make a general observation that puts our comments in context. A common thread in our comments on the proposed amendments is an effort to simplify – or at least hold the line when it comes to the complexity of – the guidelines.

A slight digression will help to explain what we mean by this and why it is important. When the Commission sought input on its priorities for the 2007 cycle, one of our suggestions was for the Commission to update the Manual to take account of the *Booker* decision,[1] which renders the Guidelines advisory. We were not asking for major structural changes when we made that suggestion. Instead, there are places in the Manual – especially chapters 5H, 5K and 6 – where the failure even to mention the advisory nature of the Guidelines after *Booker* gives a reader the misleading impression as to the ability of the courts to sentence above or below the guideline range.

Although the Commission chose not to update the Manual in this cycle to account for *Booker*, the reality is that the Guidelines are now one factor among several that a court must consider before imposing sentence. It has long been the view of the members of our group – and

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1 *United States v. Booker*, 543 U.S. 220 (2005).

the view of many other practitioners and commentators – that over the years the Commission has given a false sense of precision in the Guidelines by, among other things, building in myriad offense characteristics and other adjustments that appear to account for relevant sentencing factors. The effort has generated a false sense that the Guidelines *do* account for every relevant factor in a given case and, perhaps more importantly, the false sense that they account for how these multiple factors should interact to generate a final sentencing range. Some, including Justice Breyer, have identified this as a false precision.

Whether it was right for the Commission to embark on such a venture before *Booker*, it should be clear that in a post-*Booker* world a much simpler Guidelines Manual would better promote the dual and complementary goals of treating like cases alike and avoiding the like treatment of cases that are not alike. Our comments to proposals during this cycle are informed by this view that the Commission should avoid adding provisions that complicate calculation of the Guidelines and attempt to account for factors that frequently can be considered by a judge when deciding, instead, whether to sentence above or below the applicable range.

TRANSPORTATION[2]

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

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

Similarly, the suggestion in Option 2 of expanding § 2B1.1(b)(11) to those convicted under § 659 should be rejected. That enhancement of two levels, with a floor of 14, is currently reserved for those whose offense "involved an organized scheme" to steal vehicles or vehicle parts. As noted above, § 659 is not limited to those involved in such organized schemes, nor is it limited to offenses involving vehicles or vehicle parts.

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2 The comments and recommendations set forth below on these topics largely track the language of our letter to the Commission dated March 14, 2007.

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

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

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

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

Bribery Affecting Port Security (Request for Comment 3)

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

INTELLECTUAL PROPERTY RE-PROMULGATION

The Commission has asked for comment on Congress's directive to determine whether the infringement amount definition in § 2B5.3 is adequate for certain offenses. Various options are proposed for measuring the infringement amount. The PAG believes Option 1 – which would give every trafficking case under 17 U.S.C. § 1201(b) a minimum of 12 offense levels – is premature. The experience with this offense is still developing, and there is no relevant case law. There is not yet any reason to think the guideline as it stands, including its provision that allows for upward departures, will be insufficient to capture the seriousness of trafficking cases under § 1201(b). And Option 3 is

too complex to be applied reliably: it is not at all clear what is meant by "the price a person legitimately using the device ... would have paid" in the context of a copy control circumvention device. The PAG believes that Option 2 is the simplest to apply and should be adopted.

There are two issues for comment, and the PAG agrees with the responses and recommendations made by the Federal Public and Community Defenders. First, the PAG believes there should be a downward departure provision in § 2B5.3 to deal with cases where the infringement amount overstates the offense's seriousness. Given the rapidly-changing technology involved, the guideline should provide flexibility. Just as other guideline sections allow for upward and downward departures in appropriate cases, so too should § 2B5.3. Second, the PAG supports the deletion of Application Note 3 and believes the special skill enhancement should not be required in every instance of initial access. Again, given the complexity and ever-changing nature of the relevant technologies, the PAG believes that significant flexibility in the guidelines, particularly in the short term, is desirable so as to permit accumulation of more sentencing data and experience under sections 1201 and 1204.

TERRORISM/PATRIOT ACT

Narco-terrorism

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

Border Tunnels And Passages (And Request For Comment 2)

In response to the congressional directive to promulgate or amend guidelines for persons convicted of offenses involving tunnels, the Commission has proposed new guideline: § 2X7.1. The new guideline provides a base offense level of 8 or 9 for defendants convicted under 18 USC § 554(b) (permitting the construction of a tunnel on one's property), 16 for defendants convicted under 18 U.S.C. § 554(a) (constructing or financing the construction of a tunnel) and 4, plus the underlying offense level for a minimum combined offense level of 16, for a violation of 18 U.S.C. § 554(c) (using a tunnel to unlawfully smuggle an alien, goods, controlled substances, weapons of mass destruction or a member of a terrorist organization). The PAG opposes the four-level increase to the offense level for the underlying offense. In immigration offenses, in particular, this could lead to very significant increases for those with an already high offense level – an increase disproportionate to the added culpability of using a tunnel rather than other means of illegal entry. In

response to the second request for comment, we also see no reason to increase the other penalties beyond those proposed.

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

The Commission asks whether the current guidelines provide sufficient punishment for violations of 18 U.S.C. §§ 545 and 549. The sole basis cited for raising this issue is the recent increase in the statutory maximum for each offense. But in the absence of either an explicit directive from Congress that the guidelines are too low or data gathered from prior sentencings demonstrating that judges have frequently needed to exceed the current guidelines, the Commission should not increase the guidelines. There may be unusual cases where the higher statutory penalty gives the courts the ability to impose a sentence above the current norm, but that is no reason to increase the sentences for the heartland of cases prosecuted under those statutes.

Displaying insignias and uniforms (Request for Comment 3)

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

DRUGS

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

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

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

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

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

level enhancement is thus a four-level enhancement for all facilitated entry abusers, save those who receive a mitigating role adjustment under § 3B1.2. *See* § 2D1.1(b)(4)(B).

Issue for Comment 3(b) asks whether the Commission should extend the facilitated entry enhancement to importation of all drugs under 21 U.S.C. §§ 960 and 963. The PAG opposes this suggestion. We see no reason that justifies extending this enhancement to other than methamphetamine. To our knowledge there is no reason to assume that the practice of using facilitated entry programs to import drugs is so widespread that it warrants a special enhancement beyond the special case of methamphetamine. Congress certainly has not identified it as a concern and explicitly limited enhanced penalties to methamphetamine importers. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (The provision "creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.")

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

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

18 U.S.C. § 860a

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

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

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

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

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

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

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

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

The issue for comment further asks if the enhancement should be broadened to include simple distribution of methamphetamine or even possession with intent to distribute

methamphetamine to the extent the distribution of methamphetamine poses a substantial risk of harm. And the Commission asks whether the enhancement should be further expanded to include all drugs. We oppose these constructions.

Congress, in 2000, recognized a special danger attendant to methamphetamine manufacturing. The nature of the chemicals involved, the risks of their combinations and the dangers posed by their disposal all trigger special concerns that are simply not implicated when already manufactured methamphetamine, or any other drug, is present. The Commission drafted guidance in Application Note 20 addressing factors such as the quantity of chemicals and hazardous or toxic substances, the manner of their disposal, the extent of the operation and the location of the lab. Such a nuanced examination is an appropriate approach for courts to take in making a determination of whether an operation poses the accepted risks. Presence of the end product does not trigger them. If such an enhancement were adopted, it is an easy step to apply the same penalty in the case of simple possession of the drug, making drug addicts who keep their drugs on the premises liable for extreme sentences because their minor children reside with them. This approach is excessive, unnecessary and unsupported by any evidence.

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

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

21 U.S.C. § 841(g)

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

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

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

841(g) offense, wherein a defendant's offense conduct involves extensive or far-reaching Internet use.

Third, in enacting § 841(g), Congress expressed no intent as to specific enhancements or penalties, aside from increasing the statutory maximum for ketamine offenses in one, limited circumstance (see below). Accordingly, the Commission should act judiciously and consistent with existing guidelines and policy. In particular, enactment of § 841(g) does not support adoption of the type of minimum base offense level (floor) proposed in Option 3. Indeed, the Commission should move away from such stringency.

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

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

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

Ketamine

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

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

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

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

TELEPHONE RECORDS AND PRIVACY PROTECTION ACT (PRETEXTING)

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

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

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

On a related note, we understand that the President's Task Force on Identity Theft is proposing an expanded definition of "victim" under § 2B1.1 that would include persons who suffer non-monetary harm, such as invasion of privacy, damage to reputation and inconvenience. This

proposed definitional expansion is terribly ill-advised. Section 2B1.1 is already complicated enough without requiring courts to identify the number of non-monetary-harm victims, as well as to assess the extent to which the offense has harmed them in such a non-monetary manner. The proposed definition is sufficiently broad and vague that it could conceivably require courts to count as victims any person who is required to testify as a witness before the grand jury or at trial. Even the larger categories of persons who are interviewed, or entities from which the government subpoenas or otherwise requests records, during the course of an investigation would surely have a claim of being "inconvenienced" by the offense.

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

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

* * * * *

As I mentioned at the outset, the Practitioners Advisory Group welcomes the opportunity to offer its views, which we believe are shared by many defense counsel, on the Commission's proposed amendments and issues for comment. I am happy to take your questions on these issues.

United States
Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 14, 2007

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

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

Dear Judge Hinojosa:

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

1. TRANSPORTATION

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

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

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

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

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

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

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

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

Bribery Affecting Port Security (Request for Comment 3)

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

2. SEX OFFENSES/ADAM WALSH ACT

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

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

§ 2A3.5/18 U.S.C. § 2250

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

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

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

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

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

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

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

New Offenses and Increased Penalties

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

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

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

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

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

Other Criminal Provisions

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

3. TECHNICAL AND CLARIFYING AMENDMENTS

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

4. MISCELLANEOUS LAWS

Fallen Heroes

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

International Marriage Brokers

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

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

Internet Gambling

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

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

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

5. INTELLECTUAL PROPERTY RE-PROMULGATION

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

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

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

6. TERRORISM/PATRIOT ACT

Narco-terrorism

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

Border Tunnels And Passages (And Request For Comment 2)

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

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

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

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

Displaying insignias and uniforms (Request for Comment 3)

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

7. DRUGS (NOT INCLUDING CRACK COCAINE)

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

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

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

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

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

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

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

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

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

18 U.S.C. § 860a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 U.S.C. § 841(g)

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

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

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

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

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

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

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

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

Ketamine

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

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

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

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

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

8. IMMIGRATION

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

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

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

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

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

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

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

9. BUREAU OF PRISONS MOTION/"COMPASSIONATE RELEASE"

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

10. CRIMINAL HISTORY

Minor Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related cases

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

11. PRETEXTING

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

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

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

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

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

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

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

12. CRACK COCAINE

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

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

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

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

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

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

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

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

CONCLUSION

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

Sincerely,

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Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner Edward F. Reilly, Jr.
Commissioner Benton J. Campbell
Kenneth Cohen, General Counsel
Judy Scheon, Chief of Staff

IMPORTANT NOTES

UNITED STATES SENTENCING COMMISSION
WASHINGTON, DC
TUESDAY, MARCH 20, 2007
PUBLIC HEARING

PANEL THREE
PROPOSED AMENDMENTS FOR 2007

JUDGE REGGIE B. WALTON

Judge Reggie B. Walton assumed his position as a United States District Judge for the District of Columbia on October 29, 2001, after being nominated to the position by President George W. Bush and confirmed by the United States Senate. Judge Walton was also appointed by President Bush in June of 2004 to serve as the Chairperson of the National Prison Rape Reduction Commission, a two-year commission created by the United States Congress that is tasked with the mission of identifying methods to curb the incidents of prison rape. Former Chief Justice Rehnquist appointed Judge Walton to the federal judiciary's Criminal Law Committee, effective October 1, 2005. Judge Walton previously served as an Associate Judge of the Superior Court of the District of Columbia from 1981 to 1989 and 1991 to 2001, having been appointed to that position by Presidents Ronald Reagan in 1981 and George H. W. Bush in 1991. While serving on the Superior Court, Judge Walton was the court's Presiding Judge of the Family Division, Presiding Judge of the Domestic Violence Unit and Deputy Presiding Judge of the Criminal Division. Between 1989 and 1991, Judge Walton served as President George H. W. Bush's Associate Director of the Office of National Drug Control Policy in the Executive Office of the President and as President Bush's Senior White House Advisor for Crime.

Before his appointment to the Superior Court bench in 1981, Judge Walton served as the Executive Assistant United States Attorney in the Office of the United States Attorney in Washington, D.C., from June, 1980 to July, 1981, and he was an Assistant United States Attorney in that Office from March, 1976 to June, 1980. From June, 1979 to June, 1980, Judge Walton was also the Chief of the Career Criminal Unit in the United States Attorney's Office. Before joining the United States Attorney's Office, Judge Walton was a staff attorney in the Defender Association of Philadelphia from August, 1974 to February, 1976.

Judge Walton was born in Donora, Pennsylvania on February 8, 1949. He received his Bachelor of Arts degree from West Virginia State College in 1971 and received his Juris Doctorate degree from The American University, Washington College of Law, in 1974. Judge Walton has been the recipient of numerous honors and awards, including his inclusion in the 2001 edition of The Marquis Who s Who in America, the 2000 edition of The Marquis Who s Who in the World, the 2000 North Star Award, presented by The American University, Washington College of Law; the 1999 Distinguished Alumni Award presented by The American University, Washington College of Law; the 1997 Honorable Robert A. Shuker Memorial Award, presented by the Assistant United States Attorneys Association; the 1993 William H. Hastie Award, presented by the Judicial Council of the National Bar Association; the 1990 County Spotlight Award, presented by the National Association of Counties; the 1990 James R. Waddy Meritorious Service Award, presented by the West Virginia State College National Alumni Association; the Secretary's Award, presented by the Department of Veterans Affairs in 1990; the 1989 H. Carl Moultrie Award, presented by the District of Columbia Branch of the National Association for the Advancement of Colored People; the Bar Association of the District of Columbia's Young Lawyers Section 1989 Award for Distinguished Service to the Community and the Nation; the 1989 Dean's Award for Distinguished Service to The American University, Washington College of Law; and the United States Department of Justice's Directors Award for Superior Performance as an Assistant United States Attorney in 1980. In addition, April 9, 1991, was declared as Judge Reggie B. Walton Day in the State of Louisiana by the Governor for his contribution to the War on Drugs. Judge Walton was also commissioned as a Kentucky Colonel by Governor Wallace G. Wilkinson in 1990 and 1991, which is the highest civilian honor awarded by the state of Kentucky. Numerous mayors in cities throughout the country have bestowed similar honors on Judge Walton.

Judge Walton was one of 14 judges profiled in a 1994 book entitled "Black Judges On Justice: Perspectives From The Bench." The book is the first effort to assess the judicial perspectives of prominent African-American judges in the United States.

Judge Walton traveled to Irkutsk, Russia in May 1996 to provide instruction to Russian judges on criminal law subjects in a program funded by the United States Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. Judge Walton is also an instructor in the Harvard University Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada. Judge Walton has been active in working with the youth of the Washington, D.C. area and throughout the nation. He has served as a Big Brother and frequently speaks at schools throughout the Washington Metropolitan area concerning drugs, crime and personal responsibility.

Judge Walton and his wife are the parents of one daughter.

COMMITTEE ON CRIMINAL LAW
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JUDICIAL CONFERENCE OF THE UNITED STATES
112 Frank E. Moss United States Courthouse
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March 16, 2007

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

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

IMPORTANT NOTES

UNITED STATES SENTENCING COMMISSION
WASHINGTON, DC
TUESDAY, MARCH 20, 2007
PUBLIC HEARING

PANEL FOUR
COMMUNITY INTEREST REPRESENTATIVES

PLACEHOLDER FOR ERIC E. STERLING

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WRITTEN STATEMENT
U.S. SENTENCING COMMISSION
MARCH 20, 2007
Cocaine Sentencing Policy
of
Eric E. Sterling
President, The Criminal Justice Policy Foundation
Adjunct Lecturer in Sociology, The George Washington University

Thank you very much for the honor of inviting me to testify before the Commission regarding cocaine sentencing policy.

My Background

From 1979 to 1989 I was Assistant Counsel to the Committee on the Judiciary, U.S. House of Representatives, responsible for federal drug laws, oversight of the federal anti-drug effort, and other matters.

In 1979 and 1980, I helped the Committee develop the Criminal Code Revision Act of 1980 (H.R.6915). Among its features was a precursor to the Sentencing Reform Act of 1984, providing that sentencing guidelines be promulgated by the Judicial Conference of the United States.

In 1982, I helped develop on the House side "drug czar" legislation proposed by Senator Joseph Biden (D-DE) that Congress passed to guide national anti-drug strategy. It was vetoed by President Reagan in January 1983. I worked on subsequent drug czar legislation culminating in the 1988 Act creating the Office of National Drug Control Policy in the White House.

In 1984, I participated in the development of the Comprehensive Crime Control Act of 1984 (P.L.98-473), which included the Sentencing Reform Act creating this Commission, and other provisions.

In 1986, I was the staff counsel principally responsible for processing the development of the Narcotics Penalties and Enforcement Act that created 5- and 10-year mandatory minimum sentences for crack cocaine, powder cocaine and other drugs. In

1988, I worked on the Anti-Drug Abuse of 1988 which extended the mandatory minimums to attempts and conspiracies, and created the crack possession mandatory minimum.

The Statutory Goal of Mandatory Minimum Legislation

In 1986, Congress had a laudable goal for the legislation – **"to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."** The Judiciary Committee said in its report, "The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs." (H.Rep't. 99-845, Part 1, Sept. 19, 1986).

This point deserves emphasis. First, by 1986, every state police organization, and most county and municipal law enforcement agencies of any size, had dedicated, highly-trained narcotics agents and bureaus. Far more state and law enforcement officers than DEA Special Agents were engaged in the specialized tactics and procedures necessary to enforce the drug laws. Suppressing the illegal drug trade was not primarily a Federal government activity.

Second, throughout the 1980s, in numerous committee hearings in both houses of Congress, Members of Congress expressed a strong concern that there be much more effective coordination and division of labor in fighting the drug trade.

For example in 1983, U.S. House of Representatives Select Committee on Narcotics Abuse and Control, on a mission to Mexico, Peru, Bolivia, Colombia and Jamaica that I accompanied, encouraged U.S. enforcement personnel and the law enforcement officials of those nations to focus on the most important drug traffickers in order to raise the effectiveness of our efforts.

In another example, in 1986, in addition to creating mandatory minimum sentences for major drug traffickers, Congress created the new crimes of money laundering as another tool to prosecute the high level drug traffickers (another bill that I was involved in developing).

The enormous capacity of state and local law enforcement agencies to effectively police neighborhood, local and city-wide retail drug trafficking is that collectively they have been making between 1 and 1 ½ million arrests for drug abuse violations each year for the last decade. State courts impose about one-third of a million felony drug convictions annually.

In contrast, the number of federal drug cases that can be brought is dramatically smaller -- in the range of 20 to 30 thousand cases per year.

Congress's stated goal made sense – focus the federal effort, with assistance from the military and intelligence agencies, and foreign governments, with the ability to gather evidence globally on the cases promising the greatest impact in dismantling the drug trade and supply.

Congress's decision to modify the Controlled Substances Act penalty structure to provide

much longer penalties for major trafficking as a tool to encourage the federal enforcement agencies to focus on major traffickers made sense.

But as this Commission has heard in repeated testimony for over fifteen years, Congress made a colossal mistake. Congress, in its haste, chose quantity triggers, particularly for cocaine and crack cocaine that have pointed the federal effort in precisely the wrong direction, the lowest level of the retail trade.

Congressional anti-drug activity in its political context

Congress has historically addressed the drug problem in highly emotional and highly political terms. The drug problem is always devastating. It is always an enormous menace. The language is that of the moral crusade, rich in the anecdotes of devastated lives and hyperbolic warnings of the dangers to generations, to populations, even to civilization itself. ("Crack cocaine threatens our society's futur. . .we have a duty as a civilization, as a lawful society, to do all that we can to fight this threat," Rep. Ed Bryant (R-TN), Oct. 18, 1995, 104th Congress, Cong Rec. H10267) In drug rhetoric, the phenomena of drug use and drug production trumps all other social phenomenon as the cause of crime and disorder. Partial truths regarding drugs become distorted.

It is true, for example, that an enormous fraction of those in prison for property crime and violent crime have long histories of alcohol abuse and drug abuse. This fact creates a political drugs and crime *gestalt* that obviates the need for analysis of the genuine complexity of the many dimensions of drug use and abuse and crime commission.

In this universe, drugs are an agency of evil and inevitably corrupt those who use them. In its more sophisticated modern articulation this corruption is accomplished through the changing of brain chemistry. Normal people who use illegal drugs (or legal prescription drugs illegally) are changed, and once said to be addicted, suffer from a "brain disease." The enlightened response of providing drug treatment to drug users is nearly universally endorsed. The legal principle that warrants punishment for the conduct that results from this "brain disease," use of prohibited drugs is rarely thoughtfully examined. (*See* Douglas Husak, *Legalize This! the case for decriminalizing drugs,* Verso, New York, 2002.)

The other context is political combat. Dissent from political hegemony regarding drugs brings attack. U.S. Rep. Gerald Solomon (R-NY) most famously defeated the Democratic incumbent in his 1978 race, U.S. Rep. Edward W. Pattison, who admitted having tried marijuana (long before Rep. Newt Gingrich, and many other national political leaders in the years since), by regularly referring to him as "Pot-tison."

For twenty years, reform of the cocaine sentences has been stymied by fears (both real and exaggerated) that it will be characterized as being "soft on drugs" or to structure a political debate to force opponents into casting such votes.

In both1986 and 1988, the Anti-Drug Abuse Acts were conceived by the House

Democratic leadership as vehicles to improve Democratic political prospects in November.

As the Commission knows very well, the effort to correct the 1986 legislation runs against the charge that increasing the quantity trigger "lowers the penalty" for crack cocaine trafficking offenses. One senior Member of Congress even suggested Congress "is softening its stance regarding *the acceptability of their behavior,*" implying that rationalizing the sentence carries the implication that crack cocaine trafficking would be acceptable behavior (Rep. Bill McCollum, 104th Congress, Cong. Rec. H01264, Oct. 18, 1995, in the debate on H.R.2259 to disapprove certain sentencing guidelines amendments).

If trafficking in crack cocaine no longer had a five year mandatory minimum and merely remained a felony that could be punished by up to twenty years in prison, would a reasonable person argue that now this conduct borders "acceptability?"

Sadly, often those engaged in the discourse around drugs in the Congress and elsewhere sound like they are hallucinating.

Commission's approach to its findings

The Commission has issued carefully researched reports in 1995, 1997 and 2002 that demonstrated that federal cocaine sentencing has offended one of the key goals of the Sentencing Reform Act of 1994, to provide fairness and uniformity in sentencing.

The Commission has found racially disparate sentencing in the area of cocaine sentencing, exemplified by the crack cocaine cases.

The federal government prosecutes ten Black drug offenders for crack cocaine offenses for every White drug offender.

So a key approach has been to correct the apparent racial imbalance by trying to bring the quantity triggers for crack cocaine and powder cocaine closer together. This approach is exemplified by the legislation that has been introduced in every Congress for the past decade by Rep. Charles Rangel (D-NY), the Crack Cocaine Equitable Sentencing Act, which sets the quantity triggers for the mandatory minimums for both crack and powder cocaine at the powder cocaine level, now 500 grams for the 5 year minimum and 5000 grams for the 10 year minimum.

This approach is laudable for its simplicity and for recognition of the pharmacological fact that cocaine base and cocaine hydrochloride are neuro-pharmacologically the same.

But this approach has not addressed the political fact that crack cocaine is believed to be a much more dangerous drug than powder cocaine.

Crack cocaine versus powder cocaine – the dangers

It is widely believed that crack cocaine leads to more violence than powder cocaine and is more destructive of the communities in which it is used than is powder cocaine.

The problem with this analysis has been its pharmacological bias. Since the analysis is attempting to find the differences between crack and powder cocaine to justify the sentencing difference, it attributes the differences that are found to the drug, and not to other factors that cause or contribute to the problems, independent of the form of the drug.

A little more than a century ago, the acclaimed sociologist, W.E.B. Du Bois, published his study, *The Philadelphia Negro*. Contemporary sociologist, Elijah Anderson, at the University of Pennsylvania, has continued this work in *Code of the Street: Decency, Violence and the Moral Life of the Inner City* (1999).

A century ago, Du Bois,

> developed a typology [of the black community] made up of four classes. The first were the well-to-do; the second, the hardworking, decent laborers who were getting by fairly well; the third, the 'worthy poor,' who were making or trying to work but barely making ends meet; and the fourth, 'submerged tenth,' those who were in effect beneath the surface of economic viability. Du Bois portrayed the submerged tenth is *largely characterized by irresponsibility, drinking, violence, robbery, thievery, and alienation*...Today the counterpart of this class, the so-called ghetto underclass, appears much more entrenched and its pathologies more prevalent, but the outlines Du Bois provided in *the Philadelphia Negro* can be clearly traced in the contemporary picture. (Anderson, p. 108, emphasis added).

Some contemporary observers, seeking to justify the current sentencing scheme look for the effects of crack cocaine, point to conditions that have plagued a portion of the African-American population for generations, and say this is the fault of crack cocaine.

But the problems in the ghetto have gotten worse, and started getting worse when crack cocaine appeared. Dr. Anderson argues however,

> "The growth and transformation of this underclass is in large part *a result of the profound economic changes* the country – especially urban areas like Philadelphia – had undergone in the past twenty to thirty years. Deindustrialization and the growth of the global economy have led to a steady loss of the unskilled and semiskilled manufacturing jobs that, with mixed results, had sustained the urban working class since the start of the industrial revolution. At the same time 'welfare reform' has led a much weakened social safety net. For the most desperate people, many of whom are not effectively adjusting to these changes – elements of today's submerged tenth – *the underground economy of drugs and crime often emerges to pick up the slack.* (Anderson, p. 108, emphasis added).

Crack cocaine, it must be conceded, has aggravated these underlying problems. However,

the profits from the crack cocaine trade, however, are not profoundly different from the profits of the heroin, marijuana, methamphetamine trade.

The reality is that attributing the plight of the most disorderly, run down, and impoverished neighbors to crack cocaine omits too many other very real phenomena: four centuries of North American white privilege, the legacy of slavery and racial segregation and continuing racial discrimination, historic poverty and a lack of jobs and economic opportunity, overcrowded and substandard housing, teenage pregnancy and families without the presence of fathers, domestic violence, welfare dependency, lack of health care including mental health care, poor schools and a variety of other cultural problems.

No doubt crack cocaine addiction aggravates these problems, as does alcohol abuse and addiction, and heroin addiction, as far as chemicals go. But so does a culture of conflict resolution by violence (*See* Fox Butterfield, *All God's Children*, 1996).

Claims about crack cocaine's unique addictiveness or its unique *in utero* devastation of fetal development have been demolished because epidemiological methodology has exposed those claims to statistical fact.

That leaves the supporters of the harsh crack cocaine mandatory minimum sentences with arguments that are statistically harder to disprove such as crack cocaine is especially destructive of community order because it is impossible to control for the other independent variables such as poverty and jobs, schools and educational success, family structure and parenting, health care, mental illness and treatment, and the hard to measure reality of racism and racial discrimination.

Powder cocaine addiction leads to impoverishment and death. But to the extent that there is a middle class stigma against crack cocaine, powder cocaine may be more prevalent in the middle class than crack cocaine. Yet powder cocaine addicts in this class often convert their powder to crack or buy crack cocaine because inhaling vaporized cocaine is a more efficient way of getting cocaine to the brain and produces a more intense high. Yet such cocain users more frequently have health insurance and economic resources to get treatment, and don't come as readily to the attention of the public hospitals and the public defenders.

Arguably ineffective national firearms control laws contribute to the availability

Violence

Does crack cocaine cause more violence than powder cocaine? Is the crack cocaine trade more violent than the powder cocaine trade?

The Sentencing Commission's data on federal cocaine offenders demonstrates that weapons involvement is found only among a very small minority of crack cocaine offenders. Carrying and using guns is not, at least as far as the Sentencing Commission's research goes, a normative behavior for crack offenders.

It seems to be the case that pharmacologically there is no difference in the violence propensity of crack users versus powder cocaine users.

Regarding the violence associated with the cocaine trade, one must consider the violence of the wholesale and international powder cocaine trade. In Mexico and Colombia, thousands of persons are murdered each year in the struggles between the powder cocaine producers, wholesalers and shippers. Surely that violence, even though it takes place outside the United States, must be put on the scale of relevant violence.

In the early 1980s, the wars between Cuban and Colombian criminal organizations for control of the South Florida powder cocaine market were fought in the streets and shopping centers with automatic weapons.

When illegal drug markets are unstable and immature, violence is more common than when the markets are mature and stabilized. Violence is an inherent tool of all the illegal drug markets. Disputes among market participants cannot be resolved by resort to the courts. The only way to resort to arbitration is to turn to organized crime organizations, and their judgments are enforced with violence. Violence is a tool of competition in the illegal drug markets.

The illegal drug markets sell very high volumes of enormously valuable commodities exclusively for cash. They are always targets for robbery and cannot rely upon off-duty police or private security businesses for protection. They must protect themselves. The best protection is to employ persons with reputations for lethal and unrestrained violence with "street credibility" to deter potential robbers. As the markets mature, the risk of such robberies and such violence diminishes.

The crack market in the late 1980s was a new, immature and unstable market and characterized by violence, especially youth related gun violence.

Nothing about crack cocaine markets is intrinsically more prone to violence than another busy illegal drug market.

Time for an old approach

Congress was correct in 1986 in identifying the federal role in national drug enforcement as a focus upon the highest level traffickers. State and local enforcement have the staffing, the legal authority, and the punishment capacity to prosecute the retail drug trade.

To the extent that federal law enforcement agencies spend time on retail drug cases, they are not focusing their unique powers on the international, continental and nationwide criminal organizations that assure the local crack markets of their inventory.

When local citizens protest that they want their streets cleaned up, implicit in their

complaint is fact that the local police are not sufficiently mobilized to protect them from the retail cocaine trade, and that the federal government is not focused on stopping the international traffic that keeps the corner crackhouse supplied.

The local complaint should not be allowed to distract the federal agencies from their job. The local law enforcement agencies naturally would like federal personnel to join them on the street. But that is not the proper federal role.

The complaint of the local homeowner should no more redirect national anti-drug policy than their complaint would be allowed to skew national mortgage policy or energy policy.

The federal government should no longer be involved in retail drug cases. The federal drug enforcement focus, if it is to provide the correct support to state and local law enforcement, must be to fully engage the international production and trafficking in cocaine, i.e., the highest level traffickers.

Crack cocaine is almost always only created by retail organizations a short distance from where it is sold. It is not the form of international smuggling.

Conclusion

This leads to two conclusions.

First, as a general rule, there should be no federal crack cocaine cases. A case that involved crack cocaine is, almost by definition, basically a retail case.

Second, the mandatory minimum quantity triggers should be set at appropriate levels for high level traffickers. For the ten year mandatory, an appropriate target for managing DEA and U.S. Attorneys offices should be one metric ton, 1000 kilograms of cocaine. For the five year mandatory, a more appropriate target quantity would be in the range of 100 to 200 kilograms.

When these become the typical levels of federal prosecutions – not 52 grams of crack cocaine or 500 grams of powder cocaine – then state and local police will be getting the federal law enforcement support they need to fight neighborhood crack houses. And local communities may begin to enjoy a reduced drug problem that the prohibition strategy purports to offer.

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Deborah Peterson Small
Executive Director – Break the Chains

Deborah Peterson Small is the Executive Director of Break the Chains, an organization that seeks to build a national movement within communities of color to promote progressive drug policies that promote racial justice and human rights. Before founding Break the Chains, Ms. Small was Director of Public Policy for the Drug Policy Alliance where she spoke regularly to the public, including elected officials, religious and community leaders as well as parents about issues relating to our government's failed drug policies. She has also served as Legislative Director for the New York Civil Liberties Union. It was during this period that she became an ardent advocate for drug policy reform as she became increasingly aware of the number of people of color arrested and incarcerated for drug offenses. She is a native New Yorker and a graduate of the City College of New York and Harvard Law School.

Justice Delayed is Justice Denied:
A Plea to Reform Federal Cocaine Sentencing Laws

Submitted by Break the Chains and Members of the
National African American Drug Policy Coalition

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Dear Commissioners:

Twenty-years ago, in response to what appeared at the time to be a serious epidemic of crack cocaine abuse, Congress enacted laws singling out offenses involving crack cocaine for more severe penalties than other drug crimes including a mandatory five year minimum for sale of as little as 5 grams of crack cocaine. Under these provisions crack cocaine offenses are punished 100 times more severely than crimes involving powder cocaine, consequently the threshold amount that would trigger a five year mandatory sentence for powder cocaine is 500 grams. Congress further singled out crack cocaine for special punishment when it required a mandatory minimum sentence of five (5) years for a first offense of mere possession of five grams or more of crack cocaine.[1] There is no federal mandatory minimum sentence for first time possession of powder cocaine or any other currently illicit drug.

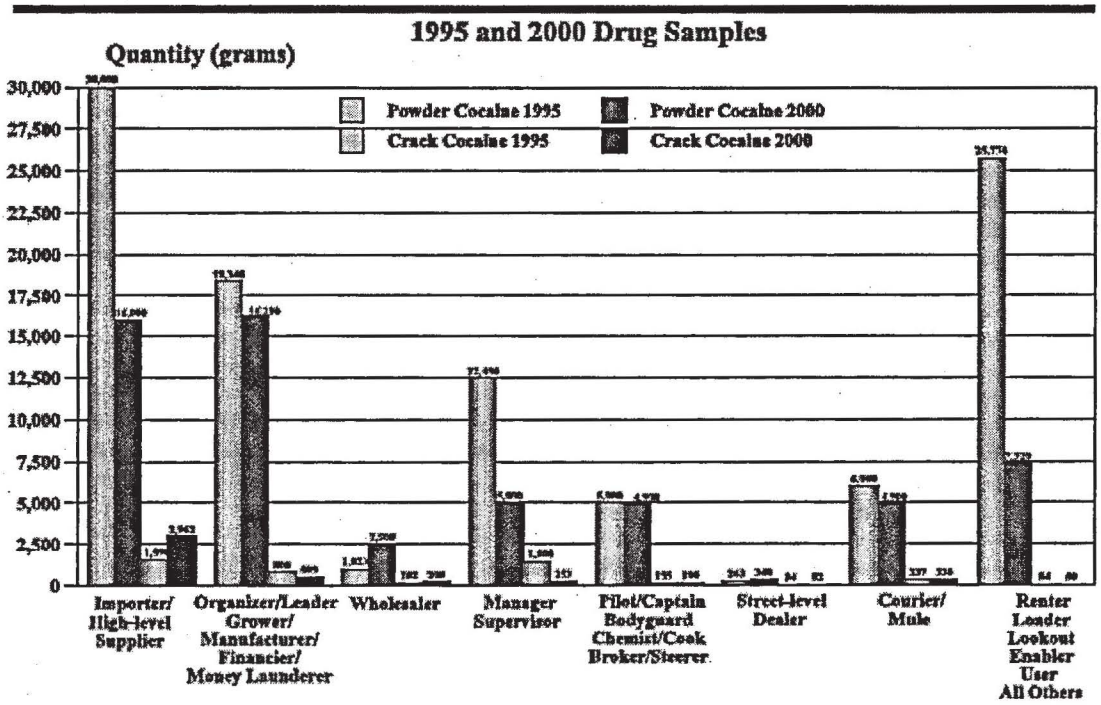
In the years since the passage of these laws, there has been a growing chorus of criticism regarding their impact, particularly on African-American defendants and the continuing validity of the 100:1 sentencing disparity. In 1986, before mandatory minimums for crack cocaine offenses became effective, the average federal sentence for black drug offenders was 11% higher than for whites. Four years following the implementation of the crack-powder cocaine sentencing disparity, the average federal sentences for black drug offenders was 49% higher than for whites.[2] According to the Sentencing Project, between 1994 and 2002, the average time served by African Americans for a drug offense increased by 73%, compared to an increase of 28% for white drug offenders.[3] The stiff sentences imposed by these laws were ostensibly intended to provide incentive for federal prosecutors to target major drug traffickers that manage large scale operations moving large amounts of drugs. However, their implementation has had the opposite effect. Because the threshold level quantity of crack cocaine needed to trigger a 5 or 10-year mandatory sentence is so low, prosecutions have focused disproportionately on low-level

[1] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) and Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).
[2] Mierhoefer, Barbara S., The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed (Washington DC: Federal Judicial Center, 1992).
[3] The Federal Prison Population: A Statistical Analysis, The Sentencing Project, January 2006, http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=502

crack cocaine cases. Between 1995 and 2000 the percentage of federal crack cocaine convictions of street-level dealers rose from almost half (48.4%) to more than two thirds (66.5%).[4]

Because crack cocaine sentences are based primarily on the amount of drugs involved, the 100:1 disparity affects not only street level offenders but also those prosecuted as major distributors or traffickers. The following chart illustrates the disparity in the median amount of drugs involved in various levels of federal cocaine prosecutions.

Median Drug Quantity by Offender Function in Powder Cocaine and Crack Cocaine Cases



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

As the chart above clearly shows, the 5 grams of crack cocaine threshold set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less "serious" drug traffickers. The median crack cocaine street level dealer was arrested holding 52 grams of crack cocaine enough to trigger a 10-year mandatory sentence. For powder cocaine, the median street level dealer is charged with holding 340 grams of powder cocaine, not enough even to trigger the 5-year mandatory sentence.[5] It its 2002 Report to Congress, the Commission recognized the adverse effects of the 100:1 sentencing disparity for crack cocaine offenses –"it has resulted in severely long prison terms for low-level crack cocaine offenders and because sentences are based primarily on the quantity of drugs involved, defendants with different levels of culpability are lumped together." No where is this effect more pronounced and injurious than

[4] USSC Report to Congress Cocaine Sentencing Policy, May 2002, p. 53.
http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm
[5] Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

in the case of women who are prosecuted as mules or co-conspirators. The problem has become so pervasive that it's known colloquially as "the girlfriend problem".

Federal sentencing laws punish not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs. A woman charged with conspiracy in a drug crime is held legally responsible for the total amount of drugs possessed or sold by everyone in the operation rendering her vulnerable to extremely long mandatory sentences. As a result, even when they have minimal or no involvement whatsoever in the drug trade, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity. The experience of Sandra Lavonne Rucker is illustrative:

> At the time of her arrest Sandra was in relationship with a man who ran a drug operation, and allegedly brought a weapon into Sandra's apartment. Although the testimony of a codefendant established that Sandra was not a principal organizer of the operation and she provided credible testimony that she had never sold drugs and was just the man's girlfriend, she was nevertheless convicted of involvement in the drug conspiracy and was held liable for the total amount of drugs involved in the operation – in this case 50 grams or more of crack cocaine – Sandra received a sentence of life imprisonment.[6]

The impact of federal drug sentencing policy on women has been dramatic. Women are now the fastest growing segment of the prison population. Women are now six times more likely to spend time in prison than they were before the passage of mandatory minimum drug sentencing. As a result of federal mandatory minimum drug sentences including the crack-powder sentencing disparity, African-American women are entering prison at rates that are 2 ½ times higher than Hispanic women and 4 ½ times higher than white women.

Sentences for crack cocaine offenses are grossly disproportionate when compared with sentences for other crimes that don't have mandatory minimums. Five grams of crack cocaine is worth about $400 and represents one fifty-millionth of annual U.S. cocaine consumption, or about two weeks supply for the average user. Compare the five year mandatory sentence for possession of five grams of crack cocaine with the national average time served for homicide of about five years and four months.[7]

Accumulating evidence demonstrates that the punitive sentencing structure enacted two decades agoto combat crack cocaine abuse has not produced benefits commensurate with the harms it is inflicting. Extensive ethnographic and governmental evidence show that despite increased law enforcement focus on cocaine, the street prices of crack and powder cocaine have remained the same over the past decade. Moreover, cocaine purities are as high as they were at the height of the crack era which demonstrates that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.[8]

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[6] Hameefah Jackson, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 How.L.J. 517, 520-521 (2003); United States v. Riley, 215 F.3d 1323 (4th Cir. 2000).

[7] Caulkins, Jonathan P., Reuter, Peter, Reorienting U.S. Drug Policy, Issues in Science and Technology, Fall 2006 www.issues.org/23.1/caulkins.html

[8] Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

In 1994, Congress directed the Commission to study the impact of the crack-powder disparity in federal cocaine sentencing. In 1995 the Commission recommended a revision of the crack-powder 100:1 sentencing disparity, based on its finding the differential was not justified by any differences between the two forms of the drug and implementation of the laws was having a severely disparate effect on African-American cocaine offenders. The Commission recommended that Congress equalize the ratio to 1:1 based on the quantities set to trigger mandatory sentences for powder cocaine offenses and repeal the 5 year mandatory sentence for possession of crack cocaine. The Commission suggested that Congress could accomplish its goal of punishing violent crime related to crack cocaine distribution more severely by using criteria other than drug type or amount to enhance sentences based on specific behavior (e.g. use of weapon; sales to minors or use of minors in transactions; gang-related drug activity). For the first time in the Commission's history, Congress rejected its recommendation in its entirety and refused to consider any changes to the penalties.[9]

In 1997 the Commission again recommended that Congress reduce the crack-powder sentencing disparity, again by changing the weight amounts that would trigger a mandatory sentence except this time the Commission provided a ratio range of 2:1 – 15:1 to choose from. However, again Congress refused to act on the recommendation. The issue came up again in 2002. This time the Commission recommended reducing the crack-powder disparity ratio to 20:1. Each time the Commission also recommended that Congress repeal the mandatory minimum for simple possession of crack cocaine. Once again, Congress refused to act on the recommendation.

Which brings us to the present. Once again the Commission is holding hearings on the crack-powder sentencing disparity and again experts from the judiciary, academia, criminal defense and prosecution as well as drug treatment and drug policy reform advocates have testified in favor of reforming these laws. Much has already been said regarding the racially disparate impact of these laws. Government surveys have consistently shown that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.[10] Research demonstrates that the majority of drug users purchase their drugs from people who are of the same racial or ethnic background as they are which means that the majority of crack cocaine sellers in the U.S. are white.[11] Despite these well known facts African-Americans continue to comprise the bulk of federal crack cocaine defendants. Indeed in 2005, 82.3% of federal crack cocaine defendants were African-American. If these numbers were referencing prosecutions for murder, arson, burglary or car theft, there would be no question of racially skewed law enforcement as there is broad acknowledgment that these crimes cut equally across racial, ethnic and class groupings but when it comes to drug crimes – especially crack cocaine - we are all too willing to accept a racialized view of who the offenders are.

Supporters of the current laws claim that crack cocaine offenses are deserving of harsher penalties because there is greater criminality and violence associated with crack cocaine than with powder cocaine. Furthermore, they argue that crack cocaine sellers tend to congregate in poor inner-city communities, turning neighborhoods into war zones that drive businesses away and leave residents in fear.

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[9] Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.
[10] Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995 (Washington, DC: Sept. 2005), Table 1.43a.
[11] Dorothy Lockwood, Anne E. Pottinger, and James Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnell F. Hawkins, ed. Ethnicity, Race and Crime, New York: State University of New York Press, 1995. p. 21.

Testimony the Commission received in November 2006, from experts in drug addiction treatment, criminology and ethnographic research made it clear that whatever validity that position may have had in 1986, it no longer holds today. Dr. Nora Volkow, Director of NIDA testified that there is "no evidence that crack [cocaine] is associated with more violent behavior than intravenous drug use [of cocaine]." "Now can cocaine produce violent behavior?.....yes, cocaine can be associated with violence very much in part driven by the fact that it can induce paranoid thinking in the individual taking the drug. That occurs whether you inject or you smoke, and it even occurs with snorting. The more repeatedly you are doing it, the more likely you are to become paranoid from cocaine."[12]

Dr. Bruce Johnson of NDRI testified that inner-city African-American youth – especially males - have voluntarily eschewed crack cocaine use which has become heavily stigmatized. He also testified that only a small minority of crack cocaine users in New York City carried guns or used weapons during the past six years. They also had very low incidences of aggravated assault or otherwise caused physical harm to people. It is our belief that similar studies in other jurisdictions would demonstrate the same findings. Another study of criminal activity among heavy or regular crack cocaine users found that their illegal income generating activities were sporadic and tended to be crimes of opportunity as opposed to crimes that involved planning or organized action.[13]

The claim by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade is belied by the available evidence. Two recent studies are of particular note:

In Seattle, Washington, African-Americans account for about 8% of the population but comprised 57% of those arrested for drug crimes in the city. A report analyzing the reasons for such dramatic racial disparities in arrests reached the following conclusions[14]:

1. Drug enforcement practices focus on visible street-level markets, which tend to disproportionately involve persons of color, but are not necessarily reflective of all drug markets or even the majority of drug markets.
2. Crime and other ancillary effects are related to all drugs, including those that fall outside the radar of local police. While drug enforcement since the crack epidemic is often characterized as targeting the violence associated with drug markets, it appears that the violence associated with the crack trade has declined significantly and the focus of local policing is more on the quality of life effects of public drug use and markets.
3. Police often claim that they are responding to community complaints and concerns, but the geographic distribution of formal narcotics complaints did not necessarily reflect the concentration of drug arrests – while only 12.5% of drug complaints emanated from the predominantly African-American section of the city, more than 50% of all drug arrests took place there.

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[12] U.S.S.C. Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, p. 193.

[13] Cross, J. et al., Supporting the habit: income generation activities of frequent crack users compared with frequent users of other hard drugs, Drug and Alcohol Dependence 64 (2000) 191-201.

[14] Beckett, Kathleen. et al. A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle, John F. Kennedy School of Government, Harvard University April 2001. http://www.defender.org/projects/rdp/

Another report by Drs. Bruce Johnson and John C. Cross begins with the following provocative hypothetical:

> "Two young men are selling on the sidewalk on a street in upper Manhattan. Both are hoping to make a sale soon so that they can use the money for something they need. Both are selling a product that they purchased from someone with whom they have a personal relation. Neither one has a license or a permit to sell products on the street, nor has any plans to pay taxes on their earnings. Both keep an eye out for the police. Despite all these similarities, however, there is a world of difference in the type of product they are selling. One is selling sweaters imported from Peru and if he is caught he will probably be placed under administrative arrest for a few hours and fined. The other is selling crack cocaine: if he is caught he could face from five to ten years in prison."[15]

The report ends with the following conclusions:

> "In many ways our research on crack [cocaine] dealers showed that they behaved in ways very similar to informal street vendors. Both had marginal skills for primary sector jobs (low social capital); both put in long hours in public locations during which it was often not clear whether they were working or socializing; both used social networks to further their selling repertoire; and in other ways both used similar techniques for risk management used in the legal informal sector.
>
> While illegality may be for some people a form of entrepreneurship, most of the persons immersed in the illegal drug trade did not and could not squeeze a profit out of the commodity they sold. Rather, most were victims of many forms of exploitation by others in the market.....While people make choices about their actions, the available choices are radically different for different members of our society. Moreover, those choices are structured by our very legal system. For those who have been excluded from the legal formal economic system, the rules of formality and legality crate two disparate paths, fraught with the risk of capture but open with the semblance of opportunity. Thus choices deemed to be negative by society are actually made valuable to these marginal populations by the very legal system itself. If crack were a legal drug, very few people currently involved in its production, distribution and sales would be employed by it".[16]

The disparate focus of drug law enforcement on poor inner-city communities and particularly on young men in those communities only exacerbates the endemic problems of poor performing schools, high unemployment, dysfunctional families and persistent poverty. One recent study of crack cocaine sellers found that "the vast majority of respondents engaged in crack [cocaine] selling were raised in severely distressed households. Their career 'choices' and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside."[17] A fundamental problem facing New York City and American society is how to develop appropriate social responses and supports for a whole generation of inner-city youth from severely distressed families and communities who have "said no" to heroin injection and crack smoking but will still find

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[15] Cross, J., Johnson, B. et al. Expanding Dual Labor Market Theory: Crack Dealers and the Informal Sector, International Journal of Sociology and Social Policy, Vol. 20 November 1/ 2 2000, P. 96-133.

[16] Id.

[17] Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

integration into mainstream society impossible. From their vantage point, they have no opportunities or supports to gain access to decent jobs or conventional roles. Locking up an ever larger number of young black male residents of inner-city neighborhoods constitutes a cost to society, and this cost must be placed alongside the alleged benefits of the policy to determine its effectiveness. The fact that inner-city drug sellers are not choirboys does not mean that imprisoning them at ever increasing rates for long periods of time is an effective way to deal with the drug problem.

Dr. Alfred Blumstein of Carnegie Mellon testified that a significant amount of the violence associated with crack cocaine markets during its early advent was related to the following factors:

- The crack cocaine market in inner city communities was predominantly a street market – making it more visible and vulnerable to violence in comparison to the powder cocaine market which tended to be more indoors, controlled and less prone to violence;
- The rapid popularity of crack cocaine led to increased competition among street level dealers including turf battles and disputes over drugs and/or money.
- Increased law enforcement combined with long mandatory minimums led to a "replacement effect" where young men with minimal impulse control and ready access to guns were recruited to replace older, more experienced dealers.

He further testified that the past ten years have seen a steady decrease in crime and violence related to crack cocaine distribution. Distribution roles in crack cocaine and other drug markets are well known, and easy to access by inner-city youth. For many, participating in the drug trade appears to be the only available economic option. Yet, these youth are apprehensive. Selling drugs requires a wide range of skills they lack, including the ability to recognize undercover police, possess and use guns and deal with rivals.

Dr. Blumstein provided a very salient basis for eliminating the crack-powder sentencing disparity in particular and mandatory minimums in general when he noted: "the appropriateness of mandatory [minimums] decays over time, as I believe it clearly has in the difference between crack and powder cocaine. So that it would appear that mandatory [minimums] are acts of the moment that, when incorporated into statute, keep on forever. It would be desirable, obviously to not impose them on the future. It would be desirable, at a minimum to sunset the mandatory on this particular law and it would be desirable generally to sunset mandatory [minimums] more widely...."[18]

The severity of punishment for crack cocaine offenses was based in large part on the perception of crack as the most "powerfully addictive" and "dangerous" drug that posed a significant threat to communities and society. However, the past decade has witnessed the re-emergence of a drug that is considered by all to be more addictive and dangerous than crack cocaine – that drug is methamphetamine. Methamphetamine is a powerful stimulant drug that can be injected, smoked, inhaled or swallowed. In most areas of the country methamphetamine is cheaper than cocaine and for some users more desirable because it metabolizes slowly so the high lasts longer, generally between four to six hours after which users often turn to other drugs to ease the crash that follows.

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[18] U.S. Sentencing Commission Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, Pgs. 206- 211.

As was true when crack cocaine first emerged, media outlets around the country have reported on methamphetamine as "the most dangerous and addictive drug" in the United States. Unlike prior drug outbreaks that were generally identified with urban inner city communities, methamphetamine abuse has spread from the biker and trucker communities of California to the Pacific Northwest, Mountain states and the rural heartland. Communities that previously had little experience with illicit drug addiction or drug-related crime have seen significant increases in many of the direct and collateral consequences of addiction. As was true with crack cocaine, many of those who have become addicted to methamphetamine are women, often with devastating impact on their lives and families. Methamphetamine abuse is associated with crime, domestic violence, child abuse, erratic behavior, paranoid delusions and rapid physical deterioration. Methamphetamine is comprised of synthetic chemicals that can be easily obtained and "cooked". These chemicals are extremely volatile, particularly in the hands of non-chemists, consequently areas of methamphetamine production are marked by an increase in chemical explosions of unstable labs causing damage to humans, wildlife and the environment.

Methamphetamine is considered by both scientists and public officials to be more addictive and dangerous than crack cocaine, but so far the Congressional response to rising methamphetamine abuse has not been as punitive as it was towards crack. As noted in a Congressional Quarterly story last year, the primary response to methamphetamine production and use has not focused on punishing and incarcerating low level sellers and users. Instead, according to Rep. Elijah Cummings, "There seems to be more of an emphasis on shutting down these methamphetamine labs and trying to figure out ways to treat these addicts and then get them back into the flow of society". [19]

Unfortunately, thus far that compassion has not carried over to our treatment of men and women involved with crack cocaine. Many believe this difference in attitude is because of the demographics of the affected communities. Unlike crack, -- which is associated with poor, inner-city communities of color – methamphetamine is primarily used by white men and women in small cities and rural communities. While crack cocaine is now generally regarded as less dangerous than methamphetamine, crack offenses are still punished more severely. We prefer to think that this time Congress is acting in accordance with evolving knowledge and growing compassion. There is now a Congressional Methamphetamine Caucus with about 135 members. That development along with the recent change in leadership in the House of Representatives and Senate gives us hope that Congress may be ready to give serious consideration to recommendations from the Commission regarding changes in federal cocaine sentencing.

Reforming the current crack cocaine sentencing scheme would allow federal judges the flexibility to give shorter sentences to street level drug sellers; police to de-emphasize the arrest of users for simple possession; and government to shift some resources from punishment into prevention and treatment. The fear of appearing "soft" on crime or the drug issue has had a

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[19] Stern, Seth, Meth vs. Crack – Different Legislative Approaches, Congressional Quarter Weekly, June 5, 2006 – Page 1548

deleterious effect on the quality of public debate in this area. The research illustrates that for many white crack cocaine users and sellers drugs are already effectively decriminalized since the risk of apprehension and incarceration for them in negligible, Hopefully, Congress will decide to rethink its adherence to drug enforcement strategies that do little to impact drug use and crime but cause considerable harm to communities of color.

"The racially disproportionate nature of the war on drugs is not just devastating to black Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as a land of opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation."[20]

We urge the Commission to reaffirm its 1995 recommendation - repeal of the mandatory five year sentence for simple crack possession, and eliminating the crack-powder cocaine sentencing disparity by raising the threshold amount that triggers a mandatory minimum for crack cocaine offenses to equal the amount established for powder cocaine offenses. Let's demonstrate compassion for people caught in the net of drugs and addiction regardless of their drug of choice. Twenty years of racial injustice is too long - justice delayed is justice denied.

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[20] Key Recommendations from Punishment and Prejudice: Racial Disparities in the War on Drugs (Washington, DC: Human Rights Watch, June 2000), http://www.hrw.org/campaigns/drugwar/key-reco.htm

ANNE E. BLANCHARD

Sentencing Resource Counsel to the Federal Public and Community Defenders

Anne E. Blanchard is Sentencing Resource Counsel to the Federal Public and Community Defenders. In that capacity, she supports the Federal Defender Guideline Committee in their advocacy before the United States Sentencing Commission, provides training in sentencing advocacy for both defenders and Criminal Justice Act attorneys, and supplies analyses and training on the sentencing impact of legislation. Ms. Blanchard was previously with the Office of the Federal Public Defender for the District of New Jersey, which she joined in 1990.

Ms. Blanchard served as visiting federal public defender to the United States Sentencing Commission in 1999 and with the Office of Defender Services in the same capacity. She has been a long-standing member of the Federal Defenders' Guideline Committee as well as the Sentencing Commission's Practitioners' Advisory Group.

She received her B.A. from the College of William and Mary in 1986, her M.A. from the Eagleton Institute of Politics and Public Policy at Rutgers University in 1988, and her J.D. from Rutgers School of Law in 1989.

MARY PRICE

Vice President and General Counsel, Families Against Mandatory Minimums

Mary Price is Vice President and General Counsel of Families Against Mandatory Minimums Foundation (FAMM). She directs the FAMM Litigation Project and works on federal sentencing reform on Capital Hill and before the United States Sentencing Commission. She serves on the senior staff and oversees the organization's operations. Prior to joining FAMM, Ms. Price was associated with the law firm of Feldesman, Tucker, Leifer, Fidell & Bank, LLP where she handled appeals of courts martial and conducted administrative advocacy on behalf of U.S. service members. She is a member of the American Bar Association's Corrections and Sentencing Committee and serves on the Practitioners' Advisory Group to the United States Sentencing Commission. Ms. Price graduated from Georgetown University Law Center, where she was a Public Interest Law Scholar and the Law Center's first recipient of the Bettina Pruckmayr Human Rights Award. She received her undergraduate degree from the University of Oregon. Ms. Price joined the staff of FAMM in late 2000.

FAMM
Families Against Mandatory Minimums

March 19, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Issue for Comment: Reduction in Sentence Based on BOP Motion

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) offers these comments concerning the new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter sets out FAMM's position on early release, addresses matters raised by the Department of Justice in its submission of July 14, 2006, and answers the Commission's specific questions in the Issue for Comment.

FAMM welcomes the Commission's continued interest in this area. We have long championed a reading of the early release authority consistent with congressional intent that it be used in cases including, but not limited to, impending death or debilitating circumstances. In 2001 we proposed specific language to the Commission that, in our view, would further Congress's intent that there be a way to take account of extraordinary and compelling circumstances that were not or could not be addressed at sentencing.[1]

Our concern was motivated by, among other things, the many stories we had heard from or about prisoners whose circumstances had changed so dramatically that continued service of their sentences would be unjust or meaningless. We began to assist prisoners in their petitions and were stunned to learn how seldom the Director of the Bureau of Prisons exercised the authority to seek sentence reductions.

Our examination of the practice revealed that the Bureau takes a very narrow view of its mandate. Although 18 U.S.C. § 3582 (c)(1)(A) speaks of "extraordinary and compelling reasons," in practice, the Director has moved for a reduction in a mere handful of cases each year and only on behalf of terminally ill prisoners, or more recently, on behalf of some whose "disease resulted in markedly diminished public safety

[1] *See* Letter to Honorable Diana J. Murphy and Commissioners (June 25, 2001).

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risk and quality of life."[2] In the years since our letter, and despite the significant growth in the federal prison population, it appears that the Bureau has used the authority even more sparingly.[3] This may be due to a more stringent set of criteria enunciated by the Department of Justice in its recent submission to the Commission on this matter.[4] The Bureau of Prisons has recently published for public comment a proposed rulemaking that would limit early release motions to those on behalf of prisoners within 12 months of death or who suffer a medical condition so debilitating that the prisoner cannot attend to fundamental bodily functions and personal care.[5]

FAMM certainly agrees with the Department that prisoners who are terminally ill and those debilitated by physical or mental illness merit consideration for early release under 18 U.S.C. § 3582(c)(1)(A)(i). However, there are other classes of extraordinary and compelling reasons that merit consideration as well, including but not limited to cases where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children, or where the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence. FAMM endorses the approach taken by the American Bar Association in its recommendations to the United States Sentencing Commission, as you consider adopting a policy statement to guide courts considering early release motions. [6]

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[2] *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. R. 191, Exhibit II (Vera Inst. Just.).

[3] *See* Testimony of Stephen A. Saltzburg on Behalf of the American Bar Association (March 20, 2007) at 7 n.4 (The Bureau of Prisons has filed between 15 and 25 early release motions annually since 2000.). While the federal prison population has more than tripled, from 58, 838 in 1990 to 195,623 today, the number of motions has remained fairly constant, never exceeding 30 in any given year. *See* U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2000, August 2001, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.

[4] Letter from Michael J. Elson, Senior Counsel to the Attorney General to The Honorable Ricardo H. Hinojosa at 1 (July 14, 2006) (DOJ Letter).

[5] *See* 71 Fed. Reg. 76619-01 (Dec. 21, 2006) ("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our authority under these statutes and our current policy." *See* 71 Fed. Reg. at 76619-01.

[6] *See* letter from Denise Cardman, Governmental Affairs Office, American Bar Association to Honorable Ricardo H. Hinojosa (March 12, 2007) attachment, Proposed Policy Statement, § 1B1.13 (Revised March 9, 2007). FAMM's most recent letter on this subject was one of several that collectively endorsed the ABA's approach. *See* Letters

Congress intended that early release authority be broad.

Congress and, until recently, the Department, have consistently enunciated a generous view of the breadth of the early release authority, contemplating its use for changed circumstances beyond serious or terminal illness. The Bureau's existing authority to seek early release dates from the 1976 Parole Commission and Reorganization Act.[7] The BOP issued its § 4205(g) regulations in 1980. Those rules provided that early release motions under 18 U.S.C. § 4205(g) were to be brought "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."[8]

Significantly, when Congress in the Sentencing Reform Act (SRA), eliminated parole in 1984, it kept intact the courts' existing authority to reduce sentences for a range of reasons. 18 U.S.C. § 3582(c)(1)(A)(i). Congress crafted 18 U.S.C. § 3582(c)(1)(A)(i) in 1984 fully aware of the Bureau's existing regulations, which provided a relatively broad use of sentence reductions in extreme cases

The SRA thus in no way limited the courts' existing authority. This conclusion is supported by the legislative history, demonstrating that Congress embraced a broad view of the potential underlying reasons to bring an early release motion. The Senate Judiciary Committee's Report on the Sentencing Reform Act states:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.[9]

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from Julie Stewart and Mary Price (July 14, 2006); Mark Flanagan and David Debold (PAG) (July 13, 2006); and Jon Sands (Federal Public and Community Defenders) (July 14, 2006).

[7] 18 U.S.C. § 4205(g).

[8] 28 CFR § 572.40 (1980).

[9] S. Rep. No. 98-225, at 55, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3132, 3238-39 (emphasis added.).

By not limiting the courts' existing sentence reduction authority, Congress signaled its intention that the authority be used broadly, if sparingly, to reduce a determinate sentence in appropriate circumstances. Had Congress wanted to limit the new law prisoners' access to sentence reductions, it would have stated conditions in the SRA, or indicated something in the legislative history. It did not.

Further support for broad authority is found in another part of the SRA. Congress charged the newly created United States Sentencing Commission (not the Bureau of Prisons) with the task of issuing policy statements to guide courts considering early release motions brought to them by the Bureau.[10] The only limitation the SRA made to existing authority was to instruct that rehabilitation alone could not constitute a sufficiently extraordinary or compelling circumstance. Congress did not eliminate rehabilitation as a reason, but required that it be combined with others. It is clear that Congress considered rehabilitation a reason for early release if found in combination with at least one other reason.

Unwarranted restrictions on the early release mechanism would subvert congressional intent that courts be able to entertain early release motions for a variety of circumstances, provided they are extraordinary and compelling and reflect more than rehabilitation alone.

The Department of Justice has long endorsed a broad view of the sentence reduction authority.

The Bureau of Prisons, a DOJ agency, recognized that Congress intended that it take a robust approach to the discretion given it in the Sentencing Reform Act when considering early release for prisoners serving determinate sentences. In the ten years following the passage of the SRA, the BOP operated under the 1980 rule to bring early release motions under 18 U.S.C. § 3582(c)(1)(A)(i). Those regulations covered sentence reduction motions under both § 4205(g) and § 3582(c)(1)(A)(i), making early release available "in particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. This section may be used, for example, *if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill.*"[11]

Following the SRA, the Bureau published new regulations in 1994 "to include provisions applicable to inmates who were sentenced under the new law sentencing guidelines that eliminated parole." 59 Fed. Reg. 1238. The new rules

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[10] *See* 28 U.S.C. § 994(t).

[11] 48 FR 48972-01, 48973, 1983 WL 105766 (emphasis added).

thus were inclusive, crafted to bring new law prisoners into the program and treat them much as the old law prisoners were treated. The Bureau affirmed existing policy in important respects and even added specific provisions to underscore that the authority could be used in medical and in non-medical cases.[12]

Significantly, the Bureau did not publish the 1994 rule for notice and comment before adopting it. "Because the revised rule *imposes no additional burdens or restrictions* on inmates, the Bureau finds good cause for exempting the provisions of the Administrative Procedures Act (5 U.S.C. [§] 553) [APA] requiring notice of proposed rulemaking . . . ."[13] Further underscoring the continuity of authority to exercise discretion, the Bureau stated in the final rule that "the standards to evaluate the early release *remain the same.*" [14]

That the Bureau eschewed notice and comment because no additional restrictions were placed on prisoners and because the evaluation standards remained the same means that according to the Bureau, the new rule did not change the ability of a prisoner to seek and the Bureau to move for a sentence reduction in the event there is an "extraordinary [and compelling] change in an inmate's personal or family situation *or* if an inmate becomes severely ill." Eliminating consideration of extraordinary changes in a personal or family situation would have imposed an additional restriction on inmates, who previously would have been able to seek a sentence reduction for other than imminently terminal or debilitating conditions. Such a restriction would have in turn required notice and comment under the Administrative Procedures Act. The Bureau did not intend to eliminate those conditions and thus saw notice and comment as unnecessary. Put another way, if the Bureau intended to eliminate extraordinary changes to a personal or family situation, this would represent a new restriction and thus trigger the notice and comment requirement.

The Department's New Position is Unwarranted, Insupportable, and Unduly Restrictive

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[12] *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment."); *id.* at § 571.62(a) – (c) (describing different processes to follow in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

[13] 59 Fed. Reg. 1238, 1994 WL 3184 (emphasis added). The Bureau did eliminate "prison overcrowding" as one of the acceptable bases for a sentence reduction motion, added the "extraordinary and compelling" language and required a release plan for prisoners. 59 Fed. Reg. 1238.

[14] 59 Fed. Reg. 1238 (emphasis added).

We address several of the Department's points set forth in its letter of July 14, 2006: (1) its concern that a proposal broader than that urged by the Department would contravene congressional intent to abolish parole and establish a system of determinate sentencing; (2) its warning that it would be futile for the Commission to adopt a policy statement broader than that urged by the Department; and (3) its recommendation that the resulting sentence reduction be determined by the Department.

(1) The Department of Justice warns the Commission that to take a broad view of the early release authority would be akin to subverting congressional intent to establish determinate sentencing through the elimination of parole and truth in sentencing reforms ushered in by the SRA.[15] It urges the Commission to take a very narrow view of the authority, limited to cases where the prisoner is expected to die within twelve months or is suffering a medical condition that is "irreversible and irremediable and prevents the prisoner from attending to basic bodily functions and personal care without substantial assistance from others."

Crafting a policy statement consistent with congressional intent will hardly subvert the goals of the SRA. Congress specifically provided for a sentence reduction authority for extraordinary and compelling circumstances in the SRA. It included only one specific limitation: rehabilitation alone would not be sufficient. Had Congress been concerned that sentence reductions for extraordinary and compelling circumstances would undermine the goal of determinate sentencing, it would not have specifically provided for such a broad view of the potential reasons for sentence reductions.

(2) The Department warns in its submission that a Commission policy statement that is broader than the Department's practice will be ignored as a "dead letter." The Department cites no authority for its extreme position. The Commission should not consider itself limited by this warning. The SRA does not commit the definition of what constitutes extraordinary and compelling circumstances to the Department or to the Bureau. It commits the job of defining the contours of sentence reductions motions to the U.S. Sentencing Commission. We submit that the Bureau has no authority to categorically eliminate from judicial consideration all cases except those presenting terminal illness and debilitating conditions. The Bureau is charged with at most considering whether individual prisoner circumstances meet the criteria and if so, submitting the motion to the sentencing court. It cannot categorically limit the conditions and criteria without implicating separations of powers concerns.[16]

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[15] DOJ Letter at 3.

[16] *See* Testimony of Steven A. Saltzburg at 14-15 & n.10 ("Because the Commission is an agency of the judicial branch, any effort by the executive . . . to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimensions . . .); *see also* Letter from John Sands (March 13, 2007) at page 5-6 (pointing out that "[u]nilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem.").

Further, and as evidenced by the discussion of how the Department has treated the authority in BOP regulations thus far, future Departments of Justice, just like previous ones, may not take so restrictive a view of when to bring sentence reduction motions. The Commission should not indulge the current Department's view of the matter.

(3) FAMM opposes limiting the extent of the reduction upon resentencing to that recommended by the Bureau. There is no indication in the statute, the legislative history, or elsewhere, that courts can be limited in the extent of reduction. Courts are competent to consider the BOP's submission on the matter of extent, but should not be considered bound by the recommendation.

Finally, we note that the circumstances proposed by the Bureau of Prisons (impending death or near complete incapacitation), while certainly appropriate early release precursors, do not express the breadth of medical and mental health conditions that would warrant early release. We find the personal hygiene limitation to be particularly curious. There are certainly changed medical conditions that render a prisoner physically or psychologically damaged that do not limit the prisoner's ability to bathe or use the bathroom. The limitations suggest that contours of extraordinary and compelling circumstances should be defined by the amount of staff trouble and time taken up by the personal hygiene needs of incontinent prisoners.

Issue for Comment Questions

FAMM believes that changed circumstances can include those that were known to the court at the time of sentencing but have changed significantly, such as an auto-immune disease in remission at the time of sentencing that subsequently is diagnosed; or a significant change in an existing medical condition, such as total blindness brought on by pre-existing diabetes or pre-existing glaucoma; or a subsequent change in the law that the court was forbidden from taking into account at the time of sentencing and by its nature presents a compelling and extraordinary case for reduction.

As discussed above and evidenced in our endorsement of the ABA's model guideline, FAMM does not believe that the authority should only be used to respond to medical conditions. Nor does FAMM believe that only conditions that are considered terminal within twelve months should be accounted for. For example, a failure to diagnose a medical condition may render an otherwise treatable condition terminal but not necessarily terminal within twelve months. Such a situation is extraordinary and compelling and courts should be able to address it.

The Commission should provide for a combination approach. Such an approach was contemplated by Congress in 28 U.S.C. § 994 (rehabilitation alone is insufficient).

The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling

may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances.

Thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

Attachment:

STEPHEN A. SALTZBURG
American Bar Association

Stephen A. Saltzburg is the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. Professor Saltzburg served as Associate Independent Counsel in the Iran-Contra investigation. In 1988 and 1989, he served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice, and in 1989 and 1990 was the Attorney General's ex officio representative on the United States Sentencing Commission. In June, 1994, the Secretary of the Treasury appointed Professor Saltzburg as the Director of the Tax Refund Fraud Task Force, a position he held until January, 1995.

Professor Saltzburg is the author of numerous books and articles onevidence, procedure, and litigation. He serves as a member of the ABA House of Delegates from the Criminal Justice Section and is Chair-Elect of the Criminal Justice Section.

AMERICAN BAR ASSOCIATION

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Stephen A. Saltzburg

On behalf of the

American Bar Association

Before the

United States Sentencing Commission

Washington, D.C.
March 20, 2007

Mr. Chairman and Members of the Commission:

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. It was my privilege and honor to serve as the Attorney General's ex officio representative on the U.S. Sentencing Commission from 1989 to 1990.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Karen Mathis to reaffirm the ABA's position on the Commission's obligation to give policy guidance to courts considering sentence reduction motions for "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c.)(1)A)(i), and our resulting concerns about USSG § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

Before addressing my remarks to this subject, let me note and reiterate the ABA's concerns that I expressed when I testified at the Commission's November 14, 2006 hearing. We urge that the Commission recommend, as it did on May 1, 1995, that Congress amend federal drug laws to eliminate the differences between sentences imposed for crack and powder cocaine offenses. The American Bar Association has not

departed from the position that it took in 1995, and the Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

I. ABA Policy on Sentence Reduction in Extraordinary Situations

As noted in our prior submissions to the Commission on the issue of sentence reduction policy,[1] the ABA strongly supports the adoption of mechanisms within the context of a determinate sentencing system to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February

[1] My testimony supplements and reaffirms our testimony of March 15, 2006, and our letters of March 25 and July 12, 2006. Most recently, we commented on the issues raised by § 1B1.13 in a letter dated March 12, 2007, and resubmitted, with one modification, the proposal for Section 1B1.13 that was included with our July 12, 2006 letter.

2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate."

In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." Against this background of strong and consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances, it is a privilege to address the Commission on this subject.

II. Statutory and Regulatory Background

The extraordinary sentence reduction authority in § 3582(c)(1)(A)(i) was enacted as part of the original 1984 Sentencing Reform Act (SRA), continuing an authority first granted courts in the 1976 Parole Commission and Reorganization Act. See 18 U.S.C. § 4205(g)(1980). This authority permits a court at any time, upon motion of the Bureau of Prisons (BOP), to reduce a prisoner's sentence to accomplish his or her immediate release from confinement. The only apparent limitations on the court's authority under § 3582(c)(1)(A)(i), once its jurisdiction has been invoked by a BOP motion, is that it must find 1) "extraordinary and compelling reasons" to justify such a reduction, and 2) that the reduction be "consistent with applicable policy statements issued by the Sentencing Commission."

The legislative history of the SRA establishes that Congress intended the judicial sentence reduction authority in § 3582(c)(1)(A)(i) to be broadly construed, consistent with the old law sentence reduction authority, to allow a court to address "the unusual case in which the defendant's circumstances are so changed... that it would be inequitable to continue... confinement. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at 5. See also *id.* at 55 (reduction may be justified for "changed circumstances" including "severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction. . . ."). In continuing the courts' ability to entertain and act on sentence reduction motions filed by BOP, Congress signaled its intention to permit sentence reduction in a variety of circumstances, not simply those involving a prisoner's

medical condition. For example, the BOP regulations in effect at the tine provided that "The section may be used, for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."[2]

In connection with continuing the courts' extraordinary sentence reduction authority in response to motions filed by BOP, the SRA directed this Commission to promulgate general policy for the guidance of courts considering such motions that would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). Such policy must "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." § 994(t). The only normative limitation imposed on the Commission in its policy-making under § 994(t), other than the general purposes of sentencing embodied in § 3553(a)(2), is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

Over the years, in the absence of policy guidance from this Commission, BOP has tended to take a conservative view of its responsibilities under § 3582(c)(1)(A)(i).[3] In recent years, BOP has filed motions almost exclusively in cases where a prisoner was within

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[2] *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced to minimum term because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(sentence reduced because of exceptional adjustment in prison). The law giving BOP authority to petition the court for sentence reduction was originally designed to expedite situations that theretofore had required an application for executive clemency to be submitted to the President through the Office of the Pardon Attorney. *See U.S. v. Banks, supra*, 428 F. Supp. at 1089 (statement of Director of BOP explaining that the new procedure offered the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco, supra,* 457 F. Supp. at 72 (same).

[3] *See, e.g.,* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001)("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section.").

months or even weeks of death.[4] At the same time, BOP's own formal operating policy has contemplated a broader application for the statute. Until 1994, BOP's operating policy for filing sentence reduction motions, under both 3582(c)(1)(A)(i) and the old law authority § 4205(g), explicitly contemplated invoking a court's authority "if there is an extraordinary change in an inmate's personal or family situation" as well as in situations in which "an inmate becomes severely ill." *See* 28 CFR § 572.40, *supra*.

When BOP revised its sentence reduction regulations in 1994, it continued to apply the same policy to both old and new law prisoners, and emphasized that "the standards to evaluate the early release remain the same." 28 C.F.R. § 571.61, *et seq.*; 59 Fed. Reg. 1238 (Jan. 7, 1994). Significantly, the 1994 regulations underscored the propriety of petitioning courts in both medical and non-medical cases. *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "*if* the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment.") (emphasis added); *id.* § 571.62(a)–(c) (describing different procedures for medical and non-medical requests from prisoners). That the Justice Department has now proposed more restrictive guidelines for the operation of BOP's discretion cannot wipe away 30 years of contrary regulatory interpretation.[5]

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[4] According to figures provided by BOP, it has filed between 15 and 25 motions under § 3582(c)(1)(A)(i) annually since the year 2000. As far as we are aware, no motion has been denied during this time period.

[5] BOP has recently proposed revisions to 28 CFR Parts 571 and 572 (re-titled "Sentence Reduction for Medical Reasons") that would for the first time place categorical limits on BOP's ability to bring sentence reduction motions. *See* 71 Fed. Reg. 76619-01 (Dec. 21, 2006)("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our authority under these statutes and our current policy." *See* 71 Fed. Reg. at 76619-01. Without some more extended attempt to reconcile the broad statutory language of § 3582(c)(1)(A)(i) with the crabbed new eligibility criteria, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or 18 U.S.C. § 4205(g), much less on the authority Congress intended to give courts under

III. Comments on USSG § 1B1.13

In its request for comment, the Commission asked a number of specific questions about possible amendments to USSG § 1B1.13. The ABA responded to those questions in our letter dated March 12, 2007. At this time I will confine my testimony to the more general issues raised by the Commission's policy on sentence reduction, as reflected in USSG § 1B1.13.

Our principal concern, as we have previously noted, is that USSG § 1B1.13 does little more than recite the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), and does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the policy contemplates that courts considering sentence reduction motions should simply defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for courts considering sentence reduction motions under § 3582(c)(1)(A)(i). Rather, it contemplates that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau

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these statutes, or the Commission under 28 U.S.C. § 994(t). In our comments on the rule we point out that: "It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present 'extraordinary and compelling reasons,' and that have in the past been thought to present them."

of Prisons, and not in a general rule-making by the Commission. But the text of § 994(t) plainly requires the Commission to enunciate general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than defer to case-by-case decision-making by the BOP. While we do not doubt that, as a practical matter, BOP may shape the Commission's policy-making role through the particular sentence reduction motions it files, it is quite another thing for the Commission to abdicate that role entirely.[6]

To assist the Commission in carrying out the mandate of § 994(t), we have submitted draft language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply.[7] The proposed policy statement, appended to this testimony, would also make several other changes in the language of § 1B1.13 to make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

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[6] Our objection to BOP's proposed changes to 28 CFR Parts 571 and 572 (note 5, supra) is based in part upon what we argue is their usurpation of the Commission's policy-making function, and the resulting frustration of the courts' sentence reduction authority.

[7] The draft policy statement appended to this testimony differs from the version dated July 12, 2006, only in adding a new subsection (h) to the list of "extraordinary and compelling reasons." in the proposed Application Note, and renumbering old subsection (h) as subsection (i). We believe the situation described in new subsection (h) is one contemplated by subsection (b)(2) of the policy statement ("information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement").

We propose three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

We then propose, as part of an application note, nine specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, or in past administrative practice under this statute or its old law predecessor, 19 U.S.C. § 4205(g). These reasons are:

- where the defendant is suffering from a terminal illness;
- where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;
- where the defendant is experiencing deteriorating physical or mental health as a

consequence of the aging process;

- where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence;
- where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive;
- where the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;
- where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children;
- here the defendant's sentence was based upon a mistake of fact or law so significant that it would be inequitable to continue the defendant's confinement, and for which there is no other legal remedy; or
- where the defendant's rehabilitation while in prison has been extraordinary.

Finally, we propose that neither changes in the law nor a prisoner's rehabilitation should, by themselves, be sufficient to justify sentence reduction.

As to the scope of a court's sentence reduction authority, we believe that Congress intended a court to have authority to reduce a term of imprisonment to whatever term it deems appropriate in light of the particular reasons put forward for the reduction. For

example, it would be appropriate for a court to reduce a term of imprisonment to time served where sentence reduction is sought because the prisoner is close to death. (It appears that reduction to time served is ordinarily what is sought in a BOP motion, since almost all of the cases it has brought over the past 20 years involve imminent death.) On the other hand, where reduction of sentence is sought on grounds of, *e.g.,* disparity or undue severity, or a change in the law not made retroactive, it would be appropriate for the court to be guided by the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner. *See, e.g., U.S. v. Diaco, supra* (sentence reduced to minimum term in case involving disparity); *U.S. v. Banks, supra* (sentence reduced to time served in case involving extraordinary rehabilitation).

In reducing a term of imprisonment, a court may (but is not required to) substitute a term of community supervision equivalent to the original prison term. A 2002 amendment to § 3582(c)(1)(A)(i) makes clear that the court in reducing a term of imprisonment "may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." We believe that any period of supervised release originally imposed would remain in effect over and above any additional period of supervision imposed by the court, since the court's power to reduce a sentence under this statute extends only to the term of imprisonment.

I would like to take this opportunity to reiterate comments made in our March 15, 2006, testimony about the limits of a court's authority under this statute, to allay concerns that it

could undercut the core values of certainty and finality in sentencing embodied in the federal sentencing guidelines scheme. The Department of Justice raised these concerns in its letter of July 12, 2006, and I believe they are ones that deserve a careful and considered response. I would emphasize that the ABA does not support a return to a parole system, and I do not believe that this statute in any way implicates any such routine administrative method of early release. Far from it. This is a statutory release authority that may be invoked only in "extraordinary and compelling" circumstances involving a fundamental change in circumstances since sentencing. Moreover, it is entirely dependent upon a motion filed by the government. I believe that the government can be counted upon to take a careful course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling.

At the same time, we also believe that Congress intended this Commission to be responsible for promulgating the general policy guidance within which the government exercises its discretion on a case-by-case basis. This is an important distinction. And we are confident that the government will find it useful to have guidance from the Commission about the options available to it for making a mid-course correction where the term of imprisonment originally imposed appears unduly harsh or unjust in light of changed circumstances. We are equally confident that BOP's decision to file a motion with the court will be informed not just by its perspective as jailer, but also by the broader perspective of the Justice Department of which it is a part.[8]

[8] *Cf.* David M. Zlotnick, "Federal Prosecutors and the Clemency Power," 13 Fed Sent. R. 168 (2001)(analyzing five commutations granted by President Clinton six months before the end of his term, in four of which the prosecutor either supported clemency or had no objection to the grant).

My final comment relates to the letter submitted by the Department of Justice dated July 12, 2006, commenting on proposed USSG § 1B1.13. This letter states that any policy the Commission adopts that is inconsistent with what it describes as BOP's current sentence reduction policy will be greeted as a "dead letter."[9] The DOJ letter minces no words in explaining that, because Congress gave BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them."

It seems that the DOJ letter has put BOP's policy cart before the Commission's horse. To be sure, BOP has operational responsibility for carrying out the Commission's policy-making role under 28 U.S.C. § 994(t) through case-by-case decision-making. But this cannot mean that BOP is free to adopt an administrative policy that forecloses a court's consideration, on a categorical basis, of a wide variety of situations that the Commission under its policy-making authority has determined may present "extraordinary and compelling reasons." The development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under § 994(t), not to BOP or the Department of Justice. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the

[9] The BOP sentence reduction policy announced in the DOJ letter was recently proposed as an amendment to BOP's regulations. See note 4 supra. It would categorically restrict the circumstances in which the Bureau of Prisons will move for sentence reduction to two narrow classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." This policy represents a significant curtailment of the policy reflected in BOP's existing regulations.

original sentence, so too is the Department and its agencies, including BOP, bound to comply with the Commission's lawfully promulgated policies in connection with reduction of that sentence. While BOP is free to interpret and apply Commission policy as it deems most appropriate in particular cases, in its discretion, it cannot in advance declare that policy a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position on the primacy of the Commission's policy-making role avoids.[10]

I very much appreciate this opportunity to comment on the proposed policy, and hope that these comments will be helpful.

[10] To the extent BOP's proposed limitation of sentence reduction motions to two narrow classes of medical cases (see note 5, supra) would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of constitutional concerns. The ABA's position on the Commission's authority to promulgate general policy for courts considering sentence reduction motions would avoid these concerns as well.

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement.

(b) "Extraordinary and compelling reasons" may be found where

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

(c) When a term of imprisonment is reduced by the court pursuant to the authority

in 18 U.S.C. § 3582(c)(1)(A), the court may reduce the term of imprisonment to one it deems appropriate in light of the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner, including to time served. In its discretion, the court may but is not required to impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment, provided that any new term of supervision shall be in addition to the term of supervision imposed by the court in connection with the original sentencing.

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence;

(e) the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children;

(h) the defendant's sentence was based upon a mistake of fact or law so significant that it would be inequitable to continue the defendant's

confinement, and for which there is no other legal remedy; or

(i) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).

IMPORTANT NOTES

UNITED STATES SENTENCING COMMISSION
WASHINGTON, DC
TUESDAY, MARCH 20, 2007
PUBLIC HEARING

PANEL FIVE
INDUSTRY REPRESENTATIVES

SHAWN T. DRISCOLL
American Trucking Associations

Shawn T. Driscoll began his career with Swift Transportation Co. Inc. in 2004 and holds the position of Assistant Director of Security. Shawn came to Swift after his retirement from the Montana Highway Patrol (MHP). Shawn served 24 years as a law enforcement officer, prior to coming to Swift. While with the MHP, he had risen through the ranks to the position of Colonel and Chief of the largest law enforcement agency in the state.

While in the MHP headquarters, Shawn was responsible for selection and training of troopers, patrol operations, state communications, and commercial vehicle enforcement, to name a few of his assigned duties. One of the many initiatives that Shawn was responsible for was long term strategic planning to attract quality trooper candidates, retain trained troopers as well as significantly increase the number of troopers on patrol across the State of Montana. The outcome of that strategic plan is paying huge dividends in Montana, currently.

Shawn had served in many locations across the state with many different responsibilities. He also served on the MHP & State Academy staff as an instructor on numerous topic areas. Shawn works with a seasoned security group at Swift and investigates cargo theft for Swift.

Shawn and his wife Tamara, live in Glendale, AZ with their two children, Alicia and Mark, who are attending college in the area.

Before the

UNITED STATES SENTENCING COMMISSION

Testimony of

SHAWN DRISCOLL
ASSISTANT DIRECTOR OF SECURITY
SWIFT TRANSPORTATION

Representing

THE AMERICAN TRUCKING ASSOCIATIONS, INC.

On

Amendments to the Federal Sentencing Guidelines

March 20, 2007

AMERICAN
TRUCKING
ASSOCIATIONS

Driving Trucking's Success

2200 Mill Road
Alexandria, VA 22314
703-838-1996

Mr. Chairman and members of the Commission, thank you for inviting me today to testify on behalf of American Trucking Associations, Inc. ("ATA") as this Commission considers amendments to the Federal Sentencing Guidelines related to transportation. My name is Shawn Driscoll. I am the Assistant Director of Security for Swift Transportation, the largest truckload carrier in the United States with over $3.1 billion in operating revenues and approximately 18,000 trucks and forty-plus full service facilities in both the continental U.S. and Mexico. Prior to my work at Swift, I served as a Colonel and chief of the Montana Highway Patrol and was with that agency for over 20 years. I am a member of the Security Council of ATA. ATA is a federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

I will focus this testimony on the proposals related to implementation of section 307(c) of the USA PATRIOT Improvement and Reauthorization Act of 2005 ("PATRIOT Act Reauthorization"), Pub. L. No. 109-177, as they relate to cargo theft, an issue of paramount importance to the trucking industry and those served by the trucking industry. Enactment of section 307 of the PATRIOT Act Reauthorization was the culmination of a lengthy effort by ATA, others in the transportation industry, law enforcement and interested Members of Congress to promote efforts to combat the scourge of cargo theft. Subsection (c), which directs the Commission to review the Federal Sentencing Guidelines "to determine whether sentencing enhancement is appropriate" for an offense under section 659 of title 18[1], United States Code, is just part of a multi-pronged approach to more effectively stem the rise in cargo theft.

To fully grasp the potential impact of cargo theft on the U.S. supply chain, it is helpful to understand a broad picture of the trucking industry. According to the 2002 Commodity Flow Survey conducted jointly by the Bureau of Transportation Statistics and the U.S. Census Bureau, trucks hauled 74.3% of the value of all shipments in 2002. In 2005, trucking generated $622.9 billion in gross freight revenues, representing 84.3% of the nation's freight bill. That same year, trucking transported 68.9% of total domestic tonnage shipped. The statistics confirm that trucking is the primary mode of transportation for our nation's freight.

Unfortunately, the statistics on cargo theft are not so readily available or precise. Yet, as one industry commentator noted, cargo theft is not new, but "never before in this country have the targets been so plentiful and the goods so moveable and the chance of getting caught so slim to make cargo thieving in all its forms a truly promising career for criminals."[2] While recognizing the imprecise nature of their figure, the Federal Bureau of Investigation estimates the direct costs of cargo theft to be between $15-30 billion in the United States annually.[3] When indirect costs

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[1] It should be noted that 18 U.S.C. § 659 is within the chapter of embezzlement and theft crimes and refers specifically to interstate or foreign shipments by carrier. While there is no specific crime of cargo theft in title 18, for purposes of this testimony, the crime delineated in 18 U.S.C. § 659 shall be loosely termed cargo theft.
[2] David Cullen, *Shining a Light on Cargo Theft*, Fleetowner, August 1, 2006.
[3] Federal Bureau of Investigation, *Cargo Theft's High Cost: Thieves Stealing Billions Annually*, http://www.fbi.gov/page2/july06/cargo_theft072106.htm (accessed on March 12, 2007).

are considered, the annual losses are estimated to be "well north of one percent of GDP or $100 billion."[4] While the figures range dramatically, law enforcement generally agrees that they are low for a variety of reasons, including failure to bring charges under a uniform criminal offense and under-reporting. My experience tells me that it may not be a matter of carriers not reporting as much as it is law enforcement not taking the report for lack of jurisdiction or manpower. Either way, a primary impediment to reporting – that cargo theft is not often a law enforcement priority – remains. Therefore, it is safe to assume that cargo theft is a significant threat with negative impacts on manufacturers, carriers, and ultimately, consumers.

Why am I here before you today? The trucking industry's interest lies in focusing resources to deter cargo theft. We in the trucking industry spend significant amounts on security measures to prevent cargo theft. Unfortunately, our efforts are not 100 percent effective. The trucking industry supports coordination of law enforcement efforts at the local, state, and federal level, as witnessed by cargo theft task forces such as CargoCATS in the LA/Long Beach area and TomCATS in the South Florida area as well as the motor carrier industry-organized Regional Security Councils which comprise both carriers and law enforcement. However, one glaring impediment to preventing cargo theft was identified in the Report of the Interagency Commission on Crime and Security in U.S. Seaports ("Seaport Commission Report"):

> Former drug traffickers are becoming more involved in cargo theft because of the high profit that can be made and *because the criminal sentences are much lower than those for drug offenses, according to law enforcement officials.* (emphasis added)[5]

This sentiment is oft-cited as an obstacle by both law enforcement and prosecutors. Therefore, the trucking industry is pleased that Congress expressed interest in having this Commission examine the current sentencing guidelines, and is further encouraged by the two proposals being considered by the Commission, both of which would potentially enhance sentences for convictions under 18 U.S.C. § 659.

ATA believes enhancing sentences for cargo theft or its federal equivalent, 18 U.S.C. § 659, would assist the fight against cargo theft in different ways. First, ATA believes there is a credible deterrent effect that accompanies increased sentencing and penalties. While I am not an expert in criminology or sociology, I believe that most would agree that mandatory minimums and increased sentences for drug trafficking has had some deterrent effect. ATA recognizes, however, that increased sentencing and penalties are not sufficient standing alone. Law enforcement and prosecutorial resources need to be devoted to pursuing convictions for the increased sentences to have the desired, most complete deterrent effect.

This leads to the second manner in which enhanced sentences are beneficial in the fight against cargo theft. ATA member carriers hear all too often from law enforcement officials at all levels that there is a reluctance to pursue cargo theft crimes, since prosecutors rarely prosecute the cases. In turn, prosecutors say the penalties associated with cargo theft convictions do not justify

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[4] Michael Wolfe, *In this Case, Bad News is Good News on Cargo Security*, Journal of Commerce, July 26, 2004.
[5] Report of the Interagency Commission on Crime and Security in U.S. Seaports, Fall 2000 at 48.

the allocation of scarce prosecutorial resources. Enhanced sentencing directly addresses these heretofore valid concerns.

Finally, there is discussion among law enforcement officials that some of the proceeds from cargo theft are being diverted to fund other organized crime activities. The Seaport Commission Report stated that, according to law enforcement authorities, "the majority of cargo theft today is committed by organized criminal groups."[6] Enhanced sentencing for cargo theft crimes could assist in the fight against foreign and domestic, organized criminal groups by cutting off profits that are currently obtainable with little risk.

The Commission has proposed two options for implementing section 307(c) of the Patriot Act Reauthorization. As emphasized throughout this testimony, ATA is strongly supportive of enhancing sentences and criminal penalties associated with conviction under 18 U.S.C. § 659. Therefore, ATA supports Option 2, which, per our interpretation, would provide for an enhancement of two levels for convictions under 18 U.S.C. § 659 (as well as for organized schemes to steal vehicles or vehicle parts) and further provides that the offense level would be no less than level 14. ATA finds this option preferable to Option 1 in terms of consistently generating a more robust sentence or penalty.

Mr. Chairman and members of the Commission, thank you for the opportunity to testify before you on this issue that impacts companies like mine and, ultimately, you as the consumer of the goods and products we in the trucking industry carry. The work this Commission is undertaking today is a significant, positive step at the federal level toward defeating the perpetrators of cargo theft. While not all cargo theft cases are brought at the federal level (in fact, most are at the state level), the U.S. Attorneys' Manual states, "Thefts from interstate shipment should be prosecuted under Federal laws where . . . (2) the thefts are systematic or widespread." It further goes on to state, "Major theft cases and cases involving repeat offenders should be given priority attention under 18 U.S.C. § 650." ATA believes that amending the Federal Sentencing Guidelines, as proposed in Option 2, gives federal law enforcement authorities and prosecutors another arrow in the quiver as they confront this particular crime. The trucking industry has long been a partner with law enforcement and prosecutors in this effort, and we pledge to continue to be partners in this worthwhile effort.

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[6] *Id.*

PETER J. PANTUSO
President and CEO, American Bus Association
President, National Bus Traffic Association
President, American Bus Association Foundation

Peter J. Pantuso is president and chief executive officer of the American Bus Association, North America's largest motorcoach, tour and travel association representing more than 65 percent of all private buses on the highways, as well as private travel related businesses, state and local government travel and tourism offices, state associations and other entities involved in promoting travel throughout North America. In addition, Mr. Pantuso is also president of the National Bus Traffic Association and the American Bus Association Foundation.

Mr. Pantuso has revitalized ABA, increasing annual revenues by more than $2 million, doubling the size of its annual travel convention and growing membership in all categories by more than twenty-five percent. He has significantly expanded the association's lobbying efforts and clout in Washington, D.C., as well as in state capitals.

Mr. Pantuso oversees the trade association's daily operations, including government affairs; policy; communications; meetings and education programs; publications, including ABA's award winning magazine *Destinations*; membership programs; and budgeting and personnel. During his tenure he also developed of new culture of professionalism and inclusiveness across all constituencies at ABA.

The ABA Foundation began under Mr. Pantuso's leadership, and in just a few years it has grown to nearly $1 million in funds and awarded more than $85,000 in scholarships and grants. Both the Foundation and NBTA are headquartered in the ABA offices.

Mr. Pantuso serves on the U.S. Chamber of Commerce's Committee of 100 leading association executives, the Policy Committee of the American Society of Association Executives, and the Board of the Museum of Bus Transportation.

Mr. Pantuso remains active in his home state, serving on the Board of Directors of Servco, Inc., and is a member of the President 's Advisory Council for the University of Pittsburgh.

A native of Bradford, Pennsylvania, Mr. Pantuso is a graduate of the University of Pittsburgh and earned his Masters of Association Management from George Washington University's School of Business and Government.

Before the United States
Sentencing Commission

Hearing on the

Proposed Amendments to the Sentencing Guidelines

March 20, 2007

Testimony of

Peter J. Pantuso

President and Chief Executive Officer

American Bus Association

Mr. Chairman and members of the United States Sentencing Commission, my name is Peter Pantuso and I am the President and CEO of the American Bus Association. First, I want to thank you for giving me and the association I lead the opportunity to testify concerning the proposed amendments to the Federal sentencing guidelines. In the time I have today I would like to accomplish two goals. First, I want to give you an overview of the American Bus Association, the private bus industry and what makes our interest in the sentencing guidelines especially critical. Second, I want to address two issues within the proposed guidelines from the perspective of the private over-the-road bus industry and the 650 million passengers we transport every year.

American Bus Association

The American Bus Association is the primary trade association representing the private over-the-road bus industry. The ABA has 3800 members engaged in all manner of transportation, travel and tour services. While the name "American Bus Association" may connote only bus transportation, our reach is much broader. ABA serves as the voice of almost 1,000 bus and tour operators. ABA represents thousands of tourist attractions such as theaters, restaurants, the Empire State Building and the Smithsonian Museums here in Washington, D.C. ABA also represents Convention and Visitors Bureaus (CVBs) as well as bus manufacturers and companies that service the private bus industry.

As I mentioned, the private bus industry transports approximately 650 million passengers a year; a total that compares favorably with the number of passengers carried by the nation's airlines. Moreover, ABA members link some 4000 bus terminals, airports and rail stations in the United States. ABA members are engaged in providing all types of transportation services; charter and tour, sightseeing, commuter and airport shuttles services among them. Given the "reach" of the transportation the industry provides, it is clear that security is the industry's top priority.

Indeed since the attacks on 9/11 and the enactment of the Patriot Act the private bus industry has been heavily engaged in securing its passengers, facilities and personnel. With $50 million appropriated by Congress since Fiscal Year 2002, the private bus industry has taken steps to ensure increased protection of our assets. Private bus operators have purchased cell phones for drivers, engaged Global Positioning Satellite (GPS) systems, installed cameras in maintenance facilities and staging areas, developed and installed shields to protect drivers and begun passenger screening at some terminals.

Our interest in security is more than academic. Each of ABA's 800 bus operator members is very aware that it is their motorcoaches that bring families to the Nation's Capitol; students to the Grand Canyon and senior citizens to Las Vegas every year. The plain fact is a motorcoach may be used as a vehicle borne improvised explosive device with devastating effect. Thus, the ABA and the private bus industry take the possible hijacking of one of our vehicles very seriously.

Post 9/11 Motorcoach Incidents

Since 9/11 ABA motorcoach operators have endured several incidents in which persons have, or have attempted to hijack motorcoaches while the coaches were in operation and carrying passengers. One of the most horrifying was the takeover of a Greyhound Bus in Tennessee, one month after the 9/11 terrorist attack, an incident that resulted in the motorcoach driver having his throat slit by the assailant and the wreck of the bus on a busy highway resulting in six deaths. On a Minnesota highway in 2005 a woman held a knife to the throat of the driver of her Jefferson Lines bus. The attacker was one of ten people on the bus and three people were injured battling the hijacker before she was taken into custody. Also that year a Wisconsin man was arrested after he grabbed the steering wheel of the intercity bus he was on causing it to careen into oncoming traffic and collide with a passenger car in Black Hawk Valley, Iowa. Three people were injured in the attack including a 1 year old girl in the car.

The Patriot Act Improvement and Reauthorization Act of 2005

The Congress shared our concern with bus transportation security when it passed the Patriot Act ("The Patriot Act"). Among other provisions the Act amended Section 1993 of Title 18 of the United States Code. In pertinent part Subsection (a) prescribes:

"Whoever willfully (1) wrecks, derails, sets fire to, or disables a mass transportation vehicle or ferry (5) interferes with, disables, or incapacitates any dispatcher, driver,

captain, or person while they are employed in dispatching, operating, or maintaining a mass vehicle or ferry, with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life; shall be fined under this title or imprisoned not more than twenty years, or both, if such act is committed, on against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce, or if in the course of committing such act, the person travels or communicates across a State line in order to commit such act, or transports materials across a State line in aid of the commission of such act."

In aid of determining which transportation operations are included within section 1993, Congress provided that the Patriot Act definition of "mass transportation" had the meaning given to that term in section 5302(a)(7) of Title 49 United States Code, except that the term "shall include schoolbus, charter and sightseeing transportation." Congress needed to add these bus transportation modes to the term, "mass transportation" because they were specifically excluded from the section 5307 (a)(7) definition, which was "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation." There was no need for Congress to add intercity bus service to the section 5307(a)(7) mass transportation definition since it was not specifically excluded by section 5307(a(7) and clearly is transportation by a conveyance that provides regular and continuing general...transportation to the public."

In 2005, the USA Patriot Improvement and Reauthorization Act consolidated 18 U.S.C. 1992 and 1993 and replaced the term "public transportation" (added by the SAFETEA-LU Act) with "mass transportation. In SAFETEA-LU, 119 Stat. 1144, Public Law 109-59 (Aug. 2005), 49 U.S.C. 5302 (d) (7) Congress replaced the term "mass transportation" with "public transportation" and defined "public transportation" as:

"Transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter or intercity bus transportation or intercity passenger rail transportation..." 49 U.S.C. 5302(e)(10).

Thus on its face, the definition of "mass transportation" as the Sentencing Commission points out, is broader than that of "public transportation for the purpose of applying the sentencing guidelines to criminal inference with transportation operations. ABA and its members are in favor of the broadest application of these sentencing guidelines to transportation operations.

Applicability of the Sentencing Guidelines

Responding directly to the question raised in paragraph 4 on page 35 of the draft Guidelines, ABA believes that the Guidelines should use the definition of "mass transportation" and that the Guidelines should make clear that the term "mass transportation" includes intercity bus service.

First, if the Commission used the term, "public transportation", rather than "mass transportation", that action would have the effect of excluding school bus, charter, and sightseeing services when Congress explicitly included them in the Patriot Act reauthorization.

Second, the Patriot Act reauthorization definition of "mass transportation" includes "transportation by a conveyance that provides regular and continuing general or special transportation to the public". There is no doubt that what intercity bus and rail operations provide is "regular and continuing ... transportation to the public." That is true whether it is Greyhound intercity service between Washington and New York City or Jefferson Lines service between Minneapolis, Minnesota and Des Moines, Iowa. Thus, since intercity bus service is not specifically excluded from the definition of "mass transportation", Congress clearly meant to include these operations within the sphere of the sentencing guidelines. In the formulation of the Patriot Act, Congress used the broadest definition of transportation operations available to it, that of "mass transportation" (which does not exclude intercity bus operations) and supplemented it with the operations excluded from that definition "school bus, charter and sightseeing" operations. Obviously, Congress's intent was to cover all transportation operations.

Third, there is no evidence Congress meant to exclude any transportation operation from the applicability of these guidelines. The Patriot Act is quite comprehensive in the list of conveyances, personnel, and equipment meant to be covered by the Act's prohibitions. A motorcoach in intercity service is identical to a motorcoach engaged in a charter operation.

Finally, there is no logic in excluding intercity bus operations from the operation of the sentencing guidelines. To hold to that view requires one to believe that Congress chose to provide Patriot Act protection to a charter bus operator traveling to Washington, D.C. with 54 passengers and leave unprotected an intercity bus traveling with 54 passengers to the same destination. For all of the above reasons ABA and its members believe that the use of the term "mass transportation" in the sentencing guidelines would apply these guidelines to intercity bus and rail transportation operations.

However, if the Commission is unsure of the correctness of ABA's analysis, the association urges you to ask the Congress for clarifying language to explicitly close any "gap" in the guidelines applicability. Indeed, if the Commission believes this step necessary, ABA can assure you of our strong support for any such effort. As I stated earlier, no organization takes more seriously the security of bus passengers, personnel and facilities.

Federal Focus on Intercity Bus Incidents

My final task is to impress upon the Commission the importance of a federal focus on intercity bus incidents. In two of the three hijacking incidents I describe above the criminal was prosecuted under local law. The Greyhound incident resulted in the death of the assailant in the bus wreck. In the other cases, the county prosecutor, without

any help, cooperation or coordination from federal law enforcement, took the case to trial, pled down the charges and got a conviction. One could describe each as a "successful prosecution." But the amount of jail time to the criminal is not the issue.

What is at issue is the focus of the federal law authorities on what is a federal crime involving a specific mode of transportation. I think it is fair to assume that a similar hijacking incident on a commercial airliner would be handled as a federal crime by federal authorities. In that case, more attention would be paid to the crime and its consequences. The focus would be placed on that crime as a possible terrorist act.

With such a focus there would be increased attention by the media and the public, attention that could deter additional, similar acts. With added focus federal law enforcement agencies gain the ability to gather information about the crime, the participants and to determine whether a particular crime fits into a pattern of terrorist activity. Finally, with more attention the nation strengthens the notion that the transportation system is one system, with one legal regime for all modes of transportation.

The American Bus Association and its 3800 members support the United States Sentencing Commission and its purpose to establish fair and appropriate sentencing policies and practices for the courts. The ABA would like to work with you to ensure that such policies apply to intercity bus operations as well as air, rail and maritime operations.

Thank you.

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FREDERIC HIRSCH, ESQ.
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Entertainment Software Association (ESA)

Frederic (Ric) Hirsch joined the Entertainment Software Association in April 2000 as Senior Vice President, Intellectual Property Enforcement to direct ESA's global enforcement efforts against the piracy of member company game software product. The ESA is the U.S. association dedicated to serving the business and public affairs needs of companies publishing interactive games for video game consoles, handheld devices, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the $7 billion in entertainment software sales in the United States in 2005, and billions more in export sales of American-made entertainment software. The ESA's anti-piracy efforts include an extensive investigation and litigation program against online piracy, as well as on-the-ground enforcement programs against game pirates in the United States, Canada, Asia and Latin America.

Mr. Hirsch spent much of his professional career working for the Motion Picture Association (MPA) in a number of different capacities, most recently as Senior Vice President and Director of the MPA's worldwide anti-piracy program overseeing enforcement activities against motion picture and video piracy in over sixty countries. During his tenure, the MPA expanded its enforcement efforts against Internet piracy and optical disc piracy, particularly in the Asia/Pacific region. In addition to his work for MPA, he spent over three and a half years as a transactional attorney for CBS Cable working on their program services in the US and abroad as well as their sports marketing ventures.

Born and raised in New York City, Mr. Hirsch received his B.A. from Brandeis University in 1978 and his J.D. from the New York University School of Law in 1981.

UNITED STATES SENTENCING COMMISSION

March 20, 2007 Hearing on
Proposed Amendments of Sentencing Guidelines, Policy Statements and Commentary

Statement of
Ric Hirsch, Senior Vice President, Intellectual Property Enforcement
Entertainment Software Association

Mr. Chairman and members of the Commission, thank you for the opportunity to comment on the January 30, 2007 proposed amendments of the Sentencing Guidelines, specifically Amendment 5 "Intellectual Property Re-Promulgation." ("Amendment"). The Amendment is being proposed, pursuant to the directive in the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-81, to address, among other things, the adequacy of the Guidelines' definition of "infringement amount" to cover situations where "the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement," such as a circumvention device. As the entertainment software industry relies heavily on technological measures to protect its game software products from infringement, we have a great interest in the efforts of the Sentencing Commission to address the Sentencing Guidelines' treatment of those convicted of trafficking in circumvention devices in violation of 17 USC §1201.

I am testifying here on behalf of the members of the Entertainment Software Association (ESA). I am the ESA Senior Vice President, Intellectual Property Enforcement and, in that capacity, oversee the anti-piracy efforts that the association pursues on behalf of its members. The ESA serves the business and public affairs interests of companies that publish interactive games for video game consoles, personal computers, handheld devices, and the Internet. ESA members published more than 90 percent of the $7.4 billion in entertainment software sold in the United States in 2006. In addition, ESA's member companies produced billions more in exports of American-made entertainment software, helping to power a global game software market estimated to be approaching $30 billion in sales. The entertainment software industry is one of the nation's fastest growing economic sectors, more than doubling in size since the mid-1990s and in so doing, has generated thousands of highly skilled jobs in the creative and technology fields.

The entertainment software industry makes a tremendous investment in its intellectual property. For an ESA member company to bring a top game to market, it often requires a team of 40 to 50 professionals—sometimes twice that number—working for two or three years to fuse together the work of writers, animators, musicians, sound engineers, software engineers, and programmers into an end product which, unlike any other form of entertainment, is interactive, allowing the user to direct and control the outcome of the experience. On top of several million dollars in research and development costs, publishers will invest millions more to market and distribute the game. The reality is that only a small percentage of these titles actually achieve profitability, and many more never even recover their front-end R&D costs. Moreover, the commercial life of a video game is quite short compared to other entertainment content, as the average video game is estimated to earn roughly 75% of its total revenues in the two-month

period following its release. In this type of market, it is easy to understand how devastating piracy can be as it siphons off the revenue required to sustain the high creative costs necessary to produce successful products.

For this reason, and the susceptibility of digital content to widespread abuse and infringement, ESA members have invested heavily in the use of technological measures that are designed to prevent the piracy of their game software products. Such measures help to reduce the infringement of their software titles by restricting access to, or preventing the copying of, their digital content. Some of these measures are embedded in the disks or cartridges on which game publishers publish their games. Others are incorporated into the game consoles on which game software is played. The game consoles generally use access control measures through an authentication system that locks the machine out from playing an illegitimate copy of a game. In each case, members of the game software industry have taken affirmative steps, some involving significant expense, to preclude the infringement of their digital software products.

Congress recognized the important role that technological protection measures play in controlling the piracy of digital content when it enacted the Digital Millennium Copyright Act ("DMCA") in 1998. The provisions of this legislation, codified under 17 USC §1201, prohibit the circumvention of such measures and criminalize the activities of those engaged in the manufacture or trafficking of devices used to circumvent such measures, with "access protection" measures covered under §1201(a)(2) and "copy protection" measures covered under §1201(b).

Notwithstanding the enactment of the DMCA, because of the strong appeal of video games and the business opportunity that the popular demand for games fosters, the "hacker" community has targeted the technological protection measures used by the game software industry. Many of these "hackers" are resident abroad and are thus beyond the purview of the DMCA's prohibitions. With few exceptions, almost every game console system launched since the early 1990's has had its protection technology compromised within six to nine months of its release, sometimes sooner. As an example, the popular Wii game console, launched by Nintendo just this past November, has recently seen its security measures hacked. This track record is not a function of the low robustness or sophistication of the technological protection measures used in these systems, as most of these technological measures are quite technologically advanced, particularly the ones found in recent consoles. It is, rather, a result of the illicit profits to be made from the creation and commercialization of circumvention devices that will bypass such measures and permit pirate versions of games to be played on these consoles.

The most prevalent forms of circumvention devices are semi-conductor chips that modify the lock-out systems incorporated into game consoles. Each game console system has its own proprietary technological measures, so that the measures used on the Microsoft Xbox are different from the ones used in the Sony PlayStation 2. In addition, with new generations of consoles, the console companies have designed and incorporated into their newer consoles new and improved access-control technologies, so that the Xbox 360 has a different set of protection measures from the Xbox. Unfortunately, despite the investments made in improving such technological protections, hackers have succeeded in compromising each of these systems through the development of chips that, when installed in the console (by either the owner or any

of the many service providers who will do so for a fee), modify the console's processes to bypass its authentication system and thereby enable it to play an illegal copy of a game. These modification chips are commonly referred to as "mod chips." Once installed in a game console, a mod chip will allow that console to play an unlimited number of pirate copies of the games designed for that console. Different mod chips are designed and made to work on different game consoles, with some consoles suffering from several different mod chips designed to work to circumvent its security measures.

Since the enactment of the DMCA, the entertainment software industry has supported enforcement of its provisions against individuals and enterprises in the United States engaged in the trafficking of mod chips and other circumvention devices. In most cases, when the defendants have been engaged in pirate activities in addition to the sale and installation of circumvention devices, federal prosecutors have been more likely to charge the defendants with copyright infringement than with violations of the DMCA, even though the latter activities are ultimately responsible for more harm being done to rights holders. While ESA and its members are appreciative of the cases brought against these individuals, there is the sense that prosecutors might be more inclined to charge defendants with DMCA violations if an enhanced level of punishment were recommended for such crimes.

Unfortunately, ESA's investigations into game piracy across the United States over the past years have seen an increase in the number of enterprises that will offer to sell or modify game consoles, without any other infringing activities, such as the sale of copies of pirate game software. So, there appear to be an increasing number of individuals and enterprises engaging only in circumvention activities with respect to game consoles and thus subject only to charges of violating the DMCA. While these enterprises are usually not large, there are many of them and they can be very active, with some of these businesses estimated to take in several thousands of dollars per month.

Thus, the Sentencing Commission's Amendment to enhance the level of punishment available against individuals convicted of DMCA violations is very timely and could serve to increase the level of deterrence against mod chip enterprises.

ESA has reviewed the three options outlined in the Amendment. Of the three, Option 1 seems to offer the best approach for enhancing the level of punishment for trafficking in circumvention devices. Option 1 provides for a two or more level enhancement to a minimum level of 12 for anyone convicted of "trafficking in devices used to circumvent a technological measure." The approach underlying Option 1 provides a simple and straightforward recognition of the greater amounts of infringement that circumvention devices facilitate. The only deficiency ESA has identified within Option 1 is that it applies only to defendants convicted under §1201(b), which covers only trafficking in devices that circumvent copy-protection measures, rather than §1201 generally, or §1201(a)(2) additionally, which would cover defendants convicted of trafficking in devices that circumvent access controls, which are what mod chips effectively circumvent. We would recommend that the Commission reconsider the coverage of Option 1 to include all convictions under §§1201 and 1204. This is consistent with the scope of coverage in other portions of the Amendment.

By contrast, in the context of game piracy and mod chips for game consoles, Option 2 understates the value of the "infringement amount" as it uses a calculation that factors the average retail value of the circumvention device multiplied by the number of such devices. As most mod chips retail for $30-50, equivalent to the retail value of one legitimate game, such a calculation produces a minimal infringement amount. Given that the installation of a mod chip in a game console facilitates dozens of infringements (i.e., the number of pirate games played on a console, after it has been modified), the retail value of each mod chip is a fraction of the value of the damage it inflicts on legitimate game sales.

While Option 3 attempts to address this understatement by offering an alternative formulation, it does so in a way that makes it very difficult to calculate the "infringement amount." Option 3 specifies that the infringement amount is the greater of the amount calculated under Option 2's formula or the number of circumvention devices "multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid." In the context of someone convicted of trafficking in mod chips, such a calculation would require that a federal judge make a judgment on how many pirate games a person using a mod chip would play and then multiplying that by the retail value that the person would have paid for legitimate versions of those games. This is an extremely difficult and conjectural calculation, as it requires an assessment of how many pirate games are played by those using mod chips and then requiring a deep knowledge and understanding of retail game software prices. ESA sees this calculation as extremely difficult to make and, for that reason, fears that such a formulation is imprecise and could result in an infringement amount that is disproportionately low.

ESA would also like to take this opportunity to address the two issues raised for comment at the end of the proposed amendment.

The Commission has requested comment on whether it should "provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense." ESA would suggest that no such provision is required as its experience is that, in most cases involving intellectual property infringement, the infringement amount understates the seriousness of the offense, rather than the opposite. In the few cases, where the seriousness of the case is overstated by the infringement amount, ESA believes that federal judges already factor this into their determination of the punishment to be imposed. ESA does not see the need for any additional provision embodying a principle already being applied in practice.

The Commission has also asked for comment on Application Note 4 providing for an adjustment to be made under §3.B1.3 "in any case in which the defendant deencrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item." The Commission has received comment that not every de-encryption or circumvention requires a "special skill" as defined in §3.B1.3. The ESA's comment is that the Commission should not make any change to Application Note 4 as it sees this as applying to de-encryptions and circumventions of technological measures to gain "initial" access to protected content. Such instances of de-encryption and circumvention where initial access to protected content is achieved describes situations where hackers have achieved the first breakthrough in compromising a technological measure. As opposed to some less complex acts of circumvention, these "cracks" in security measures invariably do require "special skills." In the

game software context, these initial "cracks" of protected game software are performed by groups of individuals working together through the Internet, commonly known as "warez" groups. These groups will "crack" the copy protection of a newly released game (sometimes, even prior to release), strip out the protection technology and then release an unprotected downloadable version for dissemination on the Internet. Within days, if not hours, thousands of copies are being copied and downloaded throughout the Internet. The "crackers" in these groups are individuals with high technological skills who able to figure out how to penetrate the security measures in order to access the digital content of game software and would thus meet with the "special skills" requirements of §3.B1.3. As ESA believes that Application Note 4 is intended to cover such activity, in accordance with the purposes of the No Electronic Theft (NET) Act, it would recommend that the Commission not make any change in such Application Note.

ESA is grateful for the Commission's efforts reflected in the Proposed Amendment to address this important aspect of the law governing enforcement against digital piracy and is appreciative of this opportunity to provide its comments on such efforts.