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# UNITED STATES SENTENCING COMMISSION

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**WRITTEN TESTIMONY**

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**PUBLIC HEARING  
MARCH 13, 2008**



## TENTATIVE PUBLIC HEARING AGENDA

*Mecham Conference Center – Side A  
Thurgood Marshall Federal Judiciary Building, Washington, DC*

**March 13, 2008**

9:30 a.m. – 12:00 p.m.

### **PANEL ONE: Court Security**

**The Honorable Henry E. Hudson**

*United States District Judge, Eastern District of Virginia;  
Committee on Judicial Security, Judicial Conference of the United States*

**Q&A**

### **PANEL TWO: Other Amendments for 2008**

**Diane J. Humetewa (immigration)**

*United States Attorney, District of Arizona*

**Maureen Franco (immigration)**

*Deputy Federal Public Defender  
Western District of Texas*

**Marianne Mariano**

*Acting Federal Public Defender  
Western District of New York*

**Todd A. Bussert**

*Practitioners Advisory Group*

**Suzanne E. Ferreira**

*Supervisory United States Probation Officer  
Southern District of Florida*

**Q&A**

**ADJOURN**







**Panel One: Court Security**

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**The Honorable Henry E. Hudson**

*United States District Judge, Eastern District of Virginia;*

*Committee on Judicial Security, Judicial Conference of the United States*



**The Honorable Henry E. Hudson**

*United States District Judge, Eastern District of Virginia;*

*Committee on Judicial Security, Judicial Conference of the United States*

Judge Henry E. Hudson is a United States District Judge in the Eastern District of Virginia. In 2005, Judge Hudson was appointed by the Chief Justice to the Judicial Conference Committee on Judicial Security. Prior to his appointment to the federal bench in 2002, Judge Hudson was a circuit court judge in Fairfax County, Virginia. His career in the federal government has included service as both an assistant U.S. attorney and U.S. attorney for the Eastern District of Virginia. Judge Hudson is former director of the U.S. Marshal Service. Judge Hudson's professional career has included service with the Commonwealth Attorney's Office in Arlington County, as well as private practice. He graduated from American University in 1969 with a Bachelor of Arts, and received his law degree from American in 1974.

*Committee on Judicial Security  
Judicial Conference of the United States*

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March 11, 2008

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 Proposed Fictitious Liens Amendments

Dear Judge Hinojosa:

I am writing on behalf of the Judicial Conference's Judicial Security Committee, in coordination with the Criminal Law Committee, to convey the views of the two committees while the Sentencing Commission considers sentencing guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens against federal judges. For the reasons set forth in the attached statement, the Committees are of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate.

Although I have provided the statement for the Committees, Judge Henry E. Hudson, Eastern District of Virginia, will testify before the Commission at the hearing on March 13, 2008. Again, the Security Committee is thankful to the Sentencing Commission for taking the Committee's testimony on this important issue.

Sincerely,



Edmund A. Sargus, Jr.

cc: Members Judicial Security Committee  
Members Criminal Law Committee



**STATEMENT OF JUDGE EDMUND A. SARGUS, JR.**  
**Member, Judicial Security Committee of the Judicial Conference of the United States**  
**United States District Court**  
**Southern District of Ohio**  
**March 10, 2008**

Thank you for the opportunity to offer the following comments on behalf of the Judicial Security Committee of the Judicial Conference of the United States. I have coordinated these comments with the chair of the Criminal Law Committee of the Judicial Conference of the United States. The Security Committee appreciates the speed with which the Sentencing Commission has moved to promulgate new Sentencing Guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens or encumbrances upon real or personal property owned by federal judges or federal officers and employees in relation to the performance of the official duties of such persons. The offense is punishable by imprisonment not to exceed ten years.

The Sentencing Commission should also take note that according to the U.S. Marshals Service, the number of threats made against federal judges and prosecutors has increased 69 percent from fiscal years 2003 to 2007. In addition, 503 threats were reported in fiscal year 2008, through February 9. Judge Sentelle, chair of the Judicial Security Committee, has noted that "... threats are a significant security concern to his (my) colleagues." Kevin Johnson, *More Judges, Prosecutors at Risk; 69% Increase in Threats Since 2003*, U.S.A. Today, March 6, 2008, at 3A.

The filing of fictitious liens against judicial officers has been a problem for the judiciary for many years. For this reason, in September 1997, the Judicial Conference of the United States agreed to support legislation that would create a new federal criminal offense for harassing or intimidating a federal official, including a judicial officer, with respect to the performance of

official duties to include the filing of a lien on the real or personal property of that official (JCUS-SEP 97, p. 66). Such legislation was repeatedly introduced, but never enacted, in Congress during the following years. In January 2008, however, the Court Security Improvement Act of 2007 was enacted and it included a provision to create a new law for the filing, conspiring to file, or attempting to file any false lien or encumbrance against the property of a federal judge or law enforcement officer because of the performance of that individual's official duties (Public Law No. 110-177, 121 Stat. 2534 (2008)).

These liens are usually filed in an effort to harass judicial officers against whom a civil action has been initiated by the individual filing the lien. Liens are placed on the property of judicial officers based on the allegation that the property is at issue in the lawsuit. Judges are generally very careful about listing their home address in public. When filing the lien, the home address of the judge generally is listed on the filing. By this action alone, the filing individual is saying to the judge in essence, "I know where you live," and could be threatening and intimidating to the judge. While the filing of such liens has occurred in all regions of the country, they are most prevalent in the state of Washington and other western states.

The Administrative Office's Office of General Counsel has had experience with this practice since it acts as a liaison between judicial officers and the Department of Justice to obtain representation for judicial officers sued for actions taken in their official capacities. The General Counsel's Office has observed that the practice of filing liens has been going on for some time. Between September 1992, when the practice began to be recorded, and 2007, liens were filed in at least 81 of the civil cases filed against judicial officers; however, multiple liens were filed in several of these cases. While the incidences of filing liens have occurred in all regions of the



country, they are most prevalent in the western states.

The responsibility to initiate legal action to remove these liens is vested in Assistant United States Attorneys, who represent the judicial officers, and their forms of response vary according to the state law and the circumstances. It is sometimes necessary for the AUSA to bring action in state court for the removal of liens. In some circumstances, an action to remove the liens may be brought in federal court, and in others, state court proceedings are commenced and removed to federal court under the provisions of 28 U. S .C. § 1452. In some cases, the AUSA may seek an injunction against further filing of liens by the litigant. All of these methods are time consuming, of course, but experience indicates that they are ultimately successful.

Nonetheless, the pendency of these liens prior to their removal has caused some judicial officers great inconvenience. In supporting a federal criminal statute, the Criminal Law Committee expressed hope that criminal sanctions might act as a deterrent against false filings. Prior to the enactment of this statute, the Department of Justice was encouraged to prosecute persons filing these liens in state court under state false liens statutes; however, there were problems with this approach.

For one, not all states had laws that were reasonably available for this purpose. A review of state provisions discloses only a handful of applicable specific provisions, and most of these were civil remedies. They permit a party who has had a lien or other encumbrance placed on his or her property for malicious purposes to recover damages, sometimes treble damages, and attorneys fees. A few states have criminal penalties for filing such encumbrances. No state statute that specifically penalizes claims against the property of judicial officers has been found, but Wisconsin has both civil and criminal "slander of title" provisions on the subject.

Wis. Stat. § 706.13 and Wis. Stat. § 943.60, respectively. The civil penalty authorizes punitive damages of \$1,000 plus any actual damages caused by the false failing. The criminal statute is punishable by a fine not exceeding \$10,000 or not more than six years imprisonment. Wis. Stat. § 939.50.

As to the federal judiciary, the core conduct prohibited by § 1521 typically involves the wrongful filing of a lien or encumbrance by a party unwilling to accept a final judgment or sentence. In this context, the filer of the fictitious lien is often engaged in an act of retaliation against a judge, prosecutor, or probation officer. While prompt discovery and subsequent civil litigation may obviate financial harm to parties subject to fictitious liens, the prohibited conduct represents an attack upon the integrity of the judicial system. In the case of an incarcerated filer, or a party with prior criminal involvement in federal court, the conduct indicates that rehabilitation has not occurred. Further, such offender presents a security risk to all parties against whom the fictitious liens have been filed.

I am attaching to my written comments a copy of a decision issued last week in the case of *United States of America v. McCall*, No. C2-06-1051 (S.D. Oh., March 5, 2008). As the opinion describes, Bondary McCall is serving a sentence of 292 months in the federal prison system. From May of 2005 through November of 2006, Bondary McCall filed a series of fictitious claims against me, as well as an Assistant United States Attorney. In November of 2006, McCall attempted to file a U.C.C. financing statement listing me as indebted to him in the amount of \$19 million.

Due in part to the fact that I reside in a small, rural community, the filings were recognized as suspicious and sent to the county prosecutor. Shortly thereafter, the United States

Attorney's Office instituted a lawsuit seeking to restrain McCall. I draw your attention to the fact that, in many states, official record keepers – clerks of court, county recorders – are not authorized to screen documents or refuse filings so long as technical requirements are met and proper fees are tendered. This consideration presents a concern that a fictitious lien will be recorded without notice to a judicial officer. As a further example of these concerns, on March 7, 2006, McCall did in fact cause a fictitious lien to be filed in the office of the Washington Secretary of State. Fortunately, the U.C.C. filing lists the AUSA and me as the secured party, rather than the debtor.

The gravity of the offense is not confined to the potential financial harm or inconvenience to a judge. The offense involves conduct which reveals a deep antagonism against the legal system and demonstrates that the perpetrator will not be restrained from unlawful conduct. The Security Committee considered, and rejected, two possible guideline analogues the Sentencing Committee might consider, including obstruction of justice and fraud. Specifically, that although the Sentencing Commission could also consider the use of U.S.S.G. § 2J1.2, Obstruction of Justice, the Security Committee believes that a substantial number of fictitious liens involving judges have been filed after the conclusion of litigation. Such filings were not intended to actually obstruct judicial proceedings, but to instead extract retaliation or vengeance upon a judicial officer. Because the filing of fictitious liens is not necessarily addressed to pending cases, the nexus between the filing and the alleged obstruction may be lacking.

Similarly, in the Security Committee's view, U.S.S.G. § 2B1.1, which addresses fraud and related financial crimes, would not capture the essence of the offense. The Security



Committee believes that the gravamen of the fictitious-lien offense is the threat to the legal process, not to the financial security of a judge, prosecutor or probation officer. The wrongfully filed liens will ultimately be removed through legal proceedings, if necessary. In most instances, there will not be actual economic harm. The filing of fictitious liens, however, clearly indicates that the perpetrator is a threat to the legal process and to a particular jurist.

In light of these concerns, the Security Committee is of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate. This Guideline currently applies in cases involving threatening or harassing communications. While the base offense level is 12, several specific offense characteristics relevant to § 1521 increase the offense level. For example, § 2A6.1(3) provides for a 3 level increase, if the offense involves violation of a court order. It is likely that a civil action seeking injunctive relief banning a defendant from sending harassing mail from a penal institution may precede the filing of criminal charges. Consequently, a later fictitious-lien filing also violates the earlier injunction and should warrant an increased sentencing guideline range.

The Security Committee is also of the view that the offense level should increase if the defendant has filed multiple fictitious liens. Likewise, the offense level should increase if the conduct causes substantial economic harm or extended litigation to remove the fictitious lien from public records. Finally, because U.S.S.G. § 2A6.1 covers more than fictitious-lien filings against judges, prosecutors and probation officers, the Security Committee believes that a Chapter Three Adjustment, involving official victims, is warranted under U.S.S.G. § 3A1.2.

Again, thank you for the opportunity to share the views of the Security Committee of the Judicial Conference with you as you consider this important issue.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

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**United States of America**

**Plaintiff,**

**v.**

**Case No. 2:06-cv-01051**

**Bondary McCall,**

**Judge Michael H. Watson**

**Defendant.**

**OPINION AND ORDER**

Plaintiff the United States of America seeks declaratory and injunctive relief against Defendant Bondary McCall. Plaintiff alleges Defendant has filed and continues to file harassing and frivolous documents against various federal officials in retaliation for prior criminal proceedings against the Defendant. Plaintiff seeks a judgment permanently enjoining Defendant from filing documents with government agencies without first obtaining written leave of this Court. Furthermore, Plaintiff requests a judgment declaring any such documents currently filed or filed in the future without leave of this Court to be void and of no legal effect. For the reasons that follow, the Court grants Plaintiff's motion for summary judgment.

## **I. FACTS**

### **A. Parties**

Plaintiff is the United States of America ("United States"). Defendant, Bondary McCall, is an inmate (federal register number 43827019) confined in federal custody at the Federal Correctional Institution in Williamsburg, South Carolina.

### **B. Case History**

Plaintiff filed the original complaint on December 14, 2006. Plaintiff filed a Motion for Summary Judgment on January 9, 2007. On March 7, 2007, the Court issued an order granting Defendant fourteen days to respond to the pending motion for summary judgment. Defendant did not respond. On March 23, 2007, Plaintiff filed a Supplemental Memorandum Supporting Motion for Summary Judgment. On September 21, 2007, Defendant filed a Response to Plaintiff's Supplemental Motion for Summary Judgment.

Where, as here, a motion for summary judgment goes unopposed, a district court properly relies upon the facts provided by the moving party. *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404-405 (6<sup>th</sup> Cir. 1992).

### **C. Defendant's Filings**

In December 1994, Defendant was sentenced to 292 months imprisonment for an unrelated offense. Since his sentencing, Defendant has filed over twenty collateral actions and appeals. Each of these cases, naming local and federal officials as defendants, was dismissed by the respective courts.

Subsequent to his incarceration, Defendant has filed numerous documents

alleging a variety of financial claims against various federal officials. Many of these documents allege financial claims against the Hon. Edmund A. Sargus, Jr. ("Judge Sargus"), a United States District Judge in the Southern District of Ohio, and Robyn Jones Hahnert ("Hahnert"), an Assistant United States Attorney for the Southern District of Ohio.

In May 2005, Defendant conveyed a document to the Internal Revenue Service (IRS) in Washington, D.C. entitled "Reporting of 'Tax Delinquents'". The document identified Judge Sargus and Hahnert as "Tax Fugitives".

In June 2005, Defendant sent the United States Department of Justice, via U.S. Mail, a "notice of tort claim" against the United States, in the amount of \$19,920,000,000.00, for damages allegedly caused by Judge Sargus, Hahnert and others.

In June 2005, Defendant named Judge Sargus, Hahnert, and others, in a document titled "Affidavit Notice of Default" filed with the United States District Court for the Southern District of Ohio.

In October 2006, Defendant sent to Belmont County, Ohio officials, via U.S. Mail, a document titled "UCC Financing Statement" listing Judge Sargus as the "Debtor" and Defendant as the "Secured Party". The document purported to encumber "all of Debtor's assets, land, and personal property . . . ."

In November 2006, Defendant sent to the Belmont County, Ohio Treasurer, via U.S. Mail, a letter requesting the Treasurer provide tax assessments for Judge Sargus, provide all parcel numbers Judge Sargus is paying taxes on, and list Defendant on the county records.



In November 2006, Defendant sent to Judge Sargus, via U.S. Mail, a letter identifying Judge Sargus as "Debtor Judgment" and claiming to possess a "Security Interest" in Judge Sargus.

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Neither Judge Sargus or Hahnert are indebted to Defendant and neither have ever had a commercial relationship with Defendant. There is no valid security agreement between Defendant and the federal officials. There are no judgments entered against either Judge Sargus or Hahnert involving Defendant that would justify the filing by Defendant of any lien, financing statement, or other filing concerning the federal officials' property.

Plaintiff filed this complaint on Dec. 14, 2006. Plaintiff seeks a declaratory judgment that the purported "liens" and or financing statements prepared, attempted to be filed, or filed by Defendant are null, void, and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Plaintiff also seeks to permanently enjoin Defendant from filing or attempting to file any document claiming financial interests against any federal officer or employee without leave of this Court.

## II. SUMMARY JUDGMENT

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving



party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

### III. DISCUSSION

#### A. Declaratory Relief

Plaintiff requests a declaratory judgment that the purported "liens" and/or financing statements prepared, attempted to be filed, or filed by Defendant are null, void and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Given the uncontested facts offered by the Plaintiff, the Defendant's pseudo-financial filings are without merit. The Defendant has demonstrated no contractual relationship with any federal employee and consequently has no property claim against any of the named individuals. This Court declares the Defendant's purported "liens" and/or financing statements to be void and of no legal effect.

#### B. Injunctive Relief

Plaintiff asks this Court to permanently enjoin the Defendant from filing liens, UCC statements or other documents with government agencies without leave of this Court. Plaintiff alleges the case at bar satisfies the four requirements for permanent injunctive relief as described by the Eastern District of Texas in *Moore v. City of Van*,

Texas. 238 F.Supp.2d 837, 852 (E.D. Tex. 2003). Because this Court agrees, the Defendant is hereby permanently enjoined from filing liens, UCC statements or other documents with governmental agencies without leave of this Court.

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While *Moore* is not mandatory authority for this Court, it is instructive to the extent it is a refined version of this Court's discussion of the requirements for permanent injunctive relief in *Dayton Christian Schools v. Ohio Civil Rights Com'n.* 578 F.Supp. 1004 (S.D. Ohio 1984) (*rev'd on other grounds*, 766 F.2d 932 (6<sup>th</sup> Cir. 1985), *rev'd and remanded on other grounds*, 477 U.S. 619 (1986)). In *Dayton*, this Court explained that permanent injunctive relief is appropriate when the plaintiff has actually prevailed on the merits of his claim, has demonstrated requisite real and present danger of irreparable injury, and the balancing of equities between the parties weighs in favor of an injunction. The factors are similar to those considered when determining whether a preliminary injunction should be issued. "Specifically, the Court must consider whether the plaintiff has demonstrated irreparable injury, whether the issuance of the injunction 'would cause substantial harm to others,' and 'whether the public interest would be served by issuing' an injunction." *Id.* at 1017 (quoting *Friendship Materials, Inc. V. Michigan Brick, Inc.*, 679 F.2d 100 (6<sup>th</sup> Cir. 1982)).

In *Moore* the Eastern District of Texas neatly clarified the requirements for permanent injunction. "The standard for permanent injunction is 'essentially the same' as for a preliminary injunction, in that the plaintiff must establish each of the following four elements: (1) actual success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury

outweighs any damage that the injunction may cause the defendants; and (4) that the injunction will not impair the public interest." *Moore*, 238 F.Supp.2d at 852. The difference between the standard for a permanent injunction and a preliminary injunction is that a permanent injunction requires the court to determine the plaintiff's actual success on the merits rather than the plaintiff's likelihood of success.

A permanent injunction cannot be granted without careful consideration by the court. The Sixth Circuit quoted Professor Wright in discussing the "ordinary principles of equity" that must be considered prior to issuing a permanent injunction. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages." *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No.*, 471 F.2d 872, 876 (6<sup>th</sup> Cir. 1972) (quoting 3 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) § 1431). So it is with careful deliberation that this Court evaluates the applicability of a permanent injunction to the case at bar.

#### **1. Plaintiff's Success on the Merits**

To win a permanent injunction the Plaintiff must demonstrate actual success on the merits of the case. The Defendant here has filed numerous frivolous documents alleging a variety of financial claims against various federal officials. The undisputed facts demonstrate the Defendant has no legitimate financial claim against any of the



federal officials named in the various filings. In particular, Defendant's October 2006 UCC Financing Statement attempting to encumber the assets of Judge Sargus amounts to fraud. Judge Sargus has no contractual relationship with the Defendant to warrant Defendant's claim to Judge Sargus' assets.

There can be no genuine issue of material fact as to the invalidity of Defendant's filings. The Plaintiff's success on the merits is established.

## **2. Substantial Threat of Irreparable Injury**

Injunctive relief is appropriate only where there exists a substantial threat that failure to grant the injunction will result in irreparable harm. Here, this threshold is satisfied. Defendant's frivolous filings place a constant and irreparable strain on federal employees and the federal offices they serve. By Defendant's own admission ("I have 14 more year (sic) to study, study and study,") he intends to continue his malicious filing campaign. To allow the Defendant to persist would impose a constant burden on the victims of his unwarranted financial filings.

The Supreme Court of North Dakota recognized the problem in a similar situation. "A strong and stable corrections system is necessary to protect the general welfare of the people. We cannot allow that system to be undermined by permitting an inmate to indiscriminately file liens not authorized by law against the property of . . . employees." *State v. Jensen*, 331 N.W.2d 42, 47 (N.D. 1983). In that case, an inmate was permanently enjoined from filing illegitimate, unauthorized liens against state employees. The court explained "[a]ny purported lien filed by [the inmate] would encumber the property of the State employee against whom the lien was filed and effectively inhibit the alienability of that property . . . this unwarranted cloud on the title

could result in damages which would be difficult to ascertain and could cause irreparable harm to the State employee." *Id.*

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The Defendant's fraudulent filings are a legitimate concern for federal employees. The Plaintiff appropriately notes the irreparable negative effect such filings might have on a victim's credit score or other financial interests. Because the Defendant has imposed a real harm and apparently wishes to continue to do so, his actions demonstrate a substantial threat of continuing and irreparable injury.

### **3. Injury Outweighs Damage Caused by Injunction**

Injunctive relief is only to be granted if the injury to the Plaintiff outweighs the damage the injunction would cause the Defendant. Here, a balancing of the relative hardships weighs in favor of injunctive relief. A permanent injunction will protect federal officials from the injury described above, but will still enable the Defendant to file public records pending court approval. While the Defendant's ability to file public documents might arguably be delayed, his ability to obtain court approval provides him with a legitimate mechanism to file valid documents.

### **4. Public Interest**

Injunctive relief may only be granted if the injunction will not impair the public interest. In the case at bar, injunctive relief will in fact advance the public interest. Public officials, and the offices they serve, should be protected from frivolous filing campaigns such as this. Further, our nation's financial institutions cannot fall victim to the Defendant's personal vendettas. Left unchecked, the Defendant's illegitimate financial claims would inevitably affect someone's legitimate financial interests. It is in



the public's best interest that Defendant be barred from future filings pending the approval of the court.

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**IV. DISPOSITION**

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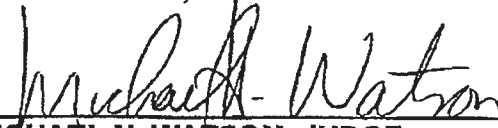
Based on the foregoing analysis, the Court **GRANTS** Plaintiff's summary judgment motion (Doc. 6). Moreover, the Court **GRANTS** Plaintiff's request for permanent injunctive relief.

The Clerk shall enter a final judgment on the merits in this case in favor of Plaintiff, and against Defendant, as follows:

1. The Court **DECLARES** the Defendant's purported "liens" and/or financing statements filed against federal officials, including Judge Sargus and Robyn Hahnert, to be void and of no legal effect; and
2. Defendant is hereby **PERMANENTLY ENJOINED** from filing liens, UCC statements or other documents with governmental agencies without first seeking and obtaining written leave of this Court.

The Court further warns Defendant that Congress recently passed into law a provision criminalizing the filing of false liens against federal judges and federal law enforcement officers. Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (2008). Violations are punishable by fine and/or up to ten years imprisonment. *Id.*

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**

**PLACEHOLDER  
FOR  
WITNESS  
TESTIMONY**







**Panel Two: Other Amendments for 2008**

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**Diane J. Humetewa** (immigration)  
*United States Attorney, District of Arizona*

**Maureen Franco** (immigration)  
*Deputy Federal Public Defender, Western District of Texas*

**Marianne Mariano**  
*Acting Federal Public Defender, Western District of New York*

**Todd A. Bussert**  
*Practitioners Advisory Group*

**Suzanne E. Ferreira**  
*Supervisory United States Probation Officer, Southern District of Florida*



**Diane J. Humetewa**

*United States Attorney, District of Arizona*

Diane J. Humetewa is United States Attorney for the District of Arizona. Ms. Humetewa started at the U.S. Attorney's Office in 1986 as one of the first victim-witness advocates in the federal criminal justice system. She graduated law school at Arizona State University in 1993. Before rejoining the U.S. Attorney's Office in 1996 as a special assistant U.S. attorney then an assistant U.S. attorney, Ms. Humetewa was counsel in the U.S. Department of Justice Office of Tribal Justice, and counsel for Senator John McCain, U.S. Senate Committee on Indian Affairs.

**Joseph E. Koehler** (available for questions; not making a statement)

*Assistant United States Attorney*

*Deputy Chief, Criminal Division Immigration Unit*

*United States Attorney's Office – District of Arizona*

Mr. Koehler has been an assistant United States attorney in the District of Arizona criminal division since 1992, and has worked a variety of criminal cases in both Tucson and Phoenix offices. Mr. Koehler currently supervises the immigration unit of the criminal division in Phoenix. In addition to his traditional duties as an assistant U.S. attorney, in 1998, 2000, and 2005, Mr. Koehler served as the project editor for a book published by the Department of Justice, Office of Legal Education (OLE), titled *Immigration Law*. The book serves as a resource for government attorneys and agents throughout the Departments of Justice and Homeland Security. Mr. Koehler has also performed training for AUSAs and liaison work for the Attorney General's Advisory Committee.



DIANE J. HUMETEWAW

UNITED STATES ATTORNEY  
DISTRICT OF ARIZONA

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ATTORNEY GENERAL'S ADVISORY SUBCOMMITTEE  
ON BORDER AND IMMIGRATION LAW ENFORCEMENT

PRESENTED TO THE  
UNITED STATES SENTENCING COMMISSION

MARCH 13, 2008

#### INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is a pleasure to appear before you on behalf of the Department of Justice. Today I will address just one of the issues raised in the "Proposed Amendments" that you issued for comment on January 24<sup>th</sup>. 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 with me today Joe Koehler, who I believe you know from previous hearings. He is a supervisory attorney in my office and has years of experience prosecuting immigration cases. He has just returned to our office from a detail to

Washington where he represented the Department in drafting provisions of the immigration bill. I ask the Commission's indulgence if I call upon one of him to respond to particular questions that you may have.

Before I address the main topic, I would like to express the Department's appreciation for all of the hard work that you and your staff have done over the past year. Obviously on some issues we have not had a complete meeting of the minds, but we can all agree that from collecting and analyzing the data on the impact of crack retroactivity, to conducting the roundtable on Immigration, and working with all of the interested parties in developing the other guideline proposals for your consideration, the staff's hard work, expertise and guidance has helped us all better understand these complex issues. On behalf of the Department I would like to thank them for their assistance.

## IMMIGRATION

Let me now address immigration and in particular the proposals to amend § 2L1.2. As you are aware, the Department has been urging wholesale change to this guideline for the past 3 years. We have made specific proposals aimed at furthering the dialogue and have been open to alternative suggestions. We have not sought to increase or decrease the length of sentences; rather, we have

suggested ways that we believe would help fix a guideline that, despite all good intentions in the past, is broken. Broken because of the unintended way that it operates and ends up requiring everyone, judges, probation officers, prosecutors, and defense attorneys, to spend an inordinate amount of time locating records and litigating issues that in the end do not further the goal of the guidelines, i.e., “deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender.”

As we have said before, there is a dire need for change.

Let me try to put this in perspective. When the Commission published the first manual it noted in the Introductory Chapter: “The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery).” It never mentioned immigration, which is not surprising because there were only 2,289 defendants prosecuted for immigration crimes in Federal court in 1988, which represented approximately 4% of all defendants (55,764) that year. In contrast, according to the Commission’s data, in 2007 there were 17,592 defendants prosecuted for immigration offenses, and that now constitutes 24.2% of the federal docket. In the past 3 years that the illegal reentry guidelines have been under consideration by the Commission, there have been approximately 50,000 defendants sentenced for immigration offenses,



nearly two thirds of them under 2L1.2. Last year alone, nationwide, 10,953 cases were sentenced with 2L1.2 as the primary guideline, with 8,542 receiving some type of increase under 2L1.2(b).

Let me briefly describe how illegal immigration prosecutions impact Arizona. The Southwest border districts represent only five of the nation's 94 federal districts, but those 5 districts, including mine, conducted nearly 30% of all federal sentencings in FY 2007 (21,850 of the national total of 72,865 guideline sentences), according to the Sentencing Commission's 2007 Sourcebook of Federal Sentencing Statistics. In my district, immigration cases comprise 58.0% (2,249) of the entire docket. We anticipate that percentage will continue to increase. Of the 1,849 cases sentenced under Guideline 2L1.2, 89% received an increase under subsection (b). Although our district has struggled to complete its mission with current resources, last year we initiated Operation Streamline in the Yuma Sector, and this year we recently initiated Arizona Denial Initiative, a Streamline like program in the Tucson Sector. These initiatives involve filing criminal charges against nearly everyone caught crossing the border illegally within certain areas of the border. Right now we are prosecuting 35 new cases a day in Yuma and 50 new misdemeanors a day in Tucson, with plans to incrementally increase the Tucson prosecutions to 100 a day.

We anticipate bringing at least an additional 40 felony cases per month as part of this operation. In 2007, each of our judges sentenced approximately 250 felony defendants; the national average is about 75. Presently my office has four lawyers on loan from the Department of Homeland Security to help with this influx. Unfortunately, I have heard that the Federal Public Defender does not have that luxury and is hard pressed to find panel lawyers willing to take these cases. Similarly, the probation office is overwhelmed. On average, each day, all year long, in every courtroom, a defendant is being sentenced. In each case a presentence report had to be prepared, which includes obtaining prior conviction records and analyzing under current precedent what guideline range is appropriate.

Not surprisingly, in most illegal reentry cases the length of the prospective sentence stands as the lone issue triggering litigation in the case and thereby delaying resolution of the case. This delay creates difficulty throughout the federal criminal justice system, tying up judges, probation officers, prosecutors, defenders and consuming valuable detention space.

As you are aware, the stakes are high. If a court determines that a prior conviction qualifies as a crime of violence, that will probably double the defendant's sentence. And these are not easy things to determine. First, we must get the record of the previous conviction - that occasionally includes the

preliminary task of determining where the conviction took place when all we have is a record of incarceration at a prison facility. Even when we finally obtain the preliminary conviction records, they may not be complete or may not supply the information that is necessary and we end up having to go back and ask for additional information. It is no small task to obtain more documentation, particularly for convictions issued from all of the various state, county, and local courthouses among the 50 states. Often, the further records that are needed – such as various plea or trial transcripts, or more complete documentation – are not available because of the age of the conviction, the vagaries of the state court retention practices, or other circumstances out of our hands. And even when all the conviction records can be obtained, the parties and the court must labor to determine, under oft-changing circuit precedent, whether the records contain sufficient information to cause the conviction to qualify as a predicate for any of the enhancements under 2L1.2(b).

In most cases, you will have four parties examining this material. At least initially, agents and prosecutors try to get a “quick read” of a defendant’s record both to inform a charging decision and to determine what, if any, plea agreement might be offered. Second, a defense attorney will examine those same records so that the defendant can make an informed decision. Third, once a guilty verdict or



plea has been entered, the probation officer will conduct a detailed search and review of the records. Finally, the Court often will engage in an independent analysis as it prepares to rule on whether an offense under a particular jurisdiction's statute falls within the scope of one of the offenses that trigger the enhancements set forth in 2L1.2.

Unfortunately, it doesn't end there. My office, and I am sure this applies to the Federal Defenders, spends an enormous amount of time briefing and arguing these cases before the Court of Appeals. In our experience, the circuit precedent that flows from this appellate litigation has not made subsequent guideline determinations easier or more straightforward – quite the contrary. The total financial cost, much less the diversion of personnel, to the judicial system is mind boggling. It is clearly a frustrating situation to everyone and especially to you.

We went back and looked at the history of 2L1.2. It is somewhat shocking to realize that in the 1987 Guidelines, 2L1.2 started out as a Base Offense Level 6, with a single Specific Offense Characteristic calling for an increase of 2 levels if the defendant was a repeat offender. Ironically, just a few months later, the guideline was “simplified” even further to a Base Offense Level of 8 with no SOC's. In the next 20 years, the Commission has struggled with this guideline,

often attempting to respond to Congressional revisions of the statute. In total it was amended 8 more times including several major restructurings.<sup>1</sup>

In 1989, “aggravated felonies” were mentioned for the first time reflecting their addition by Congress to 8 U.S.C. § 1326 just a few months before. Even though the amended statute increased the maximum punishment from 2 to 15 years (5 if it was for a non-aggravated felony), the commission simply added an SOC of 4 for a felony conviction and invited a departure if it was an aggravated felony. Two years later, a second SOC was added calling for an increase of 16 levels if the defendant had previously been convicted of an “aggravated felony.” In 1996 Congress expanded the definition of “aggravated felony” found in 8 U.S.C. § 1101 and in 1997 the Commission again amended this guideline to include the expanded definitions while at the same time expressly authorizing downward departures for aggravated felonies that were not violent, nor weapons related, and for which the previous sentence had been 1 year or less.

In 2001, the Commission responded “to concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the

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<sup>1</sup> November 1, 1989 (amendment 193); November 1, 1991 (amendment 375); November 1, 1995 (amendment 523); November 1, 1997 (amendment 562); November 1, 2001 (amendment 632); November 1, 2002 (amendment 637); November 1, 2003 (amendment 658); November 1, 2007 (amendment 709)..

southwest border between the United States and Mexico, that §2L1.2 (Unlawfully Entering or Remaining in the United States) sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties result because the breadth of the definition of “aggravated felony” . . .”<sup>2</sup>

It once again dramatically rewrote 2L1.2 so that there were more graduated SOC's. The SOC for aggravated felonies was reduced 8 levels, however crimes of violence, certain drug trafficking offenses, child pornography and a few other specific crimes still received an SOC of 16.

The final substantial amendment occurred in 2003 and was in response “to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors”<sup>3</sup> concerning the changes made in 2001. You added definitions for “alien smuggling”, “child pornography”, and “human trafficking”, further explained what was covered by “crimes of violence”, and clarified a number of other issues.

I apologize for this somewhat detailed recitation of where we have been, but we think it is important to remember how long everyone has been struggling with

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<sup>2</sup> See Reason for Amendment 632, effective date November 1, 2001.

<sup>3</sup> Amendment 658, Reason for Amendment, Effective November 1, 2008.



this issue and I hope it gives some context to the options available now and why we believe that another attempt at defining terms will not alleviate the problems.

There is no question that the Commission has had a difficult if not impossible task. Periodically, Congress has changed the statute, increasing the penalties or expanding the offenses included as an "aggravated felony." The Courts have rendered often conflicting opinions on what offenses qualify under various categories while also placing restrictions on the manner of proof, thus limiting the ability to use prior convictions anticipated by the statutes and guidelines as the basis for increased sentences. I would like to provide a few examples from my district. In one case, the Ninth Circuit ruled this past year that a North Carolina conviction for indecent liberties with a child was not categorically sexual abuse of a minor and therefore not a crime of violence, even though the Fifth and Eleventh Circuits had ruled that the very same North Carolina statute was a crime of violence. Thus, if this same individual illegally entered in Texas, he would face a different guideline range under 2L1.2 than he faces in my district. These kinds of decisions cause more work because more underlying conviction documents must be obtained to try to demonstrate that the prior conviction qualifies. In the case I just mentioned, we needed to go back and obtain transcripts from a courthouse in North Carolina to try to prove that the

conviction qualified under the modified Taylor approach. The court conducted another sentencing on remand, and the matter is now pending on appeal again. In another case, the Ninth Circuit ruled that the Arizona state crime of unlawful discharge of a firearm into a residential structure did not categorically constitute a crime of violence. The panel ruled for the first time that we needed to show that the residence was "presently occupied," which then required us to go back and try to unearth more conviction documents before re-sentencing to prove this fact. I would also note that, because of all the varying crimes and wording in statutes among the 50 states, one circuit decision on a particular issue does not end the litigation on that issue. For example, if a circuit rules that a California prior conviction qualifies for enhancement under section 2L1.2, for example, this may not definitively resolve whether an Arizona or other state conviction for a similar crime will qualify, even in the same circuit. As these examples show, circuit precedent can make sentencing determinations more unpredictable and laborious. As a result, we believe that 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. With the kinds of immigration caseloads like we have in my district, the burdens

become even more immense for all concerned. We believe that the current immigration guidelines provide a significant barrier to doing more with increasingly limited resources.

We believe the Commission has two choices - it can once again try to adjust the existing guideline, or it can select a new tactic which will clearly save resources for everyone, the courts, probation offices, defenders and prosecutors while, we believe, still obtaining equally fair and just sentences. Given nearly unanimous agreement that there are serious problems with the current guideline, we do not believe that leaving things the same is an option.

As it has for the past two years, the Department favors a variation of Option 3 of the proposed amendments. We want to emphasize that this is not an attempt to increase the overall sentences for illegal re-entry cases and in fact the Commission's data indicates that under Option 3 overall sentences would remain about the same.

Under Option 3, 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. At the same time, for very serious offenses, namely a prior felony conviction for murder, rape, kidnapping, a human trafficking offense, a child pornography offense, or an offense of child sexual abuse it would keep the present categorical approach. We would note, that for most of these specific offenses there hasn't been the litigation that has proven so problematic as with other offenses current listed in 2L1.2(b). Although there continues to be litigation in the circuits about what constitutes sexual abuse of a minor (as the North Carolina example I gave illustrates), the proposed amendment should decrease the Taylor litigation when the length of sentence for those and other offenses can be considered under the guideline.

We believe length of sentence has been proven to be an appropriate indicator of the seriousness of an offender's prior record. 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. While some have expressed concern with the disparate way sentences are imposed from one jurisdiction to another, we would note that current 2L1.2(b)(1)(A)(i) and (B) both

determine the application of certain offenses based upon the length of sentence imposed.

We would however, offer a couple of changes to proposed Option 3 by including certain parts of the other Options. Option 2 includes at Application Note 4 departure considerations<sup>4</sup> in those cases where there have been multiple prior removals or where the Court feels that the resulting offense level “substantially overstates or understates” the seriousness of the prior conviction. This is language that is present in Guideline 4A1.3, (Criminal History) and it would provide judges with the flexibility to address one of the concerns that has been raised that sentences for illegal aliens sometimes understate the seriousness of the underlying offense because the local court takes into account the fact that the illegal alien will be deported upon completion of the sentence.

We would also suggest including the definition of “forcible sex offense” that is proposed as sub-option A of Option 1 for the definition of “Crime of Violence”. This could be added to Application Note 1(B)(vi) of Option 3 which

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<sup>4</sup> 4. Departure Considerations.

- (A) In a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction, a departure may be warranted.
- (B) In a case in which the defendant has been removed multiple times prior to committing the instant offense, an upward departure may be warranted.

uses the term "forcible sex offense and would address the definitional problem that would remain under either option.

Let me address a couple of the issues that have been raised with regard to this proposal. First, while overall average length of sentences would not change under Option 3, for some groups of offenders there would be those whose sentences would generally be shorter and for others their sentences would be longer. Presently many defendants who have a simple assault conviction qualify for a 16 level SOC under § 2B1.2(b)(a)(ii) because the maximum potential sentence is more than a year. Thus under the current guideline and under Option 1, they are treated equivalently to murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling. Under Option 3 they would generally receive a lower sentence. On the other hand, under the present guideline, a defendant who had been convicted of a major fraud disrupting the lives of hundreds of people and was sentenced to 4 years or more imprisonment, and then was deported, now only gets a 4 level increase if he illegally reenters. Under Option 3, if the original trial court felt it was a serious enough offense to merit substantial incarceration, then the illegal alien would get a 16 level increase. We believe these changes are appropriate.



The other concern has been whether using the length of sentence for a prior conviction is an adequate substitute for determining the increase in offense level when compared to the “nature” of the prior offense. Perhaps, if we had a unitary judicial system where all defendants were charged under a single statutory scheme, the current guideline would work; but we don’t. Instead, we must try to interpret and equate hundreds of often unfamiliar federal, state, local, and foreign statutes, attempting to identify what was in effect on a particular date and how that might fall within one of the categories within 2L1.2(b). Variances in the sentencing policies of the myriad of jurisdictions are no different than the charging decisions and at least much more transparent. Further, as we have mentioned, we at least have the assurance from empirical studies, that the prior length of sentence can be linked to a clear current sentencing objective. On the other hand, we have no such support for individual offenses.

This approach is not merely valuable for the sake of easing the burden on the criminal justice system; it is equally valuable to the people most affected—the defendants facing charges under Section 1326. Just as attorneys, probation officers and judges struggle with application of the categorical analysis, criminal defendants with no legal training have significantly more difficulty. Two defendants who are housed together and face the same charges and have the same

type of convictions often face dramatically different enhancements under 2L1.2 because, as I mentioned earlier, the statutes under which they were convicted have minor variations in wording, or the records of one defendant's conviction are more specific than the records for the other. This confusion creates difficulties between defendants and their counsel, often leading to delays in the resolution of re-entry cases. Enhancements based on length of sentence will be far more consistent in application and easier to explain, in turn giving the system greater transparency to the criminal defendant.

Let me now address Option 1. As we have previously mentioned, we are concerned that Option 1 will only perpetuate all of the problems that presently exist. Everyone will still be required to obtain and litigate the details of the previous convictions and in fact, at least for the short term, the new "definitions" will probably generate an increase in contested sentencings until the courts sort through the new criteria. Of the options available in Option 1, we prefer sub-option A. This option, both in expanding the offenses included in SOC (b)(1)(A) and (b)(1)(B), and clarifying the definitions for "crime of violence" and "drug trafficking," will address some of the issues that have led to many conflicting decisions within and between the circuit courts and in district courts as well. Failure to include all of these in an amendment, especially that pertaining to the

expanded SOCs (b)(1)(A) and (b)(1)(B) would leave us in practically the same place that we have been in for the past several years. Unfortunately, even if all of Option A were implemented, we would still face continued extended litigation in many of these sentencings, forcing us to expend substantial resources and delaying the movement of re-entry cases through the system.

Option 2 is similar to Option 3 in that it is based in large part on the length of sentence of the underlying conviction. Option 2, however, does not include the list of serious offenses that participants in the Commission's round table sessions felt should be retained from the current guideline. We would note that Option 2 would drastically change the penalties for re-entry offenses. For example, under Option 2's § 2L1.2(b)(3) a defendant with a prior felony conviction for which he did not receive a sentence of more than 2 years, nor was it an "aggravated felony", would receive, at the lowest alternative, a 4 level SOC increase to a base offense level of 12 resulting in a total offense level of 16. Under current guidelines, that same offense would have a total offense level of 12. On the other hand, a defendant previously convicted of most drug trafficking, firearms, child pornography, and alien smuggling offenses would receive substantially lower sentences. We cannot support such dramatic changes and the shift in priorities

that they represent without additional empirical evidence that they are merited.

To date we have not seen that evidence.

Regardless of how one balances the various factors regarding these options, we believe there is one additional factor that has already impacted the fairness, and will increasingly do so in the future, of current 2L1.2(b) or the application of Option One. That factor is the disappearance of the complete records necessary to make the factual and legal determinations required by the SOC's. More and more often when we request court records pertaining to a suspect's records, we are getting, at best, an abstract of the conviction record. Sometimes we get nothing. That piece of paper will usually include the defendant's name and enough other identifying information that will assure that it can be linked to our suspect. Also included will be the date of sentence and the actual sentence imposed. Finally, there will be some description of the offense and statute of conviction, but the information is often generic rather than specific, leading to an inability to identify the specific charge that would serve as the predicate for the SOC's. In many instances, the abstract will only give a statute number or maybe combine that with a generic name for the offense. Using the United States Code as an example, an abstract might state that the defendant had been convicted of "tampering with a witness, victim or an informant" in violation of 18 U.S.C. § 1512. A court,



looking at that statute, would find violent and non-violent offenses, felonies and misdemeanors. It would be necessary to find additional information before the court could determine whether one of the SOC's applied to that conviction.

Further complicating matters, as I mentioned earlier, is the disappearance of the underlying record that might help provide the necessary information. We have heard of jurisdictions that are destroying their paper files and relying exclusively on abstracts. For example, we understand that Houston no longer keeps files longer than five years. As a result, we will have disparate treatment under the enhancements under existing § 2L1.2 or under Option 1 depending upon how the local jurisdiction keeps and reports its records. This problem is going to get worse in the future. Option 3 helps avoid that disparate effect.

We favor Option 3 as a means to achieving fair sentences more efficiently, thereby allowing the Federal Judicial system to handle more cases with the same amount of resources, and reduce confusion and perception of unfair treatment among re-entry defendants. 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. As I have mentioned, 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. 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. Of all of the proposals, we believe Option 3 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases.

### 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.

**Maureen Franco**

*Deputy Federal Public Defender, Western District of Texas*

Maureen Scott Franco has been the Deputy Federal Public Defender for the Western District of Texas since September 2007, and has worked in the El Paso office since 1994. Prior to her graduation from Baylor Law School in 1989, Ms. Franco graduated with honors in 1986 from the University of Texas at Austin. Ms. Franco currently serves on the Federal Grievance Committee for the Western District of Texas, and is a former member of the State Bar of Texas Grievance Committee.



**Testimony of Maureen Franco**  
**Deputy Federal Public Defender**  
**Western District of Texas**  
**On Behalf of the Federal Public and Community Defenders**  
**Before the United States Sentencing Commission**  
**Public Hearing on Proposed Amendments for 2008**  
**March 13, 2008**

Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the Sentencing Guidelines pertaining to § 2L1.2 (Unlawfully Entering or Remaining in the United States).

**A. In General**

At the outset, we commend the Commission for its commitment to addressing the complex application problems that plague the current § 2L1.2. We appreciate the ongoing efforts in this area and are hopeful that the ultimate result will be a guideline that is both simpler to apply and a fairer reflection of the purposes of sentencing under 18 U.S.C. § 3553(a). However, given the ongoing national debate about federal immigration law and the inevitable changes to come with a new Administration, we believe that the Commission should not amend § 2L1.2 during this cycle. Instead, we urge the Commission to wait until stability has been established, after which we can begin work on a long term and comprehensive solution that is consistent with national policy.

Whether the Commission addresses § 2L1.2 this year or next, however, we wish to reiterate the Federal Defender community's longstanding view that the guideline, by including a broad 16-level enhancement for prior convictions, produces sentences that are simply too high.<sup>1</sup> In our view, the guideline, if followed, contravenes the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *See Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). While data provided by the Commission indicates that Options 2 and 3 would reduce some of the more severe sentences,<sup>2</sup> we are concerned that for every variation of every option, sentences would significantly increase for many defendants at the lowest offense levels. There is no policy reason why sentences should be increased for those who are the least culpable.

As the Commission has recognized, the original guideline for illegal reentry was largely based on past practice, but subsequent revisions to the guideline, beginning in 1988 and including the 16-level enhancement in 1991, caused penalties to soar, with the

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<sup>1</sup> See, e.g., Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration at 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn before the U.S. Sentencing Commission Re: Proposed Immigration Amendments, San Diego, California (Mar. 6, 2006).

<sup>2</sup> See Memorandum from Kevin Blackwell to USSC Immigration Team, *Impact of Proposed Amendments to §2L1.2(Unlawfully Entering or Remaining in the United States)* (Feb. 29, 2008). The Commission was not able to perform an analysis of the impact of Option 1. *Id.* at 1.



average length of sentences nearly tripling between 1990 and 2001.<sup>3</sup> The Commission has never justified, either with empirical data or any policy analysis based on national experience, the 16-level enhancement in § 2L1.2, even though this enhancement is far more severe than other increases that depend on prior convictions. In the absence of empirical data or experience, § 2L1.2 does not “exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 567, 574-75 (discussing crack cocaine guideline). Accordingly, while we recognize that the driving force behind the current proposals is the Commission’s immediate interest in a certain degree of simplification, we believe that the Commission should not amend § 2L1.2 without also reviewing its fundamental premises and reducing the penalties themselves.

The actual sentences imposed, including the widespread use of government-sponsored downward departures, demonstrate that the current guideline is greater than necessary to achieve the goals of sentencing under § 3553(a)(2). For example, in 2006, based on motions by the government and determinations by the courts, 36.5% of sentences imposed for illegal reentry were lower than the advisory guideline range, not including sentences reduced for substantial assistance under § 5K1.1.<sup>4</sup> In contrast, only 15.6% of offenders sentenced for crack cocaine received sentences lower than the advisory guideline range (excluding reductions for substantial assistance),<sup>5</sup> despite the Commission’s own view that guideline sentences for crack cocaine are too harsh and result in unwarranted disparities.

In short, reducing the more severe sentences without raising the sentences for the least culpable should be a primary objective underlying any amendment to § 2L1.2. In aid of that goal – and the overarching goal of achieving the purposes of sentencing – we summarize what we believe should also be included as the Commission’s primary objectives when it amends § 2L1.2:

- If kept, the 16-level enhancement should be reserved for only the *most serious* of the offenses that fall into the category of “aggravated felonies” under 8 U.S.C. § 1101(a)(43).
- Prior convictions used to increase a defendant’s offense level should be subject to the same remoteness rules in Chapter 4 to reflect more accurately Congress’s intent to deter and increase punishment for those individuals who present the most serious risk of recidivism.

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<sup>3</sup> See United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 61-65 (Nov. 2004).

<sup>4</sup> United States Sentencing Comm’n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2006).

<sup>5</sup> *Id.* tbl. 45; see also United States Sentencing Comm’n, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2007) (showing similarly divergent rates of below-guidelines sentences for illegal reentry (40%) and offenses involving crack cocaine (15%) for fiscal year 2007). Preliminary statistics indicate that the rate of below-guideline sentences has increased to 38% since *Gall* and *Kimrough* were decided. See United States Sentencing Comm’n, *Preliminary Post-Kimbrough/Gall Data Report*, tbl 4 (Feb. 2008).

- The Commission should take into consideration, as a factor, the existence of “fast-track” dispositions in any amendment to the immigration guidelines. The “fast-track” dispositions clearly indicate the true seriousness of many offenses, which is markedly lower than current guidelines. Considering “fast-track” sentences also would address the problem of unwarranted disparity for those similarly situated defendants in nonfast-track districts.
- For every Chapter Two guideline that relies on prior convictions (and for calculation of criminal history), the Commission should use “sentence served” instead of “sentence imposed.” “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. It would also lessen the effect of triple counting prior offenses in § 2L1.2 cases, first for increasing the statutory maximum for “aggravated felony,” second for criminal history, and third for recency.
- The Commission should eliminate criminal history points for status and recency for defendants arrested for illegal reentry while they are serving a prison sentence. *See* USSG § 4A1.1(d), § 4A1.1(e). This would help avoid unfair double- and triple-counting of the same conduct.
- The Commission should add an application note suggesting bases for downward departure, such as overrepresentation of criminal history and a defendant’s benign motives for the reentry (*e.g.*, defendants who return for medical or humanitarian reasons, due to dangerous conditions in the defendant’s country of origin, or because of cultural assimilation into the United States).

## **B. Our Proposal**

We previously submitted a proposed guideline modeled on the guideline for prohibited persons in possession of firearms, USSG § 2K2.1.<sup>6</sup> Our proposal is premised on the fact that both offenses, illegal possession of a firearm and illegal reentry, are enhanced based on the nature of the defendant’s prior convictions, but that the potential harm to the community of a felon’s possession of a firearm is far greater than the potential harm resulting from illegally re-entering the United States. Our proposal retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, and notes that a downward departure may be warranted where the defendant has returned because of family medical needs or because the defendant was culturally assimilated into the United States.

Although our proposal was not included as one of the options published for

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<sup>6</sup> *See* Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 21-23 (July 9, 2007).

comment for this amendment cycle, we believe that it deserves consideration. First, our proposal both addresses application problems presented by the current proposals and reflects the sound policy that Chapter Two guidelines that set offense levels based on prior convictions should have a similar structure while appropriately calibrating punishment to the relative harms involved. Second, the Commission has provided data on its potential impact on sentences, which indicates that our proposal would reduce sentences overall. Like Options 2 and 3, however, it would raise some sentences for the least culpable defendants, though to a significantly lesser degree than Options 2 and 3. Because there is no reason to raise any sentences for illegal reentry, we hope to work with the Commission to discover the reason that our proposal would raise some sentences and then amend it accordingly.

Finally, we remain open to modifications to our proposal that address the goal of simplification (for example, our proposal does not define “crime of violence” in accordance with 8 U.S.C. § 1101(a)(43), as Option 1B of the proposed amendments would do).

### **C. The Proposed Amendments**

In light of our general position, we hesitate to comment at length on the Commission’s proposals because they leave unaddressed many of the most fundamental problems presented by § 2L1.2. However, we would like to point out several ambiguities and problems presented by the proposed amendments – areas that invite more questions than are answered and are of particular concern to the Defender community.

#### **Option 1**

The Commission was not able to conduct an impact analysis for Option 1 with the available data. Without knowing whether Option 1 would reduce the most severe sentences without raising the least, we nevertheless provide the following comments:

##### *Option 1A*

Option 1A not only fails to simplify, but increases complexity to § 2L1.2. By including new language and defining new terms, such as “forcible sex offenses,” Option 1A adds to the many statutory and guideline definitions that the court must consider in each case, exacerbating the confusion and creating yet more areas for litigation. *See, e.g., United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007), *reh’g en banc granted*, 2008 WL 373182 (5th Cir. Feb. 22, 2008) (considering the meaning of “forcible sex offense”). In addition, by retaining guideline-level enumerated categories of offenses that may constitute “crimes of violence,” Option 1A does little to address the application problems identified by many commentators, judges, and practitioners, who have noted with frustration the complex litigation even in the mine run of cases.

Further, by amending the definition of “drug trafficking offense” to include transportation and offers to sell, Option 1A will increase sentences for a large number of



defendants without any reasoned basis for doing so. There has been no empirical evidence, data, or policy reason offered to explain why sentences should now be increased across the board for every defendant convicted of these minor offenses. It is not enough to say that on occasion, defendants sentenced under the current guideline do not receive a 16- or 12-level enhancement for a prior offense that might have been a drug trafficking offense.<sup>7</sup> We cannot support an amendment that addresses unsupported speculation about “problems” created by the categorical approach in some cases by enhancing punishment for defendants not previously subject to an enhancement because the Commission did not view the prior conviction as a drug trafficking offense.

### *Option 1B*

Option 1B appears to be a step in the right direction – at least as far as simplicity is concerned – in that it tends to eliminate some of the application problems, streamlining the definition of “crime of violence” by referring to the controlling statute, 8 U.S.C. § 1101(a)(43), and defining “drug trafficking offense” as it is defined by 18 U.S.C. § 924(c)(2) and recently interpreted by the Supreme Court in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). These changes respond to comments from judges and practitioners alike who urged the Commission to eliminate the often incoherent results of the second-level guideline definitions for “crime of violence.” In addition, the use of § 924(c) as the source of the definition of “drug trafficking offense” enjoys a level of certainty and some needed narrowing of covered offenses. However, we have several concerns.

Option 1B does not address the disproportionate severity of the guideline as a whole. Nor does it address stale convictions or the 16-level enhancement for alien smuggling, which many commentators view as particularly inappropriate in the mine run of cases. In those isolated cases in which aggravating circumstances occur, sufficient mechanisms for increased punishment are already in place. And we are wary of the wholesale incorporation of the definition of “drug trafficking offense” from § 924(c)(2) into the provision advising a 16-level enhancement, as that definition can reach simple possession of more than 5 grams of crack and cases with two prior convictions, including misdemeanors. See 21 U.S.C. § 844. Given the varying degrees of seriousness for these offenses, the Commission should exempt the least serious offenses covered by § 924(c)(2) from the 16-level enhancement.

### *Option 1 – Departure Considerations*

Option 1 also proposes two departure considerations in Application Note 7. The first suggests an upward departure where a prior conviction for possession or transportation or offer to sell does not qualify for the 16-level enhancement because it is

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<sup>7</sup> See, e.g., *United States v. Gonzales*, 484 F.3d at 412, 714-15 (5th Cir. 2007) (applying the categorical approach to Tex. Health & Safety Code § 481.112, the offense of “delivery of a controlled substance” includes the offense of “offering to sell a controlled substance,” and thus “lies outside section 2L1.2’s definition of ‘drug trafficking offense’”); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 354 (5th Cir. 2005) (under the categorical approach, an unspecified conviction under Cal. Health & Safety Code § 11352(a), which includes transportation, does not constitute a “drug trafficking offense” under § 2L1.2).

not a “drug trafficking offense” as defined by § 2L1.2, but the offense involved “a quantity of a controlled substance that exceeds a quantity consistent with personal use.” In essence, this proposal invites judges to make factual determinations that second-guess the nature of a prior conviction as determined by the relevant jurisdiction, with the apparent purpose of “making up for” – through increased punishment for the illegal reentry – what a federal judge views as a “too-lenient” state sentence. Although we generally oppose incorporating these types of factual determinations into the advisory guidelines, we believe that should the Commission adopt such a departure provision in § 2L1.2, it must be mitigated by an Application Note that emphasizes the purpose of the system of graduated punishment for illegal reentry:

*The purpose of the specific offense characteristics is to reflect the seriousness of the current offense. It is not to punish the defendant for a prior offense for which he or she has already been convicted and punished.*

The second departure consideration in Option 1B suggests a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43). We believe that any version of § 2L1.2, including the current guideline as written, should limit the 16-level enhancement under § 2L1.2(b)(1)(A) to convictions that meet the definition of “aggravated felony” under § 1101(a)(43). Otherwise, it should include a note such as the one in Option 1B suggesting a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43).

## **Option 2**

Option 2 avoids many of the application problems that currently complicate §2L1.2 by reducing the emphasis on the categorical approach and by linking the greatest single enhancement to national security or terrorism offenses or those “aggravated felonies” described in 8 U.S.C. § 1101(a)(43)(A). However, the data confirms that Option 2 would raise sentences for many of the least culpable defendants without any reason. Although we hesitate to comment at length given this fundamental problem, we point out several features that, in our view, raise serious concerns.

First, in subsection (b)(1), we believe it would be more appropriate to increase punishment if the defendant was convicted of a felony for which a sentence *of imprisonment* that exceeded 24 months was imposed. This is especially true if the ambiguous language of subsection (b)(3) means that other felony offenses could result in additional (and apparently limitless) increases, as appears to be the case under either option in proposed Application Note 3 .

Second, subsection (b)(4) appears to shift the burden to the defendant to show that he or she has no prior felony convictions in order to receive a decrease in the offense level, a shift that violates principles of basic fairness and implicates constitutional questions of due process. Even worse, it places the burden on the party who is least able to obtain the information. Far from simplifying the process, subsection (b)(4) invites



unnecessary litigation of constitutional proportion and should not be considered.

Third, we oppose the use of any conviction to enhance a sentence for illegal reentry that did not receive any criminal history points under the rules for computing criminal history points in Chapter Four, as directed by Application Note 2 of Option 2. The proposed structure of Option 2 is ambiguous as best, potentially allowing for stacked enhancements through the repeated application of subsection (b)(3) for old convictions or multiple convictions that were disposed of in single proceedings. Application Note 2 thus could operate to result in significantly higher sentences for illegal reentry based on a system that is not only out of sync with the Commission's view of the predictive value of criminal history under Chapter Four (or its relationship to culpability for the instant offense), but is not, as far as we know, based on any reasoned principles or empirical evidence related to the overarching purposes of sentencing for illegal reentry.

A similar criticism must be leveled against Application Note 3, Option B. That provision would greatly increase sentences that, in our view, are already too high. (It would, for example, set the offense level as high as 30 for a defendant convicted twice of minor drug offenses, even if one of them occurred decades earlier.)

Finally, we question the purpose of the upward departure consideration in Application Note 4. The note would invite an upward departure in cases in which the defendant has been removed multiple times before committing the offense of illegal reentry. In addition to raising serious due process concerns (along with the specter of unwarranted disparity between defendants from contiguous and noncontiguous nations), such a departure provision is unnecessary. The Commission removed a similar provision from § 2L1.2 in 2001 when it restructured the guideline to provide for graduated punishment based on the seriousness of the prior offense.<sup>8</sup> Although the Commission provided no specific reason for removing the provision, we note that in fiscal year 2001, it was applied in only two out of 6,121 cases (.03%) for which §2L1.2 was the primary guideline, an application rate that approached zero.<sup>9</sup> We presume that the Commission removed the provision after analyzing it in light of empirical data and the purposes of sentencing in 18 U.S.C. § 3553(a). That judges did not apply it further supports the conclusion that it was not necessary to achieve the purposes of sentencing. Reintroducing a similar provision at this time – in the absence of any new evidence or articulated policy reasons and when sentences are already too high – strikes us as particularly unsound.

### Option 3

Option 3 is conceptually interesting, but should not be adopted at this time. It relies on a sentence-length approach, which is designed to eliminate many of application

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<sup>8</sup> See USSG App. C, Amend. 632 (Nov. 1, 2001) (deleting provision allowing for an upward departure in the case of "repeated prior instances of deportation").

<sup>9</sup> See United States Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*, tbls. 17 & 24 (2001).



problems. However, like Option 2, Option 3 would raise sentences for the least culpable. Moreover, Option 3 retains several enumerated offenses that would require a guideline-level categorical approach, leading to complexity and litigation.

Although we have expressed interest in a sentence-length approach in the past, we recognize that it would represent a fundamental change in the structure of § 2L1.2, one that, if adopted here, might also reasonably be applied to firearms and other Chapter Two guidelines relying on prior convictions. In addition, we believe that before the Commission considers a sentence-length approach for § 2L1.2, it should both revisit criminal history in general, as we expect it will, and revisit the underlying premise of the 16-level enhancement. No matter what, we believe that Option 3B's requirement of a prior sentence of imprisonment exceeding 13 months in order to apply the enhancements under subsection (b)(1)(B)(iii) and (b)(1)(D) is the more appropriate approach, as it is consistent with Chapter 4.

#### **D. Issue for Comment**

The Commission has asked for comment on whether any specific offense characteristics and departure provisions in one option should be adopted by the Commission as part of another option. As we have indicated, we believe that any tinkering with § 2L1.2 should be delayed at least until the next amendment cycle, unless the Commission proposes revising the guideline to address all of its fundamental problems, not just a few application problems, while refraining from raising any sentences without sound policy reasons. For all of the reasons set forth above, we do not believe that any combination of the specific offense characteristics or departure considerations contained in the proposed amendments would achieve the needed reform of § 2L1.2.

Instead, we urge the Commission to take this time to consider our proposal, modeled on the guideline for § 2K2.1. Of course, we would be happy to discuss modifications to it that would advance the goal of simplicity and the overarching purposes of sentencing, but we believe it represents the best starting place.

Thank you for considering our comments, and please let us know if we can be of any further assistance. We look forward to working with the Commission on this very important issue.

**Marianne Mariano**

*Acting Federal Public Defender, Federal Public Defender's Office  
Western District of New York*

Marianne Mariano is the acting Federal Public Defender in the Western District of New York. She has been employed with the Federal Public Defender's Office for the Western District of New York in Buffalo, New York, since June 1995. Previously, she was a law clerk for the Honorable Carol E. Heckman, United States Magistrate Judge. Ms. Mariano is an honors graduate of State University of New York at Binghamton, where she received her Bachelor of Arts degree in 1991. She graduated *cum laude* from the State University of New York at Buffalo, School of Law in 1994. Ms. Mariano is a member of the National Association of Criminal Defense Lawyers, NYS Association of Criminal Defense Lawyers, and the Federal Defenders Sentencing Guideline Committee.



**Testimony of Marianne Mariano**  
**Acting Federal Public Defender**  
**Western District of New York**  
**On Behalf of the Federal Public and Community Defenders**  
**Before the United States Sentencing Commission**  
**Public Hearing on Proposed Amendments for 2008**  
**March 13, 2008**

Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments related to criminal history, the Commission's Rules of Practice and Procedure regarding retroactivity, disaster fraud, court security, and animal fighting.

**I. CRIMINAL HISTORY**

The Commission has proposed adding language to USSG § 4A1.2(a)(2) to modify the provision that exempts sentences that are separated by an intervening arrest from being counted as a single sentence. The proposed amendment states:

An "arrest" includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an "arrest".

We see no need for this change. If any change is made, however, only the second sentence should be included.

The first sentence injects unnecessary complications into the guideline. We have been unable to find any reported case in which this issue has been presented. In the absence of any empirical evidence that this issue arises with any frequency, or that it presents an indication of an increased likelihood of recidivism, the Commission should omit this sentence.

Further, the language is so ambiguous that it is likely to lead to extensive litigation and evidentiary hearings. For example, could the government argue that a defendant "escapes" arrest or service of an arrest warrant if he is in fact not at home when the police arrive? If the police go to a home and are falsely told that the defendant is not there? What if police records reflect an inaccurate address, and the government argues that the defendant had previously given a false address? Would a defendant be subject to this provision if he or she moves without leaving a forwarding address? To what extent would the government have to prove that the defendant's actions were motivated by a desire to escape arrest, or that the defendant even knew that police were looking for him?

Although the second sentence does not create the same complications as the first, we likewise see no need for it. This point is clear in existing law. In *United States v. Joseph*, 50 F.3d 401, 402 (1st Cir. 1995), the Seventh Circuit held that issuance of an arrest warrant could not be an "intervening arrest." See also *United States v. Correa*,



114 F.3d 314, 316 n.3 (1st Cir. 1997) (not deciding whether the district court erred in treating issuance of a complaint as an intervening arrest, but describing that ruling as “problematic”).

The intervening arrest rule, which derives from the Parole Commission’s Salient Factor Score, presumably is “consistent with the Parole Commission’s recidivism research, as well as with the common sense notion that an offender who continues to commit offenses after criminal justice system intervention is more likely to recidivate.” Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192 (1997). This rationale does not apply when a defendant escapes arrest, or when a complaint or summons is issued.

This minor issue aside, we remain hopeful that the Commission will soon turn its attention to the career offender guideline. In *Rita*, the Supreme Court emphasized that the guideline system is meant to be “evolutionary,” improved over time as a result of a reasoned dialogue among the district courts, the appellate courts, and the Commission. See *Rita v. United States*, 127 S. Ct. 2456, 2464-65, 2469 (2007) (“The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”).<sup>1</sup> After *Booker*, the rate of below-guidelines sentences for those who otherwise qualified for career offender status markedly increased,<sup>2</sup> and after *Gall* and *Kimbrough*, we can expect that courts will continue to exercise their wide discretion to sentence defendants below the advisory guideline range for career offenders until it more accurately advances the goals of sentencing under 18 U.S.C. § 3553(a).<sup>3</sup> We urge the Commission to seize the opportunity to improve the career offender guideline – not only to reflect more precisely Congress’s directive to the Commission in 28 U.S.C. § 994(h), but also to reflect the empirical data it has collected demonstrating that the career offender guideline too often results in sentences that fail to advance the purposes of sentencing. See *Kimbrough*, 128 S. Ct. at 574-75.<sup>4</sup>

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<sup>1</sup> See also Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

<sup>2</sup> United States Sentencing Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at 137-140 (March 2006).

<sup>3</sup> *United States v. Parker*, 512 F.3d 1037 (8th Cir. 2008) (recognizing that the district court has the discretion after *Gall* to sentence the defendant to 60 months, well below the advisory guideline range of 151-188 months under the career offender guideline under § 3553(a), and noting that the government withdrew its appeal in light of *Gall*); see *United States v. Marshall*, 2008 U.S. App. LEXIS 153, 22-23 (7th Cir. Jan. 4, 2008) (unpublished) (in a case involving a challenge to the career offender guideline, stating that it must “reexamine” its caselaw, in light of *Kimbrough*, in which it had previously held that courts are not authorized “to find that the guidelines themselves, or the statutes on which they are based, are unreasonable”).

<sup>4</sup> United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (career offender guideline “makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses,” does not serve a deterrent purpose, and has a disproportionate impact on African-Americans); see *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring) (cited in *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007)) (“This might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a)

## II. RULES OF PRACTICE AND PROCEDURE

The Commission also proposes changes to Rules 2.2 and 4.1 of its Rules of Practice and Procedure. Although these rules generally involve Voting Rules for Action by Commission and Promulgation of Amendments, respectively, the proposed changes address only those procedures which govern determinations about whether to give amendments to the guidelines retroactive effect.

We agree with the proposed change to Rule 2.2, which would eliminate the requirement of the affirmative vote of at least three members at a public hearing before staff can be instructed to prepare a retroactivity impact analysis for a proposed amendment. Rule 2.2 should promote, rather than hinder, the initiation of this critical and often time-consuming endeavor and believe the proposed change does just that.

We also agree that Rule 4.1 should be amended to eliminate the requirement that the Commission decide whether to make a proposed amendment retroactive at the same meeting at which it decides to promulgate the amendment, as such an approach is neither practical nor efficient. For example, it would unnecessarily require the preparation of retroactivity impact analyses prior to decisions about whether to promulgate, as such analyses would be needed to inform decision-making and permit meaningful public comment.

We agree with the spirit of the proposed change to Rule 4.1, though the first sentence of the proposed language does not, in our opinion, make sense outside the context of a particular case. We suggest replacing it with the following sentence, which we believe better describes, in the abstract, the import of the proposed amendment:

The Commission, however, shall consider whether to give retroactive application to an amendment that reduces sentencing ranges for a particular offense or category of offenses. See 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2).

This language tracks the statutory language of title 18, section 3582(c) more closely than that of title 28, section 994(u). We believe it conveys a more accurate description of what the Commission does and that citation to both 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2) is appropriate.

With respect to the Commission's request for comment on whether the Rules of Practice and Procedure should provide a time frame governing final action with respect to retroactive application of an amendment and, if so, what time frame, we do not believe the rules should provide a time frame for final action. We fear that a deadline for final action could impact negatively the ability of the Commission to fully and fairly consider

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that '[t]he court . . . impose a sentence sufficient but not greater than necessary, to comply with the purposes of sentencing set forth in' § 3553(a)(2).").



the views of all interested parties, build consensus, and reach a well-considered decision on retroactivity.

In the event the Commission decides a time frame for final action is needed, we suggest a time frame that is more general in nature and that, in any event, does not require final action prior to November 1.

Finally, although the Commission has neither proposed an amendment nor requested comment with respect to Rule 4.3, which governs Notice and Comment on Proposed Amendments, we do believe a change to that rule is needed at this time. Rule 4.3 currently permits the Commission “to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x).” Section 994(x) makes the requirements of title 5, section 553 – publication in the Federal Register and public hearing procedure – applicable to the promulgation of guidelines.

We strongly believe the Commission should amend Rule 4.3 to require notice and comment with respect to commentary, policy statements and amendments thereto. Issues of great importance which directly impact sentence length in a large number of cases are set forth in policy statements and commentary. Section 1B1.10 is one example, and there are many others, including but not limited to all of Parts H and K of Chapter 5, all of Chapter 6, and the treatment of acquitted and uncharged conduct in § 1B1.3. Moreover, post-*Booker*, the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission. There is no current rationale to allow a change as significant as the one recently made to § 1B1.10 to occur absent notice and comment.

Alternatively, we suggest the Commission amend Rule 4.3 to require publication and public hearing procedure where the commentary, policy statements, and amendments thereto will potentially affect a large number of cases or significantly alter the way a particular guideline will be applied.

### **III. DISASTER FRAUD**

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of “reasonably foreseeable pecuniary harm” to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should include an offense level floor, whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to Kathleen Grilli, as well as the written and oral testimony of Marjorie Meyers, which was submitted to the Commission at the public briefing on February 13,



2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud offenses necessarily encompass a wide range of activity, from first-time offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

#### **A. Disaster Fraud Enhancements**

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create “unwarranted *similarities*” among dissimilarly situated individuals. *See Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, individuals convicted of disaster-related fraud range from the poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.<sup>5</sup> A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

In addition, we urge the Commission to reconsider its decision to include as “reasonably foreseeable pecuniary harm” the administrative costs of recovering fraudulently obtained funds that are borne by any government or “or any commercial or

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<sup>5</sup> 42 U.S.C. § 5122(2).

not-for-profit entity.” Congress did not direct the Commission to expand the concept of “pecuniary harm” in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

#### **B. Contractor, Sub-Contractor or Supplier Expansion**

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

#### **C. Mitigating Circumstances**

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant’s experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender’s status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

#### **D. Conclusion**

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

### **IV. COURT SECURITY**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

## **V. ANIMAL FIGHTING**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

We hope that our comments on these proposed amendments will be useful, and we thank you for considering them. As always, we look forward to working with the Commission on these very important issues.



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March 6, 2008

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

Re: Comments on Proposed Amendments

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the United States Sentencing Guidelines, published on January 28, 2008.<sup>1</sup> We also provide our comments on the proposed amendments to the Commission's Rules of Practice and Procedure as they pertain to the Commission's consideration of retroactivity.<sup>2</sup>

**I. IMMIGRATION**

**A. In general**

At the outset, we commend the Commission for its commitment to addressing the complex application problems that plague the current § 2L1.2. We appreciate the ongoing efforts in this area and are hopeful that the ultimate result will be a guideline that is both simpler to apply and a fairer reflection of the purposes of sentencing under 18 U.S.C. § 3553(a). However, given the ongoing national debate about federal immigration law and the inevitable changes to come with a new Administration, we believe that the Commission should not amend § 2L1.2 during this cycle. Instead, we urge the Commission to wait until stability has been established, after which we can begin work on a long term and comprehensive solution that is consistent with national policy.

Whether the Commission addresses § 2L1.2 this year or next, however, we wish to reiterate the Federal Defender community's longstanding view that the guideline, by including a broad 16-level enhancement for prior convictions, produces sentences that are

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<sup>1</sup> 73 Fed. Reg. 4,931 (2008).

<sup>2</sup> 73 Fed. Reg. 4,939 (2008).

simply too high.<sup>3</sup> In our view, the guideline, if followed, contravenes the “overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary,’ to achieve the goals of sentencing.” See *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). While data provided by the Commission indicates that Options 2 and 3 would reduce some of the more severe sentences,<sup>4</sup> we are concerned that for every variation of every option, sentences would significantly increase for many defendants at the lowest offense levels. There is no policy reason why sentences should be increased for those who are the least culpable.

As the Commission has recognized, the original guideline for illegal reentry was largely based on past practice, but subsequent revisions to the guideline, beginning in 1988 and including the 16-level enhancement in 1991, caused penalties to soar, with the average length of sentences nearly tripling between 1990 and 2001.<sup>5</sup> The Commission has never justified, either with empirical data or any policy analysis based on national experience, the 16-level enhancement in § 2L1.2, even though this enhancement is far more severe than other increases that depend on prior convictions. In the absence of empirical data or experience, § 2L1.2 does not “exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 567, 574-75 (discussing crack cocaine guideline). Accordingly, while we recognize that the driving force behind the current proposals is the Commission’s immediate interest in a certain degree of simplification, we believe that the Commission should not amend § 2L1.2 without also reviewing its fundamental premises and reducing the penalties themselves.

The actual sentences imposed, including the widespread use of government-sponsored downward departures, demonstrate that the current guideline is greater than necessary to achieve the goals of sentencing under § 3553(a)(2). For example, in 2006, based on motions by the government and determinations by the courts, 36.5% of sentences imposed for illegal reentry were lower than the advisory guideline range, not including sentences reduced for substantial assistance under § 5K1.1.<sup>6</sup> In contrast, only 15.6% of offenders sentenced for crack cocaine received sentences lower than the advisory guideline range (excluding reductions for substantial assistance),<sup>7</sup> despite the

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<sup>3</sup> See, e.g., Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration at 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn before the U.S. Sentencing Commission Re: Proposed Immigration Amendments, San Diego, California (Mar. 6, 2006).

<sup>4</sup> See Memorandum from Kevin Blackwell to USSC Immigration Team, *Impact of Proposed Amendments to §2L1.2(Unlawfully Entering or Remaining in the United States)* (Feb. 29, 2008). The Commission was not able to perform an analysis of the impact of Option 1. *Id.* at 1.

<sup>5</sup> See United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 61-65 (Nov. 2004) [“Fifteen Year Report”].

<sup>6</sup> United States Sentencing Comm’n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2006).

<sup>7</sup> *Id.* tbl. 45; see also United States Sentencing Comm’n, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2007) (showing similarly divergent rates of below-guidelines sentences for illegal reentry (31%) and offenses involving crack cocaine (15%) for fiscal year 2007). Preliminary statistics indicate that the rate of below-guideline sentences has increased to 38% since *Gall* and *Kimbrough* were decided. See United States Sentencing Comm’n, *Preliminary Post-Kimbrough/Gall Data Report*, tbl 4 (Feb. 2008).

Commission's own view that guideline sentences for crack cocaine are too harsh and result in unwarranted disparities.

In short, reducing the more severe sentences without raising the sentences for the least culpable should be a primary objective underlying any amendment to § 2L1.2. In aid of that goal – and the overarching goal of achieving the purposes of sentencing – we summarize what we believe should also be included as the Commission's primary objectives when it amends § 2L1.2:

- If kept, the 16-level enhancement should be reserved for only the *most serious* of the offenses that fall into the category of “aggravated felonies” under 8 U.S.C. § 1101(a)(43).
- Prior convictions used to increase a defendant's offense level should be subject to the same remoteness rules in Chapter 4 to reflect more accurately Congress's intent to deter and increase punishment for those individuals who present the most serious risk of recidivism.
- The Commission should take into consideration, as a factor, the existence of “fast-track” dispositions in any amendment to the immigration guidelines. The “fast-track” dispositions clearly indicate the true seriousness of many offenses, which is markedly lower than current guidelines. Considering “fast-track” sentences also would address the problem of unwarranted disparity for those similarly situated defendants in nonfast-track districts.
- For every Chapter Two guideline that relies on prior convictions (and for calculation of criminal history), the Commission should use “sentence served” instead of “sentence imposed.” “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. It would also lessen the effect of triple counting prior offenses in § 2L1.2 cases, first for increasing the statutory maximum for “aggravated felony,” second for criminal history, and third for recency.
- The Commission should eliminate criminal history points for status and recency for defendants arrested for illegal reentry while they are serving a prison sentence. *See* USSG § 4A1.1(d), § 4A1.1(e). This would help avoid unfair double- and triple-counting of the same conduct.
- The Commission should add an application note suggesting bases for downward departure, such as overrepresentation of criminal history and a defendant's benign motives for the reentry (*e.g.*, defendants who return for medical or humanitarian reasons, due to dangerous conditions in the



defendant's country of origin, or because of cultural assimilation into the United States).

## **B. Our Proposal**

We previously submitted a proposed guideline modeled on the guideline for prohibited persons in possession of firearms, USSG § 2K2.1.<sup>8</sup> Our proposal is premised on the fact that both offenses, illegal possession of a firearm and illegal reentry, are enhanced based on the nature of the defendant's prior convictions, but that the potential harm to the community of a felon's possession of a firearm is far greater than the potential harm resulting from illegally re-entering the United States. Our proposal retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, and notes that a downward departure may be warranted where the defendant has returned because of family medical needs or because the defendant was culturally assimilated into the United States.

Although our proposal was not included as one of the options published for comment for this amendment cycle, we believe that it deserves consideration. First, our proposal both addresses application problems presented by the current proposals and reflects the sound policy that Chapter Two guidelines that set offense levels based on prior convictions should have a similar structure while appropriately calibrating punishment to the relative harms involved. Second, the Commission has provided data on its potential impact on sentences, which indicates that our proposal would reduce sentences overall. Like Options 2 and 3, however, it would raise some sentences for the least culpable defendants, though to a significantly lesser degree than Options 2 and 3. Because there is no reason to raise any sentences for illegal reentry, we hope to work with the Commission to discover the reason that our proposal would raise some sentences and then amend it accordingly.

Finally, we remain open to modifications to our proposal that address the goal of simplification (for example, our proposal does not define "crime of violence" in accordance with 8 U.S.C. § 1101(a)(43), as Option 1B of the proposed amendments would do).

## **C. The Proposed Amendments**

In light of our general position, we hesitate to comment at length on the Commission's proposals because they leave unaddressed many of the most fundamental problems presented by § 2L1.2. However, we would like to point out several ambiguities and problems presented by the proposed amendments – areas that invite more questions than are answered and are of particular concern to the Defender community.

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<sup>8</sup> See Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 21-23 (July 9, 2007).

## Option 1

The Commission was not able to conduct an impact analysis for Option 1 with the available data. Without knowing whether Option 1 would reduce the most severe sentences without raising the least, we nevertheless provide the following comments:

### Option 1A

Option 1A not only fails to simplify, but increases complexity to § 2L1.2. By including new language and defining new terms, such as “forcible sex offenses,” Option 1A adds to the many statutory and guideline definitions that the court must consider in each case, exacerbating the confusion and creating yet more areas for litigation. *See, e.g., United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007), *reh’g en banc granted*, 2008 WL 373182 (5th Cir. Feb. 22, 2008) (considering the meaning of “forcible sex offense”). In addition, by retaining guideline-level enumerated categories of offenses that may constitute “crimes of violence,” Option 1A does little to address the application problems identified by many commentators, judges, and practitioners, the participants of the Immigration Roundtable in Houston last September, who noted with frustration the complex litigation even in the mine run of cases.

Further, by amending the definition of “drug trafficking offense” to include transportation and offers to sell, Option 1A will increase sentences for a large number of defendants without any reasoned basis for doing so. There has been no empirical evidence, data, or policy reason offered to explain why sentences should now be increased across the board for every defendant convicted of these minor offenses. It is not enough to say that that on occasion, defendants sentenced under the current guideline do not receive a 16- or 12-level enhancement for a prior offense that might have been a drug trafficking offense.<sup>9</sup> We cannot support an amendment that addresses unsupported speculation about “problems” created by the categorical approach in some cases by enhancing punishment for defendants not previously subject to an enhancement because the Commission did not view the prior conviction as a drug trafficking offense.

### Option 1B

Option 1B appears to be a step in the right direction – at least as far as simplicity is concerned – in that it tends to eliminate some of the application problems identified at the Immigration Roundtable, streamlining the definition of “crime of violence” by referring to the controlling statute, 8 U.S.C. § 1101(a)(43), and defining “drug trafficking offense” as it is defined by 18 U.S.C. § 924(c)(2) and recently interpreted by the Supreme Court in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). These changes respond to comments

<sup>9</sup> *See, e.g., United States v. Gonzales*, 484 F.3d at 412, 714-15 (5th Cir. 2007) (applying the categorical approach to Tex. Health & Safety Code § 481.112, the offense of “delivery of a controlled substance” includes the offense of “offering to sell a controlled substance,” and thus “lies outside section 2L1.2’s definition of ‘drug trafficking offense.’”); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 354 (5th Cir. 2005) (under the categorical approach, an unspecified conviction under Cal. Health & Safety Code § 11352(a), which includes transportation, does not constitute a “drug trafficking offense” under § 2L1.2).



from judges and practitioners alike who urged the Commission to eliminate the often incoherent results of the second-level guideline definitions for “crime of violence.” In addition, the use of § 924(c) as the source of the definition of “drug trafficking offense” enjoys a level of certainty and some needed narrowing of covered offenses. However, we have several concerns.

Option 1B does not address the disproportionate severity of the guideline as a whole. Nor does it address stale convictions or the 16-level enhancement for alien smuggling, which many commentators view as particularly inappropriate in the mine run of cases. In those isolated cases in which aggravating circumstances occur, sufficient mechanisms for increased punishment are already in place. And we are wary of the wholesale incorporation of the definition of “drug trafficking offense” from § 924(c)(2) into the provision advising a 16-level enhancement, as that definition can reach simple possession of more than 5 grams of crack and cases with two prior convictions, including misdemeanors. *See* 21 U.S.C. § 844. Given the varying degrees of seriousness for these offenses, the Commission should exempt the least serious offenses covered by § 924(c)(2) from the 16-level enhancement.

#### *Option 1 – Departure Considerations*

Option 1 also proposes two departure considerations in Application Note 7. The first suggests an upward departure where a prior conviction for possession or transportation or offer to sell does not qualify for the 16-level enhancement because it is not a “drug trafficking offense” as defined by § 2L1.2, but the offense involved “a quantity of a controlled substance that exceeds a quantity consistent with personal use.” In essence, this proposal invites judges to make factual determinations that second-guess the nature of a prior conviction as determined by the relevant jurisdiction, with the apparent purpose of “making up for” – through increased punishment for the illegal reentry – what a federal judge views as a “too-lenient” state sentence. Although we generally oppose incorporating these types of factual determinations into the advisory guidelines, we believe that should the Commission adopt such a departure provision in § 2L1.2, it must be mitigated by an Application Note that emphasizes the purpose of the system of graduated punishment for illegal reentry:

*The purpose of the specific offense characteristics is to reflect the seriousness of the current offense. It is not to punish the defendant for a prior offense for which he or she has already been convicted and punished.*

The second departure consideration in Option 1B suggests a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43). We believe that any version of § 2L1.2, including the current guideline as written, should limit the 16-level enhancement under § 2L1.2(b)(1)(A) to convictions that meet the definition of “aggravated felony” under § 1101(a)(43). Otherwise, it should include a note such as the one in Option 1B suggesting a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43).



## Option 2

Option 2 avoids many of the application problems that currently complicate §2L1.2 by reducing the emphasis on the categorical approach and by linking the greatest single enhancement to national security or terrorism offenses or those “aggravated felonies” described in 8 U.S.C. § 1101(a)(43)(A). However, the data confirms that Option 2 would raise sentences for many of the least culpable defendants without any reason. Although we hesitate to comment at length given this fundamental problem, we point out several features that, in our view, raise serious concerns.

First, in subsection (b)(1), we believe it would be more appropriate to increase punishment if the defendant was convicted of a felony for which a sentence of *imprisonment* that exceeded 24 months was imposed. This is especially true if the ambiguous language of subsection (b)(3) means that other felony offenses could result in additional (and apparently limitless) increases, as appears to be the case under either option in proposed Application Note 3.

Second, subsection (b)(4) appears to shift the burden to the defendant to show that he or she has no prior felony convictions in order to receive a decrease in the offense level, a shift that violates principles of basic fairness and implicates constitutional questions of due process. Even worse, it places the burden on the party who is least able to obtain the information. Far from simplifying the process, subsection (b)(4) invites unnecessary litigation of constitutional proportion and should not be considered.

Third, we oppose the use of any conviction to enhance a sentence for illegal reentry that did not receive any criminal history points under the rules for computing criminal history points in Chapter Four, as directed by Application Note 2 of Option 2. The proposed structure of Option 2 is ambiguous as best, potentially allowing for stacked enhancements through the repeated application of subsection (b)(3) for old convictions or multiple convictions that were disposed of in single proceedings. Application Note 2 thus could operate to result in significantly higher sentences for illegal reentry based on a system that is not only out of sync with the Commission’s view of the predictive value of criminal history under Chapter Four (or its relationship to culpability for the instant offense), but is not, as far as we know, based on any reasoned principles or empirical evidence related to the overarching purposes of sentencing for illegal reentry.

A similar criticism must be leveled against Application Note 3, Option B. That provision would greatly increase sentences that, in our view, are already too high. (It would, for example, set the offense level as high as 30 for a defendant convicted twice of minor drug offenses, even if one of them occurred decades earlier.)

Finally, we question the purpose of the upward departure consideration in Application Note 4. The note would invite an upward departure in cases in which the defendant has been removed multiple times before committing the offense of illegal reentry. In addition to raising serious due process concerns (along with the specter of

unwarranted disparity between defendants from contiguous and noncontiguous nations), such a departure provision is unnecessary. The Commission removed a similar provision from § 2L1.2 in 2001 when it restructured the guideline to provide for graduated punishment based on the seriousness of the prior offense.<sup>10</sup> Although the Commission provided no specific reason for removing the provision, we note that in fiscal year 2001, it was applied in only two out of 6,121 cases (.03%) for which §2L1.2 was the primary guideline, an application rate that approached zero.<sup>11</sup> We presume that the Commission removed the provision after analyzing it in light of empirical data and the purposes of sentencing in 18 U.S.C. § 3553(a). That judges did not apply it further supports the conclusion that it was not necessary to achieve the purposes of sentencing. Reintroducing a similar provision at this time – in the absence of any new evidence or articulated policy reasons and when sentences are already too high – strikes us as particularly unsound.

### Option 3

Option 3 is conceptually interesting, but should not be adopted at this time. It relies on a sentence-length approach, which is designed to eliminate many of application problems. However, like Option 2, Option 3 would raise sentences for the least culpable. Moreover, Option 3 retains several enumerated offenses that would require a guideline-level categorical approach, leading to complexity and litigation.

Although we have expressed interest in a sentence-length approach in the past, we recognize that it would represent a fundamental change in the structure of § 2L1.2, one that, if adopted here, might also reasonably be applied to firearms and other Chapter Two guidelines relying on prior convictions. In addition, we believe that before the Commission considers a sentence-length approach for § 2L1.2, it should both revisit criminal history in general, as we expect it will, and revisit the underlying premise of the 16-level enhancement. No matter what, we believe that Option 3B's requirement of a prior sentence of imprisonment exceeding 13 months in order to apply the enhancements under subsection (b)(1)(B)(iii) and (b)(1)(D) is the more appropriate approach, as it is consistent with Chapter 4.

We also note that Option 3 refers, in Application Note 3, to “related cases,” a concept that no longer exists in Chapter 4, having been replaced by the concept of “single sentences.” See USSG § 4A1.2(a)(2). The “single sentence” concept should be included in a new application note.

### D. Issue for Comment

The Commission has asked for comment on whether any specific offense

<sup>10</sup> See USSG App. C, Amend. 632 (Nov. 1, 2001) (deleting provision allowing for an upward departure in the case of “repeated prior instances of deportation”).

<sup>11</sup> See United States Sentencing Comm’n, *2001 Sourcebook of Federal Sentencing Statistics*, tbls. 17 & 24 (2001).



characteristics and departure provisions in one option should be adopted by the Commission as part of another option. As we have indicated, we believe that any tinkering with § 2L1.2 should be delayed at least until the next amendment cycle, unless the Commission proposes revising the guideline to address all of its fundamental problems, not just a few application problems, while refraining from raising any sentences without sound policy reasons. For all of the reasons set forth above, we do not believe that any combination of the specific offense characteristics or departure considerations contained in the proposed amendments would achieve the needed reform of § 2L1.2.

Instead, we urge the Commission to take this time to consider our proposal, modeled on the guideline for § 2K2.1. Of course, we would be happy to discuss modifications to it that would advance the goal of simplicity and the overarching purposes of sentencing, but we believe it represents the best starting place.

## II. CRIMINAL HISTORY

The Commission has proposed adding language to USSG § 4A1.2(a)(2) to modify the provision that exempts sentences that are separated by an intervening arrest from being counted as a single sentence. The proposed amendment states:

An "arrest" includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an "arrest."

We see no need for this change. If any change is made, however, only the second sentence should be included.

The first sentence injects unnecessary complications into the guideline. We have been unable to find any reported case in which this issue has been presented. In the absence of any empirical evidence that this issue arises with any frequency, or that it presents an indication of an increased likelihood of recidivism, the Commission should omit this sentence.

Further, the language is so ambiguous that it is likely to lead to extensive litigation and evidentiary hearings. For example, could the government argue that a defendant "escapes" arrest or service of an arrest warrant if he is in fact not at home when the police arrive? If the police go to a home and are falsely told that the defendant is not there? What if police records reflect an inaccurate address, and the government argues that the defendant had previously given a false address? Would a defendant be subject to this provision if he or she moves without leaving a forwarding address? To what extent would the government have to prove that the defendant's actions were motivated by a desire to escape arrest, or that the defendant even knew that police were looking for him?

Although the second sentence does not create the same complications as the first, we likewise see no need for it. This point is clear in existing law. In *United States v.*



*Joseph*, 50 F.3d 401, 402 (1st Cir. 1995), the Seventh Circuit held that issuance of an arrest warrant could not be an “intervening arrest.” See also *United States v. Correa*, 114 F.3d 314, 316 n.3 (1st Cir. 1997) (not deciding whether the district court erred in treating issuance of a complaint as an intervening arrest, but describing that ruling as “problematic”).

The intervening arrest rule, which derives from the Parole Commission’s Salient Factor Score, presumably is “consistent with the Parole Commission’s recidivism research, as well as with the common sense notion that an offender who continues to commit offenses after criminal justice system intervention is more likely to recidivate.” Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192 (1997). This rationale does not apply when a defendant escapes arrest, or when a complaint or summons is issued.

This minor issue aside, we remain hopeful that the Commission will soon turn its attention to the career offender guideline. In *Rita*, the Supreme Court emphasized that the guideline system is meant to be “evolutionary,” improved over time as a result of a reasoned dialogue among the district courts, the appellate courts, and the Commission. See *Rita v. United States*, 127 S. Ct. 2456, 2464-65, 2469 (2007) (“The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”).<sup>12</sup> After *Booker*, the rate of below-guidelines sentences for those who otherwise qualified for career offender status markedly increased,<sup>13</sup> and after *Gall* and *Kimbrough*, we can expect that courts will continue to exercise their wide discretion to sentence defendants below the advisory guideline range for career offenders until it more accurately advances the goals of sentencing under 18 U.S.C. § 3553(a).<sup>14</sup> We urge the Commission to seize the opportunity to improve the career offender guideline – not only to reflect more precisely Congress’s directive to the Commission in 28 U.S.C. § 994(h), but also to reflect the empirical data it has collected demonstrating that the career offender guideline too often results in sentences that fail to advance the purposes of sentencing. See *Kimbrough*, 128 S. Ct. at 574-75.<sup>15</sup>

<sup>12</sup> See also Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

<sup>13</sup> United States Sentencing Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at 137-140 (March 2006).

<sup>14</sup> *United States v. Parker*, 512 F.3d 1037 (8th Cir. 2008) (recognizing that the district court has the discretion after *Gall* to sentence the defendant to 60 months, well below the advisory guideline range of 151-188 months under the career offender guideline under § 3553(a), and noting that the government withdrew its appeal in light of *Gall*); see *United States v. Marshall*, 2008 U.S. App. LEXIS 153, 22-23 (7th Cir. Jan. 4, 2008) (unpublished) (in a case involving a challenge to the career offender guideline, stating that it must “reexamine” its caselaw, in light of *Kimbrough*, in which it had previously held that courts are not authorized “to find that the guidelines themselves, or the statutes on which they are based, are unreasonable”).

<sup>15</sup> Fifteen Year Report at 133-34 (career offender guideline “makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses,” does not serve a deterrent purpose, and has a disproportionate impact on African-Americans); see *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring) (cited in *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007)) (“This might appear to be an

### III. DISASTER FRAUD

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of “reasonably foreseeable pecuniary harm” to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to the Commission’s legal staff, as well as the written and oral testimony of Marjorie Meyers, Federal Public Defender, Southern District of Texas, which was submitted to the Commission at the public briefing on February 13, 2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud offenses necessarily encompass a wide range of activity, from first-time offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

#### A. Disaster Fraud Enhancements

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create “unwarranted *similarities*” among dissimilarly situated individuals. *See Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, individuals convicted of disaster-related fraud range from the

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admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that “[t]he court . . . impose a sentence sufficient but not greater than necessary, to comply with the purposes of sentencing set forth in’ § 3553(a)(2).”)



poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.<sup>16</sup> A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

In addition, we urge the Commission to reconsider its decision to include as “reasonably foreseeable pecuniary harm” the administrative costs of recovering fraudulently obtained funds that are borne by any government or “or any commercial or not-for-profit entity.” Congress did not direct the Commission to expand the concept of “pecuniary harm” in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

#### **B. Contractor, Sub-Contractor or Supplier Expansion**

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

#### **C. Mitigating Circumstances**

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant’s experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender’s status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the

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<sup>16</sup> 42 U.S.C. § 5122(2).



disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

#### **D. Conclusion**

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

#### **IV. COURT SECURITY**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

#### **V. ANIMAL FIGHTING**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

#### **VI. RULES OF PRACTICE AND PROCEDURE**

The Commission also proposes changes to Rules 2.2 and 4.1 of its Rules of Practice and Procedure. Although these rules generally involve Voting Rules for Action by Commission and Promulgation of Amendments, respectively, the proposed changes address only those procedures which govern determinations about whether to give amendments to the guidelines retroactive effect.

We agree with the proposed change to Rule 2.2, which would eliminate the requirement of the affirmative vote of at least three members at a public hearing before staff can be instructed to prepare a retroactivity impact analysis for a proposed amendment. Rule 2.2 should promote, rather than hinder, the initiation of this critical and often time-consuming endeavor and believe the proposed change does just that.

We also agree that Rule 4.1 should be amended to eliminate the requirement that the Commission decide whether to make a proposed amendment retroactive at the same meeting at which it decides to promulgate the amendment, as such an approach is neither practical nor efficient. For example, it would unnecessarily require the preparation of retroactivity impact analyses prior to decisions about whether to promulgate, as such analyses would be needed to inform decision-making and permit meaningful public comment.

We agree with the spirit of the proposed change to Rule 4.1, though the first sentence of the proposed language does not, in our opinion, make sense outside the context of a particular case. We suggest replacing it with the following sentence, which we believe better describes, in the abstract, the import of the proposed amendment:

The Commission, however, shall consider whether to give retroactive application to an amendment that reduces sentencing ranges for a particular offense or category of offenses. See 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2).

This language tracks the statutory language of title 18, section 3582(c) more closely than that of title 28, section 994(u). We believe it conveys a more accurate description of what the Commission does and that citation to both 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2) is appropriate.

With respect to the Commission's request for comment on whether the Rules of Practice and Procedure should provide a time frame governing final action with respect to retroactive application of an amendment and, if so, what time frame, we do not believe the rules should provide a time frame for final action. We fear that a deadline for final action could impact negatively the ability of the Commission to fully and fairly consider the views of all interested parties, build consensus, and reach a well-considered decision on retroactivity.

In the event the Commission decides a time frame for final action is needed, we suggest a time frame that is more general in nature and that, in any event, does not require final action prior to November 1.

Finally, although the Commission has neither proposed an amendment nor requested comment with respect to Rule 4.3, which governs Notice and Comment on Proposed Amendments, we do believe a change to that rule is needed at this time. Rule 4.3 currently permits the Commission "to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x)." Section 994(x) makes the requirements of title 5, section 553 – publication in the Federal Register and public hearing procedure – applicable to the promulgation of guidelines.

We strongly believe the Commission should amend Rule 4.3 to require notice and comment with respect to commentary, policy statements and amendments thereto. Issues of great importance which directly impact sentence length in a large number of cases are set forth in policy statements and commentary. Section 1B1.10 is one example, and there are many others, including but not limited to all of Parts H and K of Chapter 5, all of Chapter 6, and the treatment of acquitted and uncharged conduct in § 1B1.3. Moreover, post-*Booker*, the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission. There is no current rationale to allow a change as significant as the one recently made to § 1B1.10 to occur absent notice and comment.

Alternatively, we suggest the Commission amend Rule 4.3 to require publication and public hearing procedure where the commentary, policy statements, and amendments thereto will potentially affect a large number of cases or significantly alter the way a particular guideline will be applied.

Thank you for considering our comments, and please let us know if we can be of any further assistance. We look forward to working with the Commission on these very important issues.

Very truly yours,



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*Practitioners Advisory Group*

Todd A. Bussert is a criminal defense attorney practicing in New Haven, Connecticut. He is co-chair of the National Association of Criminal Defense Lawyers' Corrections Committee, the past co-chair of the American Bar Association's Corrections & Sentencing Committee and a member of the Sentencing Commission's Practitioners' Advisory Group. After graduating from the George Washington University Law School, Mr. Bussert provided sentencing and post conviction consultation services through the National Center on Institutions and Alternatives (NCIA). He left NCIA in 2001 and subsequently established a practice that involves federal trial, appellate and post-conviction representation. In addition to assisting other attorneys in their representation of clients facing disposition in both state and federal courts nationwide, Mr. Bussert has written and spoken extensively on these issues.



# Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 7, 2008

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 2008**

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 2008 amendment cycle. We look forward to addressing some of these proposals at the Commission's hearing, on March 13.

## 1. EMERGENCY DISASTER FRAUD AMENDMENT

The Commission requests comment on issues related to the recent emergency amendment to § 2B1.1 resulting from the Emergency and Disaster Assistance Fraud Penalty Enhancement Act. The PAG believes that the Commission's recent amendment, as directed by the Act, addresses sufficiently the concerns that prompted the legislation. With one possible exception, further amendments should not be considered until the Commission has accumulated a greater body of experience.

There are three issues for comment. The first is whether the Commission should add a minimum offense level to the new specific offense characteristic for this type of offense. As the guideline now stands, any offense involving fraud or theft in emergency or disaster relief will generate a minimum offense level of 9 (base level of 7 plus the new 2-level enhancement pursuant to § 2B1.1(b)(16)). Within the current Manual, the most closely analogous specific offense characteristic containing a minimum offense level is for fraud involving, *inter alia*, misrepresentations that the defendant was acting on behalf of a charitable organization or government agency. For such conduct, there is a minimum offense level of 10. § 2B1.1(b)(8)(A). A similar floor for the new offense is unnecessary. The difference between a minimum of 9 and a minimum of 10 is too small to warrant an amendment. (Under the enhancement for charitable organization or government agency misrepresentations, an offense level of 8 is possible, so the argument for a floor of 10 in those cases is stronger.) Moreover, with an intended or actual loss of anything greater than \$5,000, the offense level for emergency or disaster relief fraud will be at least 11. U.S.S.G. §§ 2B1.1(a)(1), (b)(1)(C). An amendment affecting the lowest-level cases, where the intended loss is less than \$5,000, is unwarranted.

The second issue is whether the 2-level enhancement should be expanded to fraud or theft involving a benefit paid, etc., in connection with a procurement of property or services related to any emergency or major disaster declaration "as a prime contractor with the United States or as a subcontractor



or supplier on a contract in which there is a prime contract with the United States.” Such an amendment might be warranted. We are aware of no principled basis for treating emergency or disaster relief fraud by contractors or subcontractors in connection with a procurement of property or services different than emergency or disaster relief fraud by others. The addition of this language promotes consistency.

The third request for comment is whether aggravating or mitigating circumstances should be added for disaster fraud cases. Although we agree with the testimony at the Commission’s February 13, 2008 hearing that fraud by victims of disasters or emergencies should warrant a mitigating adjustment, there is much to be said for leaving the recently amendment guideline as is until some experience can be gathered through, among other things, an analysis of sentences imposed under the Act, in particular whether, why and to what extent courts are deviating from the recommended guideline ranges. There is more reason now than when the guidelines were mandatory for the Commission to wait for data before making adjustments that may further complicate the guidelines or otherwise prove ill-advised.

Finally, the PAG understands at least one organization is proposing that § 2B1.1 incorporate language concerning the appropriateness of a lesser sentence (*i.e.*, downward departure) in cases where the defendant was an actual victim of a natural disaster. The PAG supports judicial recognition of instances where the personal consequences of a disaster influenced, and potentially mitigate, a defendant’s offense behavior so as to offset the enhancement required under § 2B1.1(b)(16).

## **2. HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007**

The PAG has no comment concerning the proposed amendments to § 2C1.1.

## **3. MISCELLANEOUS FOOD AND DRUG OFFENSES**

### **Human Growth Hormone (hGH)**

As a general matter, the PAG supports the previous testimony of Rick Collins, Esquire, of Collins, McDonald & Gann, P.C., particularly with respect to how hGH should be quantified under Guideline 2D1.1. We do not believe that the existing definition of “unit” applicable to trafficking in steroids should be used with distribution offenses involving hGH because hGH offenses present a lesser risk of harm than steroid offenses. As Mr. Collins explained, little scientific evidence supports equal treatment of steroids and hGH for sentencing purposes.

The primary considerations associated with non-medical use of anabolic steroids are not present with non-medical hGH use. For instance, two concerns with anabolic steroids are their psychoactive effects among certain users and the use of excessive amounts beyond what is normally prescribed in lawful medical uses. As Mr. Collins made clear, the medical literature does not support (and Robert Perlstein, M.D. of the FDA does not appear to maintain) that hGH causes enhanced aggression, psychosis, hypomania or other psychological disorders. Nor does the literature suggest that discontinuation of hGH use has any depressive effect on mood. As for abuse of hGH through excessive usage, Mr. Collins testified that while non-medical anabolic steroids users commonly take anywhere from 10-to-100 times the medically prescribed doses, non-medical hGH users typically administer only a fraction of the dosages approved for medical use. Dr. Perlstein appeared to differ on this point, suggesting, as an example, that the typical dosage for a bodybuilder exceeds the typical dose required by adults with severe growth hormone deficiency. Because the evidence on both sides appears somewhat anecdotal, the Commission should

undertake further study concerning how hGH should be treated relative to steroids under the drug quantity table as it bears directly on offense severity.

The Commission also requests comment on whether a maximum base offense level (cap) should apply in § 2D1.1 for hGH distribution offenses. Because hGH presents a lesser harm than anabolic steroids and because questions regarding hGH remain open, the PAG submits that any maximum offense level should be less than the maximum level for anabolic steroids, 20. Moreover, as we submitted previously (*see, e.g.*, 2/30/06 PAG Ltr. re: Proposed Emergency Steroids Amendments at 13), any maximum should be structured so that Category VI offenders have a limited incentive to plead guilty, that is, the possibility of an acceptance of responsibility adjustment that might place their recommended guideline range below the statutory maximum (60 months). Further study of the excessive use issue would undoubtedly also inform decisions regarding a maximum offense level for hGH offenses.

#### **PDMA & FDCA Offenses**

The PAG agrees with the separate comments of John R. Fleder, Esquire, and John A. Gilbert, Jr., Esquire, of Hyman, Phelps & McNamara P.C. on the issue of whether § 2N2.1 adequately addresses the numerous statutes currently referenced to that guideline. Messrs. Fleder and Gilbert both recommend that before the Commission takes any action, it should study the issues further, perhaps through a working group similar to that convened in 1994. As the Commission notes in its request for comment, § 2N2.1 covers a wide range of regulatory offenses, including felonies with full knowledge and intent requirements as well as misdemeanors that are virtually strict liability offenses. While the FDA comments raise various theoretical concerns, the empirical support for them is certainly not apparent. Nevertheless, the FDA proposes sweeping changes. This complex, heavily regulated area would benefit greatly from a more systematic study of the available data for sentences imposed under § 2N2.1 to identify areas in need of targeted adjustment due to sentences that have deviated too excessively to one extreme or another.

#### **4. ANIMAL FIGHTING PROHIBITION ENFORCEMENT ACT OF 2007**

Through the Animal Fighting Prohibition Act of 2007, Congress increased the penalties for violations of 7 U.S.C. § 2156 from a misdemeanor to a felony, with a three-year maximum term of imprisonment, while also adding a new offense involving the distribution and transportation of instrumentalities associated with bird fighting. 7 U.S.C. § 2156(e). In response, the Commission proposes to move the guidelines provisions concerning § 2156 offense from § 2X5.2 (Class A Misdemeanors) to § 2E3.1 (Gambling Offenses).

The PAG agrees that § 2E3.1 addresses offenses analogous to those covered by the Act in that animal fighting is often associated with gambling. Concurrently, we support the proposed base offense level of 8 and oppose the alternate proposed level of 10. Federal authorities pursued fewer than a half dozen animal fighting cases under the Animal Welfare Act of 1976. H.R. 110-27 (2007). Thus very little data is available by which to assess past sentencing practices. For reasons explained above, the prudent course is to take a less forceful approach, followed by monitoring newly-available sentencing data to determine whether, and to what extent, further adjustments may be warranted.

Proposed Application Note 2 to § 2E3.1 suggests an "upward departure" may be warranted in animal fighting offenses involving extraordinary animal cruelty. The PAG does not oppose sentences above the recommended guideline range in such circumstances. However, the provision appears unnecessary in



that it adds—rather than minimizes—complexity to the Manual. For one, “extraordinary cruelty” is not defined, therein encouraging litigation where it may not be needed to reach an appropriate disposition. *See, e.g., Rep. Steve King Dissenting View in H.R. 110-27* (perspective on treatment of animals informed by one’s background and livelihood). Indeed, consideration of the aggravating circumstance contemplated appears to fall squarely within the ambit of § 3553(a) considerations courts weigh routinely. *See* 18 U.S.C. §§ 3553(a)(1), (2)(A). To the extent the Application Note remains, the PAG submits that in view of *Gall v. United States*, 552 U.S. \_\_\_, 128 S.Ct. 586 (2007) and the prevailing need to move the Manual toward the current state of federal sentencing law, “departure” language should be avoided. Instead, we propose the following:

2. *In the case of an animal fighting offense that involves extraordinary cruelty to an animal, ~~an upward departure~~ a sentence greater than the recommended guideline range may be warranted.*

## 5. TECHNICAL AMENDMENTS

The PAG has no comment concerning the six proposed technical amendments.

## 6. CRIMINAL HISTORY

Last year, the criminal history guidelines underwent significant revisions. *See* Amendment 709. Among the changes is that certain prior sentences, such as those imposed on the same day, now count as a single sentence. U.S.S.G. § 4A.1(a)(2). However, where there is an intervening arrest—that is, an arrest for the first offense before the defendant committed the second offense—the prior sentences are always counted separately. *Id.* The Commission now proposes amending § 4A1.2(a) to define “arrest” as including “an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant” and to clarify that “[t]he issuance of a summons or a complaint does not constitute an ‘arrest.’”

The PAG opposes this amendment. To our knowledge, successful escape from an arrest or from the attempted service of an arrest warrant is a rare occurrence in the intervening arrest context. Although the situation no doubt will arise from time to time, we question the propriety of using the amendment process to address infrequently occurring situations, especially where the proposed amendment is contrary to the goal of simplifying the guidelines. In this vein, it is important to recognize that: (a) judges are able to vary from the recommended guidelines sentence to account for this unusual factual scenario and (b) the difference between counting the two prior offenses separately or as a single sentence will rarely be more than one criminal history category.

There are few areas where clarity on particular application questions could not be enhanced through amendments like the one proposed. But, taking the long view, as the Commission must, begs the question whether further clarification on issues that do not arise routinely serves the larger goal of a simplified, stable set of guidelines that are easy for practitioners to understand and for judges to administer. We believe that this goal is undermined by amending the Manual frequently and in a manner that adds complexity. Moreover, by making “escape” part of the definition of arrest—rather than a factor the judge may (but need not) consider—the amendment requires litigation and fact-finding where it may not be needed to reach the appropriate sentence in every applicable case.



Although the other half of the proposed amendment favors defendants by clarifying that issuance of a summons or complaint is not an arrest, for the sake of maintaining simplicity in an area where there are few cases affected by the proposed amendment we believe that the entire amendment should be rejected.

**7. IMMIGRATION**

The PAG has reviewed, and is in agreement with, the reasoned comments of the Federal Public and Community Defenders on this topic. They address fully our perspective and our concerns.

**8. COURT SECURITY IMPROVEMENT ACT OF 2007**

**Appropriate Guideline for Violations of 18 U.S.C. § 1521  
(Filing false liens against federal judges and law enforcement officers)**

The Commission has requested comment on the appropriate guideline for violations of 18 U.S.C. § 1521 and suggests two existing guidelines for consideration: § 2J1.2 (Obstruction of Justice) and § 2B1.1 (Theft and Fraud). Use of § 2B1.1 is inappropriate for several reasons.

Guideline section 2B1.1 addresses deprivation of property offenses. In adopting 18 U.S.C. § 1521, Congress was concerned not about federal judges or other federal employees actually losing real or personal property through the filing of a false lien but rather situations where false liens are used to intimidate or harass. Report of the House Committee on the Judiciary, H.R. 110-218 at 16; *see* Stmt. of the Hon. D. Brock Hornby, United States District Judge (D.-Maine) on behalf of the Judicial Conference of the United States to the Senate Committee on the Judiciary (Feb. 14, 2007) at 7-8 (“These liens are usually filed to harass a judge who has presided over a criminal or civil case involving the filer, his family, or his acquaintances”).<sup>1</sup> Additionally, § 2B1.1 is loss driven, and determination of loss in false lien cases is problematic (*e.g.*, the cost of having the lien removed, the loss of a potential sale, the value of the property, or some other figure).

Section 2J1.2 is more appropriate because obstruction of justice (or at least an attempt at obstruction) is often at the heart of these forms of intimidation or harassment. Additionally, § 2J1.2 contains several potentially applicable adjustments, including a three-level adjustment if the offense resulted in substantial interference with the administration of justice and a two-level adjustment if the offense involved a substantial number of records or was otherwise extensive in scope. U.S.S.G. § 2J1.2(b)(2), (3).

The Commission might also consider using § 2A6.1 (Threatening or Harassing Communications: Hoaxes) for this offense. The PAG recommends that, if used, a base offense level of six (6) is chosen given that the nature of this offense is far less serious than many other offenses that fall under this guideline. *See, e.g.*, 18 U.S.C. § 871 (Threats Against the President), 18 U.S.C. § 876 (Request for Ransom), 18 U.S.C. § 1992 (False Information Regarding Terrorist Attacks).

It takes some level of sophistication to properly prepare a lien, and false ones are often caught before ever being filed. For example, Chief United States District Judge R. Allan Edgar (E.D.Tenn) reports “one disgruntled litigant had a lien against my home all ready for filing. He got as far as the registrar’s

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<sup>1</sup> Available at [http://judiciary.senate.gov/testimony.cfm?id=2526&wit\\_id=6071](http://judiciary.senate.gov/testimony.cfm?id=2526&wit_id=6071)

office, but a court employee prevented him from filing it.” *False Claims Used to Harass Judges*, 34 The Third Branch 8 (August 2002).<sup>2</sup> In some jurisdictions, state law requires that liens be rejected absent court order to accept them. Therefore, whichever guideline the Commission adopts, we recommend addition of an application note that provides for a sentence below the recommended guideline range where there was no chance that the lien could have successfully been filed. A similar provision was previously included in § 2F1.1, noting that when “a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it . . . a downward departure may be warranted.” U.S.S.G. § 2F1.1, Comment n.11 (1998 ed.).

The PAG recommends against including an application note mandating an official victim adjustment in every case since § 3A1.2 contains adequate instructions to allow for such determinations on a case-by-case basis.

**Appropriate Guidelines for Violation of 18 U.S.C. § 119  
(Publishing Restricted Personal Information with Intent to Facilitate Crime of Violence)**

The Commission proposes that § 2H3.1 (Interception of Communication: Eavesdropping; Disclosure of Certain Private or Protected Information) or one of the assault guidelines (§ 2A2.1, *et seq.*) apply to violations of 18 U.S.C. § 119. The PAG recommends against including an application note mandating an official victim adjustment in every case since § 3A1.2 contains adequate instructions to allow for such determinations on a case-by-case basis.

**Potential Enhancements to Guidelines Applying to Violations of 18 U.S.C. § 115  
(Threatening Federal Officials)**

Title 18, Section 115 of the United States Code makes it a crime to assault, kidnap, murder, or threaten a federal official, judge or law-enforcement officer and members of their immediate families. Congress has directed the Commission to determine whether an adjustment is warranted when threats made in violation of 18 U.S.C. § 115 are transmitted over the Internet.

Appendix A to the Manual directs that violations of 18 U.S.C. § 115(b)(4), the threat offense, are to be sentenced under § 2A6.1. This section provides a 2-level enhancement if the offense involves more than two threats and a 4-level enhancement for offenses involving substantial disruption of governmental functions. U.S.S.G. §§ 2A6.1(b)(2), (4). Accordingly, the PAG opposes any additional upward adjustments. The realities of modern life make use of the Internet a routine, that is, non-aggravating, occurrence, particularly when compared to other forms of available communication, such as the U.S. Mail. We recognize that the Internet affords the ability to disseminate communications more widely than is possible using traditional communication tools (*e.g.*, “blast” e-mail v. multiple letters) and appreciate that such technology can make it easier to threaten numerous federal officials. However, to the extent that a defendant’s activities in a given case might present as aggravating to such a degree as to potentially warrant a sentence above the recommended guideline range (*e.g.*, a large number of e-mails are distributed simultaneously), courts, which must be presumed to be sensitive to these issues, are free to account for the conduct. *See* 18 U.S.C. §§ 3553(a)(1), (2)(A). In this regard, and consistent with the reasoning stated above, the PAG suggests amending § 2A1.6 by removing Application Note 3, which provides unneeded

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<sup>2</sup> Available at: <http://www.uscourts.gov/ttb/aug02ttb/claims.html>.



complexity to the Manual.

Congress also directed the Commission to consider whether there should also be an adjustment if the sender of such threats was acting in an individual capacity or part of a larger group. There appears no need to include adjustments under individual guidelines. This consideration is adequately addressed under § 3B1.1 (Aggravating Role).

## **9. RULES OF PRACTICE AND PROCEDURE**

The Commission requests comment regarding whether it should amend its Rules and Procedures to provide a specified time frame governing final action with respect to retroactive application of an amendment pursuant to 28 U.S.C. § 994(u), and, if so, what that time frame should be.

The PAG agrees with the Commission that the decision whether to make an amendment retroactive at the same meeting at which the amendment is promulgated may not be practicable in all situations. Accordingly, Rule 4.1 should be amended so as not to *require* retroactivity decisions on promulgated amendments until the Commission has had the opportunity to undertake a complete retroactivity analysis and until interested parties and the public have had the opportunity to comment.

With respect to a time frame under which Commission staff should undertake a retroactivity analysis and under which the Commission should take final action on retroactivity, the PAG believes that the period of time for such analysis and final action should extend no more than six-and-a-half months from promulgation of the final amendment sent to Congress. More specifically, a reasonable period is from May 1 until no later than November 15 of the same year. Any longer period of time, or an unspecified, "general" time period, will create unnecessary uncertainty in the federal criminal justice system as affected parties await final Commission action regarding retroactivity. Furthermore, the proposed period affords ample time to undertake retroactivity analyses as well as to receive comment or testimony. Finally, prolonging an announcement concerning retroactivity after an amendment's effective date creates unwarranted and arbitrary disparities between those offenders receiving the amendment's prospective benefit and those who may benefit retrospectively. The longer the lag between the effective date of an amendment and a later, final action to apply it retroactively only increases such disparities while expanding the pool of litigants who might seek to obtain the benefit of retroactive application.



### CONCLUSION

On behalf of 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 13, 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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**Suzanne E. Ferreira**

*Probation Officers Advisory Group;*

*Supervisory United States Probation Officer, Southern District of Florida*

Suzanne E. Ferreira is a Supervisory United States Probation Officer in the Southern District of Florida, working out of the Miami office. She was appointed a United States Probation Officer in January 1988, and in 1998 was promoted to supervisor in court services (PSI Officer). Ms. Ferreira supervises seven probation officers who prepare presentence reports, and she reviews an average of 25 reports per month. Ms. Ferreira has served on the Probation Officers Advisory Group for four years, and commenced her term as chair of the group in 2008.

## PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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March 10, 2008

The Honorable Ricardo H. Hinojosa, Chair  
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Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, DC on February 20 and 21, 2008 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2008.

### Immigration

The group considered the three options and agreed that Option 2 provides ease of application as it moves away from the categorical approach to crimes, which has historically complicated the sentencing process. This approach, which has been supported by the POAG in past position papers, relies on sentence imposed as a measure of seriousness of the offense which is easier to determine than the offense of conviction, due to jurisdictional differences in how crimes are charged and elements contained in the offense of conviction. The group liked the increase in offense level for those defendants who sustained a conviction for another felony offense that was committed subsequent to illegally reentering the United States. Further, the group liked the approach of increasing the base offense level and allowing for a downward adjustment in cases where there are no prior convictions. This is more representative of these types of cases as most have a prior record, those without are the exception.

As to the alternate base offense levels and other adjustments, the group agreed that the highest levels more closely mirror the existing levels under this guideline. All were in agreement that



any option employed should not reduce the existing offense levels for these offenses.

With regard to the reference to offenses described in 8 U.S.C. §1101(a)(43)(A), the group asked that the application notes include a recitation of this section as most districts do not provide a complete Title 8 book and looking for the reference is time consuming.

Finally, consideration of the departure provisions resulted in agreement by all that the upward departure for multiple removals prior to the instant offense should be included under any of the options.

### **Emergency Disaster Fraud**

The group reviewed the recommended SOC and considered the option of including a minimum offense level. The minimum offense level is not recommended unless it differentiates between defendants who were actual victims of the disaster, but received more benefits than that to which they were entitled, and non-victim defendants who exploited the disaster by using the opportunity to seek disaster benefits to which they were not entitled. The group concluded that the 2 level increase is adequate for defendants who were victims of the disaster.

As to other aggravating and mitigating circumstances that might justify additional adjustments, the group expressed concern that the adjustment for number of victims found at §2B1.1(b)(2), as currently defined, may not be employed in disaster relief fraud as the victim is usually *one* agency or relief organization that services many people. Under the current definition of victim, only the agency or organization would be considered a victim. This would not account for cases in which an organization is defrauded of large sums of money or where the defendant collected large sums of money under the pretense of acting on behalf of a charitable organization, thereby diverting funds from the intended victim recipients, who do not meet the definition of "victim" under the guidelines. The group suggested consideration of a special rule similar to the one found in §2B1.1, comment. [n.4(C)(ii)] to account for the multiple victims of the offense. The rule should exclude any defendants who were victims of the disaster and received more relief than that to which they were entitled.

### **Food and Drug Offenses**

Because hGH is used and distributed in a manner consistent with anabolic steroids, and appears to present a harm very similar to steroids, the group agreed that hGH offenses should be addressed under §2D1.1 and treated in the same manner as offenses involving steroids, including the base offense level cap of 20. Further, the group agreed that the SOC's which address steroids specifically, that is, §2D1.1 (b)(7) and (8), should include hGH, and that application note 8 should be modified to include hGH. The group took no position with respect to the unit/milligram equivalency issue and would defer to the judgement of the FDA and other experts with regard to this issue.

It is useful to note that everyone in the group indicated that they rarely, if at all, see cases in their respective districts relating to steroid abuse.

As to the issue for comment regarding the offenses referenced to §2N2.1, the group declined to comment as these offenses tend to be rare and the group has little experience with these types of offenses and this application.

### **Animal Fighting**

The group agreed that a base offense level of 10 and an upward departure for extreme cruelty under §2E3.1 provide the courts with the most latitude in sentencing and adequately addresses the seriousness of the offense.

### **Court Security Improvement Act of 2007**

The POAG reviewed the two new offenses titled under 18 U.S.C. § 1521 and § 119 and would respectfully make the following recommendations regarding implementation under the existing guidelines.

As to 18 U.S.C. § 1521, the group concluded that this offense may be addressed under §2J1.2 (Obstruction of Justice) as this guideline adequately captures the intent and harm caused by this offense. Further, the group suggested that an application note be added to instruct the use of §3A1.2 (Official Victim) for this particular offense.

As to 18 U.S.C. § 119, the POAG considered two existing guidelines for incorporation with this offense, specifically §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) and §2A6.1 (Threatening or Harassing Communications; Hoaxes). The group concluded that §2A6.1 may be the better choice as it captures the intent to threaten or facilitate a crime of violence element of this new offense. Combined with the three level increase for official victim under §3A1.2, this would adequately take into account the aggravating factors of this offense.

The group then considered alternate approaches to application of this guideline relative to this new offense. The first approach includes adding a SOC for a three level increase if the offense of conviction is a violation of 18 U.S.C. § 119, and an application note instructing that an adjustment under §3A1.2 (Official Victim) should not be applied in addition to this SOC. The second option would provide for a base offense level of 15 for defendants convicted of a 119 violation, and no new SOC's. Either alternative provides a 3 level increase for a conviction under this section which might not otherwise apply through §3A1.2, when the victim is a witness, informant, juror, or some other person covered by this statute who may not be considered an official victim.

In addition, the group suggests that a cross reference similar to §2H3.1 would be appropriate

insofar as there may be cases in which it can be established that the purpose of the offense was to facilitate another offense, then the guideline for that other offense may be applied if it achieves a higher offense level.

### Closing

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

Respectfully,

2008 Probation Officers Advisory Group



*Committee on Judicial Security  
Judicial Conference of the United States*

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March 11, 2008

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 Proposed Fictitious Liens Amendments

Dear Judge Hinojosa:

I am writing on behalf of the Judicial Conference's Judicial Security Committee, in coordination with the Criminal Law Committee, to convey the views of the two committees while the Sentencing Commission considers sentencing guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens against federal judges. For the reasons set forth in the attached statement, the Committees are of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate.

Although I have provided the statement for the Committees, Judge Henry E. Hudson, Eastern District of Virginia, will testify before the Commission at the hearing on March 13, 2008. Again, the Security Committee is thankful to the Sentencing Commission for taking the Committee's testimony on this important issue.

Sincerely,



Edmund A. Sargus, Jr.

cc: Members Judicial Security Committee  
Members Criminal Law Committee

**STATEMENT OF JUDGE EDMUND A. SARGUS, JR.**  
**Member, Judicial Security Committee of the Judicial Conference of the United States**  
**United States District Court**  
**Southern District of Ohio**  
**March 10, 2008**

Thank you for the opportunity to offer the following comments on behalf of the Judicial Security Committee of the Judicial Conference of the United States. I have coordinated these comments with the chair of the Criminal Law Committee of the Judicial Conference of the United States. The Security Committee appreciates the speed with which the Sentencing Commission has moved to promulgate new Sentencing Guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens or encumbrances upon real or personal property owned by federal judges or federal officers and employees in relation to the performance of the official duties of such persons. The offense is punishable by imprisonment not to exceed ten years.

The Sentencing Commission should also take note that according to the U.S. Marshals Service, the number of threats made against federal judges and prosecutors has increased 69 percent from fiscal years 2003 to 2007. In addition, 503 threats were reported in fiscal year 2008, through February 9. Judge Sentelle, chair of the Judicial Security Committee, has noted that "... threats are a significant security concern to his (my) colleagues." Kevin Johnson, *More Judges, Prosecutors at Risk; 69% Increase in Threats Since 2003*, U.S.A. Today, March 6, 2008, at 3A.

The filing of fictitious liens against judicial officers has been a problem for the judiciary for many years. For this reason, in September 1997, the Judicial Conference of the United States agreed to support legislation that would create a new federal criminal offense for harassing or intimidating a federal official, including a judicial officer, with respect to the performance of

official duties to include the filing of a lien on the real or personal property of that official (JCUS-SEP 97, p. 66). Such legislation was repeatedly introduced, but never enacted, in Congress during the following years. In January 2008, however, the Court Security Improvement Act of 2007 was enacted and it included a provision to create a new law for the filing, conspiring to file, or attempting to file any false lien or encumbrance against the property of a federal judge or law enforcement officer because of the performance of that individual's official duties (Public Law No. 110-177, 121 Stat. 2534 (2008)).

These liens are usually filed in an effort to harass judicial officers against whom a civil action has been initiated by the individual filing the lien. Liens are placed on the property of judicial officers based on the allegation that the property is at issue in the lawsuit. Judges are generally very careful about listing their home address in public. When filing the lien, the home address of the judge generally is listed on the filing. By this action alone, the filing individual is saying to the judge in essence, "I know where you live," and could be threatening and intimidating to the judge. While the filing of such liens has occurred in all regions of the country, they are most prevalent in the state of Washington and other western states.

The Administrative Office's Office of General Counsel has had experience with this practice since it acts as a liaison between judicial officers and the Department of Justice to obtain representation for judicial officers sued for actions taken in their official capacities. The General Counsel's Office has observed that the practice of filing liens has been going on for some time. Between September 1992, when the practice began to be recorded, and 2007, liens were filed in at least 81 of the civil cases filed against judicial officers; however, multiple liens were filed in several of these cases. While the incidences of filing liens have occurred in all regions of the



country, they are most prevalent in the western states.

The responsibility to initiate legal action to remove these liens is vested in Assistant United States Attorneys, who represent the judicial officers, and their forms of response vary according to the state law and the circumstances. It is sometimes necessary for the AUSA to bring action in state court for the removal of liens. In some circumstances, an action to remove the liens may be brought in federal court, and in others, state court proceedings are commenced and removed to federal court under the provisions of 28 U. S .C. § 1452. In some cases, the AUSA may seek an injunction against further filing of liens by the litigant. All of these methods are time consuming, of course, but experience indicates that they are ultimately successful.

Nonetheless, the pendency of these liens prior to their removal has caused some judicial officers great inconvenience. In supporting a federal criminal statute, the Criminal Law Committee expressed hope that criminal sanctions might act as a deterrent against false filings. Prior to the enactment of this statute, the Department of Justice was encouraged to prosecute persons filing these liens in state court under state false liens statutes; however, there were problems with this approach.

For one, not all states had laws that were reasonably available for this purpose. A review of state provisions discloses only a handful of applicable specific provisions, and most of these were civil remedies. They permit a party who has had a lien or other encumbrance placed on his or her property for malicious purposes to recover damages, sometimes treble damages, and attorneys fees. A few states have criminal penalties for filing such encumbrances. No state statute that specifically penalizes claims against the property of judicial officers has been found, but Wisconsin has both civil and criminal "slander of title" provisions on the subject.

Wis. Stat. § 706.13 and Wis. Stat. § 943.60, respectively. The civil penalty authorizes punitive damages of \$1,000 plus any actual damages caused by the false failing. The criminal statute is punishable by a fine not exceeding \$10,000 or not more than six years imprisonment. Wis. Stat. § 939.50.

As to the federal judiciary, the core conduct prohibited by § 1521 typically involves the wrongful filing of a lien or encumbrance by a party unwilling to accept a final judgment or sentence. In this context, the filer of the fictitious lien is often engaged in an act of retaliation against a judge, prosecutor, or probation officer. While prompt discovery and subsequent civil litigation may obviate financial harm to parties subject to fictitious liens, the prohibited conduct represents an attack upon the integrity of the judicial system. In the case of an incarcerated filer, or a party with prior criminal involvement in federal court, the conduct indicates that rehabilitation has not occurred. Further, such offender presents a security risk to all parties against whom the fictitious liens have been filed.

I am attaching to my written comments a copy of a decision issued last week in the case of *United States of America v. McCall*, No. C2-06-1051 (S.D. Oh., March 5, 2008). As the opinion describes, Bondary McCall is serving a sentence of 292 months in the federal prison system. From May of 2005 through November of 2006, Bondary McCall filed a series of fictitious claims against me, as well as an Assistant United States Attorney. In November of 2006, McCall attempted to file a U.C.C. financing statement listing me as indebted to him in the amount of \$19 million.

Due in part to the fact that I reside in a small, rural community, the filings were recognized as suspicious and sent to the county prosecutor. Shortly thereafter, the United States

Attorney's Office instituted a lawsuit seeking to restrain McCall. I draw your attention to the fact that, in many states, official record keepers – clerks of court, county recorders – are not authorized to screen documents or refuse filings so long as technical requirements are met and proper fees are tendered. This consideration presents a concern that a fictitious lien will be recorded without notice to a judicial officer. As a further example of these concerns, on March 7, 2006, McCall did in fact cause a fictitious lien to be filed in the office of the Washington Secretary of State. Fortunately, the U.C.C. filing lists the AUSA and me as the secured party, rather than the debtor.

The gravity of the offense is not confined to the potential financial harm or inconvenience to a judge. The offense involves conduct which reveals a deep antagonism against the legal system and demonstrates that the perpetrator will not be restrained from unlawful conduct. The Security Committee considered, and rejected, two possible guideline analogues the Sentencing Committee might consider, including obstruction of justice and fraud. Specifically, that although the Sentencing Commission could also consider the use of U.S.S.G. § 2J1.2, Obstruction of Justice, the Security Committee believes that a substantial number of fictitious liens involving judges have been filed after the conclusion of litigation. Such filings were not intended to actually obstruct judicial proceedings, but to instead extract retaliation or vengeance upon a judicial officer. Because the filing of fictitious liens is not necessarily addressed to pending cases, the nexus between the filing and the alleged obstruction may be lacking.

Similarly, in the Security Committee's view, U.S.S.G. § 2B1.1, which addresses fraud and related financial crimes, would not capture the essence of the offense. The Security



Committee believes that the gravamen of the fictitious-lien offense is the threat to the legal process, not to the financial security of a judge, prosecutor or probation officer. The wrongfully filed liens will ultimately be removed through legal proceedings, if necessary. In most instances, there will not be actual economic harm. The filing of fictitious liens, however, clearly indicates that the perpetrator is a threat to the legal process and to a particular jurist.

In light of these concerns, the Security Committee is of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate. This Guideline currently applies in cases involving threatening or harassing communications. While the base offense level is 12, several specific offense characteristics relevant to § 1521 increase the offense level. For example, § 2A6.1(3) provides for a 3 level increase, if the offense involves violation of a court order. It is likely that a civil action seeking injunctive relief banning a defendant from sending harassing mail from a penal institution may precede the filing of criminal charges. Consequently, a later fictitious-lien filing also violates the earlier injunction and should warrant an increased sentencing guideline range.

The Security Committee is also of the view that the offense level should increase if the defendant has filed multiple fictitious liens. Likewise, the offense level should increase if the conduct causes substantial economic harm or extended litigation to remove the fictitious lien from public records. Finally, because U.S.S.G. § 2A6.1 covers more than fictitious-lien filings against judges, prosecutors and probation officers, the Security Committee believes that a Chapter Three Adjustment, involving official victims, is warranted under U.S.S.G. § 3A1.2.

Again, thank you for the opportunity to share the views of the Security Committee of the Judicial Conference with you as you consider this important issue.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

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**United States of America**

**Plaintiff,**

**v.**

**Case No. 2:06-cv-01051**

**Bondary McCall,**

**Judge Michael H. Watson**

**Defendant.**

**OPINION AND ORDER**

Plaintiff the United States of America seeks declaratory and injunctive relief against Defendant Bondary McCall. Plaintiff alleges Defendant has filed and continues to file harassing and frivolous documents against various federal officials in retaliation for prior criminal proceedings against the Defendant. Plaintiff seeks a judgment permanently enjoining Defendant from filing documents with government agencies without first obtaining written leave of this Court. Furthermore, Plaintiff requests a judgment declaring any such documents currently filed or filed in the future without leave of this Court to be void and of no legal effect. For the reasons that follow, the Court grants Plaintiff's motion for summary judgment.

## **I. FACTS**

### **A. Parties**

Plaintiff is the United States of America ("United States"). Defendant, Bondary McCall, is an inmate (federal register number 43827019) confined in federal custody at the Federal Correctional Institution in Williamsburg, South Carolina.

### **B. Case History**

Plaintiff filed the original complaint on December 14, 2006. Plaintiff filed a Motion for Summary Judgment on January 9, 2007. On March 7, 2007, the Court issued an order granting Defendant fourteen days to respond to the pending motion for summary judgment. Defendant did not respond. On March 23, 2007, Plaintiff filed a Supplemental Memorandum Supporting Motion for Summary Judgment. On September 21, 2007, Defendant filed a Response to Plaintiff's Supplemental Motion for Summary Judgment.

Where, as here, a motion for summary judgment goes unopposed, a district court properly relies upon the facts provided by the moving party. *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404-405 (6<sup>th</sup> Cir. 1992).

### **C. Defendant's Filings**

In December 1994, Defendant was sentenced to 292 months imprisonment for an unrelated offense. Since his sentencing, Defendant has filed over twenty collateral actions and appeals. Each of these cases, naming local and federal officials as defendants, was dismissed by the respective courts.

Subsequent to his incarceration, Defendant has filed numerous documents



alleging a variety of financial claims against various federal officials. Many of these documents allege financial claims against the Hon. Edmund A. Sargus, Jr. ("Judge Sargus"), a United States District Judge in the Southern District of Ohio, and Robyn Jones Hahnert ("Hahnert"), an Assistant United States Attorney for the Southern District of Ohio.

In May 2005, Defendant conveyed a document to the Internal Revenue Service (IRS) in Washington, D.C. entitled "Reporting of Tax Delinquents". The document identified Judge Sargus and Hahnert as "Tax Fugitives".

In June 2005, Defendant sent the United States Department of Justice, via U.S. Mail, a "notice of tort claim" against the United States, in the amount of \$19,920,000,000.00, for damages allegedly caused by Judge Sargus, Hahnert and others.

In June 2005, Defendant named Judge Sargus, Hahnert, and others, in a document titled "Affidavit Notice of Default" filed with the United States District Court for the Southern District of Ohio.

In October 2006, Defendant sent to Belmont County, Ohio officials, via U.S. Mail, a document titled "UCC Financing Statement" listing Judge Sargus as the "Debtor" and Defendant as the "Secured Party". The document purported to encumber "all of Debtor's assets, land, and personal property . . . ."

In November 2006, Defendant sent to the Belmont County, Ohio Treasurer, via U.S. Mail, a letter requesting the Treasurer provide tax assessments for Judge Sargus, provide all parcel numbers Judge Sargus is paying taxes on, and list Defendant on the county records.

In November 2006, Defendant sent to Judge Sargus, via U.S. Mail, a letter identifying Judge Sargus as "Debtor Judgment" and claiming to possess a "Security Interest" in Judge Sargus.

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Neither Judge Sargus or Hahnert are indebted to Defendant and neither have ever had a commercial relationship with Defendant. There is no valid security agreement between Defendant and the federal officials. There are no judgments entered against either Judge Sargus or Hahnert involving Defendant that would justify the filing by Defendant of any lien, financing statement, or other filing concerning the federal officials' property.

Plaintiff filed this complaint on Dec. 14, 2006. Plaintiff seeks a declaratory judgment that the purported "liens" and or financing statements prepared, attempted to be filed, or filed by Defendant are null, void, and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Plaintiff also seeks to permanently enjoin Defendant from filing or attempting to file any document claiming financial interests against any federal officer or employee without leave of this Court.

## II. SUMMARY JUDGMENT

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

### III. DISCUSSION

#### A. Declaratory Relief

Plaintiff requests a declaratory judgment that the purported "liens" and/or financing statements prepared, attempted to be filed, or filed by Defendant are null, void and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Given the uncontested facts offered by the Plaintiff, the Defendant's pseudo-financial filings are without merit. The Defendant has demonstrated no contractual relationship with any federal employee and consequently has no property claim against any of the named individuals. This Court declares the Defendant's purported "liens" and/or financing statements to be void and of no legal effect.

#### B. Injunctive Relief

Plaintiff asks this Court to permanently enjoin the Defendant from filing liens, UCC statements or other documents with government agencies without leave of this Court. Plaintiff alleges the case at bar satisfies the four requirements for permanent injunctive relief as described by the Eastern District of Texas in *Moore v. City of Van*,



Texas. 238 F.Supp.2d 837, 852 (E.D. Tex. 2003). Because this Court agrees, the Defendant is hereby permanently enjoined from filing liens, UCC statements or other documents with governmental agencies without leave of this Court.

While *Moore* is not mandatory authority for this Court, it is instructive to the extent it is a refined version of this Court's discussion of the requirements for permanent injunctive relief in *Dayton Christian Schools v. Ohio Civil Rights Com'n.* 578 F.Supp. 1004 (S.D. Ohio 1984) (*rev'd on other grounds*, 766 F.2d 932 (6<sup>th</sup> Cir. 1985), *rev'd and remanded on other grounds*, 477 U.S. 619 (1986)). In *Dayton*, this Court explained that permanent injunctive relief is appropriate when the plaintiff has actually prevailed on the merits of his claim, has demonstrated requisite real and present danger of irreparable injury, and the balancing of equities between the parties weighs in favor of an injunction. The factors are similar to those considered when determining whether a preliminary injunction should be issued. "Specifically, the Court must consider whether the plaintiff has demonstrated irreparable injury, whether the issuance of the injunction 'would cause substantial harm to others,' and 'whether the public interest would be served by issuing' an injunction." *Id.* at 1017 (quoting *Friendship Materials, Inc. V. Michigan Brick, Inc.*, 679 F.2d 100 (6<sup>th</sup> Cir. 1982)).

In *Moore* the Eastern District of Texas neatly clarified the requirements for permanent injunction. "The standard for permanent injunction is 'essentially the same' as for a preliminary injunction, in that the plaintiff must establish each of the following four elements: (1) actual success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury

outweighs any damage that the injunction may cause the defendants; and (4) that the injunction will not impair the public interest." *Moore*, 238 F.Supp.2d at 852. The difference between the standard for a permanent injunction and a preliminary injunction is that a permanent injunction requires the court to determine the plaintiff's actual success on the merits rather than the plaintiff's likelihood of success.

A permanent injunction cannot be granted without careful consideration by the court. The Sixth Circuit quoted Professor Wright in discussing the "ordinary principles of equity" that must be considered prior to issuing a permanent injunction. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages." *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No.*, 471 F.2d 872, 876 (6<sup>th</sup> Cir. 1972) (quoting 3 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) § 1431). So it is with careful deliberation that this Court evaluates the applicability of a permanent injunction to the case at bar.

#### **1. Plaintiff's Success on the Merits**

To win a permanent injunction the Plaintiff must demonstrate actual success on the merits of the case. The Defendant here has filed numerous frivolous documents alleging a variety of financial claims against various federal officials. The undisputed facts demonstrate the Defendant has no legitimate financial claim against any of the

federal officials named in the various filings. In particular, Defendant's October 2006 UCC Financing Statement attempting to encumber the assets of Judge Sargus amounts to fraud. Judge Sargus has no contractual relationship with the Defendant to warrant Defendant's claim to Judge Sargus' assets.

There can be no genuine issue of material fact as to the invalidity of Defendant's filings. The Plaintiff's success on the merits is established.

## **2. Substantial Threat of Irreparable Injury**

Injunctive relief is appropriate only where there exists a substantial threat that failure to grant the injunction will result in irreparable harm. Here, this threshold is satisfied. Defendant's frivolous filings place a constant and irreparable strain on federal employees and the federal offices they serve. By Defendant's own admission ("I have 14 more year (sic) to study, study and study,") he intends to continue his malicious filing campaign. To allow the Defendant to persist would impose a constant burden on the victims of his unwarranted financial filings.

The Supreme Court of North Dakota recognized the problem in a similar situation. "A strong and stable corrections system is necessary to protect the general welfare of the people. We cannot allow that system to be undermined by permitting an inmate to indiscriminately file liens not authorized by law against the property of . . . employees." *State v. Jensen*, 331 N.W.2d 42, 47 (N.D. 1983). In that case, an inmate was permanently enjoined from filing illegitimate, unauthorized liens against state employees. The court explained "[a]ny purported lien filed by [the inmate] would encumber the property of the State employee against whom the lien was filed and effectively inhibit the alienability of that property . . . this unwarranted cloud on the title



could result in damages which would be difficult to ascertain and could cause irreparable harm to the State employee." *Id.*

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The Defendant's fraudulent filings are a legitimate concern for federal employees. The Plaintiff appropriately notes the irreparable negative effect such filings might have on a victim's credit score or other financial interests. Because the Defendant has imposed a real harm and apparently wishes to continue to do so, his actions demonstrate a substantial threat of continuing and irreparable injury.

### **3. Injury Outweighs Damage Caused by Injunction**

Injunctive relief is only to be granted if the injury to the Plaintiff outweighs the damage the injunction would cause the Defendant. Here, a balancing of the relative hardships weighs in favor of injunctive relief. A permanent injunction will protect federal officials from the injury described above, but will still enable the Defendant to file public records pending court approval. While the Defendant's ability to file public documents might arguably be delayed, his ability to obtain court approval provides him with a legitimate mechanism to file valid documents.

### **4. Public Interest**

Injunctive relief may only be granted if the injunction will not impair the public interest. In the case at bar, injunctive relief will in fact advance the public interest. Public officials, and the offices they serve, should be protected from frivolous filing campaigns such as this. Further, our nation's financial institutions cannot fall victim to the Defendant's personal vendettas. Left unchecked, the Defendant's illegitimate financial claims would inevitably affect someone's legitimate financial interests. It is in

the public's best interest that Defendant be barred from future filings pending the approval of the court.

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#### IV. DISPOSITION

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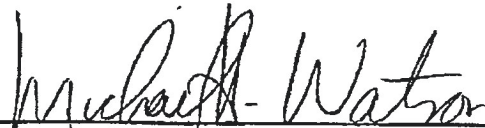
Based on the foregoing analysis, the Court **GRANTS** Plaintiff's summary judgment motion (Doc. 6). Moreover, the Court **GRANTS** Plaintiff's request for permanent injunctive relief.

The Clerk shall enter a final judgment on the merits in this case in favor of Plaintiff, and against Defendant, as follows:

1. The Court **DECLARES** the Defendant's purported "liens" and/or financing statements filed against federal officials, including Judge Sargus and Robyn Hahnert, to be void and of no legal effect; and
2. Defendant is hereby **PERMANENTLY ENJOINED** from filing liens, UCC statements or other documents with governmental agencies without first seeking and obtaining written leave of this Court.

The Court further warns Defendant that Congress recently passed into law a provision criminalizing the filing of false liens against federal judges and federal law enforcement officers. Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (2008). Violations are punishable by fine and/or up to ten years imprisonment. *Id.*

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**

**Testimony of Maureen Franco  
Deputy Federal Public Defender  
Western District of Texas  
On Behalf of the Federal Public and Community Defenders  
Before the United States Sentencing Commission  
Public Hearing on Proposed Amendments for 2008  
March 13, 2008**

Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the Sentencing Guidelines pertaining to § 2L1.2 (Unlawfully Entering or Remaining in the United States).

**A. In General**

At the outset, we commend the Commission for its commitment to addressing the complex application problems that plague the current § 2L1.2. We appreciate the ongoing efforts in this area and are hopeful that the ultimate result will be a guideline that is both simpler to apply and a fairer reflection of the purposes of sentencing under 18 U.S.C. § 3553(a). However, given the ongoing national debate about federal immigration law and the inevitable changes to come with a new Administration, we believe that the Commission should not amend § 2L1.2 during this cycle. Instead, we urge the Commission to wait until stability has been established, after which we can begin work on a long term and comprehensive solution that is consistent with national policy.

Whether the Commission addresses § 2L1.2 this year or next, however, we wish to reiterate the Federal Defender community's longstanding view that the guideline, by including a broad 16-level enhancement for prior convictions, produces sentences that are simply too high.<sup>1</sup> In our view, the guideline, if followed, contravenes the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *See Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). While data provided by the Commission indicates that Options 2 and 3 would reduce some of the more severe sentences,<sup>2</sup> we are concerned that for every variation of every option, sentences would significantly increase for many defendants at the lowest offense levels. There is no policy reason why sentences should be increased for those who are the least culpable.

As the Commission has recognized, the original guideline for illegal reentry was largely based on past practice, but subsequent revisions to the guideline, beginning in 1988 and including the 16-level enhancement in 1991, caused penalties to soar, with the

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<sup>1</sup> *See, e.g.*, Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration at 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn before the U.S. Sentencing Commission Re: Proposed Immigration Amendments, San Diego, California (Mar. 6, 2006).

<sup>2</sup> *See* Memorandum from Kevin Blackwell to USSC Immigration Team, *Impact of Proposed Amendments to §2L1.2(Unlawfully Entering or Remaining in the United States)* (Feb. 29, 2008). The Commission was not able to perform an analysis of the impact of Option 1. *Id.* at 1.



average length of sentences nearly tripling between 1990 and 2001.<sup>3</sup> The Commission has never justified, either with empirical data or any policy analysis based on national experience, the 16-level enhancement in § 2L1.2, even though this enhancement is far more severe than other increases that depend on prior convictions. In the absence of empirical data or experience, § 2L1.2 does not “exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 567, 574-75 (discussing crack cocaine guideline). Accordingly, while we recognize that the driving force behind the current proposals is the Commission’s immediate interest in a certain degree of simplification, we believe that the Commission should not amend § 2L1.2 without also reviewing its fundamental premises and reducing the penalties themselves.

The actual sentences imposed, including the widespread use of government-sponsored downward departures, demonstrate that the current guideline is greater than necessary to achieve the goals of sentencing under § 3553(a)(2). For example, in 2006, based on motions by the government and determinations by the courts, 36.5% of sentences imposed for illegal reentry were lower than the advisory guideline range, not including sentences reduced for substantial assistance under § 5K1.1.<sup>4</sup> In contrast, only 15.6% of offenders sentenced for crack cocaine received sentences lower than the advisory guideline range (excluding reductions for substantial assistance),<sup>5</sup> despite the Commission’s own view that guideline sentences for crack cocaine are too harsh and result in unwarranted disparities.

In short, reducing the more severe sentences without raising the sentences for the least culpable should be a primary objective underlying any amendment to § 2L1.2. In aid of that goal – and the overarching goal of achieving the purposes of sentencing – we summarize what we believe should also be included as the Commission’s primary objectives when it amends § 2L1.2:

- If kept, the 16-level enhancement should be reserved for only the *most serious* of the offenses that fall into the category of “aggravated felonies” under 8 U.S.C. § 1101(a)(43).
- Prior convictions used to increase a defendant’s offense level should be subject to the same remoteness rules in Chapter 4 to reflect more accurately Congress’s intent to deter and increase punishment for those individuals who present the most serious risk of recidivism.

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<sup>3</sup> See United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 61-65 (Nov. 2004).

<sup>4</sup> United States Sentencing Comm’n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2006).

<sup>5</sup> *Id.* tbl. 45; see also United States Sentencing Comm’n, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2007) (showing similarly divergent rates of below-guidelines sentences for illegal reentry (40%) and offenses involving crack cocaine (15%) for fiscal year 2007). Preliminary statistics indicate that the rate of below-guideline sentences has increased to 38% since *Gall* and *Kimbrough* were decided. See United States Sentencing Comm’n, *Preliminary Post-Kimbrough/Gall Data Report*, tbl. 4 (Feb. 2008).

- The Commission should take into consideration, as a factor, the existence of “fast-track” dispositions in any amendment to the immigration guidelines. The “fast-track” dispositions clearly indicate the true seriousness of many offenses, which is markedly lower than current guidelines. Considering “fast-track” sentences also would address the problem of unwarranted disparity for those similarly situated defendants in nonfast-track districts.
- For every Chapter Two guideline that relies on prior convictions (and for calculation of criminal history), the Commission should use “sentence served” instead of “sentence imposed.” “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. It would also lessen the effect of triple counting prior offenses in § 2L1.2 cases, first for increasing the statutory maximum for “aggravated felony,” second for criminal history, and third for recency.
- The Commission should eliminate criminal history points for status and recency for defendants arrested for illegal reentry while they are serving a prison sentence. *See* USSG § 4A1.1(d), § 4A1.1(e). This would help avoid unfair double- and triple-counting of the same conduct.
- The Commission should add an application note suggesting bases for downward departure, such as overrepresentation of criminal history and a defendant’s benign motives for the reentry (*e.g.*, defendants who return for medical or humanitarian reasons, due to dangerous conditions in the defendant’s country of origin, or because of cultural assimilation into the United States).

## B. Our Proposal

We previously submitted a proposed guideline modeled on the guideline for prohibited persons in possession of firearms, USSG § 2K2.1.<sup>6</sup> Our proposal is premised on the fact that both offenses, illegal possession of a firearm and illegal reentry, are enhanced based on the nature of the defendant’s prior convictions, but that the potential harm to the community of a felon’s possession of a firearm is far greater than the potential harm resulting from illegally re-entering the United States. Our proposal retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, and notes that a downward departure may be warranted where the defendant has returned because of family medical needs or because the defendant was culturally assimilated into the United States.

Although our proposal was not included as one of the options published for

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<sup>6</sup> *See* Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 21-23 (July 9, 2007).

comment for this amendment cycle, we believe that it deserves consideration. First, our proposal both addresses application problems presented by the current proposals and reflects the sound policy that Chapter Two guidelines that set offense levels based on prior convictions should have a similar structure while appropriately calibrating punishment to the relative harms involved. Second, the Commission has provided data on its potential impact on sentences, which indicates that our proposal would reduce sentences overall. Like Options 2 and 3, however, it would raise some sentences for the least culpable defendants, though to a significantly lesser degree than Options 2 and 3. Because there is no reason to raise any sentences for illegal reentry, we hope to work with the Commission to discover the reason that our proposal would raise some sentences and then amend it accordingly.

Finally, we remain open to modifications to our proposal that address the goal of simplification (for example, our proposal does not define “crime of violence” in accordance with 8 U.S.C. § 1101(a)(43), as Option 1B of the proposed amendments would do).

### **C. The Proposed Amendments**

In light of our general position, we hesitate to comment at length on the Commission’s proposals because they leave unaddressed many of the most fundamental problems presented by § 2L1.2. However, we would like to point out several ambiguities and problems presented by the proposed amendments – areas that invite more questions than are answered and are of particular concern to the Defender community.

#### **Option 1**

The Commission was not able to conduct an impact analysis for Option 1 with the available data. Without knowing whether Option 1 would reduce the most severe sentences without raising the least, we nevertheless provide the following comments:

##### *Option 1A*

Option 1A not only fails to simplify, but increases complexity to § 2L1.2. By including new language and defining new terms, such as “forcible sex offenses,” Option 1A adds to the many statutory and guideline definitions that the court must consider in each case, exacerbating the confusion and creating yet more areas for litigation. *See, e.g., United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007), *reh’g en banc granted*, 2008 WL 373182 (5th Cir. Feb. 22, 2008) (considering the meaning of “forcible sex offense”). In addition, by retaining guideline-level enumerated categories of offenses that may constitute “crimes of violence,” Option 1A does little to address the application problems identified by many commentators, judges, and practitioners, who have noted with frustration the complex litigation even in the mine run of cases.

Further, by amending the definition of “drug trafficking offense” to include transportation and offers to sell, Option 1A will increase sentences for a large number of



defendants without any reasoned basis for doing so. There has been no empirical evidence, data, or policy reason offered to explain why sentences should now be increased across the board for every defendant convicted of these minor offenses. It is not enough to say that on occasion, defendants sentenced under the current guideline do not receive a 16- or 12-level enhancement for a prior offense that might have been a drug trafficking offense.<sup>7</sup> We cannot support an amendment that addresses unsupported speculation about “problems” created by the categorical approach in some cases by enhancing punishment for defendants not previously subject to an enhancement because the Commission did not view the prior conviction as a drug trafficking offense.

### *Option 1B*

Option 1B appears to be a step in the right direction – at least as far as simplicity is concerned – in that it tends to eliminate some of the application problems, streamlining the definition of “crime of violence” by referring to the controlling statute, 8 U.S.C. § 1101(a)(43), and defining “drug trafficking offense” as it is defined by 18 U.S.C. § 924(c)(2) and recently interpreted by the Supreme Court in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). These changes respond to comments from judges and practitioners alike who urged the Commission to eliminate the often incoherent results of the second-level guideline definitions for “crime of violence.” In addition, the use of § 924(c) as the source of the definition of “drug trafficking offense” enjoys a level of certainty and some needed narrowing of covered offenses. However, we have several concerns.

Option 1B does not address the disproportionate severity of the guideline as a whole. Nor does it address stale convictions or the 16-level enhancement for alien smuggling, which many commentators view as particularly inappropriate in the mine run of cases. In those isolated cases in which aggravating circumstances occur, sufficient mechanisms for increased punishment are already in place. And we are wary of the wholesale incorporation of the definition of “drug trafficking offense” from § 924(c)(2) into the provision advising a 16-level enhancement, as that definition can reach simple possession of more than 5 grams of crack and cases with two prior convictions, including misdemeanors. *See* 21 U.S.C. § 844. Given the varying degrees of seriousness for these offenses, the Commission should exempt the least serious offenses covered by § 924(c)(2) from the 16-level enhancement.

### *Option 1 – Departure Considerations*

Option 1 also proposes two departure considerations in Application Note 7. The first suggests an upward departure where a prior conviction for possession or transportation or offer to sell does not qualify for the 16-level enhancement because it is

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<sup>7</sup> *See, e.g., United States v. Gonzales*, 484 F.3d at 412, 714-15 (5th Cir. 2007) (applying the categorical approach to Tex. Health & Safety Code § 481.112, the offense of “delivery of a controlled substance” includes the offense of “offering to sell a controlled substance,” and thus “lies outside section 2L1.2’s definition of ‘drug trafficking offense’”); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 354 (5th Cir. 2005) (under the categorical approach, an unspecified conviction under Cal. Health & Safety Code § 11352(a), which includes transportation, does not constitute a “drug trafficking offense” under § 2L1.2).

not a “drug trafficking offense” as defined by § 2L1.2, but the offense involved “a quantity of a controlled substance that exceeds a quantity consistent with personal use.” In essence, this proposal invites judges to make factual determinations that second-guess the nature of a prior conviction as determined by the relevant jurisdiction, with the apparent purpose of “making up for” – through increased punishment for the illegal reentry – what a federal judge views as a “too-lenient” state sentence. Although we generally oppose incorporating these types of factual determinations into the advisory guidelines, we believe that should the Commission adopt such a departure provision in § 2L1.2, it must be mitigated by an Application Note that emphasizes the purpose of the system of graduated punishment for illegal reentry:

*The purpose of the specific offense characteristics is to reflect the seriousness of the current offense. It is not to punish the defendant for a prior offense for which he or she has already been convicted and punished.*

The second departure consideration in Option 1B suggests a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43). We believe that any version of § 2L1.2, including the current guideline as written, should limit the 16-level enhancement under § 2L1.2(b)(1)(A) to convictions that meet the definition of “aggravated felony” under § 1101(a)(43). Otherwise, it should include a note such as the one in Option 1B suggesting a downward departure where the prior conviction does not meet the definition of “aggravated felony” under § 1101(a)(43).

## Option 2

Option 2 avoids many of the application problems that currently complicate §2L1.2 by reducing the emphasis on the categorical approach and by linking the greatest single enhancement to national security or terrorism offenses or those “aggravated felonies” described in 8 U.S.C. § 1101(a)(43)(A). However, the data confirms that Option 2 would raise sentences for many of the least culpable defendants without any reason. Although we hesitate to comment at length given this fundamental problem, we point out several features that, in our view, raise serious concerns.

First, in subsection (b)(1), we believe it would be more appropriate to increase punishment if the defendant was convicted of a felony for which a sentence of imprisonment that exceeded 24 months was imposed. This is especially true if the ambiguous language of subsection (b)(3) means that other felony offenses could result in additional (and apparently limitless) increases, as appears to be the case under either option in proposed Application Note 3 .

Second, subsection (b)(4) appears to shift the burden to the defendant to show that he or she has no prior felony convictions in order to receive a decrease in the offense level, a shift that violates principles of basic fairness and implicates constitutional questions of due process. Even worse, it places the burden on the party who is least able to obtain the information. Far from simplifying the process, subsection (b)(4) invites

unnecessary litigation of constitutional proportion and should not be considered.

Third, we oppose the use of any conviction to enhance a sentence for illegal reentry that did not receive any criminal history points under the rules for computing criminal history points in Chapter Four, as directed by Application Note 2 of Option 2. The proposed structure of Option 2 is ambiguous as best, potentially allowing for stacked enhancements through the repeated application of subsection (b)(3) for old convictions or multiple convictions that were disposed of in single proceedings. Application Note 2 thus could operate to result in significantly higher sentences for illegal reentry based on a system that is not only out of sync with the Commission's view of the predictive value of criminal history under Chapter Four (or its relationship to culpability for the instant offense), but is not, as far as we know, based on any reasoned principles or empirical evidence related to the overarching purposes of sentencing for illegal reentry.

A similar criticism must be leveled against Application Note 3, Option B. That provision would greatly increase sentences that, in our view, are already too high. (It would, for example, set the offense level as high as 30 for a defendant convicted twice of minor drug offenses, even if one of them occurred decades earlier.)

Finally, we question the purpose of the upward departure consideration in Application Note 4. The note would invite an upward departure in cases in which the defendant has been removed multiple times before committing the offense of illegal reentry. In addition to raising serious due process concerns (along with the specter of unwarranted disparity between defendants from contiguous and noncontiguous nations), such a departure provision is unnecessary. The Commission removed a similar provision from § 2L1.2 in 2001 when it restructured the guideline to provide for graduated punishment based on the seriousness of the prior offense.<sup>8</sup> Although the Commission provided no specific reason for removing the provision, we note that in fiscal year 2001, it was applied in only two out of 6,121 cases (.03%) for which §2L1.2 was the primary guideline, an application rate that approached zero.<sup>9</sup> We presume that the Commission removed the provision after analyzing it in light of empirical data and the purposes of sentencing in 18 U.S.C. § 3553(a). That judges did not apply it further supports the conclusion that it was not necessary to achieve the purposes of sentencing. Reintroducing a similar provision at this time – in the absence of any new evidence or articulated policy reasons and when sentences are already too high – strikes us as particularly unsound.

### Option 3

Option 3 is conceptually interesting, but should not be adopted at this time. It relies on a sentence-length approach, which is designed to eliminate many of application

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<sup>8</sup> See USSG App. C, Amend. 632 (Nov. 1, 2001) (deleting provision allowing for an upward departure in the case of "repeated prior instances of deportation").

<sup>9</sup> See United States Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*, tbls. 17 & 24 (2001).



problems. However, like Option 2, Option 3 would raise sentences for the least culpable. Moreover, Option 3 retains several enumerated offenses that would require a guideline-level categorical approach, leading to complexity and litigation.

Although we have expressed interest in a sentence-length approach in the past, we recognize that it would represent a fundamental change in the structure of § 2L1.2, one that, if adopted here, might also reasonably be applied to firearms and other Chapter Two guidelines relying on prior convictions. In addition, we believe that before the Commission considers a sentence-length approach for § 2L1.2, it should both revisit criminal history in general, as we expect it will, and revisit the underlying premise of the 16-level enhancement. No matter what, we believe that Option 3B's requirement of a prior sentence of imprisonment exceeding 13 months in order to apply the enhancements under subsection (b)(1)(B)(iii) and (b)(1)(D) is the more appropriate approach, as it is consistent with Chapter 4.

#### **D. Issue for Comment**

The Commission has asked for comment on whether any specific offense characteristics and departure provisions in one option should be adopted by the Commission as part of another option. As we have indicated, we believe that any tinkering with § 2L1.2 should be delayed at least until the next amendment cycle, unless the Commission proposes revising the guideline to address all of its fundamental problems, not just a few application problems, while refraining from raising any sentences without sound policy reasons. For all of the reasons set forth above, we do not believe that any combination of the specific offense characteristics or departure considerations contained in the proposed amendments would achieve the needed reform of § 2L1.2.

Instead, we urge the Commission to take this time to consider our proposal, modeled on the guideline for § 2K2.1. Of course, we would be happy to discuss modifications to it that would advance the goal of simplicity and the overarching purposes of sentencing, but we believe it represents the best starting place.

Thank you for considering our comments, and please let us know if we can be of any further assistance. We look forward to working with the Commission on this very important issue.

**Testimony of Marianne Mariano  
Acting Federal Public Defender  
Western District of New York  
On Behalf of the Federal Public and Community Defenders  
Before the United States Sentencing Commission  
Public Hearing on Proposed Amendments for 2008  
March 13, 2008**

Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments related to criminal history, the Commission's Rules of Practice and Procedure regarding retroactivity, disaster fraud, court security, and animal fighting.

**I. CRIMINAL HISTORY**

The Commission has proposed adding language to USSG § 4A1.2(a)(2) to modify the provision that exempts sentences that are separated by an intervening arrest from being counted as a single sentence. The proposed amendment states:

An "arrest" includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an "arrest".

We see no need for this change. If any change is made, however, only the second sentence should be included.

The first sentence injects unnecessary complications into the guideline. We have been unable to find any reported case in which this issue has been presented. In the absence of any empirical evidence that this issue arises with any frequency, or that it presents an indication of an increased likelihood of recidivism, the Commission should omit this sentence.

Further, the language is so ambiguous that it is likely to lead to extensive litigation and evidentiary hearings. For example, could the government argue that a defendant "escapes" arrest or service of an arrest warrant if he is in fact not at home when the police arrive? If the police go to a home and are falsely told that the defendant is not there? What if police records reflect an inaccurate address, and the government argues that the defendant had previously given a false address? Would a defendant be subject to this provision if he or she moves without leaving a forwarding address? To what extent would the government have to prove that the defendant's actions were motivated by a desire to escape arrest, or that the defendant even knew that police were looking for him?

Although the second sentence does not create the same complications as the first, we likewise see no need for it. This point is clear in existing law. In *United States v. Joseph*, 50 F.3d 401, 402 (1st Cir. 1995), the Seventh Circuit held that issuance of an arrest warrant could not be an "intervening arrest." See also *United States v. Correa*,

114 F.3d 314, 316 n.3 (1st Cir. 1997) (not deciding whether the district court erred in treating issuance of a complaint as an intervening arrest, but describing that ruling as “problematic”).

The intervening arrest rule, which derives from the Parole Commission’s Salient Factor Score, presumably is “consistent with the Parole Commission’s recidivism research, as well as with the common sense notion that an offender who continues to commit offenses after criminal justice system intervention is more likely to recidivate.” Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192 (1997). This rationale does not apply when a defendant escapes arrest, or when a complaint or summons is issued.

This minor issue aside, we remain hopeful that the Commission will soon turn its attention to the career offender guideline. In *Rita*, the Supreme Court emphasized that the guideline system is meant to be “evolutionary,” improved over time as a result of a reasoned dialogue among the district courts, the appellate courts, and the Commission. *See Rita v. United States*, 127 S. Ct. 2456, 2464-65, 2469 (2007) (“The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”).<sup>1</sup> After *Booker*, the rate of below-guidelines sentences for those who otherwise qualified for career offender status markedly increased,<sup>2</sup> and after *Gall* and *Kimbrough*, we can expect that courts will continue to exercise their wide discretion to sentence defendants below the advisory guideline range for career offenders until it more accurately advances the goals of sentencing under 18 U.S.C. § 3553(a).<sup>3</sup> We urge the Commission to seize the opportunity to improve the career offender guideline – not only to reflect more precisely Congress’s directive to the Commission in 28 U.S.C. § 994(h), but also to reflect the empirical data it has collected demonstrating that the career offender guideline too often results in sentences that fail to advance the purposes of sentencing. *See Kimbrough*, 128 S. Ct. at 574-75.<sup>4</sup>

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<sup>1</sup> See also Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

<sup>2</sup> United States Sentencing Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at 137-140 (March 2006).

<sup>3</sup> *United States v. Parker*, 512 F.3d 1037 (8th Cir. 2008) (recognizing that the district court has the discretion after *Gall* to sentence the defendant to 60 months, well below the advisory guideline range of 151-188 months under the career offender guideline under § 3553(a), and noting that the government withdrew its appeal in light of *Gall*); *see United States v. Marshall*, 2008 U.S. App. LEXIS 153, 22-23 (7th Cir. Jan. 4, 2008) (unpublished) (in a case involving a challenge to the career offender guideline, stating that it must “reexamine” its caselaw, in light of *Kimbrough*, in which it had previously held that courts are not authorized “to find that the guidelines themselves, or the statutes on which they are based, are unreasonable”).

<sup>4</sup> United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (career offender guideline “makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses,” does not serve a deterrent purpose, and has a disproportionate impact on African-Americans); *see United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring) (cited in *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007)) (“This might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a)



## II. RULES OF PRACTICE AND PROCEDURE

The Commission also proposes changes to Rules 2.2 and 4.1 of its Rules of Practice and Procedure. Although these rules generally involve Voting Rules for Action by Commission and Promulgation of Amendments, respectively, the proposed changes address only those procedures which govern determinations about whether to give amendments to the guidelines retroactive effect.

We agree with the proposed change to Rule 2.2, which would eliminate the requirement of the affirmative vote of at least three members at a public hearing before staff can be instructed to prepare a retroactivity impact analysis for a proposed amendment. Rule 2.2 should promote, rather than hinder, the initiation of this critical and often time-consuming endeavor and believe the proposed change does just that.

We also agree that Rule 4.1 should be amended to eliminate the requirement that the Commission decide whether to make a proposed amendment retroactive at the same meeting at which it decides to promulgate the amendment, as such an approach is neither practical nor efficient. For example, it would unnecessarily require the preparation of retroactivity impact analyses prior to decisions about whether to promulgate, as such analyses would be needed to inform decision-making and permit meaningful public comment.

We agree with the spirit of the proposed change to Rule 4.1, though the first sentence of the proposed language does not, in our opinion, make sense outside the context of a particular case. We suggest replacing it with the following sentence, which we believe better describes, in the abstract, the import of the proposed amendment:

The Commission, however, shall consider whether to give retroactive application to an amendment that reduces sentencing ranges for a particular offense or category of offenses. See 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2).

This language tracks the statutory language of title 18, section 3582(c) more closely than that of title 28, section 994(u). We believe it conveys a more accurate description of what the Commission does and that citation to both 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2) is appropriate.

With respect to the Commission's request for comment on whether the Rules of Practice and Procedure should provide a time frame governing final action with respect to retroactive application of an amendment and, if so, what time frame, we do not believe the rules should provide a time frame for final action. We fear that a deadline for final action could impact negatively the ability of the Commission to fully and fairly consider

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that '[t]he court . . . impose a sentence sufficient but not greater than necessary, to comply with the purposes of sentencing set forth in' § 3553(a)(2).").

the views of all interested parties, build consensus, and reach a well-considered decision on retroactivity.

In the event the Commission decides a time frame for final action is needed, we suggest a time frame that is more general in nature and that, in any event, does not require final action prior to November 1.

Finally, although the Commission has neither proposed an amendment nor requested comment with respect to Rule 4.3, which governs Notice and Comment on Proposed Amendments, we do believe a change to that rule is needed at this time. Rule 4.3 currently permits the Commission “to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x).” Section 994(x) makes the requirements of title 5, section 553 – publication in the Federal Register and public hearing procedure – applicable to the promulgation of guidelines.

We strongly believe the Commission should amend Rule 4.3 to require notice and comment with respect to commentary, policy statements and amendments thereto. Issues of great importance which directly impact sentence length in a large number of cases are set forth in policy statements and commentary. Section 1B1.10 is one example, and there are many others, including but not limited to all of Parts H and K of Chapter 5, all of Chapter 6, and the treatment of acquitted and uncharged conduct in § 1B1.3. Moreover, post-*Booker*, the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission. There is no current rationale to allow a change as significant as the one recently made to § 1B1.10 to occur absent notice and comment.

Alternatively, we suggest the Commission amend Rule 4.3 to require publication and public hearing procedure where the commentary, policy statements, and amendments thereto will potentially affect a large number of cases or significantly alter the way a particular guideline will be applied.

### **III. DISASTER FRAUD**

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of “reasonably foreseeable pecuniary harm” to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should include an offense level floor, whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to Kathleen Grilli, as well as the written and oral testimony of Marjorie Meyers, which was submitted to the Commission at the public briefing on February 13,

2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud offenses necessarily encompass a wide range of activity, from first-time offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

#### **A. Disaster Fraud Enhancements**

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create “unwarranted *similarities*” among dissimilarly situated individuals. *See Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, individuals convicted of disaster-related fraud range from the poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.<sup>5</sup> A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

In addition, we urge the Commission to reconsider its decision to include as “reasonably foreseeable pecuniary harm” the administrative costs of recovering fraudulently obtained funds that are borne by any government or “or any commercial or

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<sup>5</sup> 42 U.S.C. § 5122(2).



not-for-profit entity.” Congress did not direct the Commission to expand the concept of “pecuniary harm” in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

#### **B. Contractor, Sub-Contractor or Supplier Expansion**

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

#### **C. Mitigating Circumstances**

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant’s experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender’s status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

#### **D. Conclusion**

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

### **IV. COURT SECURITY**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

**V. ANIMAL FIGHTING**

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

We hope that our comments on these proposed amendments will be useful, and we thank you for considering them. As always, we look forward to working with the Commission on these very important issues.