FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 6, 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 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.[1] 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.[2]

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

[1] 73 Fed. Reg. 4,931 (2008).
[2] 73 Fed. Reg. 4,939 (2008).

simply too high.[3] 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,[4] 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.[5] 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.[6] In contrast, only 15.6% of offenders sentenced for crack cocaine received sentences lower than the advisory guideline range (excluding reductions for substantial assistance),[7] despite the

---

[3] *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).

[4] *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.

[5] *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"].

[6] United States Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2006).

[7] *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.[8] 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.

---

[8] *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.[9] 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

[9] *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.[10] 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.[11] 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

---

[10] *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").

[11] *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.").[12] After *Booker*, the rate of below-guidelines sentences for those who otherwise qualified for career offender status markedly increased,[13] 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).[14] 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.[15]

---

[12] *See also* Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hoftstra L. Rev. 1, 18-20, 23 (1988).

[13] United States Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing*, at 137-140 (March 2006).

[14] *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").

[15] 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

---

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.[16] 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

[16] 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,

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

AMY BARON-EVANS
ANNE BLANCHARD
JENNIFER COFFIN
SARA E. NOONAN
Sentencing Resource Counsel

HENRY BEMPORAD
Federal Public Defender, Western District of Texas

MIRIAM CONRAD
Federal Public Defender, District of Massachusetts

LISA FREELAND
Federal Public Defender, Western District of Pennsylvania

MARJORIE MEYERS
Federal Public Defender, Southern District of Texas

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Richard L. Murphy
Judith Sheon, Chief of Staff
Kenneth Cohen, General Counsel
Kelley Land, Assistant General Counsel
Alan Dorhoffer, Senior Staff Attorney