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March 16, 2007

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

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

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

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Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
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[**Option 8 (New):**

§2L1.2. <u>Unlawfully Entering or Remaining in the United States</u>

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) (Apply the greatest):

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

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

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

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

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

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

<u>Commentary</u>

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

<u>Application Notes</u>:

1. <u>Application of Subsection (b)(1)</u>.—

(A) <u>In General</u>.—For purposes of subsection (b)(1):

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

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

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

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

(B) <u>Definitions</u>.—For purposes of subsection (b)(1):

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

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

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

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

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

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

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

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March 2, 2007

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Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

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

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

II. § 2L1.2 (Illegal Reentry)

A. Options 1 through 5

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

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

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

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

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

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

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

B. Option 6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Over-representation of criminal history

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

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

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

III. Issues for Comment

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

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

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

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

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

Sincerely,

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cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
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March 12, 2007

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

Dear Judge Hinojosa:

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

I. Intellectual Property, § 2B5.3

A. "Anti-Circumvention Devices"

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

[1] The directive states:

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

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

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

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

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

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

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

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

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

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

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

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

B. Downward Departure

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

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

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

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

C. Special Skill

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

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

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

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

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

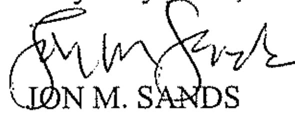
We strongly oppose the proposal by the President's Task Force on Identity Theft to expand the definition of "victim" in USSG § 2B1.1 (or anywhere in the Guidelines) to include a person or entity who sustained no pecuniary harm or bodily injury but "the theft of a means of identification, invasion of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

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

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

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

Very truly yours,



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August 3, 2005

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

Dear Ms. Grilli:

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

I. Family Entertainment and Copyright Act of 2005

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

[1] 28 U.S.C. § 994(o).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] Id. at 6, 11.

[10] Id. at 22.

[11] Id. at 23, 25.

[12] Id. at 2.

[13] Id. at 3.

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

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

[16] Harvard Study at 1, 24.

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

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

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

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

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[17] Id. at 24.

[18] Id. at 2, 25.

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

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

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

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

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

4. Suggested Basis for Downward Departure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Intellectual Property Protection and Courts Amendment Act of 2004

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

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

2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level**.

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

(A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

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

[29] See Harvard Study at 7-8.

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

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

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

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

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

III. CAN SPAM Act of 2003

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

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

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

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

Very truly yours,

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March 14, 2007

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Re: <u>Comments on Proposed Amendments Relating to Terrorism and Transportation</u>

Dear Judge Hinojosa:

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

I. <u>Terrorism</u>

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

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

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

1. Defender Proposals

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

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

§2D1.14. Narco-Terrorism

(a) Base Offense Level

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

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

2. What the Statute Requires

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

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

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

3. The Proposed Amendments Exceed What the Statute Requires.

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

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[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Mitigating Role Cap and Safety Valve

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

B. Border Tunnels, 18 U.S.C. § 554

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Transportation

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

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

Very truly yours,

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