COMMENTS TO PUBLISHED AMENDMENTS

Federal Public and Community Defenders

As the Commission embarks on this amendment cycle, we are reminded of that old adage, "the more things change, the more they remain the same ... only worse." Despite our bulging prison population, each of the proposed amendments responds to a new offense or otherwise ratchets up the sentences on existing offenses. Recognizing that we are simply stating what you already know, Defenders are nevertheless compelled to ask the Commission to be mindful of Justice Anthony M. Kennedy's recent exhortation:

> Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.
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> We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.
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> While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about $26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system.[1]

With this amendment cycle, our *race to incarcerate* will continue to fill federal prisons disproportionately with Latinos, who now make up the largest group of federal prisoners, African Americans, and nonviolent, first time offenders, who are being sentenced to prison terms that were once reserved for only the most serious and violent offenders.[2] Admittedly, this upward spiral in federal

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[1] Speech at the American Bar Association Annual Meeting, by Associate Justice Anthony M. Kennedy, Supreme Court of the United States, August 9, 2003.

[2] In 2001, Hispanics made up 40.6% of the prison population, whites were 30.4% and blacks were 25.3%. 2001 Sourcebook of Federal Sentencing Statistics, Table 4 at 14. In 1995, Hispanics were 27.3%, whites were 39.2% and blacks were 29.2%. USSC, 1995 Annual Report, Table 11 at 45. More

sentencing is driven in large part by Congressional mandates, many in response to Department of Justice initiatives. Yet, without evidence that longer prison terms are necessary to impose just punishment, deter criminal conduct or safeguard the public, the Commission should not add to this upward spiral. Indeed, without such evidence, any increased penalties would be inconsistent with the Commission's statutory mandate to establish guidelines that "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1).

I. PROMULGATE ONLY ESSENTIAL AMENDMENTS

In light of this state of affairs, Defenders recommend that the Commission step back and allow the substantial changes made during the last few years to take hold before making any non-essential changes, including even small adjustments that leave basic problems unresolved. In 2003, Congress and the Commission made substantial changes to federal sentencing, particularly in the area of departure jurisprudence; five separate sets of amendments were promulgated. The extent of the changes, coming on top of the economic crime package and other recent changes, have left the Commission with insufficient time for the thoughtful analysis that should accompany federal sentencing policy and threatens the ability of the criminal justice system to assimilate the changes. It would be wise for the Commission to allow time for these changes to be absorbed into the system. This would reduce application errors and attendant litigation; maintain uniformity; and avoid confusion and prejudice to defendants in the shuffle of new and old concepts.

Defenders recommend, therefore, that during this amendment cycle, the Commission promulgate only essential amendments – those amendments required by statutory mandates or new legislation and those that based on irrefutable empirical evidence, are necessary to protect the public or correct an injustice.

A. Piecemeal Changes Subvert the Legitimacy of the Guidelines

Piecemeal amendments make the guidelines less cohesive and a more complicated labyrinth than necessary and make the Commission's amendment process unsound. Defendants who commit identical crimes with identical backgrounds face substantially different sentences from year to year or season to season, as in the case of the 2003 amendments. In addition to the difficulties for counsel, probation officers and courts of remaining proficient, when the stated reason for an amendment is seemingly ignored

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than three quarters of all federal offenders sentenced in 2001 had no prior countable sentences of 60 days or greater. 2001 Sourcebook of Federal Sentencing Statistics at Table 20 (77.3% or 39,170 of 50,665 cases). Almost ninety percent of all drug cases involved no weapon. Id. at Table 39 (87.6% or 19,766 of 22,552 drug cases). More than a third of all convictions involved white collar, non violent offenses or immigration offenses. Id. at Table 3 & 46 (approximately 13,000 cases were fraud, theft, embezzlement, tax and similar offenses and 8,969 were immigration offenses). Drugs, white collar and immigration offenses -- all nonviolent offenses – make up approximately three fourths of all federal cases.

without explanation only one or two years after its promulgation, the amendment process and the Commission's legitimacy as an expert body is undermined.

For this very reason, two amendments under consideration – aberrant conduct and mitigating role cap – should not be promulgated. With respect to aberrant conduct, there is no reason to once again limit or otherwise amend the policy statement (§ 5K2.20), which was first adopted in November 2000 and again amended just a few months ago during the Departure Review completed in October 2003. Case law reflects that this departure is being applied appropriately by courts, particularly in light of the new de novo standard of review.[3]

There is also no reason to address the overstatement of culpability in the drug guideline with a new approach that "compresses" rather than "caps" the effect of drug quantity. The drug role cap adopted in November 2002 (§ 2D1.1(c)(3)) has barely had a chance to work itself through the courts, with fewer than a dozen cases applying the cap found in a recent Westlaw search. In each of the cases found, the cap functioned as intended -- giving the defendant's role in the offense greater consideration -- with the result that the sentence was more proportional without compromising the goals of deterrence or incapacitation.[4]

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[3] See e.g., United States v. May, __ F.3d __, No. 03-4589, 2004 WL 396279, *7 (4th Cir. 2004) (reversing aberrant conduct departure under de novo standard: "Weighing these factors both individually and in the aggregate, May's case is not exceptional, and a downward departure based on aberrant behavior is not justified."); United States v. Castellanos, 355 F.3d 56, 60 (2d Cir. 2003) (affirming denial of aberrant conduct departure, court held that while spontaneity is not determinative, "it is a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of section 5K2.20 has been met" so that district court properly denied departure for defendant convicted of conspiring to distribute more than 100 grams of heroin, where defendant had a week's notice of the crime, was carrying the money to purchase drugs at the time of arrest, and had attempted to evade responsibility for her role in the drug transaction by lying on the stand and suborning the perjury of others.); United States v. Patterson, 281 F. Supp. 2d 626, 628 (E.D. N.Y. 2003) (granting unopposed aberrant conduct departure to defendant, whose criminal act involved no planning and was of limited duration, amounting to putting friend in touch with trafficker, after refusing to take part in drug transaction and expected and received no payment for arranging meeting; defendant had otherwise been a hard-working woman and supportive daughter and fully cooperated with government).

[4] See e.g., United States v. Ferreira, 239 F. Supp.2d 849, 850, 857 (E.D. Wis. 2002) (applied role cap to impose a 41-month sentence on a 39-year old, safety valve defendant, married, with five children, who had been a lawful permanent resident alien for 25 years, whose involvement was limited to transporting cocaine and had been recruited because he was a truck driver; court would have granted a 3-level downward departure but reduced it to 1-level to offset the role cap reduction); United States v. Ruiz, 246 F. Supp.2d 263, 265 (S.D. NY. 2002) (applied role cap in a case involving a 30-year old first

Unless it has empirical evidence that the role cap is creating unjustified disparity or endangering the public, the Commission ought to give this option more time before scrapping it in favor of a different approach that provides no assurance of more just sentences nor a more welcome reception in Congress.[5] If the Commission is concerned with Congressional opposition to the role cap, it should review its application, report problems and suggested solutions, if any, and explain, through empirical evidence, how the role cap advances or detracts from the purposes of sentencing.

B. Sentence Increases Drive Unintended Increases in Other Guidelines to Maintain Consistent and Proportionate Sentences

Each time the Commission raises one offense level or increases the magnitude of an offense adjustment there are consequent pressures to increase other guidelines to "maintain consistent and proportionate sentencing," the reason stated for a number of the proposed amendments. Hence, each time the Commission proposes what appears to be a minor adjustment to a single guideline, it ought to take into account how that change will impact future sentencing policy. There is no question, that this year's increases establish the seeds of next year's increases for similar offenses and for dissimilar offenses that are regarded more harmful to society.

Harsh drug sentences originally intended to be applied to midlevel dealers and major traffickers – the kingpins and managers who control the flow of drugs – are applied disproportionately to minorities and to street-level dealers, particularly in crack cocaine cases despite repeated attempts by the Commission and Congress to correct the unintended disparity.[6] Yet these same drug sentences drive up sentences for economic crimes even for the "blue-collar" defendant who commits an offense that is not otherwise serious notwithstanding the dictates of 28 U.S.C. § 994(j) ("The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first time offender who has not been convicted of a crime of violence or an otherwise serious offense..."). Now that first-time white collar defendants who commit more serious offenses can be sentenced to terms once reserved for armed career criminal cases, a life sentence across the board at offense level 43 appears to be the only end in sight to the need to maintain "consistent and proportionate sentencing."

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time ecstasy courier, imposing 97-month high end sentence of the 78-97 month range; absent role cap sentencing range would have been 235-293 months).

[5] While the House of Representatives voted to disapprove the role cap when first promulgated, the Senate did not go along with the disapproval.

[6] See *Report to Congress:* Cocaine and Federal Sentencing Policy, Executive Summary at v-viii, USSC (May 2002).

A number of the homicide amendments under consideration fall into this trap of proposing increased penalties to maintain consistent and proportional sentencing. Where amendments are driven primarily by a need to maintain a seeming consistency with recent increases, it is important for the Commission to determine whether there truly exists a lack of proportionality or whether there are significant differences which make the increase unnecessary.

C. Double Counting Harms & Enhancements of a Large Magnitude Are Inconsistent With a Graduated Guideline System

Another problem with a number of the current proposals is the double and triple counting of the same conduct that occurs when the Commission adopts a new specific offense characteristic to capture harm already taken into account in the base offense level or in existing adjustments. Also problematic are enhancements of more than 2 levels. These methods create sharp and generally unjustified differences between defendants whose conduct falls just below the threshold for the particular enhancement, obscuring slight gradations in a defendant's culpability and the seriousness of the offense. Moreover, these methods result in guidelines that are appropriate for the most severe form of an offense but overstate culpability for the majority of defendants sentenced under the guideline.

Steep enhancements of 4-levels or more are particularly objectionable creating the cliffs and tariff effects that pervade mandatory minimum sentences and obscuring important distinctions between gradations of offenses and culpability.[7] The immigration guideline for reentry cases has clearly shown that adjustments of a large magnitude introduce unwarranted disparity into the sentencing calculation, which is adjusted by *ultra vires* methods. The Commission should return to basic guideline principles, using one- and two-level adjustments that provide more graduated, proportional differentiation among defendants whose conduct and prior record are similar rather than the marked difference created by steep enhancements.

A number of the proposals under consideration suffer from these problems. For example, there is little justification to add an upward adjustment for public corruption offenses that involve false identification documents or border entry situations on the basis of a speculative national security risk when the overwhelming majority of cases to be sentenced under these guidelines will not involve such risks. More importantly, there already exists a substantial enhancement in Chapter 3, which applies whenever the government can prove by a mere preponderance of the evidence that the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4.[8] There is thus no need to

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[7] See generally *Special Report to Congress:* Mandatory Minimum Penalties in the Federal Criminal Justice System, USSC at 23-34 (Aug 1991).

[8] The Terrorism adjustment in § 3A1.4 applies if "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." In such cases, an upward adjustment of 12 levels applies, with a minimum offense level of 32; and the criminal history category is enhanced to category VI.

add an enhancement that will apply to all border entry situations or involving false identification documents, when the overwhelming majority of cases prosecuted will pose no national security risk. For those cases that do involve a national security risk, the Chapter 3 terrorism adjustment will adequately capture the harm.

Similarly, a number of the amendments in the pornography guidelines propose increases for conduct which the Commission had already taken into consideration in existing specific offense characteristics making the increases unnecessary.

D. Ratcheting Up Sentences Corrupts the Criminal Justice System

Sentences that are continuously ratcheted up shift discretion from Article III judges to prosecutors, driving sentencing decisions from the public arena of the courtroom to the back rooms of a prosecutor's office. Prosecutors use unreviewable discretion to exact guilty pleas in return for waivers of Constitutional and procedural rights, creating unjustified disparities in the bargain.[9] Penalties deemed too harsh, even by the government which sought the severe sentences in the first place, are then reduced through fast track programs and charge bargains available at the sole discretion of the prosecuting attorney.

These methods exact too steep a cost. They impair the truth-seeking function of courts, jeopardize the defendant's Fifth and Sixth Amendment rights to effective assistance of counsel and to present a defense, and introduce disproportional and unjust punishment. As fast track practices become normalized, moreover, they also have a corrupting effect on the whole criminal justice system; waivers of constitutional rights become standard terms inserted into all plea bargains, even in the absence of deeply reduced sentences. A more just response that does less damage to our principles is to set sentences for all such offenses at the lower ranges that the government deems appropriate for fast track cases. The current proposals move us farther away from this solution.

In the face of a morally perverse upward sentencing spiral that is not tied to protecting the public nor establishing just punishment and that seemingly ignores the human costs of imprisonment, the Commission must faithfully adhere to its statutory mission to ensure that courts can impose sentences that

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This results in a range of 210 - 262 months, or 151-188, with a 3-level reduction for acceptance of responsibility.

[9] Guilty plea rates have increased from 88.1% in 1989 to 96.6% in 2001. A defendant continues to receive a more severe sentence for asserting his innocence and exercising his constitutional right to have a jury determine his guilt, even when acquitted of some or even most of the charges. The PROTECT Act imposes even more burdens on the exercise of constitutional rights for now a defendant who litigates pretrial motions challenging constitutional violations risks loss of the third point for acceptance of responsibility, even when he thereafter pleads guilty, at the sole discretion of a prosecutor.

are "sufficient, but not greater than necessary" to meet the purposes of sentencing. 18 U.S.C. § 3553(a).[10] Anything else makes for sentencing policy that rather than reflecting the "advancement in knowledge of human behavior as it relates to the criminal justice process" as required by 28 U.S.C. § 991(b)(1)(C), devolves to constant and unjustified increased punishment.

Proposed Amendment #1 – Child Pornography:

While a number of the proposed changes are required to implement statutory changes enacted in the PROTECT Act, many of the proposals go beyond the requirements of the Act and ought not be promulgated. In relevant part, The PROTECT Act increased statutory maximum penalties and created or increased the statutory mandatory minimum for a number of the offenses covered by these guidelines. The PROTECT Act also included four directives that are relevant to the proposed amendments:

- **Section 401(i)(2):** the Commission "shall amend ... to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b), 2244(a)(4), and 2244(b)," sexual abuse of a minor, abusive sexual contact, and unwanted sexual contact, respectively. This directive affects guidelines **§2A3.3 and §2A3.4.**

- **Section 504(c):** Directs the use of U.S.S.G. § 2G2.2 (or other guideline if such does not result in "sentencing ranges that are lower than those that would have applied under" 2G2.2) for violations of 18 U.S.C. § 1466A, engaging in the business of selling or transferring obscene matter. This directive affects guidelines **§2G3.1 and §2G2.4.**

- **Section 512:** the Commission "shall review, and as appropriate amend . . . to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of [18 U.S.C. § 2423] to deter and punish such conduct." This directive affects guideline **§2G1.1**.

- **Section 513:** the Commission "shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of [18 U.S.C. § 2252A(a)(3)(B) or 2252A(a)(6)] as created by this Act. With respect to the guideline for section 2252A(a)(3)(B) the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such materials. This directive affects guidelines **§2G2.2** and **§2G2.4.**

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[10] In "Race to Incarcerate," Marc Mauer concludes with the moving appeal to stop "caging the least fortunate among us to solve our problems." See Marc Mauer, Race to Incarcerate (The Sentencing Project, 2001).

Recommendations by Defenders:

- Do not increase the base offense level in trafficking (2G2.2) or possession (2G2.4) cases because enhancements that typically apply in these cases, i.e., use of computers and number of images, already result in an offense level in the typical case that adequately reflects the penalty increases required by the PROTECT Act.

- Do not consolidate the guidelines for trafficking and possession offense, which would make the guideline more complex by requiring multiple alternative base offense levels and will expose simple possession offenses to enhancements that should apply only in distribution offenses.

- Make enhancements applicable to defendant's conduct rather than based on all conduct within the relevant conduct of others ("offense involved") to more adequately reflect the defendant's culpability.

- An "image" should be defined in terms of a single item such as one photograph or video rather than by reference to each frame in a video or each person depicted. This definition reflects a more common-sense definition and thus more readily comports with notice requirements of due process particularly as these factors are applied based on a preponderance of reliable "hearsay." This definition is also more appropriate as it pertains to a factor that does not necessarily measure culpability with sufficient precision to support a broader definition. For similar reasons, an "image" should exclude images contained in temporary cache drives that are automatically downloaded to a computer when a defendant visits a site without the knowledge of the defendant; images which the defendant did not cause to download or of which the defendant was not aware are not probative of enhanced culpability and should therefore not be used to enhance the defendant's sentence.

- Adopt the Seventh Circuit rule in United States v. Sromlski, 318 F.3d 748 (7th Cir. 2003), which held that the cross-reference in U.S.S.G. § 2G2.4(c)(2), which directs use of the trafficking guideline, should apply in simple possession cases only where it can be shown that defendant received child pornography with the intent to traffic. The Sromlski rule is well-reasoned and should be adopted. As the Sromlski court explained, any other interpretation of the cross-reference would "effectively read[] § 2G2.4 out of the Guidelines." 318 F.3d at 753. In addition, the Sromlski analysis is consistent with the Commission's reason for promulgating U.S.S.G. § 2G2.4 as stated in Appendix C, Amend. 372. Id.

- Because any increases to the offense levels or enhancements for the criminal sexual abuse

guidelines at §§ 2A3.1 (criminal sexual abuse), 2A3.2 (statutory rape), 2A3.3 (sexual abuse of a minor/ward), and 2A3.4 (abusive sexual contact) will have a disparate impact on Native Americans, who account for a large number of the persons prosecuted for these offenses in the federal system, do not increase penalties for these offenses; it would be preferable to create a new guideline (§ 2G1.3) to account for the PROTECT Act created-mandatory minimum applicable to cases involving the offense of traveling with intent to engage in a sexual act with a juvenile.

- Increases to account for proportionality issues created by increases in §§ 2G2.2 and 2G2.4 would not be necessary, or should be kept to a minimum, if the Commission does not increase the base offense level for the child pornography guidelines as Defenders have recommended.

- Defenders object to the use of cross-references, which are widely used in the child abuse guidelines because they are violative of basic notions of due process, and impose punishment on persons without the benefit of an indictment, trial by jury, or a finding of guilt beyond a reasonable doubt.

A. Offenses Under § 2G2.2 (Trafficking) and § 2G2.4 (Simple Possession)

The Commission has proposed amending § 2G2.2 and § 2G2.4 to reflect the new mandatory minimum and increased statutory maximum penalties in the PROTECT Act. It also proposes to amend § 2G2.2 in response to the directive in § 513 of the PROTECT Act that requires the Commission to "review and, as appropriate, amend the guidelines to ensure that penalties are adequate to deter and punish conduct" that involves a violation of new offenses relating to the distribution or solicitation of obscene visual depictions of a minor engaging in sexually explicit conduct or distribution of such materials to a minor. One option also proposes to consolidate the trafficking and simple possession offenses under a single guideline.

§ 2G2.2: The proposal provides two options for trafficking offenses to replace the existing base offense level 17 to a level ranging from level 20 to level 26.

§ 2G2.4: The proposal provides for an increase in the base offense level 15 to a level 18 or 20 to account for the new 5-year statutory mandatory minimum applicable for simple possession cases.

1. No Increase in the Base Offense Level is Necessary

The existing enhancements in § 2G2.2 result in a total offense level of 39 when all the enhancements apply. For a defendant in criminal history category I, for example, with an offense level 39, the sentencing range is 262 to 327 months. With a Criminal History category of IV or above, the range is 360 to life. The statutory maximum for offenses covered under this guideline range from 20 to 40 years imprisonment,

as amended by the PROTECT Act. Hence, the existing base offense level and enhancements generate an appropriate range for even the most culpable defendants.

2. Any Increase in the Base Offense Level Should be Minimal and Should be Set to Produce a Sentencing Range Below the Statutory Mandatory Minimum to Account for Typical Enhancements

If the Commission were to decide that the base offense level must be increased to correspond to the offenses with newly enacted 5-year mandatory minimums, any such increase should be minimal and in any event, should be set to fall below the statutory minimum because a number of specific offense characteristics are typically present in the commission of the offense in its simplest form.[11] In formal findings, Congress determined that the "vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media." See PROTECT Act, § 501(6) (congressional finding of computer use in these offenses). This means that the "vast majority" of these offenses will trigger a 2-level upward adjustment for use of a computer. U.S.S.G. §§ 2G2.2(b)(5) (adjustment for use of computer); 2G2.4(b)(3) (same). Typically when computers are used, the offense also involves multiple images and will thus trigger an additional upward adjustment of between 2 to 5 levels (10 or more images to 600 or more images, respectively). See U.S.S.G. §§ 2G2.2(b)(6); 2G2.4(b)(5). Defenders recommend, therefore, that the Commission establish the base offense level below the statutory minimum so that in the typical case, the mandatory minimum range is not the starting point to which these typical enhancements are added.

a. An Increase to Base Offense Level 18 Suffices

If the Commission were determined to increase the base offense level, Defenders recommend an increase to Base Offense Level 18 under Option 1. As long as the offense level is set at level 18, there is no need to establish alternative base offense levels as proposed under Option 2. A single offense level at a lower level would simplify the guideline.[12] For example, at Base Offense Level 18, the typical child

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[11] The PROTECT Act created 5-year mandatory minimums for violations of

[12] Option 2 provides for alternative base offense levels as follows:

(1) [20] [22][24], if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or

(2) [22] [24] [25] [26], otherwise.]

pornography offense would result in a range above the 5-year mandatory minimum before acceptance of responsibility.

With a base offense level of 18, a first time offender who commits a typical offense that involves the download of at least 150 images (+3); using a computer (+2); with no intent to distribute for pecuniary gain but who exchanges the pornographic images by bartering with others in a chat room or otherwise (+5), faces a sentencing range of 78 to 97 months (OL 28), before acceptance of responsibility or 57 to 71 months (OL 25), with a full 3-level reduction for acceptance. If more images were involved, which is rather typical when a computer is involved, or if the images involved a minor under the age of 12, an additional 2-level enhancement would apply for a range of 97 to 121 months (OL 30). The total offense level would be much greater for more serious offenses that involved enhancements for distribution for pecuniary gain (+ 2 to + 30 levels from the loss table in § 2B1.1); or sadistic, masochistic, or violent images (+ 4 levels); or distribution to a minor (+5 levels), for example.

3. Relative Culpability of Distributing as Compared to Soliciting Materials Is Already Taken into Account by Existing Enhancements

Section 513 of the PROTECT Act directs the Commission to "consider the relative culpability of promoting, presenting, describing, or distributing material . . . as compared with solicitation of such material." Existing enhancements already account for the relative culpability of the differing conduct. Section 2G2.2(b)(2) already provides an adjustments ranging from 2 levels to a maximum of 30 levels to account for the increased culpability of defendants who distribute obscene pornographic materials. A person who distributes materials for pecuniary gain is subject to a minimum enhancement of 5 levels up to level 30, by reference to the loss table in § 2B1.1 to correspond to the retail value of the material. Distribution to a minor triggers a 5 to 7 level enhancement. Distribution involving the bartering of materials triggers a 5-level enhancement. Hence, the Commission does not need to establish alternative base offense levels to account for the relative culpability between the person who merely solicits pornographic materials and one who distributes such materials because that difference is already taken into consideration in existing adjustments. Were the Commission to establish a higher base offense level for cases where the defendant's conduct involved distribution, it would result in an unjustified double counting of this factor even in cases where the distribution amounts to nothing more than the bartering of such depictions for no pecuniary gain.

There is no need to establish an alternative higher base offense level to distinguish the relative culpability between a person who merely solicits such materials as the guideline already takes this factor under consideration. The directive in section 513 does not require an amendment it just requires the Commission to "consider the relative culpability," which the Commission has amply done in this guideline.

Proposed Amendment #3 – Body Armor (§ 2K2.6):

Defenders recommend that the Commission set the base offense level at level 8 or below, in light of the 3-year statutory maximum penalty for this new offense. The proposed amendment creates a new guideline applicable to 18 U.S.C. § 931, a new offense that prohibits felons from purchasing, owning or possessing body armor.[13] The proposal provides for a base offense level of [8], [10] or [12] and an upward adjustment of [4] levels if the "defendant used the body armor in connection with a [crime of violence or drug trafficking crime] or [another offense]."

A. Base Offense Level for § 2K2.6:

An offense level of 6 for a felon in possession of body armor would be more consistent with the guidelines' treatment of comparable or even more serious offenses. The chart below identifies the BOL for related 2K2 offenses that provide good reference points. For example, the base offense level in § 2K2.5 for the unlawful possession of a firearm in a school zone, a class D felony which carries a 5 year statutory maximum, is offense level 6.[14] Similarly, the base offense level in § 2K1.5, for possession of dangerous weapons and materials on aircrafts, a class C felony, which carries a 10 year statutory maximum, is offense level 9. Even § 2K2.1, the guideline for a felon-in-possession of a firearm, which carries a statutory maximum of 10 years has a BOL 14 (for defendants who do not have multiple priors that involve crimes of violence or drug trafficking offenses).

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[13] Body Armor is defined as "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment." 18 U.S.C. § 921(a)(35).

[14] 18 U.S.C. § 922(q)(2)(A) makes it a crime "for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." The offense is punishable by imprisonment for "not more than 5 years," which can "not run concurrently with any other term of imprisonment imposed under any other provision of law." 18 U.S.C. § 924(a)(7); see also 18 U.S.C. § 3581(b)(5) (Class E felony).

USSG	BOL	Offense	US Code Section	Stat Max
2K1.5	9	Possessing Dangerous Weapons/Materials on Aircraft	49 U.S.C. § 46505	10 years
2K2.1	14	Felon-in-Possession of Firearm	18 U.S.C. § 922(g)	10 years
2K2.5	6	Possession of Firearm in School Zone	18 U.S.C. § 922(q)	5 years consecutive

Each of these comparable offenses not only carries a more a severe statutory maximum penalty, each also defines a more serious offense. Body armor is a defensive artifact, which in many or even most cases will be used by defendants as a means of self-defense, perhaps to protect oneself from others in a crime-ridden neighborhood. In contrast, firearms or weapons can be used to harm others in ways that a bulletproof vest cannot. Moreover, if the body armor is used for a more dangerous purpose, such as to embolden the user during a crime of violence, the defendant is subject to prosecution for the crime of violence. Establishing a higher offense level for this 3-year felony would create a guideline that is neither consistent nor proportionate to guidelines that cover similar offenses.

Adjustment at § 3B1.5:

The proposed amendment also adds commentary to the Body Armor upward adjustment in U.S.S.G. § 3B1.5 explaining that the adjustment should not be applied when the defendant is also convicted under 18 U.S.C. § 931. However, if the defendant is also convicted of a crime of violence or drug trafficking offense, the § 3B1.5 adjustment "may be applied with respect to that crime of violence or drug trafficking crime." Defenders recommend that the Commission eliminate § 3B1.5 altogether now that a separate offense has been enacted, with a corresponding guideline. But in any event, if a § 931 conviction is present, there should not be a double-counting of the possession of the bulletproof vest or other body armor by allowing the crime of violence or drug trafficking offense to also be enhanced under § 3B1.5.

Defenders also oppose the specific offense characteristic because it allows the government to increase the sentence without proof beyond a reasonable doubt or indictment, based merely on reliable hearsay. Defenders also oppose that portion of application note 3 to U.S.S.G. § 3B1.5, which provides for double counting of the use of body armor by authorizing imposition of the enhancement in chapter 3 in addition to a prosecution for § 931.

Proposed Amendment #4 – Public Corruption

Defenders do not believe that there is any reason for increasing punishment for all bribery and gratuity offenses. The proposal would increase the base offense level, make some enhancements

cumulative, and add two new enhancements: (1) if the defendant was a high level official and (2) if the offense involved a payment to a border agent or involved a passport or government issued identification document. These changes are all proposed without any empirical evidence that increased punishment is necessary to deter, incapacitate or provide just punishment and therefore should not be adopted.

As an initial matter, because these guidelines incorporate the loss table from § 2B1.1, punishment for these offenses has already been increased in recent years. In November 2001, when the Commission promulgated the economic crime package the loss table was increased for cases involving a loss in excess of $10,000. At the same time, the table was amended to use 2-level increments rather than the previous 1-level increments; the loss table also was increased from a maximum of 18 offense levels to 26 levels. Just last year, the Sarbanes-Oxley amendments once again increased the loss table at the highest levels from 26 levels to 30 levels.

Second, there is no need to add an enhancement related to entry across the border or when identification documents are involved. This enhancement is based, purportedly, on some speculative national security risk. However, the great majority of cases prosecuted under this guideline will involve the run of the mill border crossing by an alien attempting to enter the United States to visit relatives or obtain work so that this enhancement will overrepresent the culpability of most offenses and offenders. Where an actual national security breach is involved, for example, were a terrorist to be prosecuted for this offense, the increased culpability will be adequately covered by application of the terrorism adjustment in § 3A1.4. Moreover, the potential for such severe punishment under § 3A1.4, in cases involving national security risks, is more than adequate to deter these offense, assuming that deterrence in fact results from increased punishment.

Third, if punishment is to be enhanced based on such a speculative national security risk, then a distinction should be made between the person who offers the bribe, who presumably will know whether he or she presents a national security risk, and the person who accepts the bribe, who risks the breach of national security by accepting a bribe, without adequate notice of the circumstances. Only the person who accepts the bribe and risks the breach of security should receive an enhancement, if the Commission were to adopt such an enhancement.

Lastly, and under all circumstances, work permits should be exempted from the reach of this enhancement.

Proposed Amendment # 6 – Mitigating Role

Proportionality, one of the lynchpins of the Sentencing Reform Act and indeed a hallmark of fairness in sentencing continues to be elusive in drug sentencing because of the overemphasis on drug quantity in the guidelines scheme. To quote Justice Breyer: "sentencing fairness ... demands that the law punish a drug "kingpin" and a "mule" differently. *Harris v. United States*, 122 S.Ct. 2406, 2421 (2002).

To address this very concern, in November 2002, the Commission adopted amendment 640 in response "to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders."

The Commission now proposes to amend § 2D1.1(c)(3) that caps the offense level for defendants who receive a mitigating role adjustment by replacing it with an alternative reduction that "is more gradual and less generous than the current approach." Published proposal at 97. Defenders recommend to the Commission that it first assess how the cap is working before it undertakes a repeal, so soon after its adoption.

When the Commission adopted the amendment, it provided the following reason:

> [T]he amendment modifies § 2D1.1(a)(3) to provide a maximum base offense level of level 30 if the defendant receives an adjustment under § 3B1,2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., "mules" or "couriers" whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment.
>
> This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in § 2D1.1 overstates the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under § 3B1.2. The Commission determined that, ordinarily, a maximum base offense level of level 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at § 2D1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments), may increase the offense level above level 30. The maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders.

Appendix C, Amend. 640 at 265 (2002).

The reasons stated by the Commission when it adopted this amendment remain valid. The Commission would undermine its credibility were it to abandon this provision so soon after its adoption, particularly without any evidence that it is not working as intended.

Accordingly, as noted above, Defenders recommend that the Commission give the cap more time to work itself through the courts before it undertakes yet another change. Published cases reveal that the cap is functioning as intended -- giving the defendant's role in the offense greater consideration -- with the result that the sentence was more proportional without compromising the goals of deterrence or incapacitation.[15] Unless it has empirical evidence that the role cap is creating unjustified disparity or

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[15] See e.g., United States v. Ferreira, 239 F. Supp.2d 849, 850, 857 (E.D. Wis. 2002) (applied role cap to impose a 41-month sentence on a 39-year old, safety valve defendant, married, with five children, who had been a lawful permanent resident alien for 25 years, whose involvement was limited to transporting cocaine and had been recruited because he was a truck driver; court would have granted a 3-level downward departure but reduced it to 1-level to offset the role cap reduction); United States v. Ruiz, 246 F. Supp.2d 263, 265 (S.D. NY. 2002) (applied role cap in a case involving a 30-year old first

endangering the public, the Commission ought to give this option more time before scrapping in a favor of a different approach that provides no assurance of more just sentences nor a more welcome reception in Congress. If the Commission is concerned with Congressional opposition to the role cap, it should review its application, report problems and suggested solutions, if any, and explain, through empirical evidence, how the role cap advances or detracts from the purposes of sentencing.

Proposed Miscellaneous Amendments # 8A: § 2B1.1(b)(7)(C).

A. § 2B1.1(b)(7)(C). Defenders agree with the proposal to make the enhancement in § 2B1.1(b)(7)(C) regarding a violation of a prior judicial order apply only when the violation is committed by the defendant and not based on the relevant conduct of others but recommend that the term "knowingly" be inserted into both the guideline and the commentary to better implement the Commission's stated rationale for the enhancement. In the published proposal, the Commission explains that this enhancement should not be applied on the basis of conduct by others given "that the underlying principle of the enhancement is to provide increased punishment for an individual who demonstrates aggravated criminal intent by knowingly ignoring a prior warning not to engage in particular conduct." Synopsis of Proposed Amendment 8(A) (emphasis added).

Defenders recommend that the published proposal to amend the guideline and commentary be amended to read:

§ 2B1.1(b)(7):

> If . . . (B) the defendant *knowingly* violated a prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

and

§ 2B1.1, comment. (n. 6(D)):

> Offenses Committed in Contravention of Prior Judicial Order.– Subsection (b)(7)(B) provides an enhancement if the defendant commits an offense in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who *knowingly* does not

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time ecstasy courier, imposing 97-month high end sentence of the 78-97 month range; absent role cap sentencing range would have been 235-293 months).

> comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. . . .

Proposed Amendment #10 – Aberrant Behavior

To amend the policy statement for aberrant behavior in § 5K2.20 once again so recently after the October 2003 amendment is burdensome. The policy statement in § 5K2.20 was first created effective November 1, 2000 "in order to resolve a longstanding circuit conflict and more appropriately define when a departure based on aberrant behavior may be warranted." *Report to Congress:* Downward Departures from the Federal Sentencing Guidelines, US Sentencing Commission (Oct. 2003). On October 27, 2003, as part of the PROTECT Act departure amendments, the Commission added several additional prohibitions and provided greater guidance in how to apply the existing § 5K2.20 provisions. The Commission should give those amendments time to work through the system before it makes yet another change.

Moreover, empirical evidence of the incidence of this departure is not clear. For example, the Commission's PROTECT Act departure review disclosed that a number of "Fast Track" departures resulting from government initiated programs cited aberrant behavior as the basis for the sentence reduction. Id. at 45. The Commission should not make another change just for the sake of change without empirical evidence of how the changes already adopted have worked. That information is not yet available.

Lastly, this departure should not be integrated into the computation of criminal history, as suggested in the pending Issue for Comment until the Commission completes its ongoing recidivism study. Once that study is completed, amendments to the Criminal History guideline will be considered by the Commission. In addition, at that point, there should also be case law regarding the October 2003 amendments, including how the Early Disposition departure practices have affected aberrant behavior departures.

It would make much more sense to wait to gather information to make a more informed decision before making one more piecemeal change at this time, particularly without any empirical evidence showing that a change is needed.

Proposed Amendment # 12 – Immigration

Defenders recommend that the Commission delay until next cycle any partial amendments dealing with the immigration guidelines. Immigration offenses continue to present a number of substantial application issues particularly with the guideline for offenses involving reentry after deportation, for which no proposed amendments are being considered during this cycle. It would also make more sense to wait and see how the Early Disposition Departure recently adopted is being applied to immigration cases. In sum, it would be more efficient and appropriate to submit an immigration package that incorporates both appropriate reductions as well as any increases that may be required.

U.S.S.G. § 2L1.1

If the Commission is nevertheless determined to adopt an amendment for alien smuggling cases, Defenders recommend that the Commission adopt 2-level increments rather than more steep enhancements, which have proven to cause a number of application problems in the § 2L2.1 guideline.

Moreover, because smuggling cases involve serious issues for obtaining evidence and preserving testimony of material witnesses, enhancements should be kept to a minimum. It would be unjust for a defendant to be subject to enhancements without the ability to refute the information because witnesses have been deported.

Lastly, the proposed enhancement of 8 to 12 levels with a minimum offense level of 25 if the offense resulted in death creates serious due process problems, particularly as the enhancement applies based on relevant conduct of others and is not limited to conduct for which the defendant alone is responsible ("if the offense involved"). In cases of this nature, the government often indicts every person remotely connected to the offense – the driver, the recruiter, a shop keeper or other employer who may have tried to help an employees' family to come to the United States. Using strict liability to apply such a steep enhancement does not comport with due process and is certain to result in unjustified disparate sentences.

U.S.S.G. § 2L2.2

Defenders strongly oppose any increase in the base offense level for these offenses. These documents are essentially equivalent to illegal entry documents, where the BOL is 8 (2L1.2). More significantly, thousands if not millions of the undocumented aliens working in this country (those recently applauded by the President and being offered semi-legal status) use these type of documents to work. This proposal is inconsistent with the new compassion toward hardworking undocumented aliens that the Administration has announced.

Defenders object to the double-counting aspect of using convictions both to assess criminal history and as a function of an offense level adjustment. Moreover, the other major problem with using priors for

this adjustment is the potential remoteness of the prior aggravated felony. In many such cases there may exist a long history of law-abiding behavior since the defendant obtained the prior conviction. The proposal does not provide any time limit or staleness provision for counting prior felonies but if the Commission is to promulgate this amendment it should include such traditional criminal history limitations.

The proposed enhancement if the defendant was a fugitives wanted in another country should not be adopted for the same reasons foreign convictions do not count. Like foreign convictions, fugitive warrants may have been obtained without regard to the most basic due process guarantees or may reflect political or religious persecution, which would be very difficult for a defendant to prove.

Defenders also oppose any special treatment for obtaining or using passports. A fraudulent document is a fraudulent document after all. If the increase is based on some speculative national security risk, as previously discussed that issue may be addressed by application of the terrorism enhancement in § 3A1.4 in cases actually presenting such a risk.

Conclusion

Defenders are available to provide any additional information that the Commission may require.