

**FEDERAL DEFENDER  
SENTENCING GUIDELINES COMMITTEE**

Lyric Office Centre  
440 Louisiana Street, Suite 1350  
Houston, Texas 77002-1634

Chair: Marjorie Meyers

Phone: 713.718.4600

March 21, 2016

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

**Re: Public Comment on Proposed Amendments for 2016**

Dear Chief Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published on January 15, 2016. At the public hearing on February 17, 2016, we submitted written testimony on the proposals related to the guidelines for Compassionate Release and Conditions of Supervision. At the public hearing on March 16, 2016, we submitted written testimony on the proposals related to the guidelines for Immigration and Child Pornography. Copies of that testimony are attached and incorporated as part of our public comment. Here, we address a few issues that arose at the March hearing and offer additional comment on the Commission's proposals.

**I. Immigration**

**A. Proposed Amendments to §2L1.2**

**1. Using Prior Illegal Reentry Convictions to Increase the Offense Level**

At the March hearing, the Commission questioned whether individuals with multiple reentry convictions are more culpable and deserving of greater punishment because they have ignored multiple orders to stay out of the country. Defenders are troubled that the Commission seems to view all individuals with multiple reentries as having similar culpability and is poised to increase sentences for those with the least culpable motives. While the Commission provides additional enhancements for those who have multiple violations and have committed crimes, it fails to do anything in the opposite direction for those who reenter because of family, finances, or fear. The Commission's proposal would increase sentences for many of these status offenders

who reenter multiple times for these reasons, without any evidence that these individuals are more culpable and without any evidence that increased sentences will deter future violations or better protect the public.<sup>1</sup>

We also remind the Commission that the harsh conditions of confinement in private contract prisons are an additional punishment. Before increasing sentences on the basis of prior illegal reentry convictions or minor prior convictions, we encourage the Commission to read the 2014 American Civil Liberties Union report: *Warehoused and Forgotten: Immigrants Trapped in our Shadow Private Prison Industry*.<sup>2</sup> The report documents “pervasive and disturbing patterns of neglect and abuse of the prisoners – all non-citizens, most of whom have been convicted only of immigration offenses (such as unlawfully reentering the country).”<sup>3</sup> Prison conditions were so bad at one facility in Willacy County, Texas, that a major uprising occurred last year.<sup>4</sup> And an Inspector General’s report, identifying an improper payment by BOP of \$1.95 million to a private prison facility in Reeves County, Texas that failed to meet minimum contractual standards, has raised concerns in Congress.<sup>5</sup> By increasing sentence length for the least culpable (i.e., those who currently receive +0, +4, or +8 increases in offense level), the Commission would only exacerbate these problems unless courts choose not to follow the guidelines.

Rather than put more people in private prisons for longer periods of time and appear to buy into the urban myth that all unauthorized immigrants present a danger to the community, the Commission should focus its efforts on individuals who reenter and commit serious violent

---

<sup>1</sup> “[T]here is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation. Instead, the evidence suggests that reoffending is either unaffected or increased.” Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013).

<sup>2</sup> <https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system?redirect=CARabuse>.

<sup>3</sup> *Id.* See also Cristina Costantini & Jorge Rivas, *Shadow Prisons: A Private and Profitable Corner of the Federal Prison System Thrives After a Long-Ignored Offense is Prosecuted*, Fusion, <http://interactive.fusion.net/shadow-prisons/index.html>.

<sup>4</sup> Brianna Lee, *ACLU Petitions DOJ to Investigate Texas Immigrant Prison Uprising*, Int’l Business Times (Mar. 11, 2015), <http://www.ibtimes.com/aclu-petitions-doj-investigate-texas-immigrant-prison-uprising-1844012>.

<sup>5</sup> See Letter from Senator Charles Grassley, to The Honorable Charles E. Samuels, Jr, Director Federal Bureau of Prisons (June 12, 2015) (citing Office of the Inspector General, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas to Operate the Reeves County Detention Center I/II Pecos, Texas* (April 2015)), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-06-12%20CEG%20to%20BOP%20%28Prison%20Contractor%20Waste%29.pdf>.

offenses. It can do so by using the categorical approach or setting appropriate enhancements based upon sentence imposed or time served.

## **2. Enhancements Based Upon the Length of the Sentence Imposed**

As to comments made by some witnesses that a sentence imposed or time served approach does not adequately capture the seriousness of the offense because state court judges impose lesser sentences on unauthorized immigrants, evidence we have gathered does not show that Texas judges routinely or consistently follow such practices. First, Texas law expressly prohibits a judge from suspending the imposition of sentence and imposing community supervision if the person has been convicted of a serious offense such as murder, sexual assault, aggravated robbery, indecency with a child, and a host of other offenses.<sup>6</sup> Nor does a discharge to an immigration detainer operate as a suspended sentence under the guidelines.<sup>7</sup>

---

<sup>6</sup> Under Texas law, a judge may not “suspend imposition of the sentence and place the defendant on community supervision” if the defendant was adjudged guilty of an offense under:

- (A) Section 19.02, Penal Code (Murder);
- (B) Section 19.03, Penal Code (Capital murder);
- (C) Section 21.11(a)(1), Penal Code (Indecency with a child);
- (D) Section 20.04, Penal Code (Aggravated kidnapping);
- (E) Section 22.021, Penal Code (Aggravated sexual assault);
- (F) Section 29.03, Penal Code (Aggravated robbery);
- (G) Chapter 481, Health and Safety Code, for which punishment is increased under:
  - (i) Section 481.140, Health and Safety Code; or
  - (ii) Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections;
- (H) Section 22.011, Penal Code (Sexual assault);
- (I) Section 22.04(a)(1), Penal Code (Injury to a child, elderly individual, or disabled individual), if the offense is punishable as a felony of the first degree and the victim of the offense is a child;
- (J) Section 43.25, Penal Code (Sexual performance by a child);
- (K) Section 15.03, Penal Code, if the offense is punishable as a felony of the first degree;
- (L) Section 43.05, Penal Code (Compelling prostitution);
- (M) Section 20A.02, Penal Code (Trafficking of persons); or

Second, available data and information from the field shows that Texas courts do in fact incarcerate unauthorized immigrants for long periods of time. A recent report shows that 370 persons serving life sentences in Texas entered the U.S. illegally and 1,260 unauthorized immigrants are in prison for sentences of more than 21 years.<sup>8</sup> In addition, among our clients who are unauthorized immigrants, we have seen lengthy sentences imposed by Texas state courts, including for example:

- 20 years for possession with intent to distribute less than 28 grams of cocaine;
- 4 years for aggravated assault;
- 15 years for delivery of greater than 400 grams of cocaine;
- 5 years for arson.

Third, state public defenders, private attorneys, and federal defenders who are intimately familiar with Texas plea bargaining and sentencing practices report that practices vary widely from county to county. For example, practitioners in Webb and Harris counties report that state judges do not impose lesser sentences because of the person's immigration status.<sup>9</sup> A person's

---

(N) Section 30.02, Penal Code (Burglary), if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit a felony under Section 21.02, 21.11, 22.011, 22.021, or 25.02, Penal Code; or

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment.”

Tex. Code Crim. Proc. Ann. § 42.12.

The court may defer adjudication under certain specified circumstances, Texas Code Crim. Proc. Ann. § 42.12, § 5, but it is a rare case where such deferred adjudications occur for serious offenses.

<sup>7</sup> See *United States v. Rodriguez-Bernal*, 783 F.3d 1002, (5th Cir. 2015) (defendant's sentence to two years of imprisonment for conviction of possession with intent to distribute one gram of heroin was a sentence imposed in excess of 13 months warranting a 16-level increase under §2L2.1 even though he served only 10 months before being released to an immigration detainer and removed to El Salvador).

<sup>8</sup> Rob Milford, *Report: Illegal Aliens Represent Nearly 5 Percent of Texas Prison Population*, (Feb., 19, 2016) <http://www.breitbart.com/texas/2016/02/19/report-illegal-aliens-represent-nearly-5-percent-of-texas-prison-population/>.

<sup>9</sup> If the Commission wants to hear directly from the individuals from whom we collected information, we would be happy to set up a conference call with Commissioners or staff.

immigration status may enter into the equation in some places when the defense attorney seeks to negotiate a plea to avoid the deportation consequences of an aggravated felony conviction. And while counties with limited jail space may avoid lengthy sentences to make room for new arrestees, state practitioners report that prosecutors negotiate time served or probation sentences for all defendants, not just unauthorized immigrants. Because the Commission has no empirical foundation to construct a guideline on the premise that unauthorized immigrants consistently receive suspended or probated sentences or lesser terms of imprisonment because they will face deportation, we strongly encourage it to revisit the breakpoints in the proposed offense levels and to reject the suggestion by some that suspended sentences or sentences of probation or even fines should be treated the same as a sentence of imprisonment.<sup>10</sup>

At the hearing earlier this month, the Commission inquired about the data we had that supported higher breakpoints than what exists in the proposed amendment. In response to this question, we first reiterate that the Commission's limited data release hinders our ability to provide informed feedback on the breakpoints.<sup>11</sup> We urge the Commission to release its dataset from the special coding project so that stakeholders may analyze it to determine more appropriate break points and offer additional comments on the Commission's proposal. Second, the Statement of Marjorie Meyers at page 24 points to data from the Commission's study on the average sentence length triggering the current 16-, 12-, and 8-level increases, as well as information from the Bureau of Justice Statistics on the average length of state sentences as a measure of offense seriousness.

We trust that the Commission heard the multiple concerns about the proposed 4-level increase for convictions where the sentence imposed was less than 12 months, particularly given how judges may impose longer sentences to ensure that the person actually serves less time.

We are deeply troubled by the suggestion that any non-custodial sentence, including those where nothing more than a fine was imposed, should receive a 4-level enhancement.<sup>12</sup> The Sentencing Table in the Guidelines recognizes a fundamental difference between a probation sentence, a term of imprisonment of less than 6 months, and a greater sentence. It would be odd

---

<sup>10</sup> See Letter from Probation Officers Advisory Group, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 10 (Mar. 7, 2016) (POAG Letter); Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 19-20 (Mar. 14, 2016) (DOJ Letter); Letter from The Honorable Andrew S. Hanen, U.S. District Judge, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 4 (Mar. 9, 2016).

<sup>11</sup> See Statement of Marjorie Meyers Before the U.S. Sentencing Comm'n, Washington, D.C., at 23 (Mar. 16, 2016) (Statement of Marjorie Meyers).

<sup>12</sup> POAG Letter, at 10; DOJ Letter, at 19-20.

for the guidelines to treat a probationary sentence or a fine the same as a 12-month term of imprisonment.<sup>13</sup> Counting probationary sentences would lead to unfair results for the least culpable defendants. Take for example a California wobbler conviction – an offense that may be classified and punished either as a felony or a misdemeanor, or that may start as a felony and change to a misdemeanor over time. When a defendant is convicted of a wobbler (for example, forgery or counterfeiting a driver’s license or identification card in violation of Cal. Penal Code § 470a), a state judge may suspend imposition of a sentence and place the defendant on probation. Under that scenario, the wobbler is a presumptive felony unless further action converts the sentence to a misdemeanor, even if the defendant successfully completes probation. If probation-only sentences are counted, this defendant would receive an enhanced sentence. Another defendant, however, who also was convicted of a wobbler, had his sentence suspended and was placed on probation, but who violated probation, was revoked and spent 10 months in county jail as a result, would not have his sentence count at all, because the revocation and resulting 10-month term of imprisonment converts the presumptive felony to a misdemeanor. We urge the Commission to recognize that as a rule, a significant difference exists between a probation-only sentence and a term of imprisonment, and if there truly is an exceptional case or jurisdiction where this is not the case, as suggested at the hearing and in the written statement submitted by the Department of Justice,<sup>14</sup> federal courts can address it with a departure or variance.

Similarly, creating a special rule to count suspended sentences in their entirety for purposes of the illegal reentry guideline, when only the portion that is not suspended is counted for criminal history purposes (§4A1.2(b)(2)), would create confusion and lead to unjust results. It would result in severe disproportionality if a person who successfully completed a 24-month suspended sentence without incident was treated the same as a person the courts believed needed to be incapacitated for 2 years.

We remain concerned about the Commission’s proposal to use 24 months or more as the break point for an 8-level increase – a point that received little discussion at the hearing. As the Commission’s data shows, the proposal will dramatically increase the sentencing range for individuals who currently receive within or below guideline range sentences. For individuals with prior Texas convictions, that increase will occur regularly because a 24-month sentence is a

---

<sup>13</sup> It would also be difficult to measure the severity of any probation sentence based on its length since the statutory maximum for probation terms for felonies vary greatly, from 1 year in Washington to 10 years in Texas, and are entirely discretionary in other places such as Colorado and Massachusetts. *See* Alexis Lee Watts, Robina Institute of Criminal Law and Criminal Justice, *Probation In-Depth The Length of Probation Sentences* (Mar. 1, 2016), <http://www.robainstitute.org/news/new-brief-probation-depth-length-probation-sentences/>.

<sup>14</sup> *See* DOJ Letter, at 19-20.

required minimum term of imprisonment for many minor Texas offenses where the court has the option of imposing a term of imprisonment or, for certain offenses, suspending the sentence for community supervision. The 24-month breakpoint is also inappropriate because, as the Probation Officer's Advisory Group, noted: "in approximately eight states, certain misdemeanor offenses are punishable by up to two years of imprisonment."<sup>15</sup> To avoid unduly harsh sentences based on these less serious prior convictions, at the very least the 8-level enhancement should be reserved for those receiving sentences greater than 24 months, and ideally, for sentences even greater than that.<sup>16</sup>

Following the hearing which revealed important questions for which there are still not answers, we urge the Commission to defer action on this important amendment, particularly because no Commission data or evidence offered at the hearing supports increased ranges for those individuals currently falling in the +0, +4, and +8 enhancements.<sup>17</sup> Without such evidence, the current proposal is yet another example of the Commission increasing recommended sentences without empirical justification that doing so is necessary to promote the purposes of sentencing under 18 U.S.C. § 3553(a). As such, it is an open invitation to judges to reject the guideline. *Kimbrough v. United States*, 552 U.S. 85 (2007).

### **3. Application of the Single Sentence Rule**

The Probation Officer's Advisory Group raised an issue about the application of the single sentence rule under §4A1.2(a)(2) and how simultaneous convictions for illegal reentry and another offense should be used in determining the base offense level and the specific offense characteristics. POAG recommended that the illegal reentry offense be used to increase the base offense level.<sup>18</sup> While we question the wisdom of the guidelines' approach of always instructing application of the greater offense level "when two or more guideline provisions appear equally applicable,"<sup>19</sup> and believe that the Commission should revisit that approach, we fear that having special rules for specific guidelines will complicate issues and increase the chances of incorrect guideline application.

---

<sup>15</sup> POAG Letter, at 10.

<sup>16</sup> See Statement of Marjorie Meyers, at 27.

<sup>17</sup> USSC, *Immigration Data Briefing*, Slide 14 (2016).

<sup>18</sup> POAG Letter, at 10.

<sup>19</sup> §1B1.1, comment. (n.5).

#### **4. Invited Departures Based on Seriousness of Criminal History**

The Commission proposes amending the departure provision at §2L1.2, comment. (n.7), which is currently based on seriousness of prior convictions, to one based on criminal history. It specifically adds a departure for “offenses” that do not result in a conviction. We object to this proposed amendment because (1) §4A1.3 already invites departures based on the inadequacy of the criminal history category; and (2) it is yet another example of the guidelines ignoring how the adversarial process works and encouraging additional punishment for alleged conduct that did not result in a conviction and need only be proven by a preponderance of the evidence and without evidentiary procedural protections – even in circumstances where the defendant may have been acquitted. Such invited departures also raise issues similar to that recognized by the Supreme Court in *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013), where a defendant may plead guilty to one offense, not contest extraneous facts, but then have “his silence . . . come back to haunt him” years later.

##### **B. Proposed Amendment to §2L1.1**

Some commenters, including the Department of Justice, objected to the Commission’s proposal to add a mens rea requirement to §2L1.1(b)(4) or to require specific proof of a defendant’s knowledge of the nature of the organization.<sup>20</sup> In doing so, the Department made allegations about the nature of smuggling, but offered no proof to support those allegations.<sup>21</sup> This push by the Department for strict liability enhancements that can increase a sentence by approximately 20 percent is offensive to basic principles of our criminal justice system. The guidelines already relieve the government of the burden of complying with core constitutional protections including the right to indictment, trial by jury, confrontation, and proof beyond a reasonable doubt. To obtain an enhanced sentence, a prosecutor need only prove a fact by a preponderance of evidence and may rely on evidence that would be inadmissible under the federal rules of evidence. This is an extraordinarily low threshold. It is not too much to expect a prosecutor to offer evidence that a defendant knew the nature of the activity in which he was involved. If the Commission is going to enhance an individual’s sentence based on smuggling unaccompanied minors, at minimum, it should require – as it proposes – that the defendant knew the minor was unaccompanied. And, as mentioned in the Statement of Marjorie Meyers, the enhancement would better measure culpability if it applied only when the defendant knew the

---

<sup>20</sup> DOJ Letter, at 11-12.

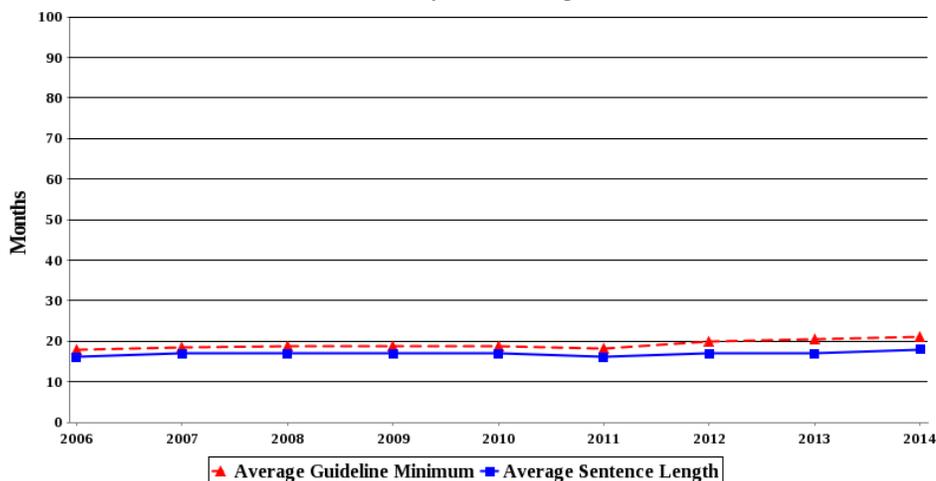
<sup>21</sup> *Id.* at 12.

minor was unaccompanied by *any relative 16 years of age or older*, not just a parent or grandparent.<sup>22</sup>

We also disagree with the Department's suggestion during the March hearing that a person caught transporting or harboring unauthorized immigrants on the interior of the border is more culpable than a person responsible for helping them cross the border. Two examples demonstrate our point. We had a 30-year-old client with three children who left Mexico in 1998 because of an abusive relationship. After she was laid off from her job, she helped maintain a stash house by cooking and picking up Western Union Moneygrams for the fees. She also provided transportation to new migrants. The offense involved no violence, threats, or display of weapons. Her guideline range was 24 to 30 months. She received a sentence of 12 months and a day. In another case, a 19-year-old was caught transporting 6 unauthorized immigrants, including his younger brother for whom he received a 2-level unaccompanied minor enhancement. He was paid \$100 to transport the individuals and \$200 for expenses. His guideline range was 15-21 months. He received a 10-month term of imprisonment and 2 years supervised release.

Lastly, the Commission's data shows a consistent and close correlation between the average sentence and average guideline minimum under §2L1.1. Given the stability of the guideline compared to actual sentences imposed, we see no reason to amend §2L1.1 to increase recommended sentences.

**AVERAGE SENTENCE & AVERAGE GUIDELINE MINIMUM COMPARISON OVER TIME**  
Fiscal Years: 2006-2014  
Primary Sentencing Guideline: §2L1.1



Source: USSC, *Interactive Sourcebook*.

<sup>22</sup> Statement of Marjorie Meyers, at 43 (citing congressional research about an increase in apprehended family units).

## II. Animal Fighting

The Commission proposes increasing the base offense levels for offenses involving an animal fighting venture, and amending the commentary to invite upward departures not only when the offense “involved extraordinary cruelty to an animal,” but also when the offense “involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).”<sup>23</sup> When deciding whether to amend §2E3.1, we encourage the Commission to consider three points: (1) increasing offense levels for animal fighting from 10 to [14/16] raises proportionality concerns and could have collateral consequences for other sentencing decisions; (2) a person’s involvement in an animal fighting venture may be mitigated by racial and cultural considerations; and (3) the principles driving the multiple count rules favor treating multiple counts of animal fighting as a closely interrelated group.

First, the proposed offense level of 14 or 16 for an offense involving an animal fighting venture raises proportionality concerns and would likely lead the Department and others to argue for increased sentences for other offenses in the future. A base offense level of 14 places animal fighting at the same or a higher base offense level than several offenses involving death, injury, or sexual abuse. *See, e.g.*, §2A1.4 (BOL 12 for criminally negligent conduct resulting in death); §2A2.3 (total offense level of 11 for an assault involving physical contact that resulted in substantial bodily injury to a spouse, intimate partner, dating partner, or an individual under the age of sixteen years); §2A2.4 (total offense level of 12 for obstructing a police officer where the officer sustained bodily injury); §2A3.3 (offense level of 14 for criminal sexual abuse of a ward); and §2A3.4 (BOL 12 for abusive sexual contact). A base offense level of 14 or 16 would place animal fighting on par with violent offenses such as aggravated assault, §2A2.2 (BOL 14), and sexual abuse, §2A3.4(a)(2) (BOL 16). A base offense level of 14 or 16 also would result in a guideline range significantly higher than what §2Q2.1 provides for other offenses involving fish, wildlife, and plants, such as destruction of endangered species (BOL 6 with a 2-level increase “[i]f the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations,” and several other specific offense characteristics that generally do not rise to a final offense level of 14). Because the guidelines are supposed to be a system that recommends “appropriately different sentences for criminal conduct of differing severity,”<sup>24</sup> we think the Commission should ensure that it does not recommend higher sentences for animal fighting than assaults against human beings or for offenses involving endangered species and other wildlife. If the Commission nonetheless raises the offense level from 10 to [14/16], it should not be surprised to receive complaints in the future

---

<sup>23</sup> 81 Fed. Reg. 2295, 2304 (Jan. 15, 2016).

<sup>24</sup> USSG Ch. 1, Pt. A, intro. comment. (3).

about the adequacy of certain guidelines for offenses against the person, as compared to the guideline for animal fighting.

Second, a variety of racial and cultural issues arise in the context of animal fighting that should make the Commission cautious about elevating penalties or doing so without providing mitigating circumstances. The Animal Welfare Act has been criticized for disproportionately impacting racial minorities in a way similar to crack cocaine laws.<sup>25</sup> Michael Vick, an African American football player, is to dogfighting what Len Bias, an African American basketball player, was to crack cocaine. Just as the government stepped up efforts to prosecute street level crack dealers, it is now planning to more vigorously pursue dog fighting cases, particularly in urban areas.<sup>26</sup> The net result of increased prosecution and longer periods of incarceration will be the removal of even more individuals from African American communities.

Increased sentences for animal fighting ventures will also greatly impact people in rural areas, especially the poor, and immigrants from the Philippines, Mexico, and other Latin American countries, as well as individuals from Puerto Rico. Cockfighting, a once popular and socially acceptable pastime for elite white people,<sup>27</sup> continues to be a part of the cultural heritage of many other groups.<sup>28</sup> It is reportedly the most resilient industry in Puerto Rico, where it is considered the island's "national sport."<sup>29</sup> It is considered "so important in Mexican culture that it 'restores ritual and structure to dissonant chaos.'"<sup>30</sup> Cockfighting was prevalent in the Sunbelt

---

<sup>25</sup> Kiran Nagulapalli, *Strictly for the Dogs: The Fourteenth Amendment Analysis of the Race Based Formation and Enforcement of Animal Welfare Laws*, 11 Rutgers Race & L. Rev. 217 (2009).

<sup>26</sup> *Id.* at 246.

<sup>27</sup> *Id.* at 248-49 (discussing the popularity of cockfighting among the elite white class after the start of the Civil War). The "Gamecocks" are the sports teams for the University of South Carolina, <http://www.gamecocksonline.com>. The Jacksonville State Gamecocks are the sports teams of Jacksonville State University in Alabama, <http://www.jsugamecocksports.com>. See also Ed Crews, *Once Popular and Socially Acceptable: Cockfighting*, Colonial Williamsburg J. (Autumn 2008), <https://www.history.org/Foundation/journal/Autumn08/rooster.cfm> (discussing history of cockfighting).

<sup>28</sup> See Lynn Morrow, *History They Don't Teach You: A Tradition of Cockfighting*, 35 White River Valley Hist. Q. (1995) (discussing history of cockfighting in Missouri, other Sunbelt states, and other places such as the Philippines and Puerto Rico), <https://thelibrary.org/lochist/periodicals/wrv/V35/N2/f95d.htm>.

<sup>29</sup> Meredith Hoffman, *Cockfighting is Puerto Rico's Most Resilient Industry*, *Vie* (Feb. 2016). See also *AP Photos: Cockfighting is Popular Pastime in Poor Haiti* (Nov. 10, 2015), <http://bigstory.ap.org/article/f8e3097d9e844cbda8b3c6ca0bd843db/ap-photos-cockfighting-popular-pastime-poor-haiti>.

<sup>30</sup> Nagulapalli, *supra* note 25, at 251 (quoting Jennifer J. Rose, *Cockfighting - Chicken Soup for the Soul*, Mex. Connect (Feb. 4, 2007), <http://www.mexconnect.com/MEX/jrose/jjrcockfight.html>).

and not outlawed in Louisiana until 2008.<sup>31</sup> And a recent case from the Eastern District of Washington, involved an enrolled member of the Yakama Nation who raised a First Amendment challenge to his prosecution for hosting a cock fight.<sup>32</sup> To avoid concerns about the disproportionate impact of increased sentences for animal fighting on the poor and racial minorities, we encourage the Commission not to raise the offense levels. If, however, the Commission decides to do so, it should include an invited downward departure for individuals who participate in animal fighting ventures as part of their racial or cultural heritage.

Third, multiple counts of conviction for animal fighting offenses should group together under §3D1.2. The Animal Welfare Act focuses on animal fighting ventures, which means:

any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment, except that the term ‘animal fighting venture’ shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal.<sup>33</sup>

The definition indicates that the harm is in organized fighting events involving multiple animals, not a single animal as the Department of Justice suggests.<sup>34</sup> Having offenses under §2E3.1 group together as closely related counts also serves a key purpose of the grouping rules – to “limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct.” USSG, CH. 3, Pt. D. To not group the counts would hand prosecutors a 5-level<sup>35</sup> bargaining chip in trying to extract a plea agreement.

### **III. Miscellaneous**

The Commission has proposed amendments to recently enacted legislation and miscellaneous guideline issues.

---

<sup>31</sup> See B. David Zarley, *On the Edge of the Pit: Cockfighting in America*, Vice Sports (Mar. 11, 2015), [https://sports.vice.com/en\\_us/article/on-the-edge-of-the-pit-cockfighting-in-america](https://sports.vice.com/en_us/article/on-the-edge-of-the-pit-cockfighting-in-america).

<sup>32</sup> *United States v. Olney*, 1:13-CR-2094-TOR-19, 2016 WL 660886, at \*1 (E.D. Wash. Feb. 18, 2016). The defendant relied on his religious belief “that the Holy Scriptures quoted in Genesis 1:26-28, [] entitles him to rule over his fighting roosters, to breed them, exhibit them, train them, and to present them for gamecock fighting.” *Id.*

<sup>33</sup> 7 U.S.C. § 2156(g)(1).

<sup>34</sup> DOJ Letter, at 26-27.

<sup>35</sup> If §2E3.1 counts do not group, §3D1.4 would allow for up to a 5-level increase because each count of conviction would be considered a separate unit under §3D1.4(a).

### **A. Bipartisan Budget Act of 2015**

In response to recent legislation that added “new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes,” the Commission proposes amending Appendix A so that sections 408, 1011, and 1383a of Title 42, which are currently referenced to §2B1.1, are also referenced to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).<sup>36</sup> Defenders have no objection to the proposed amendment.

The Commission also seeks comment on whether the guidelines should be amended to address persons who meet certain criteria set forth in the Bipartisan Budget Act of 2015 that would trigger new statutory maximums for this subgroup of persons who commit offenses under three particular statutes, or whether existing provisions in the guidelines adequately address these cases.<sup>37</sup> Defenders believe that the current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to cover a broad range of offenses, including those addressed in the Bipartisan Budget Act.<sup>38</sup> The Commission should resist the Department’s request for bright line rules that are driven by a political decision to raise the statutory maximum penalty for a certain subgroup of individuals. An individual’s culpability is best determined by an assessment of the particular facts of the case.

No evidence shows that the current guideline-recommended sentences are too low for offenses prosecuted under these three statutes.<sup>39</sup> Looking at defendants in fiscal years 2012-2014 with a conviction under 42 U.S.C. § 408, 54.7% of defendants received sentences within the guideline recommended range, 43.7% received sentences below the guideline recommended range, and only 1.6% received sentences above the guideline recommended range.<sup>40</sup> The numbers are similar for defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1: 53.5% of defendants received sentences within the guideline recommended range, 46.5% received sentences below the guideline recommended range, and not one defendant

---

<sup>36</sup> 81 Fed. Reg. 2295, 2297-99 (Jan. 15, 2016).

<sup>37</sup> *Id.* at 2299.

<sup>38</sup> As the Commission is aware, Defenders believe the guidelines do a poor job of appropriately addressing the culpability of those defendants who commit less serious offenses. *See, e.g.*, Statement of Michael Caruso Before the U.S. Sentencing Comm’n, Washington, D.C., at 1-5 (Mar. 12, 2016).

<sup>39</sup> Although the Act increases the statutory maximum for a certain subgroup of people, it does not change who may be prosecuted. The individuals in this subgroup have been prosecuted and sentenced under the current guideline without indication that the sentences the guidelines recommend are too lenient.

<sup>40</sup> USSC, *FY 2012-FY 2014 Monitoring Dataset*.

received a sentence above the guideline recommended range.<sup>41</sup> No defendants were convicted of violating the third statute at issue, 42 U.S.C. § 1011, at any point in the past decade.<sup>42</sup> Even in the high-profile case of Samuel Torres-Crespo in Puerto Rico that likely played a role in precipitating the changes to these statutes,<sup>43</sup> the government agreed to “ask that the court exercise its sound discretion and sentence the defendant within the range of 12-18 months.”<sup>44</sup>

Amending the guidelines to incorporate every possible factual permutation of the wide-variety of economic offenses that are referenced to §2B1.1 (and the applicable Chapter 3 guidelines) would add even more complexity to an already unwieldy guideline, which covers 5 pages plus 18 pages of commentary that sets forth complicated rules for calculating loss and applying the other 18 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and often requires lengthy sentencing hearings.

In light of the Department’s call earlier this year for a “new, simpler set of sentencing guidelines,”<sup>45</sup> Defenders were particularly disappointed to see the Department is still in the “factor creep”<sup>46</sup> game, asking for a new specific offense characteristic to address a new statutory maximum here,<sup>47</sup> without any evidence such change would serve the purposes of sentencing. The Department does not even claim a new enhancement would serve any purpose of sentencing except deterrence by “notify[ing] [defendants] in advance that they will be punished more severely for their conduct,”<sup>48</sup> and suggesting that a new enhancement aimed at this new subset of

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Stephen Dinan, *Puerto Rico Fraud Ring Sets Off Call for Social Security Disability Reform*, Wash. Times, Aug. 21, 2013, <http://www.washingtontimes.com/news/2013/aug/21/75-arrested-social-security-scam-puerto-rico/?page=all>.

<sup>44</sup> *United States v. Samuel Torres Crespo*, Nos. 13-538, 13-539 (D.P.R.), Plea Agreement, Dkt. No. 133 (filed Sept. 26, 2014), at 4. Mr. Torres-Crespo was sentenced earlier this year to a term of 8 months imprisonment, with 3 years of supervised release. *Id.*, Judgment, Dkt. No. 203 (filed Jan. 8, 2016).

<sup>45</sup> Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2 (July 24, 2015).

<sup>46</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 *Psychology, Law & Pub. Pol’y* 739, 752 (2001) (“In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.”).

<sup>47</sup> DOJ Letter, at 36-38.

<sup>48</sup> DOJ Letter, at 37.

defendants who commit certain social security offenses will work to “safeguard disability payments from fraud and abuse.”<sup>49</sup> This bald assertion flies in the face of extensive and established research on deterrence. First, adding language to the guidelines to give “notice” ignores the reality that “knowledge of sanction regimes is poor.”<sup>50</sup> “[D]ecisions to refrain from crime are based on the mere knowledge that the behavior is legally prohibited or for other nonlegal considerations such as morality or fear of social sanctions.”<sup>51</sup> In addition, “*certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent.”<sup>52</sup> Absent any evidence that a new enhancement is necessary to serve the purposes of sentencing, the political decision by Congress to increase the statutory maximum for a certain subgroup of people is not alone a sufficient reason to inject additional complexity and severity into the guideline.

That factor creep is alive and well is illustrated by the Department’s argument that there should be an enhancement for these social security offenses simply because there is an enhancement for Federal health care offenses.<sup>53</sup> Notably, the Department fails to mention that the 2-level enhancement for Federal health care offenses at §2B1.1(b)(7) applies only when there has been a loss of more than \$1,000,000 to the Government health care program. It also fails to acknowledge that this specific offense characteristic was added in response to a specific directive from Congress to the Commission to provide additional enhancements for certain loss amounts for Government health care programs.<sup>54</sup> No such directive exists in the Bipartisan Budget Act of 2015.

---

<sup>49</sup> DOJ Letter, at 38.

<sup>50</sup> Nagin, *supra* note 1, at 204.

<sup>51</sup> *Id.* And even for those “for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration.” *Id.*

<sup>52</sup> *Id.* at 201-202.

<sup>53</sup> DOJ Letter, at 37.

<sup>54</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 1111-148, § 10606(a)(2) (2010) directed the Commission to provide:

(i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 1,000,000 and less than \$ 7,000,000;

(ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 7,000,000 and less than \$ 20,000,000;

We urge the Commission to proceed as it proposes and, in response to the new conspiracy offenses in the Bipartisan Budget Act of 2015, amend Appendix A to refer these three statutes to §2X1.1 in addition to §2B1.1, but in the absence of any evidence that additional changes would advance the purposes of sentencing, refrain from making any other amendments to the guidelines.

#### **B. Firearms as Nonmailable Items**

Responding to a request from the Department of Justice regarding violations of 18 U.S.C. § 1715 in the United States Virgin Islands, the Commission proposes amending Appendix A (Statutory Index) to reference violations of § 1715 to §2K2.1, and also adds §1715 to subsection (a)(8) of §2K2.1, establishing a base offense level of 6 for such offenses.<sup>55</sup> Defenders have no objection to referring this guideline to §2K2.1(a)(8), but would object to referring it to any higher base offense level or adding any specific offense characteristics.

Section 1715 provides:

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm declared nonmailable by this section, shall be fined under this title or imprisoned not more than two years, or both.

Other provisions referenced to §2K2.1(a)(8) include 18 U.S.C. § 922(e) and § 922(f), both of which pertain to shipping of firearms. Section 922(e) prohibits a person from

knowingly [ ] deliver[ing] or caus[ing] to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped.

And Section 922(f) prohibits a common or contract carrier from “transport[ing] or deliver[ing] in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.” To promote proportional sentences for similar offenses, section 1715

---

(iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 20,000,000.

<sup>55</sup> 81 Fed. Reg. 2295, 2298-99 (Jan. 15, 2016).

should be referenced to a base offense level no higher than that to which sections 922(e) and 922(f) are referenced.

The broad scope of § 1715, which sweeps in both those who intentionally place a nonmailable firearm in the mail, and more vulnerable individuals such as girlfriends who agree to receive packages, however, provides another reason the Commission should revisit the strict liability 4-level enhancement at §2K2.1(b)(4)(B) when “any firearm . . . had an altered or obliterated serial number.” The current strict liability approach results in the guidelines recommending the same punishment for a person who does not know or have reason to believe that the firearm has an obliterated serial number as for another person who does have knowledge or reason to know. This leads to punishment that is disproportionate to the seriousness of the offense and creates unwarranted disparity by treating different individuals the same. This problem was bad enough when the enhancement was only 2-levels, but the severity of the problem multiplied when the Commission in 2007 increased the enhancement to provide for a 4-level increase without evidence that increasing sentences was necessary to serve the purposes of sentencing, particularly as to defendants who did not know or have reason to know that “any firearm” had an “altered or obliterated serial number.”<sup>56</sup>

Finally, even though we do not object to referencing § 1715 to §2K2.1(a)(8), we have concerns about the basis for the Department’s request and urge the Commission to review similar requests from the Department with care. In support of its request for this change to the guidelines, the Department asserts that in recent years, “the United States Attorney Office (USAO) for the Virgin Islands (VI) has brought several cases charging § 1715, which generally precludes the mailing of firearms to individuals,” citing four cases as “some examples of cases charged.”<sup>57</sup> But Defenders’ review of a CM/ECF report of criminal cases charging § 1715 in the District of the Virgin Islands, shows that the four cases cited by the Department were not just a sample, but instead were the *only* such cases filed at the time of the Department’s letter since January 1, 2013. Moreover, one of cases cited by the Department did not appear in CM/ECF report because the defendant was never charged with, and did not plead to, a violation of § 1715.<sup>58</sup> In the three remaining cases involving a total of six defendants, five have pled guilty

---

<sup>56</sup> See USSG App. C, Amend. 691 (Nov. 1, 2007). Defenders opposed this increase. See Letter from Jon Sands, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm’n, at 15-17 (Mar. 9, 2006).

<sup>57</sup> Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 15-16 (July 24, 2015).

<sup>58</sup> *United States v. Williams*, No. 1:15-cr-4 (D.V.I.) (defendant pled guilty to a violation of 18 U.S.C. § 922(a)(3) (Illegal Receipt of Firearms)).

and been sentenced,<sup>59</sup> but only one pled guilty and was sentenced under § 1715. The remaining four defendants pled guilty to and were sentenced for violating 18 U.S.C. § 922(k), § 924(a)(1)(B) (Possess, Receive, Transport or Ship Firearm with Obliterated Serial Number), and/or conspiracy under 18 U.S.C. § 371 to commit the same.<sup>60</sup> Of those four, all but one were given sentences within the guideline recommended range. The one exception received the sentence the government recommended pursuant to a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). Because only one case involved a conviction under § 1715, we question the Department's assertion that an amendment is necessary because the "lack of guidance" from the guidelines "has led to sentencing disparities and should be rectified."<sup>61</sup>

### C. USA FREEDOM Act of 2015

In response to the Uniting and Strengthening American by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, which among other things, created new criminal offenses at 18 U.S.C. § 2280a, 18 U.S.C. § 2281a, and 18 U.S.C. § 2332i, the Commission proposes referencing each of these new offenses to several different guidelines.<sup>62</sup> Because these and related offenses are rare, and the new offenses are unusually broad in scope, proscribing a wide variety of conduct, Defenders are not convinced the new offenses should be referenced to any specific guidelines at this time. If, however, the Commission is inclined to reference them to specific guidelines, we think the approach the Commission proposes, referring the new offenses to a multitude of guidelines is appropriate. Since these and related offenses rarely occur, Defenders have insufficient experience to offer meaningful comment on many of the Commission's issues for comment regarding this proposed amendment.

---

<sup>59</sup> One of the defendants in the four-defendant case has not yet been sentenced, and the docket reflects no activity in her case since October 21, 2015. *United States v. Joseph et al.*, No. 1:15-cr-15 (D.V.I.).

<sup>60</sup> In one case, one of the defendants also pled guilty to, and was sentenced for, violating 18 U.S.C. § 922(a)(6), §924(a)(2) (False Statement), and a different defendant also pled guilty to, and was sentenced for, violating 14 V.I.C. § 2253(a) (Possession of an Unlicensed Firearm). *United States v. Joseph et al.*, No. 1:15-cr-15 (D.V.I.).

<sup>61</sup> The Department also asserted that there were a "number of pending investigations." Between the date of the Department's letter and March 19, 2016, according to CM/ECF, only four cases have been filed charging a violation of § 1715, one of which was dismissed, the other three of which were filed on October, 27, 2015. Only one of those cases charges only a violation of § 1715, whereas the other two include additional charges such as violations of 18 U.S.C. § 922(k), §924(a)(1)(B) (Possess, Receive, Transport or Ship Firearm with Obliterated Serial Number), and 18 U.S.C. § 922(g) (Felon in Possession of a Firearm). *United States v. Thomas*, 1:15-cr-30 (D.V.I.) (dismissed); *United States v. Thomas*, 1:15-cr-31 (D.V.I.); *United States v. Brodhurst*, 1:15-cr-32 (D.V.I.); *United States v. Lang*, 1:15-cr-33 (D.V.I.).

<sup>62</sup> 81 Fed. Reg. 2295, 2297-99 (Jan. 15, 2016).

#### **D. Technical Amendment to §2T1.6**

Responding to a request from the Department of Justice, the Commission proposes amending §2T1.6 to delete the sentence that states “*The offense is a felony that is infrequently prosecuted.*”<sup>63</sup> Defenders have no objection to this amendment.

#### **IV. Factor Creep**

During this amendment cycle, Defenders have been struck by the persistence of “factor creep”<sup>64</sup> which operates as a “one-way upward ratchet,”<sup>65</sup> increasing both severity and complexity in the guidelines. This year, on the Immigration, Child Pornography, Animal Fighting and even Miscellaneous amendments, we have been disappointed in the number of suggestions for additional enhancements – in various forms – by the Commission, the Department and others. While the Commission may be tired of us mentioning “factor creep,” and citing the article by the Department’s former *ex officio* member of the Commission, we repeat it because factor creep is a serious problem that must be addressed if the guidelines are to be simplified and provide meaningful guidance to courts on sentences that are sufficient but not greater than necessary. The Commission, Department and others made several proposals this year that raise concerns about factor creep, including, for example:

- The Department seeks a new enhancement for a subgroup of people who commit certain social security offenses;<sup>66</sup>
- The Probation Officers Advisory Group and other commenters seek as many as 3 specific offense characteristics for animal fighting in addition to the new higher base offense levels proposed by the Commission;<sup>67</sup>
- The Commission proposes, and the Department supports, encouraging the application of the vulnerable victim enhancement in child pornography offenses,

---

<sup>63</sup> 81 Fed. Reg. 2295, 2298-99 (Jan. 15, 2016).

<sup>64</sup> See Ruback & Wroblewski, *supra* note 46.

<sup>65</sup> See, e.g., Frank O. Bowman, III, *Mr. Madison Meets A Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 246 (2005).

<sup>66</sup> DOJ Letter, at 36-38.

<sup>67</sup> POAG Letter, at 5; Statement of Jennifer Chin, American Society for the Prevention of Cruelty to Animals Before the U.S. Sentencing Comm’n, Washington, D.C., at 2-3 (Mar. 16, 2016); Statement of Chris Schindler, Director, Animal Crimes the Humane Society of the United States Before the U.S. Sentencing Comm’n, at 2-3 (Mar. 16, 2016).

including both production and non-contact offenses, on top of the specific offense characteristic for offenses involving children under the age of 12;<sup>68</sup>

- The Department opposes the Commission’s proposal to better distinguish culpability by limiting the reach of certain often-applied specific offense characteristics in the child pornography guidelines (demonstrating the difficulty of undoing “factor creep”);<sup>69</sup>
- The Department seeks to add a new specific offense characteristic to §2L1.1 regarding sexual abuse;<sup>70</sup>
- The Department seeks a 3-tiered enhancement for offenses involving the smuggling transporting, or harboring of 6 or more unaccompanied minors under §2L1.1;<sup>71</sup>
- The Commission proposes, and the Department supports, adding two new types of enhancements for illegal reentry offenses for (1) prior illegal reentry offenses (in the form of increased base offense levels) and (2) post-reentry felonies, even though both of these are already accounted for in a defendant’s criminal history score;<sup>72</sup>
- The Department seeks an additional specific offense characteristic in §2L1.2 for prior deportations that are not reflected in prior convictions;<sup>73</sup>
- The Department seeks an additional specific offense characteristic in §2L1.2 for possession of false identification documents or means of identification.<sup>74</sup>

In considering the various enhancements suggested this year, we ask the Commission to keep in mind how specific offense characteristics and other enhancements have a notorious

---

<sup>68</sup> 81 Fed. Reg. 2295, 2306-7 (Jan. 15, 2016); DOJ Letter, at 27-28.

<sup>69</sup> 81 Fed. Reg. 2295, 2305-6 (Jan. 15, 2016); DOJ Letter, at 28-35.

<sup>70</sup> DOJ Letter, at 13.

<sup>71</sup> DOJ Letter, at 13-14.

<sup>72</sup> 81 Fed. Reg. 2295, 2308-2311 (Jan. 15, 2016); DOJ Letter, at 18-19.

<sup>73</sup> DOJ Letter, at 21.

<sup>74</sup> DOJ Letter, at 23-24.

history of ratcheting up sentences.<sup>75</sup> As the Commission has recognized in the past, “as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”<sup>76</sup> When additional offense levels are added for no reason other than to capture some part of the offense that is considered more egregious, the guidelines put excessive weight on the nature of the offense, quickly moving away from the other purposes of sentencing, and resulting in sentences greater than necessary to accomplish the purposes of sentencing. Rather than continually add specific enhancements for various factual permutations, the better course of action is to have judges use atypical offense characteristics to determine where within the guideline range the sentence should fall, or if the conduct is particularly egregious, to depart or vary.

## V. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission’s proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,  
/s/ Marjorie Meyers  
Marjorie Meyers  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

## Enclosures

cc (w/encl.): Hon. Charles R. Breyer, Vice Chair  
Dabney Friedrich, Commissioner  
Rachel E. Barkow, Commissioner  
Hon. William H. Pryor, Commissioner  
Michelle Morales, Commissioner *Ex Officio*  
J. Patricia Wilson Smoot, Commissioner *Ex Officio*  
Kenneth Cohen, Staff Director  
Kathleen Cooper Grilli, General Counsel

---

<sup>75</sup> This has been a problem with a number of guidelines. *See, e.g.*, Ian Friedman, *Child Pornography Sentencing: The Road here and the Road Ahead*, 21 Fed. Sent. R. 83 (2008); James Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent. R. 138 (2010).

<sup>76</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 137 (2004) (citing Ruback & Wroblewski, *supra* note 46).

**Statement of Marianne Mariano  
Federal Public Defender for the Western District of New York  
on Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on Compassionate Release and Conditions of Supervision**

**February 17, 2016**

**Statement of Marianne Mariano**  
**Federal Public Defender for the Western District of New York**  
**on Behalf of the Federal Public and Community Defenders**  
**Before the United States Sentencing Commission**  
**Public Hearing on Compassionate Release and Conditions of Supervision**  
**February 17, 2016**

My name is Marianne Mariano and I am the Federal Public Defender in the Western District of New York, as well as a longstanding member of the Federal Defender Guideline Committee. I would like to thank the Commission for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Compassionate Release and Conditions of Supervision.

**I. Conditions of Supervision**

We appreciate the Commission's decision to review conditions of supervision and the interest in making the conditions easier for our clients to understand. However, we question the necessity of many of the standard conditions and are concerned about the overbreadth and ambiguity of some of the conditions.

**A. The Commission Should Strictly Limit the Number of Standard Conditions in Favor of Individualized Special Conditions.**

As a threshold matter, we believe the Commission should reduce and limit the number of standard conditions for several reasons, including: (1) A limited number of standard conditions is consistent with the statutory provisions at 18 U.S.C. §§ 3563(a) and 3583(d) which require that the court make specific findings when imposing conditions not mandated by statute; (2) There is no evidence the proposed list of standard conditions serves the purpose of "facilitat[ing] the reintegration of the defendant into the community"<sup>1</sup>; (3) An extensive list of standard conditions is counterproductive because it may increase re-incarceration and even the most technical of violations extends the term of imprisonment for the original offense<sup>2</sup>; and (4) A lengthy list of standard conditions has a disproportionately negative impact on the poor. Each of these reasons is discussed more fully below.

---

<sup>1</sup> USSC, *Federal Offenders Sentenced to Supervised Release 2*, 10 (2010) (quoting *United States v. Vallejo*, 69 F.3d 992, 994 (9th Cir. 1995)).

<sup>2</sup> *Johnson v. United States*, 529 U.S. 694, 700 (2000) (holding that post-revocation penalties must be treated as part of the penalty for the original offense, particularly since a violation leading to imprisonment need not be criminal).

First, “standard” “one-size-fits-all” conditions that are not mandated by statute undermine the requirements in 18 U.S.C §§ 3563(a) and 3583(d), that the court make specific findings when imposing additional conditions of supervision. The statutory requirements include that any condition be “reasonably related” to specified § 3553(a) factors and that it “involve[] no greater deprivation of liberty than is reasonably necessary” to serve the purposes set forth in § 3553(a).<sup>3</sup> Because the standard conditions do not require such findings and ignore the need for consideration of the history and characteristics of the defendant, any standard condition not already mandated by the statute is contrary to the intent of Congress.

The Seventh Circuit has acknowledged the problem with “one-size-fits-all” conditions, noting that the “district judge is required to give a reason, consistent with the sentencing factors in section 3553(a), for every discretionary part of the sentence that the judge is imposing, including non-mandatory conditions of supervised release.” *United States v. Bryant*, 754 F.3d 443, 444-45 (7th Cir. 2014) (judge failed to give reasons for imposing 13 standard conditions). *See also United States v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015) (all discretionary conditions require findings; “sentencing judges rarely, if ever, should list a multitude of conditions without discussion”); *United States v. Thompson*, 777 F.3d 368, 379-80 (7th Cir. 2015) (“a condition of supervised release permitting the probation officer to visit at any time at home or elsewhere was ‘too broad in the absence of any effort by the district court to explain why [it is] needed’”).

Second, application of conditions not mandated by statute to each and every case is not supported by empirical evidence or current evidence-based practices. The Commission has acknowledged that “supervised release is primarily concerned with ‘facilitat[ing] the reintegration of the defendant into the community,’” and that such facilitation is the reason behind standard conditions of release.<sup>4</sup> But we are not aware of any data showing either the existing or proposed standard conditions serve that purpose. Indeed, decades of research show the opposite: “overly supervising (by number of contacts, over-programming, or imposing

---

<sup>3</sup> For probation, the condition must be reasonably related to the “nature and circumstance of the offense and the history and characteristics of the defendant” and the four purposes of sentencing. 18 U.S.C. § 3563(b). For supervised release, the condition must be reasonably related to the same factors except for the need to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” 18 U.S.C. § 3583(d). For both probation and supervised release, the condition may involve “no greater deprivation of liberty than is reasonably necessary” to accomplish the specific statutory purposes. 18 U.S.C. § 3563(b) & § 3583(d).

<sup>4</sup> *Federal Offenders Sentenced to Supervised Release*, *supra* note 1.

unnecessary restrictions) low-risk [supervisees] is likely to produce worse outcomes than essentially leaving them alone.”<sup>5</sup>

Another study found that probation officers spend too much time enforcing compliance with conditions of supervision rather than delivering needed services to the person under supervision. James Bonta, et al., *Exploring the Black Box of Community Supervision*, 47 J. Offender Rehabilitation 24 (2008). While the study did not examine federal probation, we see similar problems with far too many clients who need services, do not receive them, and are accused of technical violations of supervision, such as not reporting a change in residence<sup>6</sup> or employment, associating with persons with prior felonies even though the convictions may be old and the person may be a family member, and not reporting to probation as required (e.g., not submitting weekly job search reports that show five attempts to find work even though transportation may be lacking and the person does not have a driver’s license, missing an appointment because of transportation problems, not filing written reports even though the person has a low educational level, or not filing a report via computer even though the person lacks computer access and technical skills). This “trail ‘em, nail ‘em, jail ‘em” approach is counter-productive and perpetuates the “get tough” view of community supervision rather than focus on rehabilitation and reintegration.<sup>7</sup>

Setting aside the reality of how many standard conditions of supervision are used as enforcement mechanisms rather than to help the person reintegrate, “one-size-fits-all” conditions are not compatible with the approach that the U.S. Probation system has been trying to implement. According to the “evidence based practices” that the Office of Probation and Pretrial Services encourages local district offices to use, conditions of supervision should be directed toward the particular “criminogenic” needs and responsivity of the individual, while the intensity of supervision is based upon the individual’s actuarial risk score.<sup>8</sup> If conditions of supervision

---

<sup>5</sup> Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* 13 (2013), <http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>.

<sup>6</sup> In one case, for example, a defender client was discharged from a halfway house because of a verbal argument with another resident. He wandered the streets looking for a place to live, found a homeless shelter, and then found employment with the help of a local police officer. The probation officer focused on preparing a technical violation because the individual was not living at the halfway house. When defense counsel suggested to the probation officer that he help the client find an alternative place to live, the probation officer responded: “So I should bend over backwards so this guy doesn’t go back to federal prison?” Fortunately for the client, the police officer, working with a homeless outreach program, helped the client find temporary housing and eventually permanent housing.

<sup>7</sup> William D. Burrell, *Community Corrections Management: Issues and Strategies* 19-1 to 19-3 (2012).

<sup>8</sup> See generally National Institute of Corrections, *Annotated Bibliography: Evidence-Based Practices in the Criminal Justice System* (2013); Bradford Bogue et al., National Institute of Corrections,

are to be consistent with that approach, there should be few standard conditions. All conditions should be specifically targeted to the needs and responsivity of the individual who should be “directly involved in the creation of [the] supervision plan” rather than “treated as [a] passive participant[.]” Faye Taxman, et al., National Institute of Corrections, *Tools of the Trade: A Guide to Incorporating Science into Practice* 15 (2006).

Third, extensive standard conditions of supervision are unnecessarily burdensome and increase, rather than decrease, the risk of re-incarceration for technical violations. Even if the conditions do not result in reported violations or revocation, they give probation officers enormous power over the lives of those under supervision. As aptly explained in a recent article about conditions of supervision: “probation systems have broad and at times surprising expectations for those under their control: probationers must be good people, in addition to being law-abiding people.”<sup>9</sup> Rather than help reintegrate a person into the community, too many conditions can set him or her up to fail in many ways. For example, notification of risk and visitation requirements may interfere with a person’s ability to maintain a job – another requirement of supervision. Defender experience also shows that technical violations lead to revocations even when there is no evidence of any criminal activity and the defendant is otherwise succeeding with reintegration.<sup>10</sup>

Fourth, the Commission should be mindful that many of the standard conditions of supervision unduly burden the poor. For example, poor people have more trouble than others finding work because of a lack of education and employment opportunities. They also have greater difficulty reporting on a regular basis because of problems with transportation,<sup>11</sup> limited access to computers, and lack of flexibility in their work schedules.<sup>12</sup> They also typically have

---

*Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention* (2004).

<sup>9</sup> Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291, 295 (2016).

<sup>10</sup> See, e.g., *United States v. Poindexter*, 616 F. App’x 141 (5th Cir. 2015) (defendant sentenced to 24 months of imprisonment for technical violation even though he had a successful employment record); *United States v. Davis*, 606 F. Appx. 257 (5th Cir. 2015) (defendant, just two months short of completing three-year term of supervised release, was sentenced to one year and one day for failing to report to probation officer about change of residence after he became homeless involuntarily; neither probation officer nor prosecutor advocated for revocation); see also Brief of Appellant, *United States v. Davis*, 2015 WL 128364 (Jan. 5, 2015).

<sup>11</sup> Transportation problems include limited access to public transportation because of limited routes or schedules and the unavailability of personal vehicles because of the costs of insurance and vehicle maintenance.

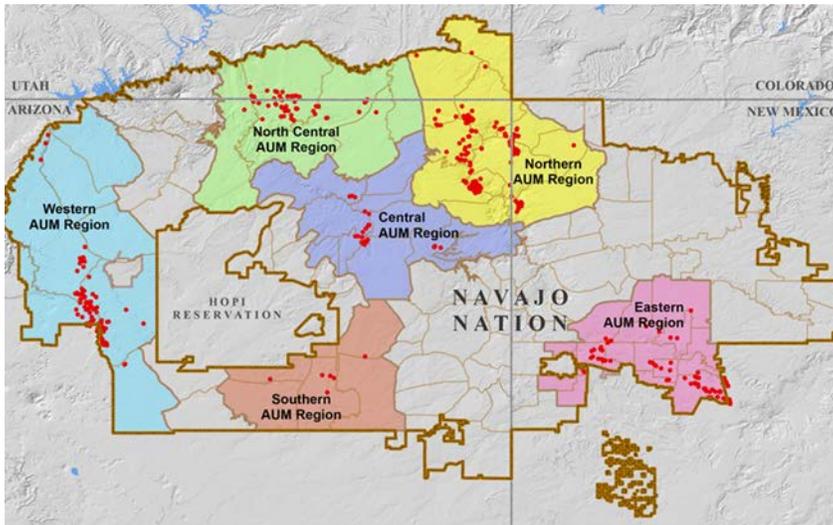
<sup>12</sup> Doherty, *supra* note 9, at 350.

limited housing options, which makes it hard for them to give advance notice of a move or to remember to do so within the requisite time period. And, because they often live in neighborhoods where others have been convicted of felony offenses, it is extremely difficult, if not impossible, to avoid communicating or interacting in any way with a person they know to have a felony conviction.

## **B. Additional Comments on Specific Conditions of Probation and Supervised Release**

### **1. Knowingly Leaving the Federal Judicial District Without Permission**

The prohibition on not leaving the district without permission should not be a standard condition because it is unrealistic to follow in many places where the boundaries of the district do not align with states and reservations or where the individual lives close to a district border. For example, the Navajo Nation is the largest and most populous Indian reservation in the United States, covering 14 million acres of land. As shown below, it covers areas in Arizona, Utah, and New Mexico.



Other Indian Reservations also span multiple states,<sup>13</sup> including:

- Ute Mountain Indian Reservation – Colorado, New Mexico, and Utah

---

<sup>13</sup> *List of Largest Indian Reservations in the United States*,  
[https://en.wikipedia.org/wiki/List\\_of\\_largest\\_Indian\\_reservations\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_largest_Indian_reservations_in_the_United_States).

- Standing Rock Indian Reservation and Lake Traverse Indian Reservation – South and North Dakota
- Pine Ridge Indian Reservation – South Dakota and Nebraska
- Zuni Indian Reservation – New Mexico and Arizona
- Northern Cheyenne Indian Reservation – Montana and South Dakota
- Colorado River Indian Reservation – Arizona and California
- Omaha Indian Reservation – Nebraska and Iowa.

Aside from Indian reservations, people who live near the borders of districts may find it extraordinarily difficult to carry out normal activities of life without sometimes leaving the district. In such cases, requiring an individual to obtain permission of a probation officer to walk across a street into a different district is unnecessarily punitive and “a greater deprivation of liberty than is reasonably necessary” for the purposes of probation or supervised release.<sup>14</sup> For example, a person living in Prince George’s County, Maryland, near the District of Columbia, may easily cross over a district line just to go to a restaurant, grocery store, bank, or the doctor.<sup>15</sup> The same holds true for many other areas near a district border.

## **2. [Answering Truthfully] or [Being Truthful] When Responding to the Probation Officer’s Questions**

We appreciate the Commission’s interest in protecting the Fifth Amendment right against self-incrimination, which is not sufficiently protected under the current language of the condition, i.e., “the defendant shall answer truthfully all inquiries by the probation officer.” Under the current language, a person may be placed in the position of having to choose between answering the question truthfully and incriminating himself or not answering and face revocation. *See Thompson, 777 F.3d at 378* (this provision “essentially asks for a waiver of the right not to be forced to incriminate himself”). *See also Stephen Vance, Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision, 75*

---

<sup>14</sup> 18 U.S.C. § 3583(d)(2).

<sup>15</sup> Looking at a map of the Capitol Heights area provides an example of the problem of needing to depend upon a probation officer’s permission to carry on normal life activities. Southern and Eastern Avenues are the border between the District of Columbia and the District of Maryland. <http://www.mapquest.com/us/md/capitol-heights-282040734>.

Fed. Probation 33 (2011) (acknowledging the Fifth Amendment implications created by the current language in the condition).

The Ninth Circuit has found such language unconstitutional. In *United States v. Saechao*, 418 F.3d 1073 (9th Cir. 2005), the court addressed whether “a probationer who provides incriminating information to his probation officer in response to questions from that officer, and does so pursuant to a probation condition that requires him to ‘promptly and truthfully answer all reasonable inquiries’ from the officer or face revocation of his probation, is ‘compelled’ to give incriminating evidence within the meaning of the Fifth Amendment.” *Id.* at 1075. The court concluded that because the condition required the probationer to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent,<sup>16</sup> the defendant’s “admission of criminal conduct was compelled by a ‘classic penalty situation’ and the evidence obtained by the probation officer may not be used against him in a criminal proceeding.”<sup>17</sup>

This problem with the “answer truthfully” language is not resolved by the Commission’s proposed second bracketed option [“be truthful”]. The proposed language is not sufficiently clear, and would not adequately convey to the average supervisee that he or she need not answer every inquiry posed by the probation officer. In addition, to ensure that the condition does not involve a “greater deprivation of liberty than reasonably necessary,”<sup>18</sup> the permissible questions should be limited to those related to the conditions of supervision. Accordingly, we propose the following language: *The defendant must be truthful when responding to the questions asked by the probation officer regarding compliance with the conditions of supervision, but the defendant remains free to exercise the Fifth Amendment right against self-incrimination when the questions pose a “realistic threat of incrimination in a separate criminal proceeding.”* *Minnesota v. Murphy*, 465 U.S. 420, 435, n.7 (1984). *See also United States v. Marvin*, No. 2:99-CR-148 (N.D. Ind. May 20, 2015) (inquiries by the probation officer directed to compliance with the conditions of the defendant’s supervised release); *United States v. Kappes*, 782 F.3d 828, 850 (7th Cir. 2015) (ruling that defendant may request that the standard condition of answering “truthfully all inquiries by the probation officer” include language indicating that the condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination).

---

<sup>16</sup> *Saechao*, 418 F.3d at 1075 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 436 (1984)).

<sup>17</sup> *Id.* at 1075.

<sup>18</sup> 18 U.S.C. § 3583(d)(2); 18 U.S.C. § 3563(b).

### **3. Allowing the Probation Officer to Visit Anytime and Anywhere and Permitting Probation Officer to Seize Items in Plain View**

This condition, like any non-mandatory condition, should require an explanation of why it is needed. *See Thompson*, 777 F.3d at 380 (“The second condition would allow the probation officer to ‘visit’ the defendant at 3:00 a.m. every morning and look around for contraband, and also allow him to follow the defendant everywhere, looking for contraband. Regardless of any possible constitutional concern, both conditions are too broad in the absence of any effort by the district court to explain why they are needed.”).

### **4. Working Full Time, Finding Full-Time Employment, and Notification of Change in Employment**

Even if the Commission rejects our position that all non-mandatory conditions should be “special conditions” directed at the particular needs of the individual, we encourage the Commission to make this one a special condition. Defenders often represent people who are unable to work for physical or mental health reasons or who will be elderly at the time of release. Making the employment condition a special rather than standard condition will allow individualized circumstances to be taken into account, including the area where the defendant is releasing to and other mechanisms of financial support.

Making employment a standard condition also gives probation officers too much discretion and overlooks that the availability of employment varies tremendously. In some areas, finding a job is near impossible and looking for a job is extraordinarily difficult. For example, the Navajo reservation has an unemployment rate of 42%<sup>19</sup> and little phone service or internet access that would help a person look for employment elsewhere. The ease of finding a job is also fundamentally different in metropolitan areas like Ames, Iowa or Fargo, North Dakota, where the unemployment rate is 1.9%, than it is in Yuma, Arizona or El Centro, California, where the unemployment rate is 20% or higher and over four times the general unemployment rate for the United States.<sup>20</sup>

And, of course, a sizable number of unemployed persons are those with criminal records and who lack job or employment skills. According to a New York Times/CBS News/Kaiser Family Foundation poll, “[m]en with criminal records account for about 34 percent of all

---

<sup>19</sup> <http://navajobusiness.com/fastFacts/Overview.htm>.

<sup>20</sup> The general unemployment rate for metropolitan areas in the United States is 4.8%. <http://www.bls.gov/web/metro/laummtrk.htm>.

nonworking men age 25 to 54.”<sup>21</sup> While “ban the box” laws have been part of an effort to reduce barriers to employment for people with criminal records, only 19 states have adopted laws that require certain employers to remove conviction history questions from job applications.<sup>22</sup> The employment condition of supervision also fails to acknowledge how the ability to comply with the condition is related to social class. Poor people have a more difficult time finding steady employment than others who have had more educational and employment opportunities.<sup>23</sup>

### **5. Communicating or Interacting with Someone Convicted of a Felony or Engaged in Criminal Activity**

While the Commission’s proposed addition of the mens rea requirement is a positive change, the proposed prohibition is still overly broad and isolates individuals from their communities. The definition of “interact” is “to talk or do things with other people.”<sup>24</sup> Does that mean that a person who rides a bus with another person he knows has a felony conviction is “interacting”? Is a person sitting in a bar prohibited from encouraging a friend to call a taxi rather than drive while intoxicated because the friend is about to engage in criminal activity?

We recognize that the overall purpose of this condition is to encourage the supervisee to avoid exposure to persons engaged in behaviors that may trigger further criminal involvement, but such restrictions are greater deprivations of liberty than necessary. For example, a person would violate the condition if he or she did not obtain prior approval to have a discussion with someone who had been convicted of a felony twenty years before and is now living a law-abiding life. Because chance encounters are a part of life that can lead to positive relationships, a broad prohibition on such communications is counter-productive. Such a prohibition is also nearly impossible to comply with because many of our clients have family members with prior convictions.<sup>25</sup>

To better capture the purpose of this condition and to ensure that it has no greater infringement on the individual’s liberty interest than is reasonably necessary, we suggest the

---

<sup>21</sup> Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, N.Y. Times, Feb. 28, 2015, [http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0).

<sup>22</sup> National Employment Law Project, *Ban the Box 3-5* (2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

<sup>23</sup> Doherty, *supra* note 9, at 350.

<sup>24</sup> Merriam Webster, <http://www.merriam-webster.com/dictionary/interact>.

<sup>25</sup> Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* 11 (2013), <http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>.

following wording from a recent case in the Northern District of Indiana: “*The defendant shall not knowingly remain in the presence of other individuals while such individuals are engaged in criminal activity.*” *United States v. Marvin*, No. 2:99-CR-148 (N.D. Ind. May 20, 2015).

#### **6. Requirement to Notify Probation Officer if Arrested or Has Any Official Contact with Law Enforcement Officer**

The term “official contact” is vague. A person of reasonable and ordinary intelligence has no way of knowing the difference between “official” and “unofficial” contact. For example, if the defendant is briefly stopped by a traffic officer and then permitted to proceed on his or her way without even receiving a citation, is that official? If the officer stops the person and asks for identification and then frees the person, is that official? Because we do not know what the Commission intends by the term “official contact,” we are not in a position to offer alternative wording.

#### **7. Ownership, Possession, or Access to a Firearm, Ammunition, Destructive Device, or Dangerous Weapon**

The addition of the term “access” to this condition makes it unduly restrictive. Unlike constructive possession, which at least requires that the individual have dominion and control over the item or the premises where it is located,<sup>26</sup> the term “access” simply means a “way of getting near” something.<sup>27</sup> As a result, a person could be held in violation of this condition and subject to revocation by visiting a person who owns a firearm and ammunition for legitimate purposes. For our clients who live in rural areas where hunting supplies food for many individuals, this is particularly problematic. To help ensure that this condition is reasonable, it should focus on possession of the firearm, ammunition, destructive device, or dangerous weapon.

#### **8. Notification of Risk to Another Person or Organization**

The reference to “risk” is too vague because the condition contains “no indication of ... what ‘risks’ must be disclosed to which ‘third parties.’” *Thompson*, 777 F.3d at 379. *See also United States v. Poulin*, 809 F.3d 924, 934 (7th Cir. 2016) (finding ambiguous and overbroad standard condition that “as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement”).

---

<sup>26</sup> *See United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007).

<sup>27</sup> Merriam-Webster, <http://www.merriam-webster.com/dictionary/access>.

It is particularly appropriate for this to be a special, rather than a standard, condition. *See United States v. Mike*, 632 F.3d 686, 698 (10th Cir. 2015) (third party notification condition vacated because court did not make necessary findings to support the condition). The Second Circuit has held that “[i]f the court believes such notification should be mandatory for certain types of employment but not others, the court may specify guidelines to direct the probation officer, but may not simply leave the issues of employer notification to the probation officer’s unfettered discretion.” *United States v. Peterson*, 248 F.3d 79, 85-86 (2d Cir 2001). To clarify the scope of the probation officer’s discretion the condition should specify the nature of the offense and characteristics of the defendant that pose the risk. *See United States v. Nash*, 438 F.3d 1302, 1307 (11th Cir. 2006) (approving standard condition but noting how it must be related to specific circumstances that inform the probation officer about the nature of the risk); *United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996) (order to require defendant who pled guilty to aiding and abetting filing of false income tax return to notify clients of conviction was not reasonably necessary to protect the public).

### **9. Condition That the Defendant May Not Use or Possess Alcohol**

A condition that prohibits the possession of alcohol is overbroad and creates a situation where a person who does not drink alcohol could live in a home with someone who does, but nonetheless violate the condition. It also keeps a supervisee from “staying with any friend or relative who keeps even a bottle of wine in the house.” Doherty, *supra* note 9, at 315.

The prohibition on alcohol possession also makes it impossible for a supervisee to comply with the condition even when not associating with anyone who drinks alcohol. Many products used in daily living contain alcohol, including laxatives, cold sore medication, non-prescription cough medicine, deodorant, mouth wash, hand sanitizer, cologne, deodorizer, toothpaste, soap, cleaning products, windshield wiper fluid, antifreeze, and makeup.<sup>28</sup>

### **10. Material Change in Economic Circumstances**

The Commission seeks comment on whether the condition regarding changed economic circumstances should be a special rather than standard condition. For the reasons stated earlier in this testimony, we believe that it should be a special condition. As a standard condition, it encourages probation officers to be debt collectors and detracts from what should be the real

---

<sup>28</sup> Doherty, *supra* note 9, at 316. *See also* Savithiri Ratnapalan, *Alcohol in Household Products*, <http://www.pedsforparents.com/general/103166/alcohol-in-household-products/>; Soberlink, *Products Containing Alcohol*, <https://www.soberlink.com/products-containing-alcohol/>; SafeBee, *5 Products in Your House that Contain Alcohol*, <http://www.safebee.com/home/5-products-your-house-contain-alcohol>.

focus of supervision – to help the person reintegrate into society and live a law-abiding life. Because so many of our clients struggle to find housing, feed themselves, and pay off other debts, it is quite burdensome for them to monitor their budgets and determine whether their economic circumstances have changed enough to require notification to the probation officer.

## **II. Compassionate Release**

Defenders are pleased that the Commission is revisiting the compassionate release guideline. We support the proposed amendment included in the testimony of the Practitioner’s Advisory Group and agree with the reasons set forth in that testimony on why such changes are necessary. In our testimony, we wish to focus on two points: (1) Congress delegated to the Commission, not the Bureau of Prisons, the authority to define the “extraordinary and compelling reasons” that should trigger a motion for a reduction in sentence from the Bureau of Prisons; and (2) the Commission should encourage the Bureau of Prisons to reach out to defense counsel before deciding whether an inmate meets the criteria for compassionate release.

### **A. The Commission Should Adopt a Comprehensive Guideline Identifying the “Extraordinary and Compelling Reasons” that Warrant a Reduction in Sentence and Clarify that the Bureau of Prisons Should not Refuse to File a Motion if Those Criteria are Met.**

We encourage the Commission to adopt a comprehensive guideline that defines “extraordinary and compelling” circumstances independent of the Bureau of Prisons’ policy statement and that makes clear that BOP should file the motion for a sentence reduction if those criteria are met. For years, BOP has thwarted congressional intent by ignoring that the Commission has the exclusive authority to identify the “extraordinary and compelling reasons” warranting a motion. The Commission also has been lax in independently identifying the “extraordinary and compelling reasons” that warrant a motion for a sentence reduction and in making clear that the BOP should file the motion for a reduction when the criteria are met. Multiple reasons support a change of course.

First, the terms of the statute make clear that Congress did not intend to delegate exclusive authority to BOP in deciding what extraordinary and compelling reasons merit a motion for a reduced sentence. Congress gave the Commission an express role and it gave the judiciary the penultimate authority to determine whether a person should receive a reduced sentence. For the BOP to have absolute discretion in filing a motion effectively deprives the judiciary of the power to grant a reduction even though the person may meet the criteria set forth by the Commission.

Section 3582(c) of Title 18 permits a court to modify a term of imprisonment “upon motion of the Director of the Bureau of Prisons” when it finds that “extraordinary and

compelling reasons warrant such a reduction” or “the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

Rather than explicitly define “extraordinary and compelling reasons” to guide BOP’s decision on when it should file a motion under § 3582(c)(1)(A)(i), Congress delegated to the Sentencing Commission the responsibility of establishing policy statements for the sentence modification provisions of § 3582 and expressly directed the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. § 994(t). Under this statutory scheme, Congress intended the Bureau of Prisons, the Sentencing Commission, and the courts to each play a role in determining whether a sentence should be modified. Congress delegated to the Commission the authority to define “extraordinary and compelling reasons” and set forth other policy statements on implementation of the statute. Congress gave BOP the responsibility of making the motion to the court when such extraordinary and compelling reasons were established. And in a case involving a defendant at least 70 years of age who served at least 30 years of a sentence under 18 U.S.C. § 3559(c), Congress gave BOP the responsibility of determining whether the defendant is a danger to the safety of any other person or the community, as provided under 18 U.S.C. § 3142(g). Lastly, it gave the courts the ultimate authority to decide whether to reduce the sentence.

Second, it should not be ignored that the current process – under which the BOP has coopted exclusive control – is not working. Indeed, the Office of the Inspector General concluded that the “BOP’s compassionate release program could be more effective in assisting the BOP in managing its aging inmates.”<sup>29</sup> Data from the Inspector General’s report shows that the BOP Director approved a sentence reduction motion for only about one-third of inmates that Wardens recommended for relief.<sup>30</sup> Defenders also are aware of individuals who met the criteria for compassionate release, but BOP nonetheless declined to file a motion for a sentence reduction. One inmate, convicted of a non-violent offense, suffered from stage 4 cancer and other health issues. BOP refused to file a motion for reduction of sentence even though the judge signaled a willingness to grant a reduction. In another case, BOP rejected the request of a 68-

---

<sup>29</sup> Office of the Inspector General, U.S. Dep’t of Justice, *The Impact of An Aging Inmate Population on the Federal Bureau of Prisons* 46 (2015).

<sup>30</sup> *Id.* at 45.

year-old man who was wheelchair bound and suffered from diabetes, cardiac disease, and vision problems.

Third, the Commission has previously amended the guidelines to direct government motions, such as when the Commission made clear that the government may not refuse to move for the third level reduction under USSG §3E1.1. The Commission should do the same with compassionate release. BOP's authority to make the motion for a reduction is "not a roving license to ignore the statutory text" but is instead a "direction to exercise discretion within defined statutory limits." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (quoted in *United States v. Divens*, 650 F.3d 343, 347 (4th Cir 2011) (remanding where government could not provide valid reason for refusing to move for additional reduction under §3E1.1(b))). Similar to what the Commission found in studying the Protect Act when it amended §3E1.1,<sup>31</sup> the history of the Sentencing Reform Act and 18 U.S.C. § 3582 shows no congressional intent to allow BOP to withhold a motion based on factors other than whether extraordinary and compelling reasons exist. Accordingly, the Commission should state in the guideline that the "Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as 'extraordinary and compelling reasons' in §1B1.13."

Fourth, well-established principles of administrative law give the Commission good reason to act here as did in connection with §3E1.1. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–844 (1984), BOP's construction of § 3582 is not entitled to deference because Congress spoke directly to which agency should define extraordinary and compelling reasons – the Sentencing Commission.<sup>32</sup> Because Congress did not leave a gap for BOP to fill<sup>33</sup> on the scope of extraordinary and compelling reasons, no weight need be given to the BOP's policy statement on compassionate release.<sup>34</sup>

Furthermore, even if it could be argued that Congress left a gap for BOP to fill, BOP's decision-making process on whether to file a motion is not entitled to deference because it is unreasonable for a variety of reasons. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2705 (2015) (even

---

<sup>31</sup> USSG App. C, Amend. 775 (2013).

<sup>32</sup> If Congress meant to give BOP exclusive power over the substantive decision to file the motion, it did not need to delegate to the Commission the responsibility of defining extraordinary and compelling circumstances.

<sup>33</sup> *Lopez v. Davis*, 531 U.S. 230 (2001) (deference is owed an agency's interpretation under *Chevron* if Congress left a regulatory gap for the agency to fill and the agency's "interpretation is a reasonable construction of the statute").

<sup>34</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)* (2015) (*Program Statement*).

under a deferential standard “agencies must operate within the bounds of reasonable interpretation” and the “process by which it reaches [a] result must be logical and rational”) (citations omitted). First, as described above, BOP’s view that it has exclusive authority to decide whether to file a motion for reduction of sentence is inconsistent with the statutes. Second, the sparse number of individuals that BOP has identified as worthy of a reduction, notwithstanding criticism from the Office of Inspector General, shows that the process is not working as Congress intended. Third, BOP’s policies have circumvented the statute’s mandate that the Director of the Bureau of Prisons is responsible for filing the motion. Rather than permitting the Director of the Bureau of Prisons to exercise the authority to file the motion, BOP gives final authority to the Attorney General and Deputy Attorney General – the same authorities responsible for prosecutorial policies. 28 C.F.R. §571.62. Fourth, because BOP has relied on factors that Congress did not intend for it to consider in deciding whether a motion should be filed for a reduction in sentence, its policy statement on compassionate release and its resulting decisions are arbitrary and capricious.<sup>35</sup> For example, in 18 U.S.C. § 3582(c)(1)(A)(ii) (regarding a defendant age 70 or over who served at least 30 years in prison on a mandatory life sentence), Congress expressly stated that BOP should consider whether the defendant is a “danger to the safety of any other person or the community, as provided under section 3142(g).” Congress excluded that consideration from 18 U.S.C. § 3582(c)(1)(A)(i), yet BOP’s policy statement requires it to evaluate the risk of whether the person may reoffend.<sup>36</sup> Fifth, it is not appropriate for the BOP to consider the views of the U.S. Attorney’s Office in the district of conviction when it does nothing to collect information from others who have information relevant to the person’s eligibility for release, including defense counsel.

Finally, assuming *arguendo* that BOP, and not the Commission, has absolute authority to identify the “extraordinary and compelling reasons” to support a sentence reduction and to decide whether to file a motion, the Commission’s independent work on expanding §1B1.13 is essential. Even if not binding, the guidance on compassionate release would likely have an anchoring effect and play a significant role in BOP decisions on when to file a motion. *See, e.g.*, Office of the Inspector General, *supra* note 29, at 43 (noting that BOP’s General Counsel acknowledged that the “medical provisions were based on the United States Sentencing Guideline (USSG) definition of the term ‘extraordinary and compelling reasons.’”).

---

<sup>35</sup> *Lopez*, 531 U.S. at 721 (under *Chevron*, the agency must interpret the statute “reasonably” and “in a manner that is not arbitrary or capricious”).

<sup>36</sup> *Program Statement*, *supra* note 34, at 1.

**B. BOP Should Be Encouraged to Solicit Information from Defense Counsel Before Declining to Seek a Sentence Reduction for an Inmate.**

BOP currently collects information from the U.S. Attorney and the Office of Probation and Pretrial Services when making a decision on whether an individual meets the criteria for compassionate release. This fact-finding and decision-making process would be improved if BOP also involved defense counsel. Accordingly, we request that the Commission encourage BOP to obtain information from defense counsel of record or the Federal Defender Office in the district where the inmate was sentenced or where he or she will be released.<sup>37</sup> If BOP is unwilling to notify defense counsel before deciding whether a motion for reduction of sentence should be filed, then it should at least notify counsel when the decision is made to file the motion. Counsel could then make sure that the court has all relevant information and work with Probation and the U.S. Attorney's Office on the appropriate disposition.

In December 2013, BOP adopted an interim rule that provided for the General Counsel of BOP, when examining a request for compassionate release, to "solicit the opinion of the United States Attorney in the district in which the inmate was sentenced." 78 Fed. Reg. 73083-011 (Dec 5, 2013). It also made clear that "final decision authority is subject to the general supervision and direction of the Attorney General and Deputy Attorney General." *Id.* Those two provisions give prosecutors complete control over whether BOP should file a motion to reduce an inmate's sentence. In addition to involving the U.S. Attorney, the BOP program statement encourages Wardens to obtain documentation about the inmate with the assistance of the Office of Probation and Pretrial Services. Program Statement, *supra* note 34, at 7. If, after collecting information from prosecutors and probation officers, and reviewing victim comments, the General Counsel's Office of BOP denies the motion, the inmate has no administrative review remedy and is left without recourse. *Id.* at 13.

To make the process more fair and to ensure that BOP has all relevant information before deciding whether to file a motion for a sentence reduction, it would be beneficial for BOP to contact defense counsel of record or the Federal Defender Office in the district in which the inmate was sentenced or the district in which he or she will be released. Counsel could then help the inmate gather the extensive information that BOP requires when considering a request for sentence reduction, including the reasons for the request and "proposed release plans" (where the inmate will reside, how the inmate will support himself/herself). And if the basis for the request involves the inmate's health, counsel could assist the individual in obtaining information on where he or she will receive and pay for medical treatment. *See Program Statement, supra* note

---

<sup>37</sup> Appointment of counsel would be permitted under the same rationale that courts appoint counsel to screen cases to determine if individuals are eligible for relief under the retroactivity provision of 18 U.S.C. § 3582.

34, at 3. Counsel also could help with other information that BOP requires – e.g., death certificates, verifiable medical documentation of the incapacitation, birth certificates, adoption certificates, verification of paternity, documentation of custodial skills or obligations, the inmate’s living arrangements before incarceration, and unresolved detainers. *Program Statement, supra* note 34, at 5. Such assistance is particularly important for indigent inmates who cannot afford private counsel and whose families often lack the resources to gather all of the information that BOP requires.

Defense counsel also could play a role in providing information to BOP that would help it determine the accuracy of information presented by the U.S. Attorneys’ offices and victims. For example, when an inmate seeks release because of the incapacitation of his or her child’s caregiver, BOP examines whether the inmate had “drugs, drug paraphernalia, firearms, or other dangerous substances in the home while caring for the child prior to incarceration.” *Program Statement, supra* note 34, at 6. Because such information is not always in the PSR, any allegation, whether proven true or not, could be presented by a prosecutor as a reason to deny the request for BOP to file a motion. If defense counsel was involved, BOP would have more information to accurately determine the facts.

In sum, if BOP included defense counsel in its process, then it would obtain more accurate information about an individual’s eligibility for compassionate release. This, in turn, would further the Congressional intent of § 3582(c), that individuals with truly extraordinary and compelling reasons receive a reduced sentence.

**Written Statement of Marjorie Meyers  
Federal Public Defender for the Southern District of Texas  
On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on Immigration**

**March 16, 2016**

## Table of Contents

I.	Introduction.....	1
II.	Illegal Reentry.....	2
A.	The Commission’s Data on Persons Convicted of Illegal Reentry Suffers from Several Flaws and Fails to Provide a Reliable Basis for Policy-Making. ....	2
B.	It is Unsound Policy to Seek to Maintain the Same “Average Guideline Sentence” for all §2L1.2 Cases, Increase Recommended Sentences for Lower Level Defendants for the Purpose of Decreasing Recommended Sentences for Those with Pre-Removal Convictions, and Continue to Use Criminal History to Elevate Offense Levels. ....	3
1.	Using the Average Guideline Minimum to Measure the Overall Impact of the Proposed Amendment Ignores Data About the Actual Sentences Being Imposed in Illegal Reentry Cases and Invites Higher Sentences or More Sentences Below the Advisory Guideline Range.....	3
2.	The Commission’s Attempt to Rewrite §2L1.2 So It Replicates the Current Average Guideline Minimum and Continues to Emphasize Criminal History Overlooks How Relying on Criminal History to Ratchet up Offense Levels Lacks an Empirical Foundation, Does Not Serve the Purposes of Sentencing, and Is Inconsistent with the Commission’s Organic Statute. ....	5
C.	Prior Illegal Reentry Offenses and Removals Should Not Be Used to Increase the Base Offense Level or for Invited Upward Departures. ....	8
1.	Increasing Sentences Based Upon Prior “Illegal Reentry Offenses” Overcriminalizes Individuals Who Come to this Country to Improve Their Lives Rather Than Commit Serious Crimes That Threaten Public Safety. ....	8
2.	Increasing Offense Levels Based Upon Convictions for Illegal Entry, Illegal Reentry, Failure to Depart, and Failure to Comply with Terms of Release Under Supervision Would Perpetuate Disparity in the Enforcement of Immigration Laws and Fails to Acknowledge the Weak Procedural Protections Associated with Prosecutions under 8 U.S.C. § 1325. ....	15
3.	Neither Alternative Base Offense Levels Nor an Invited Upward Departure Should be Based upon “Multiple Prior Deportations not Reflected in Prior Convictions.” .....	18
4.	Any Conviction Used to Increase Sentences Should at Least Receive Criminal History Points.....	20
5.	If Adopted, the Commission’s Proposal to Increase Even the Lowest Base Offense Level Above the Current Level Would Entangle It In the Debate (on the Anti-Immigrant Side) About Whether Undocumented Workers Help or Hurt the U.S. Economy. ....	21
6.	The Commission Has Other Alternatives to Using Prior Illegal Reentry Offenses to Modify the Guideline.....	22

D.	The Proposed Amendments on How Prior Convictions Count as Specific Offense Characteristics Would Overstate the Seriousness of the Prior Offense, Create Problems with Proportionality, and Generate Confusion about the Application of the Enhancement for Misdemeanors. ....	23
1.	The Break Points for the Sentence Lengths Triggering the Proposed Tiered Enhancements for Prior Convictions Are Not Sufficiently Supported by Empirical Evidence. ....	23
2.	The Proposed Break Points Would Result in Disproportionate Penalties. ....	25
3.	A Three-Tiered Set of Specific Offense Characteristics Would Promote Greater Proportionality. ....	26
4.	The Proposed Language Regarding the Counting of Three Misdemeanors Lacks Clarity. ....	27
E.	The Proposed Language “First Deportation or First Order of Removal” Is Ambiguous and Needing to Determine the Date of the “First Deportation” or the “First Order of Removal” Would Unnecessarily Complicate Guideline Application. ....	29
F.	Several Departure Provisions and an Amendment to the Criminal History Rules on Counting Remote Convictions Should be Incorporated into the Guidelines to Mitigate the Specific Offense Characteristics Based upon Prior Convictions. ....	33
G.	The Commission Should not Delete the Departure Provision that Allows Credit for Time Served in State Custody. ....	35
III.	Alien Smuggling. ....	38
A.	Available Data Does Not Show a Need to Increase Sentences for Alien Smuggling Offenses. ....	38
B.	Existing Guidelines Already Account for the Few Cases Involving “Large Scale Criminal Organizations,” Which Should Be Defined More Broadly than Five or More People Smuggling Persons on More than One Occasion. ....	40
C.	The Guidelines for Smuggling of Unaccompanied Minors and Sexual Abuse are Generally Adequate. The Only Amendment Necessary Is to Limit the Enhancement at §2L1.1(b)(4) to Circumstances Where the Defendant Knew the Minor was Unaccompanied by a Parent, Grandparent, <i>or Other Related Adult</i> . ....	41

**Testimony of Marjorie Meyers  
Before the United States Sentencing Commission  
Public Hearing on Immigration  
March 16, 2016**

**I. Introduction**

My name is Marjorie Meyers and I am the Federal Public Defender for the Southern District of Texas, as well as Chair of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the guidelines regarding illegal reentry and alien smuggling.

This year, the Commission has proposed a major overhaul of the guideline for illegal reentry, changing core considerations for the base offense level and the specific offense characteristics, but continuing to place too much emphasis on a defendant's criminal history, even though that conduct is already addressed through the criminal history guidelines. For those individuals who score at the highest levels under the current guideline, the proposed amendment brings a welcome reduction from unduly severe recommended sentences. We applaud the Commission for pursuing this change. There is good reason for it: it reflects that judges are consistently imposing sentences far below what the guidelines recommend. For those individuals who score on the other end of the spectrum, however, those who score at the lowest levels under the current guideline, the proposed amendment will increase their guideline recommended sentences. There is no evidence-based justification for increasing these sentences on individuals who are the least culpable and who pose no danger to the community. In fact, the data demonstrates that courts consistently sentence these individuals at or below the current recommended range.

The Commission's proposal would affect a significant number of people and we urge the Commission to proceed with caution in this tricky area that involves defendants with a wide range of culpability, and politics that often obfuscate reality. In light of the significant changes being proposed and their wide-reaching impact, we have tried to carefully set out our thoughts on what we understand to be the both positive and negative aspects of the Commission's proposal. We appreciate the Commission's interest in simplifying application of this frequently used guideline, and the much needed reduction in the recommended guideline range for those who currently score at the high end of the, but we have serious concerns about many aspects of the proposal including (a) the continued reliance on criminal history as a measure of offense seriousness; (b) the unwarranted increase in recommended sentence lengths for those individuals who currently score at the lower end of the guideline; (c) the proposed increase in the recommended sentence length on the basis of prior illegal reentry offenses because it both fails to account for the significant numbers of people who come to the United States to improve their

lives, rather than with an intent to commit crime, and it exacerbates disparity arising from how immigration laws are enforced and prosecuted; and (d) the specific offense levels that fail accurately to reflect the seriousness of prior offenses because the thresholds (based on length of sentence) are set too low for the proposed increases in offense level.

We also believe that the proposed increases to the offense levels for alien smuggling are unwarranted. The commercial nature of an enterprise is already taken into account by current Guideline enhancements. We welcome the addition of a mens rea to the enhancement for smuggling minors but would urge the Commission to require that the defendant also know that the individual being smuggled was a minor.

These and other issues are discussed in more detail below.

## **II. Illegal Reentry**

### **A. The Commission's Data on Persons Convicted of Illegal Reentry Suffers from Several Flaws and Fails to Provide a Reliable Basis for Policy-Making.**

We appreciate that the Commission has undertaken efforts to collect data from a special coding project and has shared some of the findings with the public. And we encourage the Commission to release the datasets from this and other special coding projects. That said, we have serious concerns about the sources of information the Commission relied upon for this special coding project and do not believe those sources and the resulting data accurately capture the criminal histories, prior deportation/removal, and personal characteristics of individuals sentenced under §2L.2.

The Commission's special coding project focused only on those cases for which the Commission received full documentation.<sup>1</sup> Such documentation, however, is not available for a significant number of immigration cases. Districts with the most immigration cases vary significantly in the rate at which they submit presentence reports to the Commission. For example, in FY 2013, presentence reports were waived in 1,463 cases in the Western District of Texas, 2,170 in Arizona, 964 in the Southern District of California, and 145 in the Southern District of Texas.<sup>2</sup> Many, if not most, of the cases for which the Commission does not receive full documentation are immigration cases because of the heavy reliance on worksheets in these cases, which are not submitted to the Commission.<sup>3</sup> Those worksheets contain only the

---

<sup>1</sup> USSC, *Illegal Reentry Offenses* 14 (2015).

<sup>2</sup> USSC, *FY2013 Sourcebook of Federal Sentencing Statistics*, tbl. 1. In contrast, the Southern District of Texas had only 145 waived presentence reports. *Id.*

<sup>3</sup> Defenders will make a redacted worksheet available to the Commission for review.

information necessary to calculate the guidelines and no information about the individual's personal characteristics. These worksheets are typically done for those with minimal criminal histories that do not result in enhanced sentences under the current guidelines. Consequently, the Commission's coding project underrepresents those who would be most harshly punished by the Commission's proposed amendment to raise the minimum base offense level from 8 to 10 and increase offense levels for prior convictions for illegal reentry offenses.

Even in cases where presentence reports are done, they often do not contain adequate information about the defendant's background. Some presentence reports are modified and contain little or no personal history background.<sup>4</sup> Even where there is a full presentence report, the information on the individual's personal characteristics is often sparse and inaccurate. For example, a person may be unlikely to reveal to a probation officer that an undocumented spouse, child, or other relative is living in the United States. And in cases where the individual elects to disclose information about family located in the United States, neither pretrial nor probation probe far into family information about unauthorized immigrants who entered this country. They usually find no need to verify such information because the individual will not be released to family in the United States.

Because of the difficulty in obtaining accurate and reliable information about the nature of §2L1.2 offenses, we believe the Commission needs to explore other sources of information such as the anthropological studies cited elsewhere in our testimony.

**B. It is Unsound Policy to Seek to Maintain the Same “Average Guideline Sentence” for all §2L1.2 Cases, Increase Recommended Sentences for Lower Level Defendants for the Purpose of Decreasing Recommended Sentences for Those with Pre-Removal Convictions, and Continue to Use Criminal History to Elevate Offense Levels.**

The Commission seeks to raise guideline ranges for those with lower base offense levels in order to lower the ranges for individuals at higher base offense levels. Defenders believe this approach is unsound because it lumps individuals with vastly different criminal histories into a stereotypical “average.” To our knowledge, the Commission has never sought to amend a guideline in a way that kept the same average guideline minimum sentence. For example, when it lowered the guidelines for crack cocaine, it did not seek to raise penalties for cocaine powder or other drugs to maintain an average guideline minimum. Similarly, when it sought to lower penalties for high dollar loss amounts, it did not propose raising penalties at the lower loss amounts.

**1. Using the Average Guideline Minimum to Measure the Overall Impact of the Proposed Amendment Ignores Data About the Actual Sentences Being Imposed**

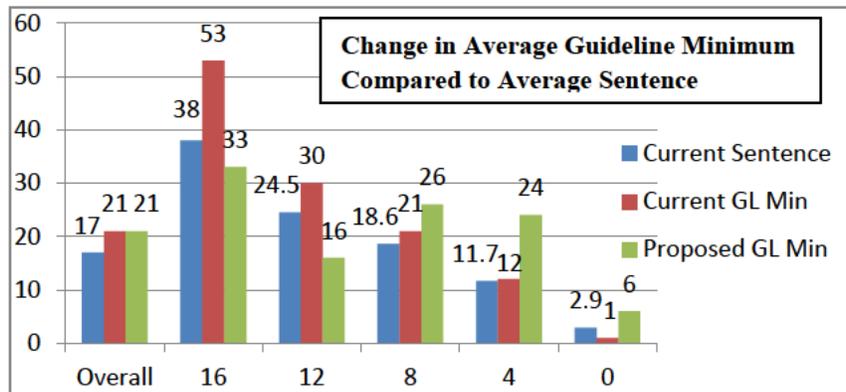
---

<sup>4</sup> Defenders will make a redacted modified presentence report available to the Commission for review.

**in Illegal Reentry Cases and Invites Higher Sentences or More Sentences Below the Advisory Guideline Range.**

The Commission’s data analysis suggests that the average guideline minimum for all cases under the proposed §2L1.2 would be 21 months,<sup>5</sup> with decreased recommended sentence length for those currently subject to +16 and +12 increases in offense level, and increased recommended sentence length for those subject to +8, +4, or 0 increases in offense level. While this may be accurate, it ignores critical information about the sentences actually being imposed in these cases. Table I<sup>6</sup> compares the proposed average guideline minimum to the current actual sentence imposed, and shows a different picture than slide 32 of the Commission’s presentation.

**Table I**



Note: the average sentence of 2.9 months for those who receive no increase in offense level is likely the result of the time spent in detention before being sentenced to time served.

First, if courts impose sentences within the amended guideline range, individuals currently receiving the 8- and 4-level increases would face a greater increase in the length of their sentences than suggested by slide 32 in the Commission’s Immigration Data Briefing. Second, the difference between the proposed guideline amendment and the sentence actually imposed for those subject to the 16-level enhancement is significantly less than the difference between the current guideline minimum and the proposed guideline minimum.<sup>7</sup> Third, whereas

<sup>5</sup> USSC, *Immigration Data Briefing*, Slide 32 (2016).

<sup>6</sup> Sources: *Id.* and USSC, *FY 2014 Monitoring Dataset*.

<sup>7</sup> The Commission’s presentation on *The Application of Proposed §2L1.2 Amendment* is misleading because it suggests that more guideline ranges would be lowered or stay the same than is actually the case. Only two of the six case examples in the presentation received higher sentences under the proposed amendment although the Commission’s coding project shows that the recommended guideline range would increase for persons falling within three (+0, +4, +8) out of the five current offense levels, which make up 68.5% of the individuals sentenced under the §2L1.2 guideline in FY 2014. *Immigration Data Briefing*, *supra* note 5.

the average guideline minimum sentence for all illegal reentry offenses is 21 months, FY 2014 data show that the average overall sentence imposed under §2L1.2 is 17 months with a median of 12 months.<sup>8</sup> If the Commission truly wanted to respond to feedback from the courts and base the amendments on empirical data, it would consider actual sentences imposed in cases and construct a guideline that more closely aligns with those sentences.

By not accounting for actual sentences imposed and increasing the recommended sentences for persons who currently receive the +8, +4, and +0 enhancements in order to reduce guideline ranges for those who receive the +16 and +12 enhancements, the proposed amendment could have two possible effects: (1) a net overall increase in actual length of sentence imposed when courts choose to strictly follow the new guidelines, particularly since the percentage of persons receiving the 4-level increase under the current guideline has been on the rise while fewer persons are receiving the 16-level increase;<sup>9</sup> or (2) an even more significant number of cases sentenced below the recommended guideline range because courts will reject the increased base offense levels for prior illegal reentries and convictions sustained after the first order of removal, just as many courts have with the current 16-, 12-, 8-, and 4-level increases.

**2. The Commission’s Attempt to Rewrite §2L1.2 So It Replicates the Current Average Guideline Minimum and Continues to Emphasize Criminal History Overlooks How Relying on Criminal History to Ratchet up Offense Levels Lacks an Empirical Foundation, Does Not Serve the Purposes of Sentencing, and Is Inconsistent with the Commission’s Organic Statute.**

The Commission’s attempt to keep the average guideline sentence at 21 months is particularly troublesome because the history of §2L1.2 shows that the current guideline lacks an empirical basis related to actual offense conduct and the purposes of sentencing.<sup>10</sup> The guideline’s reliance on prior convictions to establish offense levels is also ill-conceived and inconsistent with the Commission’s organic statute, which anticipates that criminal history will be considered as an “offender,” not an “offense,” characteristic. The better course is for the Commission to go back to square one, reject the long history of ratcheting up sentences for prior conduct for which punishment has already been imposed, and construct a guideline that focuses on the instant offense.

---

<sup>8</sup> USSC, *FY 2014 Monitoring Dataset*.

<sup>9</sup> USSC, *Quick Facts: Illegal Reentry Offenses* (2015).

<sup>10</sup> See *United States v. Aguilar-Huerta*, 576 F.3d 365, 367 (7th Cir. 2009) (citing multiple cases criticizing the 16-level enhancement on the basis that it is not the “result of the Commission’s utilizing empirical data, national experience, or input from a range of experts in the field”).

When §2L1.2 was first promulgated and based on past practice, the base offense level was 6 with a 2-level increase if the person previously entered or remained in the United States. If the defendant had “repeated prior instances of deportation without criminal conviction,” the guideline stated that “a sentence at or near the maximum of the applicable guideline range may be warranted.” §2L1.2, comment. (n.2) (1987). Within two years, the base offense level increased to 8 with a 4-level increase for a pre-removal felony conviction other than a felony involving immigration laws and an invited departure for aggravated and violent felonies. USSG App. C, Amends. 38 (Jan. 15, 1988) & 193 (Nov. 1, 1989). Two years later, the Commission changed the invited departure to a 16-level increase, but cited no empirical evidence to support the change. *Id.* at Amend. 375 (Nov. 1, 1991). In 1995, the suggestion that a person with repeated instances of prior deportations (currently known as removals) not resulting in criminal convictions may warrant a sentence at or near the maximum guideline range was switched to an invited upward departure. Again, no empirical evidence was cited in the reason for amendment. *Id.* at Amend. 523 (Nov. 1, 1995).

As congressional immigration policy got more severe, the severity of the guideline increased drastically (with a 16-level increase for any aggravated felony) even though, once again, no empirical evidence supported the increases and they were not justified by the purposes of sentencing. *Id.* at Amend. 562 (Nov. 1, 1997). In 2001, the Commission responded to feedback from judges and other stakeholders about the severity of the 16-level enhancement and graduated the enhancements by adding 8- and 12-level enhancements. *Id.* at Amend. 632 (Nov. 1, 2001). Subsequent amendments primarily focused on definitions of terrorism and other aggravated felonies. *Id.* at Amends. 637 (Nov. 1, 2002), 658 (Nov. 1, 2003), & 722 (Nov. 1, 2008). Finally, in 2010, the Commission recognized that cultural assimilation was a mitigating circumstance that could provide a basis for a downward departure, *id.* at Amend 740 (Nov. 1, 2010), and that old prior convictions should not result in extreme 16- or 12-level enhancements. *Id.* at Amend. 754 (Nov. 1, 2011). It then amended the guideline to clarify how revocation sentences should be counted. *Id.* at Amend 764 (Nov. 1, 2012). And in 2014, the Commission added a downward departure based on time served in state custody, which acknowledged the arbitrariness of not having time credited toward service of a federal sentence when the defendant is located by immigration authorities while serving time in state custody. Amend. 787 (Nov. 1, 2014).

Section 2L1.2 is the only Chapter 2 guideline that exclusively focuses on prior convictions as specific offense characteristics even though the prior offense has no factual nexus to the instant offense of reentry.<sup>11</sup> That focus is inconsistent with the Commission’s organic

---

<sup>11</sup> A handful of guidelines contain specific offense characteristics based upon prior convictions, but they are not the exclusive focus of the guideline. See USSG §§2D1.1, 2K1.3, 2K2.1, 2L1.1, 2L2.1, 2L2.2, 2N2.1. Significantly, three of the Chapter Two guidelines that contain specific offense characteristics for prior convictions are for immigration, naturalization, and passport violations. USSC, *Interactive Sourcebook*, tbl. 46 FY 2014.

statute, which directs the Commission to establish “categories of offenses” and “categories of defendants.” 28 U.S.C. § 994(c) and (d). Criminal history is expressly listed as a potentially relevant factor for the Commission to consider in “establishing categories of defendants,” but it is not listed as a factor to be considered in “establishing categories of offenses.” 28 U.S.C. § 994(d)(10). The Commission recognized this distinction when it first promulgated the guidelines. *See* Ch. 1, Pt. A (Statutory Mission) (providing an example of offense behavior as “bank/robbery committed with a gun/\$2500 taken” and an “offender characteristic category” as an “offender with one prior conviction not resulting in imprisonment”).

The Commission’s proposal to continue to focus the specific offense characteristics in §2L1.2 on convictions sustained before the first deportation or first order of removal, and add even more specific offense characteristics based upon prior illegal reentry convictions and convictions sustained after the first order of removal, moves the guideline further away from drawing a “distinction between the instant offense and criminal history.”

To avoid obliterating that distinction, the Commission should leave Chapter Four to address prior convictions rather than add more offense levels based upon past convictions. The multiple uses of past convictions in calculating the guidelines and increasing sentence length have been the subject of criticism by judges and commentators for years.<sup>12</sup> Whether counted in criminal history or used to elevate an offense level, using criminal history punishes the defendant twice for the same bad act. When the guidelines use past offense to elevate the criminal history score and offense level, it punishes the defendant three times for the same bad act. In the context of illegal reentry, where a prior conviction is an element of the offense, the prior history is used against the defendant four times.

The Defenders’ November 2015 testimony on crimes of violence contains an analysis of why the purposes of sentencing are not served by using prior convictions multiple times to

---

<sup>12</sup> *See United States v. Santos*, 406 F. Supp. 2d 320, 327 (S.D.N.Y. 2005) (granting downward departure because of inappropriateness of using prior convictions to enhance criminal history and raise offense level); *United States v. Garcia-Jaquex*, 807 F. Supp. 2d 1005, 1011-15 (D. Colo. 2011) (discussing lack of empirical support for §2L1.2(b)(1) and how double-counting of prior convictions by using them to enhance criminal history and offense level “places excessive and unwarranted emphasis on the defendant’s prior acts instead of placing the focus where it should be – on the instant offense”); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005) (finding it “questionable whether a sentence should be increased twice” on the basis of a defendant’s prior record). *See also* Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important Role for District Courts*, 57 Drake L. Rev. 575, 590-91 (2009) (noting how §2L1.2 “effectively punishes the defendant twice for the same misconduct” by “placing such heavy emphases on the defendant’s prior record”); Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Reentry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C.L. Rev. 719, 748 (2010) (discussing Commission’s failure to articulate a purpose for its prior conviction scheme in §2L1.2).

increase sentence length.<sup>13</sup> Here, we present a brief summary: (1) as the introductory commentary to Chapter 4 makes clear, the criminal history score was specifically designed to promote the four purposes of sentencing;<sup>14</sup> (2) major research studies have found that “insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects”;<sup>15</sup> (3) in contrast to the criminal history score, no research supports the premise that offense level is associated with recidivism and that longer sentences are necessary to serve the goal of specific deterrence or to protect the public; and (4) retributive or “just deserts” should be focused on the instant offense of conviction rather than past conduct, which has already been punished.<sup>16</sup>

### **C. Prior Illegal Reentry Offenses and Removals Should Not Be Used to Increase the Base Offense Level or for Invited Upward Departures.**

#### **1. Increasing Sentences Based Upon Prior “Illegal Reentry Offenses” Overcriminalizes Individuals Who Come to this Country to Improve Their Lives Rather Than Commit Serious Crimes That Threaten Public Safety.**

We strongly oppose the increase in the base offense level and the alternative offense levels based upon the number of illegal reentry offenses. The premise that individuals with one or more convictions for illegal reentry offenses are more dangerous and more culpable is

---

<sup>13</sup> Statement of Molly Roth Before the U.S. Sent’g Comm’n, Washington, D.C., at 3-11 (Nov. 5, 2015).

<sup>14</sup> The commentary states: “The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2)). A defendant’s record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.” USSG Ch. 4, Pt. A, intro. comment. *See also United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005) (justifications for increasing offense level based upon criminal history “substantially overlap with those the Commission uses to justify increasing the defendant’s criminal history score”).

The Commission acknowledged in its supplementary report that criminal history rules serve utilitarian and retributive purposes. USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 41 (1987).

<sup>15</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 90 (2015).

<sup>16</sup> Section 2L1.2 has never considered the actual conduct associated with reentry compared to the person’s criminal history.

misguided and unsupported by the evidence.<sup>17</sup> In many respects, the Commission's bold assertion that these individuals are more dangerous mirrors the claims that resulted in ICE removing over one million people who were a threat to no one – a policy that has since been rescinded following heavy criticism.<sup>18</sup> Rather than protect the public and deter individuals from reentering, increasing sentences for those with one or more prior illegal reentry offense exacerbates human rights violations, the harsh treatment immigrants receive in private prisons and during the removal process, and the lack of proportionality in trespass laws.

Research shows that the motive for many people returning to the United States after being removed is to reunite with family, return to the only place they know as home, seek work to support their families, or flee violence or persecution in their home countries.<sup>19</sup> These

---

<sup>17</sup> The Commission's data presentation states that there is "Commission research suggesting additional factors regarding dangerousness and culpability of the defendant that may be relevant," but does not elaborate on those factors or explain how a prior reentry makes one more dangerous or culpable or how other provisions of the guidelines do not already account for those factors. USSC, *Immigration Data Briefing*, *supra* note 5, Slides 12 and 20.

<sup>18</sup> See, e.g., Immigration Policy Center, *Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One* (2014) (discussing how 80% of ICE removals did not focus on "aliens who pose a danger to national security or a risk to public safety"); Jeh Charles Johnson, Secretary of Homeland Security, *Memorandum on Policies for Apprehension, Detention, and Removal of Undocumented Immigrants 2* (Nov. 20, 2014) (changing policies to on enforcement and removal activity to refocus efforts on "threats to national security, public safety, and border security"), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf). Thomas Miles & Adam Cox, *Does Immigration Enforcement Reduce Crime?, Evidence from Secure Communities*, 57 J.L. & Econ. 937 (2014) (finding that "Secure Communities led to no meaningful reductions in the FBI index crime rate").

Secure Communities was an immigration enforcement program in place from 2008 to 2015 that focused not only on immigrants with criminal convictions, but those "not yet convicted, of criminal offenses, in addition to individuals with no criminal history, such as individuals with final orders of removal from an immigration judge." U.S. Immigration and Customs Enforcement, *How is PEP Different from Secure Communities*, [/www.ice.gov/pep#wcm-survey-target-id](http://www.ice.gov/pep#wcm-survey-target-id). The program was replaced in July 2015 with the "Priority Enforcement Program," which will no longer focus on "individuals with civil immigration offenses alone, or those charged, but not convicted of criminal offenses." *Id.*

Data from ICE shows that 45% of the individuals removed between FY 2008 and FY 2013 were "Non-criminal Immigration Violators." In a single year – FY 2008, 69% of those removed were non-criminal. U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>. There is no reason to believe that these individuals pose any more of a threat when reentering to be with families, find work, or otherwise improve their lives.

<sup>19</sup> See, e.g., Jeremy Slack, et al., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. Migration & Human Security 109, 123 (2015) (finding that "a shift toward family-oriented migration is becoming a significant portion of the unauthorized stream" of migrants). See also

powerful motives are stronger than any deterrent value of longer sentences.<sup>20</sup> As one recently removed person explained about his reason for wanting to return to the United States: “I have no choice, my family is there. I need to go back to my children who want me back.”<sup>21</sup>

Others who enter without authority have families in Mexico or Central America, but come to this country to find employment so they can support their families.<sup>22</sup> A 23-year-old Mexican man Defenders recently represented on an illegal reentry charge provides an example of a scenario we often see. He has two children and a wife who live in Mexico. He came to the United States to find employment. When living in Mexico, he earned \$52 a week as an agricultural laborer. When living in the United States, he earned \$400 a week as a cook and \$500 a week as a landscape laborer. He was removed to Mexico on 6 separate occasions between 2009 and 2014. His criminal history category was V based upon three prior convictions for illegal reentry and one prior conviction for driving while intoxicated. Under the current guidelines, his sentencing range was 15-21 months based upon a CH V and final offense level of

---

American Immigration Council, *Unauthorized Immigrants Today: A Demographic Profile* 1 (2014) (Data from U.S. Census Bureau and other sources show that “three-fifths of unauthorized immigrants have been here over a decade. One of every 20 U.S. workers is an unauthorized immigrant.” “Nearly half of all adult unauthorized immigrants have children under the age of 18, and roughly 4.5 million native-born U.S.-citizen children have at least one parent who is an unauthorized immigrant.”), <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-today-demographic-profile>.

The Commission’s data also shows that the criminal history of persons sentenced under §2L1.2 has shifted over the past ten years, with far fewer individuals having serious felony convictions. In FY 2004, only 33.9% of individuals sentenced under §2L1.2 received a 0- or 4-level increase in offense level. In FY 2014, 59.7% received either no increase or a 4-level increase. USSC, *Use of Guidelines and Specific Offense Characteristics*, §2L1.2 (2004) (2014). That data is not surprising given the Secure Communities program and the focus of removing people that have lived in this country for many years, have family members who are U.S. citizens, but who have no way to become legal residents or citizens because they may have committed a minor crime or reentered after being removed. See Juan Quevedo, *The Troubling Case(s) of Noncitizens: Immigration Enforcement Through the Criminal Justice System and the Effect on Families*, 10 Tenn. J.L. & Pol’y 386 (2015).

ICE has acknowledged that “many Central American nationals are asserting claims of credible or reasonable fear of persecution.” Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

<sup>20</sup> The Migrant Border Crossing Study shows that “deterrence by arrest, incarceration and removal is largely ineffective.” Slack, *supra* note 19. at 114. The study is based on surveys of a random sample of deportees in six cities, including five along the U.S.-Mexico Border and Mexico City. *Id.* at 111.

<sup>21</sup> *Id.* at 114-15.

<sup>22</sup> See, e.g., *United States v. Santos*, 406 F. Supp. 2d 320, 327-28 (S.D.N.Y. 2005) (defendant “returned to the United States illegally to find work and send money home to support his family and his son, who needed, and continues to need, special medical attention to treat his asthma”).

10 (BOL 8, +4 for a prior felony conviction, -2 for acceptance of responsibility). The court sentenced him to 10 months imprisonment for the illegal reentry conviction and 4 months consecutive for a violation of supervised release on a prior reentry. Under the proposed amendment, his guideline range would increase to 21-27 months (BOL 14, - 2 for acceptance = 12, CH IV).<sup>23</sup>

For individuals fleeing gang violence in their native countries, longer sentences also would have no deterrent value. Faced with a choice between being killed or risking being caught coming into the United States and removed, the logical, life-sustaining choice is obvious – reenter whether immigration officials find you qualify for refugee status or not.<sup>24</sup>

In addition to not having any deterrent effect, elevating sentences for persons with multiple illegal reentry convictions who come to this country to meet basic human needs is a serious violation of human rights. The Human Rights Watch in 2013 reported:

US civil immigration law fails to adequately protect families and makes it nearly impossible for many who have been deported to reunite with their families legally in the United States. Recent surveys, as well as reports from humanitarian organizations along the border, indicate that a growing number of people seeking entry into the United States are not traditional migrants but former long-term residents seeking to return to their families. Increasingly, the US immigration system is splitting families through deportation and then subjecting the deported family member to potentially lengthy prison terms for trying to reunite with loved ones. The focus on criminal prosecutions also means that asylum seekers fleeing violence or persecution can face serious obstacles to obtaining the protection guaranteed by international refugee law ratified by the United States.

Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions* 4 (2013).

---

<sup>23</sup> To impose the same 10 month sentence, which the sentencing judge found sufficient but not great than necessary, the judge would have to give a variance 50% below the advisory guideline range.

<sup>24</sup> See Yara Simon, *Human Rights Watch to Investigate Immigration Detention Centers Along the U.S.-Mexico Border* (2016), <http://remezcla.com/culture/human-rights-watch-to-investigate-immigration-detention-centers>; Joshua Partlow, *El Salvador Is On Pace to Become The Hemisphere's Most Deadly Nation*, Wash. Post, May 17, 2015, [https://www.washingtonpost.com/world/the\\_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed\\_story.html?tid=a\\_inl](https://www.washingtonpost.com/world/the_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed_story.html?tid=a_inl); U.S. Dep't of State, *El Salvador Travel Warning* (Jan. 15, 2016) (warning that crime and violence levels remain critically high), <https://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html>. See also U.S. Dep't of State, *Honduras Travel Warning* (Oct. 30, 2015) (discussing high murder rates, extortion, kidnapping, sexual assault, and other violent crimes); U.S. Dep't of State, *Mexico Travel Warning* (Jan. 19, 2016) (warning of threats from organized crime groups).

Increased punishment for these individuals is also incompatible with the views of United Nations human rights experts, who “have urged the use of civil law, and strongly cautioned against using criminal law, to punish illegal entrants.” *Id.*

The Commission’s proposal to increase sentences for individuals with multiple reentry convictions also fails to consider the uniquely harsh conditions under which such individuals are housed in prisons, the “extra” punishment of removal under circumstances that endangers their lives,<sup>25</sup> and the utter lack of proportionality in how people who cross the U.S. border unlawfully are treated significantly more harshly than other people who trespass on government property for unlawful purposes.

First, noncitizens suffer worse conditions of confinement than other federal prisoners. Crowding in the federal prison system is a longstanding problem, but it is especially acute in immigration cases. Because of overcrowding, BOP has entered into contracts with private companies to detain noncitizens convicted of immigration offenses and other federal crimes. Currently, BOP has thirteen contract prisons located throughout the country.<sup>26</sup> The quality of the services they provide has long been a source of concern. A recent analysis shows that many persons incarcerated in “immigrant only contract prisons” suffer serious medical neglect, in some cases leading to death.<sup>27</sup> An investigation done by the American Civil Liberties Union found that “the men held in these private prisons are subjected to shocking abuse and mistreatment, and discriminated against by BOP policies that impede family contact and exclude them from rehabilitative programs.”<sup>28</sup>

Second, increasing sentences for those with prior reentry convictions fails to acknowledge that prosecution and incarceration for immigration offenses is a “supplement to, not a substitute, for deportation.”<sup>29</sup> Accordingly, the individual faces incarceration and exile,<sup>30</sup>

---

<sup>25</sup> Slack, *supra* note 19, at 119 (discussing how certain repatriation strategies place people at increased risk of violence).

<sup>26</sup> [https://www.bop.gov/about/facilities/contract\\_facilities.jsp](https://www.bop.gov/about/facilities/contract_facilities.jsp).

<sup>27</sup> Seth Wessler, *Separate, Unequal, and Deadly*, The Investigative Fund (Jan. 27, 2016), <http://www.theinvestigativefund.org/investigations/immigrationandlabor/2200/Most%20Read?page=entire>. See also Alicia Neaves, *Family of Detainees, Current Inmate Speak Out Regarding Maltreatment at Big Spring Correctional Center*, NewsWest9, Feb. 12, 2015, <http://www.newswest9.com/story/28098380/family-of-detainees-current-inmate-speak-out-regarding-maltreatment-at-big-spring-correctional-center>.

<sup>28</sup> American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* 3 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>.

<sup>29</sup> Daniel I. Morales, *Crimes of Migration*, 49 Wake Forest L. Rev. 1257, 1269 (2014).

and may encounter enormously dangerous conditions in their home countries for trespassing into the United States without permission. The process of repatriation has been riddled with problems, with migrants being robbed, stripped of personal belongings, and stranded in places they have never been before during the removal process.<sup>31</sup>

Third, the stark differences between punishment for illegal reentry and other forms of trespass raise serious proportionality concerns and undermine respect for the law. For example, a person in possession of a firearm who trespasses at a secure government facility faces an offense level of 8 under USSG §2B2.3. A person who “goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or regulation,” or who reenters after “having been removed therefrom or ordered not to reenter” faces no more than 6 months imprisonment. 18 U.S.C. § 1382. Similarly, a person who trespasses on Bureau of Prisons land faces a penalty of 6 months. 18 U.S.C. § 1793. While the Commission has no control over the statutory maximum penalties that Congress has set forth for these various forms of trespass, it certainly can consider these inequities when deciding how best to structure guidelines that recommend sentences sufficient but not greater than necessary to serve the purposes of sentencing.<sup>32</sup>

Against the backdrop discussed above, we fail to see how the increased base offense levels under the proposed amendment are justifiable. The following case examples illustrate how the Commission’s proposal increases the recommended sentence length for the least culpable individuals who do nothing but cross the border for a better life and may have committed a minor offense.

- Defendant A has two prior illegal reentry convictions, for which she received sentences of imprisonment of 2 months (time served), which result in a total of 4

---

<sup>30</sup> See *Costello v. INS*, 376 U.S. 120, 128 (1964) (“deportation is a drastic measure, at times the equivalent of banishment or exile”).

<sup>31</sup> See American Immigration Council, *New U.S. – Mexico Repatriation Agreements Seek to Protect Returning Migrants* (2016) (discussing problems associated with removal that prompted policy changes), <http://immigrationimpact.com/2016/03/01/new-u-s-mexico-repatriation-agreements-seek-to-protect-returning-migrants>. See also Dep’t of Homeland Security, *United States and Mexico Sign Updated Repatriation Agreements* (2016) (noting vulnerability of individuals repatriated to Mexico and need for policy changes), <https://www.dhs.gov/news/2016/02/23/united-states-and-mexico-sign-updated-repatriation-arrangements>.

<sup>32</sup> The lack of proportionality prevalent in the proposed base offense levels is apparent upon examination of other guidelines as well. A person who obstructs a police officer is subject to an offense level of 10 – the same offense level of someone who may do nothing more than put their foot over the border after having once been removed. And a person who obstructs an officer and injures the victim is subject to the same offense level as a person who reentered after sustaining a single conviction for illegal reentry. USSG §2A2.4. A person who commits criminal sexual abuse of a ward is subject to a base offense level of 14. USSG §2A3.3.

criminal history points (CH III). Under the current guideline, she would have an offense level of  $8 + 4$  (felony) = 12, placing her in a range of *15-21 months* (10-16 months with acceptance). Under the proposed amendment, her guideline range would increase to *21-27 months* (OL 14, CH III) (15-21 months with acceptance).

- Defendant B has one prior illegal reentry conviction for which he received a sentence of imprisonment of 3 months. After his first order of removal, he sustained a conviction for forgery for which he received a sentence of 24 months. The two convictions give him 5 criminal history points (CH III). Under the current guideline, he would have an offense level of  $8 + 4$  (felony) = 12, placing him in a range of *15-21 months* (10-16 months with acceptance). Under the proposed amendment, his guideline range would increase to *41-51 months* (BOL  $12 + 8$  for a felony offense for which the sentence imposed was 24 months or more = 20, CH III) (30-37 months with acceptance).
- Defendant C has a 2006 conviction for drug possession, for which he received a 1-year sentence, and three misdemeanor illegal entry convictions (12/14/01, 7/5/03, 6/2/06), for which he received 30 days, 30 days, and 60 days custody. He unlawfully returned to the United States in 2006, lived a law abiding life, and then was arrested for illegal reentry in 2015. Because all of the prior sentences were imposed within 10 years of the instant illegal reentry offense, USSG §4A1.2(e)(2), all of his prior convictions count for criminal history points, giving him 6 criminal history points (CH IV). Under the current guideline, he would have a base offense level of  $8 + 4$  (felony) = 12, placing him in a range of *21-27 months* (15-21 months with acceptance). Under the proposed amendment, his guideline range would increase to *51-63 months* (BOL  $14 + 6$  for felony conviction before first order of removal = 20, CH IV) (37-46 months with acceptance).
- Defendant D has a 2011 forgery conviction for which he received a nine month sentence. He was deported in December 2011. Following a 2013 arrest for possession of a controlled substance and driving while intoxicated, ICE agents placed a detainer on him. In separate proceedings on different days,<sup>33</sup> he received 4 months for the drug possession and 6 months on the misdemeanor DWI. The prior convictions give him 6 criminal history points (CH III). He receives an additional 2 points under §4A1.1(d) because he was “found” on the day after he was sentenced in the state case, resulting in a CH IV. Under the current guideline,

---

<sup>33</sup> Texas processes misdemeanors and felonies in separate proceedings even if the person was arrested for both offenses at the same time.

he would have a base offense level of  $8 + 4$  (felony) = 12, placing him in a range of *21-27 months* (15-21 months with acceptance). Under the proposed amendment, his guideline range would increase to *41-51 months* (BOL level 10 +4 for conviction before first order of removal +4 for conviction after first order of removal = 18, CH IVI) (33-41 months with acceptance).

No evidence shows that increasing sentences for these individuals and removing them from the United States does anything to protect the public. Indeed, evidence about the impact of the “Secure Communities” initiative, which was in place from 2008 to 2014 and designed to identify immigrants who had committed crimes and remove them, shows that the program did not reduce rates of violent crimes or make communities safer.<sup>34</sup> If detaining and deporting noncitizens who committed minor crimes had no effect on crime rates, then there is no reason to believe that increasing sentences for these individuals, many of whom will have done nothing but commit a status offense because they returned to the United States, would do anything to protect the public.

**2. Increasing Offense Levels Based Upon Convictions for Illegal Entry, Illegal Reentry, Failure to Depart, and Failure to Comply with Terms of Release Under Supervision Would Perpetuate Disparity in the Enforcement of Immigration Laws and Fails to Acknowledge the Weak Procedural Protections Associated with Prosecutions under 8 U.S.C. § 1325.**

Using a broad category of “illegal reentry offenses” to increase base offense levels exacerbates widespread disparity in how immigration laws are enforced<sup>35</sup> and overlooks how § 1325 prosecutions are handled.<sup>36</sup>

---

<sup>34</sup> Thomas Miles & Adam Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & Econ. 937 (2014).

<sup>35</sup> Significant disparity also exists in the sentences imposed upon those convicted of illegal reentry. Even setting aside *Booker*, a similarly situated individual can receive a vastly different sentence depending upon the nature of the fast track policy. 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, 524 (2006).

<sup>36</sup> The proposal to include an offense under 8 U.S.C. § 1253 as an “illegal reentry offense” that increases the offense level is also misguided. Although there were few prosecutions under 8 U.S.C. § 1253 in FY 2015, persons convicted of failing to depart should not be subject to additional increases because they are often asylum seekers who are afraid to return to their home countries so they refuse to fill out travel documents. In addition, failure to depart prosecutions against persons who are afraid to sign travel documents can be arbitrary because in our experience they are sometimes brought to shift the expense of detention from immigration authorities to the U.S. Marshals.

First, not all individuals who unlawfully enter this country face prosecution for illegal entry or reentry. Instead, they may face reinstatement of removal. Reinstatement of removal is a process used by the Department of Homeland Security to quickly remove people who previously departed the United States under an order of removal and reentered without lawful authority. Reinstatement of removal proceedings, which have grown in the past years,<sup>37</sup> permits the immigration officer to serve as law enforcement officer, prosecutor, and judge. But whether a person faces a reinstatement of removal proceeding or prosecution under 8 U.S.C. §§ 1325 or 1326 varies from agent to agent, prosecutor to prosecutor, and district to district. The different policies that states and localities adopted regarding cooperation with ICE also create disparities in the rates of removals under ICE's Criminal Alien Program (CAP).<sup>38</sup> For example, in FY 2013, Texas and Arizona experienced the highest rate of removals per 1,000 noncitizens whereas other states, such as Florida and New York, had "comparatively lower rates of CAP removals per 1,000 noncitizens."<sup>39</sup> Other disparities are documented in a report by the Office of the Inspector General, which found that Border Patrol does not have a consistent practice of referring for prosecution aliens who "express fear of persecution on return to their home countries."<sup>40</sup> Disparities in prosecutions for §§ 1325 and 1326 offenses are also prevalent. In FY 2015, the Southern District of Texas and the Western District of Texas were the top ranked districts (per one million people) for prosecutions of § 1325 offenses.<sup>41</sup> The Southern District of Texas had 21,656 prosecutions, whereas Arizona only had 1,592 prosecutions for § 1325 offenses. In contrast, Arizona and New Mexico were the top ranked districts (per one million people) for

---

<sup>37</sup> American Immigration Council, *Removal Without Recourse: The Growth of Summary Deportations from the United States* (2014).

<sup>38</sup> ICE itself has noted that the level of cooperation from state and local law enforcement agencies impacts its operations. U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015 3* (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

<sup>39</sup> See American Immigration Council, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program 5* (2015).

Federal prosecutions also vary. The Southern District of Texas, Arizona, and the Western District of Texas have had the most prosecutions for the past twenty years, but the Southern District of Texas had 14.1 percent more prosecutions in 2015 than it did in 2010. During the same time period, the District of Utah experienced a growth in prosecutions while the Central District of California saw a decline. Transactional Records Access Clearinghouse, *Immigration Prosecutions for 2015* (2015).

<sup>40</sup> Office of Inspector General, U.S. Dep't of Homeland Security, *Streamline: Measuring Its Effect on Illegal Border Crossing 2* (2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf).

<sup>41</sup> Transactional Records Clearinghouse, *Prosecutions for 2015: Lead Charge 8 U.S.C. § 1326 (reentry of deported alien)*; Transactional Records Clearinghouse, *Prosecutions for 2015: Lead Charge: 8 U.S.C. § 1325 (entry of alien at improper time or place)*.

prosecutions of § 1326 offenses. Arizona had 16,894 prosecutions, whereas the Southern District of Texas only had 3,999 for § 1326 offenses.

The disparity in practices could easily result in a two or four level difference in the base offense level under the proposed amendment between, for example, (1) a person who was prosecuted for entry without inspection under § 1325 and was prosecuted again under § 1325 or § 1326 upon returning to the United States (BOL 14), (2) a person who had a single conviction under § 1326, returned several times and was subject to an expedited removal rather than prosecution (BOL 12), (3) a person who was removed multiple times without conviction (BOL 10), and (4) a person who was only removed one time without conviction (BOL 10). The solution to this disparity, however, as discussed below, is not to count removals that did not result in a conviction.

Second, the proposal to use a second or subsequent offense under 8 U.S.C. § 1325 (regardless of whether the conviction was designated a felony or misdemeanor) to increase the base offense level raises serious fairness concerns. Those offenses are the most frequently prosecuted immigration offenses.<sup>42</sup> The proposal to treat a second or subsequent § 1325 conviction the same as a § 1326 conviction overlooks how the prosecution and defense of a § 1325 case is dramatically different than that of a § 1326 case. The process surrounding misdemeanor illegal entry cases under § 1325 is so fraught with error that it is unfair to count second or subsequent convictions regardless of whether they are treated as misdemeanors or felonies.

Section 1325 prosecutions are rushed, rely heavily on standard pleas, and typically occur with minimal access to legal representation. For example, in the Western District of Texas, a half dozen lawyers might go to a detention center and visit with 120 individuals charged with a §1325 violation. The lawyers explain the charges and basic legal rights to the group. Because of the high numbers and bureaucratic hurdles in obtaining relevant information, it is difficult for criminal defense counsel to determine if the person has a viable claim for derivative citizenship or if they can apply for a visa. When the detainees get to court, there may be two to three lawyers representing seventy-five people in a single day. The process moves so quickly that “potential defenses – such as being a juvenile or unfit to stand trial, or being eligible for citizenship or asylum – slip through the cracks.”<sup>43</sup> If the Commission were to use these convictions to increase offense levels, it would set up a situation where individuals without counsel or barely adequate counsel face lengthier terms of imprisonment.

---

<sup>42</sup> In FY 2015, 50% of immigration-related federal prosecutions (36,014) were for illegal entry and 44 % (31,703) were for illegal reentry. Transactional Records Clearinghouse, *Immigration Convictions for 2015*.

<sup>43</sup> Joshua Partlow, *Under Operation Streamline, Fast-Track Proceedings for Illegal Immigrants*, Wash. Post, Feb. 10, 2014 (referencing testimony of federal public defender Heather Williams before Congress).

If the Commission were to amend the guidelines to count § 1325 offenses in criminal history and offense level, then the incentive to challenge the validity of the conviction would increase and new litigation would emerge over whether a court should vary below the guideline range based upon the invalidity of a prior conviction or the questionable circumstances surrounding it. *See United States v. Miramontes-Murillo*, 21012 WL 2884689 (W.D. Texas 2012) (prior sentence resulting from proceeding where defendant denied right to counsel cannot be used to increase defendant's criminal history score).<sup>44</sup>

### **3. Neither Alternative Base Offense Levels Nor an Invited Upward Departure Should be Based upon “Multiple Prior Deportations not Reflected in Prior Convictions.”**

The Commission requests comment on whether it should use “deportations and orders of removal” to apply alternative base offense levels and it proposes a departure for prior removals (a.k.a. deportations) “not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326.” Defenders oppose the use of removals or orders of removal as a basis to increase the recommended guideline sentence, whether in the form of an alternative base offense level or invited upward departure.<sup>45</sup>

First, U.S. Immigration and Customs Enforcement's (ICE) and Removal Operations (ERO) have been seriously criticized for focusing on removing immigrants who pose no threat to anyone. In FY 2013, only 20% of persons removed were within ICE's highest enforcement priority, i.e., those “who pose a danger to national security or a risk to public safety.”<sup>46</sup>

Second, enhancing sentences based upon multiple removals not reflected in prior convictions raises serious due process concerns and invites litigation over the validity of the removal. The system of justice associated with the removal of immigrants lacks core procedural protections. In the past, most removal or deportation orders were entered after a hearing before an immigration judge. In recent years, “two-thirds of individuals deported are subject to summary removal procedures, which deprive them of both the right to appear before a judge and

---

<sup>44</sup> Although USSG § 4A1.2 does not confer a right to attack a prior conviction on grounds other than deprivation of the Sixth Amendment right to counsel, nothing precludes a defendant from arguing for a variance because of the circumstances surrounding his prior entry conviction. *See* 18 U.S.C. § 3661 (“no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence”).

<sup>45</sup> The criminal history rules already invite upward departures in criminal history for prior removals. USSG §4A1.3(a)(2)(B). If the guideline was to include such prior removals or orders of removal in the offense level or an invited departure, it confuses guideline application and invites multiple departures for the same conduct.

<sup>46</sup> *Misplaced Priorities*, *supra* note 18.

the right to apply for status in the United States.”<sup>47</sup> Two of these procedures, “‘expedited removal,’ and ‘reinstatement of removal,’ allow immigration officers to serve as both prosecutor and judge – often investigating, hearing, and making a decision all within the course of one day. Typically, the immigrant does not have access to counsel or even his or her immigration records.”<sup>48</sup> Another procedure – stipulated removal – begins in immigration court, but the party waives his or her right to a hearing and the judge “may enter the order of removal without seeing the person and asking him or her whether the stipulation was entered into knowingly and voluntarily.”<sup>49</sup>

Using such removals as a basis to increase sentences would increase litigation and require more investigative resources. Counsel would be obligated to investigate the circumstances surrounding the removal and point out any mitigating factors to the court, which would then place an additional burden on probation, prosecutors, and judges. What occurred during the interaction between the immigration enforcement officer and the individual would be relevant to how the removal should factor into the sentencing decision. For example, was it a voluntary departure, formal removal by an immigration judge, judicial order of removal, or expedited removal where the individual was not allowed to consult legal counsel, present his or her case to an immigration judge, or have the removal decision reviewed by a judge? Was it a border removal, interior removal, removal of someone who failed to leave the United States based on a final order of removal, or failed to report to ICE for removal? Was the person detained for a long period of time<sup>50</sup> or removed quickly? Was the removal done under circumstances that placed the person’s life in jeopardy?<sup>51</sup> Were the person’s basic needs met during the removal process? Were there mitigating circumstances surrounding the entry and removal - e.g.,

---

<sup>47</sup> American Immigration Council, *Removal without Recourse: The Growth of Summary Deportations from the United States* 1 (2014). See also *Misplaced Priorities*, *supra* note 18, at 5 (data from a single year show that seven out of ten persons subjected to removal did not have an opportunity to appear before an immigration judge); American Immigration Council, *How the Immigration System Falls Short of American Ideals of Justice: Two Systems of Justice* 2 (2013) (“stipulation may occur quickly and without the assistance of any attorney”).

<sup>48</sup> *How the Immigration System Falls Short of American Ideals of Justice*, *supra* note 47, at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> See Suzy Khimm, *Many Immigrants Facing Deportation Must Wait 550 days for Their Day in Court*, Wash Post, Feb. 22, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/02/22/many-immigrants-facing-deportation-must-wait-550-days-for-their-day-in-court>.

<sup>51</sup> See generally WOLA: Advocacy for Human Rights in the Americas, *U.S. Dangerous Deportation Practices News & Analysis* (2015), [http://www.wola.org/research\\_analysis/1180](http://www.wola.org/research_analysis/1180). For example, in March 2014, “three recently deported Mexican women were kidnapped while waiting in line at a Western Union in Matamoros.” Clay Boggs, *What Happens to Migrants After They Are Deported?* (2014), [http://www.wola.org/commentary/what\\_happens\\_to\\_migrants\\_after\\_they\\_are\\_deported](http://www.wola.org/commentary/what_happens_to_migrants_after_they_are_deported).

cooperation, illness, cultural assimilation, need to visit an ill family member, or desire to visit a child?<sup>52</sup>

Third, using removals to increase sentences would perpetuate unwarranted racial and ethnic disparity. Mexican and Central Americans are overrepresented in CAP removals when “compared to their share among the noncitizen and the undocumented population living in this country.”<sup>53</sup> According to a study done by the American Immigration Council, “[p]eople from Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) accounted for 92.5 percent of all CAP removals between FY 2010 and FY 2013, even though, collectively, nationals of said countries account for 48 percent of the noncitizen population of the United States.”<sup>54</sup> The difference in crime rates among the noncitizen population did not explain this disparity.<sup>55</sup>

#### **4. Any Conviction Used to Increase Sentences Should at Least Receive Criminal History Points.**

Even if multiple illegal reentry offenses were relevant to the dangerousness and culpability of the defendant, Defenders see no rationale for the Commission’s proposal to use only convictions that receive criminal history points to increase offense levels for felonies and misdemeanors under §2L1.2(b)(1) and (b)(2), but count all “illegal reentry offenses,” no matter how old, for purposes of determining the base offense level. Just as old convictions should not count in criminal history, they should not count for enhancements in base offense level. A person who is convicted of failure to depart, receives a two month time served sentence, is removed, and then returns to this country ten years later to visit an ill family member is certainly less culpable than a person who is removed, returns and is convicted of illegal reentry, removed again, and then returns within one year to see a former spouse with whom he is having a financial dispute (though we question the severity of either one of these offenses).

---

<sup>52</sup> The removal of parents of U.S. children is a significant human rights issue that can have a devastating impact on the future lives of the children. *See generally* Human Rights Watch, *Border Enforcement Policies Ensnare Parents of U.S. Citizen Children* (Jan. 2015) (discussing consequences of summary removals of parents of U.S. citizen children and how the removal process rarely gives the parent a chance for a hearing before an immigration judge), <https://www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children>.

<sup>53</sup> *Enforcement Overdrive*, *supra* note 39, at 17. *See also id.* at tbl.7.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 19.

**5. If Adopted, the Commission’s Proposal to Increase Even the Lowest Base Offense Level Above the Current Level Would Entangle It In the Debate (on the Anti-Immigrant Side) About Whether Undocumented Workers Help or Hurt the U.S. Economy.**

The Commission should be mindful of the consequences of its policy decisions and the “community view of the gravity of the offense.” 28 U.S.C. § 994(c)(4). With illegal reentry, the community views vary widely. An example of those diverse views is found in the debate on the economic impact of undocumented workers. The challenge for the Commission is whether it wants to take sides in that debate by recommending higher sentences for persons who come into this country unlawfully, but commit no other crime or only a minor crime.

The Pacific Standard recently published an article that shows the deep disagreement on the impact of undocumented workers on the American economy.<sup>56</sup> The article discusses research showing how “undocumented workers improve companies’ bottom lines and create more jobs,”<sup>57</sup> and other views from economists that believe illegal immigration “has tended to depress both wages and employment rates for low-skilled American citizens.”<sup>58</sup>

The Commission’s suggestion that persons who enter this country multiple times are more dangerous and culpable ignores the data that shows how many individuals enter this country to find work and puts the Commission on the side of the debate that views people who enter this country illegally as “social and economic burdens to law-abiding, tax-paying Americans.”<sup>59</sup> We think it a mistake for the Commission to take sides on this issue (by rejecting the notion that people come into this country multiple times to find work and to support families

---

<sup>56</sup> Francie Diep, *How Undocumented Immigrants Contribute to the American Economy: Would You Notice a Day Without Latinos? Most Definitely*, Pacific Standard, Feb. 19, 2016, <http://www.psmag.com/business-economics/how-undocumented-immigrants-contribute-to-the-american-economy>. See also Andrew Wallace, et al., *The Immigration Debate: Economic Impact* (2015), [http://www.umich.edu/~ac213/student\\_projects07/global/economicimpact.html](http://www.umich.edu/~ac213/student_projects07/global/economicimpact.html); H. Goodman, *Illegal Immigrants Benefit the U.S. Economy*, The Hill, Apr. 23, 2014, <http://thehill.com/blogs/congress-blog/foreign-policy/203984-illegal-immigrants-benefit-the-us-economy>.

<sup>57</sup> Julian Aguilar, *Report: Immigrants Economic Strength Increases*, The Texas Tribune, May 30, 2013 (“If all unauthorized immigrants were removed from Texas, the state would lose \$69.3 billion in economic activity, \$30.8 billion in gross state product, and approximately 403,174 jobs, even accounting for adequate market adjustment time”), <http://www.texastribune.org/2013/05/30/report-immigrants-economic-strength-increases>.

<sup>58</sup> *Id.* See ProCon.org, *Is Illegal Immigration and Economic Burden to America?* (2015) (summarizing various positions in debate on the impact of undocumented immigration on the U.S. economy), [prohttp://immigration.procon.org/view.answers.php?questionID=000788](http://immigration.procon.org/view.answers.php?questionID=000788).

<sup>59</sup> *Id.*

within and outside the United States), particularly since its decision to punish more harshly those individuals who enter multiple times for work reasons could well have a negative impact on the economy.

**6. The Commission Has Other Alternatives to Using Prior Illegal Reentry Offenses to Modify the Guideline.**

Rather than drive up sentence length for those with a single or multiple illegal reentry offense in order to reduce sentences for those with prior felony convictions, the better course is to look to the individual's motive in reentering and punish those who reenter and commit serious offenses. As one commentator has explained:

[I]t seems tenuous at best to suggest that a defendant is more blameworthy for reentering the country after a previous conviction than for reentering without a criminal record. To the extent that courts look beyond the act of reentry in assessing the defendant's culpability for the offense, motives for reentering appear much more relevant than criminal history to an analysis of culpability. For example, courts should treat a defendant who reenters to rejoin his wife and children and work to support them differently from one who returns to engage in gang activity.

Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1233 (2010).

If the Commission wants to pursue offense level increases for post-reentry convictions and move from the categorical approach, it should keep the base offense level at 8 and not use illegal reentry offenses to increase the offense level. If the Commission decides to explore other ways to amend §2L1.2, we would be happy to work with staff on a new proposed amendment. In the meantime, the Commission should at least incorporate into §2L1.2 the new definitions in §4B1.2.<sup>60</sup> Multiple definitions for the same term cause confusion and lead to mistakes. To ease application, a single definition should be put in place. In addition, the definitions set forth in the current guideline are questionable because they are based on the unconstitutional residual clause of 18 U.S.C. § 16.

---

<sup>60</sup> For the same reasons that the Commission excluded burglary of a dwelling and most statutory rape in §4B1.2, it should exclude them in §2L1.2.

**D. The Proposed Amendments on How Prior Convictions Count as Specific Offense Characteristics Would Overstate the Seriousness of the Prior Offense, Create Problems with Proportionality, and Generate Confusion about the Application of the Enhancement for Misdemeanors.**

Defenders have several concerns about the proposed amendments: (1) the proposed sentence length for each tiered enhancement is not supported by empirical evidence and fails to consider states that call for lengthy terms of imprisonment, including 2-year minimums, for minor offenses; (2) three tiers with 2-, 4-, and 6-level increases would provide more proportional increases than 4 tiers with 2-, 4-, 6-, and 8-level increases; and (3) the terms “misdemeanor involving drugs” and “crimes against the person” need clarification.

**1. The Break Points for the Sentence Lengths Triggering the Proposed Tiered Enhancements for Prior Convictions Are Not Sufficiently Supported by Empirical Evidence.**

We understand that the Commission has tried to show through its immigration data briefing that sentence length is a reasonable proxy for the seriousness of the offense, but we are concerned that the data shared with the public does not provide sufficient information to fully assess the Commission’s proposal.

First, the Commission chose only to share the cutoff point of 24 months or more rather than provide a greater statistical breakdown on sentence length.<sup>61</sup> For example, the data shows that 51% of assault cases received a sentence of 24 months or above, but it does not provide other break points<sup>62</sup> that would be more informative. If it were actually the case that 50% of all assault cases had a sentence over 30 months, then the 24-month break point would overstate the seriousness of the offense.

Second, the Commission does not provide definitions for the offenses it used to measure sentence length. For example, does assault include only “aggravated assault” or also “simple assault”?

Third, the offenses for which the Commission provides average sentence length do not correspond to the most frequent convictions triggering the current enhancements. According to the *Illegal Reentry Offenses* report, burglary was the most frequent conviction that triggered the 8-level enhancement,<sup>63</sup> but the Commission provides no information on what the average

---

<sup>61</sup> *Immigration Data Briefing*, *supra* note 5, Slide 28.

<sup>62</sup> *Id.*

<sup>63</sup> *Illegal Reentry Offenses*, *supra* note 1, at 21.

sentence length was for burglary. Similarly, the Commission's *Illegal Reentry Offenses* report, which draws a distinction between possession with intent to distribute drugs and trafficking or distribution of drugs, shows that possession with intent to distribute drugs was a frequent conviction for the 8-, 12-, and 16-level enhancements,<sup>64</sup> but the Commission's publicly released data does not draw the same distinctions. Without such information, it is difficult to determine whether the proposed sentence lengths are a reasonable proxy for offense seriousness at the levels set by the Commission.

Fourth, the Commission also has not explained how it arrived at the proposed 12- and 24-month break points when other data relevant to offense seriousness as defined by the Commission shows that the average sentences imposed for offenses triggering the highest enhancement in the current guideline – 16 levels – was 40 months.<sup>65</sup> Fifth, the Commission's own data on average sentence imposed demonstrates that the break points are too low. In FY 2014, the average sentence imposed for a federal felony conviction was 51 months.<sup>66</sup> Federal drug trafficking and assault had average sentences of 73 months and 38 months.<sup>67</sup>

Sixth, data on state prison sentences further shows that the Commission's break points for the tiered enhancements would not provide meaningful distinctions and are too low. While current information on the average sentences imposed for state offenses is not readily available, two studies show that twenty-four months for the highest proposed offense level would likely result in many individuals receiving an 8-level increase. A 2009 study from the Bureau of Justice Statistics showed the average length of prison sentences imposed for state felony offenses in 2006 was 38 months. Offenses that the Commission deems more serious had longer average sentences, e.g., 41 months for aggravated assault; 38 months for drug trafficking; 87 months for robbery; 78 months for sexual assault other than rape.<sup>68</sup> Another study of time-served sentences shows that the sentences imposed in many state felony offenses are substantial.<sup>69</sup> Individuals released from prison in 2009 spent an average of 2.9 years in state custody.<sup>70</sup> These findings are

---

<sup>64</sup> *Id.* at 21-22.

<sup>65</sup> *Id.* at 22.

<sup>66</sup> USSC, *Interactive Sourcebook*, Length of Imprisonment in Each Primary Offense Category.

<sup>67</sup> *Id.*

<sup>68</sup> Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006-Statistical Tables, tbl. 1.3 (2009), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152>.

<sup>69</sup> The PEW Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 13 (2012), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prison-timeservedpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prison-timeservedpdf.pdf).

<sup>70</sup> *Id.*

consistent with our experience, which is that sentences of at least 3, 4, and 5 years are imposed on the more serious offenses considered aggravated felonies.

## **2. The Proposed Break Points Would Result in Disproportionate Penalties.**

The proposed 8-level increase for offenses where the sentence imposed was 24 months or more also would result in disproportionate penalties because low level offenses may be punished by a period of imprisonment of 2 years or more depending upon the state. For example, under California Penal Code, felonies are punishable by 16 months, 2 years, or 3 years, unless the statute of conviction specifies another term. Cal. Penal Code § 18(a). The proposed amendment makes many California felonies subject to a 6- or 8-level increase. Texas and other states also present proportionality problems. In Texas, a court may impose a term of imprisonment or probation or defer adjudication for certain felony offenses,<sup>71</sup> but if a period of imprisonment is imposed, minimum terms apply. Many offenses that would normally not be considered serious offenses carry 2-year minimum prison sentences, including delivery of more than 5 pounds but less than 50 pounds of marijuana.<sup>72</sup> The harshness of that penalty is shown by comparing it to the federal drug guideline. A person who distributes 5.5 pounds of marijuana is subject to a guideline recommended sentence of 0-6 months. To reach the 2 year mark, a person would have to distribute at least 44 pounds or 20 kg of marijuana. (BOL 16, CH I, range of 21-27 months). USSG §2D1.1.<sup>73</sup>

Texas also has harsher penalties for other offenses compared to other states. A person can be sentenced for 2 years as a state jail felony for fleeing from a police officer in a vehicle or watercraft when he knows the officer is trying to arrest or detain him.<sup>74</sup> In comparison,

---

<sup>71</sup> See Texas Code Crim. P. § 42.12.

<sup>72</sup> Texas Health & Safety Code Ann. § 481.120. Theft and fraud offenses also have 2-year minimum prison sentences, including fraudulent transfer of a motor vehicle with a value of more than \$30,000 but less than \$150,000, Texas Penal Code Ann. § 32.34; harvesting timber valued at least \$20,000, Texas Penal Code Ann. § 151.052; theft of cattle, horses, livestock, or 10 or more head of sheep, swine or goats if valued less than \$150,000. Texas Penal Code Ann. § 31.03. Simple assault on a public officer also is subject to a 2-year minimum prison sentence. Texas Penal Code Ann. § 22.01.

<sup>73</sup> Other states also have harsh sentences for possession offenses. For example, simple possession of a Schedule I or II controlled substance in Oklahoma is punishable by a minimum of two and not more than ten years imprisonment. Okla. Stat. Ann. tit. 63, § 2-402. Possession of two ounces or more of marijuana in Vermont is punishable by up to three years in prison. Vt. Stat. Ann. tit. 18, § 4230.

<sup>74</sup> Texas Penal Code Ann. § 38.04.

resistance in California is subject to imprisonment of not more than 1 year.<sup>75</sup> And in New Mexico, it is a misdemeanor subject to a maximum of 1 year.<sup>76</sup>

The 12-month break point for the proposed 6-level increase is also disproportionate and arbitrary.<sup>77</sup> What evidence supports a higher sentence for a person who receives 366 days versus 364 days when that two-day difference is relevant to whether the person is eligible for good time credits? For example, a person sentenced in the federal system is more likely to get a 366-day sentence to earn good time credits, which results in a lesser time served than the person sentenced to 365 days.<sup>78</sup> Under the proposed amendment, the person who gets the one-year-and-a-day sentence would receive a 6-level increase whereas the person who received less than 1 year (e.g. 364 days) would receive a 4-level increase. The reality is that the court that imposes the lesser sentence and deprives the person of good time credits typically does so because the offense is considered more serious.<sup>79</sup>

### **3. A Three-Tiered Set of Specific Offense Characteristics Would Promote Greater Proportionality.**

Defenders also oppose the proposal to have four tiers of enhancements and urge the Commission, if it is going to pursue this model, to consider a simpler 3-tiered approach. A person convicted of a felony offense who receives a sentence of less than 12 months is no more culpable or dangerous than a person convicted of three or more misdemeanors “involving drugs” or “crimes against the person.” For example, a person in a jurisdiction where minor offenses carry a prison term of over 1 year, but who receives nothing more than a time-served sentence, should not be treated more harshly at a subsequent proceeding because of the arbitrariness of state criminal codes. Similarly, we fail to see how a person who is convicted of a single felony theft who is sentenced to a short period of imprisonment (likely time-served) is more culpable or more dangerous than a person who committed three misdemeanor assaults.

---

<sup>75</sup> Cal. Penal Code Ann. § 148.

<sup>76</sup> N.M. Stat. Ann. §§ 20-22-2; 31-19-1.

<sup>77</sup> The arbitrariness of the Commission’s 24-month and 12-month break points is apparent when compared to a recent legislative proposal that set statutory penalties according to whether the person received a term of imprisonment of not less than 30 months or not less than 60 months. S. 1640 114th Cong (2015).

<sup>78</sup> 18 U.S.C. § 3624(b).

<sup>79</sup> See also National Conference of State Legislatures, *Good Time and Earned Policies for State Prison Inmates* (2011), [http://viriniacure.weebly.com/uploads/2/0/8/8/20882986/sentence\\_credit\\_50-state\\_chart.pdf](http://viriniacure.weebly.com/uploads/2/0/8/8/20882986/sentence_credit_50-state_chart.pdf). Defenders believe that looking at time served rather than sentence imposed would provide for more proportionate offense level increases, but we recognize that there may be concerns with how such an approach would be more complex.

To avoid the disproportionate results that would occur under the proposed amendment and to construct a guideline that more appropriately reflects offense seriousness and that leaves more flexibility to account for variations in good and earned time policies,<sup>80</sup> Defenders suggest a better approach would be as follows:

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **60 months or more**, increase by **6 levels**;

(B) a conviction for a felony offense( other than an illegal reentry offense) for the which sentence imposed was at least **36 months but less than 60 months**, increase by **4 levels**;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than **36 months**, increase by **2 levels**.

If the Commission is determined to keep the proposed breaking points for sentence length of prior offenses, it should at least keep the base offense level under §2L1.2 at 8 and not raise the base offense levels for prior illegal reentry offenses. While there would still be disproportionate results, fewer increases in the base offense level would offset the lack of proportionality in increasing offenses levels based upon other prior convictions and counting those prior convictions again in criminal history.

#### **4. The Proposed Language Regarding the Counting of Three Misdemeanors Lacks Clarity.**

Defenders are concerned the proposal to change the current guideline language (“misdemeanors that are crimes of violence or drug trafficking offenses”) to “misdemeanors involving drugs, crimes against the person, or both” would complicate guideline calculations and generate litigation. The proposed amendment leads to the question: Is the addition of the word “involving” meant to change the guideline application from a categorical to a circumstance specific approach where the court examines the defendant’s actual conduct?<sup>81</sup> Given the Department of Justice’s push for exceptions to the categorical approach during the Commission’s

---

<sup>80</sup>*Id.*

<sup>81</sup> Compare *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009) (using circumstance specific approach to determine if offense involves fraud or deceit in which the loss to the victim or victim exceeds \$10,000; noting that “‘aggravated felony’ statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed”) with *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (using categorical approach to determine whether offenses “involv[e] fraud or deceit” within the meaning of 8 U.S.C. § 1101(a)(43)(M)(i)).

November hearing on crimes of violence,<sup>82</sup> DOJ would likely argue that the change reflects a circumstance specific approach.

Whether the categorical approach is retained, the terms “involving drugs” and “crimes against the person” are overbroad and lack clarity. The use of the term “involving drugs” might be construed to expand the definition to include offenses such as simple possession of drugs or transportation of drugs<sup>83</sup> – a significant change from the current guideline. Is driving under the influence of marijuana or possession of paraphernalia a misdemeanor “involving drugs”?<sup>84</sup> By “crimes against the person,” does the Commission contemplate the meaning used by the Fifth Circuit – “offenses that, by their nature, are likely to involve the intentional use or threat of physical force against another person”?<sup>85</sup> If so, this definition, which the Fifth Circuit defined by reference to 18 U.S.C. § 16, is unconstitutionally vague.<sup>86</sup> Even if not unconstitutional, the meaning of the term is not clear. *See United States v. Selvan-Selvan*, 2015 WL 5178200 (E.D.N.C. 2015) (parties disputed the meaning of the phrase “crimes against the person” and whether it applied to convictions for child abuse, simple assault, and assault on a female), *appeal docketed* No. 15-4541 (4th Cir. Sept. 9, 2015).

Defenders believe that the better course of action for misdemeanors is to keep the current language in place, but redefine the term “crime of violence” to be consistent with that set forth in the Commission’s January 2016 crime of violence amendment.<sup>87</sup>

---

<sup>82</sup> Transcript of Public Hearing Before the U.S. Sent’g Comm’n, Washington, D.C., at 70-109 (Nov. 5, 2015) (Robert Zauzmer).

<sup>83</sup> Cal. Health & Safety Code Ann. § 11379 (punishing transportation of drugs under the heading “Offenses Involving Controlled Substances Formerly Classified as Restricted Dangerous Drugs”).

<sup>84</sup> Under the Fifth Circuit’s “common sense approach,” which has been used to broaden the reach of enumerated offenses, our concerns are not merely hypothetical. *See United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006).

<sup>85</sup> *United States v. Trejo-Galva*, 304 F.3d 406, 410 (5th Cir. 2002); *United States v. Miranda-Garcia*, 427 F. App’x 296, 298 (5th Cir. 2011). Few reported decisions discuss the meaning of “involving drugs” and “crimes against the person,” but that is likely because many of these cases are handled through fast track programs. If changes in sentencing length modify fast track policies, more litigation could be forthcoming.

<sup>86</sup> *See United States v. Gonzalez-Longoria*, \_\_\_ F.3d \_\_\_, 2016 WL 537612 (5th Cir. 2016) (holding 18 U.S.C. §16 definition of crime of violence to be unconstitutionally vague); *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015) (same); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (same).

<sup>87</sup> 81 Fed. Reg. 4741-4745 (Jan. 27, 2016).

**E. The Proposed Language “First Deportation or First Order of Removal” Is Ambiguous and Needing to Determine the Date of the “First Deportation” or the “First Order of Removal” Would Unnecessarily Complicate Guideline Application.**

We appreciate that the Commission is trying to fix a complicated guideline, but we fear that the proposed amendment would create substantial confusion and be more difficult to apply than it appears at first blush. The proposed amendment contains specific offense characteristics that turn on the timing of any prior convictions in relationship to the defendant’s “first deportation” or “first order of removal.” The amendment would be difficult to apply because the terms “first deportation or first order of removal” are confusing and determining the dates of those events would not be as easy as one might think. Moreover, because some first orders of removal, or orders of deportation or exclusion, are legally insufficient to support a conviction under 8 U.S.C. § 1326, they should not be the benchmark for enhancing sentences based on prior convictions.

The language “first deportation or first order of removal” is confusing and injects unnecessary complication into application of the guideline. The proposed amendment fails to distinguish between the “first deportation” and “first order of removal.” The term “deportation” is not expressly defined in the application notes, but USSG §2L1.2, comment (n.1(a)(i)) states: “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.” The comment suggests that “deportation” refers to the defendant leaving the United States after an order of removal, order of exclusion, or order of deportation was entered.<sup>88</sup> If so, then the reference to both “deportation” and “first order of removal” is redundant because

---

<sup>88</sup> Depending upon when it was entered, an order prohibiting the person from being in the United States has one of three names: an order of exclusion; an order of deportation; and a removal order. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which went into effect on April 1, 1997, combined exclusion and deportation hearings into one unified removal hearing. IIRIRA § 309(c); Ira J. Kurzban, *Immigration Law Sourcebook* 203 (14th ed. 2014–2015). Persons in exclusion or deportation proceedings on or before April 1, 1997 are not subject to the new rules. 8 C.F.R. § 1240.30–.39. The term “removal” order has now replaced the terms “order of deportation” and “order of exclusion” used in pre-IIRIRA proceedings. Socheat Chea, *Reopening Exclusion, Deportation, and Removal Orders*, 1 n.5 (2005), <http://www.employmentvisaimmigration.com/images/Articles/ReopeningExclusionOrders.pdf>. To prove a violation of 8 U.S.C. § 1326, the government must prove that the person left under one of those orders (albeit not necessarily the first order) and then illegally reentered. *United States v. Baraja-Alvarado*, 55 F.3d 1077 (9th Cir. 2011).

An order of removal is entered when a person is deemed inadmissible (in the case of an undocumented person) or deportable (in the case of a documented person). 8 U.S.C. § 1229a(e). Formal removal proceedings occur before immigration judges and may be based upon “any applicable ground of inadmissibility” or “any applicable ground of deportability.” 8 U.S.C. § 1229a(a)(2). Expedited removal proceedings do not require a hearing in front of an immigration judge. 8 U.S.C. §§ 1225, 1228.

correct guideline application would still require a determination of the date of the first order of removal rather than the date the defendant left the United States.

If the terms “first deportation” and “first order of removal” are not redundant, then an additional problem arises because there can be a time gap between the two events. Consider the case of a person who was ordered removed, appealed the decision, and while awaiting the result sustained a conviction. The person was then removed from the United States and later returned. Does the single conviction serve to enhance the sentence twice: once under proposed §2L1.2(b)(1) because the conviction occurred before the person was removed (deported?) and again under §2L1.2(b)(2) because the conviction occurred after the first order of removal?

The ambiguity of the proposed language “first deportation or first order of removal” could also generate disparity based on whether the person was ordered deported, excluded, or removed. Does the Commission intend for convictions that occurred after an “order of deportation” or “order of exclusion,” but before the person departed the United States, to not be used to increase the offense level under §2L1.2(b)(1), but for convictions that occurred after an “order of removal” to count regardless of whether the person departed the United States?

Even if the language is clarified, having to determine the date of the “first order of removal” would complicate the sentencing process because it would require the probation officer to examine the “Alien” (a.k.a. “A”) file that may consist of hundreds of pages, as well as other records that may have incomplete or inaccurate information.

An examination of the file would be necessary because the removal order used to sustain the instant conviction is not always the “first order of removal.” Consider a defendant charged with illegal reentry based on a December 2013 expedited removal order entered by an immigration inspector when the defendant was found attempting to enter the United States without permission. The December 2013 expedited removal order was the subject of a collateral attack and ultimately found valid, leading to a guilty plea to unlawful reentry. While the bulk of the discovery and other records in the case focus on the December 2013 removal, it cannot be assumed that the December 2013 order was the “first order of removal.” To apply the guideline correctly, the probation officer and counsel would have to review the entire “A” file and other records to determine the “first order of removal.” And even after collecting all the records, the accuracy of the files is questionable.<sup>89</sup> Defenders have seen files that contain multiple sets of removal documents and where it is not clear which ones were actually executed. In this not

---

<sup>89</sup> See Barbara Hines, *Immigration Law*, 35 Tex. Tech L. Rev. 923, 945 (2004) (author, with years of experience of dealing with immigration records, expresses pessimism about whether INS record keeping and file maintenance was sufficiently accurate for court to assume that Attorney General’s consent for defendant to apply for readmission would have been found in INS records).

uncommon scenario, it is nearly impossible to accurately determine the “first deportation or first order of removal.”

The need to examine the often unreliable and confusing “A” file and other documents adds an unnecessary step to current practice. When preparing presentences reports, probation officers typically receive an agent’s summary of the person’s immigration file, which is often riddled with errors because the agents do not have all of the documents and the multiple repositories’ for records makes them time-consuming and difficult to collect. In addition, presentence reports and worksheets do not always contain information on the first date of removal.<sup>90</sup>

Focusing on the first order of removal for sentencing purposes and the date of removal for purposes of establishing an element of the offense and determining the applicable statutory maximum sentence also would require two separate analyses of the relationship between the dates of removal, the dates of the order of removal, and dates of any convictions. Under 8 U.S.C. § 1326(b)(2), the statutory maximum is 20 years for “any alien . . . whose removal was subsequent to a conviction for commission of an aggravated felony.” When applying the statute, the relevant point in time is the date of any removal in relationship to the conviction for an aggravated felony. For example, a person ordered removed in 1997 and then removed twice -- once in 1997, and again in 1999 after a 1998 conviction – is subject to an enhanced penalty because the 1998 conviction occurred before the 1999 removal even though the 1999 removal was based on the 1997 order of removal.<sup>91</sup> Under the proposed amendment, however, the enhancement would not be based on the 1998 conviction occurring before the 1999 removal. Instead, it would be based on the 1998 conviction occurring after the first order of removal in 1997. While the net sentencing result is the same, the analysis is complicated by the different terms.

The need to use the first order of removal for purposes of calculating the guideline range under the proposed amendment and the use of a later order for purposes of establishing the element of the illegal reentry offense also raises a question about whether the defendant would be able to collaterally attack the validity of the first order of removal. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987) (“where a determination made in an administrative

---

<sup>90</sup> The redacted PSR and worksheet provided to the Commission demonstrate how reports may provide information on the dates of previous removal and grants of voluntary return, but not the date of the first order of removal.

<sup>91</sup> *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (defendant subject to enhanced penalty based upon the following: “after having been deported (equivalent to being removed), he reentered the United States illegally; was convicted for an aggravated felony; was removed pursuant to the summary removal procedure set forth in 8 U.S.C. § 1231(a)(5) (‘prior order of removal is reinstated from its original date’); reentered the United States once again; and was convicted for illegal reentry, in violation of 8 U.S.C. § 1326”).

proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding”). We are concerned that enhancing sentences based on conduct that occurs after the first order of removal may unfairly punish people who did not realize the significance of the removal order, or may not have even been aware that the order was entered. Research shows that about 28 percent of individuals who signed a removal order while in the custody of the United States Border Patrol did not receive an explanation of what they were signing or did not know what they were signing.<sup>92</sup> “Thirty-three percent reported feeling forced or pressured to sign a removal order.”<sup>93</sup> Others may not have had notice of the order of removal because it was entered in absentia. We have seen cases where a person enters the country seeking asylum, is left out on work release, does not show up for the immigration court proceeding because of insufficient notice,<sup>94</sup> asylum is denied and the person is ordered removed, but they are not found for five years before being removed. If between the time of the entry of the order of removal and actual removal, the person committed an offense, such as a minor crime characterized as a “felony,” then the person is subject to a harsher sentence without notice.<sup>95</sup>

The proposed amendment’s focus on “first order of removal” rather than the order of removal supporting the conviction for reentry also fails to consider how a person may be ordered removed in absentia if the person fails to appear after proper notice. An in absentia order may be rescinded when the person did not receive the notice to appear and notice of hearing. A motion to reopen the removal proceeding can be filed at any time if the person did not receive proper notice, was incarcerated, or was not at fault for the failure to appear.<sup>96</sup> The order can also be rescinded if there were exceptional reasons for the failure to appear, such as illness. The process

---

<sup>92</sup> Slack, *supra* note 19, at 121.

<sup>93</sup> *Id.*

<sup>94</sup> Convictions under 8 U.S.C. § 1326 have been overturned where the in absentia removal order was not valid. *See, e.g., United States v. Essam Helmi El Shami*, 434 F.3d 659 (4th Cir. 2005).

<sup>95</sup> A similar situation would arise in the case of a person who is initially granted voluntary departure by an immigration judge and given a set period of days to depart on their own. If the person fails to depart within the allotted time frame or is unable to obtain a travel document, the voluntary departure order is automatically vacated and an alternate removal order takes immediate effect. 8 C.F.R. §§ 1240.26(b)(1)(E)(iii), 1240.26(d). The person will not be brought before an immigration judge again in this scenario and there may be a delay of years before the person is found and the deportation actually executed.

<sup>96</sup> *See* 8 U.S.C. §1229a(b)(5)(C)) – Removal Proceedings; Beth Werlin, American Immigration Council, *Rescinding An In Absentia Order of Removal* (2010) (discussing various challenges to in absentia orders of removal), [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_092104.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_092104.pdf). *See* Lawyers.com, *In Absentia Deportation & Removal Proceedings*, <http://immigration.lawyers.com/deportation/in-absentia-deportation-and-removal-proceedings.html>.

to rescind an in absentia order complicates the focus on the “first order of removal” because the filing of a motion to reopen for lack of notice automatically stays deportation pending a decision.<sup>97</sup> And some courts have ruled that an in absentia order is not final until the Board of Immigration Appeals rules on the motion to reopen.<sup>98</sup>

Given the multitude of problems with the proposed amendment’s focus on the “first deportation or first order of removal,” if the Commission is going to pursue this path of enhancing offense levels based on prior convictions and their timing in relation to prior immigration proceedings, we encourage the Commission to instead focus on the date of actual removal underlying the offense of illegal reentry. Such a rule would be consistent with the language of 8 U.S.C. § 1326. See *United States v. Salazar-Lopez*, 506 F.3d 748, 752 (9th Cir. 2007) (“the date of the removal, or at least the fact that [the defendant] had been removed after his conviction, should have been alleged in the indictment”). It would also ensure that the benchmark for determining when the predicate conviction occurred is based on a constitutionally valid removal. See *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); 8 U.S.C. § 1326(d).

**F. Several Departure Provisions and an Amendment to the Criminal History Rules on Counting Remote Convictions Should be Incorporated into the Guidelines to Mitigate the Specific Offense Characteristics Based upon Prior Convictions.**

The Commission requests comment on what mitigating factors it should incorporate into §2L1.2. Here, we offer three suggestions for departures and an amendment to the criminal history rules on remote convictions.

First, the Commission should include an invited downward departure where the sentence imposed for a prior conviction is higher than it would have been in the majority of jurisdictions. Such a provision would encourage a court to consider how the sentence imposed overrepresented the seriousness of the offense. It would be particularly applicable in cases where a higher sentence than average was imposed for drug possession.<sup>99</sup>

Second, the Commission should invite a departure for predicate felony convictions that are classified as misdemeanors under state law, as the Commission did in its recent crime of

---

<sup>97</sup> 8 U.S.C. § 1229(b)(5)(C).

<sup>98</sup> See *Kay v. Ashcroft*, 387 F.3d 664, 670–73 (7th Cir. 2004); *Santo-Quiroa v. Lynch*, 2016 WL 850954, at\*10 (1st Cir. 2016).

<sup>99</sup> See, e.g., Ky. Rev. Stat. Ann. §218A.1437, §532.020 (possession of a methamphetamine precursor is a Class D felony subject to a sentence of at least 1 year but not more than 5 years); Ky. Rev. Stat. Ann. §218A.1415 (possession of a controlled substance in first degree (e.g. cocaine) is subject to a three year maximum penalty); Texas Penal Code Ann. §481.124 (depending upon nature of the precursor, possession of a chemical with intent to manufacture is punishable by a minimum of 2 years or 180 days to 2 years).

violence amendments.<sup>100</sup> Defender testimony submitted for the crime of violence hearing contains an extensive discussion of the problems associated with the current definition of felony, particularly for states that punish misdemeanors with more than 1 year imprisonment. The Commission also has acknowledged that certain offenses “such as theft, assault, drug possession, and some DUIs [] are treated differently from jurisdiction to jurisdiction.”<sup>101</sup> Because some states call for harsher punishments for some offenses than do other states, it is important to encourage courts to be mindful of unwarranted disparity by including an invited departure for offenses that meet the definition of felony under federal law, but are considered less serious offenses under state law even though the maximum sentence may be higher because of the vagaries of state law.

Third, the Commission should use the date the defendant was discovered in the United States as the date of commencement of the instant offense or include an invited downward departure for old convictions that count under the criminal history rules because of the continuing nature of the offense of illegal reentry. In its publicly available presentation on the proposed amendment,<sup>102</sup> the Commission emphasizes how only convictions that receive criminal history points would be used to increase offense levels for convictions sustained before and after the individual’s “first deportation or first order of removal.” The limitation on applicability of enhancements to convictions that receive criminal history points overlooks how the criminal history rules apply in illegal reentry cases in ways that overstate the risk of recidivism.

The focus on the date of the defendant’s “commencement of the instant offense” for purposes of determining the applicable time period for prior convictions under §4A1.2(e) often results in old convictions counting under the criminal history rules even though the person remained crime free for years. The example of Defendant C, provided earlier in our testimony, shows how old convictions can drive up a sentence because illegal reentry is treated as a continuing offense that starts from the moment of the person’s unauthorized border crossing.<sup>103</sup> The court in *United States v. Vaolyes*, 2011 WL 3099881, at \*2 (E.D.N.Y. 2011), provided another illustration of how treating illegal reentry as a continuing offense that commenced on the day the person crossed the border “stands the concept of recency and repose embedded in criminal history computations on its head”:

---

<sup>100</sup> 81 Fed. Reg. 4741, 4742 (Jan. 27, 2016).

<sup>101</sup> *Illegal Reentry Offenses*, *supra* note 1, at 16.

<sup>102</sup> USSC, *Public Data Briefing: Proposed 2016 Immigration Amendments* (2016).

<sup>103</sup> See *United States v. Hernandez-Guerrero*, 633 F.3d 933 (9th Cir. 2011) (defendant’s 1992 conviction for possession for sale of a controlled substances counted for criminal history purposes because he unlawfully reentered the United States in 1995 and was subsequently found in 2009).

With no statute of limitations to bar prosecution on the front end, an illegally reentered alien who apparently has not had a single brush with the law, say, for a quarter century, still would be accountable under the Guidelines at the back end, upon being apprehended and (inevitably) convicted, for crimes committed almost 40 years before being “found.” Specifically, extrapolating in Lozano's case, if Lozano had been arrested in the year 2041, at the age of 90 (the age of the oldest judge currently serving in this district), her three prior convictions in 1997, 1991, and 1990 – 44, 50, and 51 years earlier, respectively – still would be held against her for Guidelines purposes. That is because these convictions would be deemed imposed within the time limits set out by the Guidelines for including prior offenses in the criminal history calculation, which run from the “commencement of the instant offense” – the illegal reentry.

*Id.*

Such outcomes are unjustified because the criminal history score in the context of a violation based on nothing more than a person's status in the United States overstates the risk of recidivism. By living a crime free life for years, these individuals have already proven that they need not be incapacitated for long periods of time to protect the public from further crimes.

We offer two suggestions on how the Commission can fix this problem. First, as recommended by the court in *Valoyes*, the Commission should adopt an application note in Chapter 4 specifying “that the date of discovery in illegal reentry cases be used for purposes of calculating the illegally reentered alien's criminal history category.”<sup>104</sup>

If the Commission is unwilling to do that, it should add language to §4A1.3(b), similar to that found for upward departures at §4A1.3(a)(2):

Types of Information Forming the Basis for Downward Departure:

*Prior sentences that fall within the applicable time period under §4A1.2(e) because of the ongoing nature of an illegal reentry offense and that would not fall within the requisite time period if the commencement of the illegal reentry offense began at the time the defendant was found within the United States.*

**G. The Commission Should not Delete the Departure Provision that Allows Credit for Time Served in State Custody.**

The departure for time served in state custody needs to be retained.

The Commission amended the guideline in 2014 to invite departures based on time served in state custody because it acknowledged that the “amount of time a defendant serves in

---

<sup>104</sup> *United States v. Valoyes*, 2011 WL 3099881, at \*3 (E.D.N.Y. 2011).

state custody after being located by immigration authorities may be somewhat arbitrary.” USSG App. C, Amend. 787 (Nov. 1, 2014). The arbitrariness, recognized by many courts,<sup>105</sup> stems from the delay that may occur between the time the defendant is found in state custody and the time federal authorities proceed with an illegal reentry charge.

The arbitrary nature of the delay in the lost opportunity for a concurrent sentence does not change with the Commission’s proposal to use convictions that occur after the first deportation or first order of removal in elevating offense levels. An example demonstrates our point.

Defendant E was convicted in state court of simple possession of marijuana and placed on probation. Soon thereafter, he was deported. Following his deportation, the state court issued a warrant for his arrest for failure to report to the state probation agency. When he tried to reenter to reunite with his citizen parents, he was stopped and arrested on the outstanding warrant. The state court imposed a revocation sentence of 2 years. Federal authorities waited until his release from state custody before charging him with illegal reentry. Under the current guideline, that single state court conviction is used against the defendant six times:

- (1) the original probation sentence;
- (2) a 2-year revocation for failing to report and reentering;
- (3) an increase in the statutory maximum penalty from 2 to 10 years, 8 U.S.C. § 1326(a) and (b)(1);
- (4) a 4-level offense level enhancement, §2L1.2(b)(1)(D);
- (5) 3 criminal history points rather than 1 point because the sentence is now deemed a 2-year sentence (§§4A1.1(a), 4A1.2(k));
- (6) 2 additional points because the reentry offense was committed while he was on probation, §4A1.1(d).

---

<sup>105</sup> The Commission cited several cases in support of the departure: “*United States v. Sanchez-Rodriguez*, 161 F.3d 556, 563-64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in proceeding with the illegal reentry case, the defendant lost the opportunity to serve a greater portion of his state sentence concurrently with his illegal reentry sentence); *United States v. Barrera-Saucedo*, 385 F.3d 533, 537 (5th Cir. 2004) (holding that ‘it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody’); *see also United States v. Los Santos*, 283 F.3d 422, 428-29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable).” USSG App. C, Amend. 787, Reason for Amendment (Nov. 1, 2014).

Under the proposed amendment, that single state court conviction is still used against him six times, but his guideline range increases from 10-16 months<sup>106</sup> to 15-21 months.<sup>107</sup> Given the multiple ways in which the single simple possession conviction is used against the defendant to increase his time in prison, because the time served in state custody is not covered by §5G1.3(b), which permits concurrent sentences, or §5K2.23, which permits departures for time in state custody, and because the delay in bringing the illegal reentry charge was arbitrary and kept the defendant from getting a concurrent sentence either from the state court or federal court, the departure provision is still warranted.

Another example shows that even if the Commission keeps the invited departure based on time served in state custody, the proposed amendments would result in a higher guideline recommended sentence than the current guideline.

Defendant F has three misdemeanor illegal entries under 8 U.S.C. § 1325(a) (12/14/01, 7/5/03, 6/2/06) for which he received sentences of 15, 30, and 45 days. He unlawfully returned to the United States in 2006 and worked as a landscaper until he was arrested in November 2014 for simple possession of marijuana and sentenced to 1 year imprisonment. Immigration authorities located him in state custody shortly after his arrest, but he was not charged with illegal reentry until November 2015. Under the current guideline, he would have 5 criminal history points (CH III), a base offense level of 8 and a 4-level increase for a felony conviction, placing him in a range of 10-16 months (OL 12 -2 for acceptance = 10, CH III). At sentencing, the court would have the option of departing based on the time he served in state custody for the possession of marijuana offense. With a 6-month credit for time in state custody, his guideline recommended sentence would be *4 months*. Under the proposed amendment, his guideline range would be *30-37 months* (BOL 14 +6 for a conviction for a felony offense for which the sentence imposed was at least 12 months = 20 -3 for acceptance = 17, CH III). If the Commission were to remove the invited departure for time served in state custody, his minimum guideline sentence would be *30 months*. If the Commission were to keep the departure provision in place and the court granted him a 6-month departure based upon time served in state custody, then his guideline recommended sentence would be *24 months* – 20 months higher than under the current guidelines.

---

<sup>106</sup> Under the current guideline, his offense level would be 12 (BOL 8, +4 for felony) and criminal history category III. With 2 points for acceptance, the guideline range would be 10-16 months.

<sup>107</sup> Under the proposed amendment his offense level would be 14 (BOL 10, +4 for sentence imposed of less than 12 months) and criminal history category III. With 2 points for acceptance, the guideline range would be 15-21 months.

### III. Alien Smuggling

Defenders believe it unnecessary and inequitable to increase the base offense level for alien smuggling or to add an alternative base offense level to account for ongoing commercial organizations involved in smuggling. We also think the amendment regarding unaccompanied minors moves the guideline in the wrong direction and that the guideline and other criminal law provisions already adequately account for sexual abuse of unaccompanied minors and others smuggled across the border.

#### A. Available Data Does Not Show a Need to Increase Sentences for Alien Smuggling Offenses.

The Commission's data on sentences imposed under §2L1.1 does not support the Department of Justice's claim that the sentences are inadequate.<sup>108</sup> Since 2011, within range sentences under §2L1.1 have decreased from 55.1% to 42%.<sup>109</sup> Government sponsored below range sentences have increased from 30.5% to 44.7%.<sup>110</sup> In the Southern District of Texas – the district with the most alien smuggling cases – the rate of government sponsored below range sentences has increased from 12.7% to 46.1%, and the rate of within range sentences has dropped dramatically from 72.7% to 41.5%.<sup>111</sup> Other border districts with alien smuggling cases also have significant rates of government sponsored below range sentences.<sup>112</sup> And the average sentence of 18 months in FY 2014 was lower than the average guideline minimum of 21 months.<sup>113</sup> Importantly, in FY 2014, 57.1% of all cases receiving the unaccompanied minor

---

<sup>108</sup> See USSC, *Proposed Amendments to the Sentencing Guidelines* 55 (January 15, 2016) (referencing Department of Justice's letter to the Commission). See also *Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing DOJ's concerns).

<sup>109</sup> USSC, *Interactive Sourcebook*, tbl. 50.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> In the Western District of Texas, the rate of government sponsored below ranges sentenced increased from 12.3% in 2011 to 40.6% in 2014. *Id.* The rate of within guideline sentences dropped from 69% to 50.8%. *Id.*

In Southern California, the rate of government sponsored below range sentences has been above 70% since 2010, and the rate of within range sentences, which hovered around 20% from 2010 to 2013, dropped to 14.6% in 2014. The only district where the rate of government sponsored below range sentences has remained steady over the past few years is Arizona, with a 40% rate. *Id.*

<sup>113</sup> In FY 2014, only 2.9% of alien smuggling cases involved an upward departure or above range sentence. USSC, *FY 2014 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2014 *Sourcebook*).

enhancement received a government sponsored below range sentence and only 32.1% of cases were within range.<sup>114</sup>

That sentences for alien smuggling are typically below the guideline range is not surprising. The majority of individuals sentenced under §2L1.1 do not have significant criminal histories and do not play an aggravating role in smuggling. The Commission reported that in FY 2014, 59.9% of individuals sentenced under §2L1.1 were in Criminal History Category I and only 12.6% were in the top three categories (IV through VI).<sup>115</sup> In FY2014, 94.5% of §2L1.1 cases received no aggravating role enhancement.<sup>116</sup> That data is consistent with our experience, which is that many of the individuals prosecuted for alien smuggling were involved in smuggling to cover their own smuggling debt, and are often drivers who are easily replaced.<sup>117</sup> Because these are individuals desperate to come to this country and are willing to risk their own lives in crossing dangerous terrain, higher sentences will do nothing to deter them. And as the Commission is aware, ample evidence shows that longer periods of incarceration have marginal deterrent value,<sup>118</sup> so the notion that punishing these individuals more harshly will put a stop to smuggling is unsupported.

In deciding whether to increase offense levels in §2L1.1, the Commission should also be aware that it can be more difficult for individuals involved in smuggling to provide meaningful cooperation over time because we have been informed that agents often rotate their duty station every six months. Commission data confirms that few persons sentenced under §2L1.1 are able to obtain cooperation departures. Whereas 13.62% of all cases in FY 2014 involved §5K1.1

---

<sup>114</sup> USSC, *FY 2014 Monitoring Dataset*.

<sup>115</sup> USSC, *Quick Facts: Alien Smuggling Offenses* (2014).

<sup>116</sup> 3% received a 2-level increase under §3B1.1; 1.4% received a 3-level increase; and 1.1% received a 4-level increase. USSC. *FY 2014 Monitoring Dataset*.

<sup>117</sup> See also Garbiella Sanchez, *Working Paper, Security from Below: The Role of Families in the Negotiation of Extra-legal Border-Crossing Services on the US/Mexico Border*, Research Gate (Aug. 2015) (finding that many involved in smuggling were “irregular migrants themselves who were offered discounts on their smuggling fees in exchange for performing driving, cooking, or cleaning duties”), [https://www.researchgate.net/publication/281149623\\_WORKING\\_PAPER\\_Security\\_From\\_Below\\_the\\_role\\_of\\_families\\_in\\_the\\_negotiation\\_of\\_extra-legal\\_border-crossing\\_services\\_on\\_the\\_USMexico\\_Border](https://www.researchgate.net/publication/281149623_WORKING_PAPER_Security_From_Below_the_role_of_families_in_the_negotiation_of_extra-legal_border-crossing_services_on_the_USMexico_Border).

<sup>118</sup> National Institute of Justice, *Five Things About Deterrence* (Sept. 2014), <http://www.nij.gov/five-things/pages/deterrence.aspx>, flyer available here: <https://ncjrs.gov/pdffiles1/nij/247350.pdf>; Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013); Gary Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a “Collective Wisdom”?*, 59 *Crime & Delinq.* 1006, 1031-33 (2013); Brennan Center for Justice, *What Caused the Crime Decline?* 26 (Feb. 2015), <https://www.brennancenter.org/publication/what-caused-crime-decline>.

departures, and 26% of cases under §2D1.1, only 7.6% of cases under §2L1.1 involved a cooperation departure.<sup>119</sup>

**B. Existing Guidelines Already Account for the Few Cases Involving “Large Scale Criminal Organizations,” Which Should Be Defined More Broadly than Five or More People Smuggling Persons on More than One Occasion.**

To the extent that persons prosecuted for smuggling, transporting, or harboring an “unlawful alien” are involved with five or more other persons in smuggling for profit and know that the group was involved in smuggling on more than one occasion, such involvement does not warrant increased offense levels. Contrary to popular belief and DOJ’s claims that alien smuggling operations are more likely to be associated with organized crime,<sup>120</sup> available research shows that many individuals involved in smuggling are not part of other criminal organizations – such as drug trafficking. Research done by Gabriella Sanchez – an anthropologist at the University of Texas at El Paso – found that “[s]muggling is conducted by men and women known to each other through their immediate family and friends,” and who often “collaborate in multiple smuggling efforts.”<sup>121</sup> Because they “must provide relatively safe journeys, amid often precarious conditions,” they “stay away from purposely engaging in violent acts.”<sup>122</sup> Profit is a motive for these individuals only because they are typically poor and undereducated.<sup>123</sup> Moreover, the income generated for these individuals from smuggling is “by no means significant”<sup>124</sup> and does nothing more than help cover “their most immediate, urgent needs like rent, food, and medical expenses.”<sup>125</sup>

To the extent cases involve large scale criminal organizations, they can be handled through two provisions already present in the guideline: (1) the enhancement at §2L1.1(b)(9) for a defendant convicted under 8 U.S.C. § 1324(a)(4), which includes cases where the “offense was part of an ongoing commercial organization or enterprise,” and (2) aggravating role enhancements, which the Commission anticipated would apply in “large scale smuggling,

---

<sup>119</sup> 2014 Sourcebook, at tbl. 28.

<sup>120</sup> USSC, *Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing DOJ’s concerns).

<sup>121</sup> Sanchez, *supra* note 117, at 276.

<sup>122</sup> *Id.* See also *id.* at 277 (citing additional research, which shows a “low incidence of violent acts against undocumented immigrants on the part of smugglers”).

<sup>123</sup> *Id.* at 280.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

transporting, or harboring cases.” §2L1.1, comment. (n.2). Organized criminal activity involving kidnapping and extortion can also be prosecuted under other statutes, including racketeering and money laundering, which carry higher base offense levels. *See, e.g.*, §2B3.2 (extortion by force or threat of injury or serious damage – base offense level of 18).<sup>126</sup>

If, notwithstanding the evidence contradicting DOJ’s claim that alien smuggling operations are “more likely to be ‘lucrative,’ larger-scale enterprises associated with organized crime,”<sup>127</sup> and the availability of other guideline provisions to cover such cases, the Commission still wants to increase offense levels in §2L1.1, then Defenders prefer Option 2 over Option 1. We encourage the Commission, however, to make several changes. First, the definition of “part of an ongoing commercial organization” should have a mens rea requirement based upon the defendant’s actual knowledge. In addition, the definition should require that the group smuggle, transport, or harbor different groups on multiple occasions over more than a year rather than on just one occasion. These changes would help ensure that the increased offense level applies only to a person who knowingly participates in a profit-making commercial organization that is truly “ongoing.”

If the Commission increases the base offense level or adds an alternative offense level for “ongoing commercial organizations,” the Commission also should consider modifying the definition of “offense committed other than for profit,” which currently “means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.” This definition is incompatible with the common meaning of “profit,” which means a financial gain made after all costs and expenses are paid. Under the common meaning of “profit,” an “offense committed other than for profit” should still allow for minimal payments so long as they do not rise to the level of a “profit.” Our indigent clients who participate in smuggling, harboring, or transporting aliens to help pay their own smuggling fees or to meet basic living expenses are not making a profit – they are surviving, and the guidelines should not recommend a higher sentence simply because they received minimal payments to aid basic survival.

**C. The Guidelines for Smuggling of Unaccompanied Minors and Sexual Abuse are Generally Adequate. The Only Amendment Necessary Is to Limit the Enhancement at**

---

<sup>126</sup> *See Porges v. Samuels*, 2008 WL 323634, \*3 (D.N.J. 2008) (defendant convicted of racketeering for involvement in smuggling of illegal aliens from China); *Pham v. United States*, 2007 WL 542378 (D.N.J. 2007) (defendant sentenced to 235 months imprisonment on seven counts related to smuggling of Chinese aliens: RICO conspiracy; conspiracy to collect extensions of credit by extortionate means; conspiracy to interfere with commerce by threats of violence; transportation of illegal aliens within the United States; concealment, harboring and shielding aliens from detection; kidnapping; hostage taking; and receipt of firearms with intent to commit offense).

<sup>127</sup> *Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing Department of Justice’s concerns).

**§2L1.1(b)(4) to Circumstances Where the Defendant Knew the Minor was Unaccompanied by a Parent, Grandparent, or Other Related Adult.**

The Commission proposes several amendments related to unaccompanied minors and seeks comment on the adequacy of the guidelines for offenses involving sexual abuse of “aliens smuggled, transported, or harbored.” Defenders see no need for these amendments and request one small change to account for situations where minors are accompanied by other relatives.

First, the Commission should consider the context in which children may cross the border. In our experience, border crossings involving unaccompanied minors are often done for the safety of the children because the parents are already in the United States,<sup>128</sup> or need to stay in their home country, or because the children may ride in a car after crossing the border whereas their parents go through the brush. The case of Nora and her family is an example. Nora had crossed the border and three years later finally reunited with her 8- and 10- year-old daughters. When interviewed by Professor Gabriella Sanchez, Nora explained the efforts she undertook to get her children across the border safely:

We wanted to bring the girls for a long time. But when I crossed the border [I did it] on foot. We walked for almost an entire month and I knew I did not want for my girls to come that way. So I started to ask around, but nobody would cross children. I was told it was too dangerous. Finally, a lady from work told me she knew of a guy who did, and I contacted him. I told the man I was concerned about my girls’ safety, that I did not want for them to walk through the desert or to suffer. And he said, ‘no ma’am, we don’t cross children through the desert, we would never do that.’ Instead, the man said, his contacts would get the girls through the checkpoint and would then drive them all the way to my home in Salake. But I decided to come get them to Phoenix, despite all the rumors that the sheriffs here are mean and arrest Mexicans. I asked my dad’s girlfriend to come with me. We drove for 11 hours, and here we are. My mother accompanied the girls all the way from our hometown in Mexico. Once on the border she went at a hotel, and two different men came and asked to take the girls. My mother called to let me know and I called the coyote, and he gave me a code word the men who were supposed to cross the girls would use so that I knew they were the real thing. We did not want for the girls to end up in the wrong group or in the wrong hands. The men crossed the girls one at a time through Nogales as my mother watched from afar. My babies made it through the checkpoint in less than 15 minutes, got

---

<sup>128</sup> When the “unaccompanied minor” enhancement was proposed in 2006, Judge Vazquez made the same point during testimony before the Commission. See Transcript of Public Hearing Before the U.S. Sentencing Comm’n, San Diego, California, at 42 (Mar. 6, 2006) (Honorable Martha Vazquez) (discussing how other family members or friends bring the child into the country after the parents have already arrived). See also GAO, *Unaccompanied Children: HHS Can Improve Monitoring of Their Care* 11 (2016) (Office of Refugee Resettlement released to a parent 60% of unaccompanied children from El Salvador, Guatemala, and Honduras).

in a car with a couple who drove them, and they are now on their way here. I have been checking up on them by cellphone; they have been saying that they are OK and the coyote driving them said they will be here soon.

Sanchez, *supra* note 117, at 6-7.

In other cases, the parents are trying to save their children from the drug cartels so they spend significant money to have them smuggled into the U.S.

Second, the enhancement at §2L1.1(b)(4) for unaccompanied minors should have an actual knowledge requirement and remain defendant rather than offense specific. The proposed “offense involved” and “reason to believe” language would sweep in many of the least culpable individuals, including those who transport other immigrants in exchange for reduced fees for their own border crossing, other family members and friends who help a child reunite with a parent in the United States, and persons who perform services such as cooking and cleaning.

Third, the Commission should amend the guideline to redefine unaccompanied minor. Defendants involved in smuggling, transporting, or harboring children who were accompanied by a related adult should not be subject to an increase in offense level. In FY 2014, a sizable number of families that did not include a parent, but did include a related individual, were apprehended crossing the border.<sup>129</sup> Because these individuals can protect the interests of the child during border crossings and provide authorities information relevant to removal or asylum proceedings, no legitimate reason for an enhanced sentence exists.<sup>130</sup>

Fourth, the 4-level enhancement at §2L1.1(b)(7)(B) sufficiently accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored. The Department of Justice’s claim that alien smuggling offenses often involve sexual abuse of unaccompanied minors is not supported by the evidence. The Office of Refugee Resettlement (ORR) is responsible for the care and custody of unaccompanied children apprehended by the Department of Homeland Security. ORR must determine if the child was a victim of trafficking, a special needs child with a disability, or “a

---

<sup>129</sup> Congressional Research Service, *Unaccompanied Alien Children: An Overview* 3 (2016) (“Apprehensions of family units (unaccompanied children with a related adult) increased from 14,855 in FY2013 to 68,445 in FY2014. Of these apprehended family units, 90% originated from Guatemala, El Salvador, and Honduras.”).

<sup>130</sup> An amendment that redefines unaccompanied minor would be consistent with the Asylum Reform and Border Protection Act of 2015 (H.R. 1153), which would amend the definition of unaccompanied alien child to “to add, in addition to no parent or legal guardian, that there are no siblings, aunts, uncles, grandparents, or cousins over the age of 18 available to provide care and physical custody to the unaccompanied minor. The act would also provide that the term unaccompanied alien child would cease if any person in the aforementioned category is found in the United States and is available to provide care and physical custody to the minor.” Congressional Research Service, *supra* note 129, at 14.

child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened." 8 U.S.C. § 1232(c)(3)(B). If such circumstances exist, ORR must do a home study before placing the child. In FY 2015, ORR received referrals for 33,726<sup>131</sup> unaccompanied children, but only did home studies for 1,895 (5.6%).<sup>132</sup> The Commission's data also shows that few §2L1.1 cases involve unaccompanied minor children and even fewer include minor children subject to abuse. In FY 2014, only 392 (17.3%) cases involved minor children.<sup>133</sup> Of those, only 12 received a 2-level increase for bodily injury and another 12 received a 4-level increase for serious bodily injury under §2L1.1(b)(7).<sup>134</sup> That means only 1% of all alien smuggling cases involved any form of abuse of an unaccompanied minor. In the rare case where the government believes a 4-level enhancement for sexual abuse is inadequate, it is always free to seek a variance or pursue sex abuse, sexual assault, or sex trafficking charges.<sup>135</sup>

Lastly, the definition of "minor" for purposes of the §2L1.1(b)(4) enhancement should not be changed to include individuals under the age of 18. The Commission's *2006 Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* noted that some participants in the Immigration Roundtable "expressed concerns that smuggling younger minors unaccompanied by their parent(s) is more harmful than smuggling older teenagers because younger minors may end up as wards of the state."<sup>136</sup> The report concluded that "minors between the ages of 15 and 18 may not present as great of a risk as the smuggling of minors under the age of 15."<sup>137</sup> Nothing has changed since the Commission made the original decision to define "minor" as a person under 16. A 16- to 18-year-old is still more capable than a younger child of providing information about where they came from, who their parents are, and where they were going. And age aside, a recent GAO report noted that "most children come with contact information for a relative who can serve as a sponsor."<sup>138</sup>

---

<sup>131</sup> This number is a significant drop from the 57,496 referrals in FY 2014. Office of Refugee Resettlement, *Facts and Data*, <http://www.acf.hhs.gov/programs/orr/about/ucs/facts-and-data>.

<sup>132</sup> *Id.*

<sup>133</sup> USSC, *FY 2014 Monitoring Dataset*.

<sup>134</sup> *Id.*

<sup>135</sup> The Commission should not mix smuggling with trafficking. To do so would undercut efforts to protect victims of trafficking. See U.S. Dep't of State, *Human Trafficking & Migrant Smuggling: Understanding the Difference* (2015), <http://www.state.gov/j/tip/rls/fs/2015/245175> htm.

<sup>136</sup> USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 9 (2006).

<sup>137</sup> *Id.*

<sup>138</sup> GAO, *supra* note 128, at 6.

**Written Statement of Neil Fulton  
Federal Public Defender for the Districts of North Dakota and South Dakota  
On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on Child Pornography Circuit Splits and Miscellaneous  
Proposed Amendments**

**March 16, 2016**

**Testimony of Neil Fulton**  
**Before the United States Sentencing Commission**  
**Public Hearing on Child Pornography Circuit Splits and Miscellaneous Proposed**  
**Amendments**  
**March 16, 2016**

My name is Neil Fulton and I am the Federal Public Defender for the Districts of North Dakota and South Dakota. I am also as a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Child Pornography Circuit Splits and Miscellaneous Proposed Amendments.

My written testimony addresses the Commission's proposed amendments to the child pornography guidelines regarding two general issues: (1) application of the vulnerable victim enhancement, and (2) the tiered enhancements for distribution in §2G2.2. Defenders will submit separate written comments on the Miscellaneous Proposed Amendments at a later date.

**I. Vulnerable Victim**

The Commission proposes amending the commentary in §2G2.1, §2G2.2 and §2G2.6 to provide an exception to the general rule that the vulnerable victim adjustment should not be applied if the offense guideline already provides an enhancement for age "unless the victim was unusually vulnerable for reasons unrelated to age." §3A1.1 comment (n.2). For these child pornography offenses, the Commission proposes recommending that courts apply the vulnerable victim adjustment in addition to the age-based enhancements "if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12, and the defendant knew or should have known this."<sup>1</sup> We oppose this proposed amendment.

While we object to adding this commentary to any of the three guidelines, we begin with §2G2.2. To the extent the Commission views this issue as a circuit conflict that should be addressed to avoid unwarranted disparity, we caution that the proposed amendment does not guarantee decreased disparity and may actually increase it. Looking at data from FY 2005-FY 2014, the Ninth and Fifth Circuits – the circuits that take the approach the proposed amendment "generally adopts"<sup>2</sup> – applied the vulnerable victim adjustment under §3A1.1(b) to defendants sentenced primarily under §2G2.2 and who received an enhancement under §2G2.2(b)(2) for material that involved "a prepubescent minor or a minor who had not attained

---

<sup>1</sup> 81 Fed. Reg. 2295, 2306-7 (Jan. 15, 2016).

<sup>2</sup> 81 Fed. Reg. 2295, 2305 (Jan. 15, 2016).

the age of 12 years,” at a higher rate than other circuits. Specifically, the rates during those years in the Ninth and Fifth Circuits were 6.9% and 5.6%, respectively. In comparison, none of the other circuits applied the adjustment in such cases at a rate above 0.4% (or in more than 5 cases in any one circuit), and several did not apply the adjustment in even one such case.<sup>3</sup> While the data does not indicate whether the vulnerable victim adjustment was based on the minor being “especially vulnerable compared to most minors under the age of 12” or on some other factor unrelated to age, it is nonetheless informative. The vast majority of circuits hardly, if ever, applied the vulnerable victim adjustment to these cases for any reason. In addition, within the two circuits that have the rule the Commission proposes, there has been significant variation among the districts in application rates of the vulnerable victim adjustment to defendants sentenced primarily under §2G2.2 and who received an adjustment under §2G2.2(b)(2). For example, in the Ninth Circuit, over half (8) of the districts, did not apply the vulnerable victim adjustment in such cases even one time during FY 2005-FY 2014, including Western Washington, the district in which the case of *United States v. Wright*, 373 F.3d 935 (9th Cir. June 15, 2004) originated.<sup>4</sup> The rates in other districts ranged from 4.4% to 17.8% during this time frame.<sup>5</sup> Similarly, in the Fifth Circuit, more than half (5) of the districts did not apply the vulnerable victim adjustment in a single one of these cases, and the rates in the remaining 4 districts ranged from 4.9% to 12.7%.<sup>6</sup> Thus, it appears that even in circuits that share the same rule the Commission proposes to “generally adopt[,]” practices vary significantly from district to district. Expanding this rule to the other circuits carries the real risk of expanding disparate practices to those circuits that, as mentioned above, consistently do *not* apply this adjustment in these cases.

---

<sup>3</sup> USSC, *FY 2005- FY 2014 Monitoring Dataset*. The adjustment was not applied in a single one of these cases in the First, Second, and Tenth Circuits. *Id.* The rate in the Third Circuit was 0.1%, the rate in Fourth Circuit was 0.4%, the rate in the Sixth Circuit was 0.15%, the rate in the Seventh Circuit was 0.12%, the rate in the Eighth Circuit was 0.22%, and the rate in the Eleventh Circuit was 0.14%. *Id.*

<sup>4</sup> *Id.* (Other districts in the Ninth Circuit that did not apply the vulnerable victim enhancement even one time to such cases during this time frame are: Southern District of California, Eastern District of Washington, District of Hawaii, District of Idaho, District of Nevada, District of Oregon, and the District of Guam.).

<sup>5</sup> *Id.* (The rate in the District of Arizona was 9.5%, the rate in the Northern District of California was 14.4%, the rate in the Eastern District of California was 17.5%, the rate in the Central District of California was 11.8%, the rate in the District of Alaska was 4.5%, and the rate in the District of Montana was 4.5%).

<sup>6</sup> *Id.* (Districts that did not apply the vulnerable victim enhancement in these cases include: Eastern District of Texas, Eastern District of Louisiana, Western District of Louisiana, Northern District of Mississippi, Southern District of Mississippi. The rate in the Southern District of Texas was 4.9%, the rate in the Northern District of Texas was 7.9%, the rate in the Western District of Texas was 12.7%, and the rate in the Middle District of Louisiana was 5.3%).

This concern is particularly strong in the context of §2G2.2, which already recommends sentences that courts have clearly and routinely determined to be too high, and fails to adequately distinguish among more and less culpable defendants. The proposed amendment exacerbates these problems.

The national rate of within guideline sentences under §2G2.2 fell from 40% in FY 2010 to 29% in FY 2014.<sup>7</sup> The rate of below guideline sentences under §2G2.2, for reasons other than substantial assistance, has continued to increase. In FY 2014, this rate climbed to 66%, up from 55% in FY 2010.<sup>8</sup> In addition, findings from a recent study looking at both the “likelihood and magnitude” of sentences below the guideline recommended range, as well as the reasons judges give for these sentences, “suggest that judges believe that the guidelines for nonproduction child pornography offenses are overly harsh.”<sup>9</sup> Indeed, the Commission has recognized that “the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior.”<sup>10</sup> The proposed amendment would only further increase the guideline recommended range based on the content of an individual’s collection of images, and thus exacerbate the problem of the guidelines recommending sentences that are too severe.

In addition, “several of the Commission’s relevant sentencing enhancements tend to apply indiscriminately to all child pornography offenders, greatly increasing the recommended punishment range without reflecting an individual’s heightened level of culpability.”<sup>11</sup> The guideline thus fails to “guard against unwarranted similarities among sentences for defendants

---

<sup>7</sup> Compare USSC, *2014 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2014) (*2014 Sourcebook*) with USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2010) (*2010 Sourcebook*). This low rate appears to be persisting, with preliminary data from FY 2015 showing a rate of within guideline sentences at 28%. USSC, *Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2015 Data* tbl. 5 (2015) (*2015 Preliminary Data*).

<sup>8</sup> Compare *2014 Sourcebook* tbl. 28 with *2010 Sourcebook* tbl. 28. This rate appears to be continuing on an upward trajectory, with preliminary data from FY 2015 showing the rate of below guideline sentences for reasons other than substantial assistance climbing to 68%. *2015 Preliminary Data* tbl. 5.

<sup>9</sup> Kimberly A. Kaiser & Cassia Spohn, *Fundamentally Flawed? Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences*, 13 *Criminology & Pub. Pol’y* 22 (2014) (Courts are imposing sentences below the guideline recommended range “because of inherent disagreement with the severity of the sentences called for by the guidelines for the *typical* offender convicted of a nonproduction child pornography offense.”).

<sup>10</sup> USSC, *Report to Congress: Federal Child Pornography Offenses* 321 (Dec. 2012) (*Child Pornography Report*).

<sup>11</sup> *United States v. R.V.*, 2016 WL 270257, \*3 (E.D.N.Y. Jan. 21, 2016).

who have been found guilty of dissimilar conduct.”<sup>12</sup> The Commission itself concluded: “as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability.”<sup>13</sup> Indeed, “four of the six sentencing enhancements in §2G2.2 – those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels – now apply to most offenders and, thus, fail to differentiate among offenders in terms of their culpability.”<sup>14</sup> For example, the specific offense characteristic in §2G2.2(b)(2) for material that involved a prepubescent minor – a term that was added in 1988 specifically to provide “an alternative measure to be used in determining whether the material involved an extremely young minor”<sup>15</sup> – or a minor who had not attained the age of 12 years applied in 95.9% of all cases in FY 2014.<sup>16</sup>

Defenders are concerned the proposed amendment would only make this problem worse. In our experience, the use of open peer-to-peer (“P2P”) programs and networks – programs that are used by a significant majority of our clients<sup>17</sup> – results in our clients unintentionally and often unknowingly having a large number and variety of images on their computer, including at least one image involving a very young child. The Commission has recognized the “significant number of extremely young children depicted in child pornography today.”<sup>18</sup> While the Commission was not able to code precise data regarding the ages of victims depicted in the child pornography cases it studied,<sup>19</sup> it cited data from a 2006 survey indicating that almost half (46%) of arrested child pornography possessors had at least one image of a child aged 3-5, and approximately 28% of arrested child pornography offenders had at least one image of a child

---

<sup>12</sup> *United States v. Dorvee*, 616 F.3d 174, 187 (2d. Cir. 2010).

<sup>13</sup> USSC, *Child Pornography Report*, at ii.

<sup>14</sup> USSC, *Child Pornography Report*, at iii.

<sup>15</sup> USSG App. C, Amend. 31, Reason for Amendment (June 15, 1988).

<sup>16</sup> USSC, *Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2014* (2014).

<sup>17</sup> See generally USSC, *Child Pornography Report*, at 166 (“Offenders’ use of P2P file-sharing programs to receive and distribute child pornography has steadily increased in recent years. By the first quarter of fiscal year 2012, 74.5 percent of §2G2.2 offenders who received child pornography used P2P programs to do so, and 85.3 percent who distributed child pornography used P2P programs to do so. The typical offender who used a P2P program used an ‘open’ program that did not involve two-way communication between the offender and others who participated in the P2P network.”).

<sup>18</sup> USSC, *Child Pornography Report*, at 35.

<sup>19</sup> USSC, *Child Pornography Report*, at 85 n.76.

under the age of 3.<sup>20</sup> As a result, we fear that the proposed amendment would regularly apply and drive up recommended sentences even further without adding a factor that would meaningfully distinguish among defendants. This is particularly so because the proposed amendment, like the current troubling enhancements, would apply regardless of whether the defendant intended to possess, receive or distribute such images, or even knew he possessed, received or distributed such images. While the proposed amendment has a requirement that the defendant “knew or should have known” that the “minor’s extreme youth and small physical size made the minor especially vulnerable,” it does not expressly require that the defendant knew that he possessed, received or distributed images with such content. Finally, adding even more focus on the nature of the image is troubling because available research fails to show that the types of images possessed are relevant to the risk of committing another child pornography offense or a contact offense.<sup>21</sup>

Defenders propose that the commentary to §2G2.2 make clear that the vulnerable victim adjustment should *not* apply for reasons solely based on the minor being under the age of 12 or related factors that correlate with being under the age of 12.<sup>22</sup> If, however, the Commission declines to affirmatively guide courts against applying additional adjustments for especially vulnerable minors based on age or factors correlated with age, we recommend it take no action at all. As mentioned above, addressing this issue in the manner the Commission proposes will likely increase disparity more than would occur if the Commission stuck with the status quo.

Due to the current problems with the guideline discussed above, Defenders oppose adding any enhancement, upward adjustment or invited upward departure based on the content of images – including the young age of minors – that would apply indiscriminately in a significant number of cases, and likely increase the rate of sentences imposed below the guidelines as well

---

<sup>20</sup> USSC, *Child Pornography Report*, at 87 (citing Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics* 23 Sexual Abuse 22 (2011)). A later chapter in the *Child Pornography Report* indicates this 2006 study “found that approximately half of child pornography offenders possessed one or more images depicting the sexual abuse of a child under six years old,” USSC, *Child Pornography Report*, at 312. But the Wolak study doesn’t provide this exact information, instead indicating that 46% of child pornography possessors had at least one image of a child between the ages of 3 and 5, and 28% had at least one image of a child less than 3 years old, without specifying the total number or percentage of child pornography possessors with images of children under the age of six.

<sup>21</sup> See Statement of Deirdre D. von Dornum Before the U.S. Sentencing Comm’n, Washington, D.C., at 14-15 (Feb. 15, 2012).

<sup>22</sup> In the Issues for Comment, the Commission asks whether the commentary to Chapter Three should be revised to clarify how age enhancements in the guidelines interact with the vulnerable victim adjustment, specifically asking whether it should revise the commentary to provide “*unless the victim was unusually vulnerable for reasons not based on age per se.*” Defenders question whether adding the words “per se” would bring clarity to the matter.

as exacerbate disparity. If, however, the Commission is going to take one of those steps, Defenders recommend it be in the form of an invited departure. We strongly oppose the addition of a tiered age enhancement. Ever-finer gradations in culpability are a prime driver of the “factor creep” that has led to undue complexity and severity in the guidelines.<sup>23</sup> And it would lead to additional litigation regarding the precise age of minors in images. We believe the proposed amendment – with the subjective standard of an “especially vulnerable minor” is better considered as a departure than an adjustment. *See, e.g.*, §2L2.1 comment. (n.2) (providing for an upward departure where “the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an *especially* serious type.”) (emphasis added).<sup>24</sup>

The other two guidelines under consideration – §2G2.1 and §2G2.6 – are used much less frequently<sup>25</sup> and present many of the same issues discussed above. Defenders believe the Commission should not amend these guidelines as proposed either. As with §2G2.2, there is little reason to believe that addressing the issue as the Commission proposes will lead to consistent application. Looking at data from FY 2005- FY 2014, in the Ninth Circuit, which issued the 2004 *Wright* decision setting forth the rule the proposed amendment “generally adopts,” it is notable that nine of the districts did not apply the vulnerable victim enhancement even one time in cases where the defendant was sentenced primarily under §2G2.1 and received an enhancement under §2G2.1(b)(1).<sup>26</sup> In addition, the data do not show that the guideline

---

<sup>23</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 *Psychology, Law & Pub. Pol’y* 739, 752 (2001) (“In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.”).

<sup>24</sup> The guidelines define “sophisticated means” for purposes of the enhancement in §2B2.1 and some of the tax guidelines to mean “especially complex or especially intricate conduct.” §2B1.1 comment. (n.9) Defenders have long complained that this enhancement is too ambiguous for meaningful application and should be eliminated from the guidelines, or at minimum included as a departure provision instead of a specific offense characteristic. *See* Statement of Michael Caruso Before the U.S. Sentencing Comm’n, Washington, D.C., at 13 (Mar. 12, 2015).

<sup>25</sup> During the past five years, there were only 42 defendants whose primary sentencing guideline was §2G2.6, and 1,433 under §2G2.1. *USSC FY 2010-2014 Monitoring Dataset*. By comparison, there were 8,348 defendants during this time frame whose primary guideline was §2G2.2. *Id.* Because §2G2.6 has been used so infrequently, we focus here on §2G2.1.

<sup>26</sup> *USSC, FY 2005- FY 2014 Monitoring Dataset* (District of Arizona, Eastern District of California, Central District of California, Southern District of California, District of Hawaii, District of Idaho, District of Nevada, District of Oregon, and Eastern District of Washington).

recommended sentences under §2G2.1 are too low. The rate of upward departures is low.<sup>27</sup> In addition, while not as extreme as §2G2.2, the “within range rate in production cases [under §2G2.1] has been steadily decreasing.”<sup>28</sup> The rate at which sentences fall within the guideline recommended range has dropped from 55.6% in FY 2010 to 41.2% in FY 2014.<sup>29</sup> For the same reasons stated above, Defenders strongly urge the Commission not to add complexity to this guideline through a tiered enhancement based on age. If the Commission is going to do something to encourage courts to consider “especially vulnerable” minors in these cases, in light of data and the subjective nature of the inquiry, Defenders urge the Commission to incorporate the consideration as an invited departure, rather than as either a tiered enhancement or a Chapter Three adjustment.

## II. Distribution

The Commission proposes amending two of the tiered distribution enhancements in §2G2.2(b)(3), subsection (b)(3)(F) and subsection (b)(3)(B), to respond to differences among the circuits in applying these enhancements, particularly in cases involving peer-to-peer (P2P) file-sharing programs or networks.<sup>30</sup> Defenders support these amendments as steps in the right direction, and encourage the Commission to do more to reform the sentencing scheme based on empirical evidence to ensure that sentences recommended by the guidelines are fair and just, and consistent with the purposes of sentencing. We also urge the Commission to specify in the commentary that mere use of P2P programs or networks is not sufficient to trigger any of the distribution enhancements. While the Commission may be reluctant to reference a certain type of technology in the commentary, it is important to do so here because of the pervasiveness of P2P file-sharing programs in non-production child pornography offenses and the apparent confusion about how they operate.

---

<sup>27</sup> The rate of sentences above the guideline recommended range was 2.5% in FY 2014, down from 4.8% in FY 2010. USSC, *Interactive Sourcebook*, Sentences Relative to the Guideline Range. *See also 2015 Preliminary Data* (showing an above guideline rate of 2.2% in FY 2015).

<sup>28</sup> USSC, *Child Pornography Report*, at 255.

<sup>29</sup> USSC, *Interactive Sourcebook*, Sentences Relative to the Guideline Range. *See also 2015 Preliminary Data* (showing a within guideline rate of 42.5%).

<sup>30</sup> The Commission has recognized this as an area where, even absent Congressional action, it can amend the guidelines to “better reflect” the sentencing factors it believes would “provide for more proportionate punishments.” Specifically, the Commission can amend §2G2.2(b) “to reflect... recent changes in technology (e.g., revisions of the enhancements in §2G2.2(b)(3) and (6), which concern distribution and use of a computer, to reflect offenders’ use of modern computer and Internet technologies such as P2P file-sharing programs).” USSC, *Child Pornography Report*, at xviii-xix.

Before addressing the details of each proposed amendment, we offer some general background that informs our position on the amendments. The base offense level for those convicted of distributing child pornography is set at 22, 4-levels higher than that for persons convicted of possession. §2G2.2(a)(2). All “distributors” whether convicted of distribution or not, are excluded from the 2-level reduction in §2G2.2(b)(1) even when the defendant did not intend to distribute, and are subject to a 2- to 7-level enhancement under §2G2.2(b)(3). One or the other of these two distribution enhancements that the Commission proposes amending applied to almost 60% (59.4%) of guideline calculations under §2G2.2 during fiscal year 2014.<sup>31</sup> This rate is significantly higher than in 2010, when it was less than 40% (37.9%).<sup>32</sup>

As noted in the previous section, few sentences under §2G2.2 fall within the range recommended by the guideline. It is too harsh<sup>33</sup> and “no longer adequately distinguishes among offenders based on their degrees of culpability.”<sup>34</sup> The Commission has acknowledged that one reason for this is a dramatic change “in the computer and Internet technologies the typical non-production offenders use.”<sup>35</sup> “[M]ost of the enhancements in §2G2.2, in their current or antecedent versions, were promulgated when offenders typically received and distributed child pornography in printed form using the United States mail.”<sup>36</sup> Now, however, the vast majority of individuals who receive and distribute child pornography use P2P programs.<sup>37</sup> And based on the Commission’s study of 2010 data, almost three-quarters (72.4%) of individuals who distributed child pornography using P2P file-sharing programs “solely used an ‘open’ P2P program (*e.g.*, LimeWire),” meaning there was “no two-way communication between the

---

<sup>31</sup> USSC, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2014* (2014).

<sup>32</sup> USSC, *Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2010* (2010).

<sup>33</sup> See discussion, *supra* at p. 3.

<sup>34</sup> USSC, *Child Pornography Report*, at ii.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 313.

<sup>37</sup> *Id.*, at 166. The Commission found that the rate at which individuals who received and distributed child pornography use P2P programs has “steadily increased in recent years.” *Id.* Looking at a random sample of non-production offenses sentenced in 2002, “none involved the use of P2P file-sharing programs.” *Id.* at 155. By 2010, a special coding project by the Commission determined that 56.1% of defendants who received child pornography used P2P programs to do so, and 73.8% of defendants who distributed child pornography used P2P programs to do so. *Id.* at 148-50. By the first quarter of 2012, the percentages were even higher according to another Commission coding project, which determined that 74.5% of defendants who received child pornography used P2P programs to do so, and 85.3% of defendants who distributed child pornography used P2P programs to do so. *Id.* at 154. Given this trajectory it would not be unreasonable to assume that now in 2016 the rates are higher still.

offender who distributed and the persons who obtained images or videos from the offender's computer."<sup>38</sup> Because of how P2P programs operate, "a simple possessory crime evolves into a distribution offense."<sup>39</sup>

Many different P2P programs are available to users, including LimeWire, ARES, and uTorrent among others.<sup>40</sup> They often have a default setting to share everything that is downloaded as soon as the program is installed, and opting out of the default requires individuals to have a certain level of sophistication with configuring software on their computers.<sup>41</sup> Some programs "automatically reset[ ] themselves to sharing mode every time the computer is used, requiring you to turn off 'sharing' each time you boot up."<sup>42</sup> A user is not required to share any files to use the P2P programs.<sup>43</sup> Programs can encourage sharing either by providing faster downloading for those who share, and/or or punishing "freeloaders," who do not share, with restrictions on downloading.<sup>44</sup> In addition, the programs can begin to share a partial file even

---

<sup>38</sup> *Id.* at 150-51.

<sup>39</sup> *United States v. Strayer*, 2010 WL 2560466, \*12 (D. Neb. 2010).

<sup>40</sup> *See, e.g.*, [https://en.wikipedia.org/wiki/Comparison\\_of\\_file\\_sharing\\_applications](https://en.wikipedia.org/wiki/Comparison_of_file_sharing_applications).

<sup>41</sup> *See, e.g., United States v. Martinez*, Cr. 12-122-RMP (E.D. Wash.), Stipulated Facts, Dkt. No. 70 (filed Apr. 18, 2013), at 2, 4-5; *Arista Records LLC v. Lime Group LLC*, 1:06-cv-05936 GEL (S.D.N.Y.), Declaration of Dr. Steven Gribble in Support of Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 147 (filed Sept. 26, 2008), at ¶20 ("When LimeWire is first installed, a new folder (called "Shared") is created on behalf of the user and is automatically designated for sharing. By default, all files that are downloaded by LimeWire are automatically placed in the Shared folder."). *See also United States v. R.V.*, 2016 WL 270257, \*21 (E.D.N.Y. Jan. 21, 2016) ("A crucial aspect of peer-to-peer file-sharing is that the default setting for these networks is that downloaded files are placed in the user's 'shared' folder, which allows others in the network to access the files. A user must affirmatively change his network setting to disable this sharing feature."). On this and other aspects of how P2P file-sharing programs and networks operate, Defenders have learned a great deal from forensic examiners within the Federal Defender community. If Commissioners have questions about how these programs operate, Defenders would be happy to facilitate a hearing or meeting with forensic investigators in our organization. *See, e.g.*, USSC, Public Hearing on Federal Child Pornography Crimes (including witness Gerald R. Grant, Digital Forensics Investigator, Office of the Federal Public Defender for the Western District of New York) (Feb. 15, 2012).

<sup>42</sup> Brown University, *Use P2P Filesharing Software Safely & Legally*, <https://www.brown.edu/information-technology/knowledge-base/index.php?q=article/1292>.

<sup>43</sup> *See* Stipulated Facts in *Martinez*, *supra* note 41, at 3 ("a user is not required to share files to use the P2P network"); Gibbs Declaration in *Arista Records*, *supra* note 41, at ¶20.

<sup>44</sup> *See R.V.*, 2016 WL 270257, at \*21 ("The network is designed to encourage sharing by providing faster downloading if the user allows sharing."); Stipulated Facts in *Martinez*, *supra* note 41, at 2-3 ("Some P2P software gives each user a rating based on the number of files the user is contributing to the network. This rating affects the user's ability to download files. Thus, the more files a user is sharing from his/her "My Shared Folder", the higher the user's rating, the greater his/her ability is to download other user's

before a single complete image has been downloaded.<sup>45</sup> Simply due to actions by a computer program that a defendant may or may not understand are happening, not because of any deliberate intent on the part of the defendant to distribute child pornography, or even any affirmative act, a defendant may be deemed to have distributed images for purposes of guideline enhancements.

What this means for defendants who are sentenced under this guideline is best illustrated with an example of a scenario that Defenders see, with slight variations, on a regular basis. We recently represented a twenty-year-old who lived with his parents. For our purposes here, we'll call him Greg. This kid was struggling in general, and it would have been a challenge for him to live independently. During an interrogation by law enforcement when they executed a search warrant, Greg was asked what the file-sharing programs on his computer did. He answered, "you can download stuff." Law enforcement explained that LimeWire has "a torrent built into it," and Greg asked, "[w]hat's a torrent? That's just a search?" Law enforcement then challenged Greg about moving files and Greg responded, "Well maybe no, you can't even like move the files. They're just on. Whenever you have like the LimeWire they're just on the screen. I don't know where to go, to like, I don't know where they're saved at. Or if they're saved on the computer or not." Greg was charged with both possession and distribution. For trial, we hired an expert to explain to the jury how LimeWire, the P2P program our client used, operates. The expert explained that the unspoken default in LimeWire is sharing, and that to turn off the default sharing settings, an individual would have to be comfortable with configuring software and make the effort to do it, working through many screens and clicks. At the end of the trial, the jury acquitted our client of distribution. At sentencing, however, the government asked for a five-level enhancement under §2G2.2(b)(3)(B), and the court imposed a two-level enhancement under §2G2.2(b)(3)(F). His total offense level was 31, and with no criminal

---

files. This rating system is intended to encourage users to 'share' their files, thus propagating the P2P network."); Gibbs Declaration in *Arista Records, supra* note 41, at ¶49 ("Peer-to-peer networks rely on the contribution of content, network bandwidth, and storage by their constituent peers in order to provide a useful and scalable service. Peers that choose to consume resources without contributing any can degrade the performance and scalability of a peer-to-peer network. Accordingly, many P2P protocols and clients are engineered with anti-freeloading mechanisms to combat this problem.").

<sup>45</sup> See Adam Pash, *A Beginner's Guide to BitTorrent*, Lifestacker (Aug. 3, 2007), <http://lifestacker.com/285489/a-beginners-guide-to-bittorrent> ("Because BitTorrent breaks up and distributes files in hundreds of small chunks, you don't even need to have downloaded the whole file before you start sharing."); Parul Sharma et al., *Performance Analysis of BitTorrent Protocol*, IEEE (2013) (describing BitTorrent protocol including that "users connected to each other directly to upload and download portions of a large file (called as a piece) from other peers who have also downloaded the file or parts of it"). Forensic examiners within the Federal Defender Organization confirm that BitTorrent is not unique in this regard and other P2P programs operate in a similar manner.

history points, his guideline recommended range was 108-135 months. The court imposed a sentence of 60 months.

In light of the problems with the guidelines punishing too harshly and failing to distinguish among individuals based on culpability, Defenders have encouraged the Commission to focus on cases where the defendant has engaged in conduct with the specific intent of making child pornography widely available to others as demonstrated by the method of distribution.<sup>46</sup> And Defenders have indicated that unless the Commission significantly lowers the base offense levels under §2G2.2, and eliminates use of enhancements for computer use, the types of images, and number of images or videos, we cannot support any enhancements for certain methods of distribution.<sup>47</sup> Without meaningful reform of the current guideline, too many individuals will receive sentences greater than necessary to satisfy the purposes of sentencing. That said, as Defenders testified before the Commission in 2012, the guideline could better distinguish individuals with different degrees of culpability by narrowly targeting methods of distribution that demonstrate they knowingly and intentionally focused their activities on distributing child pornography.<sup>48</sup> For example, where a defendant: (1) *created* a closed private network and then shared files for the purpose of distributing child pornography; (2) set up, maintained, or moderated a server, website, blog, or hosting area specifically for the purpose of distributing child pornography; (3) charged a fee to distribute child pornography; or (4) introduced a new image to the Internet.<sup>49</sup>

Against this backdrop, we support the proposed amendments as an improvement over the status quo. But we caution that these changes still fall far short of the reform needed to repair this badly broken guideline. In its Issues for Comment, the Commission asks whether it should “change any other enhancements in (b) from an ‘offense involved’ approach to a ‘defendant based’ approach,” and if so, whether it should require a “culpable state of mind.” As with the proposed amendment to the 2-level enhancement, we believe many of the enhancements would be improved by making them “defendant based” and requiring a culpable state of mind, and encourage the Commission to make such changes. But those changes should not be viewed as a substitute for the real reform that is needed to this guideline.

---

<sup>46</sup> See Statement of Deirdre D. von Dornum Before the U.S. Sentencing Comm’n, Washington, D.C., at 19 (Feb. 15, 2012).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.*

### **A. The 2-Level Distribution Enhancement at Subsection (b)(3)(F)**

The Commission proposes amending §2G2.2(b)(3)(F) to “generally adopt[]” the approach of the Second, Fourth and Fifth Circuits, by making clear the enhancement requires “knowing” distribution by the defendant.<sup>50</sup> Defenders support this amendment as an improvement to the current version which does not explicitly identify the requisite mens rea for this enhancement. We urge the Commission, however, to at minimum also require that the distribution be intentional before it can apply on top of an already higher base offense level where a defendant has been convicted of knowing distribution, or even without a conviction for distribution in cases where a defendant has not exhibited a deliberate attempt to distribute, or even taken an affirmative act to distribute child pornography.<sup>51</sup> This could be accomplished by amending §2G2.2(b)(3)(F) to read: **If the defendant knowingly and intentionally distributed,** ~~Distribution~~ other than distribution described in subdivisions (A) through (E), increase by 2 levels. To meaningfully distinguish among more and less culpable defendants, this enhancement should be reserved for those individuals who are actively seeking to distribute child pornography. Individuals who commit lower-level offenses, that is, those who passively distribute through operation of default settings on a computer program, and who have made no affirmative act, should not face an increased recommended sentence, particularly when they are virtually certain to get a number of other enhancements that go hand-in-hand with P2P file sharing programs (e.g., a 2-level increase for use of a computer at §2G2.2(b)(6), a 4-level increase for material that portrays sadistic or masochistic conduct at §2G2.2(b)(4), and a 2-level increase for material that involved a prepubescent minor or a minor who had not attained the age of 12 years at §2G2.2(b)(2)).<sup>52</sup>

The Commission also should include a note in the commentary specifying that use of a P2P file-sharing program or network is not enough on its own to satisfy the knowledge requirement.<sup>53</sup> When the Commission conducted its special coding project regarding child

---

<sup>50</sup> 81 Fed. Reg. 2295, 2306 (Jan. 15, 2016). The Commission proposes a similar change to §2G2.1(b)(3). Defenders similarly support that change as a step in the right direction.

<sup>51</sup> As indicated above, we think it is more appropriate to focus on specific methods of distribution, rather than relying on the current problematic tiered enhancements, but if the Commission declines to do that, it should at least limit application of this enhancement to intentional distribution.

<sup>52</sup> Should the Commission amend the guideline as proposed to address the vulnerable victim adjustment, we fear defendants who used P2P programs will receive that upward adjustment as well.

<sup>53</sup> In the Issues for Comment, the Commission asks whether there should be a “bright-line rule that use of a file sharing program qualifies for the 2-level enhancement, even in cases where the defendant was in fact ignorant that use of the program would result in files being shared to others.” 81 Fed. Reg. 2295, 2307 (Jan. 15, 2016). If there is any bright-line to be drawn here, it is in the opposite direction, that mere use of a file-sharing program is not a sufficient basis to enhance a sentence, precisely because the defendant may in fact be ignorant that use of the program would result in files being shared to others.

pornography offenses sentenced in 2010, and looked at distribution, it specifically “excluded cases as involving knowing distribution when a court found that a defendant who had used a P2P file-sharing program either ‘opted out’ of the P2P program or unwittingly ‘opted in’ to the P2P program.”<sup>54</sup> These exclusions are appropriate and the Commission should make clear that the knowledge requirement requires an “independent finding of knowledge”<sup>55</sup> that cannot be based solely on use of a P2P file-sharing program. We fear that absent clear language in the commentary, some courts may conclude that the government needs only to prove that the defendant “knowingly used LimeWire because the capability of the software to share files with others is self-evident” and need not prove that the defendant “knew he would be sharing images with others by using LimeWire.”<sup>56</sup>

While it may surprise some,<sup>57</sup> many of our clients use programs they may or may not know are considered to be “file-sharing” programs, yet do not understand how these programs operate. And our clients are not alone in not understanding how these programs operate. Even elite universities do not assume that users are aware of the file sharing capabilities of the programs and warn: “Even if you do not intend to engage in infringing activity, installing P2P software on a computer can easily end up sharing unintended files (copyrighted music or even sensitive documents) with other P2P users, and you may then be personally responsible for the legal and financial consequences of illegal file sharing on your computer.”<sup>58</sup> When individuals do not understand how the programs operate, it is difficult for them to ‘opt out’ of the sharing settings of the program, particularly when sharing is often a default setting, and changing it requires individuals to have a level of sophistication with configuring software on their computer, which many of our clients – as well as the rest of us – do not. Our clients who do not understand how the programs operate are not as culpable as, and should not be punished at levels

---

<sup>54</sup> USSC, *Child Pornography Report*, at 147 n.61.

<sup>55</sup> *United States v. Baldwin*, 743 F.3d 357, 361 (2d Cir. 2015).

<sup>56</sup> *United States v. Conner*, 521 F. App’x 493, 499 (6th Cir. 2013).

<sup>57</sup> *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010) (“ignorance is entirely counterintuitive”).

<sup>58</sup> Yale University, *Illegal File Sharing*, <http://its.yale.edu/secure-computing/security-standards-and-guidance/data-and-application-security/illegal-file-sharing>. See also Cornell University, *Filesharing Risks*, <http://www.it.cornell.edu/policies/copyright/filesharing/> (“If you have P2P file-sharing applications installed on your computer, you may be sharing copyrighted works without even realizing it. Even if you do not intend to engage in infringing activity, installing P2P software on a computer can easily result in you unintentionally sharing files.”); New York University, *Peer-to-Peer Security*, <https://www.nyu.edu/life/resources-and-services/information-technology/it-security-and-policies/p2p-security.html> (“Be aware: some applications for downloading music, movies and other files actually turn your computer into a server, allowing it to be used for distributing copyrighted material.”).

identical to, individuals who have taken intentional and affirmative steps to distribute child pornography.

But even when our clients have a basic understanding of how file-sharing programs work, and even when they have taken steps they believe will prevent sharing, they may still unwittingly share material from their computers, either because they do not fully understand all of the complexities of the program they are using, or because the program has actually tricked them. These clients are also less culpable than individuals who have taken intentional and affirmative steps to distribute child pornography, and their punishment should reflect that. Again, outside the context of child pornography, universities warn their highly educated users:

While peer-to-peer (P2P) software and filesharing networks may be wonderfully useful, there are a lot of “gotcha’s”....The P2P program itself may be the problem. Some automatically resetting themselves to sharing mode every time the computer is used, requiring you to turn off ‘sharing’ each time you boot up. The instructions could be wrong or misleading, so that even when you think you've turned sharing off, you may not have done so.... Changes you make to the default settings of the “save” or “shared” folder might cause you to share folders and subfolders you don't want to share.<sup>59</sup>

In addition to the programs’ “gotcha’s,” many of our clients do not understand that if they move images out of the default folder as soon as they have been downloaded, it is too late to prevent sharing.<sup>60</sup> As discussed above, by default, many of the programs start uploading partial files, before a complete image has been downloaded.

In light of the many issues with the use of P2P file-sharing programs and networks, it is imperative that the Commission make clear that knowledge of distribution cannot be inferred based solely on the use of a P2P program. It is also critical that the government bear the burden of proving knowledge. The apparent burden-shifting approach of the Eighth Circuit – under which “a fact-finder may reasonably infer that the defendant knowingly employed a file sharing

---

<sup>59</sup> Brown University, *Use P2P Filesharing Software Safely & Legally*, <https://www.brown.edu/information-technology/knowledge-base/index.php?q=article/1292>. See also Federal Trade Commission, *Peer-to-Peer File-Sharing Software Developer Settles FTC Charges* (Oct. 11, 2011) (Frostwire settled FTC charges that it “misled consumers about which downloaded files from their desktop and laptop computers would be shared with a file-sharing network.”).

<sup>60</sup> See generally *United States v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (5-level enhancement applied where defendant was initially investigated after Danish authorities found “a partially downloaded file containing child pornography had been downloaded to the computer from an Internet Protocol (IP) address that was traced to” defendant).

program for its intended purpose” “[a]bsent *evidence* of ignorance”<sup>61</sup> is untenable because it gives even more power to the prosecution. To prove “ignorance” will often require the defense to engage in an expensive and time-consuming forensic analysis, which frequently is not even an option for the defense since prosecutors will leverage charges to discourage such investigations, e.g., take a plea offer off the table or file a superseding indictment with a charge that carries a five-year mandatory minimum sentence when the defense seeks to conduct an independent forensic examination.

### **B. The 5-Level Distribution Enhancement at Subsection (b)(3)(B)**

The Commission proposes amending §2G2.2(b)(3)(B) to clarify that the 5-level distribution enhancement should apply only where “the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.”<sup>62</sup> Defenders support this amendment, with a few changes, as an important step in the right direction. We recommend that at minimum, the proposed commentary be revised, as follows:

the defendant agreed **with another person** to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

---

<sup>61</sup> *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010). The law in the Eighth Circuit is a little opaque on both the 2- and 5-level enhancements. *See, e.g., United States v. Durham*, 618 F.3d 921, 927 (8th Cir. 2010) (in a case where the Court of Appeals determined there was “concrete evidence of ignorance,” interpreting *Dodd* as reaffirming “the government retains the burden to prove the enhancement on a case-by-case basis,” “[d]espite the new requirement placed upon the defendant” to provide “concrete evidence of ignorance”). *See also United States v. Bastion*, 603 F.3d 460, 467 (8th Cir. 2010) (Colloton, J., concurring) (noting “[w]e have tried to ‘clarify,’” “but probably have not sufficiently narrowed some of [the] language and reasoning” in *United States v. Griffin*, 482 F.3d 1008, 1012-13 (8th Cir. 2007) which provides “some support” for the government’s position that the 5-level enhancement applies “if a defendant installs a file-sharing software program on his computer, knows that the program allows both the distribution and the receipt of computer files, and then distributes and receives images containing child pornography through use of the software”). In our experience in the Eighth Circuit, probation and the government are likely to pursue one of the distribution enhancements, and usually the 5-level, in cases involving P2P software based solely on the defendant’s use of the software without any apparent distinction between what is required for the 5-level as opposed to the 2-level enhancement. It then falls to the defense to present “concrete evidence of ignorance.”

<sup>62</sup> 81 Fed. Reg. 2295, 2306 (Jan. 15, 2016).

This is a severe enhancement and should be reserved for the most serious distribution cases. This 5-level enhancement is on par with the enhancement for distribution for pecuniary gain of \$40,000, and at the very least should be limited to similarly serious conduct.<sup>63</sup> It should not apply simply because of agreements with software related to passive sharing, and should, at minimum, be limited to those who go so far as to make a quid pro quo agreement with another person. The quid pro quo agreement with another person demonstrates both intent and determination to distribute that is different from the passive distribution involved in the average use of P2P programs.

Defenders also recommend that the commentary specify both that (1) mere installation and use of a P2P program is not alone sufficient for application of this enhancement,<sup>64</sup> and (2) it is not appropriate to apply the enhancement where the only valuable consideration the defendant received was faster download speeds. While adding the language “with another person” as we propose above *should* address both of those issues, in light of the confusion over how P2P programs operate and the prevalent role the programs play in non-production child pornography enhancements, we urge the Commission to clearly address these issues in the commentary.

Mere installation and use of a P2P program should be specifically excluded from the 5-level enhancements for all of the same reasons it should be excluded from the 2-level enhancements, only amplified because the enhancement is so much more severe. As one judge explained: “Applying the full 5-level enhancement in all P2P cases does not adequately distinguish among offenders who fall into a broad range of culpability. At one end of the spectrum are offenders for whom sharing via a P2P network is simply incidental to their use of the network, and who may not even fully understand that they are distributing. At the other end are users who are not only consciously sharing, but are taking steps to facilitate the distribution of child pornography.”<sup>65</sup> Because some appear to assume –incorrectly – that in every case where a defendant uses a P2P program, he has agreed to distribute,<sup>66</sup> it is imperative for the

---

<sup>63</sup> See §2G2.2(b)(3)(A) & §2B1.1(b)(1). Yet another problem with the current tiered enhancements is that the same 5-level enhancement applies whether a defendant’s pecuniary gain is \$2 or \$40,000.

<sup>64</sup> In the Issues for Comment, the Commission asks whether there should be a “bright-line rule that use of a file sharing program qualifies for the 5-level enhancement.” 81 Fed. Reg. 2295, 2307 (Jan. 15, 2016). As with the 2-level enhancement, there should be a bright-line rule drawn here, but it should be in the opposite direction, providing that mere installation and use of a file-sharing program is not a sufficient basis to enhance a sentence by 5 levels.

<sup>65</sup> *United States v. Abraham*, 994 F. Supp. 2d 723, 735 (D. Neb. 2013).

<sup>66</sup> See, e.g., *United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015) (applying the 5-level enhancement because “[b]y using this software... the user agrees to distribute the child pornography on his computer in exchange for additional child pornography.”).

commentary to clarify the issue and explicitly indicate that courts should not apply this 5-level enhancement in every case where a defendant uses a P2P program.

We also ask the Commission to make clear in the commentary that a defendant should not receive a 5-level enhancement for using a P2P program or network where the defendant has taken some action (or allowed default settings to remain) in order to obtain faster download speeds.<sup>67</sup> As discussed above, to operate efficiently, P2P programs and networks depend on people sharing, and some pressure people to share either by rewarding them with faster download speeds if they do share or punishing them with slower speeds if they do not. It is appropriate to exclude from this significant 5-level enhancement defendants who respond to that pressure and do not take the steps necessary to prevent sharing. Such conduct is not as serious as actively reaching an agreement with another person for a quid pro quo exchange, or to provide material in exchange for \$40,000. This 5-level enhancement should be reserved for the most serious distributors.<sup>68</sup>

Finally, an even better approach for appropriately limiting application of this severe enhancement to the more serious offenses, and helping the guideline draw real distinctions between more and less culpable defendants, would require not only an agreement with another person, but also that the agreement involved the introduction of a new image that has not been previously available to others. We urge the Commission to consider this more meaningful change to the guidelines.

---

<sup>67</sup> Under the current guideline, the 5-level enhancement has been applied for this reason. *See, e.g., United States v. Geiner*, 498 F.3d 1104, 1112 (10th Cir. 2007) (holding that the 5-level enhancement applied where the defendant “distributed child pornography with the expectation that he would receive a thing of value, that is, faster downloading capabilities enable him to obtain child pornography more easily and efficiently”).

<sup>68</sup> In the Issues for Comment, the Commission asks: “If the Commission were to make revisions to the tiered distribution enhancement in §2G2.2, should the Commission make similar revisions to §2G3.1?” Defenders support applying the proposed changes to §2G3.1 as well, particularly with the changes we suggest regarding intent and agreement with “another person.”