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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Re: **Public Comment on Proposed Amendments for 2011**

Dear 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 by the Commission on January 19, 2011. At the public hearings on February 16, 2011 and March 17, 2011, we submitted written testimony on the proposals, copies of which are attached and incorporated as part of our public comment. We have also attached our follow-up letter on the fraud amendments as well as our October 2010 submission. We expand on that testimony as necessary here to both address issues raised during the hearings and to clarify further our position on the proposed amendments and issues for comment.

I. Drug Quantity Table

A. Lower the Base Offense Levels in the Drug Quantity Table by Two.

In previous submissions to the Commission in October 2010 and in written testimony submitted this year, the Defenders set forth in detail the problems associated with the current Drug Quantity Table. Put simply, it punishes defendants more severely than Congress intended in the Anti-Drug Abuse Act of 1986 and more harshly than necessary to serve the purposes of sentencing at 18 U.S.C. § 3553(a).

We urge the Commission to take the following two steps to address these issues. First, tie the base offense levels for the mandatory minimum quantities of crack cocaine (28 grams and 280 grams) to the 2007 offense levels – 24 and 30. The Commission may set the base offense levels for crack two levels lower because nothing in the Fair Sentencing Act (“FSA”) requires an 18:1 ratio between crack and cocaine powder. Second, reduce by two the offense levels for all

other drugs.¹ Over the years, many of the factors for which drug quantity was a proxy² have been given independent weight with the addition of fourteen specific offense characteristics and aggravating role adjustments. The FSA adds even more enhancements that are given independent weight. When these factors are added to the drug quantity level, the net result is a disproportionate increase in prison time. Many cases will trigger application of one or more enhancements – *e.g.*, possession of a weapon, use of violence, maintaining an establishment – with the effect of further punishing the defendant for the same conduct for which drug quantity already serves as a proxy.

The net result of piling on aggravating factors without a concomitant decrease in the Drug Quantity Table is an excessive increase in sentences.³ This result stands in direct contrast to the congressional intent of the Anti-Drug Abuse Act, as described in the legislative history and the Commission’s reports. Congress intended for wholesalers and traffickers to be sentenced to five and ten year terms, respectively.⁴ Such sentences, however, are routinely meted out to lower-level functionaries and retailers.

We also note our previous observation that the drug quantity thresholds were not anchored to offense levels 26 and 32 because the Commission made a considered judgment that those offense levels best represent the seriousness of the conduct.⁵ According to the Commission, it set the base offense levels for first offenders “slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.”⁶ As discussed in Mr. Skuthan’s testimony, the data show that lowering the offense levels for crack cocaine in 2007 did not change the plea rates for crack cocaine offenses. Nor is there any evidence that the rate of substantial assistance departures was affected by the reduction in offense levels.⁷ There is no reason to believe that the rate would

¹ This amendment would keep the ratio at 18:1.

² USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* vii (2002) (“current penalty structure accounts for certain assumed harmful acts in the quantity-based penalties”).

³ A similar point has been made with respect to the fraud guideline, which has sixteen specific offense characteristics in addition to loss. *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent’g Rep. 167, 170 (2008).

⁴ *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* vii, 6-7 (2002).

⁵ The Department baldly asserts that the drug quantity “*is a valid initial measure of the seriousness of the criminal conduct.*” Statement of Laura E. Duffy Before the U.S. Sentencing Comm’n, Washington, D.C., at 17 (Mar. 17, 2011) [hereinafter Duffy Statement] (emphasis in original). It offers no support for this claim and does not acknowledge the Commission’s own statement that the drug quantity table was set two levels higher than the mandatory minimum levels to induce defendants to plead guilty or otherwise cooperate. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

⁶ USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

⁷ USSC, Monitoring Dataset.

change for any drug type if the Commission were to lower by two all levels in the Drug Quantity Table.

The Department suggests that, before reducing the offense levels in the Drug Quantity Table by two levels, the Commission should “study the results” of last year’s amendments, which slightly moved Zones B and C and made alternatives to incarceration more available for certain drug offenders.⁸ We are puzzled by the Department’s reasoning given that all of the available evidence shows that very few offenders sentence under §2D1.1 will benefit from those amendments. The vast majority of drug defendants receives, and will continue to receive, notwithstanding the amendments, sentences in Zone D.⁹ As discussed above and in Mr. Skuthan’s testimony, more than 50% receive sentences higher than required by mandatory minimum sentences. In 2009, only 3.2 percent of drug trafficking offenders (746 of 22,978 offenders) were in Zone C rather than D because of the recent expansion of the availability of split sentences or alternatives to imprisonment.¹⁰ Over 90 percent of drug trafficking offenders continued to fall in Zone D, in which the guidelines recommend a sentence of imprisonment for the full minimum term. If the offense level for all drug quantities had been reduced by two levels in 2009, only 836 additional drug trafficking offenders would have fallen in Zone C.¹¹ And this is a conservative estimate that does not take account of changes in law enforcement or prosecution practices that are likely to increase the amount of drugs for which defendants are held accountable. Even marijuana offenders, who received the lowest sentences of all drug offenders, received an average prison term of 36.2 months, with median terms of 24 months – sentences all within Zone D. USSC, *2009 Sourcebook of Federal Sentencing Statistics*, fig. J (2009) [hereinafter *2009 Sourcebook*].

⁸ Duffy Statement at 18.

⁹ In response to compelling testimony from Mary Price, Vice President and General Counsel for Families Against Mandatory Minimums, about women who are serving lengthy prison terms for drug trafficking, Judge Saris inquired whether any of the sentences were based solely on quantity. Defenders over the years have represented countless defendants – women and men – who have performed low-level drug trafficking functions, but still received long prison sentences because of the quantity of drugs involved in the offense. These include a woman who received a ten year sentence for merely pointing out to a courier, at a “friend’s request,” a suitcase full of 11 kilograms of cocaine; a nineteen-year-old Colombian woman who received a ten year sentence (with a minor role adjustment) after her aunt duped her into carrying a suitcase with 4.5 pounds of heroin; a 50-year-old mother who is serving a fifty-one month sentence (after safety-valve) for attempting to smuggle cocaine; and a severely emotionally disturbed woman with borderline intelligence who was sentenced to ninety months for being a passenger in car with 8.15 kgs of methamphetamine.

¹⁰ USSC, FY2009 Data Monitoring Set (13 of these were still subject to mandatory minimum statutory sentences of greater than 12 months, absent application of the safety valve or a reduction for substantial assistance).

¹¹ *Id.* (47 of these would still have been subject to mandatory minimum statutory sentences of greater than 12 months, absent application of the safety valve or a reduction for substantial assistance).

B. Create a Role-Driven Guideline.

Judge Saris posed a question at the March 17 hearing about how the Commission might construct a guideline that was not so driven by drug quantity. We are eager to work with the Commission in formulating a proposal for a new drug guideline that more fully considers role in the offense and places less emphasis on drug quantity. However, we have not prepared a comprehensive proposal for such a reform because we did not understand it to be within the question for comment. As a start, we believe the Commission has already laid the groundwork for a drug guideline that reduces the importance of quantity and increases the emphasis on role.

The Commission has long used classifications of defendants “functional roles” in its research and analysis. In its 2002 and 2007 reports to Congress on cocaine sentencing,¹² the Commission identified twenty-one categories of trafficking functions, reviewed presentence reports, and categorized drug offenders according to their functional roles. In doing so, the Commission set forth multifaceted definitions to describe each function. For example, a wholesaler was defined as one who “sells more than retail/user-level quantities in a single transaction”; a street-level dealer was defined as one who “distributes quantities directly to the user”; a courier was one who “transports or carries drugs with the assistance of a vehicle or other equipment.”¹³ With these definitions, the quantity of drugs involved in a single transaction was far more relevant to the analysis than the aggregate drug quantities for which the defendant was held responsible under the relevant conduct rules of USSG §1B1.3. While more work would have to be done to create a role-based guideline, we believe the trafficking functions identified in the Commission’s previous reports provide a good foundation for such a discussion.¹⁴

C. Deterrence Research Supports Lowering Base Offense Levels by Two.

Ex Officio Commissioner Wroblewski raised a question at the March 17 hearing regarding the work of Professor David Kennedy and the role severe federal penalties play in drug market interventions. The question seemed to suggest that maintaining the Drug Quantity Table at its current levels fit into strategies that have proven effective in reducing crime by forming community partnerships and engaging “stand-out offenders” with community interventions. In response, Marc Mauer, Executive Director of The Sentencing Project, described how the Kennedy model increases the certainty of punishment by making it clear that the violation will result in punishment.

¹² USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy*, tbl. C-1 (2002); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007). See also USSC, *Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); USSC, *Report of the Drug Working Group Case Review Project* (1992); USSC, *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).

¹³ *Id.*

¹⁴ A role-based drug guideline would account for mandatory minimum sentences through operation of USSG §5G1.1(b) (statutorily required minimum sentence trumps maximum of applicable guideline range).

A review of Professor Kennedy’s testimony before the Commission shows that severe penalties for federal drug offenders are not necessary to achieve successful drug market interventions, and that federal penalties play a very small role in them. As Professor Kennedy described:

It’s not necessarily high-level sanction. There’s usually a bit of federal enforcement in it, but it’s mostly state. The point turns out to be, and this is sort of classic deterrence theory, if they know it’s coming, if they know it’s credible, if they believe it and if the sanction rises to a level that they care about, they’re not going to do it. And it turns out in practice that knowing for a fact that you’re going to get a low-level state conviction tomorrow if you do this thing means more than a three-strikes penalty five years from now.

Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Chicago, Ill., at 171 (Sept. 9, 2009) (David Kennedy).

Professor Kennedy also told the Commission, it “can lower the sentences without having different outcomes.” *Id.* at 184. In other words, lower federal sentences are effective in successful drug market intervention strategies. Professor Kennedy’s work is consistent with the deterrence literature discussed in the attached testimony of Mr. Welch. We strongly encourage the Commission to consider the deterrence research and reject the myth that more severe sanctions are necessary to deter. Severe sanctions should be reserved for those offenders who must be incapacitated to ensure public safety.

II. Mitigating Role

D. The Commission Should Revise the Mitigating Role Guideline.

At the March 17 hearing, Judge Hinojosa suggested that part of the explanation for the differences among judges in application of the mitigating role adjustment might be policy disagreements among judges about the appropriateness of the adjustment, not lack of clarity in the guideline commentary. Judge Hinojosa’s comments appeared to suggest that since judges may disagree with a guideline as a matter of policy *after* correctly calculating it, then there is no problem with judges interpreting and applying a guideline in different ways (some incorrectly).

The Commission should not passively tolerate obvious differences in the way judges calculate the advisory guidelines under similar factual scenarios.¹⁵ The Commission must make every effort to construct a clear guideline. Under the advisory guideline system, the guideline range is the starting point and the initial benchmark, *Gall v. United States*, 552 U.S. 38, 49 (2007), and the guideline range must be calculated correctly. *Id.* at 51. The proper functioning of the guideline system depends upon a meaningful dialogue between the Commission and judges. *See Rita v. United States*, 551 U.S. 338, 350 (2007); 28 U.S.C. § 994(o); USSG Ch. 1, Pt. A, Subpt. 2 (“Continuing Evolution and Role of the Guidelines”). Through departures and variances, judges provide the Commission with the feedback it needs to reexamine and modify

¹⁵ Whether those judges would then impose the same sentence or agree that the correctly applied guideline was sound is an entirely different matter.

the guidelines to ensure that they achieve the purposes of sentencing. See *United States v. Booker*, 543 U.S. 220, 264 (2005); *Rita*, 551 U.S. at 358; *Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring). In turn, the Commission should provide judges advice, which is based on that judicial feedback and other sound empirical evidence. “[O]ngoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” *Kimbrough v. United States*, 552 U.S. 85, 107 (2007).

For the system to work, the Commission must be able to determine when judges decline to follow a guideline, and if they do so, whether it is because (1) the guideline lacks clarity; (2) circuit case law interprets the guideline incorrectly; or (3) the guideline “fails properly to reflect § 3553(a) considerations.” *Rita*, 552 U.S. at 351. The Commission has no basis from which to conclude that judges decline to apply the mitigating role adjustment because of an unstated policy disagreement, which itself would be contrary to the requirements that judges correctly calculate the guideline range, *Gall*, 552 U.S. at 51, and openly state any policy disagreement with a guideline, *Spears v. United States*, 129 S. Ct. 840, 844 (2009). To the contrary, ample evidence exists that judges want greater clarification of the mitigating role guideline so they can better understand the circumstances where it applies.¹⁶ Similarly, a review of case law shows that a number of courts have adopted a narrow interpretation of the guideline, which appears to be at odds with what the Commission intended.¹⁷

Consistent decisions regarding the proper application of the mitigating role adjustment are especially important because the quantity-based drug guidelines fail to properly target serious drug traffickers and instead treat low-level offenders as if they were wholesalers or kingpins.¹⁸ Mitigating role adjustments are an important mechanism to ensure that persons who perform functions such as couriers, mules, off-loaders, lookouts, gophers, and other lower-level roles, are not punished at the level Congress intended for “major” or “serious” traffickers.¹⁹

The data reveal that the mitigating role adjustments are not operating as they were intended. Judges sentence many offenders who perform low-level functions, but few of those offenders receive mitigating role adjustments. In 2005, for example, couriers/mules (33.1%) and renter/loader/lookout/enablers/users (12.7%) combined to account for more than 45.8 % of

¹⁶ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 9 (2010).

¹⁷ Skuthan Testimony at 23-28.

¹⁸ *Id.* at 11.

¹⁹ The House Judiciary Subcommittee on Crime defined major and serious traffickers as follows. “Major traffickers” are the “manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities.” USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (2002). “Serious traffickers” are “the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.” *Id.*

powder cocaine offenders.²⁰ Yet, only 23% of cocaine powder offenders received an adjustment for mitigating role.²¹

The Commission should also ensure proper application of the mitigating role adjustment because it is integrally related to other provisions in the guidelines that are designed to mitigate the harsh effects of the Drug Quantity Table. The applicability of the mitigating role caps in §2D1.1(a)(5) and §2D1.1(a), and the new mitigating adjustment under §2D1.1(b)(15), depends upon whether the defendant receives an adjustment under §3B1.2 and whether the adjustment is for being a minor or minimal participant. The applicability of the specific offense characteristics for methamphetamine and amphetamine offenses under §2D1.1(b)(5) also turns on whether the defendant receives a §3B1.2 adjustment. The Commission should also provide clear and sound advice on how §3B1.2 applies because §5K2.0 expressly prohibits departures for mitigating role in the offense, USSG §5K2.0(d)(3) (stating that role “may be taken into account only under . . . §3B1.2”).

E. Use of Examples

Mr. Skuthan described for the Commission at the March 17 hearing how offenders involved in offloading a shipment of drugs often received mitigating role adjustments before the Commission changed the commentary in 2001. In 2001, the Commission struck from the commentary to §3B1.1 language indicating that a minimal role adjustment “would be appropriate . . . for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment.” USSG §3B1.1; USSG App. C, Amend. 635 (Nov. 1, 2001). Commissioner Howell asked whether adding an example to the commentary would be more helpful in encouraging its use.

We share the Commission’s concerns that examples can sometimes send the wrong message to judges because they are often construed as limiting. If the case does not fit within the example, then the judge may conclude that the guideline does not apply. In this particular case, it might be useful if the example plainly states that it is just one example of many situations in which a role adjustment might apply and that it is not intended to be exhaustive. The Commission could also encourage mitigating role adjustments for couriers and defendants involved in offloading operations by simply stating that the quantity of drugs involved in the offense is not a dispositive consideration when deciding whether a defendant played a mitigating role in an offense and that the court should consider the totality of the circumstances about the offense and the functions typically performed in a drug trafficking enterprise. Mr. Skuthan’s written testimony offers other suggestions on how the Commission could revise the commentary to §3B1.2.

III. Expansion of Safety Valve for Non-Aggravated Drug Trafficking Offenses

We were deeply disappointed to learn that the Department and the Probation Officer’s Advisory Group (POAG) oppose expansion of the safety valve so that it applies to defendants who have more than one criminal history point, but otherwise meet all other safety valve criteria.

²⁰ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 21 (2007).

²¹ USSC, *Sourcebook of Federal Sentencing Statistics* tbl. 40 (2005).

The Department offered no real explanation for its opposition other than that the guideline safety valve should mirror the statute.²²

Sound policy reasons support expansion of the safety valve beyond what the statute provides. In addition to helping to avoid overincarceration of low-level, non-dangerous offenders, the safety valve rectifies an inequity in the use of motions for substantial assistance under USSG §5K1.1 (and 18 U.S.C. § 3553(e)), where more culpable defendants who can provide the government with new or useful information about criminal activity receive reduced sentences, but lower-level offenders with less information obtain no relief.²³ Under the current guidelines, many defendants who cannot satisfy the terms of §5K1.1 (substantial assistance) or §5C1.2 (safety valve), but who are willing to provide truthful information concerning the offense, are left without a means to obtain a reduced sentence unless the court is willing to impose a below guideline sentence. Expansion of the safety valve would correct that inequity for a greater number of defendants.

The Commission can expand availability of the safety valve beyond those with one criminal history point without posing a risk to public safety. As a threshold matter, the second criterion of the safety valve (no use of violence or credible threats of violent or possession of a firearm or other dangerous weapon in connection with the offense), excludes most defendants who are likely to present a safety risk.²⁴ More importantly, no evidence supports POAG's suggestion that drug offenders in Criminal History Category II or even III are violent or present a significant risk of engaging in new criminal conduct.²⁵

Indeed, the Commission's recidivism study shows that drug trafficking offenders are among "the least likely to recidivate," and "except in CHC I, drug trafficking offenders have the lowest, or second lowest, rate of recidivism across the CHCs."²⁶ It is also important to keep in mind that the higher recidivism rates typically associated with higher criminal history scores do not necessarily reflect new criminal conduct, much less violence or a risk to public safety. "Supervision violations are the largest type of recidivism behavior."²⁷ New convictions account for only 22% of recidivism across all criminal history categories.²⁸

²² Duffy Statement at 20.

²³ See generally *United States v. Washman*, 128 F.3d 1305, 1307 (9th Cir. 1997) (discussing general purpose of safety valve).

²⁴ Other penalty provisions also help to ensure that offenders with violent criminal pasts or prior felony drug convictions receive longer sentences. See, e.g., USSG §4B1.1 (career offender); 18 U.S.C. § 924(c); 18 U.S.C. § 924(e).

²⁵ In our experience, many defendants in Criminal History Category II are there because of probationary sentences for misdemeanors.

²⁶ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004).

²⁷ *Id.* at 7.

²⁸ *Id.*

In deciding whether to expand safety valve to persons in higher criminal history categories, the Commission should consider the vast literature on the criminogenic effects of prison and the tremendous obstacles released prisoners face upon reentry. Those effects are discussed in the attached testimony of Kyle Welch. The safety valve is one mechanism that the Commission can use to ameliorate the many negative consequences of lengthy prison terms.

We also urge the Commission to expand the safety valve to offenders with more than one criminal history point to help alleviate the adverse impact of the current criminal history restriction on black offenders. Black offenders represent only 30.6 % of all drug offenders, but they represent 79 % of crack cocaine offenders.²⁹ Crack cocaine offenders are the defendants least likely to qualify for the safety valve. Powder cocaine, methamphetamine, heroin, and marijuana offenders, who have less extensive criminal histories than crack cocaine offenders do,³⁰ tend to qualify for the safety valve much more often. In FY 2009, 40.3% of powder cocaine offenders, 40.7% of heroin offenders, 33.6% of methamphetamine, and 61.5% of marijuana offenders received the safety valve reduction, compared to 12.3% of crack offenders.³¹ Expansion of the safety valve to defendants who have more than 1 criminal history point but otherwise meet all safety valve criteria would help to reduce sentences for these offenders, many of whom are black.

IV. Firearms

A. Straw Purchasers

We are very concerned that current attention on the violence in the Southwest border region may cause the Commission to be pressured to quickly respond to a problem that is still not fully understood. We fear that as a result of this pressure, the Commission will make changes to the guidelines that negatively affect a large number of people who are not in any way connected with providing arms to drug trafficking organizations in Mexico, and that when this crisis has passed those unintended consequences will remain.³² We urge the Commission to take additional time to examine the issues and formulate a measured response that is narrowly targeted and grounded in firm empirical evidence.

A more deliberative process is particularly important in light of feedback from the sentencing courts indicating that the current guidelines are too high. More often than not (57%),

²⁹ 2009 Sourcebook tbl. 44.

³⁰ *Id.*, tbl. 37. The Commission reported in 2007 on the more extensive criminal histories of crack cocaine offenders compared to powder cocaine offenders, finding a “substantially lower rate of crack cocaine offenders (22.0%) in Criminal History Category I (containing offenders with little or no criminal history) compared to powder cocaine offenders (61.7%).” USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 44 (2007).

³¹ 2009 Sourcebook tbl. 44.

³² As noted in the attached Testimony of Kyle Welch, in 2009, 74% of the convictions under the straw purchaser statutes occurred *outside* the Southwest border region. USSC, FY 2009 Monitoring Dataset. Concerns, based on inadequate information, about violence in the border region should not drive national policy decisions regarding straw purchasers.

sentencing courts nationally imposed below guideline sentences in cases in which defendants are convicted under the three statutes commonly used to prosecute straw purchasers.³³ In only 1% of cases did sentencing judges impose sentences above the applicable guideline range.³⁴ The feedback from the Southwest border region is similar, where sentencing judges imposed sentences below the guidelines in 54% of these cases.³⁵

If the Commission is going to amend the guidelines in a way that is contrary to the feedback it has received from sentencing courts, the reason for doing so should be grounded in empirical evidence. At this time, there is simply no empirical evidence that guideline ranges need to be increased for straw purchasers in general, or for straw purchasers who intend for the firearms to cross the border. Based on the feedback from sentencing judges, and the absence of any other empirical evidence that higher ranges are necessary, it seems certain that increasing the guidelines, either by increasing the base offense levels or by adding a specific offense characteristic for offenses connected to any border crossing, will have the effect of increasing the number of below range sentences in these cases.

At the hearing on March 17, 2011, there was concern expressed that §2K2.1 needs to be changed to address a lack of uniformity between §2K2.1 and §2M5.2. In light of the operation of the specific offense characteristics in §2K2.1 whenever there is evidence that the offense conduct was similar to offenses referenced to §2M5.2, any purported lack of uniformity is best remedied by changing §2M5.2 rather than increasing the offense levels in §2K2.1. As with §2K2.1, the feedback from the sentencing judges is that the ranges produced by the offense levels in §2M5.2 are too high. In a majority of cases (62%), sentencing courts imposed sentences *below* the current §2M5.2 guideline ranges.³⁶ In only 3% of cases did sentencing judges go above the applicable guideline range. In addition, §2M5.2 has only two offense levels (14 and 26), which inadequately differentiate between a broad range of offenses that fall under that guideline. *See* Testimony of Kyle Welch at 9-10. In light of these circumstances, it makes far more sense to amend §2M5.2 than to increase the ranges under §2K2.1. To this end, we support the recommendation of the Practitioner's Advisory Group to refer all offenses involving non-fully automatic firearms currently sentenced under §2M5.2 to §2K2.1, and oppose any increases in §2K2.1.

The current levels and specific offense characteristics in §2K2.1 are more than sufficient to handle the variety of cases that fall under this guideline – from the less culpable women who violate the law under pressure from intimate, and sometimes abusive, relationships, to more serious offenders running large numbers of guns across the border with the intent to arm the drug cartels. Lower level offenders, most often first time offenders, appropriately do not, and should

³³ USSC, FY 2009 Monitoring Dataset. The data also supports that prosecutors are able to gain cooperation from defendants under the current guideline levels, and file §5K1.1 motions in straw purchaser cases at almost double the rate for other offenses (25% in straw purchaser cases compared with 13% for all offenses). *Id*; 2009 *Sourcebook* tbl. N.

³⁴ USSC, FY 2009 Monitoring Dataset.

³⁵ USSC, FY 2009 Monitoring Dataset.

³⁶ 2009 *Sourcebook* tbl. 28.

not, fall within Zone D. It should not be forgotten that probation alone is punitive and carries long-lasting consequences. *See, e.g., Gall v. United States*, 552 U.S. 38, 48-49 & n.4 (2007) (“Offenders on probation are . . . subject to several standard conditions that substantially restrict their liberty.”); *see also* Testimony of Kyle Welch at 6-7 (discussing consequences of incarceration). We were interested to learn at the March 17 hearing that a significant number of prosecutions of straw purchasers (10-12%) involve close family relationships.³⁷ That a sizable number of prosecutions of straw purchasers involve less culpable individuals supports our position that the current base offense level – already two times what it was when the guidelines were first enacted – is more than adequate. Increasing the base offense level would only further increase the number of sentences below the guideline range.

In the more serious cases, the current guidelines also allow sentencing courts to impose appropriate sentences. As addressed in Mr. Welch’s testimony, the trafficking enhancement, requested by the Department of Justice only a few years ago, addresses the very problem the Department now asks be addressed by yet another specific offense characteristic related to border crossing. *See* Testimony of Kyle Welch at 21-22.³⁸ Similarly, the enhancements for three or more firearms, and for stolen firearms allow ample room to punish the more serious offenders under the current guidelines. *Id.* at 17-18, 22. And in the exceptional cases, where the guidelines are too low, the sentencing courts depart. *See United States v. Hernandez*, 2011 WL 438828 (5th Cir. Feb. 9, 2011) (affirming an above-guideline sentence where the defendant, who was described as one of the most prolific purchasers for an organization involved in illegal firearms trafficking, had purchased himself at least 23 firearms and could reasonably foresee they would arm Mexican drug cartels).

An interesting example of how the current guidelines are already more than adequate was provided by United States Attorney Laura E. Duffy in her March 17 testimony before the Commission. In *United States v. Paul Giovanni de la Rosa*, No. 09-cr-00376 (D. Minn.), the government calculated a base offense level of 28 for Mr. de la Rosa, who was involved in smuggling more than 100 guns into Mexico from the United States. The government acknowledged that Mr. de la Rosa was eligible for a 3-level reduction because he had accepted responsibility, and recommended a 71-month sentence, at the high end of the range for an adjusted base offense level of 25. The sentencing judge, despite the availability of a lengthy term at offense level 25, determined in January of this year that a prison term of 36 months was appropriate in this case. Thus any complaint the government might have about the length of the sentence for Mr. de la Rosa is not a product of the guidelines, but a disagreement with the sentencing judge about whether a within guideline sentence was appropriate in this particular case.

³⁷ We would be interested in learning more about the characteristics of defendants prosecuted as straw purchasers, and would welcome the opportunity to review any statistics the Commission has gathered in this regard.

³⁸ In addition, the Fifth Circuit recently determined that §2K2.1(b)(6) applies when the other felony offense is another firearms possession or trafficking offense. *See United States v. Juarez*, 626 F.3d 246 (5th Cir. 2010). We believe this decision relies on a clerical error in the commentary and request the Commission amend the commentary to make clear that subsection (b)(6) does *not* apply in such circumstances. *See* Testimony of Kyle Welch at 24-26.

Finally, no evidence supports the conclusion that increasing penalties for straw purchasers will reduce firearm violence at the border or anywhere else. Straw purchasers are only one source of guns for criminals. According to the “Don’t Lie for the Other Guy” website – a national campaign to prevent straw purchases – “40 percent of criminals obtain their firearms from friends or family and another 40 percent obtain their firearms from illegal sources on the street. Less than 8.5 percent of criminals obtain their firearms from straw purchases.”³⁹ Whatever the percentage of criminals that obtain firearms from straw purchases, the straw purchasers themselves are by definition either first-time offenders or offenders with nothing more than misdemeanor convictions. To deter them, certainty of punishment is far more critical than severity of punishment.⁴⁰

Studies also show that strategies unrelated to increased federal penalties for straw purchasers will better decrease firearm trafficking. Mayors Against Illegal Guns recently released a report examining data on the illegal trafficking of firearms. The report identifies several methods to reduce gun trafficking. These methods include (1) enacting state laws to prohibit straw purchases and to prohibit dealers from violating background check laws;⁴¹ (2) requiring purchase permits for all handgun sales; (3) requiring background checks for all handgun sales at gun shows; (4) requiring the reporting of lost or stolen guns to law enforcement; (5) allowing local control of firearm regulations; and (6) allowing state inspection of gun dealers. Each of these strategies is more effective than increasing federal sentences for straw purchasers.⁴²

B. USSG §2M5.2

We believe the proposed amendments are unduly punitive for lower-level defendants with a small number of non-fully automatic small arms and ammunition. The proposed amendments will have the effect of grouping too many different degrees of harm under a single base offense level of 26. Accordingly, we support the Practitioner Advisory Group’s suggestion to exclude non-fully automatic small arms from §2M5.2 and refer such offenses instead to §2K2.1. Consolidating firearms smuggling offenses under 2K2.1 would allow for more gradation of the harms associated with arms smuggling. It would also address the concern raised by some at the March 17 hearing about uniformity between §2K2.1 and §2M5.2. With this

³⁹ See <http://www.dontlie.org/FAQ.cfm> (“Don’t Lie for the Other Guy” is a national campaign to prevent and discourage illegal straw purchases by the National Shooting Sports Foundation, in coordination with the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Department of Justice and Office of Justice Programs); see also Bureau of Justice Statistics, *Firearm Use by Offenders* (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>.

⁴⁰ See Testimony of Kyle Welch at 5-6.

⁴¹ The availability of state and federal enforcement mechanisms increases the certainty of punishment for those engaged in straw purchases because it does not depend solely on the efforts of federal law enforcement authorities.

⁴² See Mayors Against Illegal Guns, *The Link Between Gun Laws and Interstate Gun Trafficking* (2010), http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_the_guns_report.pdf.

reference to §2K2.1 for offenses involving non-fully automatic firearms, we would also urge the addition of an application note to §2K2.1 such as the following:

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

As for ammunition, we believe the proposed amendment limiting application of the lower base offense level to [200]-[500] rounds of ammunition for personal use, is an inadequate solution to the problem with this guideline. The problem with this guideline is that it addresses with only two offense levels a broad range of offenses, including exporting a single pair of night vision goggles, small amounts of ammunition as well as missile components and nuclear weapons.⁴³ The number of rounds of ammunition in the proposed amendment is simply too low to capture many, if any, of the ammunition offenses sentenced under §2M5.2, leaving a single base offense level to punish offenses involving only ammunition as well as those involving biological weapons.

Hunting websites show that hunters shoot much more ammunition than the number or rounds set forth in the proposed amendments. These sites advertise hunting trips where the daily use would easily exceed the proposed numbers. One such site says: “Bring plenty of ammunition and guns! Our average hunter shoots 500 to 1500 rounds a day! Packages start at \$200.”⁴⁴ In addition, addressing the severity of ammunition offenses based on the quantity of rounds involved would have the strange effect of punishing both less potent ammunition and more innocuous purposes. One of the least potent calibers available, .22 Long Rifle, is packaged in the greatest quantities at the lowest cost. One can buy a Value Pack online containing 2,100 rounds of .22 Long Rifle ammunition for only \$75.99.⁴⁵ In this example, the quantity is a function of small caliber and low cost, not of intent or danger to society. This example also underscores a crucial point: in the case of .22 Long Rifle and larger calibers, possession of larger quantities may often correspond with innocuous intent. Bulk rounds, often remanufactured and employing simple projectiles and materials, are frequently designed and sold not for lethality or reliability, but for cheaply supplying the high-volume activities of “plinking”⁴⁶ and target practice at shooting ranges. Persons using thousands of rounds of ammunition tend to be hobbyists.

⁴³ We also encourage the Commission to consider setting a lower base offense level for offenses involving night vision goggles.

⁴⁴ <http://www.dakotahuntingtrips.com/prairiedogandcoyotehunts.html>

⁴⁵ See, e.g., http://www.cabelas.com/catalog/product.jsp?productId=735145&categoryId=0&parentCategoryId=0&subCategoryId=0&indexId=0&productVariantId=1381374&quantity=1&itemGUID=d58c1112ac1070551f29f4e2af059c31&WTz_1=SBC%3Bcat104792580%3Bcat104691780%3Bcat104536080&destination=/checkout/item_added_to_cart.jsp

⁴⁶ “Plinking refers to informal target shooting done at non-traditional targets such as tin cans, glass bottles, and balloons filled with water.” <http://en.wikipedia.org/wiki/Plinking>

For these reasons and those set forth in the testimony of Mr. Welch, we encourage the Commission to consider expanding the lower base offense level to include ammunition in any quantity. We believe the egregious cases can be addressed with an application note inviting departures when the offense involves a quantity or type of these items typically used by a criminal enterprise where the defendant intended they be transferred to an organized criminal enterprise.

V. Child Support

The Commission proposes amending Application Note 2 to §2J1.1 to resolve a circuit split regarding whether the 2-level enhancement in §2B1.1(b)(8)(C) should apply to a defendant who violates a court order to pay child support. Subsection (b)(8)(C) provides for a 2-level enhancement where an offense involved “a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines.” USSG §2B1.1(b)(8)(C). Two circuits have held that this enhancement applies to defendants convicted of failing to pay court-ordered child support. *See United States v. Phillips*, 363 F.3d 1167 (11th Cir. 2004); *United States v. Maloney*, 406 F.3d 149 (2d Cir. 2005). One circuit has held it does not. *See United States v. Bell*, 598 F.3d 366 (7th Cir. 2010). The Commission proposes inserting a sentence in Application Note 2 to §2J1.1 that would provide: “In such a case, [apply] [do not apply] §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order).”

We urge the Commission to amend the Application Note to make clear that §2B1.1(b)(8)(C) does *not* apply when a defendant violates an order to pay child support.

The primary reason for our position is that subsection (b)(8)(C) applies only to *fraud* offenses committed in violation of court orders, and the failure to pay court-ordered child support is not a fraud. When the Commission promulgated this specific offense characteristic in §2B1.1(b)(8)(C) in 2001, it also explained in Application Note 7 that the specific offense characteristic “provides an enhancement if the defendant commits *a fraud* in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action.” (Emphasis added.) Violation of an order to pay child support is not a fraud because it does not involve a material falsehood – an essential element of a fraud offense.⁴⁷ Subsection (b)(8)(C), therefore, does not and should not apply to a failure to pay court-ordered child support.

None of the three courts of appeals to consider whether subsection (b)(8)(C) applies to a failure to pay court-ordered child support have addressed this clear language in the Application Note or its historical pedigree. *See Phillips*, 363 F.3d 1167; *Maloney*, 406 F.3d 149; *Bell*, 598 F.3d 366.

The language of Application Note 7(C) in §2B1.1 – limiting application of subsection (b)(8) to fraud offenses – is consistent with the history of the guideline. Following the enactment of the Child Support Recovery Act of 1992 (codified at 18 U.S.C. § 228), the Commission amended §2J1.1 to specify that §2B1.1 is the most analogous guideline for violations of § 228.

⁴⁷ *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999).

USSG App. C, Amend. 496 (Nov. 1, 1993). At that time, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) set a base offense level of 4 and did not provide for any enhancements based on violations of judicial orders. USSG §2B1.1 (1993).

The enhancement at issue here, regarding violations of court orders, did not appear in §2B1.1 until 2001. As part of the “Economic Crime Package,” the Commission consolidated the theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1) guidelines into a single guideline at §2B1.1. USSG App. C, Amend. 617 (Nov. 1, 2001).⁴⁸ Before the consolidation, the enhancement that now appears in §2B1.1(b)(8)(C) was part of the fraud guideline in §2F1.1.⁴⁹ Thus, the enhancement has always been associated exclusively with fraud offenses. Nothing in the text of the amended guideline, or the Reason for Amendment, indicates the Commission intended to broaden the scope of the enhancement when it consolidated the guidelines in 2001. Indeed, to the contrary, the Commission retained the language limiting application of this enhancement to fraud offenses, even captioning the application note: “*Fraud* in Contravention of Prior Judicial Order.” USSG §2B1.1 comment (n. 7(C)) (emphasis added). Similarly, neither the text nor the Reason for Amendment mentions offenses for failing to pay child support at all, let alone specifically provides that they be treated as if they were fraud offenses and subject to the enhancement in subsection (b)(8)(C).

If subsection (b)(8)(C) were to apply to those who fail to pay court-ordered child support, it would mean that during that single amendment cycle in 2001, the Commission more than doubled the offense level in every case (since the offense of failing to pay child support necessarily involves violation of a court order), without any indication that the Commission considered this implication of the amendment or thought it necessary for the offense of failing to pay court-ordered child support.

In addition, we agree with the Seventh Circuit that application of the enhancement in such cases is improper double counting. As that Court ably reasoned: “[T]here is no reason to believe conduct that *always* inflicts multiple distinct harms may validly receive a punishment enhanced on account of one of the harms.” *Bell*, 598 F.3d at 373. The offense at issue here is “failure to pay legal child support obligations.” 18 U.S.C. § 228. For a violation to occur, an individual must have “willfully fail[ed] to pay a support obligation.” *Id.* And “a support obligation” is defined as “any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe.” *Id.* Thus, each and every offense for “failure to pay legal child support obligations” involves a violation of a court

⁴⁸ As part of this extensive amendment in 2001, the Commission also increased the base offense level in §2B1.1 from 4 to 6. USSG App. C, Amend. 617 (Nov. 1, 2001).

⁴⁹ Before this consolidation, the fraud guideline, §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), included a 2-level enhancement, and floor of 10, for fraud offenses that involved “a violation of any prior specific judicial or administrative order.” USSG §2F1.1(b)(4) (2000). The relevant application note to this subsection of §2F1.1 provided: “Subsection (b)(4)(C) provides an enhancement if the defendant commits a *fraud* in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action.” USSG §2F1.1 comment (n.6) (2000) (emphasis added).

order. In sum, because violating a court order is an element of the offense, it is by definition the encompassed in the base offense level. Such a factor – violation of a court order – cannot be found to “aggravate” an offense that could not occur without the presence of the factor.

For these reasons, we strongly urge the Commission to clarify that for offenses related to failure to pay court-ordered child support, §2B1.1(b)(8)(C) should not apply.

VI. Conclusion

We were pleased that the Commission invited the Director of the Bureau of Prisons to testify about the state of affairs within BOP institutions. Director Lappin’s testimony before the Commission and before Congress shows that the ever-growing inmate population poses “substantial ongoing challenges” to BOP in providing for “safe inmate incarceration, and care for the safety of BOP staff and surrounding communities.”⁵⁰ While BOP has been able in the past to deal with the challenges presented by overcrowding, it has, according to Director Lappin, “reached a threshold . . . and [is] facing serious problems with inmate crowding.”⁵¹ Put simply, BOP is becoming increasingly dangerous because of severe overcrowding and lack of adequate funding.

The Commission could take a step toward reducing prison overcrowding with no increased threat to public safety by (1) lowering the base offense levels in the Drug Quantity Table;⁵² (2) encouraging the increased use of mitigating role adjustments; (3) providing for additional downward adjustments for certain drug offenders; (4) more narrowly tailoring its proposed changes to §2K2.1 and §2M5.2; (5) modifying the use of stale convictions in §2L1.2; and (6) carefully implementing the directives in the Patient Protection and Affordable Care Act as well as providing for adjustments so that those who play lesser roles in health care fraud are not disproportionately punished. As outlined in the testimony of Jane McClellan, we also support proposals that would give judges greater discretion in imposing terms of supervised release.

⁵⁰ Statement of Harley Lappin, Director of the Federal Bureau of Prisons Before the H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies at 3, 4-6 (Mar. 15, 2011).

⁵¹ *Id.* at 5.

⁵² Over half of the inmates in BOP prison facilities are serving sentences for drug trafficking offenses. *Id.* at 4.

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

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures

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Hon. Beryl A. Howell, Commissioner
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