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On Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2008
March 13, 2008

Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments related to criminal history, the Commission's Rules of Practice and Procedure regarding retroactivity, disaster fraud, court security, and animal fighting.

I. CRIMINAL HISTORY

The Commission has proposed adding language to USSG § 4A1.2(a)(2) to modify the provision that exempts sentences that are separated by an intervening arrest from being counted as a single sentence. The proposed amendment states:

> An "arrest" includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an "arrest".

We see no need for this change. If any change is made, however, only the second sentence should be included.

The first sentence injects unnecessary complications into the guideline. We have been unable to find any reported case in which this issue has been presented. In the absence of any empirical evidence that this issue arises with any frequency, or that it presents an indication of an increased likelihood of recidivism, the Commission should omit this sentence.

Further, the language is so ambiguous that it is likely to lead to extensive litigation and evidentiary hearings. For example, could the government argue that a defendant "escapes" arrest or service of an arrest warrant if he is in fact not at home when the police arrive? If the police go to a home and are falsely told that the defendant is not there? What if police records reflect an inaccurate address, and the government argues that the defendant had previously given a false address? Would a defendant be subject to this provision if he or she moves without leaving a forwarding address? To what extent would the government have to prove that the defendant's actions were motivated by a desire to escape arrest, or that the defendant even knew that police were looking for him?

Although the second sentence does not create the same complications as the first, we likewise see no need for it. This point is clear in existing law. In *United States v. Joseph*, 50 F.3d 401, 402 (1st Cir. 1995), the Seventh Circuit held that issuance of an arrest warrant could not be an "intervening arrest." *See also United States v. Correa*,

114 F.3d 314, 316 n.3 (1st Cir. 1997) (not deciding whether the district court erred in treating issuance of a complaint as an intervening arrest, but describing that ruling as "problematic").

The intervening arrest rule, which derives from the Parole Commission's Salient Factor Score, presumably is "consistent with the Parole Commission's recidivism research, as well as with the common sense notion that an offender who continues to commit offenses after criminal justice system intervention is more likely to recidivate." Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192 (1997). This rationale does not apply when a defendant escapes arrest, or when a complaint or summons is issued.

This minor issue aside, we remain hopeful that the Commission will soon turn its attention to the career offender guideline. In *Rita*, the Supreme Court emphasized that the guideline system is meant to be "evolutionary," improved over time as a result of a reasoned dialogue among the district courts, the appellate courts, and the Commission. *See Rita v. United States*, 127 S. Ct. 2456, 2464-65, 2469 (2007) ("The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.").[1] After *Booker*, the rate of below-guidelines sentences for those who otherwise qualified for career offender status markedly increased,[2] and after *Gall* and *Kimbrough*, we can expect that courts will continue to exercise their wide discretion to sentence defendants below the advisory guideline range for career offenders until it more accurately advances the goals of sentencing under 18 U.S.C. § 3553(a).[3] We urge the Commission to seize the opportunity to improve the career offender guideline – not only to reflect more precisely Congress's directive to the Commission in 28 U.S.C. § 994(h), but also to reflect the empirical data it has collected demonstrating that the career offender guideline too often results in sentences that fail to advance the purposes of sentencing. *See Kimbrough*, 128 S. Ct. at 574-75.[4]

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

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

[3] *United States v. Parker*, 512 F.3d 1037 (8th Cir. 2008) (recognizing that the district court has the discretion after *Gall* to sentence the defendant to 60 months, well below the advisory guideline range of 151-188 months under the career offender guideline under § 3553(a), and noting that the government withdrew its appeal in light of *Gall*); *see United States v. Marshall*, 2008 U.S. App. LEXIS 153, 22-23 (7th Cir. Jan. 4, 2008) (unpublished) (in a case involving a challenge to the career offender guideline, stating that it must "reexamine" its caselaw, in light of *Kimbrough*, in which it had previously held that courts are not authorized "to find that the guidelines themselves, or the statutes on which they are based, are unreasonable").

[4] United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (career offender guideline "makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses," does not serve a deterrent purpose, and has a disproportionate impact on African-Americans); *see United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring) (cited in *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007)) ("This might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a)

II. RULES OF PRACTICE AND PROCEDURE

The Commission also proposes changes to Rules 2.2 and 4.1 of its Rules of Practice and Procedure. Although these rules generally involve Voting Rules for Action by Commission and Promulgation of Amendments, respectively, the proposed changes address only those procedures which govern determinations about whether to give amendments to the guidelines retroactive effect.

We agree with the proposed change to Rule 2.2, which would eliminate the requirement of the affirmative vote of at least three members at a public hearing before staff can be instructed to prepare a retroactivity impact analysis for a proposed amendment. Rule 2.2 should promote, rather than hinder, the initiation of this critical and often time-consuming endeavor and believe the proposed change does just that.

We also agree that Rule 4.1 should be amended to eliminate the requirement that the Commission decide whether to make a proposed amendment retroactive at the same meeting at which it decides to promulgate the amendment, as such an approach is neither practical nor efficient. For example, it would unnecessarily require the preparation of retroactivity impact analyses prior to decisions about whether to promulgate, as such analyses would be needed to inform decision-making and permit meaningful public comment.

We agree with the spirit of the proposed change to Rule 4.1, though the first sentence of the proposed language does not, in our opinion, make sense outside the context of a particular case. We suggest replacing it with the following sentence, which we believe better describes, in the abstract, the import of the proposed amendment:

> The Commission, however, shall consider whether to give retroactive application to an amendment that reduces sentencing ranges for a particular offense or category of offenses. See 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2).

This language tracks the statutory language of title 18, section 3582(c) more closely than that of title 28, section 994(u). We believe it conveys a more accurate description of what the Commission does and that citation to both 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2) is appropriate.

With respect to the Commission's request for comment on whether the Rules of Practice and Procedure should provide a time frame governing final action with respect to retroactive application of an amendment and, if so, what time frame, we do not believe the rules should provide a time frame for final action. We fear that a deadline for final action could impact negatively the ability of the Commission to fully and fairly consider

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that '[t]he court . . . impose a sentence sufficient but not greater than necessary, to comply with the purposes of sentencing set forth in' § 3553(a)(2).").

the views of all interested parties, build consensus, and reach a well-considered decision on retroactivity.

In the event the Commission decides a time frame for final action is needed, we suggest a time frame that is more general in nature and that, in any event, does not require final action prior to November 1.

Finally, although the Commission has neither proposed an amendment nor requested comment with respect to Rule 4.3, which governs Notice and Comment on Proposed Amendments, we do believe a change to that rule is needed at this time. Rule 4.3 currently permits the Commission "to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x)." Section 994(x) makes the requirements of title 5, section 553 – publication in the Federal Register and public hearing procedure – applicable to the promulgation of guidelines.

We strongly believe the Commission should amend Rule 4.3 to require notice and comment with respect to commentary, policy statements and amendments thereto. Issues of great importance which directly impact sentence length in a large number of cases are set forth in policy statements and commentary. Section 1B1.10 is one example, and there are many others, including but not limited to all of Parts H and K of Chapter 5, all of Chapter 6, and the treatment of acquitted and uncharged conduct in § 1B1.3. Moreover, post-*Booker*, the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission. There is no current rationale to allow a change as significant as the one recently made to § 1B1.10 to occur absent notice and comment.

Alternatively, we suggest the Commission amend Rule 4.3 to require publication and public hearing procedure where the commentary, policy statements, and amendments thereto will potentially affect a large number of cases or significantly alter the way a particular guideline will be applied.

III. DISASTER FRAUD

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of "reasonably foreseeable pecuniary harm" to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should include an offense level floor, whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to Kathleen Grilli, as well as the written and oral testimony of Marjorie Meyers, which was submitted to the Commission at the public briefing on February 13,

2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud offenses necessarily encompass a wide range of activity, from first-time offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

A. Disaster Fraud Enhancements

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create "unwarranted *similarities*" among dissimilarly situated individuals. *See Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, individuals convicted of disaster-related fraud range from the poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.[5] A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

In addition, we urge the Commission to reconsider its decision to include as "reasonably foreseeable pecuniary harm" the administrative costs of recovering fraudulently obtained funds that are borne by any government or "or any commercial or

[5] 42 U.S.C. § 5122(2).

not-for-profit entity." Congress did not direct the Commission to expand the concept of "pecuniary harm' in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

B. Contractor, Sub-Contractor or Supplier Expansion

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

C. Mitigating Circumstances

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant's experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender's status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

D. Conclusion

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

IV. COURT SECURITY

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

V. ANIMAL FIGHTING

We agree with the comments of the Practitioners Advisory Group on this topic, as they address our concerns as well.

We hope that our comments on these proposed amendments will be useful, and we thank you for considering them. As always, we look forward to working with the Commission on these very important issues.