

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

March 14, 2007

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

**Re: Comments on Proposed Amendments Relating to Terrorism and
Transportation**

Dear Judge Hinojosa:

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

I. Terrorism

**A. Foreign terrorist organizations, terrorist persons and groups, 21
U.S.C. § 960a**

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

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

1. Defender Proposals

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

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

§2D1.14. Narco-Terrorism

(a) Base Offense Level

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

2. What the Statute Requires

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

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

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

3. The Proposed Amendments Exceed What the Statute Requires.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Mitigating Role Cap and Safety Valve

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

B. Border Tunnels, 18 U.S.C. § 554

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

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

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

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

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

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

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

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

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

Section 1191 of the Violence Against Women Act expanded 18 U.S.C. § 716 to prohibit the transfer, transportation or receipt of any public employee insignia or uniform² that is either counterfeit or intended to be given to a person not authorized to possess it, *see* 18 U.S.C. § 716(a), and added a statutory defense. *See* 18 U.S.C. §§ 716(b) and (d).

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

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

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

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

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

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

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

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

II. Transportation

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

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

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Kathleen Grilli, Deputy General Counsel
Pam Barron, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel