

**FEDERAL DEFENDER  
SENTENCING GUIDELINES COMMITTEE**

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March 15, 2019

Honorable Charles R. Breyer  
Honorable Danny C. Reeves  
Commissioners  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

**Re: Reply Comment on Proposed 2019 Amendments**

Dear Judge Breyer and Judge Reeves:

The Federal Public and Community Defenders write in reply to comments submitted by the Department of Justice (DOJ)<sup>1</sup> and others regarding the Commission's Proposed 2019 Amendments.

**I. Proposed Amendment: Career Offender**

The Commission's proposed amendments share a common, but costly feature: all would expand the already over-inclusive reach of the career offender guideline. The DOJ, however, pushes the Commission to reach even further. The DOJ urges the Commission to look to a wider array of documents as part of the proposed conduct-based approach, and to expand the definition of extortion, which the Commission recently narrowed in an effort to "focus[ ] the career offender and related enhancements on the most dangerous offenders."<sup>2</sup>

As explained in our initial comment, expanding the reach of the career offender guideline is inconsistent with decades of research and the Commission's own

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<sup>1</sup> See Letter from David Rybicki, Commissioner, *ex officio*, Dep't of Justice, U.S. Sentencing Comm'n, to the Honorable Charles R. Breyer & the Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm'n (Feb. 19, 2019) (DOJ 2019 Comment).

<sup>2</sup> USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016); *see also* DOJ 2019 Comment, at 9-10.

previous recommendations to Congress.<sup>3</sup> More than three-quarters of individuals deemed to be career offenders were sentenced below the guideline range in FY 2017;<sup>4</sup> Commission research shows the guideline does a poor job of identifying defendants at the greatest risk of recidivism;<sup>5</sup> and the guideline has an adverse impact on black defendants.<sup>6</sup> The Commission should not promulgate any of the proposed amendments to the career offender guideline and, instead, should return its attention to its earlier recommendation to Congress to narrow the scope of the guideline.

#### **A. Categorical Approach (Part A)**

***Shepard Documents.*** As discussed in our initial comment, the Commission’s proposal to reject the categorical approach and instead direct courts to consider unproven allegations in *Shepard* documents would result in unfairness, unpredictability, disparity, and undue litigation.<sup>7</sup> But the DOJ’s proposal that courts consider “*any information with a sufficient indicia of reliability*” would be even worse.<sup>8</sup>

Undeterred by thirty years of Supreme Court precedent, the DOJ asks the Commission to implement the precise approach the Supreme Court prohibited. In *Shepard v. United States*, the government urged the Supreme Court to allow district courts to consult police reports and complaint applications to establish that

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<sup>3</sup> See Letter from Michael Caruso, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Charles R. Breyer & the Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm’n, at 2-4 (Feb. 19, 2019) (Defender 2019 Comment); USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 44 (2016).

<sup>4</sup> See USSC, Individual Datafiles FY 2017 (77.5% sentenced below the guideline).

<sup>5</sup> See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016); USSC, *Recidivism Among Federal Violent Offenders* 14, fig. 2.9 (2019); *id.* at 36, fig. 4.7.

<sup>6</sup> See Defender 2019 Comment, at n.6 and accompanying text and authorities.

<sup>7</sup> See Defender 2019 Comment, at 11-26.

<sup>8</sup> DOJ 2019 Comment, at 4 (emphasis added).

the defendant was convicted of a predicate offense under the Armed Career Criminal Act (ACCA).<sup>9</sup> The Supreme Court rejected this approach, even in cases where the government-proffered information is “free from any inconsistent or competing evidence.”<sup>10</sup>

The Court’s rationale was not, as the DOJ represents, solely based on avoiding collateral trials.<sup>11</sup> Rather, *Shepard’s* holding was dictated by the ACCA’s text; the constitutional infirmities of a conduct-based approach; *and* the host of impracticalities and unfairness that would flow from looking at allegations regarding a defendant’s prior conduct—including mini-trials.<sup>12</sup> The categorical approach is “impose[d]” by Congress’s language.<sup>13</sup> In urging the Commission to look to mere allegations in a wide variety of documents, the DOJ ignores that the text of § 994(h)—like the text of the ACCA—refers to defendants “convicted” of particular offenses.<sup>14</sup>

Moreover, while the DOJ may “welcome” collateral trials, the Supreme Court does not.<sup>15</sup> Since 1990, one of the several rationales for the categorical approach has been that determining “what th[e] conduct was” would be impractical, unfair, and frequently futile.<sup>16</sup> As explained in *Descamps*, non-elemental facts are often uncertain, unreliable and “downright wrong.”<sup>17</sup>

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<sup>9</sup> See *Shepard v. United States*, 544 U.S. 13, 17-23 (2005).

<sup>10</sup> *Id.* at 22-23.

<sup>11</sup> See DOJ 2019 Comment, at 4.

<sup>12</sup> See *id.* at 19-20 (“*Taylor’s* reasoning controls” (citing *Taylor v. United States*, 495 U.S. 575, 600-01 (1990))).

<sup>13</sup> *Id.* at 19.

<sup>14</sup> See Defender 2019 Comment, at 6-8, 26-27 (interpreting the text of 28 U.S.C. § 994(h)).

<sup>15</sup> DOJ 2019 Comment, at 4.

<sup>16</sup> *Taylor*, 495 U.S. at 601; see also *Descamps v. United States*, 570 U.S. 254, 270-71 (2013).

<sup>17</sup> *Descamps*, 570 U.S. at 270.

Despite the DOJ's assertion, §6A1.3 would not sufficiently limit courts' consideration of unreliable allegations, nor provide defendants with fair process.<sup>18</sup> As Defenders have previously indicated, §6A1.3 fails to provide adequate procedural protections.<sup>19</sup> Defendants would not be protected by the rules of evidence,<sup>20</sup> a jury,<sup>21</sup> the right to confrontation,<sup>22</sup> or proof beyond a reasonable doubt.<sup>23</sup> While the lack of procedural protections is already troubling when applied to conduct relating to the instant offense, it would be even worse when applied to *prior* conduct. Defendants would be forced to refute years-old state court PSRs, police reports, witness statements, and other investigative materials offered up by the government that in some courts would be presumed reliable.<sup>24</sup> In many cases, refuting documents

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<sup>18</sup> See DOJ 2019 Comment, at 4-5.

<sup>19</sup> See, e.g., Statement of Alan DuBois before the U.S. Sentencing Comm'n, Washington, D.C., at 4 (Mar. 13, 2014); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 31-33 (May 17, 2013).

<sup>20</sup> See USSG §6A1.3(a).

<sup>21</sup> See *United States v. Booker*, 543 U.S. 220, 246-48 (2005).

<sup>22</sup> See, e.g., *United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 242-43 (2d Cir. 2005).

<sup>23</sup> See §6A1.3, comment. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

<sup>24</sup> For example, in some courts, allegations in presentence investigation reports are presumed reliable unless "the defendant creates 'real doubt.'" *United States v. Meherg*, 714 F.3d 457, 459 (7th Cir. 2013); see also *United States v. Fuentes*, 411 F. App'x 737, 738 (5th Cir. 2011) (defendant bears burden of showing information in presentence report is materially unreliable); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) (information in the presentence report is "presumed reliable and may be adopted by the district court 'without further inquiry' if the defendant fails to demonstrate by competent rebuttal evidence that the information is 'materially untrue, inaccurate or unreliable'" (marks and citations omitted)); *United States v. Mustread*, 42 F.3d 1097, 1101 (7th Cir. 1994) ("Generally, where a court relies on a PSR in sentencing, it is the defendant's task to show the trial judge that the facts contained in the PSR are inaccurate."); *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (defendant's "mere objection" to information in a presentence report is insufficient to challenge its accuracy and reliability) (cited in *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011)).

would be destroyed, memories would have faded, and witnesses would be unavailable, making it impossible for defendants to challenge old, untested allegations.

**The Commission’s Authority.** Despite assurances that it would address the Commission’s authority to promulgate the proposed amendment in its comment,<sup>25</sup> the DOJ offers no such analysis. Instead, the DOJ summarily thanks the Commission for the *Commission’s* “legal assessment that the categorical approach is not required under the guidelines.”<sup>26</sup> The DOJ’s citation for this statement, however, is not a legal analysis by the Commission, but only an observation by the Commission that “the guidelines do not expressly require [the categorical approach].”<sup>27</sup> Regardless of whether the *guidelines* are explicit, any inquiry regarding the Commission’s statutory authority should not begin with the

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In others, “a presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact.” *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (marks and citations omitted); *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001).

Still other courts take a third approach, allowing the consideration of allegations contained in a PSR only if the government proves its reliability. See *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) (“[B]y placing the burden on [the defendant] to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to [the defendant] and relieved the government of its burden of proof to establish the offense level.”); *United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009).

Consequently, in addition to being both impractical and unfair, the DOJ’s proposal would create unwarranted disparity as well.

<sup>25</sup> See Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 26 (Dec. 13, 2018) (“The Department . . . will further explain our reasoning [as to why Part A is consistent with the Commission’s authority under § 994] in a letter in response to the proposed amendments.”) (Rybicki, Commissioner, *ex officio*).

<sup>26</sup> DOJ 2019 Comment, at 2.

<sup>27</sup> DOJ 2019 Comment, at 2 & n.10 (quoting 83 Fed. Reg. 65400, 65408 (Dec. 20, 2018) (“The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis.”)).

guidelines, but with the *statute*. As addressed in our initial comment, the statute requires the categorical approach.<sup>28</sup>

## **B. Application Issues (Parts B – D)**

**Robbery (Part B).** Defenders oppose expanding the definition of robbery to include offenses involving injury, or fear of injury, to property. This change is not supported by empirical evidence and is not necessary to ensure that those who are convicted of dangerous robberies receive severe penalties.<sup>29</sup>

The “significant majority of states have determined that robbery requires property to be taken from a person under circumstances involving danger or threat of potential injury *to the person*.”<sup>30</sup> The DOJ requests that the Commission cast aside this “generally accepted contemporary meaning,”<sup>31</sup> and craft a definition of robbery to target the minority of jurisdictions that define robbery more broadly.<sup>32</sup> The DOJ’s

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<sup>28</sup> See Defender 2019 Comment, at 6-8; 26-27.

<sup>29</sup> See Defender 2019 Comment, at 30.

<sup>30</sup> *United States v. O’Connor*, 874 F.3d 1147, 1155 (4th Cir. 2017) (emphasis in original) (citing *United States v. Lockley*, 632 F.3d 1239, 1243-44 (11th Cir. 2011); *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380, nn.5 & 6 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541, 554-55 (5th Cir. 2013)). Circuits have recognized this prevailing view and have adopted generic robbery definitions that require force to person, not property. See, e.g., *O’Connor*, 874 F.3d at 1155; *Lockley*, 632 F.3d at 1244; *Santiesteban-Hernandez*, 469 F.3d at 380; *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008), *superseded on other grounds; United States v. Yates*, 866 F.3d 723, 733-34 (6th Cir. 2017); *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017).

<sup>31</sup> *Taylor*, 495 U.S. at 596.

<sup>32</sup> See DOJ 2019 Comment, at n.22 (citing *O’Connor*, 874 F.3d 1147; *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. Nickles*, 249 F. Supp. 3d 1162 (N.D. Cal. 2017)).

The other cases cited by the government in support of its proposed definition do not address injury against property, but rather whether the statutes at issue in those cases require the requisite force *against a person*. See *United States v. Peppers*, 899 F.3d 211, 233 (3d Cir. 2018); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018); *Yates*, 866 F.3d at 727-28; *United States v. Fluker*, 891 F.3d 541, 548-49 (4th Cir. 2018); *United States v. Mulkern*, 854 F.3d 87, 91-94 (1st Cir. 2017); *United States v. Starks*, 861 F.3d 306, 318-19, 320-22 (1st Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 802-04 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 683-85 (4th Cir. 2017).

proposal, however, like the Commission’s proposals, would sweep in less serious offenses, and move in the opposite direction from the Commission’s stated goal of “focusing. . . on the most dangerous offenders.”<sup>33</sup> Both the Commission’s and the DOJ’s proposed definitions of robbery should be rejected.

**Inchoate Offenses (Part C).** The DOJ supports the Commission’s proposal to ignore a defendant’s actual conviction and instead sentence him as if he was convicted of a different, more serious offense. While the DOJ may not want to address “complicated” questions like what the defendant was actually convicted of,<sup>34</sup> this is the inquiry that Congress imposed.<sup>35</sup> Pretending a defendant was convicted of an underlying offense when he was not, is not only unjust and inaccurate, it is contrary to Congress’s directive.<sup>36</sup>

If the Commission opts to include inchoate offenses in the career offender guideline, the Commission must require an overt act for conspiracy to commit a “controlled substance offense” or “crime of violence.” In requesting the Commission forego an overt act requirement, the DOJ makes two claims: First, that “any overt act requirement is not the majority view of the federal appellate courts;” and second, that to require an overt act “would yield counterintuitive and absurd results.”<sup>37</sup> Neither claim supports the DOJ’s request.

First, the cases cited by the DOJ do not show that circuits disagree on whether the generic definition of conspiracy requires an overt act. Only two of the cases cited by

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Further, several of these cases dealt with the ACCA, not the guidelines. *See Peppers*, 899 F.3d at 233; *Mulkern*, 854 F.3d at 91; *Starks*, 861 F.3d at 314; *Gardner*, 823 F.3d at 801; *Winston*, 850 F.3d at 679. These holdings would remain unaffected by any change the Commission makes to the definition of robbery.

<sup>33</sup> 83 Fed. Reg., at 65411 (quoting USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016)).

<sup>34</sup> DOJ 2019 Comment, at 7.

<sup>35</sup> *See* 28 U.S.C. § 994(h)(1)-(2) (requiring a guideline that applies to “categories” of defendants with a particular kind and number of “convict[ions].”).

<sup>36</sup> *See* Defender 2019 Comment, at 32-34.

<sup>37</sup> DOJ 2019 Comment, at 8.

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the DOJ address that issue and both agree that an overt act is required.<sup>38</sup> The remaining two cases did not address this question. Rather, in those cases, the courts determined that identifying the generic definition of conspiracy and applying the categorical approach was unnecessary because they found the Commission's commentary dispositive.<sup>39</sup>

The DOJ further urges the Commission not to impose an overt act requirement because adopting this requirement would mean some state conspiracy offenses would qualify under §4B1.1, while some federal conspiracy offenses would not. This perceived problem has a simple fix: if a court believes a defendant is deserving of a career offender sentence, that "court retains discretion to impose the enhanced sentence."<sup>40</sup> It is neither absurd nor counterintuitive to trust judges to exercise their statutory obligation to consider all 18 U.S.C. § 3553(a) factors and depart or vary when appropriate.

What is absurd, however, is to punish people for offenses of which they were never convicted, or perhaps even charged with. If the Commission opts to include inchoate offenses in §4B1.1, Option 3A, with the requirement that a conspiracy count "only if" an "overt act must be proved as an element," is the least harmful of the proposed options.

## **II. Proposed Amendment: §1B1.10**

The Commission proposes amending §1B1.10 "in light of the Supreme Court decision" in *Koons v. United States*, 138 S. Ct. 1783 (June 4, 2018).<sup>41</sup> Defenders oppose the amendment because: (1) *Koons* requires no change; and (2) the current rule, supported by Defenders *and* the DOJ at the time it was promulgated, helps

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<sup>38</sup> See DOJ 2019 Comment, at n.34 (citing *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016)).

<sup>39</sup> See *id.* (citing *United States v. Rivera-Constantino*, 798 F.3d 900, 906 (9th Cir. 2015); *United States v. Sanbria-Bueno*, 549 F. App'x 434, 438-39 (6th Cir. 2013)). *But see United States v. Garcia-Santana*, 774 F.3d 528, 534-36 (9th Cir. 2014) (recognizing in an immigration case that 40 out of 54 U.S. jurisdictions, the federal general conspiracy statute, the Model Penal Code, and secondary sources require an overt act and therefore generic conspiracy requires an overt act).

<sup>40</sup> *Beckles v. United States*, 137 S. Ct. 886, 894 (2017).

<sup>41</sup> 83 Fed. Reg., at 65402.



“ensure[ ] that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance.”<sup>42</sup> The DOJ, however, without any analysis or justification, retreats from its support of the current rule.<sup>43</sup> The DOJ now apparently would deny the benefit of a reduction to *some*, but not all, defendants who provide the government with “substantial assistance in the investigation or prosecution of another person” pursuant to 18 U.S.C. § 3553(e).<sup>44</sup> For all of the reasons set forth in our initial comment, the Commission should maintain the current rule that prevents unwarranted disparity and unjust results, and should reject all of the options presented in Part A of the proposed amendment.<sup>45</sup>

The Commission should, however, adopt Option 2 in Part B of the proposed amendment to §1B1.10 addressing a circuit conflict. It is supported by Defenders, the DOJ and the Probation Officers Advisory Group.<sup>46</sup> With this wide support, the Commission should amend the commentary to specify that when a court is considering a motion for a reduced sentence under 18 U.S.C. § 3582, and the original sentence was less than the applicable guideline range at that time “pursuant to one or more departures or variances in addition to a substantial assistance departure,” the court may reduce the sentence “comparably less than the amended range” under §1B1.10(b)(2)(B) based on “all the departures and variances the defendant received.”<sup>47</sup> That said, Defenders maintain that a simpler and fairer

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<sup>42</sup> Defender 2019 Comment, at 36 (quoting USSG App. C. Amend. 780, Reason for Amendment (Nov. 1, 2014)).

<sup>43</sup> See DOJ 2019 Comment, at 10.

<sup>44</sup> *Id.*

<sup>45</sup> See Defender 2019 Comment, at 36-40.

<sup>46</sup> See Defender 2019 Comment, at 40-42; DOJ 2019 Comment, at 10-11, Letter from Probation Officers Advisory Group to the Honorable Charles R. Breyer & the Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm’n, at 2 (Feb. 19, 2019) (POAG 2019 Comment).

<sup>47</sup> 83 Fed. Reg., at 65407.

solution would allow comparable reductions regardless of whether the government filed a motion for substantial assistance.<sup>48</sup>

### III. Miscellaneous

#### A. FDA Reauthorization Act of 2017 (Part A)

The Commission proposes referencing the new offense in subsection (b)(8) of 21 U.S.C. § 333 to §2N2.1, where subsections (b)(1)-(6) are already referenced.<sup>49</sup> In response, the DOJ asks the Commission to treat subsection (b)(8) differently from the related subsections and, in addition to referencing it to §2N2.1, also add a new specific offense characteristic to §2B1.1 addressing the covered conduct (not limited to convictions under § 333(b)(8)).<sup>50</sup> The Commission wisely did not propose such a change to §2B1.1, and should reject the DOJ's request to add unnecessary complexity to the guidelines.

Adding a 21st specific offense characteristic to §2B1.1, as the DOJ requests, would inject unnecessary complexity to an already unduly long and complicated guideline. The DOJ's request is another example of "factor creep" that plagues the guidelines.<sup>51</sup> And no evidence shows that the Commission's proposal to reference the new offense to §2N2.1, which contains a cross-reference to §2B1.1, would be inadequate on its own to guide courts on appropriate punishments for this new offense. Adding yet another SOC to §2B1.1 is not necessary given the range of sentences already provided for in §2N2.1 and §2B1.1, including enhancements for loss amount (§2B1.1(b)(1)); victims (§2B1.1(b)(2)), conduct outside the United States (§2B1.1(b)(10)(B)); sophisticated means (§2B1.1(b)(10)(C)); reckless risk of death or serious bodily injury (§2B1.1(b)(16)(A)), combined with the adjustments in Chapter Three.

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<sup>48</sup> See Defender 2019 Comment, at 42-43.

<sup>49</sup> See 83 Fed. Reg., at 65416.

<sup>50</sup> See DOJ 2019 Comment, at 13.

<sup>51</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 752 (2001) ("In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.").

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Rather than point to evidence in support of its request, the DOJ relies on scare tactics, citing opioids and fentanyl, knowing full well that these controlled substances can be prosecuted under 21 U.S.C. § 841 or § 960 which are referenced in the guidelines to §2D1.1.<sup>52</sup> The DOJ also expresses concern about the more dangerous forms of counterfeit drugs—those that have been adulterated in a manner where there is reasonable risk of serious health consequences or death.<sup>53</sup> The DOJ does not mention that it may charge defendants with intentional adulteration, and seek the higher penalties provided in § 333(b)(7) which the Commission already referenced, at the DOJ's request,<sup>54</sup> to §2N1.1, with a base offense level of 25 and cross-references to the murder guidelines when appropriate.<sup>55</sup>

Finally, no evidence supports that further complicating the guidelines through the addition of yet another SOC to §2B1.1 will deter individuals from committing these offenses.<sup>56</sup> Research shows that “knowledge of sanction regimes is poor.”<sup>57</sup> “[D]ecisions to refrain from crime are based on the mere knowledge that the

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<sup>52</sup> See DOJ 2019 Comment at 11; Brian T. Yeh, CONG. RESEARCH SERV., R45164, *Legal Authorities Under the Controlled Substances Act to Combat the Opioid Crisis* 3 (2018), <https://fas.org/sgp/crs/misc/R45164.pdf> (citing the offenses and penalties sections of the Controlled Substances Act, 21 U.S.C. § 841-865, as providing “civil and criminal penalties for any unlawful manufacture, distribution, importation, exportation, or possession of controlled substances,” and not mentioning 21 U.S.C. § 331 or § 333).

<sup>53</sup> See DOJ 2019 Comment, at 11 (expressing concern regarding drugs that “contain little or none of the active ingredients of genuine drugs” resulting in “instances of significant physical harm and even death to consumers”). See also 21 U.S.C. § 351 (defining a drug as adulterated if, for example, “its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess” or “it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor”).

<sup>54</sup> See Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 21 (Mar. 8, 2013).

<sup>55</sup> USSG §2N1.1(a) & (c)(1).

<sup>56</sup> See DOJ 2019 Comment, at 13 (suggesting the requested amendment is relevant to deterrence).

<sup>57</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 204 (2013).

behavior is legally prohibited or for other nonlegal considerations such as morality or fear of social censure.”<sup>58</sup> In addition, “*certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent.”<sup>59</sup>

### **B. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Part C)**

Defenders continue to urge the Commission to wait and see what the cases under 18 U.S.C. § 2421A look like and how they are treated by the courts before deciding the best way to address them in the guidelines.<sup>60</sup> No cases have been prosecuted under this statute.<sup>61</sup> Without knowing what issues will arise when they are prosecuted, it makes little sense to assign offense levels and specific offense characteristics for these offenses.

Without any evidence from actual cases about the nature of the offenses and the defendants, or the range of culpability at issue under this new provision, the DOJ asks the Commission to adopt an offense level *ten levels* higher than the level the Commission proposes for adult offenses under § 2421A(b)(2).<sup>62</sup>

In support of this request, the DOJ states that adult offenses under § 2421A(b)(2) and offenses under 18 U.S.C. § 1591(a) should be assigned similar offense levels.<sup>63</sup> But the offense levels for § 1591 are tethered to mandatory minimums set by the

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<sup>58</sup> *Id.* And even for those “for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration.” *Id.*

<sup>59</sup> *Id.* at 201-02.

<sup>60</sup> *See* Defender 2019 Comment, at 44.

<sup>61</sup> *See* Fed. Judicial Ctr. Integrated Database, Criminal, 1996-present, Filings Title/Section 1 Starts with 18:2421A, Proceeding Date is Greater than 04/11/2018, <https://www.fjc.gov/research/idb/interactive/IDB-criminal-since-1996>.

<sup>62</sup> *See* DOJ 2019 Comment, at 14. The proposed amendment would assign a base level of 14 under §2G1.1 for § 2421A offenses involving adults, and would assign a 4-level special offense characteristic enhancement for aggravated offenses under § 2421A(b)(2). *See* 83 Fed. Reg., at 65417-18.

<sup>63</sup> *See* DOJ 2019 Comment, at 14.

Adam Walsh Act.<sup>64</sup> No mandatory minimums exist in § 2421A(b)(2), nor is there any evidentiary basis for setting the penalties at such a high floor. For crimes that may involve no more than recklessness, it is inappropriate to set offense levels higher than the Commission's proposal. Indeed, as noted in our initial comment, no enhancements for § 2421A offenses are warranted and the Commission should consider lower base offense levels to reflect the relative culpability of those prosecuted for these third-party facilitation offenses.<sup>65</sup>

As to §4B1.5 and §5D1.2, Defenders maintain our recommendation that § 2421A offenses be excluded from both. Section 2421A(b)(2) should be excluded from §4B1.5 because, like transmitting information about a minor in violation of 18 U.S.C. § 2425, the conduct is attenuated from any sexual activity or contact with a victim.<sup>66</sup>

Similarly, § 2421A should be excluded from §5D1.2. The Probation Officers Advisory Group agrees.<sup>67</sup> The DOJ takes the opposite position, arguing for inclusion on the theory that the conduct is similar to that in "Section 2421 (which prohibits transportation for purposes of prostitution)."<sup>68</sup> Section 2421A offenses, however, bear little resemblance to transportation offenses, which require a person to knowingly move a victim through interstate commerce with intent that the victim engage in criminal sexual activity.

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<sup>64</sup> See USSG App. C, Amend. 701 & Reason for Amendment (Nov. 1, 2007) (assigning a base offense level of 34 under §2G1.1 if the offense of conviction is § 1591(b)(1), and base offense levels of 34 and 30 under §2G1.3 if a defendant was convicted under § 1591(b)(1) and (b)(2), respectively, in response "to the Adam Walsh Child Protection and Safety Act of 2006 (the 'Adam Walsh Act'), Pub. L. 109-248, which contained a directive to the Commission, created new sexual offenses, and enhanced penalties for existing sexual offenses").

<sup>65</sup> See Defender 2019 Comment, at 44-45.

<sup>66</sup> Indeed, § 2421A offenses are even more attenuated than § 2425 offenses. Section 2421A(b)(2) requires only that an individual act in *reckless disregard* that his conduct of owning, managing or operating an interactive computer service with the intent to promote or facilitate prostitution affected minors, compared with § 2425 which requires an individual *knowingly* transmit information of a minor to another with the intent for any person to engage in criminal sexual activity.

<sup>67</sup> See POAG 2019 Comment, at 9.

<sup>68</sup> DOJ 2019 Comment, at 15 (citing 18 U.S.C. § 2421).

Honorable Charles R. Breyer  
Honorable Danny C. Reeves  
March 15, 2019  
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#### **IV. Conclusion**

We appreciate the Commission's consideration of the Federal Public and Community Defenders' perspective on this year's important proposals.

Very truly yours,  
/s/ Michael Caruso  
Michael Caruso  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

cc: Hon. Charles R. Breyer, Commissioner  
Hon. Danny C. Reeves, Commissioner  
David Rybicki, Commissioner *Ex Officio*  
Patricia K. Cushwa, Commissioner *Ex Officio*  
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