Written Statement of Jon Sands
Chair, Federal Defender Sentencing Guidelines Committee

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2009

March 17-18, 2009

Re: Miscellaneous Amendments

Thank you for the opportunity to provide this testimony on behalf of the Federal Public and Community Defenders on the Commission's proposed miscellaneous amendments to the guidelines. Rather than comment on each part of the proposed amendments, I will limit my testimony to those proposals that are most likely to affect indigent defendants in the federal system.

1. Part A – Amendments Related to the Housing and Recovery Act of 2008

Part A of the proposed miscellaneous amendments references two new offenses created by the Housing and Recovery Act of 2008 to different guidelines, and also references numerous existing statutes to guidelines. The first new offense is found at 12 U.S.C. § 4636b, which makes it a crime to work in certain capacities for a regulated entity after being prohibited from doing so by a Federal Housing Finance Agency order. The Commission proposes to reference § 4636b violations to §2B1.1. Section 4636b is similar to an existing offense, found at 12 U.S.C. § 1818(j). Section 1818(j) offenses have never been referred to a guideline. The Commission now proposes to reference § 1818(j) violations to §2B1.1 as well, as a "conforming change."

The second new offense is found at 12 U.S.C. § 4641, which makes it a misdemeanor punishable by up to one year in prison to willfully fail to comply with a Federal Housing Finance Agency subpoena. The Commission proposes to reference § 4641 violations to §§2J1.1 and 2J1.5. Section 4641 is similar to numerous existing statutes that carry potential sanctions of up to one year in prison for failing to comply with an administrative agency's investigative subpoena. *See, e.g.,* 2 U.S.C. §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1818(j), 1844(f), 2273, 3108(b)(6); 15 U.S.C. §§ 78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 U.S.C. § 825f(c), 26 U.S.C. § 7210; 33 U.S.C. §§ 506, 1227(b); 42 U.S.C. § 3611; 47 U.S.C. § 409(m); 49 U.S.C. §§ 14909, 16104. The Commission proposes referring all of these existing offenses to §§2J1.1 and 2J1.5 as "conforming changes" as well.

We note at the outset that the existing offenses do not appear to have been prosecuted much if at all. A Westlaw search revealed only one criminal case under 26 USC § 7210, unreported, from 1974 in which the defendant received a six month sentence, *see United States v. Clough*, 1974 WL 517 (N.D. Cal. 1974), and no criminal prosecutions under 2 USC §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1818(j), 1844(f), 2273, 3108(b)(6); 15 USC §§ 78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 USC § 825f(c); 33 USC § 1227(b); 42 U.S.C. § 3611(c)(1); 47 U.S.C. § 409(m); or 49 U.S.C. §§ 14909, 16104. One of the statutes that the Commission proposes to refer to a guideline, 33 U.S.C. § 506, no longer exists. A handful of the listed

statutes are already referred to §2J1.1 but, again, do not appear to have ever resulted in a criminal conviction. *See* U.S.S.G. §2J1.1 (covering, among other statutes, 26 USC § 7210, 33 USC § 1227(b), and 49 U.S.C. §§ 14909 & 16104).

There is no need to further clutter the guidelines with references to statutes that are unlikely to ever result in a criminal conviction. The vast majority of the listed statutes are not really criminal offenses at all. With the exceptions of 12 U.S.C. §§ 4636b and 1818(j), each of the listed statutes represents a common way to give teeth to an administrative agency's subpoena by empowering a court to impose criminal sanctions for egregious failures to comply. The reason that they rarely, if ever, give rise to criminal sanctions is that many if not all of them require a civil enforcement proceeding before criminal sanctions may be sought. *See, e.g., Schulz v. IRS*, 413 F.3d 297, 301-02 (2nd Cir. 2005) (noting that "disobedience to an IRS summons [under 26 USC § 7210] has no penal consequences . . . until a judge has ordered its enforcement"). The Commission should not add to the Manual offenses that affect at most a miniscule number of cases, particularly when there is little or no empirical or other data to suggest how they should be handled.

Even if the Commission wished to reference all or some of these offenses to guidelines, the proposed references are inappropriate. With regard to new 12 U.S.C. § 4636b and old 12 U.S.C. § 1818(j), neither of those statutes describe a fraud offense, and thus should not be referenced to §2B1.1. To the contrary, each of the statutes makes it a crime punishable by up to five years to violate an agency order that suspends or prohibits a person from participating in the affairs of a regulated entity or institution without prior written approval from the agency. *See* 12 U.S.C. §§ 4636b, 1818(j). This conduct is akin to contempt – the failure to obey an order – and thus should be referred, if at all, to §2J1.1.

The remaining listed statutes, including new 12 U.S.C. § 4641, are all Class A misdemeanors. They are thus inappropriate for referral to §2J1.1, which in turn refers to §2X5.1 (covering "Other *Felony* Offenses") (emphasis added). If the Commission feels strongly that these statutes should become part of the Guidelines Manual, despite the fact that they are rarely if ever used, they should all be referred to §2X5.2.

2. Part E – Amendments Related to the Child Soldiers Accountability Act of 2008

Part E addresses a new offense created by the Child Soldiers Accountability Act of 2008. 18 U.S.C. § 2442 makes it a crime to knowingly recruit, enlist, or conscript a person under the age of 15 to serve in an armed force or group, or to knowingly use such a person to participate actively in hostilities. *See* 18 U.S.C. § 2442(a). Section 2442 carries a statutory maximum of 20 years, or life if death results from the offense. *See* 18 U.S.C. § 2442(b). The Commission seeks comment on whether it should refer § 2442 violations to §2H4.1 or some other guideline, or whether it should defer responding to § 2442 and instead take a broader review of the guidelines pertaining to human rights offenses. If referred to §2H4.1, the Commission also asks whether that guideline should be amended to define "involuntary servitude" as "forced labor, slavery and service as a child soldier."

We agree that §2H4.1 is the most analogous guideline for § 2442 offenses. Section 2H4.1 covers a variety of human rights offenses in which people are recruited or conscripted into certain behaviors. The base offense level starts at 22, which is approximately 20% of § 2442's unenhanced statutory maximum. From there, increases are available if the victim sustained bodily injury or was held in a condition of peonage or involuntary servitude for certain periods of time, and if a dangerous weapon was used or threatened. At least some of these increases will apply in any case involving the use of minors to "serve in an armed force or group" or to "participate actively in hostilities." Moreover, if any other felony offense was committed during the commission of a peonage or involuntary servitude offense (which would include such egregious acts as murder, sexual assault, kidnapping and torture), §2H4.1 recommends an increase of 2 levels over the level calculated under the other felony's guideline sentence. *See* U.S.S.G. §2H4.1(b)(4). Section 2H4.1(b)(4) is capped at life imprisonment, well beyond the 20 year statutory maximum for § 2442 violations.

We recognize that the enhancements in §§2H4.1(b)(3) & (b)(4) do not explicitly apply to child soldier-related offenses. We do not, however, recommend that the Commission remedy this problem by defining "involuntary servitude" to encompass "forced labor, slavery and service as a child soldier," as it proposes to do. "Involuntary servitude" as used in 18 U.S.C. § 1584 means "a condition of servitude in which the victim is forced to work for the defendant by use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Certainly, in the most egregious cases, child soldiers are forced to participate in hostilities by the use or threat of physical restraint or injury, or by legal coercion. In other cases, however, the minors choose to enlist or join the fight. Being a soldier can be the only real opportunity for income or social advancement in societies that otherwise offer nothing. Moreover, many foreign conflicts stem from decades or more of national, tribal or clan-based hatred and hostility. There is a marked difference in culpability between forcing a minor into military service through force or threats, and allowing a minor who is a day under 15 to voluntarily join a militia to fight for or defend his or her homeland or people, or to provide financially for self or family.

The guidelines should not advise courts to treat these two very different circumstances as though they were the same.[1] Instead, to ensure that §§2H4.1(b)(3) & (b)(4) appropriately cover § 2442 offenses, we recommend that the Commission specifically define "involuntary servitude" in Application Note 1 as follows:

> "Involuntary servitude" includes convictions under 18 U.S.C. § 2442 where the defendant used or threatened physical restraint or physical injury, or used or threatened coercion through law or the legal process, in order to recruit, enlist, or conscript a

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[1] It would also be inappropriate to define involuntary servitude as including "forced labor." Congress passed the forced labor statute, 18 U.S.C. § 1589, in order to "provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminksi*." *See* Victims of Trafficking and Violence Protection Act of 2000, H.R. Conf. Rep., No. 106-939 at sec. 12 (2000) (emphasis added).

person under the age of 15 to serve in an armed force or group, or to use such a person to participate actively in hostilities.

Additionally, to avoid double counting for conduct that is necessarily included in the underlying offense, we recommend that the Commission add an Application Note to §2H4.1 to clarify that the upward adjustment under §3A1.1 should not apply to convictions under § 2442. Specifically, we recommend the following language:

> Inapplicability of Chapter Three Adjustment.—if the defendant was convicted under 18 U.S.C. § 2442, do not apply §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

If the Commission decides that it should take a broader review of the guidelines pertaining to human rights offenses generally, we urge it to do so based on empirical data. As discussed in our testimony on the proposed amendments in response to the William Wilberforce Act, §2H4.1 over-punishes in the majority of cases. In 2007, for example, out of thirteen cases sentenced under §2H4.1, only six (42.6 %) were sentenced within the guideline range. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2007) at Table 28. The other eight all received a below-guideline sentence (three of which were government sponsored). *Id.* In 2006, only three out of eleven cases involved a within-guideline sentence, or 27.8%. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2006) at Table 28. One case received an above-guideline sentence, but the remaining seven – 63.6% of all §2H4.1 cases – received a sentence below the guideline range (two of which were government sponsored). *Id.* We urge the Commission to review its data on these cases to determine, as best as possible, why courts are finding that §2H4.1 over-punishes in such a high percentage of cases, and to amend the guidelines to reflect the results of that review.

3. Part F – Amendments Related to the Judicial Administration and Technical Amendments Act of 2008

Part F proposes several changes to the guidelines based on the amendments made to 18 U.S.C. §§ 3563 and 3583 by the Judicial Administration and Technical Amendments Act of 2008 ("Judicial Administration Act"). The proposed amendments clarify the availability of three types of sanctions as conditions of probation and/or supervised release: community service, community confinement, and intermittent confinement.

We strongly support any effort by the Commission to authorize alternative sanctions, which have repeatedly been shown to be more effective than straight prison sentences at reducing both crime rates and corrections costs. Although the proposed amendments would not expand the availability of probation or other non-prison sanctions, they would expand the types of conditions that are available to judges when fashioning probation sentences or supervised release requirements. Accordingly, we recommend that the Commission adopt them. We also urge the Commission to consider more fundamental amendments that would increase the availability of alternative sanctions under the guidelines. *See, e.g.,* Letter from Jon M. Sands, Federal Public Defender, District of Arizona to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission (Sept. 8, 2008) ("Sands Letter"), pp. 20-26.

Community Service. The Commission proposes to amend §§5B1.3(a)(2) and 8D1.3(b) to substitute community service as a potential mandatory condition of probation in place of notice to victims pursuant to 18 U.S.C. § 3555 and residential restrictions. The proposal would also delete the "Note" section found at the end of §5B1.3(a), which discusses the effect of the Antiterrorism and Effective Death Penalty Act of 1996 on the availability of community service as a condition of probation, as well as all asterisks referring to that section.

The proposed changes accurately capture changes made to 18 U.S.C. § 3563 by the Judicial Administration Act and we recommend that the Commission adopt them. In fact, we encourage the Commission to go further in making community service available as an alternative to incarceration. In addition to amending § 3563, the Judicial Administration Act explicitly added community service as an alternative sanction for failing to comply with a court order to return a completed jury qualification form or appear for jury service, and for negative employment actions based on an employee's jury service. *See* 28 U.S.C. §§ 1864(b), 1866(g), 1875(b)(3). This is but the latest indication that Congress continues to support the use of community service to punish nonviolent and nonserious offenses. *See, e.g.,* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 239, 98 Stat. 1837, 2039 (1984) (stating that "in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and *community service*" and that "[f]ederal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, *community service*, and other alternative sentences in cases of nonviolent and nonserious offenders") (emphases added).

Community service, like other alternative sanctions, "meets the traditional goals in sentencing of punishment, reparation, restitution, and rehabilitation." *See* The Third Branch, *Building Bridges: The Restorative Side of Community Service Conditions* (August 2008) (citing support for community service programs from probation officers in the Middle District of Florida, the District of Rhode Island, the District of North Dakota, the Western District of Texas, the District of South Dakota, the Northern District of Georgia, and the District of Vermont), *available at* http://www.uscourts.gov/ttb/2008-08/article03.cfm. The Administrative Office of the U.S. Courts describes it as a "flexible, personalized, and humane sanction . . . [that] is practical, cost-effective and fair – a 'win-win' proposition for everyone involved," and a "sentencing alternative that serves sentencing goals." *See Community Service*, *available at* http://www.uscourts.gov/fedprob/supervise/community.html. The guidelines, however, continue to advise that it generally be limited to 400 hours or less, and that it only be allowed as an alternative to incarceration for defendants in Zone A and some defendants in Zone B. *See* U.S.S.G. §5C1.1. We encourage the Commission to broaden options for community service and other alternative sentences. Amending the guidelines to make such options more available would serve Congress's and the judiciary's vision that community service – and other alternatives to incarceration – often better achieve the purposes of sentencing at less cost than prison. *See also* Sands Letter at 20-24.

Community Confinement. The Commission seeks comment on whether it should delete the "Note" sections found at the ends of §§5C1.1, 5D1.3(e)(1), 5F1.1, and in Chapter 7, Part A, Subpart 2(b), discussing the effect of the Antiterrorism and Effective Death Penalty Act of 1996

on the availability of community confinement as a condition of supervised release, as well as all asterisks in the guidelines referring to those "Note" sections. It would also delete that portion of Chapter 7, Part A, Subpart 2(b) that states that residing in or participating in the program of a community corrections facility is only available for a sentence of probation. We agree with the proposed changes, which would reaffirm that community confinement is a viable condition of supervised release, consistent with the Judicial Administration Act's amendments to 18 U.S.C. § 3583(d). We note, however, that neither §§ 3563 nor 3583 generally limit community confinement to 6 months, and we question why the guidelines do. *See* U.S.S.G. §5F1.1, cmt., n. 2; 18 U.S.C. § 3624(c)(1) (permitting community confinement for the last 12 months of a prison sentence). We urge the Commission to follow Congress's lead in this area as well and amend the guidelines to make community confinement available to more nonviolent and nonserious offenders.

Intermittent Confinement. The Commission seeks comment on whether it should add a new guideline at § 5F1.8 that would permit intermittent confinement as a sentencing option for both probation and supervised release. The proposed guideline would define "intermittent confinement" as "remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release," and would allow intermittent confinement as a condition of supervised release only for a supervised release violation in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. The proposed amendments would also add intermittent confinement as a permissible condition during the first year of supervised release under §5D1.3(e), and would amend Application Note 5 to §7B1.3 by stating that intermittent confinement is authorized as a condition of probation or supervised release only during the first year of each.

We recommend that the Commission adopt the proposed changes. Intermittent confinement has always been statutorily available as a condition of probation under 18 U.S.C. § 3563(b)(10), and as a condition of supervised release under 18 U.S.C. § 3583(d). Nonetheless, it is not (and never has been) included as a "Sentencing Option" in Chapter 5, Part F. We are glad that the Commission proposes to remedy this omission by explicitly including an "intermittent confinement" guideline in Part F. We also agree with the proposal to use 18 U.S.C. § 3563(b)(10)'s language to define "intermittent confinement," and to permit intermittent confinement in supervised release cases only when preceded by a supervised release violation and when facilities are available, as required by18 U.S.C. §§ 3583(b), 3583(e)(2). We applaud the Commission for not repeating its past mistakes of adding limitations to the availability of alternative sanctions that do not appear in the relevant statutes. *Cf.* U.S.S.G. §5F1.1 cmt., n. 2 (limiting to six months any condition of probation or supervised release involving community confinement, without explanation). We encourage the Commission to go further in the next amendment cycle and expand the availability of intermittent confinement as an alternative to incarceration under the guidelines.

4. Part H – Amendments Related to the Effective Child Pornography Prosecution Act of 2007 and the PROTECT Our Children Act of 2008

Part H proposes to amend §§2G2.1 and 2G2.2 to reflect amendments to the child pornography statutes made by the Effective Child Pornography Prosecution Act of 2007 (Pub. L. No. 110-358) ("Effective Prosecution Act") and the Protect Our Children Act of 2008 (Pub. L. No. 110-401) ("Protect Act"). First, wherever the guidelines refer to the purpose of producing a visual depiction, the Commission proposes to also refer to the purpose of transmitting a live visual depiction. Second, wherever the guidelines refer to possessing material, the Commission proposes to also refer to accessing with intent to view the material. Third, the Commission proposes to expand the definition of "distribution" to include "transmission." Finally, the Commission proposes a new definition of "material" to include any visual depiction, as that term is now defined by 18 U.S.C. § 2256.

Each of the proposed amendments reflects changes made to the child pornography statutes by the Acts. Nonetheless, neither the Effective Prosecution Act nor the Protect Act directs the Commission to do anything with regard to the child pornography guidelines. The child pornography guidelines have been roundly criticized recently for routinely over-punishing defendants. *See, e.g., United States v. Beiermann*, __ F. Supp.2d __, 2009 WL 467628, *14 (N.D. Iowa Feb. 24, 2009) (finding that §2G2.2 "should be rejected on categorical, policy grounds, even in a 'mine-run' case," because it "does not reflect empirical analysis" and it "impermissibly and illogically skews sentences for even 'average' defendants to the upper end of the statutory range"); *see also United States v. Phinney*, __ F.Supp.2d __, 2009 WL 425816, *4 (E.D. Wis. Feb. 20, 2009); *United States v. Grober*, __ F.Supp.2d __, 2008 WL 5395768, *13-15 (D. N.J. Dec. 22, 2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F.Supp.2d 997 (S.D. Iowa 2008); *United States v. Baird*, 580 F.Supp.2d 889, 892 (D. Neb. 2008); *United States v. Hanson*, 561 F.Supp.2d 1004, 1009-11 (E.D. Wis. 2008); *United States v. Shipley*, 560 F.Supp.2d 739, 744 (S.D. Iowa 2008); *United States v. Gellatly*, 2009 WL 35166, *3-5 (D. Neb. Jan. 5, 2009); *United States v. Doktor*, Slip Op., 2008 WL 5334121, *1 (M.D. Fla. Dec. 19, 2008); *United States v. Noxon*, 2008 WL 4758583, *2 (D. Kan. Oct. 28, 2008); *United States v. Grinbergs*, 2008 WL 4191145, *5-8 (D. Neb. Sept. 8, 2008); *United States v. Stults*, 2008 WL 4277676, *4-7 (D. Neb. Sept. 12, 2008); *United States v. Ontiveros*, 2008 WL 2937539, *8 (E.D. Wis. July 24, 2008); *United States v. Goldberg*, 2008 WL 4542957, *6 (N.D. Ill. April 30, 2008).

One of the most often criticized aspects of the child pornography guidelines is the enhancement for use of a computer. *See, e.g., Beiermann*, __ F.Supp.2d at __, 2009 WL 467628 at *15 (noting that §2G2.2 "blurs logical differences between least and worst offenders" in part because the enhancement for use of the Internet "appear[s] in nearly every child pornography case"); *Gellatly*, 2009 WL 35166 at *9 ("[t]he Internet has become the typical means of obtaining child pornography, and Internet child pornography cases are essentially the only kind of child pornography crime prosecuted in federal court"); *Stults*, 2008 WL 4277676 at *10 ("[b]ecause the Internet has become the typical means of obtaining child pornography, virtually

every offender will get a two-level enhancement for use of a computer").[2] Despite this, the Commission proposes to add "accessing with intent to view the material" wherever the guidelines refer to possessing material in §§2G1.1 and 2G1.2. The practical effect of the proposed amendment would be to expand the enhancement for use of a computer or an interactive computer service to reach any defendant whose offense involved "accessing with intent to view the material." *See* proposed §2G2.2(b)(6). We strongly recommend that the Commission not expand the reach of this overbroad enhancement, at least without specific direction from Congress and/or clear empirical need. Here, not only has Congress not directed the Commission to take this step, but all of the empirical data points to a need to delete or reduce the scope of §2G2.2(b)(6), not expand it.

We further recommend that the Commission study whether any of the other proposed amendments – and particularly the proposal to add the phrase "transmission" to the definition of "distribution" – will expand the reach of §§2G2.1(b)(3) and/or 2G2.2(b)(3). Again, given the lack of any congressional direction to take this action and the widespread criticism of the child pornography guidelines, we strongly recommend that the Commission take no action that would further increase sentences under those guidelines unless and until it finds the action empirically necessary to satisfy the purposes of punishment.

5. Part I – Amendments Related to the Firearms Guideline, §2K2.1

Part I proposes to amend the definition of "another felony offense" and "another offense" in Application Note 14(C) to §2K2.1, and to clarify that Amendment 691 was not intended to have a substantive effect on those terms. We agree with this proposal, which remedies the unintentional narrowing of the two definitions caused by Amendment 691. We further recommend that the Commission make this change retroactive in order to avoid unwarranted disparities between defendants found guilty of the conduct identified in §2K2.1(b)(6) or (c)(1) whose cases are still on direct appeal at the time the proposed amendment goes into effect and those whose cases have already been finalized on direct appeal. *See, e.g., United States v. Fanin*, Slip Op., 2009 WL 506888, *1 (5th Cir. March 2, 2009) ("except on direct appeal, a clarifying amendment is not retroactively applied unless the amendment is listed in §1B1.10(c)").

6. Comment on Proposals for 18 U.S.C. § 2252A(a)(7)

Finally, the Commission requests comment on whether the guidelines are adequate as they apply to 18 U.S.C. § 2252A(a)(7), which makes it a crime to knowingly produce with intent to distribute, or distribute by any means, child pornography that is an adapted or modified depiction of an identifiable minor. Section 2252A(a)(7) was created by the PROTECT Our

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[2] The Commission itself first criticized the enhancement over 10 years ago, noting that "[n]ot all computer use is equal" and that "sentencing policy should be sensitive to these differences in culpability so that punishments are tailored to fit the circumstances of each individual's case." *See* U.S. Sentencing Commission, *Report to the Congress, Sex Offenses against Children* (June 1996) at 29. It also acknowledged that use of a computer was not necessarily a signal of increased culpability because "[d]ownloading cyberporn is similar to receiving pornography through the mail." *Id.* at 28.

Children Act of 2008 ("PROTECT Act") to make it a crime to produce or distribute "morphed" images – that is, to alter an existing photograph of a minor to make it appear as though the minor was engaged in sexually explicit conduct, or to distribute such an alteration.

Production of "morphed" images is less serious than other forms of producing child pornography, which necessarily involve the actual sexual abuse of a minor. In fact, unlike other production offenses, § 2252A(a)(7) violations are punishable up to 15 years and have no mandatory minimum sentence – meaning that punishments for § 2252A(a)(7) violations are capped where other production sanctions begin. *Compare* 18 U.S.C. § 2252(e) (assigning a mandatory minimum sentence of 15 years for production offenses) *with* 18 U.S.C. § 2252A(b)(3). For this reason, it would be inappropriate to refer § 2252A(a)(7) violations to §2G2.1, which covers offenses involving the actual sexual exploitation of a minor and which keys its base offense level to the 15-year mandatory minimum sentences set forth in 18 U.S.C. § 2251(e).

Offenses involving "morphed images" are actually less serious than any child pornography offense that depicts actual sexual abuse of a minor. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-50 (2002) (distributing, selling and producing child pornography are "intrinsically related to the sexual abuse of children [because] as a permanent record of a child's abuse, the continued circulation itself . . . harm[s] the child who had participated," but "[v]irtual child pornography is not intrinsically related to the sexual abuse of children") (internal punctuation and citations omitted). This may be why new § 2252A(a)(7) has a lower penalty structure than other parts of § 2252A that criminalize distributing "morphed" images. Under § 2252A(a)(2), distributing "child pornography" is punishable by a mandatory minimum sentence of 5 years and a statutory maximum of 20 years. *See* 18 U.S.C. §§ 2252A(a)(2), (b)(1). "Child pornography" already includes a "visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *See* 18 U.S.C. § 2256(8)(C). In contrast, a prosecution for distributing "child pornography that is an adapted or modified depiction of an identifiable minor" under § 2252A(a)(7) is subject to no mandatory minimum sentence and a 15 year statutory maximum.

Given the fact that § 2252A(a)(7) punishes production and distribution of morphed images less than the production and distribution of images involving the actual sexual exploitation of minors, we recommend that the Commission refer § 2252A(a)(7) offenses to §2G2.2. Because § 2252A(a)(7) offenses do not carry a mandatory minimum sentence, however, we recommend that they be explicitly referred to §2G2.2(a)(1), which carries a base offense level of 18. The other statutes referred to §2G2.2(a)(1) have penalty structures akin to § 2252A(a)(7) in that none involves a mandatory minimum and all have statutory maximums of less than 20 years for a first offense. *See* 18 U.S.C. §§ 1466(b), 2252(a)(4) & (b)(2), 2252A(a)(5) & (b)(2). In contrast, the offenses referred to §2G2.2(a)(2) all have mandatory minimums of at least 5 years, and all have statutory maximums of 20 years for a first offense. *See* 18 U.S.C. §§ 1466(a), 2252(a)(1)-(3) & (b)(1), 2252A(a)(1)-(4), (6) & (b)(1).

"Morphed images" offenses under § 2252A(a)(7) will of course automatically receive the 2-level enhancement for use of a computer, bringing the base offense level for every such violation to 20, or a range of 33 to 41 months for a first offender. And, of course, numerous

specific offense characteristics in §2G2.2 could easily push the offense level to level 33 or higher, resulting in a guideline range beyond the 15-year statutory maximum for a first offender. *See, e.g., Beiermann*, __ F. Supp.2d at __, 2009 WL 467628 at *14. Thus, §2G2.2 is more than adequate to appropriately punish “morphed images” offenses.