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Protection Against Sexual Exploitation of Children Act of 2005 – H.R. 2318
Prevention and Deterrence of Crimes Against Children Act of 2005 – H.R. 2388

Chairman Coble, Ranking Member Scott, Members of the Subcommittee on Crime, Terrorism and Homeland Security, thank you for inviting me to testify today.

My name is John Rhodes, and I have been an Assistant Federal Defender in the District of Montana for over seven years. Prior to joining the Federal Defenders of Montana, I served as a state public defender in Missoula, Montana, where I specialized in serving as the legal guardian for female teenage rape victims, as well as defended sexual assault cases. As an Assistant Federal Defender, I have represented several hundred people charged with federal offenses, many of whom are Native Americans who live on one of the seven Indian reservations in Montana, six of which are subject to federal criminal jurisdiction. As is typical of many Federal Defenders, I represent my clients from their initial court appearances through trial or plea and sentencing, and on appeal. I defend all kinds of cases, many of which are prosecuted throughout the country (e.g., drug, firearm, fraud, immigration, and child pornography cases). Because I practice in the District of Montana, however, I (and everyone in my office) also represent many Indians charged with crimes of violence, including sex offenses involving minors, which in most districts are prosecuted in state courts. My federal experience defending and appealing both reservation and Internet sex offense cases brings me before this Committee.

This legislation would severely exacerbate the existing disparate impact of federal sentencing on Native Americans. Before Congress considers it further, the tribal communities should be consulted. Furthermore, the Sentencing Guidelines and current statutory penalties already provide stiff penalties for offenses against children that reflect the seriousness of these offenses and provide effective deterrence, while allowing flexibility to account for truly exceptional circumstances. The mandatory minimum provisions contained in these bills would impose punishment disproportionate to the seriousness of the offense in many cases, and, like all mandatory minimums, would create unwarranted disparity and preclude more effective individualized sentencing. Finally, the overwhelming majority of criminal justice experts have repeatedly cautioned Congress to act with restraint with respect to federal sentencing. It is unwise to add new mandatory minimum sentences and increase existing ones at a time when federal courts are adjusting to the Supreme Court's watershed opinions in United States v. Booker, 125 S. Ct. 738 (2005), and Blakely v. Washington, 124 S. Ct. 2531 (2004).

I. Native Americans already receive higher sentences under the Federal Sentencing Guidelines than non-Indians convicted of similar offenses in state court.

Under the Major Crimes Act (simply explained), any "Indian" who commits one of a list of felonies in "Indian country" is subject to prosecution and sentencing exclusively under federal law.[1] This is an "intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land."[2] The crimes subject to this federal power are murder, manslaughter, kidnapping, maiming, a sexual abuse felony under chapter 109A of Title 18, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under the age of 16, arson, burglary, robbery, and embezzlement or theft.[3]

Though Native Americans comprise approximately 1% of the population, they comprise the largest percentage of federal offenders by race for murder, manslaughter, sexual abuse, assault, and burglary/breaking and entering.[4] Most non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court.

In June of 2002, the United States Sentencing Commission formed the Ad Hoc Advisory Group on Native American Sentencing Issues ("Advisory Group") in response to concerns raised in a report to the U.S. Commission on Civil Rights and in public meetings that Native American defendants were treated more harshly under the United States Sentencing Guidelines than similarly situated defendants prosecuted by the states.[5] The Commission directed the Advisory Group to "consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native

[1] 18 U.S.C. §§ 1151-1153.

[2] Keeble v. United States, 412 U.S. 205, 209 (1973).

[3] 18 U.S.C. § 1153.

[4] The Sentencing Commission maintains data on the race of the offender by primary offense category, breaking it down into White, Black, Hispanic and "Other," with Native Americans included in "Other." For fiscal year 2003, "Other" was the race with the highest percentage of offenders for murder (32.9%), manslaughter (70.8%), sexual abuse (51.3%), assault (30.2%) and burglary/B&E (41.2%). See U. S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics, Table 4. See also Report of the Native American Advisory Group at 1-2, 21 n.37 (Nov. 4, 2003) (over 80% of federal manslaughter cases, over 60% of sexual abuse cases overall and over 90% in some districts, and nearly half of all murders and assaults arise from Indian country jurisdiction).

[5] Native Americans in South Dakota: An Erosion of Confidence in the Justice System, South Dakota Advisory Committee to the United States Commission on Civil Rights (March 2000); Report of the Native American Advisory Group at 10-11 (Nov. 4, 2003).

Americans under the Major Crimes Act."[6] The Advisory Group confined its study to manslaughter, sexual abuse, and aggravated assault.

In a report released in November 2003, the Advisory Group concluded that sentences for sexual abuse and aggravated assault under the Federal Sentencing Guidelines were significantly longer than those imposed for the same conduct by state courts, and that because of the jurisdictional framework, there was a disparate impact on Native Americans.[7] The Advisory Group was particularly concerned that when the provisions of the PROTECT Act of 2003 were incorporated into the Guidelines, it would dramatically exacerbate the already significant disparity for sexual abuse that would otherwise be prosecuted under state or tribal law. It noted that the PROTECT Act was aimed at child pornography, Internet and transportation sex crimes, a pool of offenders from which Native Americans are all but absent, yet the PROTECT Act's "two strikes" provision applies to offenses under chapter 109A which are covered by the Major Crimes Act.[8]

The Advisory Group was particularly troubled that "Congress neither consulted with nor seems to have anticipated the consequences of the PROTECT Act on Native Americans."[9] As the Advisory Group concluded, "[t]his silence suggests that Congress has enacted legislation that will have a demonstrable impact on Native American offenders, already subject to greater sentences in federal courts, without having heard from those most impacted nor giving any thought to that impact."[10]

The Advisory Group made several recommendations to the Sentencing Commission regarding the Guidelines. The Commission adopted the Advisory Group's recommendation to increase punishment for reckless involuntary manslaughter, increased the punishment for negligent involuntary manslaughter contrary to the Group's recommendation to leave it unchanged, increased the punishment for assault contrary to the Group's recommendation to decrease it, and increased the punishment for sexual abuse contrary to the Group's recommendation to leave it unchanged.[11]

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[6] Report of the Native American Advisory Group at I (Nov. 4, 2003).

[7] Id. 21-25, 30-33. Based on a report on manslaughter, the Advisory Group found that federal sentences for manslaughter were higher than those of some states and lower than those of others. See Manslaughter Working Group Report to the Commission, Table 1 (Dec. 15, 1997).

[8] Id. at 23-25.

[9] Id. at 23-24.

[10] Id. at 24.

[11] The Commission adopted the Advisory Group's recommendation to increase the base offense level for reckless involuntary manslaughter from 14 to 18 and add 4 levels for drunk driving. Id. at 16, 36. Instead of leaving the base offense level for criminally negligent involuntary manslaughter at 10 as recommended, id. at 17, the Commission raised it to 12. Instead of leaving the base offense level for voluntary manslaughter at 25 and adding specific offense characteristics

The Advisory Group also recommended sex offender and alcohol treatment programs to address the sources of reservation crime. It thoroughly researched and highly recommended the creation of more sex offender treatment programs, with a sentence reduction as an incentive, like the successful drug abuse treatment programs mandated by Congress. Id. at 25-30. There is, however, still only one sex offender treatment program in the entire Bureau of Prisons system. It has a long waiting list, is in North Carolina far from the western states where most Native American prisoners are housed, and offers no reduction in sentence. The Advisory Group also recognized that alcoholism plays a devastating role across the board in reservation crime, and recommended that the Commission ask Congress to provide additional treatment programs. Id. at 35-37. The Indian Health Care Improvement Act Amendments of 2005, S.1057, recognizes the efficacy of treatment for Indian sex offenders, but has not been passed.[12] These proposals reflect the tribal focus on rehabilitation and treatment as the best means to address crime and improve their communities, but they have not been implemented.

The Advisory Group strongly encouraged the Sentencing Commission to consult with affected tribal communities concerning whether to make changes to the Federal Sentencing Guidelines for crimes covered by the Major Crimes Act. "Such changes invariably impact Native Americans more heavily than any other group," and "[o]nly by further consultation with the communities impacted . . . can the perceptions and realities of bias be avoided in the future."[13] The Advisory Group noted that in virtually every federal program other than criminal justice, the federal government has adopted a consultative approach with Indian tribes, and that Congress had determined that at least the federal death penalty and "three strikes" provisions could be applied only with tribal consent.[14] It pointed out that the Commission had failed to consider the special circumstances of Indian offenders and tribal concerns in implementing the Guidelines,

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as recommended, id. at 18-19, the Commission raised the base offense level for all cases to 29. The Advisory Group recommended that the sexual abuse guidelines not be increased, but the Commission raised them across the board. The Advisory Group strongly recommended a two-level decrease in the assault guidelines, id. at 33-35, but the Commission instead raised the base offense level for assault with intent to murder by 5 levels, did not lower the base offense level for aggravated assault, and increased the base offense level for minor assault by 1 level and added a 2-level increase for bodily injury.

[12] Section 712(b)(5) proposes funding to "identify and provide behavioral health treatment to Indian perpetrators and perpetrators who are members of an Indian household-- (A) making efforts to begin offender and behavioral health treatment while the perpetrator is incarcerated or at the earliest possible date if the perpetrator is not incarcerated; and (B) providing treatment after the perpetrator is released, until it is determined that the perpetrator is not a threat to children."

[13] Report of the Native American Advisory Group at iv-v.

[14] Id. at 37-39.

and, as noted above, was quite troubled that Congress did not consult with the tribes on the demonstrable impact of the PROTECT Act on Native American offenders.[15]

II. Subsection 2(a) of H.R. 2318 and Section 2 of H.R. 2388 would severely increase the disparate impact of federal sentencing on Native Americans while affecting few other cases.

H.R. 2318 and H.R. 2388 directly impact Native Americans by creating mandatory minimum penalties for crimes covered by the Major Crimes Act. I respectfully ask that Congress consult directly with the tribal communities about this legislation. A failure to do so would create at least the perception of bias toward and disrespect for Indian sovereignty.

Subsection 2(a) of H.R. 2318 would create mandatory minimum penalties of ten or thirty years for sexual abuse offenses under Title 18, chapter 109A, §§ 2241 (aggravated sexual abuse), 2244 (abusive sexual contact), and 2245 (sexual abuse resulting in death).[16] These offenses, which are covered by the Major Crimes Act, currently are not subject to mandatory minimums but to the Sentencing Guidelines, which already carry lengthy sentences and have a disparate impact on Native Americans.

Section 2 of H.R. 2388 would create mandatory minimum sentences for all "crimes of violence" against persons under the age of 18, no matter how minor, and would impose a mandatory life sentence, or death, in circumstances far broader than under current law. The changes to current law would directly and severely impact Native Americans and very few other defendants.

Title 18 U.S.C. § 3559(d) as currently written focuses on the most egregious crimes against children. Under it, a defendant convicted of a "serious violent felony" or a violation of §§ 2422 (coercion and enticement), 2423 (transportation of minors), or 2251 (sexual exploitation of children) is subject to a mandatory life sentence or death if the victim was under 14 and died as a result of the offense, and the defendant acted intentionally and either intended to kill, intended to inflict serious bodily injury, contemplated that lethal force would be used, or recklessly disregarded human life.

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[15] Id. at 9, 23-24 & nn.42-44.

[16] It would (1) increase the penalty from any term of years or life to a mandatory minimum of 30 years or life for knowingly engaging in a sexual act with a person under the age of 12, or knowingly engaging in a sexual act with a person who has attained the age of 12 but is under the age of 16 and is at least 4 years younger than the defendant, by force, threats, or rendering unconscious or substantially impaired, (2) increase the penalty for abusive sexual contact under the foregoing circumstances from not more than ten years or, if under the age of twelve, not more than twenty years, to a mandatory minimum of ten years and not more than 25 years, and (3) increase the penalty for an offense under chapter 109A that results in the death of a person under the age of 12 from death or imprisonment for any term of years or life to death or imprisonment for a mandatory minimum of 30 years or life.

A "serious violent felony" is defined under section 3559(c) as murder; voluntary manslaughter (not involuntary manslaughter); assault with intent to commit murder or rape (not other forms of assault); aggravated sexual abuse, sexual abuse and abusive sexual contact; kidnapping; aircraft piracy; robbery; carjacking; extortion; arson; firearms use or possession; or any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

Section 2 of H.R. 2388 would create penalties escalating from a mandatory minimum of 10 years to death, depending on the circumstances, for any "crime of violence against the person" of an individual under the age of 18. Since "crime of violence" is not defined in section 3559, it presumably would be defined by 18 U.S.C. § 16:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Under section 112 of H.R. 1279, recently passed by the House, "crime of violence" under subsection (b) would be further broadened to include not just felonies involving a risk that force may be used, but any offense punishable by imprisonment for more than one year that by its nature involves a substantial risk that "physical injury may result to the person or property of another," and drug trafficking offenses.

The broadened conduct and attached penalties under H.R. 2388 would be as follows, unless a higher mandatory minimum applied and regardless of any lower statutory maximum:

> (1) death or life in prison if the "crime of violence" "results in the death" of a person under the age of 18;
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> (2) mandatory minimum of 30 years to life if the "crime of violence" is kidnapping, sexual assault or maiming, or results in "serious bodily injury," defined in 18 U.S.C. § 1365(h)(3) as involving a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss of the function of a bodily member, organ or mental faculty;
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> (3) mandatory minimum of 20 years if the "crime of violence" results in "bodily injury," defined in 18 USC 1365(h)(4) as a cut, abrasion, bruise, burn, or disfigurement, physical pain, illness, impairment of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary;

(4) mandatory minimum of 15 years if a "dangerous weapon" was used "during and in relation to the crime of violence;"

(5) mandatory minimum of 10 years in "any other case."

In contrast to current law, these heightened penalties would apply to involuntary manslaughter, any type of assault, and burglary, and need not involve a death. An assault resulting in a bruise, momentary pain, or other temporary injury would be subject to a mandatory minimum of 20 years. An assault with a "dangerous weapon" (which is not defined in the code and therefore could be anything from a firearm to a foot to a pencil) involving no injury would be subject to a mandatory minimum of 15 years. A ten-year mandatory minimum would be required in every case. These penalties would apply to a person close in age to the victim, such as a teenager who gets involved in a scuffle with a slightly younger teenager.

These sentences would be disproportionate to the seriousness of the offense in most cases, and would apply to Native American defendants but very few others. Native Americans are far more likely to be prosecuted and sentenced for "crimes of violence" in federal court than are non-Native Americans, who are prosecuted for the same conduct under state law. State law already carries less harsh penalties, and many states are repealing mandatory minimum statutes, closing prisons, and placing greater emphasis on treatment.[17] It is highly unlikely that the states would enact comparable penalties that would narrow the disparity.

In addition to further increasing the disparity in penalties between Native Americans and others, the legislation conflicts with traditional tribal justice, which is based upon healing, unity and peacemaking.[18] The tribal governments follow a rehabilitative model which involves both modern treatment methods and traditional tribal practices. Mandatory minimum sentences, however, thwart any possibility of community rehabilitation, directly contradicting the precepts of tribal justice. Again, before Congress considers this legislation further, it should consult the tribal communities.

III. The Sentencing Guidelines reflect the seriousness of crimes against children and effectively achieve deterrence and incapacitation, while allowing for flexibility when necessary.

The PROTECT Act of 2003 and a slate of Guidelines amendments in 2004 dramatically increased punishments for the child sex offenses that would be covered by Section 2 of H.R. 2318. According to the Sentencing Commission's statistics, the mean

[17] See Michael Cooper, New York State Votes to Reduce Drug Sentences, N.Y. Times, Dec. 8, 2004, at A1; Jon Wool, Don Stemen, Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003, Vera Institute of Justice (March 2004); Judith A. Greene, Positive Trends in State-Level Sentencing and Corrections Policy, Families Against Mandatory Minimums (November 2003).

[18] Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M.L. Rev. 175 (1994).

and median sentences for sex abuse offenses reached an all-time high even before the impact of those changes were felt.[19]

The PROTECT Act created a new 15 year mandatory minimum sentence for a first offense of using a child to produce child pornography, see 18 U.S.C. § 2251(e), and a new 5 year mandatory minimum for the distribution or receipt of child pornography, with an enhanced range of 15 to 40 years for repeat offenders. See 18 U.S.C. § 2255A(b)(1).

The PROTECT Act also contains provisions that apply to every sex offense conviction. It enacted a "two strikes" provision mandating life imprisonment for a second sex offense conviction against a minor. See 18 U.S.C. § 3559(e). To facilitate rehabilitation and protection of the community, it enacted lifetime supervision for sex offenses. See 18 U.S.C. § 3583(k).

The PROTECT Act also amended the basic sentencing statute, 18 U.S.C. § 3553, limiting downward departures in sex offense cases to grounds "affirmatively and specifically identified" in the Sentencing Guidelines. See 18 U.S.C. § 3553(b)(2). As a corollary, the PROTECT Act amended Chapter 5 of the Guidelines to limit departures in sex offense cases, directing that the "grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure." U.S.S.G. § 5K2.0(b).

Thus, in sex offense cases, downward departures are limited to: (1) victim's conduct, § 5K2.10, (2) lesser harms, § 5K2.11, (3) coercion and duress, § 5K2.12, (4) voluntary disclosure of offense, § 5K2.16, (5) age, § 5K2.22, and (6) extraordinary physical impairment, § 5K2.22. Realistically, only the latter two grounds -- age and extraordinary physical impairment -- will factually justify a downward departure, as it is most unlikely that a sex offense, particularly involving a minor, would be mitigated by the victim's conduct, as being a lesser harm, as resulting from coercion or duress, or by voluntary disclosure.

The PROTECT Act directly amended the child pornography guideline. It imposed a 4-level increase for "material that portrays sadistic or masochistic conduct or other depictions of violence," U.S.S.G. § 2G2.2(b)(4), and gradated increases for the number of images, ranging from a 2-level increase for 10-149 images, to a 5-level increase for 600 or more images. U.S.S.G. § 2G2.2(b)(7).

Finally, as detailed in Amendment 664 to the Sentencing Guidelines, the Sentencing Commission substantially increased the punishment for child sex offenses by increasing the base offense levels and existing specific offense characteristics, and adding new specific offense characteristics, to correspond to the new mandatory minimums and statutory maximums enacted by the PROTECT Act.

[19] See U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, FY 1996-2003.

For these reasons, as well as the repeat and dangerous sex offender guideline, U.S.S.G. § 4B1.5, Guidelines sentences for sex offenses have dramatically increased in recent years, resulting in substantial incarceration followed by lifetime supervision.

The Guidelines sentences for first offenders under the statutes to which H.R. 2318 would apply are as follows.

- Aggravated sexual abuse of children - 97 months to life[20]
- Abusive sexual contact - 33 months to ten years[21]
- Sexual abuse of children resulting in death - life imprisonment or death penalty[22]
- Sexual exploitation of children (pornography production) - 15 years (mandatory minimum) to 30 years[23]
- Sexual exploitation of children and activities relating to material involving the sexual exploitation of children (pornography trafficking/receipt) - 5 years (mandatory minimum) to 20 years[24]
- Using misleading domain names to direct children to harmful material on the

[20]U.S.S.G. § 2A3.1 applies to aggravated sexual abuse of children under 18 U.S.C. § 2241. Section 2A3.1 provides for a base offense level of 30, with 97 months at the bottom of the range. If force or threats are used, a 4 level increase applies. U.S.S.G. § 2A3.1(b)(1). The base offense level is further increased by either 2 or 4 levels if the victim is under the age of 12 years or 16 years. U.S.S.G. § 2A3.1(b)(2). If the victim was in the care or custody or supervisory control of the defendant, 2 more levels are added. U.S.S.G. § 2A3.1(b)(3). In my experience, these enhancements typically apply in reservation cases.

[21]U.S.S.G. § 2A3.4 governs abusive sexual conduct under 18 U.S.C. § 2244. It provides a base offense level of 20, but importantly includes a cross reference to U.S.S.G. § 2A3.1, where the conduct qualifies as aggravated sexual abuse or attempted aggravated sexual abuse, thus raising the punishment as detailed in the immediately preceding footnote. Without the cross reference, if the victim is under 12 years old, a 4 level increase attaches, and if the victim is under 16 years of age, there is a 2 level increase. U.S.S.G. § 2A3.4(b)(1) and (2). There is an additional 2-level enhancement if the victim was in the care or custody or supervisory control of the defendant. U.S.S.G. § 2A3.4(b)(3). In my experience, these enhancements typically apply in reservation cases.

[22]The first degree murder guideline, U.S.S.G. § 2A1.1, applies to this offense.

[23]Production of child pornography, per U.S.S.G. § 2G2.1, carries a base offense level of 32. According to the Commission, that level "combined with the application of several specific offense characteristics that are expected to apply in almost all production cases (e.g., age of the victim)" ensures "that the 15 year mandatory minimum will be met in the Chapter Two calculations [in] almost every case." U.S.S.G. Amendment 664.

[24]U.S.S.G. § 2G2.2 provides a base offense level of 22. The Commission explains that "when combined with several specific offense characteristics which are expected to apply in almost every case (e.g. use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations." U.S.S.G. Amendment 664.

Internet -15 months to 4 years[25]

- Production of sexually explicit depictions of children for importation into the United States - ten years[26]
- Child prostitution - five years (mandatory minimum) to 30 years

These sentences would, of course, be much higher for offenders with more than one criminal history point.

The "crimes of violence" against persons under the age of 18 to which Section 2 of H.R. 2388 would apply are subject to sentences under the Guidelines that are entirely sufficient to achieve incapacitation and deterrence commensurate with the seriousness of the offense as determined based on the particular characteristics of the offense. Guidelines sentences for various "crimes of violence" with a vulnerable victim adjustment are as follows:

- first degree murder - life[27]
- second degree murder - 292 months to life (depending on criminal history)[28]
- voluntary manslaughter - 108 to 235 months (depending on criminal history)[29]
- involuntary manslaughter - 15 to 125 months (depending on whether negligent, reckless or drunk driving, and criminal history)[30]
- kidnapping/hostage taking – 151 months to life (depending on criminal history and offense characteristics)[31]
- assault – 21 months to 262 months (depending on criminal history and offense characteristics)[32]

Thus, Guidelines sentencing imposes increasingly severe punishment depending on the characteristics of the offense. When there is a lawful, compelling reason to impose a sentence outside the guideline range, the judge may do so. This flexibility is

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[25]U.S.S.G. § 2G3.1(b)(2) provides a base offense level of 14, which includes enhancements for use of a computer and "use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors."

[26]U.S.S.G. § 2G2.1, child pornography production, applies to this offense, resulting in a guideline sentence that will typically exceed the ten-year statutory maximum. See note 21, supra.

[27] See 18 U.S.C. § 1111; U.S.S.G. § 2A1.1.

[28] See 18 U.S.C. § 1111; U.S.S.G. § 2A1.2.

[29] See 18 U.S.C. § 1112; U.S.S.G. § 2A1.3.

[30] See 18 U.S.C. § 1112; U.S.S.G. § 2A1.4.

[31] See 18 U.S.C. §§ 1201, 1203; U.S.S.G. § 2A4.1.

[32] See 18 U.S.C. § 111; U.S.S.G. 2A2.2.

essential in our system of justice, even, at times, in cases involving crimes against children.

For instance, I litigated one of the cases, United States v. Parish, 308 F.3d 1025 (9th Cir. 2002), cited in the Fact Sheet issued by the Department of Justice on April 30, 2003 in support of the PROTECT Act. Mr. Parish pled guilty to two counts of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Based upon the facts that Mr. Parish's conduct was outside the heartland of the typical offense and his unusual susceptibility to abuse in prison, the district court departed downward to a sentence of 8 months in prison followed by 8 months of house arrest. The government appealed, and the court of appeals affirmed the sentence, noting "that Parish had not affirmatively downloaded the pornographic files, indexed the files, arranged them in a filing system, or created a search mechanism on his computer for ease of reference or retrieval." 308 F.3d at 1030. The court further relied upon expert testimony that Mr. Parish's conduct was "outside the heartland, definitely," id., in resolving the case.

The United States Probation Office has supervised Mr. Parish since his release. I have checked on his status on several occasions. He has fully complied with and has been released from supervision. He is employed, living with his wife and two children, and successfully complying with sex offender treatment. Under current law, Mr. Parish would still be serving (at least) a five year mandatory minimum sentence. Under H.R. 2318, he would be serving (at least) a 25 year sentence. He would not be living at home, working, paying his bills, paying taxes, raising his children, and being a good husband, neighbor and community member.

Similarly, in the recent case of United States v. Bailey, 2005 WL 1119770 (D. Neb. May 12, 2005), Judge Kopf departed downward to probation in a child pornography case. Mr. Bailey pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(b). The government agreed that the case was unique, because like Mr. Parish, Mr. Bailey only viewed the Internet images temporarily, did not consciously download most of them, and either deleted or took no steps to keep them. Id. at *2. According to an expert in whom the judge had a great deal of confidence, Mr. Bailey was not a predator or otherwise a danger to society. Id. at *4. Most important, Mr. Bailey was an essential caretaker for his daughter. Following the filing of the federal charges, custody of Mr. Bailey's daughter was transferred to her mother, resulting in her being sexually abused by the mother's friend. Id. at *4. The state court then awarded Mr. Bailey custody, while the federal child pornography charge was pending. Id. at *4-7, 9. Judge Kopf concluded that Mr. Bailey's presence "is critical to the child's continued recovery, and the defendant's presence cannot reasonably be duplicated by using other providers." Id. Under current law, the court would have had to impose a five year mandatory minimum sentence. Under H.R. 2318, the punishment would be a mandatory minimum of 25 years. In either case, a child at risk would be without a responsible parent.

IV. Mandatory minimums create unwarranted disparity, and preclude individualized sentences that are proportionate to the seriousness of the offense.

Congress in the Sentencing Reform Act established the United States Sentencing Commission to promulgate sentencing guidelines and policies that would assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met, and that would "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." See 28 U.S.C. § 991(b)(1)(A), (B). Congress explicitly recognized that "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law." Rep. No. 225, 98th Cong., 1st Sess. 46 (1983).

On January 12, 2005, the Supreme Court held in United States v. Booker, 125 S. Ct. 738, 748-50 (2005), that the Sentencing Guidelines must be imposed in an advisory manner in order to pass constitutional muster. Since then, the district courts have imposed sentences above the guideline range in 1.7% of cases, below the range for reasons advocated by the government in 22.8% of cases, and below the range for reasons identified in the Guidelines Manual or in 18 U.S.C. § 3553(a) in 12.7% of cases.[33] While the rate of sentences above the guideline range has nearly doubled since the pre-Booker era, that of sentences below the range has not significantly changed. When judges have imposed sentences below the guideline range following Booker, they have carefully explained why a different sentence was appropriate as a departure identified in the Guidelines Manual or as otherwise necessary to achieve just punishment, deterrence, incapacitation, and needed rehabilitation or treatment, and to promote respect for the law.

Thus, there does not appear to be an epidemic of judicial leniency that requires a legislative response. We are therefore concerned to see two more in a series of bills that seem designed to blanket the criminal code with mandatory minimums and thus preclude judges from imposing individualized sentences that distinguish among defendants according to the seriousness of the offense, their role in the offense, and their potential for rehabilitation. Unlike guideline sentencing, mandatory minimum statutes result in unwarranted disparity, including racial disparity, produce sentences that are unfair and disproportionate to the seriousness of the offense, and are not cost effective.[34] For these reasons, diverse institutional and policy organizations, including the Judicial

[33] U.S. Sentencing Commission Special Post-Booker Coding Project, available at http://www.ussc.gov/Blakely/PostBooker_5_26.pdf.

[34] See United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199 (1993); Caulkins, Jonathan P., C. Peter Rydell, William L. Schwabe, and James Chiesa, Are Mandatory Minimum Drug Sentences Cost-Effective?, Corrections Management Quarterly, 2(1):62-73, 1998; Harris v. United States, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

Conference,[35] the Sentencing Commission,[36] and the Sentencing Initiative of the Constitution Project,[37] have voiced strong opposition to mandatory minimum statutes and their continuing proliferation. State governments, too, are turning away from mandatory minimum sentencing laws, in recognition that these laws do not achieve the purposes of sentencing commensurate with their extraordinary fiscal and human cost.[38]

Furthermore, the mandatory minimums proposed in H.R. 2318 and H.R. 2388 would undoubtedly increase the number of trials. Mandatory minimum sentences provide no incentive for defendants to plead guilty. By eliminating the beneficial effects of plea bargaining, the bills would result in more trials. These trials would not only tax the resources of the judiciary and the executive branches, but would also require child witnesses to suffer the ordeal of courtroom testimony. That traumatic experience would negatively impact the children. Given the difficulties inherent with child witnesses, the increase in trials most likely would actually adversely impact conviction rates. These costs of mandatory minimums are not justified where the existing laws provide for ample punishments and already enable the courts to severely punish the most culpable defendants.

Judges are exercising their discretion responsibly under advisory guidelines, and the system should be given a chance to work. A proliferation of mandatory minimums is not the answer.

V. Section 3 of H.R. 2388 would generate extensive and inefficient litigation and may be unconstitutional.

Section 3 of H.R. 2388 singles out "claims" that "relate" to a judgment or sentence in an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court for a crime that involved the killing of a person under the age of 18. It appears to strip federal judges, justices, and courts of jurisdiction over this very rare class of claims, subject to an exception for a "claim that qualifies for consideration in the grounds described in subsection (e)(2)."

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[35] See April 25, 2005 Letter from the Committee on Criminal Law of the Judicial Conference of the United States to Chairman Sensenbrenner re H.R. 1528; Leter from Judicial Conference of the United States to Chairman Coble re H.R. 1279.

[36] See April 19, 2005 Letter from United States Sentencing Commission to Chairman Coble and Ranking Member Scott re H.R. 1528.

[37] The Sentencing Initiative of the Constitution Project is a bipartisan working group of current and former state and federal prosecutors, defense lawyers, judges, policymakers, and scholars. We understand that it is about to announce its principles for sentencing reform, and that among these is that sentencing guidelines systems are desirable and that mandatory minimum sentences are inconsistent with sentencing guidelines.

[38] See note 15, supra.

Subsection (e)(2) governs the availability of federal evidentiary hearings, not jurisdiction. Assuming that it could be converted to a jurisdictional requirement, there would be no jurisdiction over such claims unless they cleared a hurdle more exacting than the standard for granting the writ itself.[39] Those few claims that cleared the jurisdictional hurdle would be subjected to a complex set of truncated timetables for consideration.

The constitutional review of state cases assigned to federal courts is a serious matter calling for careful consideration. It is a hallmark of the liberty that defines America. Congress has consistently avoided jurisdiction-stripping legislation of this kind. In all of the AEDPA provisions, Congress never thought it appropriate to simply eliminate habeas jurisdiction entirely in any class of cases or claims. We are not aware of any evidence that unnecessary delays are especially problematic in such cases. This provision selects certain cases for special treatment without a rational basis and thus raises constitutional questions.

Moreover, both the incorporation of subsection (e)(2) standards and the timetable provisions would generate a great deal of inefficient litigation. Courts would have to agree on a series of uniform interpretations of each provision in this context and then apply them in individual cases. This is what has occurred with subsection (e)(2) in its intended context relating to evidentiary hearings, and with the filing deadlines established by the AEDPA. An enormous amount of time and effort would be expended on trying to make these provisions work, thus slowing the resolution of such cases, not speeding it up.

The provision that would make this amendment applicable to pending cases risks even more inefficient litigation. By changing the rules after cases have begun, this legislation would force courts to decide whether the changes have retrospective effect, and if so, to work through the complexities of applying the new rules in cases already underway.

Conclusion

Again, I am grateful for the opportunity to provide my views and those of the Federal Public and Community Defenders. The Federal Public and Community Defenders have a wealth of experience in federal sentencing generally and in the sentencing of Native Americans. We would be happy to answer any questions or respond to any requests from you or the Subcommittee staff.

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[39] Subsection (e)(2) requires a new rule of constitutional law made retroactive by the Supreme Court and not previously available, or a factual predicate that could not previously have been discovered through due diligence, coupled with facts that would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the offense. The standard for granting the writ is that the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts.