

**FEDERAL PUBLIC DEFENDER**

***Southern District of Texas***

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Honorable Patti B. Saris  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

**Re: Public Comment on Proposed Amendments for 2014**

Dear Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published by the Commission on January 17, 2014. At the public hearing on February 13, 2014, we submitted written testimony on proposals related to the Violence Against Women Reauthorization Act of 2013 (VAWA), and on March 13, 2014, we submitted written testimony on proposals related to guidelines for drug offenses, the felon in possession guideline, and §5G1.3. Copies of that testimony are attached and incorporated as part of our public comment. Here, we address issues raised at the hearing regarding the drug guideline, and offer comment on the remaining proposals.

**I. Proposed Amendment 1 – §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range)**

The Commission proposes amending the policy statement at §1B1.10 as it applies in cases in which the court was authorized to sentence a defendant below a statutorily required minimum sentence pursuant to a substantial assistance motion made under 18 U.S.C. § 3553(e) or Rule 35. The amendment is intended to resolve differences in approach adopted by the courts of appeals. For the reasons that follow, we urge the Commission to adopt Option 1, which would permit comparable departures in all such cases. We further urge the Commission to take this opportunity to amend §1B1.10 so that district courts may likewise re-impose previously granted

departures or variances for reasons other than the policy reasons for amending the guideline, as before 2011.

**A. The Commission should amend §1B1.10 so that defendants are eligible for a reduction comparably less than the amended guideline range as determined without regard to the mandatory minimum in all cases in which the court was authorized to impose a sentence below the mandatory minimum based on substantial assistance.**

Subsection (b)(2)(B) of §1B1.10 provides that in cases in which the defendant received a sentence below the “guideline range applicable to the defendant” at the time of sentencing pursuant to a substantial assistance motion, “a reduction comparably less than the amended guideline range may be appropriate.” USSG §1B1.10(b)(2)(B). The courts of appeals have reached varying conclusions regarding whether, and to what extent, a district court may reduce the sentence “comparably less than the amended guideline range” when the district court imposed a sentence below a mandatory minimum based on substantial assistance, or was authorized to do so.

The Third and D.C. Circuits have held that in such cases, the district court determines whether the “guideline range applicable to the defendant” has been lowered, USSG §1B1.10(a)(1) & comment. (n.1), by following the steps set forth in the Application Instructions at §1B1.1(a)(1) through (a)(7) to calculate an amended “guideline range” that “corresponds to the offense level and criminal history category” set forth in the Sentencing Table in Part A of Chapter Five. *United States v. Savani*, 716 F.3d 66 (3d Cir. 2013); *In re Sealed Case*, 722 F.3d 361 (D.C. Cir. 2013). Because the amended guideline range is determined before any mandatory minimum is accounted for at Part G of Chapter Five, *see id.* §§1B1.1(a)(8), 5G1.1(b)-(c), all such defendants are eligible for a reduced sentence comparably below the bottom of the amended guideline range corresponding to the offense level and criminal history category as set forth in the Sentencing Table.

Other courts are of the view that a defendant’s amended guideline range is always determined by incorporating the requirements of a mandatory minimum under USSG §5G1.1. The Second, Sixth, Eighth, and Eleventh Circuits hold that a defendant whose otherwise applicable guideline range as set forth in the Sentencing Table was below the mandatory minimum, either in whole or part, is not eligible for a reduction because the bottom of the range (*i.e.*, the mandatory minimum by operation of §5G1.1) was not lowered. *United States v. Johnson*, 732 F.3d 109, 115 (2d Cir. 2013); *United States v. Joiner*, 727 F.3d 601, 605 (6th Cir. 2013); *United States v. Golden*, 709 F.3d 1229, 1231 (8th Cir. 2013); *United States v. Glover*,

686 F.3d 1203, 1204, 1208 (11th Cir. 2012).<sup>1</sup> The result is that only defendants whose pre-amendment guideline range was entirely above the mandatory minimum are eligible for a reduction. Although concluding that this result was mandated by the terms of §1B1.10, Judge Newman of the Second Circuit suggested that the Commission implement a “sane sentencing regime” by adding a “straightforward provision” allowing comparable reductions in every case involving substantial assistance. *See Johnson*, 732 F.3d at 116 n.10.

The Seventh Circuit takes yet another approach, also with asymmetrical results. Relying on §1B1.10(b)(1), which instructs district courts to “substitute only the [retroactive] amendment” in determining the “amended guideline range,” the Seventh Circuit has held that “if §5G1.1 did not affect the original calculation, it does not come into play when a court considers the effect of a retroactive change to the Guidelines.” *United States v. Wren*, 706 F.3d 861, 863 (7th Cir. 2013). Recognizing that its reading of the policy statement means that defendants whose original guideline range was below the mandatory minimum in whole or part are “excluded from a retroactive Guideline reduction, while [those] whose original ranges were just slightly above the statutory floor are eligible for the benefit of the retroactive change,” the court suggested that the Commission “take a close look at the way §1B1.10(b)(1) works.” *Id.* at 864.

The Commission has proposed two options that would resolve these differing approaches. Option 1 adopts the approach of the Third and D.C. Circuits (and eliminates the asymmetry caused by the others) by adding a new subsection (c) to §1B1.1 to state that when a district court was authorized to impose a sentence below a mandatory minimum based on substantial assistance, “for purposes of this policy statement, the amended guideline range shall be determined without regard to the operation of §5G1.1 [] and §5G1.2.” 79 Fed. Reg. 3280, 3282 (Jan. 17, 2010). Option 2 would state that in such cases the “amended guideline range shall be determined after operation of §5G1.1 [] and §5G1.2 [].” We urge the Commission to adopt Option 1.

First, Option 1 is consistent with the Commission’s use of the term “guideline range” elsewhere in the *Manual*, including §5G1.1 itself. The *Manual* instructs district courts to determine the “guideline range in Part A of Chapter 5 that corresponds to the offense level and criminal history category.” USSG §1B1.1(a)(7); *id.* Ch. 5, Pt. A (Sentencing Table) (“The intersection of the Offense Level and Criminal History Category displays the Guideline range in

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<sup>1</sup> The Fourth Circuit has taken a similar approach in cases in which both the top and the bottom of the otherwise applicable guideline range were entirely below the mandatory minimum, *see United States v. Hood*, 556 F.3d 226, 234-35 (4th Cir. 2009), but in a recent so-called “straddle” case (in which the top of the guideline range was above and then lowered to the mandatory minimum while the bottom of the range was and remained trumped by the mandatory minimum), the court held that the defendant was eligible for a reduction comparably less than the new lower range. *United States v. Gaynor*, 521 F. App’x 151 (4th Cir. 2013).

months of imprisonment.”). This “guideline range” is to be determined before accounting for the effect of any “sentencing requirement,” such as a mandatory minimum, under Part G of Chapter 5. *Id.* §1B1.1(a)(8). Section 5G1.1, in turn, does not result in a new “guideline range,” but maintains the distinction between the “guideline range” as determined under the Sentencing Table in Part A and the effect of any mandatory minimum with respect to that range in Part G. *Id.* §5G1.1(b) (distinguishing between the “applicable guideline range” and the “guideline sentence” resulting from operation of a mandatory minimum); *id.* §5G1.1(c) (distinguishing between the “applicable guideline range” and the sentencing requirements resulting from a mandatory minimum); *see* §5G1.2, comment. (n.3(B)) (distinguishing between the “applicable guideline range” and a “guideline sentence” resulting from operation of a mandatory minimum); *see also In re Sealed Case*, 722 F.3d at 369-70 (“The mandatory minimum . . . acts upon the already-determined ‘applicable guideline range’; it does not become the guideline range.” (emphasis in original)).

Second, Option 1 is consistent with subsection (b)(2)(B) of §1B1.10. Commentary makes clear that subsection (b)(2) contemplates comparable below-guideline sentences in cases in which the original sentence was below the mandatory minimum, *see id.* §1B1.10, comment. (n.3) (expressly referring to 18 U.S.C. § 3553(e) and Rule 35), suggesting no exceptions or limitations. Yet, as some courts of appeals have decided and as Option 2 would require, comparable reductions are unavailable in many but not all cases when the “amended guideline range” is determined after operation of §5G1.1. Worse, defendants deemed ineligible for a reduction under that approach are those with *lower* original and amended guideline ranges under the Sentencing Table, i.e., those convicted of less serious offenses, as measured by the guidelines, or with fewer criminal history points, which describes nearly 40% of all crack offenders who received a downward departure for substantial assistance from 1999 through 2012.<sup>2</sup>

In *United States v. Jackson*, 2012 WL 3044281 (N.D. Ohio July 25, 2012), Judge Gwin “note[d] the irony” that “[u]nder the current Sentencing Guidelines framework, Jackson actually benefits from his criminal history, which pushed his guidelines range above the statutory minimum and now makes him eligible for a sentence modification,” unlike a “similar defendant[] with a lower criminal history score.” In *Wren*, Judge Easterbrook observed that “it is difficult to see why” the mandatory minimum should render many cooperating defendants ineligible for a reduction, when none were subject to the mandatory minimum in the first place. *Wren*, 706 F.3d at 864. By adding a “straightforward provision” allowing comparable reductions in every case involving substantial assistance, Option 1 would implement a “sane sentencing

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<sup>2</sup> In fiscal years 1999 through 2012, in 38.7% of crack cases in which the defendant received a departure for substantial assistance, the guideline range was below the applicable mandatory minimum in whole or part. USSC, *FY 1999 – FY 2012 Monitoring Dataset*.

regime.” *Johnson*, 732 F.3d at 116 n.10. Option 2, in contrast, would senselessly render a large number of defendants ineligible for a reduction, while continuing to permit those with more serious offenses or criminal histories to receive a comparable below-guideline sentence.

**B. The Commission should reinstate district courts’ authority to reimpose variances and departures based on individualized circumstances relevant to sentencing purposes.**

Until 2011, §1B1.10 encouraged courts to re-impose a below-guideline sentence in all cases, just as they would re-impose any guideline adjustment. The policy statement had always said that the court “should consider” the sentence it “would have imposed” had the amendment been in effect. *See* USSG §1B1.10(b) (2006); *see also id.* §1B1.10(b) (1989). In 1994, the Commission deleted a conflicting statement that the reduction “may not exceed the number of months by which the maximum of the guideline range . . . has been lowered,” USSG App. C, Amend. 504 (Nov. 1, 1994), and in 1997, made explicit that “[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate,” USSG §1B1.10, comment. (n.3) (1997); USSG App. C, Amend. 548 (Nov. 1, 1997).

In 2008, the Commission overhauled §1B1.10 in response to *Booker* when it reduced the crack guidelines by two levels and made that change retroactive. In relevant part, it amended subsection (b) to provide as follows:

Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

*See* USSG §1B1.10(b)(2)(B) (2008); USSG App. C, Amend. 712 (Mar. 3, 2008). In revised Application Note 3, the Commission provided an illustration of a comparable departure that “may be appropriate,” but did not illustrate or explain what it meant by its recommendation that a comparable variance, though not prohibited, “generally would not be appropriate.” After some initial confusion caused by the Commission’s failure to explain this recommendation, the courts continued to impose the sentence they would have imposed had the amendment been in effect at the time of sentencing, reinstating previously-imposed departures and variances except when the reason for and extent of a variance was accounted for by the retroactive amendment.<sup>3</sup>

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<sup>3</sup> *See, e.g., United States v. Sipai*, 623 F.3d 908 (9th Cir. 2010) (superseding earlier opinion in which panel had accepted government’s argument that second sentence of §1B1.10(b)(2)(B) deprived the district

On May 3, 2011, as part of its request for public comment on whether it should make retroactive the amendments to the crack guidelines in response to the Fair Sentencing Act of 2010, the Commission asked whether it should “amend §1B1.10 to provide further guidance on how the sentencing court, in considering retroactivity, should account for . . . the fact that the jurisprudence that applies to sentencing has changed to expand the discretionary authority of a sentencing court to impose a sentence outside the guidelines framework?” 76 Fed. Reg. 24,960, 24,973-74 (May 3, 2011). At the public hearing on June 1, 2011, it became clear that the Commission’s concern was that defendants who previously received a variance based on a policy disagreement with the crack guideline might receive a windfall from retroactive application of the amendment *and* a comparable variance. Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 49-51, 61-62, 101-03, 107-09, 111-12 (June 1, 2011) (hereinafter June 2011 Hearing).

Both the defense bar and the Department of Justice advised that the number of cases in which a district court had previously varied based on a policy disagreement with the crack guideline was small, that the parties and judges were already addressing the issue when it arose, and that the Commission should either delete the provision or revise the language to precisely address the Commission’s concern. *See id.* at 51-52, 60-62 (Stephanie M. Rose, U.S. Att’y, N.D. Iowa); *id.* at 106-07, 109-11 (Michael Nachmanoff, Fed. Defender, E.D. Va.); Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Before the U.S. Sentencing Comm’n, Washington, D.C., at 24-26 (June 1, 2011); Testimony of David Debold, Practitioners Advisory Group, Before the U.S. Sentencing Comm’n, Washington, D.C., at 7-8 (June 1, 2011). In addition, the Department made clear that prosecutors would not object to comparable reductions to account for previously-imposed departures or variances based on individualized circumstances, such as “overstated criminal history, . . . mental health, or medical conditions.” June 2011 Hearing, at 51 (Stephanie M. Rose, U.S. Att’y, N.D. Iowa).

At the end of the testimony, Commissioner Howell suggested that the Federal Defenders submit proposed explanatory language that would be “helpful in resolving any confusion” that the provision “may be prompting in some jurisdictions.” June 2011 Hearing, at 111-12. In response, and in light of the testimony and concerns expressed by Commissioners at the hearing,

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court of jurisdiction to consider a motion to reduce sentence); *United States v. Curry*, 606 F.3d 323, 329 (6th Cir. 2010) (rejecting government’s argument that second sentence of §1B1.10(b)(2)(B) created a presumption against any reduction where judge varied based on the defendant’s efforts at reform and did not take into account powder-to-crack disparity); *United States v. Wilkerson*, 2010 WL 5437225 (D. Mass. Dec. 23, 2010) (granting comparable reduction because initial variance was not based on crack/powder disparity); *United States v. Reid*, 566 F. Supp. 2d 888, 894-95 (E.D. Wis. 2008) (“If the departure or variance failed to account for the crack/powder disparity, a further reduction would . . . more likely be warranted,” but “if . . . the court accounted for the disparity, a further reduction . . . may not be warranted.”); *United States v. Porter*, 2009 WL 455475 (E.D.N.Y. Feb. 23, 2009) (declining to reduce sentence because court “took into account the disparity”).

we suggested replacement language for the second sentence of §1B1.10(b)(2)(B). We proposed that the Commission “bring back the concept of the former policy statement” of instructing courts to consider the sentence it would have imposed had the amendment been in effect, including “whether they already did exactly what the amendment does, that is, reduced the sentence based on the guideline’s policy flaws and to the same extent reflected in the amended guideline range.” Letter from Marjorie Meyers, Chair, Federal Defender Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 6 (June 6, 2011). Anything more detailed, we said, would not be a good approach because “the reasons for variances and the extent of variances are too varied to capture in detail, and the courts are best situated and perfectly capable of determining what they did at the original sentencing and why.” *Id.*

One week later, the Commission amended §1B1.10(b)(2)(B). Rather than address the narrow set of circumstances identified by the Commission as its main concern – potential windfalls due to previously imposed variances based on policy disagreements that were later fully accounted for by the retroactive guideline amendment – the Commission instead amended §1B1.10(b)(2)(B) to categorically preclude the re-imposition of both departures and variances in every case except for departures “pursuant to a government motion to reflect the defendant’s substantial assistance to authorities.” 76 Fed. Reg. 41,332, 41,332 (July 13, 2011). As its reason, the Commission said that its previous rule had been “difficult to apply and ha[d] prompted litigation,” and that adopting “a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases.” *Id.* at 41,334. But, it said, defendants who provide substantial assistance “are differently situated from other defendants” and therefore “should be considered for a sentence below a guideline.” *Id.* “Applying this [same] principle in § 3582(c)(2) proceedings appropriately maintains this distinction and furthers the purposes of sentencing.” *Id.*

For the reasons that follow, the Commission should reinstate its pre-2008 rule instructing the district court to consider the sentence it would have imposed had the amendment been in effect at the time of sentencing, thereby permitting comparable departures and variances in all cases except those in which previously imposed variances based on policy disagreements are accounted for by the retroactive guideline amendment.

First, any concerns that defendants may receive a windfall from a retroactive reduction in the guideline range because a judge at the original sentencing may have varied from the guideline range because of a policy disagreement with the crack guideline are misplaced. There was no evidence before the Commission that defendants were receiving the double benefit of a re-imposed variance based on a policy disagreement with the crack guideline and the retroactive 2007 crack amendment itself; all of the evidence at the 2011 hearing was to the contrary. The parties, judges, and probation officers know what served as the basis of the departure or variance at the original sentencing hearing. The parties know what arguments they made and the basis for

departure or variance should be set forth in the statement of reasons. If a prosecutor is concerned that a defendant might receive a double benefit, she can raise that issue with the court. At the 2011 hearing, the Department made clear that prosecutors would not object to the re-imposition of departures or variances that were based on individualized circumstances relevant to the purposes of sentencing. June 2011 Hearing, at 51 (Stephanie M. Rose, U.S. Att’y, N.D. Iowa). Rather than impose a blanket rule that assumes, contrary to evidence, that defendants will receive windfalls, the Commission should rely on judges and the parties to ensure that they do not.

Second, the Commission now unfairly forces district judges to rescind all departures and variances based on individualized circumstances relevant to sentencing purposes, while encouraging them to re-impose comparable departures for cooperation. By the Commission’s logic, cooperation is the only important factor in sentencing, despite the undisputed presence of other factors highly relevant to sentencing purposes under § 3553(a) and despite that cooperators are often more culpable. The following examples – just two of many – illustrate the unfairness.

**Joel Berberena.** Joel Berberena worked for 150 days as a low-level street dealer for a large drug trafficking organization.<sup>4</sup> He was indicted in 2001 along with 31 other members of the organization, several of whom entered into cooperation agreements with the government. From the beginning, Mr. Berberena was willing to cooperate and provided all the information he knew about the organization, but could not offer anything the government did not already know. The government refused to enter into a cooperation agreement, and the court sentenced Mr. Berberena to 210 months, the bottom of the then-mandatory range of 210-262 months.

In 2005, on remand after *Booker*, Mr. Berberena requested a variance under § 3553(a) to account for his culpability relative to other street dealers in the conspiracy – some of whom worked for the organization for far longer than he did but received far shorter sentences – and relative to named leaders in the conspiracy who cooperated and received far shorter sentences; the fact that he had never been previously convicted; and so that, upon release, he could find employment, rehabilitate himself, and continue to take care of his children while they, and he, were still young. Mr. Berberena did not ask the court to vary based on the crack/powder disparity. The judge granted a variance to 150 months, a sentence within the range four levels below the applicable guideline range.

The 2007 crack guideline amendment lowered Mr. Berberena’s guideline range to 168-210 months. He moved for a reduction comparably less than the amended range. He acknowledged the 2008 amendment to §1B1.10(b)(2)(B), but pointed out that the original variance was not based on the crack/powder disparity. The government did not oppose a

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<sup>4</sup> *United States v. Berberena*, No. 2:01-cr-00363-BMS (E.D. Pa. 2009). The facts and history of Mr. Berberena’s case are drawn from documents available on PACER. *See id.* Docs. 1, 671, 822, 829, 929, 931, 970.



proportional reduction. In 2009, the district court reduced the sentence to 135 months, a sentence again within the range four levels below the amended guideline range. In its order, the court recognized that Mr. Berberena was as deserving of relief as a cooperator, noting that according to the government's own assessment, Mr. Berberena

was among the least culpable of the defendants. However, having not signed a cooperation plea agreement, he received a sentence longer than other individuals placed in the same category of culpability and longer than even substantially more culpable defendants. A reduction therefore will not result in an unwarranted disparity between Berberena's sentence and that of his fellow "defendants with similar records who have been found guilty of similar conduct." See 18 U.S.C. § 3553(a)(6). Moreover, this sentence still exceeds the applicable statutory minimum of 120 months and is longer than the sentence of those who did cooperate.

*United States v. Berberena*, No. 2:01-cr-00363-BMS (E.D. Pa. Mar. 18, 2009) (Doc. 931).

The 2011 crack guideline amendment reduced Mr. Berberena's guideline range to 135-168 months, still higher than the sentences that more culpable, cooperating defendants received. But due to the 2011 amendment to §1B1.10(b)(2)(B), the court was prohibited from reducing Mr. Berberena's sentence comparably less than the amended range. *United States v. Berberena*, 694 F.3d 514, 522-23 (3d Cir. 2012). The district court was effectively forced to rescind the variance, the reasons for which remain just as relevant to sentencing purposes as they were in 2005. Had they not already been released by the time of the 2011 amendment, more culpable cooperators would be eligible for a comparable departure for no reason other than that they cooperated.

**Travis Boyd.** In 2001, Mr. Boyd faced a guideline range of 360 months to life for dealing in eight kilograms of crack over a ninth-month period. Although he had never been previously convicted of a felony, he was placed in Criminal History Category III based on two prior misdemeanor convictions for driving on a suspended license and one prior misdemeanor conviction for "interfering with a police officer," each of which resulted in a fine. These convictions normally would not have counted in his criminal history score, but because he failed to pay the fines, he was sentenced to over 30 days in jail for each, for a total of 180 days in jail. Relying on USSG §4A1.3, which encouraged (and still encourages) downward departure when the court finds a defendant's criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes," USSG §4A1.3, p.s. (2001); see *id.* §4A1.3(b) (2013), the district court departed downward to Criminal History Category I and sentenced Mr. Boyd to 300 months, within the resulting guideline range of 292 to 365 months. *United States v. Boyd*, 721 F.3d 1259, 1261 (10th Cir.), *cert. denied*, 134 S. Ct. 630 (2013).

In 2011, Mr. Boyd moved for a reduction based on the retroactive crack amendments, which lowered his range to 292-365 months in Criminal History Category III, and to 235-293 months in Criminal History Category I. In considering the motion, the district court observed:

The parties agree that Mr. Boyd has been a model prisoner over the last thirteen years. He has been sanctioned only twice for non-violent disciplinary violations, and both of these instances occurred in 2004. Due to his longstanding good conduct, he is now in a low security camp. He has been steadily employed and has completed thousands of hours of educational and vocational training. He has also participated in substance abuse treatment programs and has earned certificates in parenting skills and stress management. In light of this impressive history, were the Court permitted to reduce Mr. Boyd's sentence to 235 months, it would do so without hesitation.

Mem. at 11, *United States v. Boyd*, No. 2:00-cr-00941-MV (D.N.M. July 20, 2012) (Doc. 39). However, as a result of the 2011 amendment to §1B1.10(b)(2), the district court was prohibited from reducing the sentence below 292 months, the bottom of the range in Criminal History Category III. *Boyd*, 721 F.3d at 1264. The court was effectively forced to rescind the departure, even though Mr. Boyd's criminal history remains less serious and his risk of recidivism remains lower than other defendants in Criminal History Category III. As the district court recognized, the original departure avoided unwarranted disparity, whereas "prohibit[ing] this Court from re-imposing the over-representation departure creates a new disparity between Mr. Boyd and other crack-cocaine defendants who have more serious criminal histories than he, yet unlike Mr. Boyd, they will be subject to a lower guideline range in light of the Fair Sentencing Act." Mem. at 10. Similarly, had a co-defendant with a more serious criminal history and higher risk of recidivism received a departure of the same amount for cooperating, he would be eligible for a reduced sentence comparably less than the amended range.

The Commission asserted that this different treatment is valid because cooperators "are differently situated from other defendants." But so are Joel Berberena and Travis Boyd. Like a minority of defendants and unlike other defendants, they were sentenced outside the guideline range because the district court determined that a sentence within the guideline range would fail to take account of individualized circumstances relevant to the purposes of sentencing.

In sum, rather than rely on unfounded assumptions to force judges to rescind every previously imposed departure and variance except departures based on substantial assistance, the Commission should assume that judges and the parties know the reasons the judge previously granted a departure or variance and that judges will take those reasons into account when deciding whether and by what extent to reduce a sentence under § 3582(c)(2). We recommend that the Commission reinstate the pre-2008 policy instructing the sentencing court to consider what sentence it would have imposed had the amendment been in effect, and state its goal of avoiding windfalls in the narrow class of cases in which they might arise.

We suggest the following changes to subsection (b)(2)(B) and relevant commentary (additions in *italics*):

~~(B) Exception for Substantial Assistance.~~—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing ~~pursuant to a government motion to reflect the defendant's substantial assistance to authorities~~, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. *In determining whether and to what extent to further reduce the term of imprisonment, the court should consider the term of imprisonment it would have imposed had the amendment been in effect at the time the defendant was sentenced, including whether and to what extent any policy considerations underlying its determination at the time of sentencing are reflected in the amended guideline range.*

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### Application Note 3

Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

~~If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.~~

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing ~~pursuant to a government motion to reflect the defendant's substantial assistance~~

~~to authorities.~~ In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months (*constituting a downward departure or variance pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing)*), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

*If the term of imprisonment constituted a variance based in whole or part on a policy disagreement with the guideline range applicable to the defendant at the time of sentencing, pursuant to 18 U.S.C. § 3553(a) and United States v. Kimbrough, 552 U.S. 85 (2007), a reduction comparably less than the amended range should not include that portion of the original reduction that was based on policy considerations fully reflected in the applicable amendment. Thus, if the term of imprisonment in the example provided above was 56 months based solely on the policy considerations underlying the applicable amendment, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months. If, on the other hand, the term of imprisonment constituted a variance of 7 months based on policy considerations reflected in the amended guideline range and an additional departure or variance of 7 months based on individualized offense or offender characteristics, a reduction to a term of imprisonment of 47 months (representing a reduction of approximately 10 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.*

~~The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).~~

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

## **II. Violence Against Women Reauthorization Act**

Our February 2014 testimony on the Violence Against Women Reauthorization Act addressed the most significant proposed amendments under the Act. Here, we comment on a few additional issues.

### **A. 47 U.S.C. §223 – Obscene or Harassing Phone Calls**

The Commission proposes referencing the three offenses under 47 U.S.C. §§ 223(a)(1)(A), 223(a)(1)(B) and 223(a)(2) to, among other guidelines, §2G2.2. Defenders oppose this reference. To maintain consistency, and to avoid unintended consequences of confusing the gravamen of a harassment offense with trafficking in child pornography, we believe the offenses should be referenced to §2A6.1, which is expressly focused on threatening or harassing communications, and to §2G3.1, which is directed at transferring obscene material to a minor. USSG §2A6.1 has a base offense level of 12; §2G3.1 has a base offense level of 10 with multiple enhancements directed at minors. Those guidelines are more than adequate to capture this conduct. To cross-reference to the much higher guidelines for trafficking in child pornography, which would start at a base offense level of 22, could well result in disparate treatment, where a single incident of harassment with one piece of child pornography is treated as harshly as trafficking in child pornography.

We also think it a grave mistake for the Commission to reference any of these offenses to §2G2.2 because that guideline has been often criticized, results in significant sentencing disparity, and needs significant revision. *See USSC, Report to the Congress: Federal Child Pornography Offenses, 207-245, 317 (2012).*

### **B. 18 U.S.C. § 1597 – Unlawful Conduct with Respect to Immigration Documents**

The Commission proposes to reference the misdemeanor offense at 18 U.S.C. § 1597 to §§2B1.1, 2H4.1, 2L1.1, and 2L2.2. It also requests comment on whether it should instead reference the offense to §2X5.2. Because this is a new offense, we believe the Commission should not provide specific references to a guideline governing other substantive offenses until more data is available regarding the nature of section 1597 offenses. The better course of action is to reference section 1597 offenses to the guideline for Class A Misdemeanors, §2X5.2. Such a reference has two benefits: it would permit courts the flexibility to sentence these defendants based on the circumstances of the offense, and allow the Commission to monitor the outcomes to determine if any pattern emerges that warrants a change in the guidelines.

The guideline provisions at §§2B1.1, 2H4.1, 2L1.1, and 2L2.2 have different base offense levels, ranging from 6, 8, and 12, to a high of 22. Because the section 1597 offense is a Class A misdemeanor, most of those guideline provisions would offer little help to the court unless they were revised. We think it unnecessary to complicate those guidelines with revisions

to account for the conduct in a section 1597 offense. Section 2X5.2, which is set at a base offense level 6, is sufficient for this misdemeanor offense.

### **III. Additional Comments on Proposal to Amend the Drug Guidelines**

Defenders offered extensive written testimony on the Commission's proposal to lower the offense levels in the Drug Quantity Table. Those comments are attached for ease of reference. Also attached is a copy of the chart Ms. Roth referred to during her testimony before the Commission on March 13, 2014, which shows the number of people in federal prison for drug offenses between 1980-2012.<sup>5</sup>

We again applaud the Commission's decision to propose this amendment and welcome the Commission's continued efforts to reexamine drug sentencing policy at a time of wide bipartisan support for reform. Here, we elaborate on several points that came up during the Commission's hearing.

#### **A. The Request for Encouraged Downward Departures in USSG §2D1.1**

In our testimony regarding the drug guideline, we encouraged the Commission to add two departure provisions: (1) a downward departure for cases where the purity of the drug overstates the seriousness of the offense, which would mirror the existing upward departure "based on unusually high purity," USSG §2D1.1, comment. n. 26(C); and (2) a downward departure in cases where drug quantity over-represents the defendant's role in the offense.<sup>6</sup>

At the Commission's hearing, a question was raised about why the Defenders would ask the Commission to add departure provisions when they no longer seemed to be a part of sentencing practice. Departure provisions are an important part of the guidelines that signal to judges the Commission's view that the guidelines may not provide for appropriate sentences in some cases. Defenders in the vast majority of districts argue for downward departures when they are provided for in the guidelines and when they are permitted to do so under plea agreements. And data supports that departure provisions remain a part of guideline sentencing. Notwithstanding the larger number of upward departure provisions in the Guidelines manual,

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<sup>5</sup> The chart was compiled by The Sentencing Project. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections* 3 (2013), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf).

<sup>6</sup> See *United States v. Garrison*, 560 F. Supp. 2d 83, 87 (D. Mass. 2008) (guidelines overemphasized "happenstance of the amount of drugs" and "under emphasized how minor Garrison's role was"); *United State v. Myles Haynes*, 20 Fed. Sent'g Rep. 284 (2008) ("while drug quantity is overvalued under the Guidelines, the defendant's minor role in the criminal activity is undervalued"). See also *United States v. Caruth*, 930 F.2d 811, 816 (10th Cir. 1991) (expressing concern about risk of double punishment when court used the quantity of drugs in deciding whether to give defendant a mitigating role adjustment).

more defendants receive downward departures than upward.<sup>7</sup> In FY 2012, judges used an upward departure – alone or in combination with a *Booker* variance – in 86 cases where §2D1.1 was the primary sentencing guideline. In contrast, judges used downward departure provisions in 782 §2D1.1 cases.<sup>8</sup>

**B. Encouraged Departure for Circumstances where the Weight of the Entire Mixture of a Substance Containing a Detectable Amount of a Drug Overstates the Dosages Involved and the Seriousness of the Offense.**

We requested in our testimony that the Commission provide for a departure where the weight of the entire mixture of a substance containing a detectable amount of a drug overstates the dosages involved and the seriousness of the offense. This departure provision would acknowledge that purity is a relevant sentencing factor.

Defenders have litigated these issues in several contexts. For example, hydromorphone – an opioid pain medication – comes in nearly equal pill weights for differing concentrations of the active ingredient. Hydromorphone tablets are supplied in 2 mg, 4 mg, or 8 mg forms. Each tablet contains five inactive ingredients.<sup>9</sup> A 2 mg tablet is 6mm in size. A 4mg tablet containing two times the amount of hydromorphone as a 2 mg tablet is only slightly larger in size – 7mm. Both tablets weigh about 90 mg each.<sup>10</sup> Because the entire weight of the tablet is included in calculating the guideline, and the potency of the tablet is irrelevant, the person who sells five hundred 2 mg tablets is subject to the same base offense level as the person who sells five hundred 4 mg tablets. Those who sell extended release capsules face the same disparate punishment. The active ingredient in an extended release capsule contains either 12, 16, 24, or 32 mg of hydromorphone. Because the guidelines find the potency irrelevant, the person who sells one hundred 12 mg extended release capsules is subject to the same penalty as a person who sells one hundred 32 mg capsules.

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<sup>7</sup> The Guidelines manual identifies 193 departure provisions – 136 of them are upward departures; 22 can run both ways; and only 35 of them are exclusively downward departures. See USSC, *Federal Sentencing Guidelines Manual*, List of Departure Provisions (2013).

<sup>8</sup> USSC, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2012) (hereinafter *2012 Sourcebook*).

<sup>9</sup> National Library of Medicine, National Institutes of Health, *Pillbox*, [http://pillbox.nlm.nih.gov/pillimage/search\\_results.php?getimprint=letters+or+numbers+on+either+side+of+the+pill&getshape=&getfirstcolor=&getsize=&getscore=0&getingredient=hydromorphone&getinactiveingredients=&getauthor=&getDEAschedule=&hide=1&submit=Search](http://pillbox.nlm.nih.gov/pillimage/search_results.php?getimprint=letters+or+numbers+on+either+side+of+the+pill&getshape=&getfirstcolor=&getsize=&getscore=0&getingredient=hydromorphone&getinactiveingredients=&getauthor=&getDEAschedule=&hide=1&submit=Search).

<sup>10</sup> This weight was reported by a West Virginia State Police lab report in a Defender case involving hydromorphone.

Market value of the drugs does not justify this similar treatment of dissimilarly situated defendants. Higher potency tablets are worth more money. And even in cases where two defendants might sell the exact same number of tablets in the same potency, the market prices can vary widely. The DEA reports that the street price of a 4mg tablet of Dilaudid – the brand name for hydromorphone – ranges from \$5 to \$100 per tablet depending upon the region.<sup>11</sup>

With drugs like heroin and cocaine, potency also matters in the market. The purer the substance, the greater its value. Hence, 200g of heroin cut with another drug or substance is worth less on the market than purer heroin.<sup>12</sup> The DEA recognizes the relevance of price and purity in drug trafficking. It regularly reports on the average price per milligram of pure heroin from different geographic regions and maintains retail level heroin price and purity data, as well as wholesale level purity data.<sup>13</sup> It does the same for methamphetamine. If potency is relevant to assessing the threat of drug trafficking, then it should be relevant in sentencing.

When Congress provided that the entire weight of the mixture should be counted toward determining the threshold quantities for mandatory minimum penalties, it may have been concerned that the effort to determine a drug's purity was not worth it. Drug purity, however, is not difficult to discern and is sometimes reported in lab analysis or as in the case with prescription medications, readily available from examining the pill or capsule. Laboratories located in states where the amount of pure heroin or cocaine is relevant under state law perform purity analysis on a routine basis while others will do it upon special request.<sup>14</sup>

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<sup>11</sup> Drug Enforcement Administration, Office of Diversion Control, *Hydromorphone*, [http://www.deadiversion.usdoj.gov/drug\\_chem\\_info/hydromorphone.pdf](http://www.deadiversion.usdoj.gov/drug_chem_info/hydromorphone.pdf).

<sup>12</sup> Drug Enforcement Administration, *FY 2014 Performance Budget Congressional Submission 16*, <http://www.justice.gov/jmd/2014justification/pdf/dea-justification.pdf>.

<sup>13</sup> The reports appear in the Heroin Domestic Monitor Program and the Heroin Signature Program, which are not generally available to the public. GAO, *DEA's Heroin Signature and Domestic Monitor Program 1* (2002). See also Jane Maxwell, *Substance Abuse Trends in Texas: June 2013* 10 (2013) (reporting DEA analysis of price per milligram of pure heroin purchased in Dallas, El Paso, Houston, and San Antonio).

<sup>14</sup> Drug Enforcement Administration, *National Forensic Laboratory Information System 2011 Annual Report 21* (2011), [http://www.deadiversion.usdoj.gov/nflis/2011annual\\_rpt.pdf#xml=http://search.deadiversion.usdoj.gov/text/search/pdfhi.txt?query=purity&pr=Prod-static-walk&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=2&order=r&cq=&id=511dd838d](http://www.deadiversion.usdoj.gov/nflis/2011annual_rpt.pdf#xml=http://search.deadiversion.usdoj.gov/text/search/pdfhi.txt?query=purity&pr=Prod-static-walk&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=2&order=r&cq=&id=511dd838d).



### **C. The Role of Drug Quantity and a Guideline That Better Captures the Harms and a Defendant's Culpability in the Offense**

At the Commission's hearing, some of the discussion focused on delinking the guidelines from the mandatory minimum thresholds and how drug quantity should be considered in the sentencing decision. Consistent with the Commission's findings in its various cocaine reports, we believe that quantity fails to track role in the offense as Congress envisioned and thus it would be appropriate for the Commission to revisit how the drug guideline is structured. This is not to say that drug quantity is irrelevant to the sentencing decision. It just should not be used as the primary driver of the offense level.

If the Commission is interested in exploring ways to revise the drug guideline to better account for the relevant factors, we would be happy to work with the Commission on ways that might be done. While we are not prepared to endorse any particular revision of the guideline, and believe that more study is needed, we note that one commentator has already explored the issue, suggesting that the guideline structure be reversed so that it uses "role in the offense as a principle sorting mechanism, and weight of narcotics as a way to then adjust the result to differentiate between large and small operations." Mark Osler, *More than Numbers: A Proposal for Rational Drug Sentences*, 19 Fed. Sent'g Rep. 326 (2007)<sup>15</sup>.

Empirical data from other sources could also help the Commission revise the drug guideline. For example, typical dosage amounts may help provide a better ranking of the severity of punishment for different drugs. The current guidelines produce widely disparate outcomes when looking at typical dosage amounts – the drug quantities set at base offense level 26 represent 1000 typical doses of heroin, but only 20-200 typical doses of a meth mixture, and 2500 to 5000 doses of powder cocaine.<sup>16</sup> Also relevant is a measure of a drug's overall harm, which examines "they physical harm to the individual user caused by the drug; the tendency of the drug to induce dependence; and the effect of drug use on families, communities, and societies."<sup>17</sup>

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<sup>15</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1263565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263565).

<sup>16</sup> This information is derived from the European Monitoring Centre for Drugs and Drug Addiction, <http://www.emcdda.europa.eu/drug-profiles>.

<sup>17</sup> See David Nutt et. al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, *Health Policy* 369 *The Lancet* 1047 (2007), <http://www.somaschi.it/Files/Public/NewsCategories/3/5/5AttachmentArticolo%20Lancet.pdf>. See also David Nutt et. al., *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 *The Lancet* 1558 (2010).

We are eager to discuss these and other ideas about ways that the drug guidelines might be redrawn to better capture culpability and offense seriousness, and stand ready to work with the Commission if it is interested in further considering this idea.

#### **D. Lessons from New York State**

At the hearing, some Commissioners raised questions about whether the experience of the states in lowering penalties for drug offenses and providing for justice reinvestment applied to the federal population. As briefly mentioned in our written testimony, we believe that the federal criminal justice system can learn from states, like New York, that prosecute felony drug cases. Here, we expand on our discussion of New York's experience with changes in the Rockefeller Drug laws and its relevance to the Commission's policy making.

Forty years ago, New York passed strict sentencing guidelines known as the "Rockefeller drug laws." Those laws, like federal mandatory minimum penalties and the guidelines, put lower-level drug traffickers behind bars for long periods of time. Many of those individuals came from poor black and Hispanic neighborhoods. Their stories are much like the stories of federal inmates the Commission has heard about for years.

The recidivism study referred to in our written testimony contains data for A-level felony drug defendants released after reform to the Rockefeller Drug Laws in 2004, which reduced sentences for drug offenses. A-I felonies were the most severe level of drug convictions under the law, followed by A-II felonies. A-level felonies involve larger quantities of drugs whereas B-level felonies include sales by street-level operators and drug possession. "The overall recidivism rate of the A-I felons who were released after being resentenced [was] 6.81%."<sup>18</sup> The rate for A-II felons was 10.10%. The recidivism rates for new criminal charges were strikingly low: 2.51% for A-I felons and 2.02% for A-II felons.<sup>19</sup> That New York could reduce the sentences of the most serious felony drug defendants without increasing the risk to the public demonstrates that the modest reduction in sentence length the Commission has proposed will not increase the risk to public safety and is a wise public policy choice.

#### **E. The Mitigating Role Cap at §2D1.1(a)(5) Should be Reduced by 2 Levels.**

Some of the discussion at the Commission's hearing focused on how mitigating role adjustments are designed to limit the effect of drug quantity in cases where the defendant plays a low-level role in drug trafficking. Defenders, like many judges, believe that the guidelines should allow for role adjustments greater than 4 levels. Close to half of judges surveyed by the Commission (47%) believed that the range of adjustments for role in the offense should be

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<sup>18</sup> *Id.* at 4-9. Recidivism rates reported here include parole violations and new charges.

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

greater.<sup>20</sup> More than one-quarter (28%) were neutral on the question. This data supports the recommendation of the Practitioner’s Advisory Group that the Commission reduce the effect of drug quantity on individuals who play mitigating roles in drug trafficking.<sup>21</sup> We join in that recommendation.

An offense level role cap of 30 for a minimal participant, who is “plainly among the least culpable of those involved in the conduct of a group,” USSG §3B1.1, comment. (n.4), would result in a guideline range of 70-87 months imprisonment for a person with no criminal history and who receives an adjustment for acceptance of responsibility. That sentence is above the five-year mandatory minimum that Congress contemplated for serious traffickers. In short, a 2-level reduction in the mitigating role cap would move closer to more fair and just sentences for the least culpable people convicted of drug offenses.

#### **IV. Proposed Amendment 5 – §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)**

Section 2L1.1 provides for a 2-level increase and a minimum offense level of 18 if “the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.”<sup>22</sup> The commentary currently provides a non-exclusive list of examples of the type of conduct considered to be reckless for purposes of applying this enhancement. The Commission proposes adding another example: “guiding persons through, or abandoning persons in, dangerous terrain without adequate food, water, clothing, or protection from the elements.” Defenders oppose this proposed amendment. Adding this example to the commentary will not serve the purposes of sentencing and injects unnecessary complication into the guidelines.

##### **A. The Proposed Amendment Will Not Serve the Purposes of Sentencing.**

###### **1. Undue Severity**

The current guideline leads to recommended sentences that are too severe for many of the individuals who are prosecuted for smuggling, transporting or harboring unauthorized migrants. Defenders fear the proposed amendment would only exacerbate the problem.

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<sup>20</sup> USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Q. 9, Role in the Offense (2010).

<sup>21</sup> Testimony of David Debold, Practitioners Advisory Group, Before the U.S. Sentencing Comm’n, Washington, D.C., at 9 (Mar. 13, 2014).

<sup>22</sup> §2L1.1(b)(6).

To understand why the current guideline produces recommended ranges that are unduly severe, it is necessary to review some of the history of this guideline. The current severity of the §2L1.1 traces its origins to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-566. In the IIRIRA, Congress directed the Commission to increase penalties for offenses related to smuggling, transporting, harboring, or inducing aliens in violation of 8 U.S.C. § 1324(a). Among other things, Congress directed the Commission to:

- A. “increase the base offense level for such offenses at least 3 offense levels above the applicable level in effect on the date of the enactment of this Act”;
- B. increase the enhancement for number of aliens “by at least 50 percent”;
- C. “impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense”;
- D. “impose an additional appropriate sentencing enhancement upon an individual with 2 or more prior felony convictions arising out of separate and prior prosecutions for offenses that involve the same or similar underlying conduct as the current offense”
- E. “impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection –
  - i. murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;
  - ii. uses or brandishes a firearm or other dangerous weapon; or
  - iii. *engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury.*”<sup>23</sup>

The Commission responded to this directive by promulgating proposed amendments to §2L1.1, many of which provided for sentencing ranges far more punitive than what Congress directed in the IIRIRA. The National Association of Criminal Defense Lawyers, the American Bar Association, and the Federal Public and Community Defenders all requested that the Commission “amend to meet the statutory directive, not go it one better.”<sup>24</sup> The Committee on

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<sup>23</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 203, 110 Stat. 3009-566 (hereinafter IIRIRA) (emphasis added).

<sup>24</sup> Letter from Judy Clarke, President, National Association of Criminal Defense Lawyers, to the Honorable Richard P. Conaboy, Chair, U.S. Sentencing Comm’n, attaching NACDL’s Comments on Emergency Amendments, at 1 (Feb. 4, 1997). *See also* Letter from Thomas W. Hillier, II, Federal Public

Criminal Law of the Judicial Conference of the United States also weighed in. The Honorable George P. Kazen, then Chief Judge for the Southern District of Texas and Chair of the Committee on Criminal Law of the Judicial Conference of the United States “urge[d] the Commission to proceed cautiously in making upward adjustment higher than those mandated by Congress,” to §2L1.1, noting among other things that “the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings. In fact, often the defendant is himself an undocumented alien selected by the ‘coyote’ to drive or guide the group for a discounted fee.”<sup>25</sup>

The Commission, however, without explanation or evidence supporting the need to do so, amended the guidelines in a manner that was far more punitive than Congress directed.<sup>26</sup> In addition to raising the base offense level by 3 levels,<sup>27</sup> and the enhancement for number of aliens by 50% as directed, the Commission provided a 2-level enhancement with a floor of 18 if “the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.” §2L1.1(b)(5) (1997).<sup>28</sup>

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Defender Western District of Washington on behalf of the Federal Public and Community Defenders, to the Honorable Richard P. Conaboy, Chair, U.S. Sentencing Comm’n, at 1-11 (Feb. 4, 1997) (“without data indicating that the resulting offense levels are inadequate, there is no rationale for raising the offense levels higher than the legislation requires”; opposing proposed amendment for number of aliens that “unnecessarily increases punishment beyond the 50 percent required by the legislation”; opposing overly-broad recidivist enhancements; opposing minimum offense levels and other parts of the proposed amendment that “do not strictly conform to the legislative directive” regarding firearm enhancements; objecting to both proposals for risk of death or serious bodily injury because “[n]either option responds to the Congressional mandate”; objecting to the proposed enhancement for bodily injury or death because it exceeds the directive that was limited to acts of the defendant); Comment of the American Bar Association to the United States Sentencing Commission on Proposed Emergency Amendments to the Federal Sentencing Guidelines, at 1 (Feb. 4, 1997) (“we recommend that the base offense levels ... be increased by the least amount required by the applicable legislative directive”; “we believe the Commission bears the burden of justifying any additional increases. Since no data supporting the need for something more onerous has been offered and without any other rationale or argument provided to explain or support the larger increases, we conclude that this burden has not been met.”).

<sup>25</sup> Letter from the Honorable George P. Kazen, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Richard P. Conaboy, Chair, U.S. Sentencing Comm’n, at 2 (Feb. 4, 1997).

<sup>26</sup> See USSG App. C, Amend. 543, Reason for Amendment (May 1, 1997) (stating only: “This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-566, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harming illegal aliens.”).

<sup>27</sup> This raised the base offense level for most offenses under 8 U.S.C. § 1324(a) from 9 to 12.

<sup>28</sup> USSG App. C, Amend. 543 (May 1, 1997).

The enhancement for risk of serious bodily injury or death was both more wide-reaching and more severe than what Congress required. It was more wide-reaching because it swept in not only risk arising from the conduct of the defendant, but also risk arising from the conduct of others. The directive called only for an enhancement if “*a defendant*... engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury.”<sup>29</sup> But the Commission amended the guideline to provide an enhancement if “*the offense* involved intentionally or recklessly creating a substantial risk of death or serious bodily injury.”<sup>30</sup> This means that a defendant is held accountable for the reckless conduct of another if it is deemed foreseeable. For example, in *United States v. Chapa*, 362 F. App’x 411 (5th Cir. 2010), Mr. Pacheco-Pina led a group of migrants through the South Texas brush to avoid a checkpoint near Laredo.<sup>31</sup> Mr. Pacheco-Pina got lost, so the trip that should have taken 6 hours took 36 hours.<sup>32</sup> And Mr. Pacheco-Pina did not bring “sufficient food or water for the group.”<sup>33</sup> When the group passed the checkpoint, Mr. Pacheco-Pina called the defendant, Mr. Chapa, and told him where to meet the group.<sup>34</sup> Mr. Chapa arrived in a sport utility vehicle.<sup>35</sup> The court applied the enhancement under §2L1.1(b)(6) to Mr. Chapa because it was reasonably foreseeable that the migrants “would walk through the brush.”<sup>36</sup>

The enhancement the Commission promulgated was more severe because Congress did not direct the Commission to establish a minimum offense level for this conduct, and certainly not one as high as level 18. At the time of this amendment, a similar enhancement in the fraud guideline, §2F1.1 (now §2B1.1), provided for a minimum offense level of 13.<sup>37</sup> In addition, the

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<sup>29</sup> IIRIRA (emphasis added).

<sup>30</sup> USSG App. C, Amend. 543 (May 1, 1997) (emphasis added).

<sup>31</sup> *Chapa*, 362 F. App’x at 413.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Section 2F1.1(b)(4) (1997) provided: “If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.” The new fraud guideline, §2B1.1, is not significantly different. It provides: “If the offense involved (A) the conscious or reckless risk of death or serious bodily injury or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than **14**, increase to level **14**.” §2B1.1(b)(15).

Commission opted to make this new enhancement cumulative with the two other new enhancements related to harm or risk of harm to the immigrants who are smuggled, transported or harbored: (1) firearms and dangerous weapons, and (2) death and serious bodily injury. This, too, stood in contrast with §2F1.1 which provided the 2-level enhancement as an alternative enhancement for risk of serious bodily injury, *or* possession of a dangerous weapon. The directive did not require that these three new enhancements apply cumulatively. The language of the directive, “or” supports an interpretation that Congress only intended them to apply in the alternative.<sup>38</sup>

The cumulative nature of the enhancements is particularly troubling because the Commission decided to expand the reach of the other two enhancements, like it did for risk of serious bodily injury or death, beyond the conduct of the defendant to include the conduct of others. The Congressional directive called for enhancements where *a defendant* (i) “murders or otherwise causes death, bodily injury, or serious bodily injury to an individual”; or (ii) “uses or brandishes a firearm or other dangerous weapon,” but the Commission amended §2L1.1 to apply whenever *the offense* involved such conduct, whether it was the conduct of the defendant or someone else.<sup>39</sup> In addition, the Commission added an enhancement for the mere possession of a dangerous weapon, even though the directive called for an enhancement only for “using” or brandishing” a firearm or dangerous weapon.<sup>40</sup>

The Commission also added a recidivist provision that applies more broadly than what Congress directed. Congress directed the Commission to impose enhancements for offenders with prior felony convictions “arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense.”<sup>41</sup> Rather than limiting the recidivist enhancement to prior alien smuggling, transporting, and harboring offenses, the Commission provided enhancements for any prior “felony immigration and naturalization offenses.”<sup>42</sup> Thus, although a conviction for fraudulently using a passport, or obtaining a false work permit for one’s own use are not “the same or similar” to alien smuggling, transporting, or harboring offenses, they may now be used to enhance a sentence, in addition to counting in the calculation of criminal history.

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<sup>38</sup> IIRIRA.

<sup>39</sup> Compare IIRIRA with USSG App. C, Amend. 543 (May 1, 1997).

<sup>40</sup> Compare IIRIRA with USSG App. C, Amend. 543 (May 1, 1997).

<sup>41</sup> IIRIRA.

<sup>42</sup> USSG App. C, Amend. 543 (May 1, 1997).

Finally, although no Congressional directive told it to do so,<sup>43</sup> the Commission added a cross-reference to the murder guidelines “[i]f any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States.”<sup>44</sup>

The march toward increased severity under §2L1.1 did not stop in 1997. In 2006, without any Congressional directives regarding §2L1.1, the Commission made several amendments, all of which increased the guideline ranges. The amendments included: (1) increasing the base offense level to 25 where a defendant is convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3); (2) adding a 2-level enhancement “[i]f the defendant smuggled, transported or harbored a minor who was unaccompanied by the minor’s parent or grandparent”; (3) increasing the enhancement from 8 levels to 10 levels if death results from the offense; (4) adding a 2-level enhancement and minimum offense level of 18 “[i]f an alien was involuntarily detained through coercion or threat, or in connection with a demand”; (5) adding a 2-level enhancement if the defendant “was convicted under 8 U.S.C. § 1324(a)(4)”; and (6) expanding the cross-reference to apply not only when there has been a “murder” but whenever “death resulted” from the offense.<sup>45</sup>

Then, in 2009, the Commission increased the severity of the guideline once again. This time, the Commission added an alternate prong to the enhancement at subsection (b)(8)(B), to apply either a 2-level increase in a case where the defendant was convicted of alien harboring, the harboring was for the purpose of prostitution, and the defendant receives an adjustment under §3B1.1, or a 6-level increase in a case where those conditions are met and the alien engaging in the prostitution had not attained the age of 18 years.<sup>46</sup> This amendment was made in response to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, which included a directive to the Commission to “review and, if appropriate, amend” §2L1.1 if “the harboring was committed in furtherance of prostitution” and the defendant “is an organizer, leader, manager, or supervisor of the criminal activity.”<sup>47</sup>

Despite these changes to the guidelines, the comments of Judge Kazen in 1997 are still true today: many defendants are “not the main organizers of smuggling rings but rather low-level underlings”; often, the defendant “is himself an undocumented alien selected by the

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<sup>43</sup> IIRIRA.

<sup>44</sup> USSG App. C, Amend. 543 (May 1, 1997).

<sup>45</sup> USSG App. C, Amend. 692 (Nov. 1, 2006).

<sup>46</sup> USSG App. C, Amend. 730 (Nov. 1, 2009).

<sup>47</sup> *Id.*, Reason for Amendment.



‘coyote’ to drive or guide the group for a discounted fee.”<sup>48</sup> Well over half of the defendants fall within Criminal History Category I (65.2%).<sup>49</sup> Roughly half of those sentenced are U.S. citizens (50.3%) and the other half are not (49.3%).<sup>50</sup>

Many of our clients who are charged with violating 8 U.S.C. §1324(a), and sentenced under §2L1.1, are themselves customers of smuggling operations. Sometimes, our clients agree to become “guides” before leaving Mexico. They may be offered a reduction in their own smuggling fee to work as a “guide” during the unauthorized crossing to the United States they had already hoped to make, as an immigrant, not a guide. This situation often arises when our client has already expended significant resources just getting to the border and whose desperation to complete the journey is capitalized upon by the smuggling operation.

In one case, for example, Defenders represented a man who was approximately 36-years-old. He had six years of schooling and had been working as an agricultural worker in his home town in Chiapas, Mexico, in the southern part of Mexico, since he was 12-years-old. He had previously entered the United States to work in restaurants and as a janitor to supplement his income and keep his family from extreme poverty. Because of increased enforcement at the border, to cross the border this time he decided to seek the help of smugglers. He was charged \$3,000. Before he left Mexico, the smugglers offered him a reduction in his smuggling fee if he would agree to lead a group of people through the desert. He had never done this before. The smugglers gave him a crash course on what to do, and directions on where to lead his group. He did not know any of the smugglers and simply followed the directions in exchange for the fee reduction. His conviction for transporting illegal aliens was his first and only criminal conviction.

In other cases, our clients become guides en route, when they may be offered a discount in their smuggling fee, or simply ordered to become secondary guides. Thus would-be migrants are suddenly exposed, in a haphazard way, to smuggling consequences. For example, in one case, when a group of migrants arrived at the vehicle, the smuggler turned to the group and asked, “Who here knows how to drive?” The client, who exhibited lower functioning mental ability, proudly shot his hand up in the air. Other clients become “guides” by default when they are abandoned by the original guide, and step in to lead the group along.

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<sup>48</sup> Letter from the Honorable George P. Kazen, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Richard P. Conaboy, Chair, U.S. Sentencing Comm’n, at 2 (Feb. 4, 1997).

<sup>49</sup> *2012 Sourcebook* tbl. 49.

<sup>50</sup> *2012 Sourcebook* tbl. 48.

In still other cases our clients are poor U.S. citizens who agree to be drivers because they are desperate for the money. In one case, for example, Defenders represented an 18-year-old boy with no criminal history who had dropped out of high school and was living with his 17-year-old common law wife and their 6-month-old baby. This boy grew up in the United States, but did not speak much English. He was working two jobs, at Burger King and Popeyes, in an effort to provide for his young family. Feeling desperate, he succumbed to the temptation of the cash fee he would receive for picking up and transporting a group of migrants who had entered the United States. In another case, Defenders represented a single mother of four children who worked as a cashier at a convenience store, and had no criminal history. When she could not make her mortgage payments, and was concerned about keeping a roof over her children's heads, she agreed to be a driver for unauthorized migrants.

The guideline in its current form is very well-equipped to appropriately punish the most serious smuggling offenses, but fails to adequately address, and provide appropriate sentencing ranges for these less culpable defendants. The proposed amendment would only make that problem worse by requiring increased sentences in cases that may not warrant such enhancement.

## 2. Deterrence

Defenders are very concerned that the conditions migrants face as they attempt unauthorized crossing of the southwest U.S. border leads to too many injuries and too many deaths. But we cannot sentence our way out of this problem. As explained below, “[t]he deaths of migrants are a direct product of border security enforcement that has been designed and implemented at the federal level.”<sup>51</sup> Adding the proposed example to the sentencing guidelines will not deter individuals from guiding migrants desperate to reach the United States through dangerous terrain.

The problem with increased rates of injury and death associated with migrants' unauthorized attempts to cross the border, like the problem of undue severity in §2L1.1, began in the 1990s. The United States implemented a border enforcement strategy called “Prevention Through Deterrence.”<sup>52</sup> “The strategy concentrated border agents and resources along populated areas, intentionally forcing undocumented immigrants to extreme environments and natural barriers that the government anticipated would increase the likelihood of injury and death. The

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<sup>51</sup> Maria Jimenez, ACLU of San Diego & Imperial Counties and Mexico's National Commission of Human Rights, *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*, at 9 (Oct. 1, 2009), <https://www.aclu.org/immigrants-rights/humanitarian-crisis-migrant-deaths-us-mexico-border>.

<sup>52</sup> Chad C. Haddal et al., Congressional Research Service Report for Congress, *Border Security: Barriers Along the U.S. International Border*, at 1 (Mar. 16, 2009) (hereinafter *CRS Barriers*), <http://www.fas.org/sgp/crs/homesec/RL33659.pdf>.

stated goal was to deter migrants from crossing.”<sup>53</sup> It is widely accepted that this strategy was “effective in reducing the number of apprehensions” in urban areas of the border.<sup>54</sup> But this did not deter migrants from attempting unauthorized crossings. Instead “there is considerable evidence that the flow of illegal immigration has adapted to this enforcement posture and shifted to the more remote areas” of the border.<sup>55</sup> In these areas, “migrants must frequently walk long distances through desert, brush, and/or mountains to evade immigration checkpoints on the main highways leading away from the border.”<sup>56</sup>

As a result of this strategy, there “has been an increase in the number of migrant deaths.”<sup>57</sup> Migrants must also rely more on smugglers.<sup>58</sup> Though estimates vary on the number of migrants that hire a smuggler, some are as high as 90%.<sup>59</sup>

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<sup>53</sup> Jimenez, *supra* note 51, at 7.

<sup>54</sup> *CRS Barriers*, at Summary; David Spener, *Mexican Migrant-Smuggling: A Cross-Border Cottage Industry*, 5 J. Int’l Migration & Integration 295, 296 (Summer 2004), <http://www.trinity.edu/dspener/clandestinecrossings/related%20articles/cross%20border%20cottage%20industry.pdf>.

<sup>55</sup> *CRS Barriers* at Summary; Spener, *supra* note 54, at 296-97.

<sup>56</sup> Spener, *supra* note 54, at 297.

<sup>57</sup> *CRS Barriers*, at 33; Chad C. Haddal, Congressional Research Service Report for Congress, *Border Security: The Role of the U.S. Border Patrol*, at 27 (Aug. 11, 2010) (“[E]vidence suggests that border crossings have become more hazardous since the ‘Prevention through Deterrence’ policy went into effect in 1995, resulting in an increase in illegal migrant deaths along the Southwest border.”), <https://www.fas.org/sgp/crs/homsec/RL32562.pdf>. See also Jimenez, *supra* note 51, at 23 (discussing “[g]rowing academic research has substantiated that these policies and strategies have made border crossing difficult, dangerous and even life-threatening”); Raquel Rubio-Goldsmith, et al., *The “Funnel Effect” & Recovered Bodies of Unauthorized Migrants Processed by The Pima County Office of The Medical Examiner, 1990-2005*, at 2 (Oct. 2006) (“findings unambiguously confirm previous evidence that [prevention through deterrence] U.S. policies did create the ‘funnel effect’ and that it is indeed the primary structural cause of death of thousands of North American, Central American, and South American unauthorized men, women, and children who have died while trying to enter the U.S.”), <http://www.ilw.com/articles/2007,0305-rubio1.pdf>.

<sup>58</sup> Spener, *supra* note 54, at 295 (“As the United States has intensified surveillance of its southern border with Mexico, unauthorized migrants have become increasingly dependent of hired smugglers when they cross the border and reach their destinations in the US interior.”); Jimenez, *supra* note 51, at 14 (“instead of dissuading unauthorized border crossings, accelerated militarization of the border has led to migrant dependency on smugglers, a decline in rates of migrant returns to countries of origin, and an increase in migrant deaths”).

<sup>59</sup> *Human Smuggling: Calling on the Coyotes*, *The Economist* (Sept. 14, 2010) (citing a “new report from the United Nations Office on Drugs and Crime”), [http://www.economist.com/blogs/democracyinamerica/2010/09/human\\_smuggling](http://www.economist.com/blogs/democracyinamerica/2010/09/human_smuggling). See also Spener,

The increased difficulty of crossing the border has not deterred migrants from attempting unauthorized crossings. “[R]esearch studies have found that migrants are well aware that border crossings are treacherous and deadly, but this knowledge is not statistically significant in their decision on whether or not to cross without authorization.”<sup>60</sup> One study which surveyed Mexican immigrants in 2007 and 2008 found that the even though most migrants contemplating an unauthorized crossing are aware of the risks, they are not deterred: “91 percent of the migrants surveyed believed it was ‘very dangerous’ to cross the border illegally and 24 percent knew someone who died trying – yet still the migrants attempted to come themselves, viewing they had no viable legal alternative if they wanted to work in the United States.”<sup>61</sup>

In light of this high demand for guides, incapacitating one through a long prison sentence has little effect in reducing the incidence of migrant smuggling.<sup>62</sup> And we already know that incremental increases in prison sentences are not an effective deterrent, since this increased reliance on smugglers occurred at a time when the guidelines were amended to provide for increased sentences.

It should be noted that although smugglers are often forced to take migrants across dangerous terrain if they are to successfully complete an unauthorized crossing, the guides have incentives to care for the migrants as best they can. One researcher gives at least two reasons it is in a guide’s interest to take good care of the migrants in his charge. First it is often in the guide’s pecuniary interest to ensure safe passage because “migrant smuggling to a significant extent remains a cash-on-delivery business in that the *coyotes* do not receive half or more of their fee until migrants are safely delivered,” and “guides are often paid per head.”<sup>63</sup> Second, safe delivery is important in “ensur[ing] a future supply of customers”: “because a *coyote*’s reputation

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*supra* note 54, at 298 (“According to data from the Mexican Migration Project and surveys conducted by the Colegio de Michoacan, since the 1980s, about three quarters of Mexican men have employed paid guides to make their first unauthorized crossing of the border. Accounts in the press and research reports from the field suggest that today guides are employed for most crossings attempted.”).

<sup>60</sup> Jimenez, *supra* note 51, at 32-33.

<sup>61</sup> Stuart Anderson, National Foundation for American Policy Brief, *How Many More Deaths? The Moral Case for a Temporary Worker Program*, at 5 (March 2013).

<sup>62</sup> As the Commission has observed: “[R]etail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” USSC, *Fifteen Years of Guideline Sentencing An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 134 (2004).

<sup>63</sup> Spener, *supra* note 54, at 308.

can travel quickly by word of mouth through migrants' social networks, it is worthwhile for *coyotes* to protect their reputations as relatively safe, honest and reliable.”<sup>64</sup>

## **B. Unnecessary Complexity**

As the Commission is aware, adding examples to the guidelines is tricky business. We caution the Commission against adding this additional example to the commentary without evidence that it is essential. No such evidence exists here.

Examples in the commentary run the risk of being both over-inclusive and under-inclusive. As indicated above, it is already too easy for less culpable defendants to reach high recommended guideline ranges under this guideline. We fear this example would exacerbate the problem. Imagine, for example, a situation where Migrant A is part of a group being guided by Migrant B who paid off part of his smuggling fee by agreeing to guide a group across the Texas brush to a rendezvous point where they would be met by a driver. Migrant B was told the journey would take 1 day. But Migrant B got lost, and the group wandered around the Texas brush for 4 days. They ran out of food and water on the second day. On that 4th day, a few members of the group, including Migrant A, decided to break off and try their luck on their own. Migrant A became the de facto guide for this subgroup. Unfortunately he did not know his way through the brush either, and it was another day before they made it to a location where they could call for a pickup. Under the proposed amendment, Migrant A not only could be charged with violating 8 U.S.C. § 1324(a), but also could be subject to the enhancement under §2L1.1(b)(6) because his offense involved “guiding persons through... dangerous terrain without adequate food, water, clothing, or protection from the elements.” Never mind that he was actually trying to save himself and the other members of his group from the terrain they found themselves lost in, without adequate food and water.

This example, like others may also prove to be under-inclusive. Some courts construe examples as limiting, and if the case does not fit within the specified examples, the judge may conclude the enhancement does not apply. The longer the list of examples, the greater this effect may be: as the examples cover more and more of the covered conduct, the conduct that is not specifically mentioned is more likely to be considered outside the reach of the enhancement. The Department of Justice implicitly recognizes this problem in its request that the proposed amendment refer to “dangerous or remote geographic area” for fear the term “dangerous terrain” might exclude river and canal crossings and other appropriate locations.”<sup>65</sup> But expanding this language as the Department suggests does not solve the problem that any conduct not construed

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<sup>64</sup> *Id.* at 310.

<sup>65</sup> Letter from Jonathan J. Wroblewski, Director, Office of Policy & Legislation, Dept. of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 23 (Mar. 6, 2014).

as falling within the examples may be excluded from consideration, even when, absent the examples, a court might conclude the “offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.”

Examples also lead to tangential litigation. If the Commission adds this example to the commentary, litigation will likely arise over a number of different issues. For example, what is the meaning of “dangerous terrain”? Is it an objective or subjective standard? And must the terrain always be dangerous, regardless of weather and season, or must it only be dangerous when the defendant, or someone else whose conduct is deemed foreseeable to the defendant, is guiding persons through it. Would it apply to a dry river bed? What about to the same river bed when it is full of water? Similar questions arise about adequate food and water and protection from the elements. Is it an objective or subjective standard? Is it assessed based on the weather during the offense, what the weather usually is during that season, or what the weather can become at its most extreme? Is it determined based on the 1-day trip it should be, the 7-day trip it could have become, or the 3-day trip it actually was?

We fail to see how this approach is better than leaving things as they are and asking courts to consider a full range of factors that may be relevant to the important question: whether “the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person” based on the totality of the circumstances. In addition to the factors identified in the proposed example, courts have recognized other relevant factors including: weather/temperature, what the migrants were told regarding the length of the journey, rest periods, actual death and/or serious bodily injury, whether the defendant was aware of the potential dangerous conditions of the journey, and time of day/night.<sup>66</sup> Asking courts to consider the full range of relevant factors as they do now is no more burdensome, and arguably less burdensome, than asking them to determine whether the offense falls within the example.

### **C. Issues for Comment**

All three of the issues for comment erroneously suggest the guideline is not sufficiently punitive. All three also attempt to address consequences from a border safety strategy that was intentionally designed to force migrants seeking unauthorized entry into the United States to more dangerous regions of the border. Because, as discussed above, we believe both that the guideline is sufficiently punitive and that we cannot sentence our way out of problems created by border policies, we oppose per se rules for desert-like terrain and mountainous regions, oppose amending the guidelines to provide increased penalties for damage to private lands, and oppose increasing sentences to account for resources spent on border patrol search and rescue teams.

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<sup>66</sup> See, e.g., *United States v. Garcia-Guerrero*, 313 F.3d 892, 897 (5th Cir. 2002); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1059 (9th Cir. 2001); *Chapa*, 362 F. App'x at 413.

Defenders strongly oppose a per se rule that would direct application of subsection (b)(6) in any case involving transportation through desert-like terrain and mountainous regions. In some cases, the journeys across this terrain are relatively short, as migrants leave the roads to circumvent a check point. As those who work and recreate in this terrain know, what is key is being prepared for the conditions and the amount of time that will be spent in the conditions. Thus, not every crossing involving this terrain should be treated as inherently dangerous, without consideration of the time spent in the terrain and the steps taken to address the conditions.<sup>67</sup> The current requirement that the offense “recklessly create[ed] a substantial risk of death or serious bodily injury” is not a difficult standard to meet. When factors such as whether the migrant was misinformed regarding the length of the journey, whether the guide denied adequate rests or water in 100 degree weather, or forced river crossings during flash floods, alone or in combination with one another and other factors, demonstrate recklessness, the enhancement applies. We believe a per se rule would unnecessarily sweep in conduct that is not inherently dangerous, resulting in penalties that are too severe. And, as mentioned above, because of the high demand for help crossing the border, a per se rule would not advance goals of deterrence.

In addition, we see no reason to add additional enhancements to the guidelines to address damage to private land and resources spent on border patrol search and rescue teams. In addition to the already unnecessarily severe guideline recommended ranges under §2L1.1, departure provisions in Chapter 5 may address these concerns in appropriate cases. Section 5K2.5 provides and upward departure for property damage and loss,<sup>68</sup> and §5K2.7 provides and upward departure for disruption of government function. Additional enhancements are not necessary to address culpability, and any incremental increase for such conduct will not have a deterrent effect in light of the high demand for help crossing the border.

## **V. 5D1.2**

### **A. Option 1 is the Better Rule for Cases Involving Statutory Minimum Terms of Supervised Release.**

The Commission sets forth two options for resolving the circuit conflict regarding how to calculate the guideline range for supervised release in cases with a statutory minimum term of supervised release. Defenders encourage the Commission to adopt Option 1 because (1) it more closely tracks existing practices; (2) it provides for supervised release terms that will facilitate

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<sup>67</sup> See *United States v. Troop*, 514 F.3d 405, 410 (2008) (holding that “the fact that the aliens walked some distance in ninety-degree heat and showed signs of fatigue at the end of their journey . . . alone is insufficient to demonstrate exigent circumstances” justifying a warrantless search).

<sup>68</sup> Restitution is also an option in some cases.

reentry without increasing the risk to public safety; and (3) discharges the Commission's statutory obligations.

First, the Commission's data analysis supports Option 1. From January 2005 through the end of FY 2009, 119,533 defendants were convicted under drug trafficking statutes that required mandatory minimum terms of supervised release. "Courts imposed supervised release for 99.6 percent of those sentenced to prison, and the average supervised release term for these offenders was 52 months." USSC, *Federal Offenders Sentenced to Supervised Release* 51 (2010). This data shows that judges do not believe lengthier terms of supervised release, which Option 2 would provide for, are necessary in most cases. More limited terms of supervision acknowledge that supervised release terms are meant "to facilitate the integration of offenders back into the community rather than to punish them." *Id.* at 9.

Second, keeping supervised release terms at or near the mandatory minimum will not present an increased risk to public safety. The majority of defendants subject to mandatory supervised release terms have been convicted of drug offenses. These defendants have a "relatively high successful closure rate of 70.8 percent among actively supervised cases," and a high rate of early termination of supervised release. *Id.* at 64-65. And as the Commission's data, and that of other researchers show, supervisees who commit violations that result in revocation typically do so early in the supervision process. *Id.* at 63 & n. 264.

Third, Option 1, which sets a meaningful range that can guide the court in deciding on a term of supervised release, is in keeping with the Commission's statutory duty to set forth guidelines on the appropriate range of supervised release. 28 U.S.C. § 994(a)(1)(C). Option 2 merely follows the wide range of options available by statute, which by implicit default tops out at life in all cases involving a statutorily required minimum term of supervision. The Commission should not adopt Option 2 anymore than it would adopt a guideline range of five years to life in a case involving a statutorily required mandatory minimum term of imprisonment.

#### **B. Failure to Register as a Sex Offender Should Not be Considered a "Sex Offense."**

Defenders agree with the Commission's proposal to amend the commentary to §5D1.2 to clarify that offenses under 18 U.S.C. § 2250 are not "sex offenses." This approach follows, *United States v. Goodwin*, 717 F.3d 511, 518-20 (7th Cir. 2013), which is the majority rule by court decision or government concession in most circuits and districts. *Goodwin's* reasoning is sound: failure to register is never "perpetrated against a minor" and thus can never be a "sex offense." *Id.*



**C. The Five Year Mandatory Minimum Term of Supervised Release Is More than Adequate in SORNA Cases.**

As to the Commission's request for comment on what terms or conditions of supervised release the guidelines should recommend for persons convicted of 18 U.S.C. § 2250, the empirical evidence presented to the Commission at the March 2014 hearing shows that defendants on supervision for failure to register should not be subject to more onerous conditions of supervision than defendants convicted of other felony offenses.

The research presented to the Commission by Dr. Zgoba unequivocally shows that persons who fail to comply with sex offender registration laws are not "more sexually dangerous than their compliant counterparts."<sup>69</sup> Noncompliance with registration requirements "reflects a range of behaviors such as inadvertent noncompliance, confusion about requirements, poor-self-management skills, a tendency toward rule violation, or outright rebellion against registration mandates." *Id.* at 8.

All of that behavior can be addressed with shorter rather than longer terms of supervision. Individuals with inadvertent noncompliance or who have poor self-management skills can be taught life skills that will help them pay closer attention to registration requirements so that they can comply.<sup>70</sup> Those with low education or intellectual disability can receive individualized instruction about the registration process that will help them comply in the future.<sup>71</sup> Those who are "rule breakers" or who are "rebellious" may benefit from additional supervision, but it should be aimed at developing prosocial thinking with the kinds of cognitive-behavioral programs that are the "bread and butter" of supervision for any defendant with anti-social attitudes no matter what the crime.

To single out those defendants who fail to comply with registration laws for longer or more strict conditions of supervision would involve a "greater deprivation of liberty than necessary," 18 U.S.C. § 3583(d), and could well be counterproductive. Sex offender registration laws in and of themselves place tremendous burdens on those previously convicted of a sex offense without supportive evidence showing that they increase public safety. They "have the potential to impede community reentry by disrupting employment, housing, and prosocial

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<sup>69</sup> Statement of Kristen M. Zgoba, Ph.D., Before the U.S. Sentencing Comm'n, Washington, D.C., at 3-4 (Mar. 13, 2014).

<sup>70</sup> The statute does not require that the prosecution show a wilful failure to register. 18 U.S.C. § 2250. The failure need only be knowing.

<sup>71</sup> The SORNA guidelines explain the registration requirements. Office of Justice Programs, Smart Office, *The National Guidelines for Sex Offenders Registration and Notification*, [http://ojp.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://ojp.gov/smart/pdfs/final_sornaguidelines.pdf).

relationships.” Zgoba, *supra* at 5. To add long periods of supervision on top of registration requirements sets up a person for failure and would hinder rather than facilitate reentry for many individuals.

The Center for Sex Offender Management sums up our point that lengthy terms and intensive conditions, even for sex offenders, may well be counter-productive:

[M]yths about sex offenders and victims, inflated recidivism rates, claims that sex offender treatment is ineffective, and highly publicized cases involving predatory offenders fuel negative public sentiment and exacerbate concerns by policymakers and the public alike about the return of sex offenders to local communities. Furthermore, the proliferation of legislation that specifically targets the sex offender population – including longer minimum mandatory sentences for certain sex crimes, expanded registration and community notification policies, and the creation of “sex offender free” zones that restrict residency, employment, or travel within prescribed areas in many communities – can inadvertently but significantly hamper reintegration efforts.

Kelly Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 *Am. J. Public Health* 412, 417-18 (2010) (quoting Center for Sex Offender Management, *Recidivism Among Sex Offenders* (2009)).

Because reintegration, not punishment, is the proper purpose of supervision, Defenders encourage the Commission to leave the length of the term up to the judgment of the court, which is in the best position to consider all of the circumstances surrounding the commission of the offense, the particular defendant’s reentry needs, and the risk of recidivism. Supervised release terms should be structured to the particular defendant. A one size fits all approach does not foster reentry and is wholly incompatible with evidence-based community corrections practices.<sup>72</sup>

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<sup>72</sup> We also think it worth noting that the limited resources of U.S. Probation should not be wasted to ensure compliance with sex offender registration laws. If a person released from supervision fails to comply with registration requirements, the United States Marshals Service has a special program in place to assist in locating and arresting these individuals. Additional grant money is available to local jurisdictions to help enforce registration requirements. See Office of Justice Programs, Smart Office, *The National Guidelines for Sex Offender Registration and Notification* 58-59 (2008), [http://ojp.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://ojp.gov/smart/pdfs/final_sornaguidelines.pdf). Hence, it is unnecessary to burden U.S. Probation with the lengthy terms of supervision the Department of Justice suggests in its March 6, 2014 letter to the Commission.

Honorable Patti B. Saris

March 18, 2014

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## **VI. Conclusion**

As always, we appreciate the opportunity to submit comments on the Commission's proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

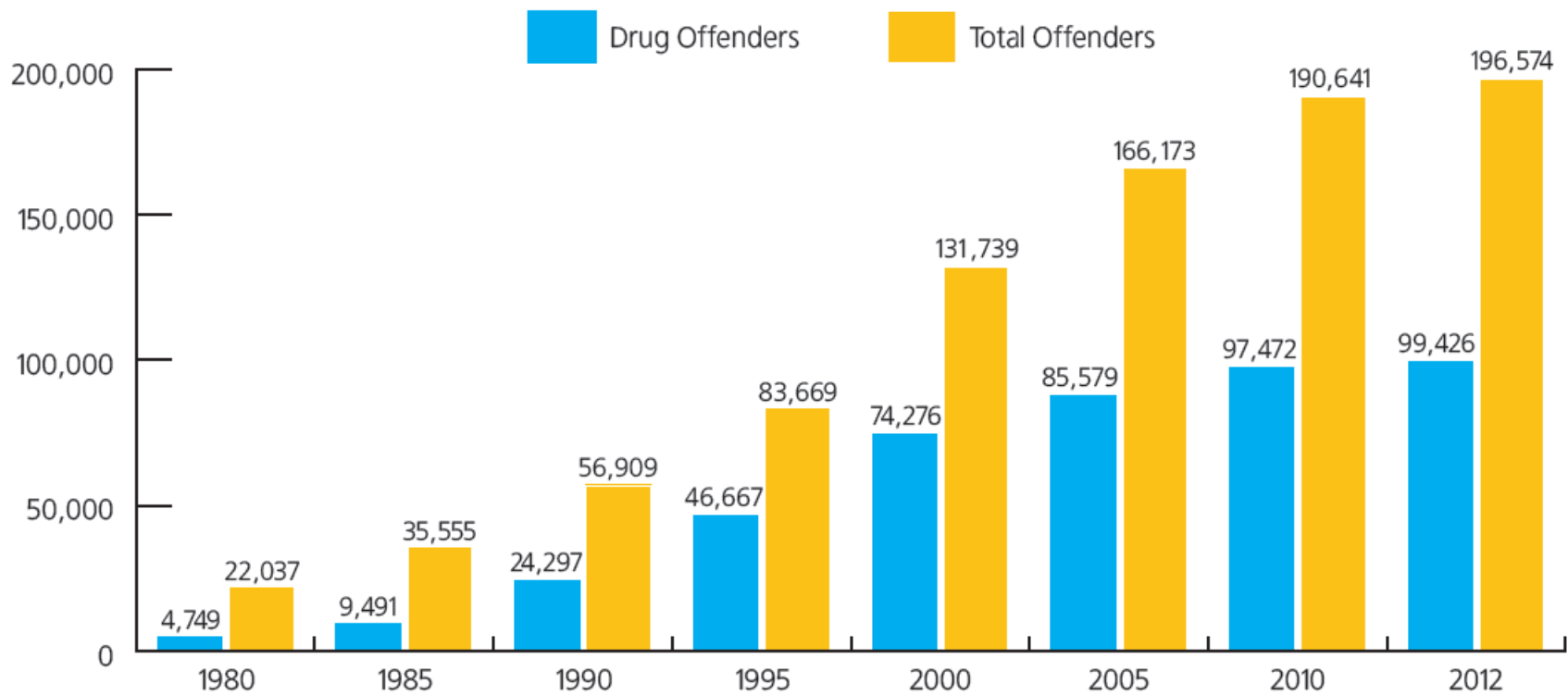
Chair, Federal Defender Sentencing

Guidelines Committee

Enclosures

cc (w/encl.): Hon. Ricardo H. Hinojosa, Vice Chair  
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Hon. Charles R. Breyer, Vice Chair  
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Kathleen Cooper Grilli, General Counsel

## Number of People in Federal Prisons for Drug Offenses, 1980-2012



**Written Statement of Neil Fulton,  
Federal Defender for the Districts of North and South Dakota**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on the Violence Against Women Reauthorization Act of 2013**

**February 13, 2014**

**Testimony of Neil Fulton, Federal Defender for the Districts of North and South Dakota  
Before the United States Sentencing Commission  
Public Hearing on the Violence against Women Reauthorization Act of 2013  
February 13, 2014**

My name is Neil Fulton, Federal Defender for the Districts of North and South Dakota. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding how the guidelines should address the statutory changes set forth in the Violence Against Women Reauthorization Act of 2013 (VAWA).

**I. The Purpose of VAWA and The Need for Caution**

When considering whether and how to amend the guidelines in response to VAWA, Defenders urge the Commission to consider (1) the purpose of the law; (2) the new law enforcement tools that the Act itself provides, without any changes to the guideline; (3) the absence of evidence about how these new tools will be used by prosecutors, received by judges and impact the community; and (4) the potential for unintended consequences from potential amendments, such as further complicating the guidelines, disrupting settled practices in resolving charges of assault and sexual abuse that are not affected by VAWA, and increased sentence disparity.

The Department of Justice, in consultation with tribal authorities, sought legislation in three areas: (1) expanded tribal jurisdiction over certain offenses; (2) tribal court jurisdiction to issue and enforce civil protective orders; and (3) three amendments to the federal assault statutes. The amendments to the federal assault statutes were designed to cover situations where the prosecution could not seek a sentence in excess of six months under pre-VAWA 2013 law: (1) assaults by striking, beating, or wounding, which carried a maximum sentence of six months; (2) assaults against spouses and domestic partners resulting in substantial bodily injury, which were either capped at 6 months or not within federal jurisdiction if the perpetrator was an Indian; and (3) assaults by strangling or suffocating, which were capped at 6 months in situations where the victim suffered no external injury.<sup>1</sup> DOJ did not propose changes to the assault statutes as reflected in 18 U.S.C. § 113(a)(1) (assault with intent commit sexual abuse) and § 113(a)(2) (assault with intent to commit sexual abuse of a minor or ward or abusive sexual contact). Nor did the Department or others complain that the penalties for existing felony offenses were too lenient.

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<sup>1</sup> See Letter of Ronald Weich, U.S. Dep't of Justice to the Honorable Joseph R. Biden, Jr. (July 21, 2011), <http://www.justice.gov/tribal/docs/legislative-proposal-violence-against-native-women.pdf>.

VAWA provides DOJ with the three new statutes they requested to prosecute domestic violence offenders. In addition, starting later this month, as authorized by VAWA, three tribes will begin to “exercise special criminal jurisdiction over certain crimes of domestic and dating violence, regardless of the defendant’s Indian or non-Indian status.”<sup>2</sup> In light of all that is not yet known about how these tools will be used and the effects they will have on violence against women in Indian country, we encourage the Commission to proceed cautiously. Specifically, we urge the Commission to avoid treating an assault with intent to commit sexual abuse or abusive sexual contact the same as a completed or attempted sexual abuse or abusive sexual contact offense and to avoid any amendments that would pile onto existing guidelines specific offense characteristics, which result in upward ratcheting, or additional cross-references, which confuse guideline calculations and have often been criticized as a source rather than a solution to unwarranted disparity.

**II. 18 U.S.C. § 113(a)(1) Assault with Intent to Commit Aggravated Sexual Abuse and Sexual Abuse; and  
18 U.S.C. § 113(a)(2) Assault with Intent to Commit Sexual Abuse of a Minor or Ward and Assault with Intent to Commit Abusive Sexual Contact**

Defenders oppose the Commission’s proposed amendment to reference convictions under 18 U.S.C. §§ 113(a)(1) and (a)(2) to Chapter 2A3 or to add specific offense characteristics or cross-references to §2A2.2. Instead, Defenders suggest that the Commission establish either (a) a new guideline for assault with intent to commit aggravated sexual abuse, sex abuse, sexual abuse of a minor or ward, or abusive sexual contact; or (b) separate base offense levels in §2A2.2 that would apply if the defendant was convicted under 18 U.S.C. § 113(a)(1) (assault with intent to commit a violation of section 2241 or 2242), or § 113(a)(2) (assault with intent to commit a violation of section 2243 or 2244). This approach would allow for proportionate punishment, greater than an aggravated assault, and lesser than that for actual or attempted sexual abuse or abusive sexual contact. Clarity of application is a critical consideration as well. Lack of clarity on the guideline calculation will lead to more trials and longer, more contested sentencing hearings.<sup>3</sup>

For several reasons, a new standalone guideline, like the Commission did with assault with intent to commit murder at §2A2.1, or alternative base offense levels in Chapter 2A2 are

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<sup>2</sup> DOJ Press Release, *Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013* (Feb. 6, 2014), <http://www.justice.gov/opa/pr/2014/February/14-ag-126.html>.

<sup>3</sup> The percentage of sexual abuse cases that go to trial is already 336% greater than the average trial rate. See U.S. Sentencing Comm’n, *Sourcebook of Federal Sentencing Statistics*, Tbl. 11 (2012) (13.1% of sexual abuses went to trial in FY 2012 compared to 3% of all cases). The percentage of assault cases that go to trial is also higher than the average. *Id.* (8.1% v. 3%).

preferable to referencing the offenses to Chapter 2A3. First, the legislative history of § 113 and the sex offense provisions in Ch. 109A show that it would be a mistake to treat an assault with intent to commit any of the specified sex offenses the same as a completed or attempted sexual abuse or abusive sexual contact offense. Why Congress amended 18 U.S.C. § 113(a)(1) and (a)(2) to include assaults with intent to commit certain sex offenses is unclear. In seeking to amend the Federal Criminal Code as part of VAWA, DOJ did not identify any gap in the law with regard to assaults with intent to commit sex offenses. Nor does the Senate report accompanying the legislation explain the need for the amendment. The most that can be discerned from legislative history is that assault with intent to commit sexual abuse or abusive sexual contact is not the same as an attempt to commit sexual abuse or abusive sexual contact. When Congress enacted Pub. L. 99-654, the Sexual Abuse Act of 1986, it deleted from § 113 the reference to assault with intent to commit rape because the new chapter 109A proscribed attempt. At that time, Congress stated that an “assault with intent to commit rape will always constitute an attempt under new chapter 109A.”<sup>4</sup> With VAWA, Congress decided otherwise, and decided to proscribe conduct that falls short of an attempted sexual abuse or abusive sexual contact. It will take some time for data to develop on what these offenses entail, but the elements and legislative history show it may punish conduct that does not result in any physical touching and that does not amount to a substantial step toward commission of the underlying sex offense. Hence, these new offenses should not be treated like a completed or attempted sex offense. Because Congress placed them in the general assault statute, they should be treated like assaults.

Second, treating these new offenses as assaults rather than sex offenses would account for aggravating conduct related to the nature of the assault that is not included in the sex offense guidelines (e.g., discharge of firearm, use of dangerous weapon, and seriousness of any injury). With the exception of §2A3.1(b)(4), none of the criminal sexual abuse guidelines contain enhancements for the degree of bodily injury resulting from the conduct because the base offense levels are predicated on there being an actual sexual act or sexual contact.<sup>5</sup>

Third, as the Issue for Comment 3(B)(1)-(6) illustrates, referring these new offenses to Chapter 2A3 would raise a number of significant and challenging questions. These questions are

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<sup>4</sup> Sexual Abuse Act of 1986, H.R. Rep. 99-594, 1986 USSCAN 6196, 6200 (1986).

<sup>5</sup> Referring these new offenses to Chapter 2A2 would also avoid the significant disparity created by the cross-references set forth in §§2A3.2 and 2A3.4. Although cross-references were meant to ameliorate the effects of uneven plea bargaining, they have not done so. *See* United States Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing* 83 (2004). The application of cross-references often results in the equivalent of conviction without notice, jury trial, admissible evidence, or proof beyond a reasonable doubt. The Commission should cut back on the use of cross-references rather than amend the guidelines in a way that would increase their use. *See generally* American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim L. Rev. 1463, 1488-95 (2001).



best addressed by treating the new assault offenses as assaults, rather than trying to merge them with the sex abuse guidelines.<sup>6</sup>

A new guideline or alternative base offense levels set forth in §2A2.1 and/or §2A2.2, are also preferable to adding a specific offense characteristic and/or cross-reference to §2A2.2. First and foremost to me, as a practitioner in federal court, is that either approach would be less disruptive to well-settled practice under §2A2.2, a guideline defense attorneys, prosecutors, and judges understand and are accustomed to using. In addition, if the Commission were to add a specific offense characteristic or cross-reference related to sexual intent, the defendant would not have to be convicted of a sex-related offense under § 113(a)(1) or (a)(2) for the enhancement or cross-reference to apply. Under those circumstances, many cases containing a hint of a sexual overtone would become much more complicated. An overly aggressive prosecutor or probation officer could take what would normally be considered an assault and make it into something worse based solely on the perceived state of mind of the defendant.

Take for example a case where the defendant was at a bar and sees his ex-girlfriend. They begin to argue. When she goes to the bathroom, he follows her, pushes her inside the bathroom, brandishes a broken beer bottle, and presses his body against hers. Another person walks into the bathroom and interrupts the encounter. Such an encounter is an assault with a dangerous weapon under 18 U.S.C. § 113(a)(3), but whether the defendant committed an assault with the intent to commit sex abuse or abusive sexual contact is in the eye of the beholder. Some prosecutors would charge it as both assault with a dangerous weapon and assault with intent to commit sexual abuse. Some would charge it as assault with a dangerous weapon. In either scenario, if the defendant entered a plea bargain to assault with a dangerous weapon, some probation officers would undermine the bargain by pushing for a sexual assault enhancement or cross-reference while others would not. Likewise, some judges would find evidence of intent and others would not. The net result is increased disparity in sentencing for similar conduct and more trials and contested sentencing hearings.<sup>7</sup>

To whatever guideline the Commission refers these new offenses, the base offense level for assault with intent to commit a violation of § 2241 or § 2242 under § 113(a) should be set at 16 and the base offense level for assault with intent to commit a violation of § 2241 or § 2242 should be set at 14. A base offense level of 16 would be 2 levels above the base for aggravated

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<sup>6</sup> Because these new §§ 113(a)(1) and (a)(2) offenses should be treated as the assault offenses, none of the provisions set forth in the Issue for Comment 3(B)(1)-(6) should be amended.

<sup>7</sup> And, as we have often emphasized, cross-references based upon conduct that the defendant has not been convicted of undermine the protection of the Sixth Amendment. A prosecutor who knows they cannot prove assault with intent to commit sexual abuse can charge the offense as an assault with a dangerous weapon, but then push for higher penalty using a lower standard of proof.

assault and would account for the mental state of intent to commit sexual abuse. Two levels would be proportionate to the enhancement at §2D1.1(c)(1) (providing for 2-level enhancement under §3A1.1(b)(1) where “the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual’s knowledge, a controlled substance to that individual”). A base offense level 14 for the other offenses would treat them the same as other aggravated assaults.

In no event should the base offense level for assault with the intent to commit aggravated sexual abuse or sexual abuse be higher than 20. Anything greater than 6 levels higher than the current base offense level under §2A2.2 would be grossly disproportionate to other offenses that contain enhancements for actual sexual conduct. For example, §2A2.1(b)(1) provides a 2-level increase for “serious bodily injury” as defined in §1B1.1. “Serious bodily injury” includes “conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2442.” USSG §1B1.1, comment. (n.1(L)). *See also* §2A2.2(b)(3)(B) (5-level increase for “serious bodily injury” as defined in §1B1.1); §2A4.1(b)(5) (6-level increase “if the victim was sexually exploited”); §2B3.1(b)(3)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2B3.2(b)(4)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2E2.1(b)(2)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2H4.1(b)(1)(B) (2-level increase for serious bodily injury as defined in §1B1.1); §2H4.2(b)(1) (4-level increase for serious bodily injury as defined in §1B1.1); §2L1.1(b)(7)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2S1.1(b)(1)(B)(ii) (6-level increase for money laundering where funds were proceeds of, or intended to promote sexual exploitation of a minor).

### **III. General Observations About the Sentencing of Domestic Violence Offenders**

As the Commission moves forward with these amendments and others related to domestic violence, it should reject the myth that incarceration is the solution to the problem of domestic violence. “There is no evidence that incarceration reduces recidivism among domestic violence offenders as a whole.”<sup>8</sup> And in fact, offenders who are incarcerated have increased odds of committing another domestic violence offense as well as a greater chance of committing any type of offense.<sup>9</sup> To the extent that incarceration is effective for a subgroup of offenders, the studies show that jail sentences and probation slightly lower the odds of recidivism, but prison sentences do not.<sup>10</sup>

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<sup>8</sup> Thomas George, Wash. State Center for Court Research, *Domestic Violence Sentencing Conditions and Recidivism* 4 (2010).

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.*

Also relevant to the Commission's decision is a 2010 review of domestic violence courts, which showed that imprisonment does not form the cornerstone of efforts to combat domestic violence. A review of "qualitative data suggested that use and enforcement of protection orders and post disposition monitoring of compliance figure prominently in conceptualization of accountability, whereas obtaining a conviction on the initial case or obtaining a sentence of incarceration were not so often linked to the concept."<sup>11</sup> "Only a very small percentage of courts (5%) often or always imposed a sentence of incarceration longer than one year. One-third usually imposed a sentence less than one year; and 2/3 imposed probation."<sup>12</sup>

The lesson from the states is that not all domestic violence offenders should be incarcerated. Native Americans, in particular, need services that will help them overcome the myriad problems on reservations that lead to violent behavior, including alcohol and drug abuse, unemployment, extreme poverty, and mental health conditions. Supervisory terms that help offenders get their lives in order would better serve this population than lengthy periods of incarceration that will only make reentry more difficult.

#### **IV. 18 U.S.C. § 113(a)(4) Assault by Striking, Beating, or Wounding**

The Commission proposes referencing 18 U.S.C. § 113(a)(4), which is now a one year rather than six month misdemeanor, to §2A2.3. Defenders have no objection to this proposal.

#### **V. 18 U.S.C. § 113(a)(7) Assault Resulting in Substantial Bodily Injury to Spouse, Intimate Partner, or Dating Partner**

The Commission sets forth two options that would broaden the scope of the 4-level enhancement at §2A2.3(b)(1)(B). Option 1, which would provide for an enhancement where the offense resulted in substantial injury to a spouse or intimate partner or dating partner, is more consistent with congressional intent than Option 2, which would expand the enhancement to all cases where an offense resulted in substantial bodily injury. When Congress amended § 113(a)(7) it meant to fill a narrow gap in existing law, which capped at six months the sentence for bodily injury falling short of serious bodily injury and which afforded no Federal jurisdiction over an Indian who committed such an offense against a spouse, intimate partner, or dating partner.<sup>13</sup> Had Congress intended an assault against these victims to be treated the same as one against any person who suffered an injury like a broken finger in a bar room brawl, it could have

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<sup>11</sup> Melissa Labriola, *A National Portrait of Domestic Violence Courts* 31 (2010), [http://www.ncdsv.org/images/CenterCourtInnov\\_NatlPortraitDVCourts\\_12-2009.pdf](http://www.ncdsv.org/images/CenterCourtInnov_NatlPortraitDVCourts_12-2009.pdf).

<sup>12</sup> *Id.* at 46.

<sup>13</sup> DOJ, *Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women*, at 9, attached to Weich, *supra* note 1.

easily said so. In the absence of any empirical evidence showing a need to increase penalties for defendants who have committed a misdemeanor assault resulting in substantial bodily injury, the Commission should not expand the enhancement to cover any person other than spouses, intimate partners, or dating partners. If a case emerges that involves vulnerable victims other than those covered by § 113(a)(7), then §3A1.1 is available to enhance the sentence.

This offense should not be referenced to §2A6.2. Section 2A6.2 covers offenses that require a specific intent to kill, injure, harass, or intimidate or that involve intentional violations of protective orders. A person who acts with such specific intent is more culpable than one who commits a general intent assault crime. Moreover, referring a § 113(a)(7) offense that involves a spouse, intimate partner or dating partner to §2A6.2 while referring the same offense involving a minor child to §2A2.2 would result in disproportionate penalties. No legitimate reason exists to punish more harshly a person who pushed a spouse onto the floor and unintentionally dislocated the spouse's shoulder than one who committed the same act with the same resulting injury against a young child.<sup>14</sup>

#### **VI. 18 U.S.C. § 113(a)(8) Assault of a Spouse, Intimate Partner, or Dating Partner by Strangling or Suffocating**

The Commission proposes to reference § 113(a)(8) to §2A2.2 and to amend the commentary to §2A2.2 to provide that the term “aggravated assault” includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. This option puts § 113(a)(8) on a par with the ten year felonies at § 113(a)(6) for assault resulting in serious bodily injury and at §113(a)(3) for assault with a dangerous weapon. While we agree that a reference to §2A2.2 is more appropriate than a reference to §2A2.3, we oppose the two proposed options to add an additional enhancement where the offense involved strangling, suffocating, or attempting to strangle or suffocate.

Defenders do not believe that either of the two options is appropriate because referencing § 113(a)(8) to §2A2.2 alone provides a sizable increase in the sentence that was available pre-VAWA 2013. Before the addition of § 113(a)(8) to the federal assault statute, prosecutors could only seek a six month sentence in cases involving strangling or suffocating where no serious bodily injury occurred. As a felony assault referenced to §2A2.2, a crime involving strangling or suffocating or an attempt to do so would carry a sentence more than twice that for simple assault – 10 to 16 months for a first offender who receives acceptance of responsibility (base offense level of 14 minus 2). In cases where the offense involved bodily injury, the offense level would increase anywhere from 3 to 7 levels depending upon the degree of injury.

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<sup>14</sup> If the Commission were to reference the offense to §2A6.2, the base offense level should be set at 11, which would be consistent with the final offense level that would apply under §2A2.3 if the offense resulted in substantial bodily injury to a minor.

If the Commission wants to increase the sentence even more, then Option 1, with an enhancement of 3 levels, would be better than Option 2 because it would put strangling or suffocating that would not otherwise warrant an enhancement under subsection (b)(3) on par with the 3-level enhancement for bodily injury. To do any more than that would create a sizable unwarranted disparity because the guidelines would then treat an assault that may have involved recklessly impeding a person's breathing for a matter of seconds the same as an assault that resulted in a broken jaw that had to be wired shut. To lessen the disparity, although not eliminate it, it would be better to allow the existing enhancements in §2A2.2(b)(3) for the degree of bodily injury to apply to § 113(a)(8) cases that rise above the 3 levels for bodily injury.<sup>15</sup> To avoid disproportionate punishment from "factor creep," a cap should also be placed on the cumulative effect of the enhancements under §2A2.2(b)(2) and (3), just as currently exists in §2A2.2(b)(3).

We are gravely concerned about the potential for a greater enhancement or the proposal to reference § 113(a)(8) to §2A6.2, which carries a base offense level 4 levels higher than §2A2.2. Persons who commit crimes in Indian country or federal enclaves should not be punished more harshly than their state counterparts. DOJ itself recognized that the available sentences for crimes committed in Indian country should be in line with the types of sentences available in state court.<sup>16</sup> Over the past several years, numerous states have enacted laws directed at strangulation. Commentators have noted how "specialized strangulation laws are working and becoming a valuable law enforcement tool to address domestic violence cases, even when the identified offenses are charged as misdemeanors."<sup>17</sup> A New York study found that 2,300 charges were filed against perpetrators in New York in just fifteen weeks after the law passed. Of those, 83% were misdemeanor charges and 17% felonies. "Nevertheless, the study found that perpetrators who had previously avoided *any* punishment because of a lack of visible injuries were now facing criminal sanctions for their life-threatening behavior. Researchers concluded, as they have in many states, that the previous gap in the law, between no charges and

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<sup>15</sup> If the Commission were to add an enhancement for strangulation or suffocation to §2A2.2, it should be limited to an assault committed against a spouse, domestic partner, or dating partner. Defenders see very few cases involving "strangulation," but chokeholds and strangleholds are used in martial arts, combat sports, self-defense, and military hand to hand combat applications. Wikipedia, *Chokehold*, [n.wikipedia.org/wiki/Chokehold](http://n.wikipedia.org/wiki/Chokehold). If an assault involving a chokehold actually results in injury, then the guidelines have five levels of enhancements to account for those injuries. It would be a strange result for a person involved in a brawl to receive a greater sentence for using a chokehold that results in no bodily injury than a person who punches a person in the face and gives him a black eye.

<sup>16</sup> DOJ, *Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women*, at 9, attached to Weich, *supra* note 1.

<sup>17</sup> Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude* 4 (2011), <http://www.familyjusticecenter.org/Strangulation/On%20Edge%20Of%20Homicide.pdf>.

murder charges, was now being rectified by this innovative intervention tool.”<sup>18</sup> The New York study shows that having a specialized law available to prosecute these cases is more important than the length of imprisonment.<sup>19</sup>

Minnesota’s experience is also worth noting, particularly because Minnesota is a jurisdiction that also prosecutes crimes in Indian country. Minnesota has a felony domestic assault by strangulation statute. Minn. Stat. § 609.2247 (2008). Unlike the federal statute that only requires reckless conduct, the Minnesota statute requires that the defendant intentionally impede normal breathing or circulation of the blood. The maximum term of imprisonment in Minnesota is three years. *Id.* From 2010-2012, 826 offenders in Minnesota were sentenced for Domestic Assault by Strangulation.<sup>20</sup> Of those, 75 (9%) received a prison term, 686 (83%) received jail as a condition of probation, and 65 (8%) received a non-incarceration sentence.<sup>21</sup> For the offenders who received a jail term as a condition of probation, the terms ranged from 54 to 209.4 days, with an average term of 75.5 days. In contrast, the least onerous of the Commission’s proposal – option 1 [base offense level of 14 plus 3] – would result in a final offense level of 14 for a first offender who pleads guilty and receives a 3-level reduction for acceptance of responsibility. That places the person in Zone D, with a guideline range of 15 to 21 months. No purpose of sentencing justifies a decision to subject primarily Native American federal defendants, who already face felony convictions, to significantly longer sentences than their state counterparts who face misdemeanor convictions and minimal jail time.<sup>22</sup>

## VII. Length and Conditions of Supervision in Domestic Violence Cases

The Commission requests comment on whether the guidelines should provide additional guidance on the imposition of supervised release in domestic violence cases. As a threshold matter, we are concerned that the Commission’s question seems to presuppose that all domestic violence offenders will be sentenced to a term of imprisonment and subject to supervised release.

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<sup>18</sup> *Id.*

<sup>19</sup> See also Archana Nath, *Survival or Suffocation: Can Minnesota's New Strangulation Law Overcome Implicit Biases in the Justice System?*, 25 Law & Ineq. 253, 273 (2007) (creation of a felony strangulation statute “increases the likelihood that actors in the legal system will at least inquire into the issue of strangulation, and perhaps even be convinced that training should be conducted in their offices, police stations and courtrooms”).

<sup>20</sup> Minnesota Sentencing Guidelines Commission, *Domestic Assault by Strangulation: Sentenced 2010-2012* (2014) (attached as Exhibit A).

<sup>21</sup> *Id.*

<sup>22</sup> If the Commission were to refer this new strangulation offense to §2A6.2, it should set the base offense level at 14 if the defendant is convicted under § 113(a)(8).

We disagree with this premise. Probation should be considered an appropriate sentence for some of these cases.<sup>23</sup>

In any event, we do not believe that the Commission should set forth any special guidance for domestic violence cases because each offender has different needs that must be met during supervision, and each district has different resources available to meet those needs. Moreover, no consensus has emerged, even in domestic violence courts, as to the appropriate conditions of supervision.<sup>24</sup>

A recent study of sentencing conditions in domestic violence cases concluded that “[n]ot all forms of [supervision] may be equally effective, and [supervision] requirements and processes may need to be tailored to offenders’ unique circumstances.”<sup>25</sup> The research literature concludes that some individuals may respond to certain interventions while others will not. The response to interventions may depend upon the individual’s motive to change and the strength of his or her social bonds.<sup>26</sup> In addition, the majority of domestic violence perpetrators “witnessed or experienced parental violence, community violence, or multiple traumas.”<sup>27</sup> Abusive men also have higher incidences of head injury or traumatic brain injury than males in the general population.<sup>28</sup> Because each person has unique problems that contributed to commission of the offense, the treatment conditions must be tailored “to the differences in kinds of violence and underlying disorders.”<sup>29</sup> We also see situations where both partners committed an assault against each other and were sentenced with conditions that helped both obtain needed services. Given these considerations, the decision to impose conditions must be case-specific and should be left up to the judge after considering the views of probation, the parties, and any relevant experts.

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<sup>23</sup> Research shows the most promising interventions with domestic violence offenders involve victim oriented treatment and a philosophical shift away from punishment. Victim oriented treatment is “designed to be emotional and engaging and change the focus from blame, judgment, and personal deficits of offenders to one in which the focus is on the harm caused to victims and society.” George, *supra* note 8, at 23. “In addition, a change in philosophy from threats of punishment and frequent monitoring to one of reinforcing positive change. . . may be a necessary component of effective intervention.” *Id.* at 24.

<sup>24</sup> Labriola, *supra* note 11, at 44.

<sup>25</sup> George, *supra* note 8, at 24.

<sup>26</sup> *Id.* at 22.

<sup>27</sup> Judith Siegel, *An Expanded Approach to Batterer Intervention Programs Incorporating Neuroscience Research*, 14 *Trauma, Violence & Abuse* 295 (2013).

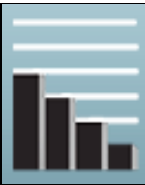
<sup>28</sup> *Id.* at 297.

<sup>29</sup> *Id.* at 299.

### **VIII. The Major Crimes Act**

Because we disagree with the proposal to reference any of the offenses under § 113 to §2A6.2, no amendment to the references in Appendix A for offenses under 18 U.S.C. § 1153 is necessary. If the Commission disagrees and decides to reference §§ 113(a)(7) or (a)(8) to §2A6.2, then the references for § 1153 should be corrected. As to the issue for comment on what Appendix references are appropriate for 18 U.S.C. § 1152, the answer is none. Section 1152 is a jurisdictional provision that does not define a crime. Its presence in the Appendix is unnecessary.





# MINNESOTA SENTENCING GUIDELINES COMMISSION

## Domestic Assault by Strangulation: Sentenced 2010-2012

Minnesota Sentencing Guidelines Commission (MSGC) monitoring data are offender-based, meaning cases represent offenders rather than individual charges. Offenders sentenced within the same county in a one-month period are generally counted only once, based on their most serious offense.

**Information Requested:** I'm interested in learning more about state sentences for DV strangulation. Since Minnesota is known for its statute, I'm particularly interested in MN sentences. Is there any way I could get data on the length of sentences in these cases for the last three years?

**Note:** For more information on assault offenses, see the MSGC annual [Assault Offenses and Violations of Restraining Orders](#) report.

**History:** In 2005, the Legislature made it a felony to assault a family member or household member by strangulation. Prior to the enactment of domestic assault by strangulation, this type of criminal behavior may have been categorized and charged under other felony assault offenses, such as domestic assault and third- and fifth-degree assault. The number of offenders sentenced for this offense quickly climbed to 315 offenders in 2007, then decreased and hovered around 260 offenders from 2009-2011. In 2012 the number sentenced increased to 298. Even the decrease in fifth-degree assault, for which we have seen the most dramatic decrease of 36 percent from 112 offenders in 2006 to 72 offenders in 2012, does not involve a large enough caseload to have contributed to the majority of the increase in domestic assault by strangulation offenses. Therefore, it is likely that these are primarily cases that would not have been felony offenses before the statutory change.

**Analysis:**

- Sentenced 2010-2012
- Domestic Assault by Strangulation under Minn. Stat. § [609.2247](#)

From 2010-2012, 826 offenders were sentenced for Domestic Assault by Strangulation under Minn. Stat. § 609.2247. Domestic Assault by Strangulation is a Severity Level 4 offense, therefore the presumptive disposition for an offender with a criminal history score of 4 or more is commitment to the Commissioner of Corrections. Of the 826 offenders sentenced, 734 (89%) had a presumptive stayed sentence and 92 (11%) were presumptive commitments to the Commissioner of Corrections. Table 1 displays the dispositional departure rate for these offenders by criminal history score.

**Table 1: Dispositional Departure Rates for Domestic Assault by Strangulation by Criminal History Score: Sentenced 2010-2012**

Criminal History Score	Total Sentenced	Presumptive Disposition		Dispositional Departure (commitment only)		Dispositional Departure (stay only)	
		Stay	Commitment	None	Mitigated	None	Aggravated
0	400	400 (100%)	0 (0%)	--	--	399 (100%)	1 (0%)
1	157	157 (100%)	0 (0%)	--	--	156 (99%)	1 (1%)
2	119	119 (100%)	0 (0%)	--	--	114 (96%)	5 (4%)
3	58	58 (100%)	0 (0%)	--	--	53 (91%)	5 (9%)
4	32	0 (0%)	32 (100%)	18 (56%)	14 (44%)	--	--
5	29	0 (0%)	29 (100%)	21 (72%)	8 (28%)	--	--
6+	31	0 (0%)	31 (100%)	24 (77%)	7 (23%)	--	--
<b>Total</b>	<b>826</b>	<b>734 (89%)</b>	<b>92 (11%)</b>	<b>63 (69%)</b>	<b>29 (31%)</b>	<b>722 (98%)</b>	<b>12 (2%)</b>

Table 2 displays durational departure rates for Domestic Assault by Strangulation by criminal history score. Of the 75 offenders who received prison, 22 (29%) received a mitigated durational departure from the presumptive sentence. Only 2 (3%) received an aggravated durational departure.

**Table 2: Durational Departure Rates for Domestic Assault by Strangulation by Criminal History Score: Sentenced 2010-2012**

Criminal History Score	Executed Prison Sentence		Durational Departure (prison only)		
	No	Yes	None	Mitigated	Aggravated
0	399 (100%)	1 (0%)	0 (0%)	0 (0%)	1 (100%)
1	156 (99%)	1 (1%)	0 (0%)	1 (100%)	0 (0%)
2	114 (96%)	5 (4%)	2 (40%)	3 (60%)	0 (0%)
3	53 (91%)	5 (9%)	2 (40%)	3 (60%)	0 (0%)
4	14 (44%)	18 (56%)	13 (72%)	5 (28%)	0 (0%)
5	8 (28%)	21 (72%)	17 (81%)	3 (14%)	1 (5%)
6+	7 (23%)	24 (77%)	17 (71%)	7 (29%)	0 (0%)
<b>Total</b>	<b>751 (91%)</b>	<b>75 (9%)</b>	<b>51 (68%)</b>	<b>22 (29%)</b>	<b>2 (3%)</b>

Table 3 displays the average pronounced prison sentence and average pronounced jail sentence where jail was a condition of probation, for this offense by criminal history score. In total, Domestic Assault by Strangulation had an average pronounced prison sentence of 23 months and an average pronounced jail term of 75 days.

**Table 3: Avg. Pronounced Prison and Jail Sentence by Criminal History Score: Sentenced 2010-2012**

Criminal History Score	Presumptive Duration (months)	Executed Prison Sentence		Jail as a Condition of Probation	
		Avg. Pronounced Sentence (months)	Number Sentenced	Avg. Pronounced Sentence (days)	Number Sentenced
0	12.03 <sup>1</sup>	24.0	1	54.0	366
1	15	12.03 <sup>1</sup>	1	80.0	144
2	18	15.6	5	93.2	99
3	21	16.2	5	111.6	49
4	24	20.3	18	172.9	13
5	27	24.7	21	178.9	8
6	30	27.5	24	209.4	7
<b>Total</b>	--	<b>23.2</b>	<b>75</b>	<b>74.5</b>	<b>686</b>

<sup>1</sup> 12.03= 12 months and 1 day

**Written Statement of Molly Roth**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission**

**Public Hearing on Proposed Amendments to the Guidelines for Drug Offenses**

**March 13, 2014**

My name is Molly Roth and I am an Assistant Federal Public Defender for the Western District of Texas (San Antonio). I thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendment to change how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and issues surrounding marijuana cultivation on public lands and private property.

### **Drug Quantity Table**

The Commission's proposal to reduce the Drug Quantity Table offense levels by two could be the most significant improvement in the history of the guidelines. Defenders strongly support changes in the Drug Quantity Table, and applaud the Commission for proposing to reduce the effect of quantity on sentence lengths.

This proposal is firmly rooted in the Commission's duty to (1) establish policies that "assure the meeting of the purposes of sentencing,"<sup>1</sup> (2) formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons";<sup>2</sup> and (3) promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute."<sup>3</sup>

Most defendants whose sentences are based upon the Drug Quantity Table are not drug kingpins or major traffickers, but individuals with a lower level of involvement in drug offenses. Many have little or no criminal history and few are involved with firearms or violence. They often need education and drug treatment. The Commission's proposed amendment to the Drug Quantity Table would still provide significant punishment, while better accounting for individual culpability, deterrence, treatment needs, and the overall seriousness of the offense. By permitting defendants to return home to their families and communities a bit sooner – on average 11 months – reducing sentences would help lessen the destabilizing effect of incarceration on families and communities.

Reducing the Drug Quantity Table level would also give full effect to the Fair Sentencing Act of 2010 (FSA). Many crack cocaine defendants have not benefitted from reduced guideline ranges because, when implementing the FSA, the Commission undid the 2-level reduction for crack made by a 2007 amendment. And some non-crack defendants saw their sentences increase under the FSA because the guidelines continued to set the statutory mandatory minimum triggering quantities at 26 and 32 while adding several aggravating factors, including ones like maintaining a premise for the purpose of manufacturing or distributing a controlled substance.

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<sup>1</sup> 28 U.S.C. § 991(b)(1)(A).

<sup>2</sup> 28 U.S.C. § 994(g).

<sup>3</sup> 28 U.S.C. § 994(a).

Without a 2-level reduction in the Drug Quantity Table for *all* drug types, the FSA's goal to better target prison resources cannot begin to be realized.

Reducing the Drug Quantity Table by two levels also would help alleviate prison crowding with no additional risk to public safety. The best evidence that the Commission's proposal presents no risk to public safety is found in the Commission's findings that the recidivism rates of persons who received a sentence reduction under the retroactive application of the 2007 Crack Cocaine Amendment did not differ in any meaningful way from the recidivism rates of a comparison group of released inmates.<sup>4</sup>

The Commission's proposal is a positive and significant step in the right direction. We believe that the Commission should amend the Drug Quantity Table without increasing the existing specific offense characteristic or adding new ones because existing statutory and guideline provisions adequately account for more serious conduct. We encourage the Commission to make some additional changes to fully and consistently implement the minus-two principle and to bring the guidelines' recommendations in line with the statutory purposes of sentencing in a larger number of cases. The Commission's analysis shows that the recommended sentences for 30 percent of individuals convicted of a drug offense would not be reduced under the amendment as proposed.<sup>5</sup> Defendants with the largest and smallest amounts of drugs would receive no reduction under the proposed Drug Quantity Table. Nor would defendants subject to various offense level floors. We offer additional reasons why the Commission should reset the upper limit of the Drug Quantity Table and lower to level 10 the floor at level 12.

We also offer two suggestions for departure provisions that would help ensure that the drug guideline better tracks the purposes of sentencing: (1) a departure when the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense; and (2) a departure when quantity overstates the defendant's role in the offense.

### **Marijuana Cultivation**

Defenders encourage the Commission to avoid the culture war over the legalization of marijuana and how to address problems associated with marijuana cultivation. Persons caught up in marijuana growing operations on public land are typically farmers and others hired to tend

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<sup>4</sup> USSC, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment 2* (2011) (hereinafter *Recidivism 2007 Crack Amendment*).

<sup>5</sup> Louis Reedt, USSC, *Presentation to the U. S. Sentencing Commission: Analysis of Drug Trafficking Offenders Table 5* (Jan. 2014) (PDF slideshow and speaker notes).

the crops or provide food and supplies to the growers. They are not the financiers. The guidelines and statutes contain numerous provisions that provide for incremental punishment in cases involving pesticides or environmental damage, and no more are needed.

## **DRUG QUANTITY TABLE**

### **I. Reducing Offense Levels in the Drug Quantity Table Would Better Serve the Purposes of Sentencing.**

The Commission's proposed changes to the Drug Quantity Table are a significant step toward bringing the drug guidelines nearer to recommending sentences in compliance with 18 U.S.C. § 3553(a). The Commission estimates that about 70 percent of defendants sentenced under the Drug Quantity Table would benefit, with reductions of sentences averaging eleven months. Any of us can imagine what eleven more months of freedom, friends, and family would mean.

To determine who might be affected by the proposed changes, we looked to the past to see who would have benefited had the changes been in effect earlier. We examined data on nearly 25,000 defendants sentenced in FY2012 for whom the Commission received full documentation, and whose primary sentencing guideline was linked to the Drug Quantity Table and thus might have benefitted if the minus-two proposal had been applicable to them.<sup>6</sup> Significantly, many are not career or repeat offenders. The majority of these defendants (53%) were in Criminal History Category I, and 21 percent had no evidence of any prior contact with the criminal justice system. And few are violent. Only 15 percent were sanctioned for having a weapon during their offense, and almost all of these merely possessed it. Just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a ten-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY2012 received the 2-level increase under (b)(2) for having "used violence, made a credible threat to use violence, or directed the use of violence." Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).

As might be expected, many of these defendants faced significant obstacles before their involvement in crime. Almost half (48%) had less than a high school education, while just 2 percent were college graduates. While most defendants are male, 12.8 percent were women. Most of these defendants are U.S. citizens (69%) or resident aliens (7%), but just over 20 percent are non-citizens (21%) or of unknown status (2%). Assuming they receive full credit for good

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<sup>6</sup> USSC, *FY 2012 Monitoring Dataset*.

time while in prison, the best estimate is that 43 percent of these individuals will be in prison past their fortieth birthday, an age well beyond the most crime-prone years. Barring some form of early release, 18 percent will be in prison at age 50, and 5 percent at age 60.<sup>7</sup>

**A. The proposed drug quantity table would better track individual culpability.**

The current drug guideline recommends sentences for most defendants that exceed the levels Congress intended for various functional roles.<sup>8</sup> Commission research has consistently shown that most drug defendants in federal court are *not* “serious” or “major” drug dealers but are actually low-level players like street dealers, couriers, and mules.<sup>9</sup> Yet most of these individuals receive sentences that Congress intended for managers or kingpins.<sup>10</sup>

The Commission’s reports on cocaine sentencing show, as have previous Commission reports, Working Group Reports, and outside research,<sup>11</sup> that the quantity thresholds – even as

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<sup>7</sup> The Inspector General has noted how the increasing number of elderly inmates presents a growing challenge for the federal prison budget. Michael Horowitz, Inspector General, *Top Management and Performance Challenges Facing the Dep’t of Justice – 2013* (Dec. 11, 2013), <http://www.justice.gov/oig/challenges/2013.htm#1>.

<sup>8</sup> The Addendum to this testimony sets forth some of the history of the Drug Quantity Table and how Congress intended quantity to serve as a proxy for role in the offense.

<sup>9</sup> The Commission’s *2007 Cocaine Report* noted that “[a]s in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%).” USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy 19* (2007) (hereinafter *2007 Cocaine Report*).

<sup>10</sup> See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy 7* (2002) (hereinafter *2002 Cocaine Report*) (reviewing legislative history that describes “Congress’s intent to establish two-tiered mandatory minimum penalties for serious and major traffickers”); *2007 Cocaine Report*, *supra* note 9, at 28-29 (showing that “[e]xposure to mandatory minimum penalties does not decrease substantially with offender culpability as measured by offender function”).

<sup>11</sup> In the early years of guideline implementation, the Commission sponsored several Working Groups and Task Forces that found quantity fails to properly track role and culpability. See, e.g., USSC, *Role in the Offense Working Group Report 7-8* (1990) (finding that application of role adjustments do not depend upon the quantity or type of drugs involved); USSC, *Report of the Drug Working Group Case Review Project 8-14* (1992) (in reviewing data to support mitigating role cap, quantity was not among factors bearing on whether mitigating role adjustment applied).

One task force reached such controversial recommendations that it never published a report. The controversy appeared to center on the political ramifications of the recommendations, not the factual basis. Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000) (discussing unpublished report recommending that the Commission revisit the role of quantity in determining offense levels because “(1) drug quantity was viewed to be an inaccurate gauge of an

revised by the FSA – are too low and result in many mid-level and low-level individuals being treated like wholesalers or even kingpins. In the 2007 report, 20 percent of powder cocaine street level dealers were attributed with amounts triggering a five-year mandatory minimum sentence and 12 percent had amounts triggering penalties of 10 years or more.<sup>12</sup> The powder cocaine thresholds in effect for these individuals were the same that remain in the Drug Quantity Table today.

Findings for other individuals with low-level involvement in powder cocaine offenses were even more striking. Only 19 percent of couriers or mules had amounts below the five-year level, while 27 percent had amounts exposing them to five-year minimums and 54 percent had amounts exposing them to ten years or more. Among renters, loaders, lookouts, enablers, users, and the other lowest level participants, only 25 percent were below the five-year threshold, 14 percent were between five and ten years, and 61 percent were attributed with amounts at the ten-year level or higher. In other words, the current linkage between drug quantity and base offense levels assigns these low-level individuals to the wrong severity level more often than the correct one, under Congress’s own rationale for quantity-based drug sentencing.<sup>13</sup>

The report also shows that even the increased quantity thresholds under the FSA and the emergency amendment remain too low to prevent many individuals involved in crack offenses from being subject to penalties more severe than necessary or than Congress intended. For example, 28 percent of street-level dealers, 31 percent of couriers or mules, and 45 percent of loaders, lookouts, users, and other low-level individuals were held accountable for more than 50 grams. Even under the FSA thresholds, these amounts would subject these individuals to base

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individual’s culpability; and (2) drug quantity was considered to cause the most injustice in sentencing for low-end individuals who held a minor role in large quantity drug offenses”).

<sup>12</sup> *2007 Cocaine Report*, *supra* note 9, at 28-30, Figure 2-12.

<sup>13</sup> Some of these individuals were exempted from the mandatory penalty by the safety-valve and received downward adjustments for the safety-valve, acceptance of responsibility, or role. But many continued to be sentenced far above the level Congress deemed appropriate. Figure 2-14 in the *2007 Cocaine Report* shows the average length of imprisonment for individuals involved in powder and crack cocaine offenses after guideline adjustments, departures, and reductions for cooperation. *Id.* at 30. Unfortunately it is not possible from averages to determine the number or percentage of individuals who receive sentences more severe than Congress intended. The data show, however, that the average sentence imposed on powder cocaine couriers was 60 months (the sentence intended for wholesalers), while the average sentence for renters, loaders, etc. was 93 months. To obtain these averages many individuals were necessarily sentenced far above the levels Congress intended for their roles. These sentences were obtained under the same Drug Quantity Table threshold amounts currently in effect.



offense levels of at least 26 with guideline ranges for first offenders of at least 63 months – the sentence length intended for wholesalers, not low-level individuals.<sup>14</sup>

Reducing the Drug Quantity Table by two levels, while not solving all the problems with the lack of relationship between drug quantity and culpability,<sup>15</sup> would reduce the frequency of the guidelines recommending excessive terms of imprisonment in the majority of cases.

**B. The proposed drug quantity table would better reflect the empirical evidence on specific and general deterrence, as well as allow for appropriate substance abuse treatment.**

Deterrence is an important goal of criminal justice, but empirical research has shown that the very threat of prosecution, the certainty of detection, and the swiftness of the sanction are more important than the severity of punishment. Marginal decreases in punishment, like that represented by two offense levels, are unlikely to reduce any deterrent effect of punishment.<sup>16</sup> Most individuals who commit crime do not believe they will be caught, and are not aware of the precise punishments applicable to their crimes if they are caught. Because many drug offenses are driven by addiction or economic circumstances, they are particularly resistant to punishment based deterrence.

The present Drug Quantity Table also does not identify those individuals in need of lengthier incapacitation to “protect the public from further crimes of the defendant.”<sup>17</sup> The guidelines take account of recidivism risk with the criminal history score, not the offense level. Indeed, Commission research has demonstrated that higher offense levels are *not* correlated with increased risk of recidivism.<sup>18</sup> Individuals convicted of drug offenses actually have *lower* rates

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<sup>14</sup> *Id.* at 29, Figure 2-13.

<sup>15</sup> Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 *J. Quant. Criminology* 155, 171 (2009) (Drug quantity “is not significantly correlated with role in the offense.”).

<sup>16</sup> See Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (2006).

<sup>17</sup> 18 U.S.C. § 3553(a)(1)(C).

<sup>18</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“There is no apparent relationship between the sentencing guideline final offense level and recidivism risk.”) (hereinafter *Measuring Recidivism*); *Recidivism 2007 Crack Amendment*, *supra* note 4, at 2. See also Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders*, (2009) (paper presented at the American Society of Criminology’s annual meeting in Philadelphia), available at [http://www.allacademic.com/meta/p372733\\_index.html](http://www.allacademic.com/meta/p372733_index.html).

of recidivism than those convicted of other types of offenses.<sup>19</sup> And the Commission's experience with individuals convicted of crack cocaine offenses who benefitted from the previous 2-level reduction shows that short decreases in length of imprisonment are not associated with increases in recidivism rates.<sup>20</sup>

Drug trafficking offenses, like other vice crimes driven by consumer demand, are particularly wasteful choices for a crime control strategy based on lengthy incarceration of sellers. As agents with the DEA and FBI have reported to the Commission, any dealers who are incarcerated are quickly replaced by others vying for their market share.<sup>21</sup> To paraphrase one distinguished criminologist: "Lock up a rapist and there is one less rapist on the street. Lock up a drug dealer and you've created an employment opportunity for someone else."<sup>22</sup>

Finally, the offense levels provided in the Drug Quantity Table, which result in guideline ranges falling within Zone D of the sentencing table for over 90 percent of defendants, do not meet "in the most effective manner," the treatment and training needs of defendants.<sup>23</sup> The Bureau of Prisons has strict eligibility criteria for its residential abuse treatment program.<sup>24</sup> And it has not yet met the goal of providing a full twelve month sentence reduction for those inmates who meet the even stricter eligibility requirements for early release.<sup>25</sup> BOP offers drug education to a greater number of inmates, but those programs do not meet the needs of inmates with chronic substance abuse disorders.<sup>26</sup> Research has shown that only 15.7 percent of federal

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<sup>19</sup> *Measuring Recidivism*, *supra* note 18, at 13 (finding lowest recidivism rates for defendants sentenced "under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%)").

<sup>20</sup> *Recidivism 2007 Crack Amendment*, *supra* note 4, at 10, Table 2.

<sup>21</sup> USSC, *Special Report to the Congress – Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

<sup>22</sup> Paul Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity 1980-1988*, 12 Fed. Sent. Rep. 12, 15 (1999) (quoting Alfred Blumstein).

<sup>23</sup> 18 U.S.C. § 3553(a)(2)(D).

<sup>24</sup> U.S. Dep't of Justice, *Federal Bureau of Prisons, Program Statement 5330.11*, ch. 2 (Mar. 16, 2009); Alan Ellis & Todd Bussert, *Looking at the BOP's Amended RDAP Rules*, 26 Crim. Just. 37 (2011).

<sup>25</sup> *Federal Bureau of Prisons FY 2014 Budget Request*, Hearing before U.S. House of Rep. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies (April 17, 2013) (Statement of Charles Samuels, Jr., Director of the Federal Bureau of Prisons), <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf>.

<sup>26</sup> *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices*, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the Senate Committee on Appropriations (Mar. 10, 2009) (Statement of Faye Taxman, Professor, Administration of Justice

prison inmates with substance abuse disorders received professional treatment after admission into the BOP.<sup>27</sup> Community residential treatment programs for individuals who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.<sup>28</sup>

**C. Amending the Drug Quantity Table across drug types will help ameliorate the negative impacts on family and community that have resulted from current drug sentences.**

A sizable number of individuals convicted of federal drug offenses are parents of young children.<sup>29</sup> One of the often overlooked effects of long prison terms is how they burden children of incarcerated parents and “dismantle black and Latino communities.”<sup>30</sup> More black (1 in 15)

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Department, George Mason University), <http://www.gmuace.org/documents/presentations/2009/2009-presentations-drug-treatment-for-offenders.pdf>.

<sup>27</sup> Nat’l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America’s Prison Population* 40, Table 5-1 (2010).

<sup>28</sup> Marshall Clement, et al., *The National Summit of Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 26 (2011) (“[d]rug treatment in the community is more effective than drug treatment in prison”), <http://www.justicereinvestment.org/summit/report>; National Institute of Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research-Based Guide* 13 (2012) (“Treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle.”), <http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations>.

The Office of National Drug Control Policy recognizes how “innovative strategies can also save public funds and improve public health by keeping low-risk, non-violent, drug involved offenders out of prison or jail, while still holding them accountable and ensuring the public safety of our communities.” Office of National Drug Control Policy, *Alternatives to Incarceration: A Smart Approach to Breaking the Cycle of Drug Use and Crime* 2 (2011), [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/alternatives\\_to\\_incarceration\\_policy\\_brief\\_8-12-11.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/alternatives_to_incarceration_policy_brief_8-12-11.pdf).

<sup>29</sup> Lauren Glaze & Laura Maruschak, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children* 3, 4 (2010) (2004 survey data showed that 62.9 percent of federal inmates were parents and that those convicted of a drug offense (69%) were more likely to report having children than those convicted of a property or violent offense).

<sup>30</sup> Ifetayo Harvey, *Children of Incarcerated Parents Bear the Weight of the War on Drugs* (July 18, 2013), [http://www.huffingtonpost.com/ifetayo-harvey/incarcerated-parents-war-on-drugs\\_b\\_3617665.html](http://www.huffingtonpost.com/ifetayo-harvey/incarcerated-parents-war-on-drugs_b_3617665.html); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (long prison sentences have “profoundly disruptive effects that radiate into other spheres of society”), [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf).

and Hispanic (1 in 41) children have an incarcerated parent than white children (1 in 110).<sup>31</sup> “Parental incarceration is associated with greater risk that a child will experience material hardship and family instability.”<sup>32</sup> These disruptive effects are incompatible with the need for the sentence imposed to promote respect for the law, afford adequate deterrence, and just punishment – three of the purposes of sentencing under 18 U.S.C. § 3553(a). Perhaps the largest burden, and the one that the Commission should not ignore in policy making, is the cycle of “intergenerational incarceration”, where “[p]eople with parents behind bars are more likely to end up in trouble with the criminal justice system.”<sup>33</sup> For the criminal justice system to play a role in the prevention of recidivism and delinquency, it should weigh the long term effects of parental incarceration in setting sentencing policy.<sup>34</sup> A reduction in sentence length for individuals involved in nonviolent drug offenses would be a step toward helping both them and their children lead a law abiding life.

**D. The proposed Drug Quantity Table would better reflect the relative seriousness of drug crimes.**

Proportionality is an important principle in sentencing policy. Commentators have noted that the radically increased sentences for drug offenses in the guidelines era have exerted upward pressure on sentences for other types of crime, such as economic offenses.<sup>35</sup> The Drug Quantity Table calls for extremely harsh sentences, even for first time offenders, compared to other types of crime.

While all crimes have different impacts that can make comparisons difficult, one measure of impact is financial. Based on data on national average retail prices and purities,<sup>36</sup> we can calculate the street value of various drugs that would earn a base offense level 26 under the Drug

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Michelle Alexander’s book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012), sets forth a thorough analysis of how mass incarceration and the War on Drugs have decimated communities of color and functions as a system of racial control.

<sup>31</sup> Harvey, *supra* note 30, at 2.

<sup>32</sup> National Conference of State Legislatures, *Children of Incarcerated Parents* 3 (2009), <http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> (hereinafter *Children of Incarcerated Parents*).

<sup>33</sup> Harvey, *supra* note 30.

<sup>34</sup> *Children of Incarcerated Parents*, *supra* note 32, at 7.

<sup>35</sup> Frank Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1332 (May 2005).

<sup>36</sup> Institute for Defense Analysis, *The Price and Purity of Illicit Drugs: 1981 – 2007* 15-20 (2008), [http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet\\_1.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf).

Quantity Table, corresponding to five years imprisonment for a criminal history category I defendant. Defendants sentenced for methamphetamine (actual) would qualify with about \$1000 worth of the drug. Crack cocaine defendants would need \$4,760 worth, while powder cocaine defendants would need \$43,750. Heroin defendants would need \$12,600 worth, while marijuana defendants would need about \$1,700,000 in street-level value. To earn the same offense level, a defendant sentenced for an economic offense under USSG §2B1.1, or a tax fraud under §2T1.1, would have to be attributed with losses or tax avoidance of over \$ 7 million dollars.

Another point of comparison is the degree of personal injury or violence involved. A defendant convicted of aggravated assault that caused permanent or life-threatening bodily injury receives an offense level of 21 under §2A2.2, corresponding to a sentence of just over three years for a first offender. Only if a firearm were discharged as part of the offense would the offense level reach 26. To have the same offense level under the current Drug Quantity Table, a street level seller would only have to be attributed with selling enough methamphetamine (actual) to sustain one user for about a week.<sup>37</sup>

These comparisons suggest that reducing the Drug Quantity Table by two levels would improve the proportionality of sentences across different offenses and be an important step in reducing the excessive severity in drug offenses.

## **II. Reducing the Drug Quantity Table by Two Levels Would Give Full Effect to the Fair Sentencing Act.**

In 2007, the Commission recognized the “urgent and compelling problems” associated with the way the Drug Quantity Table incorporated the statutory mandatory minimum penalties for crack cocaine offenses.<sup>38</sup> Wanting to address the problems, while recognizing Congress’s prerogative to establish cocaine sentencing policy, the Commission took the interim step of lowering the offense levels for crack cocaine so that the mandatory minimum amounts triggered offense levels 24 and 30.<sup>39</sup> That amendment established base offense levels that included the statutory mandatory minimum penalties. As the Commission notes in its Issues for Comment this year, the changes did not alter plea rates or substantial assistance departures in any

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<sup>37</sup> National Highway Traffic & Safety Admin., *Drugs and Human Performance Fact Sheets: Methamphetamine (And Amphetamine)* (purity of methamphetamine is at 60-90%; “[c]ommon abused doses are 100-1000mg/day, and up to 5000 mg/day in chronic binge use”).

<sup>38</sup> USSG App. C, amend. 706 (2007).

<sup>39</sup> *Id.*

significant way. Nor did recidivism rates change for those individuals given relief under the 2007 amendments.<sup>40</sup>

Following passage of the FSA, the Commission reverted from the minus-two treatment of crack cocaine to again linking quantities of crack cocaine to levels 26 and 32. That change put sentences for defendants in criminal history category I above the statutorily required minimum. Commission data now show that re-linking at minus-two is needed to give full effect to the FSA for defendants involved in both crack and non-crack offenses. When the Commission promulgated the FSA amendments, it recognized that the Drug Quantity Table base offense levels would not be reduced for some defendants because of the reversal of the 2007 minus-two amendment. At the time, the Commission estimated that several hundred crack defendants a year would not benefit from the FSA amendments.<sup>41</sup> Data from recent years confirm this prediction: many crack defendants received the same Drug Quantity Table offense levels in 2011 and 2012 that they would have received before the FSA.<sup>42</sup> For example, 425 individuals with 280 to 500 grams of crack remained at level 32. Some of these were subject to mandatory minimum penalties, or to the career offender guideline, which would have prevented them benefitting from the FSA in any event. But based on information in the PSRs recorded in Commission datasets, 185 could have received a lower offense level if minus-two had not been reversed. Individuals at other offense levels were also denied a benefit, including 73 who remained at the highest offense level 38 after the FSA.

The aggravating adjustments added under the FSA amendments also increased sentences for various non-crack defendants. By directing the Commission to add aggravating adjustments to the drug guidelines, the FSA sought to place more emphasis on certain aggravating conduct rather than have drug quantity serve as a blanket proxy for offense seriousness. For some crack defendants, the additional aggravating adjustments offset the higher drug quantity thresholds in the base offense levels in the Drug Quantity Table. For example, a defendant who stored and distributed crack out of an apartment might be subject to the same sentence before the FSA as after the FSA because the change in the Drug Quantity Table lowered his base offense level, but

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<sup>40</sup> *Recidivism 2007 Crack Amendment, supra* note 4, at 2.

<sup>41</sup> The Commission released no data analyses on this issue, but remarks at a public meeting indicated that the Commission estimated that hundreds of individuals a year would receive the same sentence if the 2007 amendment were reversed when the new FSA threshold for crack were added. *See USSC, United States Sentencing Commission Public Meeting Minutes* 4 (Oct. 15, 2010) (remarks of Commissioner Reuben Castillo) (“100 to 500 individuals are expected to be sentenced from November 1, 2010, when the emergency amendment becomes effective, to November 1, 2011, when the permanent amendment would become effective, who will be unaffected by the proposed amendment because of the decision to set the base offense levels at 26 and 32 to account for the new mandatory minimum gradations”).

<sup>42</sup> USSC, *FY2011 and 2012 Monitoring Dataset*.

the new enhancement for maintaining a premise for the purpose of distributing a controlled substance increased the offense level.<sup>43</sup> But because the FSA did not raise quantity thresholds for drugs other than crack, the aggravating adjustments exposed non-crack defendants to greater punishment.

Because the aggravating adjustments in the FSA apply to all individuals sentenced under §2D1.1, the Commission's proposal to change the base offense levels in the Drug Quantity Table would better achieve the FSA's goal of reducing the emphasis on drug quantity while also targeting the more culpable individuals for enhanced sentences. We believe that the aggravating adjustments added under the FSA,<sup>44</sup> along with the many other aggravating adjustments that have been added to the drug guidelines in the years since the Drug Quantity Table was created, more than offset the change in the Drug Quantity Table the Commission has proposed. Guideline §2D1.1 currently contains fourteen aggravating adjustments, and only three mitigating ones. A reduction in the Drug Quantity Table has been "prepaid" by years of increases in offense levels and aggravating adjustments.

### **III. A Two level Reduction in The Drug Quantity Table Would Help Reduce the Costs of Incarceration and Overcapacity of Prisons.**

#### **A. Sentences for individuals convicted of drug offenses have contributed to the climbing and costly federal prison population.**

Just as overly lengthy sentences exact a high cost on individuals, families, and communities, over-incarceration of individuals convicted of drug offenses has driven up the prison population and increased the costs of the criminal justice system.<sup>45</sup> The decision to base

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<sup>43</sup> USSG §2D1.1(b)(12).

<sup>44</sup> The FSA amendments added 2-level adjustments for maintaining a premise, the use of violence or credible threat to use violence, §2D1.1(b)(2), and bribery of a law enforcement officer, §2D1.1(b)(11). They also added a "super-aggravating" adjustment under §2D1.1(b)(14), which requires a 2-level increase for defendants who receive an aggravating role adjustment and whose conduct included any one of five aggravating circumstances, such as being directly involved in drug importation or distributing to a minor or a person otherwise vulnerable or over 65. The FSA amendments added a minimal role cap of offense level 32 at §2D1.1(a)(5) and a 2-level reduction at §2D1.1(b)(15) for defendants who receive a 4-level mitigating role adjustment and who also meet three other stringent criteria. USSG, App. C, amend. 750 (2011).

<sup>45</sup> Nathan James, *Congressional Research Service, The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* 1, 8 (2013) ("largest portion of newly admitted inmates are being incarcerated for drug offenses"), <https://www.fas.org/sgp/crs/misc/R42937.pdf>; Gov't Accountability Office, Bureau of Prisons: *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* 14 (2012) (48 percent of inmates housed were serving sentences for drug offenses), <http://www.gao.gov/assets/650/648123.pdf>; Urban Institute, *Examining Growth in the Federal Prison Population 1998 to 2010* (2012) (concluding that increase in expected time served by inmates convicted

sentence length for drug trafficking offenses on the type and quantity of drugs has had a substantial effect on the federal prison population.<sup>46</sup> Probation and other sentencing alternatives, which were imposed in almost 20 percent of drug cases the year the Sentencing Reform Act of 1984 (SRA) was enacted, were nearly eliminated by 1991. Average time served in prison by drug defendants increased more than two and a half times in the years immediately following guideline implementation.<sup>47</sup>

These changes were driven by the Anti-Drug Abuse Act of 1986, not the Sentencing Reform Act.<sup>48</sup> Before the Commission even wrote a guideline for drug trafficking, the Anti-Drug Abuse Act created mandatory minimums linked to quantities of several drugs, greatly complicating the Commission's work.<sup>49</sup> Before 1984, drug quantity had not been a statutory consideration in drug sentencing at all. In 1986, it became the overriding factor.

The Commission accurately predicted the consequences of these changes. In its 1987 *Supplementary Report*, the Commission predicted that prison populations would nearly quadruple within fifteen years of guideline implementation, in large part due to changes in the drug laws.<sup>50</sup> In 1985, the prison population consisted of 40,000 inmates in 46 facilities. By 2012, prison population had climbed to over 218,000 inmates in 118 facilities.<sup>51</sup> In January

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of drug offenses "was the single greatest contributor to growth in the federal prison population between 1998 and 2010," accounting for nearly one-third of total growth), <http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf>.

<sup>46</sup> Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent'g Rep. 26 (1990); John Scalia Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. Courts*, 14 Fed. Sent'g Rep. 152, 157 (2002).

<sup>47</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 52, 53 (2004) (hereinafter *Fifteen Year Review*).

<sup>48</sup> Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 Fed. Probation 9 (1993).

<sup>49</sup> Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 Crim. Law Bull. 50, 52 (1990) (describing Commission's abandonment of guideline development research upon passage of the Anti-Drug Abuse Act of 1986); *Fifteen Year Review*, *supra* note 47, at 48-49.

<sup>50</sup> USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 72 Figure 3; 74 Figure 4 (1987).

<sup>51</sup> Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* Table A-1 (Jan 22, 2013).



2014, individuals convicted of a drug offense accounted for 50.1 percent of inmates,<sup>52</sup> up from a third in the mid-1980s.<sup>53</sup>

Much of this growth has been attributed to the Anti-Drug Abuse Act, but the Commission's choices when implementing the statute also contributed. The Drug Quantity Table extrapolated quantity ranges below, between, and above the two statutory thresholds, first with 16 gradations of drug quantity, later expanded to 19, and currently at 17. This results in many guideline recommendations greater than the terms required by statute. In the past 3 years, 45,831 defendants (63% of all defendants sentenced under guidelines that linked to the Drug Quantity Table) met the mandatory minimum threshold quantities for drugs. Of these 14,799 (32%) were sentenced to prison terms greater than required by the statutory minimum applicable to their case.

Previous Commission analyses showed that 25 percent of the average prison time served by individuals convicted of a drug offense was the result of the Commission's choice to link the statutory thresholds to the guidelines in the manner that it did.<sup>54</sup> "The drug trafficking guideline . . . in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."<sup>55</sup>

The dramatic increase in lengthy incarceration of drug traffickers has come at great cost. The budget of the Federal Bureau of Prisons has grown to nearly \$7 billion a year.<sup>56</sup> While state sentencing commissions have evaluated the cost effectiveness of sentencing *vis a vis* other crime control policies, to identify those that give the greatest return on investment,<sup>57</sup> no such analysis

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<sup>52</sup> Federal Bureau of Prisons, *Inmate Statistics: Offenses* (Jan. 25, 2014), [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp).

<sup>53</sup> The Sentencing Project, *The Expanding Federal Prison Population 2*, [http://www.sentencingproject.org/doc/publications/inc\\_FederalPrisonFactsheet\\_March2011.pdf](http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2011.pdf).

<sup>54</sup> *Fifteen Year Review*, *supra* note 47, at 54.

<sup>55</sup> *Id.* at 49.

<sup>56</sup> U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance*, <http://www.justice.gov/jmd/2014summary/pdf/bop.pdf>.

<sup>57</sup> See Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006), <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>. See generally Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 771-90 (2005) (describing work of sentencing commissions

has been undertaken for federal sentencing.<sup>58</sup> Outside economic analyses have shown that the dramatic increase in the imprisonment of individuals convicted of a drug offense in the United States since the 1980s is unlikely to have been cost-effective.<sup>59</sup> The fact is that federal sentencing and imprisonment policy toward individuals convicted of a drug offense is perhaps the most poorly targeted spending in the criminal justice system.

**B. A two level reduction in the drug quantity table will help better allocate scarce criminal justice resources.**

Because quantity has not proven to be a good measure of the seriousness of an offense or culpability of individuals involved in drug offenses, it has resulted in unnecessarily long prison sentences for many individuals.<sup>60</sup> Judges,<sup>61</sup> scholars,<sup>62</sup> and others<sup>63</sup> have long cited the

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in North Carolina, Minnesota, and Washington to shift the use of prison to defendants convicted of more serious offenses).

<sup>58</sup> Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1011 (2001) (“the Commission has yet to address that task [of measuring the guidelines effectiveness] in any way”); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1039 (2004) (reviewing cost-benefit analysis of state systems and noting that “no comprehensive assessment of federal sentences has been performed”).

<sup>59</sup> Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) (“it is unlikely that the dramatic increase in drug imprisonment was cost-effective.”).

<sup>60</sup> The history of the Drug Quantity Table and the problems with it are discussed in an Addendum to this testimony. We have often urged the Commission to review how the drug guidelines are linked to mandatory minimums through the Drug Quantity Table. See e.g., Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Before the U.S. Sentencing Comm’n, Washington, D.C. (May 27, 2010); Statement of Julia O’Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Before the U.S. Sentencing Comm’n, Austin, Tex. (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Before the U.S. Sentencing Comm’n, Denver, Col. (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

<sup>61</sup> See USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010) (58% of judges surveyed believe the guidelines should be “delinked” from statutory mandatory minimums). Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission 2* (1995) (“[T]he Judicial Conference: . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.”); Judicial Conference of the United States, Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm’n (Mar. 16, 2007), <http://www.usc.gov/hearings/03/20/07/walton-testimony.pdf>.

excessive weight given drug quantity as the drug guideline's chief flaw. Research and analyses have shown that determinations of drug quantity are often arbitrary and capricious, are estimated from hearsay or other unreliable evidence,<sup>64</sup> are easily manipulated by law enforcement agents and confidential informants,<sup>65</sup> and result in "false precision."<sup>66</sup> Because of the emphasis placed on drug quantity in lieu of other factors, many defendants whose crimes are relatively less serious and who pose little danger to the public have been incarcerated for long periods of time. Those lengthy prison sentences have wasted scarce federal prison resources.

One of the striking facts about federal drug sentencing is that almost everyone goes to prison. This did not change after previous reform efforts, such as creation of the safety valve or addition of a minimum role offense level cap. Nor has the switch to advisory guidelines reduced the rate of imprisonment, even though within-range sentencing for this group of defendants fell to 44 percent in FY2012. Figure 1 shows the type of sentence imposed on the nearly one-third million (323,332) federal drug defendants sentenced under the quantity-based guidelines since

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Other judges have urged rethinking the link between the drug guidelines and the quantity thresholds in the mandatory minimum statutes, including witnesses at the Commission's Regional Hearings. *See* Transcript of Hearing Before the U.S. Sentencing Comm'n, Atlanta, GA, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Hearing Before the U.S. Sentencing Comm'n, Stanford, Cal., at 6-22 (May 27, 2009) (Judge Walker); Transcript of Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, NY, at 92, 139-41 (July 9-10, 2009) (Judge Newman).

<sup>62</sup> Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: "The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.").

<sup>63</sup> *See* General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees).

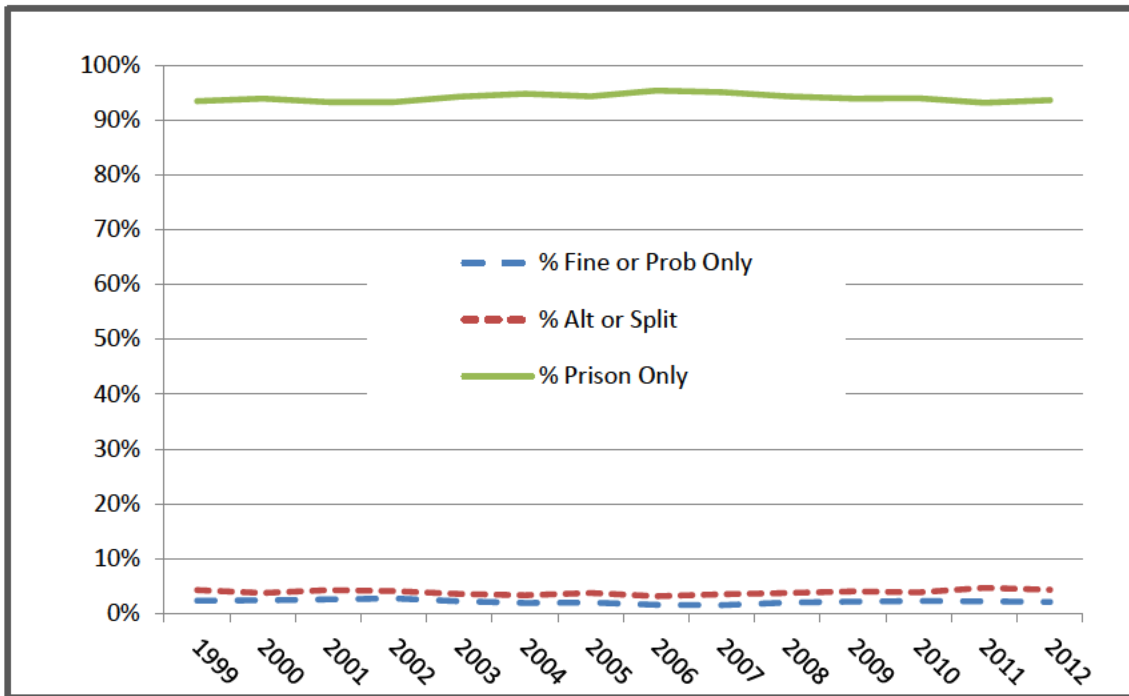
<sup>64</sup> Estimates of quantities that were not actually seized, that were under negotiation, etc., inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as "relevant conduct" lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center, Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (July/August 1997); *United States v. Quinn*, 472 F.Supp. 2d 104, 111 (D. Mass. 2007).

<sup>65</sup> Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996); Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187 (1993).

<sup>66</sup> The Honorable Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180 (Feb. 1999).

1999.<sup>67</sup> Despite the growing interest in drug courts, addiction treatment, and alternatives to imprisonment like electronic monitoring, in FY2012 only 2 percent of individuals sentenced for a drug offense received simple probation, and just 1.5 percent more received an alternative without any months of imprisonment.

**Figure 1: Type of Sentence Imposed  
Defendants subject to the Drug Quantity Table FY1999-2012**



The proposed change to the Drug Quantity Table would help shift this decades long trend of prison for individuals convicted of federal drug laws. The growth of the federal prison system has been described as a “crisis,”<sup>68</sup> which not only impacts the safety and welfare of the inmate population and BOP staff, but has sizable effects on the Department of Justice’s other law enforcement priorities. Containing the costs of incarceration is critical. Incarceration is the most costly option of all criminal justice sanctions. The annual average cost of incarceration in a BOP facility is \$28,948 compared to \$26,930 for a residential reentry center, and \$3,347 for probation

<sup>67</sup> USSC, *FY1999 – FY 2012 Monitoring Dataset*.

<sup>68</sup> Michael Horowitz, *Inspector General, Top Management and Performance Challenges Facing the Dep’t of Justice – 2013* (Dec. 11, 2013), <http://www.justice.gov/oig/challenges/2013.htm#1>.

supervision.<sup>69</sup> Reducing terms of imprisonment for individuals convicted of drug offenses is one way of containing costs without risking harm to public safety.

#### **IV. No Specific Offense Characteristics Need to be Increased or Added to the Guidelines for Drug Offenses.**

The Commission requests comment on whether any circumstances should be partially or wholly excluded from amendment to the Drug Quantity Table, asking in particular if any existing specific offense characteristics should be increased or new specific offense characteristics promulgated. Defenders oppose any such changes because they are unnecessary and would undo the benefits of a 2-level reduction across drug types.

##### **A. Reducing the average sentence of drug defendants by 11 months will not compromise public safety.**

Commission data and a number of other studies show that the average drug defendant sentenced to a shorter period of time will present no greater risk of recidivism or danger to others and may well present a lesser risk.

As previously discussed, the Commission's data show (1) no link between offense levels and recidivism;<sup>70</sup> and (2) no significant difference in recidivism rates between crack defendants who received a reduced sentence under the 2007 crack amendments and a comparable group of defendants who served their original full sentence.<sup>71</sup>

A study of New York felony drug defendants released as a result of the 2004 reforms of the "Rockefeller Drug Laws" bolsters this point. When the New York legislature contemplated changes in drug laws, some opponents of reform suggested that crime rates would soar and that harsh sentences were necessary to deter crime. An analysis of the recidivism rates of drug defendants resentenced under the reformed law showed low rates of recidivism.<sup>72</sup> Moreover, since reform of its drug laws, New York crime rates fell, with drug arrests in New York City

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<sup>69</sup> U.S. Probation & Pretrial Services, *OPPS Announces New Costs of Incarceration & Supervision* (June 7, 2013).

<sup>70</sup> *Measuring Recidivism*, *supra* note 18, at 13.

<sup>71</sup> *Recidivism 2007 Crack Amendment*, *supra* note 4, at 2.

<sup>72</sup> William Gibney, The Legal Aid Society, *Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk* 8 (2010), <http://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf>.

declining 32 percent between 2007 and 2011 and by 27 percent in the other counties that account for 80 percent of index crime reported.<sup>73</sup> Other crime rates fell as well.<sup>74</sup>

Rather than increasing the risk to public safety, a modest reduction in sentence for drug defendants may help decrease the risk of recidivism. As one report described:

The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.<sup>75</sup>

The destabilizing effect of imprisonment is particularly acute in the federal system, where inmates are often housed hundreds if not thousands of miles from home, and are unable to maintain family and community connections. Those connections are important to their successful reentry.<sup>76</sup> In the absence of continuing contact, family members are often unwilling to provide housing and other support services for the individual upon release, thereby increasing the risk of re-offense.

Reduced sentences will also help ameliorate the criminogenic effects of imprisonment. Much of our sentencing policy over the past twenty-eight years has been premised on the notion that incapacitation reduces crime. Research, however, shows that “the use of custodial sanctions may have the unanticipated consequence of making society less safe.”<sup>77</sup> In a review of five quality studies and other systematic reviews of the evidence, researchers concluded that (1) [c]ustodial sentences do not reduce recidivism more than noncustodial sanctions; (2) the evidence tilts in the direction of those proposing that the social experience of imprisonment are likely crime generating; and (3) although “the evidence is very limited, it is likely that low-risk offenders are most likely to experience increased recidivism due to incarceration.”<sup>78</sup> For

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<sup>73</sup> N.Y. State Division of Criminal Justice Services, *2009 Drug Law Changes: June 2012 Update 6* (2012), <http://www.criminaljustice.ny.gov/drug-law-reform/documents/dlr-update-report-june-2012.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005), [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf).

<sup>76</sup> See generally William D. Bales & Daniel Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 *J. of Research in Crime & Delinquency* 287 (reviewing literature on the importance of family ties and prosocial influences).

<sup>77</sup> Francis T. Cullen, et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *The Prison Journal* 48S (2011).

<sup>78</sup> *Id.* at 60S.

purposes of federal drug sentencing policy, these findings show that reducing the drug quantity table by two levels presents no real risk to public safety and may actually improve the chance of success for some defendants.<sup>79</sup>

The notion that most individuals convicted of federal drug offenses are violent or dangerous individuals who need to be incapacitated is also belied by data from the Bureau of Prisons. As of January 25, 2014, BOP housed 99,444 drug offenders.<sup>80</sup> Of those, over 50 percent (52.1%) were housed in administrative, low, or minimum security facilities. About a third (32.9%) were housed in medium security facilities. Only 8.5 percent were housed in high security facilities.<sup>81</sup> Only 11.8 percent had been found guilty of a violent prison rule infraction and even less (8.5%) were a member, associate or affiliated with a prison gang.

**B. Other statutory and guideline provisions are available to ensure sufficiently severe penalties for the few violent and serious drug traffickers.**

Defenders see no need to increase existing levels or add to the multitude of specific offense characteristics present in §2D1.1. As the Commission notes in its proposed amendments, when it promulgated the Drug Quantity Table that set mandatory minimum levels at 26 and 32, the guideline contained just a single enhancement. While the Drug Quantity Table has remained largely unchanged (with the exception of the crack quantity adjustments under the Fair Sentencing Act), §2D1.1 now contains fourteen enhancements to account for a wide variety of aggravating factors that may occur in a drug offense. Those fourteen enhancements include “super aggravating” role enhancements that add additional offense levels for a person who receives one of three aggravating role enhancements under §3B1.1 and engaged in certain other aggravating conduct. It also contains enhancements for dangerous weapons and the use of violence.

In addition to these enhancements, the guidelines contain several other provisions that reach individuals who may pose a risk to public safety. These include Chapter 5 upward departures<sup>82</sup> and the criminal history guidelines. Defendants who have criminal histories are

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<sup>79</sup> USSC, *2012 Sourcebook of Federal Sentencing Statistics*, Table 37 (2012) (in FY 2012, 64.6 percent [16,123] of drug offenders were in Criminal History Category I or II).

<sup>80</sup> Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (Feb. 24, 2014, 12:37 EST) (on file with National Sentencing Resource Counsel for the Federal Public and Community Defenders) (providing Bureau of Prisons data on Drug Offenders in BOP Custody 1/25/14).

<sup>81</sup> The remainder (6.4%) were housed in contract facilities. *Id.*

<sup>82</sup> *See* USSG §5K2.1 (death resulting); §5K2.2 (significant physical injury), §5K2.6 (weapons and dangerous instrumentalities).

subject to increased penalties to account for their risk of recidivism. And if a judge concludes that the criminal history score underrepresents that risk, the judge may depart upwardly to impose a higher sentence.<sup>83</sup>

Those defendants who are involved in organized crime, engage in more serious violence, or possess firearms face significant terms of imprisonment under other statutory and guideline provisions. These include (1) 21 U.S.C. § 848, which targets individuals who organize, manage, or supervise a continuing criminal enterprise and carries a minimum base offense level of 38 under §2D1.5 and a mandatory sentence of life imprisonment for leaders of the enterprise;<sup>84</sup> (2) 18 U.S.C. § 924(c), which prohibits possession, brandishing, or discharge of a firearm during a drug trafficking crime or crime of violence and carries mandatory minimum terms that must run consecutively to any other term of imprisonment;<sup>85</sup> (3) 18 U.S.C. § 922(g), which, among other things, prohibits unlawful drug users, drug addicts, and individuals previously convicted of a felony from possessing firearms;<sup>86</sup> and (4) 18 U.S.C. § 1959 (violent crime in aid of racketeering activity), 18 U.S.C. §§1961-1963 (Racketeer Influenced and Corrupt Organizations Act), and 18 U.S.C. § 371, which encompasses a breadth of conspiratorial activity, can easily provide a reference to a more serious guideline, including murder at §2A1.1, which calls for a life sentence.<sup>87</sup>

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<sup>83</sup> USSG §4A1.3.

<sup>84</sup> See, e.g., Immigration & Customs Enforcement, News Release: *Life Sentence for Former American Airlines Employee Who Led Drug Enterprise* (Oct. 2012), <http://www.ice.gov/news/releases/1210/121017newyork2.htm>; U.S. Attn’y E.D.N.Y., News Release, *Former Hip-Hop Manager James Rosemond, Leader of a Notorious Drug Trafficking Organization, Sentenced to Life in Prison* (Oct. 2013), <http://www.justice.gov/usao/nye/pr/2013/2013oct25.html>; U.S. Attn’y S. D. Ohio, News Release, *Dayton Man Sentenced to Life Imprisonment for Operating a Continuing Criminal Enterprise* (Feb. 2010), <http://www.justice.gov/usao/ohs/news/2010/02-26-10.pdf>.

<sup>85</sup> U.S. Attn’y M.D. Tenn., Press Release, *Nashville Gang Member Sentenced to Life in Prison for Drug Trafficking and Firearms Offenses Near Elementary School* (Feb. 2014), <http://www.justice.gov/usao/tnm/pressReleases/2014/2-14-14.html>; Immigration & Customs Enforcement, News Release, *Charlotte Felon Sentenced to 60 Years for Drug, Firearm Offenses*, (Jan. 2014), <http://www.ice.gov/news/releases/1401/140122charlotte.htm>.

<sup>86</sup> *United States v. Billy May*, No. 1:11-cr-00509-LY-1 (W.D. Tex. 2012) (48-year-old recreational user of marijuana with no prior felony convictions who possessed firearms sentenced to 30 months imprisonment – a downward variance from a guideline range of 63-78 months); *United States v. Roberts*, 529 Fed. Appx. 488 (6th Cir. 2013) (retail seller of small quantities of prescription pills sentenced to 235 months imprisonment following conviction for distribution of hydrocodone, and unlawful possession of a single handgun after having been convicted of three prior qualifying crimes under 18 U.S.C. § 924(e)).

<sup>87</sup> *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003) (defendants convicted of substantive RICO violations, conspiracy, and related crimes sentenced to life imprisonment for murder of rival gang member); *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007) (two defendants sentenced to life



**V. Minus-Two Should be Implemented Throughout the Drug Quantity Table and Guideline.**

The Commission's impact analysis showed that 30 percent of drug defendants would *not* benefit from re-linking quantity ranges in the Drug Quantity Table to offense levels at minus two. In many cases this is due to legal restrictions beyond the Commission's control. Barring revision of the mandatory minimum penalty statutes at 21 U.S.C. § 841(b), statutory minimums will continue to trump the guidelines' recommendations in a large number of cases. The career offender guideline, which is partially mandated by 28 U.S.C. § 994 (h), will continue to over-ride offense levels and criminal history scores determined under the guidelines' normal rules. We believe these provisions intrude into what is properly the Commission's decision making and cause the guidelines to function less fairly and effectively. But we understand that the remedy for mandatory minimum penalties and some of the problem<sup>88</sup> with the career offender guideline is legislation.

Other defendants will fail to benefit from the Commission's proposal, however, not because of any legal restriction but because of the limited way the Commission proposes to implement the minus-two principle. The Request for Comment cites several reasons for the Commission's proposal. These include the proliferation of sentence enhancements added to the guidelines since the creation of the Drug Quantity Table, and the statutory directive for the Commission to formulate the guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."<sup>89</sup> Both of these reasons weigh in favor of extending the minus-two principle as widely as possible. We have been unable to identify countervailing principles or policy reasons that justify denying the reduction to the particular defendants who would *not* benefit under the published proposal.

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imprisonment for murder of a confidential informant after having been convicted of substantive and conspiratorial counts of racketeering and drug trafficking and murder in relation to a continuing criminal enterprise); *United States v. Rivera*, 2013 WL 5516077 (D. Conn. 2013) (defendant convicted under 18 U.S.C. § 1962(d); 18 U.S.C. § 1962(c); 18 U.S.C. § 1959(a); and 21 U.S.C. § 846 would not be entitled to relief under 18 U.S.C. § 3582(c); putting aside the guideline calculations related to the controlled substance counts, the guidelines for the RICO counts and conspiracy to murder set his base offense level at 43, which would permit a life sentence); *United States v. Tyler*, 2008 WL 925126 (E.D.N.Y. 2008) (defendant found guilty of racketeering and conspiracy to commit murder, as well as conspiracy to distribute crack and cocaine, not entitled to relief under crack cocaine amendment because his base offense level of 43 was determined without regard to the quantity of drugs involved in the offense).

<sup>88</sup> We have in past comments discussed how the Commission made the career offender guideline broader than required under 28 U.S.C. § 994(h). See Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 22-23 (May 17, 2013).

<sup>89</sup> 28 U.S.C. § 994(g).

**A. The upper limit of the drug quantity table should be no more than a base offense level of 36, and ideally a base offense level 34.**

Rather than reducing the upper limit of the Drug Quantity Table from level 38 to level 36, the Commission's proposal retains an upper limit of level 38 and creates a new quantity range at level 36. Defenders do not believe this is necessary and recommend keeping the top of the quantity range as it currently is (e.g. 30KG or more of heroin) and making level 36 the upper limit of the Drug Quantity Table. The Commission could also implement the minus two principle by setting the upper limit at level 34, which would be two levels below the original Drug Quantity Table.

What principle is behind the decision to not lower the entire table by two levels is not apparent. The proposed table creates the new minimum quantities that trigger proposed level 38 by multiplying by three the quantities that now trigger level 38. It creates the new quantity ranges for proposed offense level 36 the same way. Looking at the rest of the table, only level 32 also has quantity ranges based upon a multiple of three. Level 26 has quantity ranges based upon a multiple of four, while the quantity ranges in level 22 are a multiple of 1.3. Absent any clear principle that necessitates retaining level 38 or creating new quantity ranges at level 36, and in light of the Commission's concern with prison crowding and excessive and duplicative sentence enhancements, a better approach is to lower the entire table by two levels.

The Commission could also make level 34 the upper limit of the Drug Quantity Table while adhering to the minus-2 principle. When the Commission first set the statutory mandatory minimum drug quantity thresholds at levels 26 and 32, it set the upper limit of the Drug Quantity Table at level 36. The Commission then changed the table several times: (1) in 1989, the Commission increased the maximum base offense level to 42 to reflect offenses of extremely high quantities;<sup>90</sup> (2) in 1994, it decreased the upper limit to 38, concluding that a higher level was unnecessary to ensure adequate punishment given the 2 to 4-level adjustment for role and the 2-level enhancement for possession of a dangerous weapon.<sup>91</sup> Although the Commission has since added to §2D1.1 thirteen enhancements beyond the original one for possession of a firearm or dangerous weapon, it has not yet readjusted the upper limit of the Drug Quantity Table.

Because the upper limit of the table was originally set at 36, decreasing the upper limit to 34, would implement the minus 2 principle in the same manner that the Commission proposes to reduce the original statutory mandatory minimum thresholds from 26 and 32 to 24 and 30. Given the wide range of non-quantity related enhancements in the guidelines, setting the upper limit at level 34 would ensure adequate punishment for more serious offenses. Congress did not

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<sup>90</sup> USSG, App. C, amend. 125 (1989).

<sup>91</sup> USSG, App. C, amend. 505 (1994).

describe a tier of punishment above the “major traffickers” for whom it wished to ensure ten year minimum sentences based on quantity alone.

We see no reason to extend the Drug Quantity table beyond level 34 or a maximum of 36. Commission reports have sometimes described the levels of the Drug Quantity Table as necessary to avoid “cliffs,” where, for example a small difference in quantity could make a large difference in punishment.<sup>92</sup> But this rationale, if needed to avoid cliffs below the ten-year statutory threshold of level 32, does not explain extension of the Drug Quantity Table for several levels above level 32. The Drug Quantity Table has at other times been described as assuring “proportionality” in sentencing. The idea is that the more drugs an offender traffics, the more harm is done, and the more punishment deserved. On close inspection, however, this “proportionality” proves illusory. Quantity as currently defined assures only that offenses involving larger amounts of a particular mixture or substance containing a drug are punished more severely than smaller amounts of *that same mixture or substance*. It does not assure similar punishment for offenses involving similar doses or actual amounts of a drug. Nor do the ratios among the quantity thresholds established by Congress for different drugs, which were apparently chosen for the unrelated purpose of acting as proxies for role, reflect the relative harmfulness of different drugs in any rational way.<sup>93</sup>

Instead of deleting level 38, the Commission’s proposal creates a new set of quantity ranges at level 36. This ensures that defendants with quantities greater than the new top of level 36 will not benefit from the proposed amendment at all. These defendants’ sentences are increased by drug quantity more than any other defendants, so the problems with quantity-based sentencing apply especially to them. Level 38 corresponds to a minimum guideline recommendation of nearly twenty years for offenders in criminal history category I with no other guideline adjustments.

In FY2012, numerous defendants whose sentences were based upon the Drug Quantity Table were held responsible for quantities of drugs sufficient to deny them any relief under the proposed table, including 124 powder cocaine defendants, 94 meth (actual) defendants, and 16 crack defendants.<sup>94</sup> Just seven of these defendants faced the career offender adjustment and just twelve had statutory mandatory minimums longer than ten years. Yet all faced base offense

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<sup>92</sup> *Fifteen Year Review*, *supra* note 47, at 50.

<sup>93</sup> See, e.g., David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 *The Lancet* 1047 (2007); Nutt et al., *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 *The Lancet* 1558 (2010); Van Amsterdam et al., *Ranking the Harm of Alcohol, Tobacco and Illicit Drugs for the Individual and the Population*, 16 *Eur. Addiction Research* 202 (2010).

<sup>94</sup> USSC, *FY2012 Monitoring Dataset*.

levels under the Drug Quantity Table linked to minimum guideline recommendations of at least twenty years, which would not be reduced under the proposed Drug Quantity Table.

We see no reason to deny these already-heavily punished individuals the same modest decrease in base offense levels that the proposed amendment would extend to other defendants whose sentences are based upon the Drug Quantity Table.

**B. The offense level floor of 12 for some drugs should reduce to 10.**

The Commission's proposal also denies relief to defendants with the *smallest* amounts of common drugs. The current Drug Quantity Table creates an offense level floor of 12 for the most common drugs, including cocaine, heroin, and methamphetamine. The Synopsis of Proposed Amendment states that "certain higher minimum offense levels are incorporated into the Drug Quantity Table for particular drug types, e.g., a minimum offense level of 12 applies if the offense involved any quantity of certain Schedule I or II controlled substances." We do not understand the rationale for setting a floor for certain drug types and none is provided in the synopsis, the commentary to §2D1.1, or Appendix C of the Guidelines Manual. Apart from that, not all Schedule I or II controlled substances are subject to the floor. Marijuana, a schedule I drug, is included in the Drug Quantity Table with ranges extending to the lowest level six.

Perpetuating this floor at level twelve would prevent a group of defendants, involved with the smallest amounts of drugs, from benefitting from the Commission's proposal. Last year, 252 defendants subject to the guidelines linked to the Drug Quantity Table were involved with drug quantities that would qualify them for a 2-level reduction of base offense level from 12 to 10 if the Commission applied the two-minus principle throughout the Drug Quantity Table.<sup>95</sup> Just over 60 of these defendants were subject to the career offender guideline or a mandatory minimum penalty from which they received no relief, and would not have benefitted from minus-two in any event. But 189 defendants would likely see their guideline ranges directly affected if the Commission dropped the offense level floor from 12 to 10.<sup>96</sup>

Most of these defendants received final offense levels of 8 (27), 10 (126) or 12 (21) after application of all other Chapter 2 and 3 adjustments. At these levels of the Sentencing Table, the guidelines recommend a range of sentencing options, depending on the defendant's criminal history category. For defendants in criminal history category I, the guidelines recommend probation at level 8, probation with confinement conditions at level 10, and a split sentence with some imprisonment at levels 12 and 13. For the 33 defendants in zones B and C of criminal

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<sup>95</sup> USSC, *FY2012 Monitoring Dataset*.

<sup>96</sup> The analysis presented in this section is based upon the USSC, *FY2012 Monitoring Dataset*.

history category I, moving down two levels opens up alternatives from which judges may choose.

At higher criminal history categories, two-point reductions do not have the same effect. None of the 48 defendants in categories IV-VI would move into zone A where the guidelines recommend probation. Although for 24 defendants in category V, judges would have the option of imposing a split sentence rather than a full term of imprisonment. Five defendants at category III, level 12 could also become eligible for a split sentence; five more at category II for probation with alternative confinement. At level 10, 37 defendants could become eligible for probation with confinement conditions instead of a split sentence. While the overall number of defendants affected is relatively small, the difference between, for example, home confinement and imprisonment can make an invaluable difference in the lives of our clients.

Nor should the Commission assume that defendants in a higher criminal history category are not good candidates for sentence reductions or alternatives to imprisonment. One of our colleagues had a case in which the client was charged with two counts of distributing cocaine. The first sale was 1.1 grams, and the second sale was 5.9 grams, for a total of 7 grams. The base offense level was 12. The client was in criminal history category IV due to prior drug possession offenses, giving a guideline range of 15 to 21 months. The judge gave the client 12 months and a day. If the Drug Quantity Table had been reduced to level 10 for this defendant, the guideline recommendation would have comported with the sentence the judge thought appropriate.

A two point reduction would make a real difference for many of our clients. Take for example one of our clients – a 25-year-old defendant convicted of selling less than 5 grams of heroin, with a criminal history category II due to a prior conviction for heroin possession. Under the current guidelines, his range was 8 to 14 months imprisonment (base offense level 12 minus 2 for acceptance of responsibility). If the Commission were to implement the minus-2 offense level reduction throughout the Drug Quantity Table, that range would be 4 to 8 months. For a father facing the loss of his liberty, the loss of employment, and the stability of a relationship, the difference between spending 4 versus 8 months in imprisonment is significant.

Experience and data have shown that judges exercise their discretion when imposing sentence in zones A, B, C. Just because the guidelines make probation or alternatives available does not mean defendants automatically receive such sentencing options. In some cases, defendants receive short prison sentences of “time served.” In other cases, judges impose imprisonment, especially on defendants with more serious criminal records, even in zones that do not require it. Just half of the defendants who fell in zone A received simple probation; over half who fell in zone B received some imprisonment, even though non-imprisonment alternatives are an option in Zone B.

Among the 56 defendants in zone D, where the guidelines recommend only imprisonment, just nine received an alternative sentence as a result of a downward departure or variance. Judges who now accept the guidelines' recommendations to require imprisonment may well consider alternatives to incarceration if they were included among the available options.

Figure 1 in Part III shows how the rate of imprisonment has not declined for drug offenses over the past fourteen years. Maintaining the offense level floor of 12 in the Drug Quantity Table prevents the Commission's minus-two proposal from addressing, in even a minor way, the astonishingly high incarceration rate of drug defendants. The proposed amendment would only serve to modestly *shorten* prison terms, not divert from prison the individuals who committed the least serious offenses.

### **C. Minimum offense levels in other guideline provisions**

While not a part of the Drug Quantity Table, we note that other provisions in the drug guidelines will prevent some defendants from benefitting from the minus-two proposal. Specific offense characteristics in several guidelines contain minimum offense levels that override the Drug Quantity Table in cases where quantity and other adjustments do not meet the minimum. These include:

- §2D1.1(b)(3) use of aircrafts, submersibles, defendant pilots      minimum level 26
- §2D1.1(b)(13)(B) meth in the presence of a minor      minimum level 14
- §2D1.1(b)(13)(C) meth manufacture and minor or risk      minimum level 27
- §2D1.1(b)(13)(D) meth manufacture and risk of harm to minor      minimum level 30
- §2D1.2(a)(4) all offenses      minimum level 13
- §2D1.2(a)(3) if protected person under 18      minimum level 26
- §2D1.5 all offenses      minimum level 38
- §2D1.10 all offenses      minimum level 20
- §2D1.10 if meth manufacture      minimum level 27
- §2D1.10 if meth manufacture and risk to minor or incompetent      minimum level 30

Perhaps the most significant minimum offense level is the floor of 17 contained in the safety-valve provision at §5C1.2(b). This applies to low-level, non-violent, first-time offenders who qualify for the safety valve, but who would otherwise be subject to a five-year mandatory minimum based on the quantity of drugs alone. This provision arose as a result of congressional action. We hope that as part of the discussion and reforms to the safety valve now being considered in Congress, any remaining restriction on the Commission's ability to amend this provision will be removed. We strongly support applying the minus-two principle to this and all minimum offense levels throughout the guidelines manual.

**VI. Additional Changes to the Guidelines Would Help Ensure that Quantity Better Tracks the Purposes of Sentencing.**

In addition to the changes discussed above, we offer two additional changes to the guideline commentary that would help ensure that the drug guidelines better serve the purposes of sentencing. Note 26 of section 2D1.1 should be amended to encourage downward departure whenever the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense. The Note should also be amended to encourage downward departure if drug quantity over-represents a defendant's role in the criminal enterprise.

Attached to this testimony is an addendum that reviews some of the history of the Drug Quantity Table, explains how it was premised on the notion that quantity could serve as a proxy for role in the offense, and resulted in different rules for when the weight of a controlled substance is determined by counting the entire weight of any mixture or substance containing a detectable amount of the controlled substance and when weight is determined only by the actual amount of the controlled substance. That history provides context to the discussion below and why we believe several other amendments could help judges fashion sentences that meet the purposes of sentencing.

Because the guidelines do not explain how drug quantity is intended to relate to the purposes of sentencing at 18 U.S.C. § 3553(a), judges have little guidance when evaluating, in a particular case, whether the guideline recommendation tracks those purposes. Too often, this has led to mechanical guideline application, where a drug mixture is simply weighed and the offense level calculated, without analysis of whether quantity is properly tracking the statutory purposes in a particular case.

Application Note 26 to guideline §2D1.1 provides "Departure Considerations" and offers three examples of when consideration of quantity might not track the statutory purposes. Note 26(A) concerns "reverse stings" when government agents sell a defendant drugs at artificially low prices, "thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed." Downward departure is invited, on the apparent theory that, in this situation, drug quantity exaggerates either the defendant's culpability or his or her ordinary scale of drug trafficking.

Note 26(B) invites upward departure "if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance." Under the current Drug Quantity Table, this is level 38 for most drugs. As an example, the note states: "upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38." If the Commission were to make 36 or 34 the highest offense

level in the Drug Quantity Table, as we have recommended, the Commission could also amend this Application Note to encourage upward departures in “an extraordinary case.”

**A. Encourage a downward departure whenever the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense.**

Note 26(C), which invites upward departure based on unusually high purity,<sup>97</sup> is of particular interest. It concerns potential problems with the use of the weight of the entire mixture or substance that contains a detectable amount of a drug, instead of the weight of the actual drug itself. The note explains:

The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant’s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.

The note then alludes to a potential problem with drug quantity as a proxy for a defendant’s role and culpability: “[a]s large quantities are normally associated with high purities; this factor is particularly relevant where smaller quantities are involved.” In other words, if a defendant is held responsible for just a small quantity, but it is unusually pure, quantity may not properly track the defendant’s role and culpability and upward departure may be warranted.

We understand the potential problem the guideline addresses, but believe it is quite rare. What we do not understand is how this is the only problem with the use of quantity that sufficiently concerns the Commission to warrant an application note and an invited departure. The Commission’s research has made clear that the biggest problem with the use of quantity is the frequency that it over represents a defendant’s role. Yet the Application Notes are silent concerning any of the common circumstances in which quantity fails to track the seriousness of an offense.

The Commission has previously acknowledged that the use of quantities of drug mixtures can misrepresent offense seriousness. We review in the Addendum how special rules were developed for LSD and other circumstances where the weight of the mixture or substance

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<sup>97</sup> The note excepts “PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity.”



exceeds the weight of the active ingredient. We believe that similar problems will become more frequent in the years ahead, particularly in offenses involving edible marijuana products. Products that include marijuana or its active ingredient THC, such as cookies, candies, and drinks, are now available for sale in Colorado,<sup>98</sup> and will be available this summer in Washington. At this point, it appears that federal marijuana enforcement will shift to interdiction of products that move inter-state. An increase in federal cases involving products in which the weight of the active drug is small relative to the rest of the mixture are likely to increase.

We believe the Commission should act now to avoid repeating the problems that led to unfairness and waste regarding LSD offenses. Note 26(C) should be amended to encourage downward departure whenever the weight of the mixture of substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense.

**B. Encourage downward departure if drug quantity over-represents a defendant's role in the criminal enterprise.**

Finally, Commission research has long established that the aggregation of many small quantities, either across time or across many participants in jointly undertaken activity, can result in street dealers, look-outs, and other low-level participants being held accountable for large quantities, and subject to prison terms Congress intended for kingpins. Couriers and mules, who may receive only a small payment for their role, are temporarily in possession of large quantities, from which they reap no profit.

The Application Note should be amended to encourage downward departure, at least in extraordinary circumstances, if drug quantity over-represents a defendant's role in the criminal enterprise.<sup>99</sup> We recognize that this is a difficult issue, but believe it is at the core of problems with the Drug Quantity Table. A more extensive revision of the drug guidelines is needed to address the ways that quantity can go wrong. But we believe that the Commission should at this point acknowledge these problems and alert judges to the unfairness that can result from mechanical application of the Drug Quantity Table.

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<sup>98</sup> Russell Haythorn, *Edible Marijuana Sales Shattering Sales Projections in Colorado*, ABC 7 News: TheDenverChannel.com (Jan. 15, 2014), <http://www.thedenverchannel.com/news/local-news/edible-marijuana-sales-shattering-sales-projections-in-colorado>.

<sup>99</sup> The role cap at §2D1.1(a)(5) recognizes that the offense levels in the Drug Quantity Table over-state role at the higher base offense levels, but do nothing to account for that over-representation below level 32.

## **MARIJUANA CULTIVATION**

Defenders encourage the Commission to avoid the current controversy surrounding marijuana grow operations – the largest of which are concentrated in California.<sup>100</sup> First, the recent emphasis on environmental harms associated with marijuana growing is part of the cultural debate surrounding the legalization of marijuana. Some opponents of legalization have been emphasizing the environmental harms as part of an effort to turn the tide of public opinion. At the same time, many environmentalists who have watched the growing operations explode in size believe that regulation rather than increased penalties for the workers caught in the fields is the solution to the problem. Second, environmental and other harms associated with some marijuana growing operations will not be ameliorated by increasing penalties for the farmers, laborers, and delivery drivers (aka “lunch men”) involved. If the federal government is going to continue to wage a war on marijuana, limited resources should be directed at eradication efforts, not prison bed space for low level field workers or drivers. Third, existing statutes and guideline provisions are more than adequate to address these issues. Neither prosecutors nor the Office of National Drug Control Policy<sup>101</sup> have complained that penalties for these offenses are inadequate.

If the Commission nonetheless amends the guidelines, any such amendment should be narrowly tailored and targeted at those who play an aggravating role and finance marijuana growing operations. Mitigating circumstances should also be provided for in the guidelines.

### **I. The Culture War over the Legalization of Marijuana Has Exacerbated the Problems Associated with the Unregulated and Covert Growing of Marijuana.**

Twenty states and the District of Columbia have legalized medical marijuana.<sup>102</sup> Two other states have legalized its recreational use. Other states have decriminalized the possession of small quantities for personal use. Thirteen more states have pending legislation or ballot

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<sup>100</sup> See Karen August, *Playing the Game: Marijuana Growing in a Rural Community, A Thesis Presented to the Faculty of Humboldt State University* 20-22 (May 2012), [http://humboldt-dspace.calstate.edu/bitstream/handle/2148/978/Augustthesis%20FINAL\\_DRAFT.pdf?sequence=3](http://humboldt-dspace.calstate.edu/bitstream/handle/2148/978/Augustthesis%20FINAL_DRAFT.pdf?sequence=3).

<sup>101</sup> *Exploring the Problem of Domestic Marijuana Cultivation*, Hearing before Senate Caucus on International Narcotics Control (Dec 7, 2011) (Statement of R. Gil Kerlikowske, Director of National Drug Control Policy), <http://www.drugcaucus.senate.gov/hearing-12-7-11/ONDCP%20testimony%20on%20marijuana%2012%2006%2011%20final.pdf>.

<sup>102</sup> Julie Lee & Kari Gelles, USA Today, *Which States have Legalized Marijuana?*, <http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199> (Jan. 6, 2014).

measures to legalize medical marijuana.<sup>103</sup> The net result is an increased demand for high quality marijuana. Because marijuana is still illegal under federal law, however, growers must operate in the shadows – on public lands or private property.

Growers have cultivated cannabis on federal property and private property within the United States since before the guidelines inception. The DEA, through its Domestic Cannabis Eradication/Suppression Program, has been funding eradication programs since 1979. The recent attention given to grow operations in California and the focus on the harm caused to the environment is a direct result of the increasing conflict between state and federal laws on the legalization of marijuana and the lack of agricultural regulations. Local officials and scholars, intimately familiar with the problems of trespass grows, point out that they are a symptom of the Drug War itself and that the current focus on environmental damage is a strategy – similar to the now disavowed fears of violent Mexican drug cartels<sup>104</sup> – designed to “undermine local growing across the board, as opposed to going after people who are violating environmental laws.”<sup>105</sup>

The conflict between federal and state authorities is most apparent in Mendocino County, California. Mendocino County is one of three counties in the “Emerald Triangle,” a region in Northern California where cannabis has been grown since the 1960s. The legalization of marijuana for medical and recreational use has caused growth in the cannabis industry there and elsewhere. While legalization has generated revenues for local and state governments in California, Washington, Colorado, and elsewhere, the demand has placed a strain on agricultural resources. In Northern California watersheds, which had been damaged by years of logging, ranching, and development, marijuana growing has presented new and unique challenges. Unlike vineyards and other agricultural operations subject to environmental regulations, marijuana growing is an unregulated industry driven underground because it is a violation of federal law.

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<sup>103</sup> ProCon.org, *13 States with Pending Legislation to Legalize Medical Marijuana* (as of Feb 13, 2014), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>.

<sup>104</sup> Three years after blaming Mexican drug trafficking organizations for cultivating marijuana on public lands, the Office of National Drug Control Policy reportedly said “there was scant evidence that the cartels exerted much control over marijuana growing in the national forests.” *Compare* Phil Taylor, *Cartels Turn U.S. Forests into Marijuana Plantations, Creating Toxic Mess*, N.Y. Times (July 30, 2009) (quoting Gil Kerlikowske, Chief of the White House’s Office of National Drug Control Policy), <http://www.nytimes.com/gwire/2009/07/30/30greenwire-cartels-turn-us-forests-into-marijuana-plantat-41908.html?pagewanted=all> with Joe Mozingo, *Roots of Pot Cultivation in National Forests Are Hard to Trace*, L.A. Times (Dec. 26, 2012) (quoting Tommy Lanier, director of the National Marijuana Initiative, Office of National Drug Control Policy), <http://articles.latimes.com/2012/dec/26/local/la-me-mexican-marijuana-20121226>.

<sup>105</sup> David Downs, *Greenwashing the War on Drugs*, East Bay Express (Oct. 9, 2013), <http://www.eastbayexpress.com/oakland/greenwashing-the-war-on-drugs/Content?oid=3732589>.

In 2010, Mendocino County officials sought through regulatory efforts to control a surge in marijuana cultivation, and the attendant environmental and other harms.<sup>106</sup> Officials issued permits to medical marijuana growers, which would have required growers to install security fencing and cameras, pay permit fees up to \$6,450 a year, and undergo inspections four times a year. Plants were given a zip-tie with a sheriff's serial number on it to show that the growers were in compliance. During the first year, eighteen growers signed up. Another ninety-one signed up the second year. The permit program not only helped to ensure safe agricultural practices and generated an estimated \$600,000, but, as Sheriff Allman of Mendocino County explained: "it allowed his department – which spends 30 percent of its \$23 million budget on pot enforcement – to target major cultivators."<sup>107</sup> The Mendocino County program, and one in the works in adjoining Humboldt County, came to a halt, however, when the U.S. Attorney and DEA agents raided several of the regulated grow sites and threatened county officials with legal action.<sup>108</sup> Similar federal enforcement actions have been taken in Fresno County, where persons growing marijuana on private property in compliance with state law have been subjected to federal prosecution.<sup>109</sup> Many observers believe that these actions have driven more growers into the backwoods to hide from federal law enforcement authorities.<sup>110</sup> The end result is that growers who wish to operate legitimate, environmentally safe enterprises cannot obtain help from county agricultural officials because of federal prohibitions.<sup>111</sup>

Of course, Mendocino County is not the only place where marijuana is grown within the United States,<sup>112</sup> but it highlights the complexity of the problem and how increasing penalties for

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<sup>106</sup> Joe Mozingo, *Mendocino County Spars with Feds Over Conflicting Marijuana Laws*, L.A. Times (Jan. 20, 2013), <http://articles.latimes.com/2013/jan/20/local/la-me-mendo-pot-20130122>.

<sup>107</sup> Peer Hecht, *California's Emerald Triangle Pot Market is Hitting Bottom*, The Sacramento Bee (May 2012), <http://www.sacbee.com/2012/05/05/4467516/californias-emerald-triangle-pot.html>.

<sup>108</sup> *Id.*

<sup>109</sup> See Letter from Margaret Mimms, Fresno County Sheriff, to Land Owners Using Property to Cultivate or Distribute (April 24, 2012), <http://operationmercury.org>.

<sup>110</sup> Downs, *Greenwashing the War on Drugs*, *supra* note 105.

<sup>111</sup> See, e.g., Josh Harkinson, *How Industrial Pot Growers Ravage the Land: A Google Earth Tour* (Feb. 6, 2013), <http://www.motherjones.com/blue-marble/2013/02/google-earth-tour-marijuana-farms-environment-video>.

<sup>112</sup> See Drug Enforcement Administration, *2012 Domestic Cannabis Eradication/Suppression Statistical Report* (identifying eradicated outdoor grow sites in 47 states and Puerto Rico; the top five states, accounting for more than half the 6470 sites, were California, Kentucky, Ohio, Hawaii, and Michigan), [http://www.justice.gov/dea/ops/cannabis\\_2012.pdf](http://www.justice.gov/dea/ops/cannabis_2012.pdf). The DEA statistics do not distinguish between industrial hemp and marijuana, which both come from the cannabis sativa plant, but which are cultivated differently so that hemp contains a much lower level of tetrahydrocannabinoids (THC). See Hempethics,

the farmers and other agricultural workers – whether they are small farmers who supply medical marijuana dispensaries, small groups of users cooperatively growing cannabis, or larger operations that supply the black market – is not going to solve the problem.

## **II. Increased Penalties for those Prosecuted for Marijuana Cultivation Will Not Deter Growers.**

The notion that higher penalties for those prosecuted for trespass grows on public or private land will serve any legitimate purpose of sentencing is misguided. The persons prosecuted in these trespass grows typically play small roles and have no connection to those who finance the operations or set up the grow site. Many are immigrants or other persons with financial struggles who are willing to work as farm laborers in any agricultural business or at whatever job is available. Their roles in marijuana grow operations vary. For the three to six months during the growing season, growers often remain on site. Sometimes they have other workers to cook, do laundry, or otherwise help around camp or in the fields. Drivers, known as “lunch men” will deliver food and other supplies to the growers. When the crop is ready to harvest, more workers are brought in to harvest and process the buds. Once the buds dry, the marijuana is packaged. At that point, drivers will deliver the drugs to those responsible for distribution.

The persons charged in these trespass grows often receive lengthy terms of imprisonment even though they fall low in the hierarchy of the grow operations and are just trying to make a living. One Defender client, a 54-year-old man with little criminal history, who cooked, did laundry and performed other mundane tasks for the growers received a 120 month sentence for manufacturing marijuana and a consecutive 60 month sentence under 18 U.S.C. § 924(c) for a gun found in his waistband when officers apprehended him at the grow site. Another Defender client was arrested four days after he arrived at a grow site to trim plants. He had been abandoned at the age of 7. For years, he worked in the fields of Mexico and California picking produce. For him, trimming marijuana plants paid more than he could make harvesting grapes. The offense involved 7,343 plants, yielding a base offense level of 30. Even with an adjustment for minor role, safety valve, and acceptance of responsibility, his guideline range was 51-63 months.<sup>113</sup> The government argued for a below range sentence of 46 months. Agreeing instead with the probation officer’s recommendation, the court imposed a sentence of 37 months. In

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*Difference Between Industrial Hemp and Cannabis*, <http://hempethics.weebly.com/industrial-hemp-vs-cannabis.html>. Industrial hemp cultivation is legal in Colorado, Oregon, Kentucky, Vermont, Montana, West Virginia, North Dakota, and Maine, but remains illegal under federal law. Raju Chebium, *Farm Bill Would Allow Hemp Cultivation in Some States*, USA Today (Jan. 29, 2014), <http://www.usatoday.com/story/news/politics/2014/01/29/hemp-cultivation/5039263>.

<sup>113</sup> His criminal history was II as a result of single offense for driving a bicycle while intoxicated.

another case in Oregon, the defendant and others on the grow site were hired to cultivate the marijuana. The defendant had no decision-making authority and was unarmed. He pled guilty to conspiracy to manufacture marijuana and depredation of government property. Upon the government's recommendation, he received concurrent sentences of 51 months and was ordered to pay \$97,474 restitution for the costs of cleanup and restoration.

Locking up workers for longer periods of time will do nothing to deter the growing operations. Cannabis is a highly profitable crop in high demand.<sup>114</sup> Sales in Colorado are expected to reach \$1 billion in the next fiscal year and this year the state is expected to reap more than \$100 million in marijuana taxes.<sup>115</sup> For every person incarcerated for working at a grow site, another will step in because they can earn more money tending cannabis plants than grapes, almonds, berries or other crops.<sup>116</sup> Because growing cannabis is such a profitable enterprise, whether eradication will solve the problem is subject to considerable debate.<sup>117</sup> But so long as marijuana remains illegal, the federal goal of “[p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands”<sup>118</sup> is not going to be served by increasing sentence length.

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<sup>114</sup> Matt Baume, *Marijuana Crushes Grapes as Cash Crop*, NBC Bay Area (July 6, 2011), <http://www.nbcbayarea.com/blogs/prop-zero/Marijuana-Crushes-Grapes-as-Cash-Crop-105288093.html>. In addition to California, marijuana is a sizable cash crop in Alaska, Alabama, California, Connecticut, Hawaii, Kentucky, Maine, North Carolina, Oregon, South Carolina, Tennessee, and West Virginia. Jon Gettman, *Marijuana Production in the United States* (2006), DrugScience.org, <http://www.drugscience.org/Archive/bcr2/cashcrops.html>.

<sup>115</sup> Jack Healy, *Colorado Expects to Reap Tax Bonanza From Legal Marijuana Sales*, N.Y. Times (Feb. 20, 2014), [http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html?hpw&rref=us&\\_r=1](http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html?hpw&rref=us&_r=1).

<sup>116</sup> This is similar to the observation the Commission made in the *Fifteen Year Report* about how “retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high.” USSC, *Fifteen Years of Guidelines Sentencing* 131 (Nov. 2004).

<sup>117</sup> Mason Tvert of the Marijuana Policy Project opined that we “cannot simply arrest and jail our way out of [the problem]” and that the “quickest and easiest way to prevent marijuana from being grown on public lands is to regulate it like alcohol.” See Robin Wilkey, *California Lawmakers Worry About Pollution Caused by Illegal Marijuana Growers*, The Huffington Post (Dec. 10, 2013), [http://www.huffingtonpost.com/2013/12/10/marijuana-pollution\\_n\\_4415248.html](http://www.huffingtonpost.com/2013/12/10/marijuana-pollution_n_4415248.html).

<sup>118</sup> Memorandum from James M. Cole, Deputy Att'y Gen. of the United States, to United States Attorneys, *Guidance Regarding Marijuana Enforcement 2* (August 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

As the Commission heard from many social scientists at its recidivism roundtable, long prison sentences do not deter criminal activity.<sup>119</sup> The certainty of getting caught and being punished are more important than the severity of the sentence.<sup>120</sup> And setting aside the social science, the practical reality is that for every dollar spent on imprisonment, the Department of Justice loses money for enforcement. Enforcement is key. As Fresno County Sheriff Mims put it: “sustained success [in taking down growing operations] appears to be a product of perseverance with focused operations that use the resources of local, state, and federal agencies, but which rely chiefly on the considerable resources afforded by the federal government.”<sup>121</sup>

### **III. Existing Statutory and Guideline Provisions Adequately Address the Environmental and Other Harms Caused by Marijuana Cultivation.**

A multitude of criminal statutes and guideline provisions already serve the purposes of sentencing and adequately address the environmental and other harms identified in the issues for comment and Congressman Huffman’s November 21, 2013 letter to the Commission. The criminal code makes it a separate crime to cultivate or manufacture a controlled substance on federal property. 21 USC § 841(b)(5). Subsection (b)(5) expressly states that “the person shall be *imprisoned as provided in [21 U.S.C. § 841(b)]* and shall be fined [certain specific amounts].” Section 21 U.S.C. § 841(b)(6) sets forth a separate offense for a person who violates 21 U.S.C. § 841(a), or attempts to do so, “and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use – (A) creates a serious hazard to humans, wildlife, or domestic animals; (B) degrades or harms the environment or natural resources; or (C) pollutes an aquifer, spring, stream, river, or body of water.”

While these statutes are not expressly referenced in the appendix to the guidelines, because they depend upon a violation of 21 U.S.C § 841(a), they are referred to §2D1.1. Section

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<sup>119</sup> Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 817 (2010) (there is “no real evidence of a deterrent effect for severity”). See Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime & Just. 143, 189 (2003) (“no consistent and plausible evidence that harsher sentences deter crime”). See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 Geo. L. J. 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Legal Stud. 1, 4-7 (1999).

<sup>120</sup> Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010).

<sup>121</sup> *Exploring the Problem of Domestic Marijuana Cultivation*, Hearing before Senate Caucus on International Narcotics Control (Dec. 7, 2011) (Statement of Margaret Mims, Fresno County Sheriff), <http://www.drugcaucus.senate.gov/hearing-12-7-11/Sheriff-Mims-Testimony-Marijuana-on-Public-Lands.pdf>.

2D1.1(13)(A) contains a 2-level enhancement “[i]f the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, stage, or disposal of a hazardous waste.” This enhancement covers the environmental harms caused by the use of pesticides, rodenticides, herbicide, and similar toxic substances at marijuana grow sites, as well as the disposal of garbage.<sup>122</sup> It is broad enough to cover not only damage to the land, but to watersheds under the Federal Water Pollution Control Act (Clean Water Act). The commentary encourages an upward departure in cases where a 2-level enhancement does not adequately account for the harm. It also instructs the court to consider the costs of cleanup and harm to individuals or property in fashioning restitution and conditions of supervision. USSG §2D1.1, comment. (n. 18).

Other statutes and guidelines also address the environmental harms identified in the issues for comment. One statute that prosecutors have used in these cases is 18 U.S.C. § 1361, which prohibits depredation against government property. Depredation is broad enough to cover such things as water diversion, vegetation removal, and pollution.<sup>123</sup> Section 1361 is referenced to §§2B1.1 and 2B1.5. When a defendant is convicted for drug manufacture and depredation, then the grouping rules provide for incremental punishment. Just as a count involving the sale of a controlled substance and a count involving an immigration law violation are “not grouped together because different societal interests are harmed,”<sup>124</sup> then a count involving the manufacture of marijuana and a count involving a violation of an environmental law do not group together. As a result, the offense level is increased anywhere from 1 to 5 levels or the defendant is subject to a sentence at the higher end of the sentencing range pursuant to §3D1.4(c). In unusual cases where the offense level does not increase and a sentence at the higher end of the range is not adequate, the guidelines expressly provide for upward departure. USSG §3D1.4 comment. (backg’d). In cases involving both marijuana manufacturing and

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<sup>122</sup> See generally Environmental Protection Agency, *Resource Conservation and Recovery Act (RCRA)*, <http://www.epa.gov/oecaagct/lrca.html>.

<sup>123</sup> See *United States v. Jenkins*, 554 F.2d 783 (6th Cir. 1977) (depredation means robbing, plundering or “laying waste”); *United States v. Fairchild*, 46 F.3d 1146, 1995 WL 7696 (9th Cir. 1995) (driving spikes into trees in an effort to prevent logging operations was depredation of property).

We are concerned that congressional representatives who called upon the Commission to increase penalties seem to have misunderstood the reach of this statute and the operation of the guidelines grouping rules. Rep. Huffman released a press release stating that “[u]nder current law, environmental damages such as water diversions and vegetation removal are not considered as separate or aggravating offenses,” but they clearly are under 18 U.S.C. § 1361. *Rep Huffman Applauds U.S. Sentencing Commission Action on Trespass Marijuana Cultivation Operations* (Jan. 17, 2014), <http://huffman.house.gov/media-center/press-releases/rep-huffman-applauds-us-sentencing-commission-action-on-trespass>.

<sup>124</sup> USSG § 3D1.2, comment. n. (2).



degradation of government property, we have seen plea agreements where the parties agree on the applicability of §3D1.4. We are aware of no cases where the prosecution has complained that the penalties are too low or where the court has found the need to depart upward.

Other statutes, including those referenced to Ch. 2, Part Q – Offenses Involving the Environment – cover the use of pesticides, herbicides, rodenticides; damage to water, fish, wildlife, and plants; and the use of hazardous or injurious devices. For example, §2Q1.1 – Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants -- carries a base offense level of 24. Section 2Q1.2 – Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification: Unlawfully Transporting Hazardous Materials in Commerce – carries a base offense level of 8, but has substantial specific offense characteristics that can quickly drive the sentence up, including a 4-level increase for the discharge of pesticides; a 4-level increase if the cleanup required a substantial expenditure, and a 4-level increase for transportation without a permit. Other guidelines in Ch. 2, Part Q cover mishandling of environmental pollutants, tampering with a public water system, hazardous or injurious devices on federal lands, and offenses involving fish, wildlife, and plants. As discussed previously, the grouping rules would provide for incremental punishment if the defendant were convicted of an environmental crime referenced to Ch.2, Part Q and a drug trafficking offense referenced to §2D1.2.

Prosecutors have used these environmental crime provisions to obtain incremental punishment where they believed it appropriate. In one case, the defendant delivered chemicals and supplies to a marijuana cultivation site in the Sequoia National Forest where 9,746 marijuana plants were growing. He was charged with multiple counts of manufacture of marijuana, possession with intent to distribute marijuana, degradation of public lands, unlawful distribution of an unregistered pesticide under 7 U.S.C. § 136j(a)(1)(A),<sup>125</sup> and possession of a firearm in furtherance of a drug trafficking crime. Pursuant to a plea agreement, he received a sentence of 6 years imprisonment after pleading guilty to the firearm count and the unlawful distribution of an unregistered pesticide. He also agreed to pay restitution in the amount of \$4,294.33 for damage to the forest caused by the marijuana cultivation operation.<sup>126</sup> That the government elected to dismiss multiple counts that could have subjected the defendant to a more significant prison term demonstrates that the existing statutory and guideline framework is more than adequate to address the harm caused by marijuana cultivation on public land.

Restitution is always an option for the court in these cases, whether the defendant is convicted of a drug and/or environmental offense. For example, one defendant pled guilty to conspiracy to manufacture and to possess with the intent to distribute marijuana and was

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<sup>125</sup> 7 U.S.C. § 136j is referenced to USSG §2Q1.2.

<sup>126</sup> Restitution has been ordered in other cases involving degradation of government property.

sentenced to 69 months imprisonment. The government dismissed the deprecation of government property count, but the defendant was nonetheless ordered to pay restitution to the U.S. Forest Service in the amount of \$25,9410.00.<sup>127</sup> Similarly, in cases that involve trespass grows on private property, the court may order restitution payable to the property owner.

As to concerns about violence and intimidation at marijuana grow sites, numerous provisions in the criminal code and guidelines reach such conduct. Section 2D1.1 contains enhancements for violence and dangerous weapons, §2D1.1(b)(1) and (2). 18 U.S.C. § 924(c) contains separate mandatory minimum penalties for cases where firearms are possessed, brandished or discharged in relation to a drug trafficking crime. Those provisions apply whether the offense occurs on public or private property. For murder, manslaughter, attempts, conspiracy, or other assaults occurring on federal property, 18 U.S.C. § 113 contains numerous penalty provisions that are referenced to Ch. 2, Part A of the guidelines. We have not seen any cases where the offense has been charged, but the Anti-Drug Abuse Act contains a specific provision for “boobytraps” on federal property where a controlled substance is being manufactured. 21 U.S.C. § 841(d). As the Commission notes, the offense carries a base offense level of 23 under §2D1.9. According to the Commission’s data, §2D1.9, has never been used in the past eleven years.<sup>128</sup> We would be surprised if it has ever been used. Accordingly, we see no need to tinker with §2D1.9.

#### **IV. Trespass on Private Property is a Matter Best Left to the States**

Defenders do not believe that trespass on private property to cultivate marijuana is any more aggravating than trespass on public lands. As discussed above, §2D1.1 contains enhancements that reach much of the conduct associated with marijuana cultivation. Many environmental laws regarding the use of pesticides and the protection of water ways apply whether the offense is committed on public or private land.

Beyond those penalty provisions, trespass on private property is best left to the states to prosecute. A recent California case, *Bock v. Smith*, 2012 WL 174968 (E.D. Cal. 2012), demonstrates the messy disputes that can occur about marijuana growing operations on private property. In *Bock*, the plaintiffs, in accordance with California law, were growing 500 plants on private property in Nevada. The defendants, one of whom had acquired title to the property on which the plants were growing, caused the local sheriff to destroy the plants. Plaintiffs sued in state court for damages on claims of trespass, conversion, and interference with contract. In

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<sup>127</sup> See U.S. Attn’y E.D. Cal., Press Release, *Fresno, Tulare and Kern Counties Marijuana Prosecution Update* (April 15, 2013), <http://www.justice.gov/usao/cae/news/docs/2013/04-2013/04-15-13Marijuana.html>.

<sup>128</sup> USSC, *Sourcebook of Federal Sentencing Statistics* (FY 2004 through FY2012).

seeking to remove the case to federal court, defendants argued that federal law prohibiting marijuana growing preempted the state law claims. The federal court disagreed and remanded the case to the Nevada court.<sup>129</sup>

Disputes are also likely to arise about whether marijuana cultivation or corporate activities on private property caused environmental damage. Green Diamond Resource Company is a logging operation mentioned in Congressman Huffman's letter to the Commission. Environmental groups have complained about how Green Diamond, and other corporate industrial logging operations, have used "highly damaging forest practices such as clear cutting, construction of endless road systems, conversion of forests essential for fish, wildlife and watersheds to sterile tree plantations, and the application of chemical herbicides."<sup>130</sup> Whether these allegations are accurate or not, one point is clear: a federal court in a marijuana cultivation case need not be saddled with the additional burden of resolving the inevitable disputes that would arise about whether growing marijuana or industrial logging practices caused environmental damage on private property that then damaged waterways and wildlife.

**V. The Guidelines Should Include, at a Minimum, Mitigating Circumstances for Those Who Operate in Compliance with State Law or Use Environmentally Friendly Growing Practices.**

Rather than amend the guidelines to increase penalties for marijuana cultivation, the Commission should amend them to account for mitigating circumstances not considered within the current guidelines. Notwithstanding significant changes in state marijuana laws over the years, the guidelines for marijuana have remained unchanged since they were originally promulgated. The evolution in the treatment of marijuana under state law is relevant to sentencing because it reflects the public's perception about the seriousness of the offense and the risks posed by marijuana use. The Department of Justice's policy not to prosecute those involved in cultivation, distribution and the sale of marijuana in compliance with state law also shows that the Department believes that marijuana related offenses are not as serious as they

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<sup>129</sup> In another case, a landlord sued an insurance company to pay for the cost of cleanup, remediation, and lost rent caused by renters growing marijuana on his property. *Kochendorfer v. Metropolitan Property & Cas. Ins. Co.*, 2012 WL 1204714 (W.D. Wash. 2012). These kinds of disputes would unnecessarily complicate the federal sentencing process if the Commission were to increase penalties for trespass grows.

<sup>130</sup> Environmental Projection Information Center, *Industrial Forestry Reform: Exposing Corporate Logging*, <http://www.wildcalifornia.org/action-issues/industrial-forestry-exposing-corporate-logging>. See also The Northcoast Environmental Center, *Green Diamond Plans Clearcut Near Headwaters*, <http://yournec.org/content/green-diamond-plans-clearcut-near-headwaters>; Center for Biological Diversity, *Lawsuit Challenges Plan to Log 150,000 Acres in Northern California: Logging Would Devastate Salmon, Let 83 Northern Spotted Owls Be Hurt or Killed* (Aug. 12, 2013), [http://www.biologicaldiversity.org/news/press\\_releases/2013/fruit-growers-supply-08-12-2013.html](http://www.biologicaldiversity.org/news/press_releases/2013/fruit-growers-supply-08-12-2013.html).

once were and that states should be given an opportunity to regulate the industry.<sup>131</sup> The guidelines should account for these changed policies by encouraging downward departures.

The guidelines should also encourage departures in marijuana cultivation cases where the growers use environmentally safe practices. Some marijuana growers recognize how the agricultural cannabis boom threatens the environment and presents new challenges. To promote responsible practices, marijuana growers in Northern California have published a *Northern California Farmers Guide Best Management Practices - A Healthy Environment and a Prosperous Economy: Seeking Balance and Sustainability in North California's "Green Rush."*<sup>132</sup> The guide contains information on all aspects of growing – from water usage, fertilizers, and disease and pest control. Other environmental groups also have promoted growing “in a regulated manner abiding by local, state and federal air quality, water quality, forest protection, endangered species, and land-use laws, without trespassing on public or private lands.”<sup>133</sup> Conscientious growers who comply with environmental laws should be punished less harshly.

Similarly, industrial hemp growing, particularly in states where hemp cultivation is legal, should be considered a mitigating circumstance under the guidelines. There is increasing widespread support for cultivating industrial hemp, particularly in farming communities that once thrived on tobacco.<sup>134</sup> Whether federal prosecutors will choose to charge these farmers with violations of the controlled substances law remains to be seen. If they do, however, farmers growing hemp should not be subject to the penalties currently set forth in the guidelines.

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<sup>131</sup> See *United States v. Dayi*, 2013 WL 5878922, \*5 (D. Md. 2013).

<sup>132</sup> [www.wildcalifornia.org/wp-content/uploads/2013/11/BestPracticesGuide\\_B\\_Reprint\\_120313\\_proof7.pdf](http://www.wildcalifornia.org/wp-content/uploads/2013/11/BestPracticesGuide_B_Reprint_120313_proof7.pdf).

<sup>133</sup> Environmental Protection Information Center, *Pollution Pot*, <http://www.wildcalifornia.org/action-issues/pollution-pot>.

<sup>134</sup> Conan Miller, *Even in Legal States, Farmers Reluctant to Grow Hemp*, Epoch Times (Jan. 30, 2014), <http://www.theepochtimes.com/n3/478795-even-in-legal-states-farmers-reluctant-to-grow-hemp>.

## ADDENDUM TO WRITTEN STATEMENT OF MOLLY ROTH, MARCH 13, 2014

### HISTORY OF THE DRUG QUANTITY TABLE

The Anti-Drug Abuse Act of 1986 and subsequent legislation sought to use quantity as a proxy for role in the offense, departed from the past practice of using the purity of drugs as a measure of offense seriousness, and resulted in some drug quantities inexplicably being based upon the weight of the mixture or substance and others being based solely on the amount of the drugs. That legislation greatly influenced the Drug Quantity Table.

#### **I. The legislative history behind the Anti-Drug Abuse Act of 1986 is limited.**

As the Commission has noted, the legislative history surrounding the Anti-Drug Abuse Act is “limited.”<sup>1</sup> “In response to a number of well-publicized tragic incidents . . . Congress expedited passage of the 1986 Act . . . [and] bypassed much of its usual deliberative legislative process. As a result there were no committee hearings and no Senate of House Reports accompanying the bill that ultimately passed . . .”<sup>2</sup>

The circumstances surrounding the legislation have subsequently been described by former Congressional staff. Eric Sterling was Counsel to the U.S. House Judiciary Committee responsible for drug law enforcement at the time the law was enacted. In 2007, he testified:

The Subcommittee’s approach in 1986 was to tie the punishment to the offenders’ role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to specify and prove and “is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.” [H.R. Rep. 99-845, pt. 1, at 11-12 (1986)] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.<sup>3</sup>

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<sup>1</sup> USSC, *Special Report to the Congress -- Cocaine and Federal Sentencing Policy* 116 (1995) (hereinafter *1995 Cocaine Report*).

<sup>2</sup> USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 5 (2002) (hereinafter *2002 Cocaine Report*).

<sup>3</sup> *Mandatory Minimum Sentencing Laws – The Issues*, Hearing Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong., 1st Sess., at 166, 169-70 (June

**II. Congress chose to have drug quantity serve as a proxy for role in the offense, but the link between the two is tenuous.**

The limited legislative history suggests that Congress was interested in using quantity to prioritize federal drug enforcement. As the Commission later characterized it: “Drug quantity would serve as a proxy to identify those traffickers of greatest concern.”<sup>4</sup> One way that quantity might theoretically help prioritize is by differentiating among individuals playing different roles. The Commission described Congress’s approach as creating a “two-tiered penalty structure for discrete categories of drug traffickers.”<sup>5</sup> The categories were defined as:

- **Major traffickers:** “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities”;
- **Serious traffickers:** “The managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.”<sup>6</sup>

The hope was that the five and ten-year mandatory sentences “would create the proper incentives for the Department of Justice to direct its ‘most serious focus’ on ‘major traffickers’ and ‘serious traffickers’.”<sup>7</sup>

This approach to using quantity as a proxy for role appeared again in the FSA. Senator Richard Durbin, the chief sponsor of the FSA, explained to the Commission that Congress intended quantity to serve as a marker for role. According to Senator Durbin, Congress chose 28 grams for the five-year threshold for crack cocaine because it read a Commission’s report as finding that this amount is typical of wholesalers, for whom Congress intended five-year minimum sentences.<sup>8</sup>

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26, 2007) (Statement of Eric Sterling). Mr. Sterling has described the legislative process as “like an auction house . . . . It was this frenzied, panic atmosphere – I’ll see you five years and raise your five years. It was the crassest political poker game.” Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, C1, C2, Wash. Post (Nov. 4, 1990) (quoting Sterling).

<sup>4</sup> 1995 Cocaine Report, *supra* note 1, at 118.

<sup>5</sup> 2002 Cocaine Report, *supra* note 2, at 6.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* (quoting H.R. Rep. No 845, 99<sup>th</sup> Cong., 2d Sess. Pt 1, at 16-17 (1986)).

<sup>8</sup> Letter from The Honorable Richard Durbin, U.S. Senate, to The Honorable William Sessions, Chair, U.S. Sentencing Comm’n 2 (Oct. 8, 2010) (“Congress selected 28 grams as the trigger for five-year

Unfortunately, Congress misunderstood the Commission's report and overlooked how drug quantity is calculated under the relevant conduct rules. The Commission's 2007 cocaine report defined a wholesaler as a person who "[s]ells more than retail/user level quantities (more than one ounce) [the equivalent of 28 grams] *in a single transaction*, or possesses *two ounces or more on a single occasion*." (emphasis added).<sup>9</sup> The report does not classify as a wholesaler a person who sells user level quantities over a period of time. The guidelines, however, require that courts aggregate drug quantities involved in multiple transactions when they are part of the "same course of conduct or common scheme or plan as the offense of conviction."<sup>10</sup> Hence, a street seller who distributes 1 gram of crack to twenty-eight customers over the course of several days is held accountable for 28 grams of crack.

Previous Commission research examined a person's actual conduct rather than merely the quantities of drugs for which the guidelines held him or her accountable.<sup>11</sup> It found that the quantity thresholds Congress chose for crack and powder cocaine, in interaction with the guidelines' relevant conduct rules, do a poor job of assigning individuals to the punishments Congress intended. Although the Commission has not released any analysis of the interplay between role in the offense and quantity for drugs other than crack and powder cocaine, the lack of a meaningful relationship between role in the offense and drug quantity likely applies to other drugs as well.

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mandatory minimums because the Commission and other experts have concluded that less than one ounce is a retail/user quantity, while more than one ounce is the quantity sold by wholesalers). *See e.g.*, USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007) (hereinafter *2007 Cocaine Report*).

<sup>9</sup> *Id.*

<sup>10</sup> USSG §1B1.3(a)(2) (Relevant Conduct). The Commission has previously considered, but not adopted, guideline amendments that would limit quantity to amounts involved in a "snapshot" of time or a single transaction. *See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing*, 60 Fed. Reg. 2430, 2451-52 (Jan. 9, 1995). In some cases, like those involving street-level dealers, such "snapshots" would provide a better indicator of functional role and culpability. In other cases, like those involving couriers, such "snapshots" of quantity would need to be combined with the surrounding circumstances to determine functional role.

<sup>11</sup> *See, e.g.*, *2007 Cocaine Report* 7-8; *2002 Cocaine Report* vii.

**III. Congress’s decision to base quantity on the “entire weight of any mixture or substance containing a detectable amount of the controlled substance” rather than the purity of the substance inexplicably departed from existing practice and created considerable confusion.**

When statutory penalties were first linked to drug quantities in the Controlled Substances Penalties Amendments Act of 1984, the weight of the *pure* drug was used.<sup>12</sup> The Parole Commission guidelines in effect at the time of the Sentencing Reform Act also measured offense seriousness based on the amount of pure drug. “For example, if 10 grams of 10% pure heroin was seized, it would be treated as 1 gram of heroin; if it was 50% pure, it would be treated as 5 grams of heroin.”<sup>13</sup> The Parole Commission’s practice makes sense – similar actual amounts, with similar potential for harm, are treated similarly.

For reasons that are unclear, Congress in the Anti-Drug Abuse Act departed from its previous approach and that of the Parole Commission and made the new mandatory penalties contingent on the entire weight of any “mixture or substance containing a detectable amount” of a drug. This added an arbitrary element to weight determinations, where varying amounts of actual drug were treated similarly. It also had the perverse effect of *increasing* punishments for individuals *lower* in the distribution chain, where dilution of drugs is more common.<sup>14</sup>

The legislative record casts little light on why Congress made this change. The House Committee report referred to the inclusion of inert ingredients in the weight as a “market-oriented approach.” The report stated: “[t]he quantity is based on the minimum [weight of the mixture including the drugs] that might be controlled . . . by a trafficker in a high place in the . . . distribution chain.”<sup>15</sup> Upon what evidence Congress based these thresholds is not mentioned in the report.

Conflicting interpretations of legislative intent have only added to the confusion about the relevance of purity and quantity in sentencing. Writing for a majority of the Supreme Court in *Chapman*, Justice Rehnquist cited Congress’s “market-oriented approach” to conclude that

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<sup>12</sup> *Chapman v. United States*, 500 U.S. 453, 460-61 (1991) (describing how the Controlled Substances Penalties Amendments Act of 1984 “first made punishment dependent upon the quantity of the controlled substance involved” and was based “upon the weight of the pure drug involved”).

<sup>13</sup> USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* Appendix B, Notes on §2D1.1 (1987), <http://www.fd.org/docs/select-topics---sentencing/Supplementary-Report.pdf>.

<sup>14</sup> See Institute for Defense Analysis, *The Price and Purity of Illicit Drugs: 1981 – 2007* (2008), [http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet\\_1.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf) (reporting purity of seizures involving four quantity ranges of various drugs) (hereinafter *Price and Purity*).

<sup>15</sup> H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986).



“Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.”<sup>16</sup> But as we have seen, the Commission concluded from other aspects of the legislative record that Congress wanted to treat serious and high-level traffickers more seriously, and expected quantity to make these distinctions. Justice Stevens, writing in dissent in *Chapman*, noted that the legislative history is “sparse” and found the “mixture and substance” language itself ambiguous.

*Chapman*’s approach of counting the entire weight of the LSD and carrier medium produced unwarranted disparities. One dose of LSD on a sugar cube could result in the same offense level as 125 doses on blotter paper. Such unwarranted disparity led the Commission in 1993 to depart from an approach of weighing the entire mixture or substance containing LSD and instead to base punishment on standardized dosage units.<sup>17</sup> Courts accepted the Commission’s dosage-based method for guideline application, but not for statutory minimum penalties.<sup>18</sup>

The Commission also developed special rules for other situations. These include standardized weights for marijuana,<sup>19</sup> and instructions to allow unsmokable, rain- or sea-soaked marijuana to dry before determining the weight.<sup>20</sup> In response to circuit conflicts and disparate practices in the district courts, the Commission added directions to *not* count fiberglass, or beeswax, or other materials from which a drug must be separated before it can be consumed. Courts were directed to not count laboratory wastewater containing unusable trace amounts of drug.<sup>21</sup> In many cases today, however, inert substances mixed with drugs continue to add offense levels and arbitrary variation to drug offense sentences, which create unwarranted disparity. For example, opioid pain medications come in many different forms – pills, liquid, or intravenous. The same amount of active ingredient can be found in a pill and liquid form, but the pill weighs more because it contains a multitude of inactive ingredients.

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<sup>16</sup> *Chapman*, 500 U.S. at 461 (holding that weight of carrier medium must be included in determining whether offense involved more than one gram of “mixture or substance containing detectable amount” of LSD – the triggering amount for a five year mandatory minimum sentence).

<sup>17</sup> App. C, amend 488 (1993); USSG §2D1.1(C) Drug Quantity Table, Note (G).

<sup>18</sup> *Neal v. United States*, 516 U.S. 284 (1996).

<sup>19</sup> USSG §2D1.1(C) Drug Quantity Table, Note (E).

<sup>20</sup> USSG §2D1.1, comment (n.1).

<sup>21</sup> App. C, amend. 484 (1993).

**IV. Consideration of the actual amount of controlled substance for some drugs – PCP, Amphetamine, Methamphetamine, Oxycodone – complicated matters.**

To confuse matters still further, Congress itself departed from the “mixture or substance” approach for certain drugs. Initially for PCP, and two years later for methamphetamine in various forms, Congress provided separate quantity thresholds for mixtures containing the drug and for the drug itself.<sup>22</sup> Congress then proceeded to enact additional legislation that affected sentencing for methamphetamine. In 1999, Congress directed the Commission to equalize penalties for amphetamine with those of methamphetamine.<sup>23</sup> The history of congressional action and the Commission’s various responses are set forth in a 1999 Commission staff report.<sup>24</sup> Neither the report nor any other information we have been able to find in consultation with Commission staff reveal why Congress chose to treat these particular drugs differently.

Any rationale for different treatment of actual and mixtures containing amphetamine, methamphetamine, and PCP would appear to be lost under the Drug Quantity Table’s Note (B) because it instructs the court to use the greater of (1) the offense level based upon the entire weight of the mixture or substance; or (2) the offense level based upon the weight of the actual drug. The Commission added this commentary at the same time it added methamphetamine to the Drug Quantity Table and when it expanded the Drug Quantity Table to level 42 (later reversed) – an effort seemingly designed to increase sentences for drug traffickers well beyond the levels required by statute.<sup>25</sup>

The Commission has previously observed that when a form of a drug, such as crack, is typically smoked, the greater addictiveness of the form of administration can support a higher ratio and harsher punishment.<sup>26</sup> Pure forms of PCP and methamphetamine are often smoked rather than ingested orally or through snorting. But for reasons no one seems to understand, Note (B) disregards the form of the drug that a person actually trafficked, even though the distinction is recognized in the statutes.

The rule has the effect of sometimes treating impure forms of the drugs as harshly as the same quantity of a smokable form. Mixtures have quantity thresholds in the Drug Quantity Table ten times higher than the pure forms of the drugs, so mixtures of greater than 10 percent

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<sup>22</sup> USSC, *Methamphetamine: Final Report* 8 (1999), [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Drugs/199911\\_Meth\\_Report.pdf](http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf).

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.*

<sup>25</sup> USSG, App. C, amend. 125 (1989).

<sup>26</sup> USSC, *Special Report to the Congress – Cocaine and Federal Sentencing Policy* 183 (1995).

purity will regularly receive higher offense levels under Note (B) than they would under the statutory approach. According to the most recent available empirical data, mixtures containing methamphetamine have fluctuated around the 50 percent purity level.<sup>27</sup> Thus, a 320 gram *mixture* of methamphetamine at 50 percent purity would receive offense level 28 under the Drug Quantity Table. But after application of Note (B), the 160 grams of actual meth is assigned to level 34, the same that would be assigned if the entire 320 grams had been actual meth. Any different treatment based on the likely mode of ingestion – which is found in cases of crack and powder cocaine – has been lost.<sup>28</sup>

Note B also treats oxycodone (actual) differently than other opioids. In 2003, the Commission amended §2D1.1 to refer to oxycodone (actual), defined as the “weight of the controlled substance, itself, contained in the pill, capsule, or mixture.”<sup>29</sup> The Reason for Amendment states that the Commission found “proportionality issues in the sentencing of oxycodone trafficking offenses” because Percocet and Oxycontin are formulated differently and because “different amounts of oxycodone are found in pills of identical weight.”<sup>30</sup> Similar issues exist with other opioids, like Dilaudid, where the active ingredient weight can change without any meaningful change in the total weight of the pill.

## V. The current Drug Quantity Table

In sum, the current Drug Quantity Table reflects a hodgepodge of quantity thresholds, special rules, and piecemeal actions by Congress and the Commission that lack any clear rationale. In addition to the thresholds and ratios in the mandatory minimum statutes that the Commission has chosen to incorporate in the Drug Quantity Table, it has been subject to statutory directives concerning methamphetamine, amphetamine, powder and crack cocaine, MDMA/ecstasy, anabolic steroids, hydrocodone, and oxycodone, precursor drugs like ephedrine, and so-called “date-rape” drugs like flunitrazepam and GHB. The prison terms associated with quantities of many types of drugs were chosen in part based on aggravating factors thought to be associated with those drugs, such as violence (crack), or use by role models such as athletes (anabolic steroids), or marketing to youth (ecstasy). Through the years, however, many aggravating upward offense level adjustments were added to the guideline to reflect these harms, and a variety of other factors, without any reduction in the quantity-based base offense level.

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<sup>27</sup> *Price and Purity*, *supra* note 14, at B-39, Table B-19.

<sup>28</sup> We can find no evidence that the milder stimulant amphetamine is ever smoked, so the Commission’s application of the same rules to it as to methamphetamine, at the same offense levels, remains incomprehensible.

<sup>29</sup> App. C, amend. 657 (2003).

<sup>30</sup> *Id.*

Quantities were chosen initially because they were mistakenly thought to indicate different defendants' aggravated roles in drug distribution schemes, such as sellers of large amounts to retail dealers (wholesalers), or heads of large organizations (kingpins). However, not only were the quantity levels mistaken, but these defendants are also subject to upward adjustments under the aggravated role guidelines. This accumulation of base offense levels erroneously set to reflect different functional roles and different harms, specific offense characteristics that reflect some of those same harms, and additional adjustments under Chapter Three of the guidelines, result in relentless "factor creep" and double counting that drive offense levels far above what is necessary to achieve the purposes of sentencing.<sup>31</sup>

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<sup>31</sup> Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (The guidelines embody "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.").

**Written Statement of Alan DuBois**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on the Felon in Possession Guideline**

**March 13, 2014**

**Testimony of Alan DuBois**  
**Before the United States Sentencing Commission**  
**Public Hearing on the Felon in Possession Guideline**  
**March 13, 2014**

My name is Alan DuBois and I am First Assistant Federal Public Defender with the Eastern District of North Carolina. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the Felon in Possession Guideline.

A defendant charged with being a felon in possession of a firearm is sentenced pursuant to USSG §2K2.1. This guideline currently provides for a 4-level enhancement if the defendant “used or possessed any firearm or ammunition in connection with another felony offense.”<sup>1</sup> A cross-reference also directs that where the “defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense,” the guideline for that other offense should be applied if the offense level is higher.<sup>2</sup>

Identifying the lack of a consistent application of these two provisions by the Circuit Courts of Appeals, the Commission proposes two options for amending the enhancement, the cross-reference, and related commentary. In its Issues for Comment, the Commission asks (a) whether the proposed amendments adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in felon in possession cases where the defendant also engaged in other offense conduct with a firearm and, if not, how the proposed amendment could better clarify the operation of these subsections; (b) whether the Commission should consider narrowing or clarifying the scope of these provisions; (c) and whether the cross-reference in subsection (c)(1) should be deleted.

Defenders are pleased the Commission has decided to examine these important provisions that too often unfairly lengthen our clients’ sentences on the basis of uncharged, dismissed, and acquitted offenses. Defenders have long opposed this use of “relevant conduct.” And it likely comes as no surprise that we urge the Commission to delete the cross-reference in §2K2.1(c)(1), and encourage the Commission to consider that the best way to sufficiently narrow the scope of §2K2.1(b)(6)(B) is to eliminate it.

Short of that, Defenders support clear limits on the reach of these provisions. Specifically, Defenders support the Commission’s proposed amendment to the guidelines in §2K2.1(b)(6)(B) and (c)(1) as set forth in Option One, limiting application to other offenses involving the same “firearm or ammunition identified in the offense of conviction.” But we do

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<sup>1</sup> §2K2.1(b)(6)(B).

<sup>2</sup> §2K2.1(c)(1).

not support the proposed commentary in Option One, and urge the Commission to revise it to make plain that the provisions do not apply to unrelated offenses just because they happen to involve the same firearm or ammunition. Proposed Application Note 14(E) fails to do this. The promise of limitation in the first sentence of the proposed commentary – directing that courts “must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles” – is made empty in the example that follows. The example provides that any other offense involving the same firearm as the charged offense is deemed to be relevant conduct by operation of §1B1.3(a)(4),<sup>3</sup> meaning the other offense need not satisfy §1B1.3(a)(1)-(a)(3), even though the usual practice is to apply the minimal restrictions set forth in these provisions to enhancements, cross-references and adjustments.<sup>4</sup> Instead of this approach, the Commission should clarify the scope of (b)(6)(B) and (c)(1) by revising existing Application Note 14(C) in one of two ways:

**Option A**

*“Another felony offense”, for purposes of (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained; and that satisfies the relevant conduct principles set forth in §1B1.3(a)(1)-(a)(3).*

*“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained; and that satisfies the relevant conduct principles set forth in §1B1.3(a)(1)-(a)(3).*

**Option B**

*“Another felony offense”, for purposes of (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking*

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<sup>3</sup> Section 1B1.3(a)(4) provides that base offense level, specific offense characteristics, cross-references and adjustments “shall be determined on the basis of ... (4) any other information specified in the applicable guideline.” As discussed below, this provision is used sparingly, and in limited circumstances that are markedly different in nature than the uncharged, dismissed and acquitted offenses at issue here.

<sup>4</sup> See, e.g., *United States v. Horton*, 693 F.3d 463, 476 (4th Cir. 2012) (stating “the Relevant Conduct Guideline treats as relevant conduct, including for cross-referencing purposes, the following,” then quoting §1B1.3(a)(1)-(a)(3), without mentioning (a)(4)); *United States v. Kulick*, 629 F.3d 165, 170 (3d Cir. 2010) (stating “Relevant conduct is defined in 1B1.3(a) as,” then quoting §1B1.3(a)(1)-(a)(3), without mentioning (a)(4)); *United States v. Settle*, 414 F.3d 629, 632 & n.2 (6th Cir. 2005) (discussion of what is included as “relevant conduct” mentions only 1B1.3(a)(1), (a)(2) and (a)(3)).

*offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained; and that is substantially and directly connected to the [instant offense] [offense of conviction].*<sup>5</sup>

*“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained; and that is substantially and directly connected to the [instant offense] [offense of conviction].*

#### **A. The Cross-Reference and Enhancement Should Be Deleted from §2K2.1.**

Allowing a judge to “sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it” is, according to the Supreme Court, an “absurd result.”<sup>6</sup> Yet that is precisely what the cross-reference in §2K2.1(c)(1) advises judges to do. We urge the Commission to delete the cross-reference in §2K2.1(c)(1) so that the guidelines will no longer endorse this absurdity. This cross-reference in §2K2.1(c)(1) is a particularly egregious example of how the “relevant conduct” rules can dwarf the actual count of conviction by requiring courts to calculate the guideline range based on separate crimes with which the defendant was never charged, that were dismissed, or worst of all, of which the defendant was acquitted. Based on our longstanding position that our clients should be sentenced for the crimes for which they have been convicted, not on the basis of uncharged, dismissed and acquitted offenses, Defenders also urge the Commission to eliminate the enhancement in §2K2.1(b)(6)(B).<sup>7</sup>

Last year, the Defenders submitted a letter to the Commission which, among other things, discussed the myriad costs associated with the guidelines’ continued reliance on relevant

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<sup>5</sup> The language, “that is substantially and directly connected to the charged offense”, is used in Application Note 1 to §2A6.1 – Threatening or Harassing Communications – to explain the “Scope of Conduct to Be Considered.” §2A6.1, comment. (n.1). *See also* §2A6.2, comment. (n.3) (requiring that “conduct that occurred prior to the offense must be substantially and directly connected to the offense”).

<sup>6</sup> *Blakely v. Washington*, 542 U.S. 296, 306, (2004).

<sup>7</sup> Defenders are not alone in the belief that the current relevant conduct rules present a critical and long-standing problem. Judges have expressed concerns in response to the Commission’s 2010 survey and in written opinions. *See* Letter from Marjorie Meyers, Chair Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 24-25 & nn. 100-102 (May 17, 2013) (*Meyer’s May 2013 Letter to USSC*), appended hereto. Other federal sentencing experts, Commissioner Barkow, John Steer, former General Counsel and Vice-Chair of the Commission, and others have expressed concerns with aspects of the relevant conduct rules. *Id.* at 25 & nn. 103-104.



conduct, and the absence of any compelling reason to rely on relevant conduct.<sup>8</sup> Rather than repeat the entire content of that earlier discussion, we append it to this testimony. Here we summarize the key points, and make a few additional points as well.

The costs of sentencing on the basis of these two relevant conduct provisions are significant.

**Unwarranted Disparity.** The relevant conduct rules work against the Commission's goal of reducing unwarranted disparity in sentencing because the rules often rely on untrustworthy evidence and, even then, only when the prosecutor or probation officer chooses to bring that evidence to the attention of the court.<sup>9</sup>

**Denial of Fair Process.** The rules also "are repugnant to the basic principles of fair process and procedure traditionally thought to be indigenous to our federal criminal law."<sup>10</sup> Defendants often are not informed of the conduct that will be used to justify a lengthier term of imprisonment until after they have pled guilty to the charged offense. The presentence report that contains the notice of this other conduct need not be provided to defendants until 35 days before sentencing, and the defendant must submit any objections within 14 days of receiving the report.<sup>11</sup> And, in many instances, it is this uncharged conduct that is the subject of the "bulk" of the sentencing hearing.<sup>12</sup> Sentencing hearings become mini-trials on offenses that may never have been charged, were dismissed, or on which the defendant was acquitted. But at these mini-trials, defendants are not protected by the rules of evidence,<sup>13</sup> a jury,<sup>14</sup> or proof beyond a reasonable doubt.<sup>15</sup> And in some districts, defendants do not receive discovery essential to preparation of a defense.

The use of acquitted conduct is of particular concern. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543

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<sup>8</sup> *Meyers May 2013 Letter to USSC*, at 24-31.

<sup>9</sup> *See Meyers May 2013 Letter to USSC*, at 26.

<sup>10</sup> *United States v. Galloway*, 976 F.2d 414, 445 (8th Cir. 1992) (Lay, J., dissenting).

<sup>11</sup> §6A1.2.

<sup>12</sup> *See, e.g., Horton*, 693 F.3d at 472 ("the bulk of the sentencing proceeding was devoted to testimony regarding a second incident, which the PSR determined – and the district court agreed – was relevant conduct").

<sup>13</sup> §6A1.3(a).

<sup>14</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>15</sup> §6A1.3, comment.

U.S. 220 (2005), many judges and commentators believe it is inconsistent with the Sixth Amendment right to a jury trial,<sup>16</sup> or at least “stands in sharp tension with the jury’s constitutional role.”<sup>17</sup>

**Prosecutors with “indecent power.”**<sup>18</sup> Although one of the reasons the Commission adopted the relevant conduct rules was to “curb the ability of prosecutors to manipulate sentences through their decisions on charging,”<sup>19</sup> in practice it has increased the power of prosecutors to control sentences.<sup>20</sup>

**Disrespect for the Law.** The rules lead to disrespect for the law because they are contrary to what ordinary citizens take for granted.<sup>21</sup>

**Liberty and Tax Dollars.** The relevant conduct rules contribute to undue severity, which unjustly deprives people of their liberty, and unnecessarily consumes limited resources and tax dollars. The Bureau of Prisons continues to be overcrowded,<sup>22</sup> and incarceration continues to be an expensive option.<sup>23</sup>

**Comity and Federalism.** Sections 2K2.1(b)(6)(B) and (c)(1) also raise serious concerns about comity and federalism. This cross-reference was designed to address cases where the “firearm statutes are ... used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon

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<sup>16</sup> See *Meyers May 2013 Letter to USSC*, at 28-29 & nn. 114-116.

<sup>17</sup> Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (2012).

<sup>18</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

<sup>19</sup> Barkow, *supra* note 17, at 1629.

<sup>20</sup> See *Meyers May 2013 Letter to USSC*, at 26-27 & nn. 109-113.

<sup>21</sup> *Id.* at 30 & nn. 123-24.

<sup>22</sup> “System-wide, the Bureau [of Prisons] is operating at 36 percent over rated capacity and crowding is of special concern at higher security facilities, with 51 percent crowding at high security facilities and 45 percent at medium security facilities.” *Oversight of the Bureau of Prisons & Cost-Effective Strategies for Reducing Recidivism, Hearing Before the Senate Judiciary Committee*, 113th Cong. (Nov. 2013) (statement of Charles E. Samuels, Jr., Director of The Federal Bureau of Prisons), <http://www.judiciary.senate.gov/pdf/11-6-13SamuelsTestimony.pdf>.

<sup>23</sup> The average cost of incarceration for a Federal inmate is \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station.”<sup>24</sup> And to this day, §2K2.1(b)(6)(B) and (c)(1) often work to give the federal courts the final say in the sanction that is appropriate for both the federal offense (felon in possession) and the state offense (the other offense).<sup>25</sup> Moreover, the federal government ends up bearing the total financial cost of these prosecutions despite the substantial state interests involved.<sup>26</sup> While this may at times work well for states with limited funds, or in jurisdictions where state and federal authorities have an established and trusted working relationship, when the federal court occupies the whole field, it carries the potential to threaten principles of comity and federalism. For example, pending before the Florida Supreme Court right now in *Bragdon v. Florida*, is the question of whether a person is barred from claiming immunity under Florida’s “Stand Your Ground” when he was engaged in unlawful activity, i.e., was a felon in possession.<sup>27</sup> If Mr. Bragdon were convicted in federal court for being a felon in possession, comity and federalism principles raise questions about whether the enhancement and cross-reference apply where Mr. Bragdon might be entitled to immunity for the “other offense” under state law. If, however, the enhancement and cross-reference were deleted from the guidelines, the federal courts would still determine the sentence for the federal felon in possession offense, and the states would then decide the appropriate response for the state offense.

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<sup>24</sup> §2K2.1, comment (backg’d) (1987).

<sup>25</sup> See, e.g., *Horton*, 693 F.3d at 473 n.10 (Defendant charged with felon in possession in federal court, and with murder in state court. State dismissed murder charges after federal court sentenced defendant to life in prison based on the murder guidelines).

<sup>26</sup> The Inspector General of the Department of Justice concluded that “the trend to prosecute at the federal level many offenses that were previously handled largely or exclusively by state and local authorities” has contributed to “the increasing number of prisoners in the federal system over the past 3 decades.” Michael Horowitz, Inspector General, *Top Management and Performance Challenges Facing the Dep’t of Justice* –2013 (Dec.11, 2013) (urging the Department to “consider how the federalization of criminal law has affected its budget and operations, and whether rebalancing the mix of cases charged federally might help alleviate the budget crisis posed by the federal prison system without sacrificing public safety, particularly where state and local authorities have jurisdiction to prosecute the conduct”), <http://www.justice.gov/oig/challenges/2013.htm#1>. And earlier this month, the House Judiciary Committee reauthorized the bipartisan Over-Criminalization Task Force. See House Judiciary Committee Press Release, *House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force* (Feb. 5, 2014), <http://judiciary.house.gov/index.cfm/press-releases?id=2D73C6FD-DAEB-4DA0-B4B4-7A2F32BA784>. Just as DOJ and Congress are exploring over-federalization and the appropriate role of the federal criminal justice system, the Commission should consider the impact of the relevant conduct rules on the over-federalization of crime.

<sup>27</sup> *Bragdon v. Florida*, No. 13-2083. The website for the Florida Supreme Court describes the issue in this case as follows: “This case asks whether people are barred from claiming self defense under the ‘Stand Your Ground’ law when they are engaged in unlawful activity.” See [http://www.floridasupremecourt.org/pub\\_info/index.shtml](http://www.floridasupremecourt.org/pub_info/index.shtml).

The costs of the relevant conduct rules are high, but the returns are minimal.<sup>28</sup> The Commission can<sup>29</sup> and should delete §2K2.1(c)(1) and §2K2.1(b)(6)(B) from the guidelines.

## **B. Option One**

If the Commission decides to retain the enhancement and cross-reference in §2K2.1 despite the costs and lack of benefit from considering this uncharged, dismissed and acquitted conduct, limits must be placed on the scope of the conduct to be considered so that §2K2.1(b)(6)(B) and (c)(1) cannot be misused to secure long sentences on the basis of wholly unrelated conduct. The proposed amendment to the guideline set forth in Option One is a critical first step in imposing such limits. No reason justifies stretching the “relevant conduct” rules so far and so thin to include other offenses that do not at the very least involve the same firearm. Defenders believe, however, that Option One could be improved upon by clarifying in the commentary that the offenses must bear some relationship to each other. It may often be the case that when the two offenses involve the same firearm they are related, but that is not true in all cases, so some relationship between the offenses must be shown. Defenders have proposed two different ways to accomplish this above.<sup>30</sup>

### **1. The Same Firearm**

Option One of the Commission’s proposal is superior to Option Two because it correctly requires that, at minimum, the enhancement and cross-reference include only offenses involving the same firearm or ammunition as that in the charged offense. This returns the scope of the cross-reference and enhancement to their original purpose. These two provisions in §2K2.1 were never intended to reach further than other offenses involving the same firearm or ammunition, and no evidence suggests that they need to do so.

When the guidelines were promulgated, §2K2.1 did not contain an enhancement for the conduct now addressed in §2K2.1(b)(6)(B), but did include a cross-reference similar to that currently found at §2K2.1(c)(1).<sup>31</sup> It provided:

If the defendant used **the** firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or 2X1.1

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<sup>28</sup> See *Meyers May 2013 Letter to USSC*, at 31.

<sup>29</sup> *Id.* at 30-31 & nn.125-128.

<sup>30</sup> See options *supra* pp. 2-3.

<sup>31</sup> §2K2.1 (1987).

(Attempt or Conspiracy) if the resulting offense level is higher than that determined above.<sup>32</sup>

This cross-reference was expressly designed to address cases where the “firearm statutes are . . . used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used **the** firearm to rob a gasoline station.”<sup>33</sup> It was not designed to reach out and punish the defendant for any other offense involving *any* firearm, but instead, to capture a more narrow range of conduct related to the firearm in the charged offense. *Id.*

In 1991, the Commission substantially revised §2K2.1, merging §§2K2.1, 2K2.2 and 2K2.3 into a single guideline. USSG App. C, Amend. 374 (Nov. 1, 1991). During this process, the language of the cross-reference changed to refer to “*any* firearm or ammunition,” rather than “*the* firearm”, without explanation.<sup>34</sup> In its Reasons for Amendment, the Commission did not indicate the change was intended to broaden the reach of the cross-reference to unrelated offenses involving different firearms.<sup>35</sup> In addition, a report by Commission staff on the Firearms and Explosive Materials Working Group regarding the proposed revision to the firearms guidelines at that time said nothing about an intent to expand the reach of the cross-reference to unrelated offenses involving separate firearms.<sup>36</sup> According to the report, a primary issue under consideration at that time was whether to extend the cross-reference to “situations where the defendant had reasonable cause to believe **the** firearm would be used or possessed in the commission of the offense.”<sup>37</sup> In keeping with a primary focus on consolidating the three

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<sup>32</sup> §2K2.1(c)(1) (emphasis added).

<sup>33</sup> §2K2.1, comment. (backg’d) (1987) (emphasis added). This background note was removed from the guideline in 1991. *See* USSG App. C, Amend. 374 (Nov. 1, 1991).

<sup>34</sup> For ease of reference, the following mark-up compares the cross-reference in 1990 with its amended version in 1991:

If the defendant used or possessed **the any** firearm **or ammunition** in connection with **the** commission or attempted commission of another offense, or possessed or transferred a **firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense**, apply....

<sup>35</sup> USSG App. C, Amend. 374, Reason for Amendment (Nov 1, 1991).

<sup>36</sup> USSC, *Firearms and Explosive Materials Working Group Report*, Dec. 11, 1990, at 62 (emphasis added) (*Firearms Working Group Report*).

<sup>37</sup> *Id.* at 62.

guidelines, the Working Group reported that the proposed amendment “presents a single cross-reference to guidelines for underlying offenses associated with **the** firearms offense.”<sup>38</sup>

During the same amendment cycle, the Commission also added a new specific offense characteristic to §2K2.1 addressing conduct similar to that in the cross-reference.<sup>39</sup> The Commission’s Working Group Report found statutory support for this enhancement, citing provisions that “increase the maximum penalty available where **the** firearm was involved in a variety of serious criminal conduct.”<sup>40</sup> The Working Group found additional support in past sentencing practices, arguing sentences were more severe “where criminal use of **the** firearm occurred, or, apparently, could reasonably have been foreseen by the defendant.”<sup>41</sup>

Thus, the history reveals no intent to expand the reach of these provisions beyond offenses involving the same firearm as in the charged offense.

Many circuits have interpreted the post-1991 language in the guideline to mean that the enhancement and cross-reference apply when “any” firearm is used in connection with another offense, and not just when the firearm identified in the offense is used.<sup>42</sup> But there is good reason to correct that course. The original purpose of the cross-reference was to address other offenses directly connected with the firearm identified in the indictment. Although the Commission changed the language as part of a significant revision of the firearm guidelines, nothing in the history of the provision shows that the Commission intended to change the scope of the cross-reference or the new enhancement. In addition, no empirical evidence provides a

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<sup>38</sup> *Id.* at 62-63.

<sup>39</sup> §2K2.1(b)(5) (1991). This new enhancement called for a 4-level increase, and a floor of 18 “[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.” *Id.*

<sup>40</sup> *Firearms Working Group Report*, at 56.

<sup>41</sup> *Id.*

<sup>42</sup> *See United States v. Williams*, 431 F.3d 767, 770 (11th Cir. 2005); *United States v. Jardine*, 364 F.3d 1200, 1208 (10th Cir. 2004); *United States v. Mann*, 315 F.3d 1054, 1056 (8th Cir. 2003). *But see United States v. Settle*, 414 F.3d 629, 634 (6th Cir. 2005) (requiring a “clear connection” between the firearm in the charged offense and any different firearm used for the other offense); *United States v. Gonzales*, 996 F.2d 88, 92 n.6 (5th Cir. 1993) (While this case involved the same firearm in both offenses, the court noted that if a different firearm is involved in the other offense, it “must at least be related to those in the charged offense.” The Court explained: “If the word ‘any’ were read literally, section 2K2.1(c)(1) would apply even though the weapon involved in the other offense had absolutely no relation to that specified in the charged offense. Such a reading would have section 2K2.1(c)(1) apply, for example to a weapon used by the defendant in a robbery committed months before he ever acquired the weapon specified in the offense of conviction.”).

reason to expand them beyond that. A separate offense involving a different firearm or ammunition is not a gap that needs filling by an enhancement or cross-reference. These separate offenses can be charged, and then sentenced upon conviction.

## 2. Additional Limitations

While limiting application of these provisions to other conduct involving the same firearm is an essential step in both returning these provisions to their original purpose and making clear the limits on the scope of conduct that can be considered, Defenders believe the commentary should specify that this conduct must have some connection to the charged offense in addition to it involving the same firearm. In contrast with other enhancements and cross-references in the guidelines where the practice is to consider whether the conduct falls within the parameters of §1B1.3(a)(1)-(a)(3), here the proposed commentary specifically excludes these uncharged, dismissed and acquitted offenses from the minimal limitations of §1B1.3(a)(1)-(a)(3) by taking the extraordinary step of invoking (a)(4) which makes *any* offense relevant conduct simply because the guideline says it is, regardless of whether that offense satisfies any of the usual relevant conduct rules. Defenders see no reason to exclude the §2K2.1 enhancement and cross-reference from the usual treatment.

Absent further restriction, the enhancement and cross-reference could apply to an assault or drug offense that occurred years before the charged offense so long as that other offense involved the same gun. They could apply to an extortion offense that occurred more than two years before the charged felon in possession offense.<sup>43</sup> And they also could apply to an offense that occurred when the defendant legally possessed the gun, i.e., before he became a felon, thus having no connection with the current felon in possession offense other than the fact that both offenses happened to involve the same firearm. These are not acceptable outcomes. And they can be easily avoided by adding language to the commentary clarifying that there needs to be a relationship between the charged offense and the other offense which often is, but sometimes is

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<sup>43</sup> In *United States v. Kulick*, the Third Circuit held that the cross reference in §2K2.1(c)(1) did not apply to the defendant's extortion offense that occurred more than 2 years before the charged felon in possession offense, even though both offenses involved the same firearm because they were not part of the "same court of conduct" or "common scheme of plan." *Kulick*, 629 F.3d at 174. The Court explained:

Kulick's extortion offense was not relevant conduct to his unlawful possession of a firearm because the time interval was considerable, there was very little similarity between the offenses, and there was no regularity. Moreover, it would eviscerate the effect and import of the Guidelines to permit an enhancement on these facts. When "illegal conduct does exist in 'discrete, identifiable units' apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct."

*Id.* (quoting *United States v. Hill*, 79 F.3d 1477, 1482 (6th Cir. 1996)).

not, satisfied when the two offenses involve the same firearm. This is not a radical request. Two possible ways to impose standard limitations on the scope of conduct to be considered are proposed above as Options A and B.<sup>44</sup>

The absence of the usual restrictions on the scope of conduct to be considered would disrupt the law in many circuits. While the Fifth Circuit is internally divided over the issue,<sup>45</sup> in at least five other circuits, when a felon in possession defendant possessed a firearm in connection with another offense, courts must determine whether the other offense is relevant conduct under §1B1.3(a)(1) or (a)(2).<sup>46</sup> Courts are familiar with applying §1B1.3(a)(1) and (a)(2) to these provisions, as they do for many others. Defenders see no good reason to disrupt this settled law.

To the extent the Commission is concerned about the Third Circuit being slightly out of step from the rest because it requires that only the charged offense be groupable under §3D1.2,<sup>47</sup> while other circuits require both the charged offense and the relevant conduct offense to be groupable, the proposed commentary draws a sword to kill a fly. Options A and B both address this without disrupting the common practice of requiring a relationship between the uncharged offense and the offense of conviction.

As noted, rather than track the usual practice on the scope of relevant conduct to be considered, the proposed commentary takes the unprecedented step of specifically invoking §1B1.3(a)(4). If this is what is necessary to avoid the minimal limitations on the use of relevant conduct set out in §1B1.3(a)(1)-(3), it is not worth it. Section 1B1.3(a)(4) is used sparingly in the guidelines and, until this proposal, has been limited to circumstances involving the mens rea

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<sup>44</sup> See options *supra* pp. 2-3.

<sup>45</sup> Compare *Gonzales*, 996 F.2d at 92 (§2K2.1(c)(1) “not restricted to offenses which would be relevant conduct but embraces all illegal conduct performed or intended by defendant concerning a firearm involved in the charged offense”) and *United States v. Outley*, 348 F.3d 476, 478 (5th Cir. 2003) (“section 1B1.3’s relevant-conduct limits do not apply to other offenses under section 2K2.1”) with *United States v. Levario-Quiroz*, 161 F.3d 903, 906 (5th Cir. 1998) (defendant’s other offense did not fall within definition of “relevant conduct” because “they were not offenses of a character for which § U.S.S.G. 3D1.2(d) would require grouping”) and *United States v. Brummett*, 355 F.3d 343, 345 (5th Cir. 2003) (affirming application of §2K2.1 enhancement because it was relevant conduct under §1B1.3(a)(2)).

<sup>46</sup> See *Horton*, 693 F.3d at 478-79 (4th Cir. 2012); *Kulick*, 629 F.3d at 170-71 & n.4 (3d Cir. 2010); *Williams*, 431 F.3d at 772-73 & n.9 (11th Cir. 2005); *Settle*, 414 F.3d at 632 n.2 (6th Cir. 2005); *United States v. Jones*, 313 F.3d 1019, 1023 & n.3 (7th Cir. 2002); *Levario-Quiroz*, 161 F.3d at 906 (5th Cir. 1998). These cases do not discuss §1B1.3(a)(3), and we have not seen any that discuss it when considering application of §2K2.1(b)(6)(B) or (c)(1).

<sup>47</sup> See *Kulick*, 629 F.3d at 170.



in the *charged offense*,<sup>48</sup> the degree of risk created by the *charged offense*<sup>49</sup> and prior *convictions*.<sup>50</sup> This proposed use of §1B1.3(a)(4) is entirely different in nature, as it reaches far beyond the offense and prior convictions to uncharted and far more treacherous territory: uncharged, dismissed and acquitted conduct. If §1B1.3(a)(4) can be used in this manner, it raises serious questions about whether it is ever necessary for conduct to satisfy §1B1.3(a)(1)-(3). What possible meaning could those provisions have if §1B1.3(a)(4) is not reserved for particular and unusual circumstances? We caution the Commission to proceed carefully before opening the door to this new use of §1B1.3(a)(4). The consequences of doing so are unknown. And opening this door is entirely unnecessary. The Commission has good reasons to require that the offenses at issue in (b)(6)(B) and (c)(1), consistent with the history of the guideline, be limited to offenses involving the same firearm, and comply with the minimal requirements of §1B1.3(a)(1)-(a)(3), as is the practice with many other enhancements and cross-references. If the other offense is not groupable under §3D1.2, and thus does not fall within §1B1.3(a)(2), it may fall within §1B1.3(a)(1),<sup>51</sup> and whether or not it does, it can be prosecuted as an independent offense and a sentence for that separate offense can be imposed following a conviction.

### C. Option Two

As indicated above, we oppose Option Two. If, however, the Commission proceeds with Option Two, it should change the proposed guidance on how to apply (b)(6)(B) and (c)(1) where the other offense involved a different firearm. The current proposal for addressing this is to provide the following example in new Application Note 14(E):

*Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. See §1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly,*

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<sup>48</sup> See §2A1.4.

<sup>49</sup> See §2K1.4.

<sup>50</sup> See, e.g., §2L1.2; §2K2.1.

<sup>51</sup> See, e.g., *United States v. Ashford*, 718 F.3d 377, 383 (4th Cir. 2013) (holding that the cross-reference at §2K2.1(c) applied because the other non-groupable offense fell within §1B1.3(a)(1), even though it did not satisfy §1B1.3(a)(2)).

*subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.*

Although it is not entirely clear, this proposed example seems to suggest a court should piggy back an uncharged felon in possession offense on top of the charged felon in possession offense to get to yet another offense – robbery in this example – that occurred during the uncharged felon in possession offense. Leaving aside the wisdom of such an approach, which is highly questionable as a further expansion of already troubling relevant conduct, it disrupts current case law and is made possible only because of a clerical error during the 2006 amendment process.

The proposed example would disrupt settled law without any justification for so doing. At least two circuits have specifically addressed the situation presented by the example, and have concluded such a scenario does not comply with the requirements of §1B1.3(a)(2) because courts must consider the groupability under §3D1.2 of the substituted offense – in this case the robbery – not the uncharged felon in possession.<sup>52</sup> These circuits have specifically rejected the idea that a court could, as the proposed example suggests, piggy back the robbery on an uncharged felon in possession offense. Applying the reasoning of these opinions to the proposed example, because the *robbery* is not groupable under §3D1.2, it cannot satisfy the requirements of §1B1.3(a)(2), and, absent the ability to satisfy §1B1.3(a)(1) or (a)(3), is not relevant conduct for purposes of §2K2.1(b)(6)(B) or (c)(1). Other circuits have implicitly agreed, without explicitly

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<sup>52</sup> See *Horton*, 693 F.3d at 479-80; *Williams*, 431 F.3d at 772 n.9. In *Horton*, the Court explained:

We further reject the Government’s argument that the relevant conduct ‘offense’ is the second felon in possession offense occurring on August 17. As we have held above and as applied in the context of cross-references, both the offense of conviction and the cross-referenced offense must be group-able. Contrary to the Government’s contention, the relevant conduct offense here is *murder*, because it was the murder offense and its Guideline that was used to set Horton’s offense level, and it was the murder that the district court treated as ‘relevant conduct.’ . . . [H]ere it is the murder that must be groupable for Subsection (a)(2) to apply ‘because it is the murder guideline that is used to calculate the offense level,’ and it clearly is not.

*Horton*, 693 F.3d at 479-80. In *Williams*, the Court explained:

The Government also makes an argument that it is not the assault that would be grouped but rather the firearm used in the assault. That is not correct: §2K2.1(c)(1) refers to another offense in which a firearm was used. Therefore it is the other offense which must be subject to the rules regarding grouping because it is the assault guideline that is used to calculate the offense level.

*Williams*, 431 F.3d at 772 n.9.

addressing the issue, that it is the substituted offense – the robbery – and not a separate uncharged felon in possession offense, that must be groupable to satisfy §1B1.3(a)(2).<sup>53</sup>

In addition to being inconsistent with current case law, the proposed example rests on an interpretation of the definitions of “another felony offense” and “another offense” that is inconsistent with the history of those terms. Before 2006 it was clear, and well-accepted that other felon in possession offenses were categorically excluded from the definitions of “another felony offense” and “another offense.”<sup>54</sup> Then, in 2006, as part of a significant revision of §2K2.1, the word “the” was inserted in the definition in a way that has led courts to conclude these definitions no longer categorically exclude all firearms possession and trafficking offenses.<sup>55</sup> But absolutely nothing in the history of the amendment shows that the Commission intended to make this change. By adopting this example in Option Two, the Commission would affirmatively endorse the position that these terms now include other firearm offenses that plainly were categorically excluded from 1992-2006, and would do so without any empirical evidence that it is necessary or wise.<sup>56</sup>

Here are the details on the history of these two terms. In 1992, to “clarif[y] the meaning of the[se] terms” the Commission amended the Commentary to §2K2.1 to add an application note defining the terms as follows:

*As used in subsections (b)(5) and (c)(1), ‘another felony offense’ and ‘another offense’ refer to offenses **other than explosives or firearms***

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<sup>53</sup> See, e.g., *Settle*, 414 F.3d at 632 n.2 (“Settle correctly argues that Guidelines §1B1.3(a)(2) does not apply in his case because the firearms offense cannot be grouped with the post-July 4, 2002 offenses in which he attempted to kill Lonnie Young and committed other acts of violence to avoid detection for that offense. See GUIDELINES §3D1.3(d) (providing that ‘all offenses in Chapter Two, Part A’ are specifically excluded from the operation of that subsection).”); *Jones*, 313 F.3d at 1023 n.3 (“Grouping would not be required in this case – in fact, grouping of the felon in possession count with the homicide charge is specifically excluded from the operation of §3D1.2(d) – rendering §1B1.3(a)(2)’s relevant-conduct definition inapplicable here.”).

<sup>54</sup> See, e.g., *United States v. Valenzuela*, 495 F.3d 1127, 1133-34 (9th Cir. 2007); *United States v. Harper*, 466 F.3d 634, 650 (8th Cir. 2006); *United States v. Lloyd*, 361 F.3d 197, 201 (3d Cir. 2004); *United States v. Garnett*, 243 F.3d 824, 827 (4th Cir. 2001).

<sup>55</sup> See, e.g., *United States v. Juarez*, 626 F.3d 246, 255 (5th Cir. 2010); *United States v. Jackson*, \_\_\_ F.3d \_\_\_, 2014 WL 351954, \*2 (7th Cir., Feb. 3, 2014). But see *United States v. Falcon*, \_\_\_ Fed. Appx. \_\_\_, 2014 WL 278931, \*1 (9th Cir., Jan. 27, 2014) (accepting for purposes of this case the parties agreement that *United States v. Valenzuela*’s holding that the other offense enhancement categorically excludes other firearm possession offense “is unaffected by the Sentencing Commission’s amendment to the commentary in U.S.S.G. app. C amend. 691 (Supp.2006)”).

<sup>56</sup> Option One does not solve the problem of the clerical error in the definitions of “another felony offense” and “another offense,” but it does not exacerbate it as Option Two does.

***possession or trafficking offenses.** However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.<sup>57</sup>*

This definition was maintained until 2006 when, as part of a significant revision of §2K2.1,<sup>58</sup> the Commission separated the definitions for “another felony offense” and “another offense” and in so doing switched from plural references to singular.<sup>59</sup> The new definitions were (and remain today) as follows:

*“Another felony offense”, for purposes of (b)(6)(B), means any federal, state, or local offense, other than **the** explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.*

*“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than **the** explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.<sup>60</sup>*

As mentioned above, before the 2006 amendment, courts routinely interpreted the definition of “another felony offense” to categorically exclude *any* other firearms possession or trafficking offenses, not just the one charged.<sup>61</sup> After the amendment, however, some courts decided that the amendment in 2006, which added the word “the” before the phrase “explosive or firearms possession or trafficking offense” “indicates the Sentencing Commission’s intention to no longer exclude all explosives or firearms possession or trafficking offenses from the definition of ‘another felony offense’ under §2K2.1(b)(6).”<sup>62</sup>

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<sup>57</sup> USSG App. C Amend. 471 and Reasons for Amendment (Nov. 1, 1992) (emphasis added).

<sup>58</sup> Among other things, the amendment modified four base offense levels and added a new specific offense characteristic that required renumbering §2K2.1(b) and related application notes.

<sup>59</sup> USSG App. C, Amend. 691 (Nov. 1, 2006).

<sup>60</sup> *Id.* (emphasis added). See also §2K2.1, comment. (n.14(C)) (2013) (emphasis added).

<sup>61</sup> See cases cited *supra* note 54.

<sup>62</sup> *Juarez*, 626 F.3d at 255. See also cases cited *supra* note 55.

The conclusion that the use of the word “the” in Application Note 14(C) evidenced the Commission’s intentional effort to change the definition of “another felony offense” that had been in use for over a decade is not consistent with other information available from that amendment cycle.

First, the reasons for amendment do not discuss this definition.<sup>63</sup> If the Commission had really intended this single word to make such a substantive change to the definition and change the law, it would have provided an explanation for the change.

Second, during that same amendment cycle, the Commission added new Application Note 13(D), which specifies how the then-new trafficking enhancement in subsection (b)(5) should interact with other subsections and includes language that is consistent with the long-standing definition of “another felony offense” as excluding all other firearm possession or trafficking offenses.<sup>64</sup> That note provides:

*In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.*<sup>65</sup>

If the Commission had intended to make a substantive change without explanation, one would at least expect the two new provisions to be the same.

Third, there was not (nor is there now) any empirical evidence indicating that extending these definitions to include other felon in possession offenses was necessary. Finally, there were enough serious questions expressed then (as now) regarding the wisdom of relying on relevant conduct at all,<sup>66</sup> that it would be surprising for the Commission to act to expand the scope of relevant conduct beyond its historical parameters without comment or explanation.

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<sup>63</sup> See USSG App. C, Amend. 691 (Nov. 1, 2006).

<sup>64</sup> See USSG App. C, Amend. 691 (Nov. 1, 2006).

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> See, e.g., Letter from Jon M. Sands, Chair Federal Defender Guideline Committee, to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm’n, Attached Memorandum at 20-25 (July 19, 2006) (“For many years, judges, the Defenders, PAG, and other experts have urged the Commission to abolish ‘relevant conduct’ rules that require the inclusion of uncharged, dismissed and acquitted offenses in calculating the guideline range.”).

Defenders believe that the best interpretation of the amendment in 2006 is that it was a clerical error. We strongly caution the Commission against endorsing the new interpretation of these definitions of “another felony offense” and “another offense” without more careful and direct consideration of the matter.

# APPENDIX

an element the use, attempted use, or threatened use of physical force against the person of another.<sup>98</sup>

Consistent, narrow definitions would help maintain uniformity and ensure that only those truly violent offenders are subject to enhanced penalties. Possession of a short-barreled shotgun is just one example of an offense that is treated as a crime of violence under the guidelines, USSG §4B1.2, but may or may not be treated as a “violent felony” for purposes of the Armed Career Criminal Act (“ACCA”). *See, e.g., United States v. McGill*, 618 F.3d 1273, 1277 (11th Cir. 2010) (possession of an unregistered sawed-off shotgun is not a violent felony); *United States v. Hall*, 2013 WL 1607612 (11th Cir. April 16, 2013) (possession of sawed-off shotgun is crime of violence); *United States v. Hood*, 628 F.3d 669, 671-73 (4th Cir. 2010) (noting difference between guideline and ACCA definitions), *cert. denied*, 131 S.Ct. 2138 (2011). *But see United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012) (unlawful possession of short shotgun qualified as a violent felony under ACCA), *cert. denied*, 133 S. Ct. 1242 (2013).

We look forward to working with the Commission as it continues to study the many problems with these definitions.

### **VIII. Relevant Conduct, USSG §1B1.3**

We encourage the Commission to consider a comprehensive review of relevant conduct under USSG §1B1.3. Over the years, Defenders have repeatedly urged the Commission to prohibit the use of acquitted conduct, and either eliminate the use of uncharged and dismissed conduct or significantly limit its impact on the guideline range.<sup>99</sup> The problems with the relevant conduct rules persist, so we again ask that the Commission review the issue during the 2013-2014 amendment cycle.

The Defenders are not alone in the belief that the current relevant conduct rules present a critical and long-standing problem. The Commission’s recent survey of District Judges shows that 84% of judges believe that it is not appropriate to consider acquitted conduct.<sup>100</sup> A majority also believe that it is not appropriate to consider dismissed conduct (69%) and uncharged

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<sup>98</sup> *Id.* at 17-18.

<sup>99</sup> *See, e.g.,* Statement of Alan DuBois & Nicole Kaplan Before the U.S. Sentencing Comm’n, Atlanta, Ga., at 24-26 (Feb. 20, 2009); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2-6 (June 6, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 33-36 (July 23, 2012).

<sup>100</sup> *See* USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, at Question 5 (2010).



conduct not presented at trial or admitted by the defendant (68%).<sup>101</sup> Judges in the districts and on the courts of appeal, have also expressed their concern in written opinions.<sup>102</sup>

Other federal sentencing experts similarly have criticized the current rules governing uncharged, dismissed, and acquitted conduct. For example, John Steer, former General Counsel and Vice-Chair of the Commission, has called for the Commission to exclude “acquitted conduct” from the guidelines and permit its use only as a discretionary factor.<sup>103</sup> He also stated that uncharged conduct “is the aspect of the guideline that [he] finds most difficult to defend” and accordingly recommended that the Commission “decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.3(a)(2) and (3).”<sup>104</sup>

The Commission has long been aware of the problems with the relevant conduct guidelines. Proposals to abolish the use of acquitted conduct have been published for comment

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<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“the unfairness perpetuated by the use of ‘acquitted conduct’ at sentencing in federal district courts is uniquely malevolent”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic.”).

<sup>103</sup> See *An Interview with John R. Steer*, 32 *Champion* 40, 42 (2008).

<sup>104</sup> *Id.* See also Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 *U. Pa. L. Rev.* 1599, 1627 (2012) (“Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury.”); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 *Tenn. L. Rev.* 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 *S. Cal. L. Rev.* 289, 313-14 (1992) (“If Congress’ goals were to eliminate disparity and to have the punishment fit the crime, the modified real-offense system does not serve them well.”); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 *Minn. L. Rev.* 403 (1993). The American College of Trial Lawyers formally proposed the following changes: (1) eliminate the use of acquitted conduct; (2) substantially discount the rate of uncharged and acquitted conduct under subsection (a)(2); (3) revise the definition of relevant conduct to eliminate cross-references to more serious offenses; and (4) clarify that sentencing liability for jointly undertaken activity encompasses only those acts “which are in furtherance of the specific conduct and objectives embraced by the defendant’s specific agreement.” See *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 *Am. Crim. L. Rev.* 1463 (2001).

at various times beginning more than twenty years ago.<sup>105</sup> More than fifteen years ago, the Commission decided that one of its priorities for the 1996-97 amendment cycle was to “develop[] options to limit the use of acquitted conduct at sentencing,” and also declared its intent to explore in the future “substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.”<sup>106</sup> Thus far, however, the Commission has declined to act. We urge the Commission to do so now.

This persistent and resounding call to change the relevant conduct rules under §1B1.3 exists because the current rules present numerous and serious problems. Critically, the relevant conduct rules work directly against the goal of eliminating unwarranted disparity. The rules produce unwarranted disparity because they are complex, they rely on untrustworthy evidence, and their application is inconsistent – varying from prosecutor to prosecutor, probation officer to probation officer, and judge to judge.<sup>107</sup>

The relevant conduct rules also provide prosecutors with “indecent power.”<sup>108</sup> They give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on

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<sup>105</sup> See 57 Fed. Reg. 62, 832 (Dec. 31, 1992) (proposing amendment to §1B1.3 “to provide that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant’s offense level but may, in an exceptional case, provide a basis for an upward departure”). See also 58 Fed. Reg. 67,522, 67,541, 62 (Dec. 21, 1993); 62 Fed. Reg. 152,161 (Jan. 2, 1997).

<sup>106</sup> 61 Fed. Reg. 34,465 (July 2, 1996). Commission staff began to “investigate ways of incorporating state practices; e.g., using an offense of conviction system for base sentence determination; providing limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range.” Phyllis J. Newton, Staff Director, U.S. Sent’g Comm’n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent’g Rep. 68, 69 (Sept./Oct. 1995); see also USSC, *Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing* (Nov. 1996).

<sup>107</sup> See *Fifteen Year Review*, at 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent’g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) (“interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant” resulting in manipulation of guidelines; “judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases”). See also *United States v. Quinn*, 472 F. Supp. 2d 104, 106-7 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

<sup>108</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof and inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained.<sup>109</sup> All a prosecutor must do is provide information about uncharged or acquitted conduct to a probation officer to include in the presentence report. Even though the information is nothing more than hearsay, in some circuits it is enough to shift the burden to the defense to disprove.<sup>110</sup> And, when a defense attorney challenges such “relevant conduct,” the defendant runs the risk of having the court deny a sentence reduction for acceptance of responsibility even though the defendant pled guilty and accepted responsibility for the charged conduct.<sup>111</sup> Thus, although one of the reasons the first Commission adopted the “real offense” system was to “curb the ability of prosecutors to manipulate sentences through their decisions on charging,”<sup>112</sup> in practice it has increased the power of prosecutors to control sentences. The Commission has been aware for quite some time that this “real offense” model transferred power to prosecutors and created unwarranted disparity.<sup>113</sup> We urge the Commission to change the relevant conduct rules to address this problem.

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<sup>109</sup> See, e.g., Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 550 (1993) (“Implementation of a conviction-offense system [rather than a ‘real offense’ system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders’ criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.”). The use of acquitted conduct “also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense.” Barkow, *supra* note 104, at 1629.

<sup>110</sup> See Thomas W. Hutchison, et al., *Fed. Sent. L. & Prac.* §6A1.3, cmt. 5(e) (2013 ed.) (discussing split in circuits on whether district court may treat allegations in PSR as evidence).

<sup>111</sup> See Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2111 (2003); see also Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 318-19 (2005).

<sup>112</sup> Barkow, *supra* note 104, at 1629. Of course, such concerns are not even theoretically implicated – then or now – with respect to acquitted offenses because an acquitted offense is charged in an indictment and tried to a jury. *Id.* (“But that justification does not account for the Guidelines’ use of acquitted conduct because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already.”).

<sup>113</sup> See Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may

In addition, the relevant conduct rules deprive defendants of their Sixth Amendment right to a jury trial and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543 U.S. 220 (2005), many judges<sup>114</sup> and commentators<sup>115</sup> believe it is inconsistent with the Sixth Amendment.<sup>116</sup> Sentencing guidelines “that require judges to increase sentences on the basis of conduct for which the defendant has

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adversely impact Black defendants and interfere with the Commission’s mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the guidelines, and “occurs in a context that forecloses oversight and obscures accountability”). Later, in 2004, the Commission itself acknowledged that real offense sentencing shifted sentencing power to prosecutors and created hidden and unwarranted disparities. *See Fifteen Year Review*, at 50, 86, 92.

<sup>114</sup> *See, e.g., Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *Mercado*, 474 F.3d at 658 (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *Canania*, 532 F.3d at 776 (Bright, J., concurring) (writing separately to “express [his] strongly held view that the consideration of ‘acquitted conduct’ to enhance a defendant’s sentence is unconstitutional,” and explaining that “[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of ‘not guilty’ amounts to more than mere second guessing of the jury—it entirely trivializes its principal fact-finding function”).

<sup>115</sup> *See, e.g., Ngov, supra* note 104, at 241, 244-69 (concluding that “use of acquitted conduct to enhance sentences, even under the advisory Guidelines, violates the Sixth Amendment because judges are permitted to find facts that enhance a defendant’s sentence beyond that authorized by the jury’s verdict”); *see also Recent Case: Criminal Law-Federal Sentencing-Ninth Circuit Affirms 262-Month Sentence Based on Uncharged Murder-United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011), 125 Harv. L. Rev. 1860, 1863-64 (2012) (discussing case where sentence relied on finding regarding uncharged conduct, and explaining that “because substantive reasonableness review may produce sentences that would not be upheld as reasonable but for judge-found facts, it implicates the *Apprendi* rule – and defendants should be able to bring as-applied Sixth Amendment challenges raising this very claim”).

<sup>116</sup> The Supreme Court has not squarely addressed the issue. The Court’s decision in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and “[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White’s Sixth Amendment rights.” *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting). In addition, “the Court has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall v. United States*, 552 U.S. 38, 60, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring).

been acquitted” is “one of the starkest threats to the jury’s role.”<sup>117</sup> Cross-references based on acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental rights. While the Supreme Court has called it “an absurd result” that a person could be sentenced “for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it,”<sup>118</sup> that is precisely what is authorized under the guidelines, and what has happened in many cases, including one that was affirmed by the Eighth Circuit just last year. *See, e.g., United States v. Stroud*, 673 F.3d 854 (8th Cir. 2012) (affirming the sentence where, after being acquitted of murder in state court, Mr. Stroud was convicted of being a felon-in-possession of a firearm in federal court, and the sentencing court “found” that Mr. Stroud had committed murder, and applied the cross-reference in §2K2.1(c), thus increasing his offense level from 22 to 43, and resulting in a sentence of 120 months, the statutory maximum, even though his guideline range without the cross-reference was 46-57 months), *cert. denied*, 133 S.Ct. 1581 (2013).<sup>119</sup>

The rules come at a great cost. They contribute to undue severity, which unjustly deprives individuals of their liberty, and unnecessarily consumes limited resources and tax payer dollars.<sup>120</sup> Take, for example, a typical drug case like *United States v. Curtis*, 96 Fed. App’x 223 (5th Cir. 2004). The conduct of conviction in 2002 involved 45.36 kg of marijuana. At sentencing, the court relied on “relevant conduct,” holding the defendant accountable for 511.55 kg based on conduct that occurred as far back as 1996. As a result of this “relevant conduct,” Mr. Curtis was sentenced to 60 months imprisonment. Had his sentence been based on the conduct underlying the count of conviction, his guideline range would have been 24-30 months.

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<sup>117</sup> *See* Barkow, *supra* note 104, at 1627, 1628. Professor Barkow further explained her position on this issue: “Advising judges to increase a sentence on the basis of relevant conduct, even when a jury acquitted a defendant of that conduct, may no longer violate the Constitution in fact, but it stands in sharp tension with the jury’s constitutional role because judges continue to comply with the Guidelines and the Guidelines continue to instruct judges to consider relevant conduct in sentencing.” *Id.* at 1628.

<sup>118</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004). One district judge compared the rules governing cross-references based upon relevant conduct rules to the strange occurrences in Lewis Carroll’s *Wonderland*: “As the Queen of Hearts said, ‘Sentence first-verdict afterwards.’ *See* L. Carroll, *Alice’s Adventures in Wonderland* 146 (Random House, 1946). Federal offenders deserve better justice than that meted out in the court of the King and Queen of Hearts.” *United States v. Carroll*, 798 F. Supp. 291, 294 (D. Md. 1992) (Smalkin, J.), *vacated*, 3 F.3d 98 (4th Cir. 1993).

<sup>119</sup> *See also* Statement of Alan Dubois and Nicole Kaplan before the U.S. Sentencing Comm’n, Atlanta, GA, at 24 (Feb. 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

<sup>120</sup> One study “concluded that one half of all sentences imposed in the districts studied had been increased, sometimes doubled or tripled, by uncharged conduct.” Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 289, 311-12 (1992).

The additional 30-36 months took up limited bed space<sup>121</sup> and cost tax payers as much as \$86,680.<sup>122</sup>

The rules also lead to disrespect for the law because they are contrary to what ordinary citizens take for granted. The rules encourage punishment on the basis of allegations that are not subject to the basic rudiments of due process assumed to apply in our criminal justice system and on information that is often unreliable. “It would only confirm the public’s darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit.”<sup>123</sup> This is particularly true when the evidence relied upon was suppressed because of unconstitutional conduct by law enforcement.<sup>124</sup> When prosecutors can manipulate charges and sentences to suit them, and can rely at sentencing on suppressed evidence they could not use to obtain a conviction, it removes incentives for law enforcement to respect and follow the law, which only further erodes the moral authority of the criminal justice system.

The Commission can and should address these problems by changing the rules governing relevant conduct. “Instructing judges to consider ‘real’ conduct was a discretionary decision by one set of Commission members [from the first Commission] who seemed to believe the Guidelines could and should occupy the entire field.”<sup>125</sup> Adopting a “real offense” model was

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<sup>121</sup> “System wide, the Bureau [of Prisons] is operating at 37 percent over rated capacity. Crowding is of special concern at higher security facilities, with 54 percent crowding at high security facilities and 44 percent at medium security facilities.” *Federal Bureau of Prisons FY2013 Budget Request Before the Subcommittee on Commerce, Justice, Science and Related Agencies of the Committee on Appropriations* (Apr. 17, 2013) (statement of Charles E. Samuels, Jr., Director of The Federal Bureau of Prisons), <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf>.

<sup>122</sup> The average cost of incarceration for a Federal inmate is \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

<sup>123</sup> *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”), *vacated*, 271 Fed. App’x 298 (4th Cir. 2008). Numerous judges have agreed. *See, e.g., Canania*, 532 F.3d at 778 & n.4 (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and “wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of ‘not guilty’ for practical purposes may not mean a thing”); *United States v. Coleman*, 370 F. Supp. 2d 661, 670 n.14 (S.D. Ohio 2005) (“A layperson would undoubtedly be revolted by the idea that, for example, a ‘person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.”).

<sup>124</sup> *See, e.g., United States v. Gonzalez*, 290 Fed. App’x 80 (10th Cir. 2008) (sentencing court relied on evidence suppressed from a previous seizure to increase the sentence from offense level 26 to 28, resulting in an additional 14 months imprisonment).

<sup>125</sup> Barkow, *supra* note 104, at 1628.

not directed by Congress.<sup>126</sup> Indeed, it is “arguably contrary to the [Sentencing Reform Act’s] most basic instructions,” which directed the Commission to take into account the circumstances under which the “offense was committed.”<sup>127</sup> The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged or acquitted conduct.<sup>128</sup>

No compelling reason justifies the current rules. The experiences in the states – none of which requires that courts consider a defendant’s acquitted conduct – “show that a real offense sentencing scheme is not necessary for maintaining low crime and incarceration rates.”<sup>129</sup> “No evidence” suggests that the states’ decisions not to “mandate the consideration of a defendant’s acquitted conduct has led to increased crime rates. Further, many states have experienced decreases in their incarceration rates since they passed their guidelines.”<sup>130</sup>

For all of these reasons, Defenders renew their request that the Commission review the relevant conduct rules.

### **IX. Resolution of Disputed Factors, USSG §6A1.3**

We reiterate our request that the Commission resolve a Circuit split about the reliability of information set forth in presentence reports and strengthen USSG §6A1.3 so that it provides greater procedural protections against the use of undisclosed evidence and unreliable hearsay.<sup>131</sup> The current guideline has been so loosely interpreted that it permits prosecutors to provide

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<sup>126</sup> *Id.* at 1626. “Nor is there any evidence in the Sentencing Reform Act’s legislative history that suggests Congress even intended the outcome.” *Id.*

<sup>127</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1661 & n.157 (2012) (“The Commission was to take into account ‘the circumstances under which the *offense was committed*’ and ‘the nature and degree of the harm caused by the *offense*.’ SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), §994(c)(2)-(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. §994(c)(2)-(3) (2006).”) (emphasis added)).

<sup>128</sup> *See* Barkow, *supra* note 104, at 1626. State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. *See* Newton, *supra* note 106, at 69 (“Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.”). While some state guideline systems permit the use of *some* facts – in the nature of details *about* the offense of conviction, the federal guidelines require that separate offense of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted. *See* USSC, Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing (Nov. 1996).

<sup>129</sup> Barkow, *supra* note 104, at 1629.

<sup>130</sup> *Id.*

<sup>131</sup> Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 16-18 (June 6, 2011).

**Written Statement of Alan DuBois**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission**

**Public Hearing on USSG §5G1.3**

**March 13, 2014**



**Testimony of Alan DuBois**  
**Before the United States Sentencing Commission**  
**Public Hearing on USSG §5G1.3**  
**March 13, 2014**

My name is Alan DuBois and I am First Assistant Federal Public Defender with the Eastern District of North Carolina. I thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the Felon in Possession Guideline.

Section 5G1.3 provides guidance to courts imposing sentences where the defendant is subject to an undischarged term of imprisonment. As the Supreme Court has noted:

There are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and §5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time.<sup>1</sup>

The Commission proposes three separate amendments to this guideline, each one of which aims to improve the coordination of sentences from different proceedings. Defenders support all three of the proposed amendments.

**A. Accounting for Undischarged Terms of Imprisonment that Are Relevant Conduct But Do Not Result in Chapter Two or Chapter Three Increases**

**1. Proposed Amendment**

Under §5G1.3(b), the guidelines direct courts to impose the federal sentence concurrently with an undischarged term of imprisonment for another offense if that other offense is (1) “relevant conduct to the instant offense of conviction under (a)(1), (a)(2), or (a)(3) of §1B1.3” and (2) that relevant conduct was “the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments).” We support the Commission’s proposed amendment to eliminate the second requirement that the other offense at issue be the basis for an increase in the offense level under Chapters Two or Three.

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<sup>1</sup> *Witte v. United States*, 515 U.S. 389, 404 (1995).

The Supreme Court has observed that “§5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant’s sentence.”<sup>2</sup> The additional requirement that the relevant conduct increase the offense level impedes §5G1.3 from performing this function, and serves no important purpose.

While we do not see it often, there are cases where our client is subject to an undischarged sentence that is relevant conduct to the instant federal offense, but that relevant conduct does not increase the offense level. This can occur in a drug case where the drug quantity from a related state offense was relevant conduct to the federal sentence but did not increase the offense level for the federal sentence, or in a fraud case where the loss amount from the related state offense was relevant conduct to the federal sentence, but did not increase the offense level.<sup>3</sup> This creates unwarranted disparity. Consider, for example, Case A, where 10 KG of marihuana in a state drug offense is considered relevant conduct to a federal offense involving 22 KG of marihuana, and Case B, where 20 KG of marihuana in a state drug offense is considered relevant conduct to a federal offense involving 22 KG of marihuana. Under the current version of §5G1.3, Case A is treated differently than Case B simply because the 10 KG from the state offense does not increase the drug quantity enough to reach the next higher offense level in the Drug Quantity Table, whereas the 22 KG in Case B does increase the offense level from 18 to offense level 20 under §2D1.1(c)(10)-(11). In both cases the federal sentence reflects the drug quantity involved in both the state and federal offense. In Case A, however, the guidelines do not direct that the sentences run concurrently because the quantity included in the state offense was too low to result in an increased offense level. Whereas in Case B, with the higher drug quantity, the guidelines direct the sentences run concurrently. We see no reason why Case A and Case B should be treated differently. The directions in §5G1.3(b) to adjust the federal sentence and run it concurrently to the state sentence should apply in both scenarios because in both, based on relevant conduct, the federal sentence accounts for both the state and federal conduct.

In addition, the requirement that the relevant conduct increase the offense level is not playing an important role, and thus adds unnecessary complexity to the guidelines. In most cases, if the offense qualifies as relevant conduct under §1B1.3(a)(1)-(a)(3), it also increases the offense level. Relevant conduct does the heavy lifting in §5G1.3(b), and the additional requirement that it also increase the offense level does not filter out many additional cases. It

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<sup>2</sup> *Witte*, 515 U.S. at 405.

<sup>3</sup> *See, e.g., United States v. Carrasco-de-Jesus*, 589 F.3d 22 (1st Cir. 2009) (case does not fall within subsection (b) of §5G1.3 because loss amount of \$101.60 from the state offense would not increase her offense level in federal case which “exceeded \$50,000” and was enhanced by six levels for a loss amount falling between \$30,000 - \$70,000).

would simplify guideline application to delete this second requirement as the Commission proposes.

## 2. Issue for Comment

The Commission asks whether §5G1.3(b) should include offenses that are relevant conduct under §1B1.3(a)(4), the only subsection of §1B1.3 (Relevant Conduct) that is not excluded from the current version.<sup>4</sup> Defenders' short answer is yes. Any prior offense that is considered relevant conduct should be included in §5G1.3(b) because that offense has been accounted for in the federal sentence. This change could be easily accomplished. For example:

If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions ~~subsections (a)(1), (a)(2), or (a)(3)~~ of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows....

This would simplify application of §5G1.3(b) by bringing consistency across guidelines regarding what conduct is considered part of the instant offense. For example, including all relevant conduct under §1B1.3 would make §5G1.3 consistent with the commentary to §4A1.2 which provides: "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)."<sup>5</sup>

No good reason justifies excluding conduct that is deemed "relevant conduct" under §1B1.3(a)(4). If another offense is relevant conduct to the instant offense, then the federal sentence accounts for the other offense, and should be treated the same, regardless of the reason it is considered relevant conduct. This is particularly important if the Commission expands its use of §1B1.3(a)(4), as suggested in the proposed Felon in Possession amendment.<sup>6</sup>

Because there is no reason to exclude (a)(4), doing so results in unwarranted disparity. As discussed above, §5G1.3 is supposed to "mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence."<sup>7</sup> It makes no sense to deny

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<sup>4</sup> Section 1B1.3(a)(4) provides that base offense level, specific offense characteristics, cross-references and adjustments "shall be determined on the basis of ... (4) any other information specified in the applicable guideline."

<sup>5</sup> §4A1.2, comment. (n.1).

<sup>6</sup> See Statement of Alan DuBois on Felon in Possession Guideline Before the U.S. Sentencing Comm'n, Washington, D.C., at 11-12 (Mar. 13, 2014).

<sup>7</sup> *Witte*, 515 U.S. at 405.

this mitigation – and to allow what amounts to double counting of the relevant conduct – for some relevant conduct but not all.

### **B. Adjustment for an Anticipated State Term of Imprisonment**

We also support the Commission’s proposed amendment to provide a new subsection in §5G1.3, and conforming commentary, addressing adjustments for anticipated state court sentences, as the guidelines already do for undischarged sentences. Consistent with our comments above, we believe the requirement that the other offense be relevant conduct to the instant offense is alone sufficient, and there is no need for the additional requirement that the relevant conduct was a basis for an increase in the offense level under Chapters Two or Three. And for the reasons mentioned above, we believe this new subsection should apply to *all* relevant conduct, and should not exclude conduct that is relevant under §1B1.3(a)(4).

The Supreme Court in *Setser v. United States*, 132 S. Ct. 1463 (2012) held that the district court, not the Bureau of Prisons (BOP), has discretion to order that the federal sentence imposed will run concurrently or consecutively to another state sentence that is anticipated but not yet imposed. The BOP has not provided guidance on how it handles credit for time the defendant spent in pretrial custody in connection with an anticipated state sentence. Absent such guidance, what we do know is that for *undischarged* sentences, even when a federal court runs a federal sentence concurrently with a state sentence, a defendant will not always receive full credit for time spent in state pretrial detention without some adjustment in his federal sentence by the district court. The guidelines currently authorize adjustments for undischarged sentences,<sup>8</sup> and should do the same, as this amendment proposes, for anticipated sentences. Defendants should not be treated differently based solely on the order in which the state and federal sentence are imposed.

Anticipated sentences differ from undischarged sentences in obvious ways. Generally, less is known about them at the time of the federal sentencing. But one thing the court does know, whether or not the state sentence has been imposed, is how much time the defendant has served in pretrial detention. Currently, if the requirements of §5G1.3 are met, the court may adjust the federal sentence to account for this time – the time spent in state pretrial detention – if the state sentence has been imposed and is being served. It should have the same authority to make this identical adjustment where the state sentence has not yet been imposed. In both cases, the specific amount of time is known at the time of federal sentencing and easily calculated by the district court but will generally not be credited against the federal sentence absent this type of adjustment.

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<sup>8</sup> §5G1.3(b)(1).

Adjusting the federal sentence allows a federal judge, consistent with her duties under 18 U.S.C. § 3553(a), to impose a term no greater than necessary, and to “avoid a situation in which the happenstance of how much of the prior sentence has been served when the federal sentence is imposed ... determine[s] the length of the defendant’s imprisonment.”<sup>9</sup> Judge Posner, writing for the Seventh Circuit provided this example to illustrate the point:

Suppose the federal statutory minimum were 10 years.... And one defendant had served 1 year of a related state sentence and another defendant 9 years. Without an adjustment the total length of imprisonment for the first defendant would be 19 years and of the second defendant 11 years; to make each defendant serve total prison time of 10 years (supposing the sentencing judge found them equally deserving of that amount of time), the first defendant would require a 9-year reduction and the second defendant a 1-year reduction.

Adjustments thus play a key role in avoiding unwarranted disparity. We support the proposed amendment because courts should be directed to make these adjustments both when the state sentence is undischarged and when it is anticipated.

Defenders believe the proposed amendment to the guideline is the best way to account for these cases. Short of that, a departure provision would be better than nothing.

### **C. Sentencing of Deportable Aliens With Unrelated Terms of Imprisonment**

Defenders support the Commission’s proposed amendment to add a new subsection to §5G1.3 directing courts to adjust the federal sentence for undischarged offenses that are unrelated to the current offense where “the defendant is a deportable alien who is likely to be deported after imprisonment.” This amendment serves at least two important purposes: it promotes the Commission’s goal of avoiding unwarranted disparity and furthers the Commission’s obligation to ensure that the guidelines are “formulated to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons.”<sup>10</sup>

This proposed amendment helps address the unwarranted disparity in sentences for our clients who have previously been deported, return to the United States, and are charged with entering or being found in the United States in violation of 8 U.S.C. § 1326(a). Sometimes clients are “found in” the United States for purposes of § 1326 while they are serving a sentence

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<sup>9</sup> *United States v. Cruz*, 595 F.3d 744, 746 (7th Cir. 2010).

<sup>10</sup> *See* 28 U.S.C. § 994(g). *See also* USSC, Notice of Final Priorities, 78 Fed. Reg. 51820, 51821 (Aug. 21, 2013) (“Pursuant to 28 U.S.C § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.”).

for an unrelated offense in state court. Some are found at the beginning of the term for their other offense, and some are not found until later in their term. Sometimes they are prosecuted for the federal offense immediately, and sometimes they are not. Generally, the timing of when they are found, and the promptness of the prosecution is entirely arbitrary, although sometimes there is reason to suspect intentional delay on the part of the federal authorities. When the § 1326 offenses are prosecuted right away, the federal court has the authority to run the federal sentence concurrently with the undischarged state court sentence.<sup>11</sup> But for those who happen to be prosecuted near or at the end of their state term, the federal sentence will run fully consecutively, or nearly so, to the other offense. The only reason for this different treatment is the happenstance of how much time is left to serve on the undischarged state offense. This creates unwarranted disparity. The proposed amendment addresses the problem.<sup>12</sup>

It also helps address concerns regarding the cost of incarceration and prison overcrowding by ensuring that sentences are not longer than what the federal sentencing court determines necessary, simply because of the timing of the federal prosecution in relation to the state sentence.

In response to one of the options in the proposed amendment, the Defenders encourage the Commission to take this opportunity to make clear that subsection (a) would not require consecutive sentences in these cases. Courts have routinely declined to apply §5G1.3(a) in these illegal reentry cases.<sup>13</sup> It makes sense to reserve the limitations of §5G1.3(a) for those who

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<sup>11</sup> See 18 U.S.C. § 3584.

<sup>12</sup> Some courts have addressed these issues by using downward departures to adjust the sentence. See *United States v. Barrera-Saucedo*, 385 F.3d 533 (2004) (holding that “even in a case of innocent delay,” “it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of the time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody”); *United States v. Los Santos*, 283 F.3d 422 (2d Cir. 2002) (holding departures for lost opportunity are allowed when the delay was “in bad faith” or “longer than a reasonable amount of time for the government to have diligently investigated the crime involved”); *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 564 (9th Cir. 1998) (en banc) (affirming the district court’s downward departure where there was “a lost opportunity” to reduce the defendant’s “total time in custody” that was “entirely arbitrary”). As discussed below, defenders believe the proposed amendment to §5G1.3 is preferable to adding an invited departure in §2L1.2.

<sup>13</sup> See, e.g., *United States v. Gutierrez-Silva*, 353 F.3d 819 (9th Cir. 2003) (“[b]ecause Gutierrez-Silva was serving an undischarged state term at the time that he was sentenced in federal court for illegal reentry, the district court was empowered by” §5G1.3(c) to run the federal sentence “concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment”; subsection (a) of §5G1.3 does not apply because “Gutierrez-Silva committed the offense of illegal reentry before he was convicted and sentenced for the state drug trafficking charge” and state charge was not considered in calculating federal offense level); *Los Santos*, 283 F.3d at 426 (without discussing §5G1.3(a), deciding that while subsection (b) of §5G1.3 did not apply, the “district court could have imposed a concurrent sentence” under §5G1.3(c) where defendant charged under § 1326 was “found” while in a state custodial

actively commit crimes while in prison.<sup>14</sup> It should not be applied in situations like illegal reentry cases where the defendant “committed no act in furtherance of his crime” while in prison but “was simply found by the INS, completing the offense of unlawful re-entry.”<sup>15</sup>

Defenders also support use of the word “shall” rather than “may”, to help ensure the benefits that attend this proposed amendment are fully embraced and implemented.

In response to the Commission’s Issue for Comment, Defenders believe the proposed amendment to §5G1.3 is superior to adding a new departure provision in §2L1.2. Where, as here, the issue is about coordinating multiple sentences, it is best addressed in §5G1.3 to provide the context that this is but one of many situations where courts take steps to ensure that when there are multiple jurisdictions involved, the federal sentencing court is still able to determine and effectuate the appropriate sentence for the federal offense, and make sure the defendant is not subject to unduly harsh punishment.

If, however, the Commission opts not to make the proposed amendment to §5G1.3, Defenders believe adding a specific departure provision to §2L1.2 would be better than leaving things as they are. Defenders believe proposed Example 1 is better than Example 2 because it is simpler and likely easier to apply. Specifying, as Example 2 does, that the departure is for the “lost opportunity” will likely lead to litigation regarding exactly which dates correspond with the “lost opportunity.” The general language in Example 1 provides adequate guidance without the potential for litigation that accompanies greater specificity.

Finally, whether the Commission adopts the proposed amendment, or opts to instead provide for a departure, we encourage the Commission to include language that would cover anticipated as well as undischarged sentences that include periods of imprisonment that will not be credited to the federal sentence by the BOP.

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drug treatment program); *United States v. Medrano*, 89 F.Supp. 2d 310, 315-18 (E.D.N.Y. 2000) (concluding that §5G1.3(a) would have applied if the instant offense of being found in the United States had been prosecuted while the defendant was still subject to that sentence, but that a departure would have been appropriate because illegal reentry is outside the heartland of cases where §5G1.3(a) applies, and would create unwarranted disparity); *United States v. Contreras-Hernandez*, 277 F.Supp. 2d 952, 955 (E.D. Wis. 2003) (exercising discretion to depart and impose a concurrent sentence under §5G1.3(c) in a § 1326 case because it presents “a circumstance not adequately taken into account by the Commission in drafting §5G1.3(a)”). *See also United States v. Santana-Costellano*, 74 F.3d 593, 599 (5th Cir. 1996) (noting the issue but declining to decide whether §5G1.3(a) or §5G1.3(c) applied where the instant offense of being found in the United States after having been arrested and deported in violation of 8 U.S.C. § 1326(a), occurred while he was serving a sentence in Texas for another offense).

<sup>14</sup> *See Contreras-Hernandez*, 277 F.Supp. 2d at 955; *United States v. Medrano*, 89 F.Supp. 2d at 316.

<sup>15</sup> *Contreras-Hernandez*, 277 F.Supp. 2d at 955.