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Norman L. Reimer Washington, DC

Hon. Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

March 18, 2014

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) welcomes the opportunity to submit comments on the Commission's Proposed Amendments to the Sentencing Guidelines, dated January 17, 2014 (the "Amendments"). In particular, NACDL applauds the Commission for proposing a series of amendments that if adopted would shorten many prison sentences and reduce the federal system's expensive and morally unacceptable reliance on incarceration. We strongly advocate that these modest changes be but first steps in a concerted effort to implement the humane punishment policies underlying the Sentencing Reform Act of 1984, namely, a preference for non-custodial sentences for non-violent first-time offenders, and parsimony in the imposition of prison sentences.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

We address the amendments chronologically.

Amdt. 1: § 1B1.10 – Applicable Amended Guideline Under 18 U.S.C. § 3582(c)(2)

NACDL supports Option 1, which proposes amending §1B1.10 to specify that in resentencing proceedings under 18 U.S.C. § 3582(c)(2) involving defendants who provided substantial assistance, a court must determine the amended guideline range without regard to the operation of §5G1.1 and §5G1.2. Put simply, Option 1 requires the resentencing court to determine the cooperating defendant's amended guideline range without regard to any mandatory minimum sentence.

Option 1 is consistent with the definition of “applicable guideline range” in other parts of the Guidelines manual, including in §5G1.1 itself. *See* § 5G1.1(b) (distinguishing between the “applicable guideline range” and the “guideline sentence” resulting from operation of a mandatory minimum). It also “conforms to the reality of the sentencing process.” *See United States v. Savani*, 733 F.3d 56, 63, n.7 (3d Cir. 2013) (noting that “[a] defendant is not assigned a new offense level or criminal history category by operation of the mandatory minimum. Rather, the guideline range that is applicable to that offense level and criminal history category is simply trumped by the mandatory minimum sentence when the sentencing court applies step § 1B1.1(a)(8).”).

More importantly, Option 1 erases the anomalous outcome that cooperating defendants may be less favorably situated at resentencings than other defendants with more serious convictions or criminal histories. *See, e.g., United States v. Jackson*, 2012 WL 3044281 (N.D. Ohio, July 25, 2012) (noting the “irony of Jackson’s fortune” that he was eligible for a sentencing reduction under 18 U.S.C. § 3582(c)(2) only because his criminal history was serious enough to “push[] his guidelines range above the statutory minimum,” unlike “a similar defendant, with a lower criminal history score”). As such, it is consistent with both the statutory and Guidelines policy favoring cooperation, as well the underlying purpose of the Fair Sentencing Act (the “FSA”), which was designed to broadly remedy the disparities created by the distinction between crack and powder cocaine penalties. It is antithetical to these policy concerns to lower the guideline ranges for some cooperating defendants and not others, based on the fortuity of their individual sentencing calculations or on whether the sentencing occurred after the retroactive Guidelines amendments took effect.

We also join with the Federal Public and Community Defenders in urging the Commission to take this opportunity to amend § 1B1.10 to reinstate the pre-2008 rule instructing district courts to impose the sentence they would have imposed had the amendment been in effect at the time of sentencing, thus preserving all previously granted departures or variances for reasons other than the policy reasons for amending the guideline. In 2011, the Commission amended § 1B1.10 to preclude the re-imposition of all departures and variances except those granted for substantial assistance. This amendment unnecessarily constrained sentencing judges, who are well capable of ensuring the defendant does not receive a “double benefit” – a variance based on a policy disagreement with the guidelines, as well as an adjustment under the amendment itself. In addition and more troublingly, the 2011 amendment forces judges to rescind all departures and variances unrelated to cooperation but which were based on compelling individualized circumstances relevant to sentencing under 18 U.S.C. § 3553(a) –

circumstances that are no less relevant today than when the sentence was imposed. Accordingly, we strongly support the broader amendment of § 1B1.10 outlined in the Federal Defenders' submission.

Amdt. 2: Violence Against Women Reauthorization Act

NACDL encourages the Commission to proceed with caution and conservatism in modifying the Guidelines in response to VAWA. Congress modified VAWA to permit prosecutors to seek a sentence of more than six months for certain types of assault. The removal of this cap is sufficient to address concerns over undue leniency in these kinds of cases. There is no need to modify the Guidelines any further, creating the risk of unnecessary complication and increased sentencing disparities.

A. §2A2.2: Aggravated Assault

NACDL does not support Option 1 or 2. Both of the proposed Amendments under §2A2.2, contend that an enhancement should apply when an offense involved assault by strangulation, suffocation, or attempting to strangle or suffocate. NACDL recommends that the existing enhancements for the degree of bodily injury found in §2A2.2(b)(3) apply to § 113(a)(8) cases and those enhancements sufficiently cover any injury under 18 U.S.C. §113(a)(8). The current enhancements are based on degree of bodily injury. That enhancement provision allows for enhancements from 3-7 levels and sufficiently provides for any injury caused by strangulation, suffocation, or attempting to strangle or suffocate based on the varying factors. The inclusion of strangulation, suffocation, or attempting to strangle or suffocate in the aggravated assault statute allows prosecutors to seek more than a 6-month sentence if there is no bodily injury and provides enhancements when there is serious bodily injury.

Of the two options, NACDL finds Option 1 to be less objectionable than Option 2. We reach this conclusion because Option 1 places instances of strangling or suffocating that do not otherwise warrant an enhancement under subsection (b)(3) on par with the 3-level enhancement for bodily injury. Option 2 could only further create an unwarranted disparity in the Guidelines, because an assault involving reckless strangulation would be treated as equivalent to an assault that resulted in broken bones. Also, to avoid “factor creep,” a cap should be placed on the cumulative effect of the enhancements under § 2A2.2(b)(2) and (3), just as currently exist under § 2A2.2(b)(3).

B. §2A2.3: Minor Assault

Currently, the 4-level enhancement in §2A2.3 applies if the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years. NACDL supports Option 1 that would broaden the scope of the §2A2.3 4-level enhancement to include substantial bodily injury to a spouse or intimate partner or dating partner. Option 2 already enhances the base level by 2 if a victim sustained bodily injury, the same as Option 1, but Option 1 allows for a 4-level enhancement if the offense resulted in substantial bodily injury to a more vulnerable group. NACDL submits that

Option 1 is more consistent with congressional intent than Option 2, which would expand the enhancement to all cases in which an offense resulted in substantial bodily injury. NACDL also supports Option 1 because it gives an enhancement for the most vulnerable victims, to wit, victims of violence perpetrated by an intimate or partner of the victim.

C. §2A6.2: Stalking or Domestic Violence

NACDL recommends Option 2 that incorporates strangling, suffocating, or attempting to strangle or suffocate into the existing factor for bodily harm. Bodily harm enhancements already sufficiently address offenses involving strangling, suffocating or attempting to strangle or suffocate. §2A6.2 starts with a base level of 18 as opposed to §2A2.2 that has a base level of 14. If the offense involves two or more of the aggravating factors the base level is increased by 4 levels. The inclusion of bodily harm or strangling, suffocation, or attempting to strangle, or suffocate under one subheading is sufficient for enhancements according to the acts involved in the offense.

D. Issues for Comment:

1. Offenses Involving Strangulation, Suffocation, or Attempting to Strangle or Suffocate Under Section 113(a)(8). The new offense under §113(a)(8) should be referenced to §2A2.2, aggravated assault. NACDL recommends that the existing enhancements for the degree of bodily injury found in §2A2.2(b)(3) apply to § 113(a)(8) cases and those enhancements sufficiently cover any injury under 18 U.S.C. §113(a)(8).
2. Supervised Release: Both probation and supervised release should be available options for an assault offense, a domestic violence or a stalking offense. The time period for probation or supervised release should not be mandatory, but rather, should be determined on a case-by-case basis. The judge is in the best position to determine the period of supervision or probation for each individual offender, based on his particular needs and the resources of the relevant district.
3. Assault with Intent to Commit Certain Sex Offenses Under Section 113(a)(1) and (2). NACDL opposes the proposed amendment referencing convictions under 18 U.S.C. §§ 113(a)(1) to §2A3.1 and (a)(2) to §§2A3.2, 2A3.3, and 2A3.4. Instead, NACDL recommends creating 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). Another option would be to create an entirely new guideline for assault with intent to commit sex offenses under section 113(a)(1) and (2). The new guideline would address the new assault offenses as assaults instead of treating them under already established sex abuse guidelines.

Amdt. 3: Drugs

NACDL supports and applauds the Commission’s proposed 2-level reduction across the Drug Quantity Table in U.S.S.G. § 2D1.1. To the extent that the guidelines remain tied to drug quantities and correlated with mandatory minimums, this reduction is an important step in the direction of sentencing that meets the statutory mandate for sentences that are “sufficient but not greater than necessary” to accomplish the purposes of sentencing.¹ The reduction is also supported by empirical sentencing data. Finally, the reduction will help reduce overcrowding in the Federal prisons.

A. Purposes of Punishment Will Be Better Accomplished by the Reduction

Under the current Drug Quantity Table, a drug quantity sufficient to trigger a mandatory minimum sentence produces a guideline range for a first-time offender slightly above that mandatory minimum sentence. The 2-level reduction will place the mandatory minimum within the guideline range.² The reduction will also lower the artificially inflated sentences of defendants with drug quantities below the mandatory minimum threshold. The current Drug Quantity Table results in overly harsh sentences that do not accomplish the purposes of sentencing.

1. Retribution

Reflecting Seriousness of the Offense. The current guideline sentences are extremely harsh, even for first-time offenders. The current guideline recommended sentence for possession with intent to distribute 22.4 < 28 grams of crack, less than required to trigger the mandatory minimum sentence, is the same as the guideline range for aggravated assault with a weapon causing permanent or life threatening bodily injury!³ This seriously inflates the relative seriousness of non-violent drug crimes in comparison to crimes of violence against a person. The proposed 2-level reduction will not completely remedy this phenomenon, but will come closer to a more accurate reflection of the seriousness of the offense.

¹18 U.S.C. § 3553(a).

²The base offense level is currently 26 for possession of 28 grams of crack, 500 grams of cocaine powder, 50 grams of methamphetamine mixture, 5 grams of pure methamphetamine/ice, or 100 grams of heroin. These are also the quantities that trigger the 5 year mandatory minimum sentence. The guideline range for a first-time offender at offense level 26 is 63 - 78 months, rendering the mandatory minimum sentence lower than the guideline sentence. The across-the-board 2-level reduction would produce an offense level of 24 for these quantities and a guideline range of 51 - 63 months, allowing first-time offenders convicted at trial to fall within the guidelines. Likewise, the quantities that trigger the 10-year mandatory minimum sentence currently have an assigned offense level of 32, resulting in a guideline range of 121 - 151 for first offenders; the proposed 2-level reduction would assign an offense level of 30, with a resulting guideline range of 97 - 121 months for a first-time offender.

³The base offense level for distributing 22.4 < 28 grams of crack is 24, which has a guideline range of 51 - 63 months for a first-time offender. Aggravated assault has a base offense level of 14, with upward adjustment of 3 for brandishing a weapon and 7 for causing permanent or life-threatening bodily injury, for a total of 24.

Promoting Respect for the Law. In addition to punishing drug crimes more harshly than some violent crimes, the current drug sentencing laws have a significant, documented disparate impact on black and Hispanic families.⁴ Sentences perceived as overly harsh and racially discriminatory do not promote respect for the law.

Providing Just Punishment for the Offense. The stated intention of Congress was to provide serious penalties for major drug dealers, that is, managers and kingpins.⁵ The reality is that current guidelines recommend these serious sentences for defendants who are not managers, wholesalers, or kingpins. Rather, even under the Fair Sentencing Act, powder cocaine guideline sentences greater than five years were recommended for 28% of street dealers, 31% of couriers or mules, and 45% of other low-level individuals.⁶ While such sentences may be considered just for true managers and kingpins, these sentences are excessive for lower level offenders. Accordingly, the proposed 2-level reduction will come closer to providing just punishment for the offense.

2. Deterrence

General Deterrence. Deterrence of criminal conduct is an express goal of sentencing under the statute.⁷ However, the threat of prosecution, certainty of detection, and swiftness of sanction all have a greater impact on deterrence than does length of sentence.⁸ Most people who commit crimes do not think they will be caught and are often unaware of the exact punishment they might receive. Further, many drug crimes are driven by addiction or economic circumstances, and dealers who are locked up are quickly replaced by other dealers seeking to profit from the high demand, according to empirical research.⁹

Specific Deterrence. “Protecting others from further crimes of the defendant,” or specific deterrence, is not accomplished by draconian sentences, according to recidivism rates.¹⁰ Except for the incapacitation effect of incarceration, there is little correlation between recidivism and length of imprisonment.¹¹ In fact, longer prison sentences may actually contribute to higher recidivism by exposing defendants to more serious criminals and keeping them out of the job market for prolonged periods, reducing their ability to reintegrate successfully into society.¹² Because the evidence fails to show improved deterrence from longer sentences, while demonstrating a correlation between lengthy

⁴Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

⁵U.S.S.C., *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (2002).

⁶U.S.S.C., *Report to Congress: Cocaine and Federal Sentencing Policy* 29 (2007).

⁷18 U.S.C. § 3553(a)(2)(B).

⁸Andrew 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).

⁹Paul Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity 1980-1988*, 12 *Fed. Sent. Rep.* 12, 15 (1999).

¹⁰18 U.S.C. § 3553(a)(2)(C).

¹¹Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Dept. Of Justice, Recidivism of Prisoners Released in 1994* 17 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

¹²Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 *Criminology* 329 (2002).

sentences and higher recidivism, the proposed 2-level reduction will be more consistent with promoting the purposes of punishment.

3. Rehabilitation

Lengthy incarceration does not meet “in the most effective manner” the treatment and training needs of defendants.¹³ Although the intensive Residential Drug Abuse Program in the Bureau of Prisons is considered an excellent treatment model, the reality is that only 15.7% of federal inmates with substance abuse problems actually receive substance abuse treatment while incarcerated.¹⁴ Residential and outpatient treatment options in the community provide more programs and better access to drug treatment than do prisons.¹⁵ Congress also recognized “the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating a defendant.”¹⁶

B. Empirical Sentencing Data Supports the Proposed 2-Level Reduction

As discussed above, empirical research corroborates the argument that current guideline sentences for drug trafficking offenses are overly harsh and fail to meet the goals of sentencing. The guidelines produce higher sentences than the guidelines for some violent offenses against the person. Decreased length of sentence has not caused any increase in recidivism rate among the offenders who benefitted from the previous 2-level reduction in offense level.¹⁷ Drug offenders consistently have had lower recidivism rates than those convicted of other types of offenses.¹⁸ Further, the criminal history category, not the offense level, is supposed to take recidivism into account. Finally, the trend in sentencing post-*Booker* indicates that Courts also find the guideline recommendations unduly harsh. Since 2006, within-guideline sentences for drug offenses fell from 51.2% to 38.8%, while judge-imposed (i.e., not the result of substantial assistance or other government motions) below-guideline sentences increased from 11.7% to 20.7% in the same time frame,¹⁹ suggesting that lower sentences better reflect judicial determination of the appropriate sentence for drug offenses.

¹³18 U.S.C. § 3553(a)(2)(D).

¹⁴Nat'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).

¹⁵National Institute of Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations' A Research-Based Guide* 13 (2012).

¹⁶28 U.S.C. § 944(k).

¹⁷U.S.S.C., *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* 10, Table 2 (2011).

¹⁸U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004).

¹⁹U.S.S.C., *2006-2012 Sourcebooks of Federal Sentencing*, Table 27; U.S.S.C., *Preliminary Quarterly Data Report, 4th Q. 2013 Release*, Table 3.

C. The Proposed 2-Level Reduction will Help Reduce the Costs of Incarceration and the Current Overpopulation of Prisons

One of the Commission's duties is to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."²⁰ The current guidelines have utterly failed to do that. Over one-half of the prisoners incarcerated in the Federal BOP prisons are drug offenders.²¹ This represents a phenomenal increase from 1985, when drug offenders comprised one-third of 40,000 inmates.²² Average time served in prison by drug offenders increased more than 2 ½ times after implementation of the guidelines.²³ The cost of the expanding prison population has raised the BOP budget to nearly 7 billion dollars a year.²⁴ Because reducing the sentence length for drug offenders will not have an impact on the deterrent value of the punishment, the proposed 2-level reduction is a way to reduce prison overcrowding and contain costs, without sacrificing public safety.

D. NACDL Urges the Sentencing Commission to Eliminate the Drug Quantity Table Entirely for the Reasons Discussed Herein

Congress intended mandatory minimum sentences to be imposed on serious drug traffickers, namely the king-pins and the mid-level dealers.²⁵ However, the drug quantity thresholds set to trigger the mandatory minimum sentences – even as revised by the FSA – are too low, resulting in large numbers of low-level dealers receiving lengthy mandatory prison sentences.²⁶ This problem is compounded by the Drug Quantity Table, which scales all drug sentences in reference to the quantity necessary to trigger the mandatory minimums, rather than setting sentencing guidelines based on the purposes of sentencing. Drug quantity is very poorly correlated with culpability, especially in large conspiracy cases. By overstating the culpability of low-level dealers, these guidelines based primarily on drug quantity do not accomplish the purposes of sentencing, as previously discussed. The Drug Quantity Table produces sentences that are excessively harsh in comparison to the crime committed, thereby failing to provide "just punishment" and also leading to disrespect for the law.

As discussed in the prior set of arguments, the guidelines based on drug quantity not only fail to promote respect for the law and provide just punishment, but the lengthy sentences are counter-productive to the rehabilitative goals of sentencing. These harsh

²⁰28 U.S.C. § 994(g).

²¹Broken down by offense, 98,554 inmates (out of 176,858) are incarcerated for drug offenses, or 50.1%. BOP, Inmate Statistics by Offenses, *available at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Mar. 13, 2014).

²²The Sentencing Project, *The Expanding Federal Prison Population 2*, *available at* http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2011.pdf.

²³U.S.C., *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 Report*).

²⁴U.S. Dept. of Justice, *FY 2014 Budget Request at a Glance*, <http://www.justice.gov/jmd/2014summary/pdf/bop.pdf>.

²⁵*Fifteen Year Report* at 48, 134.

²⁶*Id.*

sentences serve little, if any, deterrent value. Accordingly, NACDL respectfully suggests that the Commission eliminate the Drug Quantity Table entirely and develop guidelines based on factors that more accurately reflect the offender's culpability, thereby recommending sentences that will more truly accomplish the goals of sentencing.

Amdt. 4: Felon in Possession

The United States Sentencing Commission has invited comment on two proposed amendments to USSG § 2K1.1, which provides, *inter alia*, for an enhanced sentence if a defendant used, possessed, or transferred a firearm or ammunition. §§ 2K1.1(b)(6)(B), 2K1.1(c)(1).

Option 1 would amend these sections (b)(6)(B) and (c)(1) “to limit their application to firearms and ammunition identified in the offense of conviction.” However, the proposed Commentary provides that where a defendant is charged with being a felon in possession, and the court finds that the defendant used the firearm in connection with another offense—even uncharged, dismissed, or acquitted conduct—that other offense is relevant conduct that could increase the defendant's sentence.

Option 2 would amend the § 2K1.1 Commentary “to clarify that subsections (b)(6)(B) and (c)(1) are not limited to firearms and ammunition identified in the offense of conviction.” As long as the court finds that a defendant possessed a second firearm as part of the same course of conduct or common scheme or plan as the unlawful possession underlying the offense of conviction, then the court will be able to sentence the defendant based upon uncharged, dismissed, or acquitted conduct.

NACDL supports a policy that limits sentencing enhancements based on use, possession, or transfer of a firearm only where that firearm is involved in the charged offense for which the firearm enhancement may potentially apply. This means that for the enhancement to apply, two conditions must obtain. First, the crime in which the firearm is involved must be charged; the crime cannot be uncharged, dismissed, or acquitted conduct. Second, the firearm that is the subject of the enhancement must have been actually used, possessed, or transferred in connection to the charged crime.

NACDL therefore supports the adoption of USSG's Option one, with two qualifications. Option one as it stands appears to require that the crime that involves the used, possessed, or transferred firearm be the crime charged – not uncharged, dismissed, or acquitted conduct. NACDL supports this. Option one does not, however, make clear that a firearm *not* involved in the charged crime *may not* be the predicate fact for enhancement. Furthermore, Option one continues to permit sentencing based on uncharged, dismissed, or acquitted conduct, if the conduct is alleged to be connected to a relevant firearm. The USSG should adopt amending language to ensure (1) that any firearms enhancement be based on a firearm that was involved in the charged crime, and (2) that any uncharged, dismissed, or acquitted conduct not be the subject of an enhancement simply because a relevant firearm may have been involved in that conduct.

In ensuring that only firearms that are used, possessed, or transferred in relation to the charged offense are predicate facts for enhancement, the USSG will ensure that the Federal Sentencing Guidelines serve the goal of retribution by producing sentences that are based on actual culpable acts: if a defendant is convicted of a crime and possesses a firearm that is not involved in the crime in any way, the defendant’s sentence should not be enhanced based on that firearm. In addition, in ensuring that only charged offenses—and not uncharged, dismissed, or acquitted conduct—may be considered for the § 2K2.1 enhancement, the Guidelines will promote clarity and predictability in sentencing. This will also prevent prosecutors from obtaining higher sentences based on conduct that has not been proven beyond a reasonable doubt, thus avoiding a *Booker* problem.

Option 2 is not preferable because it does not require that the relevant firearms be involved in the offense of conviction. This hobbles the retributivist function of the Guidelines by permitting sentences to be based in part on conduct that has nothing to do with charged criminal conduct. NACDL opposes Option 2, and would oppose any amendment that rests a firearm enhancement on a firearm that was not involved in the charged offense, or a relevant conduct enhancement based on uncharged, dismissed, or acquitted conduct.

Amdt. 5: 2L1.1 – Smuggling, Transporting or Harboring an Unlawful Alien

NACDL opposes the addition of the proposed language to Application Note 5 because delineating further examples of circumstances in which conduct could be deemed reckless encourages a narrowing of individualized sentencing determinations. “Permitting sentencing courts to consider the widest possible breadth of information about a defendant ‘ensures that the punishment will suit not merely the offense but the individual defendant.’” *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) (quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984)).

Issues for Comment

- 1.A. Terrain. For the above reason, NACDL respectfully submits that no factors should support a per se application of the enhancement at subsection (b)(6). Rather, whether reckless conduct created a substantial risk of death or serious bodily injury should be determined based on the individual facts and circumstances of the case and the defendant.
- 1.B. Property Damage. Damage to ranch property in the appropriate case can be taken into consideration under the present sentencing scheme through an enhancement for property damage or loss not otherwise taken into account under the guidelines, *see* U.S.S.G. §§ 5K2.5 (“Property Damage or Loss”), or restitution, *see* U.S.S.G. § 5E1.1. Accordingly, an amendment to U.S.S.G. § 2L1.1 is unnecessary.
- 1.C. Rescue Costs. As noted previously, loss and restitution are already accounted for under the guidelines. Accordingly, an amendment to

U.S.S.G. § 2L1.1 to account for added resources used in a search a rescue mission is unnecessary. If the facts and circumstances of a particular case and defendant indicate that such an enhancement is called for, provisions within the existing guidelines allow that consideration. Adding specific situations in which enhancements categorically apply should be avoided.

Amdt. 6: § 5D1.2 – Supervised Release

A. When a Statutory Term of Supervised Release Applies

NACDL supports Option 1, which adopts the majority view in the circuits and rejects the unsupported minority view in the Eighth Circuit in *United States v. Deans*, 590 F.3d 907, 911 (8th Cir. 2010). Option 1 effectively implements the advisory Guideline scheme for periods of supervised release as it was intended, by embracing the Guideline range *whenever* it is permissible under the applicable statute. The Guideline range is constrained *only if* the statutory minimum period of supervised release is above the bottom end of the Guideline range. By contrast, the *Deans* approach throws out the top end of the Guideline range based solely on the fact that the statutory minimum exceeds the Guideline minimum. There is no support for such a rule, which would lead to longer-than-necessary periods of supervised release.

B. When the Defendant is Convicted of Failure to Register as a Sex Offender

NACDL supports the proposed amendment, which embraces the commonsense majority view that a mere failure to register is not a sex offense.

NACDL further supports a flexible guideline range that recognizes the disparities among offenders who are convicted of failure to register. We believe that the mandatory minimum term of supervised release is set far too high at five years, which is necessary only in extraordinary cases. Nonetheless, we recognize that even higher terms of supervised release, with relief available under 18 U.S.C. 3583(e)(1), may be appropriate in certain circumstances. Accordingly, assuming the mandatory minimum is not repealed, we urge the Commission to adopt a Option (A), i.e. an advisory Guideline recommending supervised release of “not less than five years and up to life,” with an Application Note stating that five years will be more than sufficient in nearly all cases, but that judges have the flexibility to impose longer terms in extraordinary cases, and to terminate such terms early where the releasee is successful on release.

Additional Issues for Comment

- i. Crime of Violence. Additional supervised release for a person who fails to register and also is convicted of a crime of violence is not warranted, because the underlying statute for the crime of violence provides sufficient measures to achieve the objectives of sentencing and supervised release. NACDL is aware of no empirical data suggesting that a person who fails to register prior to committing a crime of violence is more dangerous,

more likely to recidivate or more in need of supervision than a person who solely commits a crime of violence. Therefore, a flexible Guideline under which a judge can determine the period of supervised release is sufficient for convictions under either subsection (a) or (c) of 18 USC § 2250.

- ii. – iii. Minor Victims. Similarly, prescribed differences in terms of supervised release based on the victim of the underlying sex crime are not warranted. The facts of the underlying case may be based on state convictions and subject to dispute. For example, offenders are frequently required to register based on negotiated “no contest,” “withhold adjudication” or Alford pleas to misdemeanors. In such cases, even if the victim could be shown to be a certain age, the precise conduct at issue might be subject to dispute. More generally, the facts of the underlying offenses vary so widely that the age of the victim should not be more dispositive than other factors such as the relationship between the victim and the offender, the use of violence, the use of deception, the commercial nature of the offense, and other harms inflicted on the victim. Finally, any specific offense characteristic based on the age of the victim of the underlying crime would apply to all cases where the underlying crime involved child pornography, despite substantial differences in culpability among such cases. Accordingly, as with Point (i) above, a flexible rule permitting judges to impose terms of supervised release up to life is warranted and sufficient to safeguard concerns arising out of the age (and other characteristics) of the victim of the underlying crime.
- iii. Conditions of Supervised Release. As to conditions of supervised release, it is the view of the NACDL that 18 U.S.C. § 3583, USSG § 5D1.3 and local practices provide ample conditions of supervised release to protect the public and otherwise achieve the objectives of sentencing without further guidelines specific to failures to register based on the underlying offense. Sentencing judges are free to impose additional reasonable restrictions and are in the best position to craft conditions that are protective but not overreaching in particular cases. Arbitrary or universally-applicable rules based on age can lead to anomalous results and unintended consequences, particularly if an offender has children of his or her own or otherwise is legitimately in contact with children. Accordingly, NACDL would oppose any such amendment.

Amdt. 7: § 5G1.3 – Undischarged Terms of Imprisonment

A. Accounting for Undischarged Terms of Imprisonment that Are Relevant Conduct But Do Not Result in Chapter Two or Chapter Three Increases

NACDL supports eliminating any requirement that adjustments from Guidelines Chapters Two or Three must apply before courts can account for prior, undischarged

terms of imprisonment. NACDL further supports an amendment applying § 5G1.3 consideration for *all* relevant conduct, not just conduct relevant under sections 1B1.3(a)(1), (a)(2), or (a)(3). Both amendments would help the Commission fulfill its “focus on fulfilling its statutory mandate to work to reduce overcapacity in federal prisons.” U.S.S.C., Press Release, “U.S. Sentencing Commission Selects Policy Priorities for 2013-2014 Guidelines Amendment Cycle,” 8/15/2013 (available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130815_Press_Release.pdf).

“Relevant conduct” means to capture “real offense” conduct for Guidelines calculations. *See* USSG Part A, Subpart (1)(4)(a) (“Real Offense vs. Charge Offense Sentencing”); USSG § 1B1.3, Background. The Guidelines define four kinds of “relevant conduct” to be incorporated into sentencing calculations, and ultimately the sentences rendered, even when those characteristics do not trigger specific adjustments from Chapters Two or Three. Once that “real offense” conduct is captured, in light of *all four* relevant conduct definitions, the Guidelines advise courts about an appropriate “total sentence” for the offense committed. *See* USSG § 5G1.2.

That total sentence is a decision not just about which sentencing range is appropriate to the offense and offender, but also about where in the Guidelines range the final sentence should fall. Adjustments from Chapters 2 and 3 drive which offense level is appropriate, but relevant conduct can affect where in that range a sentence falls without affecting the offense level itself. Section 5G1.3 extends the “total sentence” concept to sentence length, including prior sentences not yet served. It defies reason for the Guidelines to incorporate a swath of conduct as “relevant” when it otherwise informs an appropriate sentence, but to exclude that same conduct when determining whether the appropriate total sentence should account for prior, undischarged imprisonment. The only way that a “total sentence” can actually reflect the *entire* Guidelines wisdom is for *all* relevant conduct to be considered in § 5G1.3 determinations. Further, the driving principle of federal sentencing is parsimony – that sentences be no greater than necessary to meet the goals of sentencing. *See* 18 U.S.C. § 3553(a). This fundamental congressional directive is ignored when part of relevant conduct is excluded from prior sentence credit considerations. Parsimony is also ignored when prior sentences require that the conduct be not only “relevant conduct,” but also the basis for a separate adjustment under Guidelines Chapters 2 or 3.

B. Adjustment for An Anticipated State Term of Imprisonment

Likewise, NACDL supports adjustment to Guidelines’ calculations for anticipated State sentences, and again suggests that the adjustment should apply if the State sentence meets *any* definition of relevant conduct (including that of § 1B1.3(a)(1)(D)). This required adjustment should also *not* depend on whether the State offense leads to adjustments from Guidelines Chapters Two or Three. NACDL further supports this amendment as a mandatory adjustment in *all* Guidelines calculations, rather than limiting its application to a departure in only those small numbers of cases deemed outside the heartland of Commission consideration. The Guidelines exist, in part, to encourage

uniformity of sentence and to avoid unwarranted disparity. USSG § 5G1.2 commands consideration of the “total sentence” appropriate to an instant offense. Where the total sentence does not include related State custody for relevant conduct, however, neither parsimony nor the directives of total sentencing are fulfilled.

Additionally, where there is an interplay of State and Federal sentences – even for related conduct – defendants and correctional agencies face complex legal questions about whether State or Federal authorities have “primary” custody over the defendant. Even where pretrial detention results from conduct related to the imminent Federal sentence, credit for that custody depends entirely on this complex federalism question. There is no rational reason, however, to exclude the collateral consequences of relevant conduct from a court’s sentencing determination. In fact, case law already suggests that such collateral consequences partially fulfill the goals of sentencing, and should merit adjustment to a valid Guidelines range. *See, e.g.,* *United States v. Redemann*, 295 F.Supp.2d 887, 895-96 (E.D.Wis. 2003) (quoting § 3553(a) (if “circumstances of the case reveal that the purposes of sentencing have been fully or partially fulfilled . . . a sentence within the range set forth by the guidelines may be ‘greater than necessary’ to satisfy 18 U.S.C. § 3553(a).”); *United States v. Whitmore*, 35 Fed.Appx. 307, 322 (9th Cir. 2002) (destruction of “professional capacity” and “ordinary livelihood,” as has happened here, is “a pretty serious punishment already inflicted and carried out . . . and one that’s likely to be permanent.”); *United States v. Anderson*, 533 F.3d 623, 633-34 (8th Cir. 2008) (departure reasonable in part because defendant suffered loss of reputation and his company).

This issue is so common, and so confusing, that guidance from former Federal Bureau of Prisons Regional Counsel Henry J. Sadowski is available through the Commission itself. *See* Henry J. Sadowski, “Interaction of Federal and State Sentences when the Federal Defendant is Under State Primary Jurisdiction,” October 11, 2006 (available at http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2010/014a_OGC_Memo_Sadowski.pdf). If a defense attorney does not – sometimes, cannot – ensure the State sentence is rendered first, on a defendant in “primary” federal custody, defendants can find themselves serving months or years more prison time than either sentencing court would demand. Having this sentence length computation remain only in Federal Bureau of Prisons hands means that the final decision of how to credit custody will occur only after it is too late for courts to render total sentences they believe appropriate. Requiring U.S. District Courts to consider anticipated State prison sentences will not solve the computational problem itself, of course. But that computation will occur in the sentencing court, where it will provide the vehicle to ensure prison sentences are no longer than necessary to serve the purposes of sentencing. Without making § 5G1.3 a mandatory part of a procedurally reasonable Guidelines calculation – even as to anticipated State sentences – the Commission invites unwarranted disparities in sentencing based on individual judges’ philosophies, and what order different sovereigns resolve criminal allegations.

C. Sentencing of Deportable Aliens With Unrelated Terms of Imprisonment

NACDL supports making adjustments for prior sentences mandatory when such a defendant is likely to be deported to another country after sentence is served. NACDL believes this mandatory adjustment should apply notwithstanding whether either subsection (a) or (b) of §5G1.3 would ordinarily apply to the defendant. NACDL further believes the departure suggested in § 2L1.2 (Unlawfully Entering or Remaining in the United States) is a step in the right direction, but again recommends this consideration become a mandatory adjustment in the Guideline rather than a departure in only extraordinary cases, and then only if the sentencing judge chooses to exercise that discretion.

NACDL appreciates that our Guidelines scheme generally proscribes sentencing credits for unrelated conduct. But, where defendants face deportation after completing their sentences, then the appropriate questions to ask are: (a) how much punishment is necessary before removing a criminal from the United States; and (b) how much taxpayer money are we willing to spend to impose that punishment.

NACDL believes that crediting time served for even unrelated conduct still punishes deportable aliens, protects the public, and incapacitates offenders. Allowing credit against the U.S. sentence for defendants likely subject to deportation will not undermine the seriousness of any offense, because deportation and (often permanent) exclusion reflect how seriously our system takes such misconduct. As Justice Jackson stated in 1951: deportation itself is “a life sentence of banishment in addition to the punishment which a citizen would suffer from the identical acts.” *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J). Moreover, deportation and exclusion incapacitates offenders while protecting the U.S. public. As noted above, when collateral consequences partially fulfill the goals of sentencing, as would happen in these scenarios, then the currently suggested Guideline range may be greater than necessary to comply with Congress’ demand for parsimony. Practically speaking, it is unnecessary for taxpayers to pay for often years of custody, solely for the purpose of punishing as harshly as possible, when deportation is coming. The more responsible fiscal decision is to punish no more than necessary, and then to eject the defendant from the United States – and the public dole. And, besides reducing taxpayer cost, shortening such prison terms in favor of earliest possible deportation will help ease prison overcrowding, both in public facilities and with private prison contractors, which house a substantial number of aliens (many of them deportable) committed to the Federal Bureau of Prisons. *See* Government Accountability Office, “Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure,” GAO-12-743, at 7, 13 (Sept. 2012) (available at <http://www.gao.gov/assets/650/648123.pdf>).

As above, NACDL believes these matters are best addressed as a mandatory adjustment and not a departure. But if departure is the decision, NACDL would not emphasize departure language premised upon “the defendant’s lost opportunity to serve a greater portion of his state sentence concurrently with his federal sentence.” (Example 2 in the Commission’s Proposed Amendment, at page 100). The language in Example 1

provides more appropriate departure language, by simply accounting for time already spent in State custody.

Thank you for giving us this opportunity to comment on the Amendments.

Sincerely Yours,

A handwritten signature in black ink that reads "Jerry J. Cox". The signature is written in a cursive style with a large, stylized initial "J".

Jerry J. Cox
President
NACDL