U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

March 6, 2014

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

Dear Chief Judge Saris:

On behalf of the U.S. Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 17, 2014. We thank the members and staff of the Commission for being responsive to many of the Department's sentencing policy priorities this amendment year and for working hard to address all of the guideline issues under consideration. We look forward to continuing our work with the Commission during the remainder of the amendment year on all of the published amendment proposals.

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U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT PUBLISHED BY THE U.S. SENTENCING COMMISSION IN THE FEDERAL REGISTER ON JANUARY 17, 2014.

1. Circuit Conflict Involving the Interpretation of §1B1.10

The Sentencing Commission proposes two options for resolving two separate circuit conflicts relating to proceedings under 18 U.S.C. § 3582(c) when the defendant was convicted of an offense carrying a mandatory minimum sentence but nonetheless received a sentence below the mandatory minimum at the original sentencing after providing substantial assistance to the government in the investigation or prosecution of another person.[1] As the Commission is well aware, there have been many such § 3582(c) proceedings following the retroactive application of the guideline amendments implementing the Fair Sentencing Act.[2]

Section 1B1.10(b)(2)(B) provides that in applying a retroactive guideline amendment reducing an applicable guideline range, a defendant who originally received a reduced sentence by virtue of substantial assistance may be given a further reduced sentence comparably lower than the *amended guideline range*.[3] This makes good sense as a policy because it allows for proportionate decreases reflecting an important mitigating factor, namely providing substantial assistance. Two circuit splits, though, have emerged over what is the *amended guideline range* in different circumstances. The differing interpretations stem from differing views over the operation of §5G1.1(b), which specifies that a mandatory minimum sentence trumps an otherwise applicable guideline range if the top of the range falls below the mandatory minimum.[4]

We appreciate the Commission's willingness to resolve these circuit conflicts. In our view, either solution, Option 1 or Option 2, will improve the current situation by resolving the conflict. We believe Option 1, though, which permits a defendant whose amended §2D1.1 range

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[1] Proposed Amendments to the Sentencing Guidelines, Amendment 1B1.10, January 17, 2014, available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20140114_RFP_Amendments.pdf.

[2] Amendment 759 applied Amendment 750, which reduced sentences for certain crack cocaine offenses pursuant to the Fair Sentencing Act of 2010, retroactively. USSG Appendix C, Vol III, 416, available at http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/Appendix_C_Vol_III.pdf.

[3] USSG §1B1.10(b)(2)(B): "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."

[4] "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." USSG §5G1.1(b).

falls below a mandatory minimum sentence to receive a proportionate sentence reduction notwithstanding the "trumping" mechanisms of Chapter 5, Part G, is the better choice.

In our view, the guidelines as amended in 2011 clearly foreclosed this better result, and cases such as the Third Circuit's decision in *Savani* strained to find ambiguity in the guideline application rules.[5] Nonetheless, the sentiment and policy underlying those decisions has persuasive weight: that a defendant who provided substantial assistance is entitled to consideration for a reduced sentence from the applicable guideline range without respect to any mandatory minimum.

The correct application of sentencing law requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated §2D1.1 range when determining the appropriate sentence. We think the court should do the same when the range is reduced pursuant to a retroactively applied guideline. Allowing relief with reference to the applicable guideline range in substantial assistance cases is consistent with the general policy embodied in §1B1.10, as adopted in 2011, that prohibits a reduction below the amended guideline range – even if the original sentence was lower due to a departure or variance – but provides an exception allowing a reduction below the amended guideline range proportionate to a substantial assistance departure previously granted to the defendant. That exception recognizes the propriety of assuring a benefit for substantial assistance to achieve appropriate proportionality.

While the courts have struggled with interpreting the *amended guideline range* as defined under provisions of the current guidelines, we believe the correct policy is fairly clear and the guidelines should be amended to reflect that policy. All of the applicable cases involve defendants who have provided substantial assistance in the investigation of another. As such, under § 3553(e), those defendants are not subject to any mandatory minimum, regardless of the instructions for, and order of, application of the Guidelines Manual. Putting aside those existing instructions, the correct policy – for proportionality reasons and to properly account for substantial assistance – is to permit a reduction from the applicable guideline range without regard to any mandatory minimum (*since the defendant is not subject to any mandatory minimum*) to reflect the assistance provided in relation to the defendant's individual culpability. To do otherwise will leave some substantial assistance unaccounted for and create unwarranted disparities in sentencing. **We think Option 1 reflects that better policy and should be adopted.**

[5] *United States v. Savani*, 733 F.3d 56, 66–7 (3rd Cir. 2011).

2. Implementation of the Violence Against Women Reauthorization Act

President Obama signed the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013") into law on March 7th, 2013, marking a historic day in our nation's effort to reduce domestic and sexual violence. The Act reauthorizes and expands successful programs that address violence against women across the country, includes important new law enforcement authorities, and through various provisions, defends the rights of all victims and survivors of domestic and sexual violence.

Because of the nature of federal jurisdiction, the federal criminal justice system's role in fighting violence against women is focused significantly in Indian Country.[6] Both Congress and the Justice Department recognize that violence against Native women has reached epidemic rates. Recently, a Centers for Disease Control and Prevention survey found that 46 percent of Native American women have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. VAWA 2013 closes jurisdictional gaps that had long compromised American Indian women's safety and access to justice.

To give the Commission some context related to its work on the guidelines for domestic and sexual violence, we first lay out some of the Department's ongoing efforts to ensure public safety in Indian Country and specifically to address domestic and sexual violence. We then address the guideline issues facing the Commission in implementing the new law nationwide.

I. Making Native America Safer

The Justice Department has long been concerned about the high rate of crime occurring in Indian Country – in particular the high rate of violence against women – and this Administration has launched focused initiatives alongside our tribal law enforcement partners to stem this tide. Since 2009, the Department has pursued an aggressive strategy consisting of law enforcement action, prosecution, grant funding, training, technical support, and collaboration with tribal partners that is showing some genuine success. For example, the Department's renewed commitment to the vigorous prosecution of federal crimes in Indian Country has resulted in a more than 50 percent increase in the number of Indian Country prosecutions by United States Attorney's Offices nationwide over the past four years. We recognize, though, that an increase in federal arrests and convictions alone cannot solve the public safety challenges on the reservations. That is why we have augmented our enhanced law enforcement focus with critical support for tribal criminal justice institutions.

A. Establishing Unprecedented Levels of Cooperation

Improving public safety in Indian Country poses unique challenges because of geography, varying tribal cultures, and many other factors. These challenges demand the use of

[6] "Indian Country" is the legal term used to describe reservations and other lands set aside for Indian use, such as Indian allotments and lands held in trust for Indians or Indian tribes. 18 U.S.C. § 1151.

all existing authorities to strengthen capacity at every level of the criminal justice system through close cooperative ties between federal, state, local, and tribal governments and between governments and the community.

Since taking office, Attorney General Holder has consistently emphasized that combating violent crime in Indian Country and fostering safe communities is a top priority of the Department of Justice. In early 2010, each United States Attorney's Office with responsibilities in Indian Country was required to draft and implement a district-specific operational plan to formalize its strategy for consulting and working with tribal, state, and local law enforcement, prosecutors, and other leaders, to improve public safety in Indian Country. For example, beginning in 2010, United States Attorney for the District of Montana Mike Cotter began convening bi-monthly meetings with the federal prosecutors assigned to each reservation, the tribal prosecutors for the reservation, and tribal and federal law enforcement officers. During these meetings, cases arising on a particular reservation during the preceding two-week period are discussed, and a joint decision is made concerning which jurisdiction – federal or tribal or both – will prosecute a particular case. This close communication ensures that serious Indian Country crimes are appropriately investigated and that the decision as to whether a matter will be charged in federal court or tribal court is fully informed.

Nationwide, federal Indian Country caseloads have increased from 1,091 criminal cases filed in fiscal year (FY) 2009, to 1,138 in FY 2010, to 1,547 in FY 2011, and to 1,677 in FY 2012.[7] These results are the product of the Department's renewed focus on leveraging partnerships with tribal, local, state, and federal partners to address violent crime. In North Dakota, the operational plan and anti-violence strategy developed by United States Attorney Tim Purdon combine enhanced enforcement of federal criminal laws and greater collaboration with support for viable crime prevention programs and efforts to build a sustainable offender reentry program. The plan has been in place for almost three years and has resulted in unprecedented levels of communication and collaboration between the U.S. Attorney's Office and the tribes in North Dakota as well as a large increase in the number of Indian Country prosecutions by the U.S. Attorney's Office.

Also contributing to the increase in prosecutions is the Department's enhanced Tribal Special Assistant U.S. Attorney (SAUSA) program. Tribal SAUSAs are tribal prosecutors who are "cross-deputized" and able to prosecute crimes in both tribal court and federal court as appropriate. These Tribal SAUSAs are able to strengthen tribal governments' role in fighting Indian Country crime and improve U.S. Attorney coordination with tribal law enforcement personnel.

In 2012, the Office on Violence Against Women augmented the existing Tribal SAUSA program through awards to four tribes in Nebraska, New Mexico, Montana, North Dakota, and South Dakota. The goal of the Tribal SAUSA program is for every prosecutable crime of

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[7] *See Indian Country Investigation and Prosecution Report* (ICIP) *for Calendar Years (CYs) 2011 and 2012* at www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf.

intimate partner violence to be pursued in federal court, tribal court, or both. This program has shown promising and tangible results.[8]

The work of Tribal SAUSAs can also help to accelerate implementation of the Tribal Law and Order Act of 2010 by addressing the broader need for skilled, committed prosecutors, be they AUSAs or Tribal SAUSAs, working on the ground in Indian Country. Recognizing the potential and importance of ensuring adequate staffing, Attorney General Holder announced in November the creation of a new fellowship within the Attorney General's Honors Program – the Attorney General's Indian Country Fellowship – to inspire and train the next generation of prosecutors to serve in Indian Country. This fellowship will create opportunities for highly qualified law school graduates to spend three years working on Indian Country cases, primarily in U.S. Attorneys' Offices, developing a pool of attorneys with deep experience in Federal Indian law, tribal law, and Indian Country issues.

Our efforts to increase collaboration and communication between U.S. Attorney's Offices and our tribal partners have also strengthened the bond of trust between federal and tribal investigators, prosecutors, other criminal justice personnel, and localities and have made Indian Country communities safer as a result. In an effort to move forward the government-to-government relationships between the Department and sovereign tribes even more, the Department is in the process of adopting a new Statement of Principles to guide all of the actions we take in working with federally-recognized Indian tribes. This proposed Statement will codify our determination to serve as a partner in fighting crime and enforcing the law in Indian Country. It will also memorialize our commitment to Indian tribes, serving as a blueprint for reinforcing relationships, reforming the criminal justice system and aggressively enforcing federal criminal laws and civil rights protections.

The Statement of Principles will be meaningful only to the extent that it is crafted in consultation with tribal leaders. In order to gain the benefit of their insights, expertise, goals, and aspirations, we have posted the document on our website[9] and have shared it directly with the leaders of all 566 federally-recognized tribes. We plan to hold consultations with tribal leaders over the next several months so that we are in a position to finalize and publish the Statement this year and in doing so, establish a set of core principles by which we can chart our future course.

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[8] This past November in the District of North Dakota, non-Indian Tracy Peters was convicted of assaulting a Native woman with whom he had a relationship on the Standing Rock Sioux reservation. In *U.S. v. Marcus Flying Horse*, an enrolled member of the Standing Rock Sioux reservation and a repeat domestic-abuse offender was sentenced to two years and three months in federal prison, followed by three years of supervised release, for assault by a habitual offender. Both of these cases were prosecuted by a Tribal SAUSA working in partnership with the United States Attorney's Office.

[9] http://www.justice.gov/tribal/

B. Combating Domestic Violence

The fight against domestic violence in Indian Country has been an especially important priority for the Department of Justice. VAWA 2013 strengthens federal domestic violence offenses and the federal assault statute – a statute frequently used in Indian Country intimate-partner violence crimes. It also contributes to tribal self-determination by recognizing that tribes have full civil jurisdiction to issue and enforce protection orders involving any person – Indian or non-Indian – in matters arising anywhere in Indian Country or otherwise within the tribe's authority. These provisions were first proposed and have long been championed by the Department.

VAWA 2013 represents a historic step forward for tribal sovereignty and jurisdiction. It recognizes the tribes' inherent power to exercise "special domestic violence criminal jurisdiction" over those who commit acts of domestic violence or dating violence or violate certain protection orders in Indian Country, regardless of their Indian or non-Indian status. While this jurisdictional provision of the new law takes effect on March 7, 2015, VAWA 2013 also authorizes a voluntary "Pilot Project" to allow tribes to begin exercising this jurisdiction sooner. Just last month, the Associate Attorney General granted three tribes' Pilot Project requests, and they will soon begin exercising this criminal jurisdiction. We look forward to continuing to assist these and other tribes with the implementation of this important law.

II. Implementing VAWA 2013 in the Sentencing Guidelines

The two primary statutes governing federal criminal jurisdiction in Indian Country are 18 U.S.C. §§ 1152 and 1153. Section 1153, known as the Major Crimes Act, gives the federal government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian Country. Section 1152, known as the General Crimes Act, gives the federal government jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian Country. Section 1152 also grants the federal government jurisdiction to prosecute some crimes by Indians against non-Indians, although that jurisdiction is shared with tribes, and provides that the federal government may not prosecute an Indian who has been punished by the local tribe. To protect tribal self-government, section 1152 specifically excludes non-major crimes between Indians, which fall under exclusive tribal jurisdiction. The federal government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian Country, unless a specific treaty or statutory provision provides otherwise. Certain domestic violence and stalking offenses, commonly referred to as "the Violence Against Women Act Crimes" (18 U.S.C. §§ 2261-2265A), are also crimes of general application. This means that the status of the defendant and victim as Indian or non-Indian is irrelevant. U.S. Attorney's Offices can prosecute these felony domestic violence and stalking crimes when committed in Indian Country if the statutory elements are met. On a limited number of reservations, the federal criminal responsibilities under sections 1152 and 1153 have

been ceded to the States under "Public Law 280" or other federal laws.[10] The federal assault statute (18 U.S.C. § 113) is used for prosecuting cases of domestic and sexual violence where there is federal jurisdiction pursuant to either the Major Crimes Act or the General Crimes Act. Therefore, any changes made to the sentencing guidelines for either §2A2.2 (Aggravated Assault) or §2A2.3 (Minor Assault) will apply to both Indian and non-Indian defendants.

A. Proposed Changes to §2A2.2, Aggravated Assault

Law enforcement is only recently learning what survivors of non-fatal strangulation have known for years: "Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them – any time they wish."[11] There are clear reasons why strangulation assaults, particularly in an intimate partner relationship, should be a separate felony offense and taken extremely seriously at sentencing:

- Strangulation is more common than was once realized. Recent studies have shown that 34 percent of abused pregnant women reported being "choked."[12] In another study, 47 percent of female domestic violence victims reported being "choked."[13]

- Victims of multiple non-fatal strangulations "who had experienced more than one strangulation attack, on separate occasions, by the same abuser, reported neck and throat injuries, neurologic disorders and psychological disorders with increased frequency."[14]

- Almost half of all domestic violence homicide victims have experienced at least one episode of strangulation prior to a lethal or near-lethal violent incident. Victims of one episode of strangulation are over six times more likely to be a victim of attempted

[10] Federal jurisdiction was ceded under Public Law 83-280, 18 U.S.C. § 1162, which required six states to assume jurisdiction over Indian Country crimes and divested the federal government of jurisdiction to prosecute under the Major and General Crimes Acts in those areas. The Act also gave other states the option to assume that jurisdiction. Congress has also passed a variety of tribe-specific statutes providing for a similar framework of state jurisdiction over crimes in those locations. The federal government retains jurisdiction to prosecute generally applicable offenses in P.L. 83-280 areas.

[11] Casey Gwinn, *Strangulation and the Law, in* THE INVESTIGATION AND PROSECUTION OF STRANGULATION CASES, 5, 5 (Training Inst. on Strangulation Prevention & Cal. Dist. Att'ys Assoc. eds. 2013).

[12] Linda Bullock, et al., *Abuse Disclosure in Privately and Medicaid Funded Pregnant Women*, 51 JOURNAL OF MIDWIFERY & WOMEN'S HEALTH, 361, 366 (2006).

[13] Carolyn Block, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence, A Collaborative Research Project* 236, (Illinois Criminal Justice Information Authority ed.) (2000).

[14] Donald J. Smith, Jr. et al., *Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attack*, 21 J. EMERGENCY MED. 323, 325-26 (2001).

homicide by the same partner, and are over seven times more likely of becoming a homicide victim at the hands of the same partner.[15]

- Even given the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted ("the San Diego Study") found that most cases lacked physical evidence or visible injury of strangulation – only 15 percent of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation, and no symptoms were documented or reported in 67 percent of the cases.[16]

- The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but often only minor visible external injury.[17]

- Loss of consciousness can occur within 5-10 seconds, and death within 4-5 minutes.[18] The seriousness of the internal injuries, even with no external injuries, may take a few hours to be appreciated, and death can occur days later.[19]

- Because most strangulation victims do not have visible external injuries, strangulation cases are frequently minimized by law enforcement, medical advocacy, mental health professionals, and courts.[20]

- Even in fatal strangulation cases, there is often no evident external injury (confirming the findings regarding the seriousness of non-fatal, no-visible-injury strangulation assaults).[21]

- Non-fatal strangulation assaults may not fit the elements of other serious assaults due to the lack of visible injury. Studies are confirming that an offender can strangle someone

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[15] Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 333 (2008).

[16] Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 305-06 (2001).

[17] *Id.*

[18] GWINN, *supra* note 6, at 8 (citing Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults*, 6 (2012), available at http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html2013 (last visited Jan. 27, 2014)).

[19] *Id.*

[20] *Id.*

[21] *Id.* (citing Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults*, 6 (2012), available at http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html2013 (last visited January 27, 2014)).

nearly to death with no visible injury, resulting in professionals viewing such an offense as a minor misdemeanor or as no provable crime at all.[22]

- Experts across the medical profession now agree that manual or ligature strangulation is "lethal force" and is one of the best predictors of a future homicide in domestic violence cases.[23]

The Commission published two options for amending §2A2.2 in cases of assault by strangling, suffocating, or attempting to strangle or suffocate. **The Department urges the Commission to adopt Option 2. We urge the Commission to make the enhancement for strangulation or suffocation five offense levels, and that the cumulative adjustment for application of subdivisions (3) and (4) not exceed 10 levels.**

The amended assault statute provides for the new offense of assault of a spouse, intimate partner, or dating partner by strangling or suffocating, or attempting to strangle or suffocate (18 U.S.C. § 113(8)). During the debate on the legislation, extensive information was presented to Congress, consistent with the research cited above, that strangulation is present in a large number of assaults by men against female intimate partners; that such conduct is particularly terrifying, both to the victim and to witnesses (most often children); and that the conduct is often recurring and enhances the abuser's control over the victim. Evidence was further presented that strangulation and suffocation often do not result in visible physical injury or leave physical evidence of abuse, making it difficult for law enforcement to detect, but may cause long-term psychological and physiological damage to the victim.

Option 1 proposes a 3 to 7 level enhancement for strangulation or suffocation only where the victim has not sustained bodily injury. The Department sees no reason to limit any strangulation/suffocation enhancement to situations in which there is no bodily injury to the victim. As discussed above, strangulation and suffocation, or an attempt of either, is specific serious conduct that warrants enhanced punishment even when some enhancement would already be applied due to the existence of an injury.

We believe the appropriate enhancement for suffocation/strangulation is five levels, which is the same as the enhancement for serious bodily injury. We recognize, however, that when injury occurs, the cumulative adjustment under the guidelines should be limited, and we recommend that the cumulative adjustment for application of subdivisions (3) and (4) not exceed 10 levels.

The Department also recommends a change to the commentary language found on page 17 of the reader-friendly compilation of the proposed amendments. The background

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[22] *Id.* at 9.

[23] *Id.* at 8 (citing Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 333 (2008)).

commentary states that "this guideline covers felonious assaults that are more serious than minor assaults because of the presence of an aggravating factor, *i.e.*, serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony." We recommended that "minor" be replaced with "other." Use of the word "minor" in a domestic violence situation or an assault where a dangerous weapon (including a firearm) was used is inappropriate and does a disservice to victims and the community in that such language can be interpreted by officials, victims, and defendants as minimizing or trivializing potentially lethal behavior.

B. Proposed Changes to §2A2.3, Minor Assault

Prior to the amendments of VAWA 2013, 18 U.S.C. § 113(a)(7) provided for a maximum imprisonment term of five years for assault resulting in substantial bodily injury to an individual who has not attained the age of 16. Now, although the maximum imprisonment term remains five years, § 113(a)(7) has been expanded to apply to a spouse, an intimate partner, and a dating partner, in addition to a victim who has not attained the age of 16. The Department asked Congress for this change because assaults resulting in substantial bodily injury represent an intermediate step on the ladder of escalating domestic violence, and federal law should recognize this. Under the federal assault statute prior to the passage of VAWA 2013, the offense was inadequate. If an adult Indian victim suffered a substantial bodily injury at the hands of her spouse, intimate partner, or dating partner, the maximum possible prison sentence was typically only six months if the perpetrator was non-Indian. And if the perpetrator was Indian, the federal government lacked jurisdiction altogether.

The Commission proposes two options for broadening the scope of the four-level specific offense characteristic now in §2A2.3. **The Department urges the Commission to adopt Option 2, which would apply the enhancement to *any case* in which the offense resulted in substantial bodily injury.** Option 1 would apply the enhancement only to cases in which the offenses resulted in substantial bodily injury to an individual less than 16 years old, a spouse, an intimate partner, or a dating partner. We believe Option 2 is appropriate because it focuses on the level of injury sustained by the victim, and represents an approach for accounting for injuries that is most consistent with all the purposes of sentencing. The enhancement for substantial bodily injury should not be limited to victims under the age of 16, a spouse, an intimate partner, or a dating partner, but rather should be applicable to all assault victims.

The Department also recommends that the Commission consider a change to the title of §2A2.3 (Minor Assault) and some of the commentary language in the guideline. We believe the title for the guideline should be changed to "Assault." Section 2A2.3 applies to felony assaults, like assault resulting in substantial bodily injury. Substantial bodily injury is defined in 18 U.S.C. § 113 as a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. By definition, a felony-level assault is not "minor." Furthermore, the commentary for §2A2.3 states that this guideline applies where "the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened." Given the number of serious

crimes committed with a firearm or other dangerous weapon, especially in the context of intimate partner violence, it seems prudent that the word "minor" be dropped from the guideline title and all corresponding references in the guideline. Use of the word "minor" in a domestic violence situation or an assault where a dangerous weapon, including where a firearm was possessed and its use threatened, does a disservice to victims and the community in that it can be interpreted by officials, victims, and defendants as minimizing or trivializing potentially lethal behavior.[24]

C. Proposed Changes to §2A6.2, Stalking or Domestic Violence

The Commission proposes that the new offense of assault by strangling, suffocating, or attempting to strangle or suffocate a spouse, of an intimate partner, or dating partner found at 18 U.S.C. § 113(a)(8) be referenced to §2A6.2 in addition to §2A2.2. The Department supports this change. We believe the change is consistent with the structure of the current guidelines' treatment of domestic violence. The Commission proposes that guidelines define the terms "strangling" and "suffocating" by reference to the definitions provided in 18 U.S.C. § 113. We support this as well.

The Commission proposes two options for amending §2A6.2 to account for cases involving strangulation or suffocation. Option 1 provides for a two-level enhancement for strangling or suffocating to be applied independently of bodily injury. For the reasons discussed above, **the Department supports Option 1,** which recognizes the aggravating conduct of strangling, suffocating, or attempting to strangle or suffocate as an independent aggravating factor. Option 2, on the other hand, combines bodily injury with strangling, suffocating, or attempting to strangle or suffocate into one aggravating factor. As we stated, combining injury and the act of strangulation fails to appreciate and account for the independent harms of both aggravating factors. Strangulation and suffocation, or an attempt of either, is specific serious conduct that deserves enhanced punishment regardless of injury. If the strangulation victim has suffered injury at the hand of the assailant, the injury, too, should be scored as an aggravating factor.

D. Issues for Comment Not Addressed in Previous Comments

1. Supervised Release

Supervised release is particularly important in cases of intimate-partner violence because victims are uniquely vulnerable to abusive partners and because there is a high degree of recidivism in cases of domestic violence. **The Department believes the Commission should provide additional guidance for such cases and "highly recommend" the imposition of supervised release, as it does for defendants with a history of drug abuse.** We suggest the Commission consider three provisions of federal law as it reviews this issue and as Congress considers additional legislation in this area.

[24] In the "Background" commentary, we suggest that the word "minor" be replaced with "misdemeanor."

First, 18 U.S.C. § 3583(a) provides for including a term of supervised release after imprisonment. It requires "that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the *first time* (emphasis added) of a domestic violence crime as defined in section 3561(b)." Second, 18 U.S.C. § 3563(a)(4) provides that for a defendant convicted of a domestic violence offense for the first time, "that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant."

And finally, §5D1.3(a)(3) of the guidelines, outlining the mandatory conditions of supervised release, states that "the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) *for the first time* (emphasis added) shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant." We believe that defendants, their victims, and the community would benefit if those individuals convicted of a *second, third or subsequent* domestic violence crime also receive a term of supervised release. We also believe that in certain circumstances, defendants serving a term of supervised release following a domestic violence crime should be required, as a condition of that supervised release, to participate in a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. These types of programs have the potential to benefit all domestic violence offenders and not just those sentenced to a term of probation.

Additionally, §5D1.3(d)(1) addresses a "special" condition of supervised release prohibiting a defendant previously convicted of a felony or for having used a firearm or other dangerous weapon during commission of the offense from possessing a firearm or other dangerous weapon. The Department strongly recommends the addition of another "special" condition prohibiting the purchase or possession of a firearm or ammunition where the defendant has a conviction for a qualifying misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)) or is subject to a qualifying protection order (18 U.S.C. § 922(g)(8)).

2. Assault with Intent to Commit Certain Sex Offenses Under Sections 113(a)(1) and (2)

The Commission seeks comment on whether changes are necessary to the guidelines to address the statutory changes to 18 U.S.C. §§ 113(a)(1) and (2). VAWA 2013 amended § 113(a)(1) so that it now includes the crimes of assault with intent to commit aggravated sexual abuse (18 U.S.C. § 2241) and assault with intent to commit sexual abuse (18 U.S.C. § 2242). Assault with intent to commit any felony, § 113(a)(2), has been amended to conform to changes in § 113(a)(1), so the offenses of assault with the intent to commit murder, aggravated sexual

abuse, and sexual abuse are exceptions to the charge of assault with intent to commit any felony. The crimes of assault with intent to commit sexual abuse of a minor or ward and assault with intent to commit abusive sexual contact are still included within 18 U.S.C. § 113(a)(2). We recommend that assault with intent to commit sex offenses be treated in the guidelines as an attempted sex offense. We urge the Commission, for example, to amend the guidelines' Statutory Index to reference the offenses of assault with intent to commit aggravated sexual abuse and sexual abuse to §2A3.1. Section 2A3.1 currently includes specific offense characteristics appropriate for sex offenses, and the Department sees no need to further amend §2A3.1.

3. Proposed Amendment to Appendix A for 18 U.S.C. §§ 1152 and 1153

The Commission requests comment on whether it is appropriate to add §2A6.2 (Domestic Assault and Stalking) to the Statutory Index referencing 18 U.S.C. § 1153. Although we believe it is unnecessary to list 18 U.S.C. § 1153 in the Statutory Index, if it remains, we think it appropriate to add §2A6.2 because it may be the most appropriate guideline for certain assault cases prosecuted under 18 U.S.C. § 113. Section 1153 is a jurisdictional statute that enumerates specific covered offenses. The specific offense committed, *i.e., murder, assault, sex offense*, should govern the most appropriate guideline and, consequently, we think a reference to § 1153 is unnecessary.

The Commission also requests comment on whether it is necessary to have a Statutory Index referencing 18 U.S.C. § 1152. We think the reference to 18 U.S.C. § 1152 in Appendix A should be deleted. Section 1152 is also a jurisdictional statute that provides jurisdiction for specific covered offenses. The specific offense committed, *i.e., murder, assault, sex offense*, should govern the most appropriate guideline and, consequently, a reference to § 1152 is unnecessary.

4. 18 U.S.C. §§ 2261, 2261A, 2262 (Domestic Violence and Stalking)

The Department offers no comments or suggested edits to the Commission's proposed amendment to the Application Notes for §2A6.2.

3. Sentencing Policy for Drug Trafficking Offenses

I. Amendments to the Drug Quantity Table

The Commission has proposed an amendment to revise the Drug Quantity Table ("Table") used in the sentencing guideline for those convicted of drug trafficking offenses. The Table, found in subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), provides the starting point for the guideline calculation for these offenses and is based on the quantity of drug an offender is involved with.

The Commission's proposed amendment to the Table (together with conforming adjustments to the chemical quantity tables and certain clerical changes) would change the offense level associated with quantities that trigger the statutory five- and ten-year mandatory minimum penalties to base offense levels 24 and 30 respectively, from levels 26 and 32 that are in the current guideline. The amendment would have the effect of modestly reducing guideline penalties for drug trafficking offenses while keeping the guidelines consistent with the current statutory minimum penalties.

The Department supports this amendment. Modestly reducing the quantity-based guideline for drug offenses, while continuing to ensure higher penalties for drug offenders involved in violence, or who are career criminals, or who use weapons in their offenses, is consistent with the Attorney General's Smart on Crime initiative and will help further our current need for efficient and strategic criminal justice reforms. Over the last 20 years, combined efforts among law enforcement, prosecutors, judges, and policymakers have resulted in reduced crime rates to their current, generational lows. As a result, communities across the country are safer and more productive. Nevertheless, our crime reduction strategies have been extremely costly and have caused incarceration rates to skyrocket, so much so that our nation now has the largest rate of imprisonment in the world.

The recent budget crisis has magnified this reality and has made clear that such extensive use of imprisonment as our first line of defense against crime is unsustainable. State and federal governments spent a combined $80 billion on incarceration in 2010 alone. The federal prison and detention budget has been increasing steadily, while other critical public safety spending has been shortchanged. This pattern of funneling more resources into prisons and away from other crucial justice investments, such as investigators and prosecutors and support for victims and reentry programming, has persistently impacted the allocation of funding among the Department's various activities. It has become clear that we must find ways to control federal prison spending in order to better focus limited resources on combating the most serious threats to public safety.

Prison overcrowding and insufficient investment in effective reentry programming must both change if we are to continue to push crime rates lower. Nearly 40 percent of federal prisoners and over 60 percent of state prisoners reoffend or violate the terms of their community

supervision within three years after their release. Unreasonably high recidivism rates have caused many Americans to lose confidence in the criminal justice system. The hundreds of official and unofficial collateral consequences of incarceration have only furthered this loss of trust as communities have struggled to receive citizens returning home from prison no longer able to secure gainful employment, housing, or educational opportunities. The socioeconomic realities of life after prison have had particularly devastating effects on disadvantaged populations and communities of color. This has only helped to perpetuate the cycle of poverty, criminality, and incarceration that has isolated such individuals from the prospects of upward mobility. Such failures of our current approach to public safety highlight a need for considerable reforms.

Relying on evidence-based approaches, several states have already successfully implemented necessary reforms and innovations. As we have noted before, Justice Reinvestment Initiative efforts have decreased corrections spending in many states by redirecting some resources away from expensive imprisonment and towards more cost-effective, community-based efforts. Importantly, instead of compromising public safety, many states have seen drops in recidivism rates and crime rates overall as their prison populations have declined. The Department has also taken steps to address inefficient criminal justice practices at the federal level. We are encouraging the use of diversion programs that can serve as effective alternatives to incarceration; ensuring U.S. Attorneys have designated Prevention and Reentry Coordinators in their respective districts; and directing Department components to take into account unnecessary collateral consequences that may attach to proposed regulations.

Despite significant progress at the state and federal levels, there is still the need for further reform. Of the more than 216,000 federal inmates currently behind bars, almost half are serving time for drug-related crimes. Thus, strategically revising the ways in which we address this particular group of offenders – maintaining strong penalties but reserving the longest ones for repeat and dangerous drug offenders – will measurably improve our overburdened system. In August 2013, the Attorney General announced his "Smart on Crime" initiative, which among other things changed the Department's charging policies to ensure people accused of certain low-level federal drug crimes will face sentences appropriate to their individual conduct while reserving more stringent mandatory minimum sentences for the most serious offenders. The Commission's proposed Part B amendment to §2D1.1(c), lowering the base offense levels by two levels across drug types, is consistent with the Department's initiative and goals of controlling the prison population and ensuring just and proportional sentences for all offenders. By reserving the most severe penalties for serious, violent drug traffickers, we can better promote public safety, deterrence, and rehabilitation while saving billions of dollars and strengthening communities.

II. Environmental Harms and Marijuana Production Operations

The Commission seeks comment on the environmental and other harms caused by offenses involving drug production operations and whether the guidelines provide adequate penalties to account for such harms. We believe the Commission should indeed amend the

guidelines to address the significant environmental harms and public safety risks associated with illegal marijuana cultivation. As set out in greater detail in written testimony by the U.S. Forest Service for the Commission's March 13th public hearing, our national forests are seriously harmed and threatened by large-scale, illegal marijuana cultivation, as are our national parks. Those involved in the production clear-cut trees, divert, pollute and poison water supplies, apply dangerous pesticides, herbicides, and rodenticides, kill wildlife and fish, and endanger the safety of human visitors. These are not minor or victimless crimes; the lands in the National Forest System are a treasured national resource, part of our history and culture that include high-quality wildlife habitats, diverse wildlife and fish populations, and abundant clean water. In fact, the National Forest System watersheds serve as the largest source of drinking water in the contiguous United States.[25] The harms caused by illegal marijuana cultivation are significant and should be accounted for under the current sentencing guideline structure.

A. Magnitude of the Problem, Public Safety and Environmental Harm

The U.S. Forest Service ("Service") estimates that illegal marijuana cultivation by drug trafficking organizations is currently ongoing in 22 states and in 72 national forests,[26] and the Service recorded 5,592 illegal marijuana "grow" sites containing over 19 million plants between Fiscal Year 2005 and 2013.[27]

Illegal marijuana grows are a safety risk to unexpected visitors and Service personnel, as perpetrators set up camp for months at a time – usually the length of the growing season – and defend the secrecy of the operation with weapons and traps. Many national forests have warnings posted regarding the dangers of coming across an illegal marijuana grow site.

The illegal growers typically cut down vast swaths of established growth and native trees, and divert and pollute water supplies with toxic chemicals and fertilizers. According to the Service, as well as the Environmental Protection Agency, growers use rodenticides, pesticides, and insecticides in these pristine areas. Rodenticides commonly used in illegal marijuana cultivation poison small animals. Predators feed on their carcasses, spreading the poisons through the food chain. According to the EPA and the Service, pesticides and herbicides are absorbed by native plants and consumed by local wildlife and may persist for years. Because of the degree of irrigation required, many of the toxic chemicals applied in a grow site end up in streams, rivers and lakes that support many aquifer systems.

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[25] *See The U.S. Forest Service - An Overview*, 10, available at http://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf ("About 124 million Americans rely on national forests and grasslands as the primary source of clean drinking water.").

[26] Chris Boehm, Assistant Director, Law Enforcement And Investigations, U.S. Forest Service, Statement Before the United States Sentencing Commission, for the Hearing Entitled *Marijuana Cultivation And The Environmental Impacts On Public Lands* 4 (Mar. 13, 2014).

[27] *Id.*

The Service has noted in its testimony the cost of cleanup and reclamation associated with individual grow sites.[28] These costs only tell part of the story, though; they represent only the costs to undo harms that can be undone. The Service cannot quantify the costs associated with polluted streams, rivers, and watersheds, nor of dead wildlife.

B. Sophisticated Means of Illegal Growers and Expected Profits

The growing techniques used at most of the illegal grow sites are sophisticated. For example, illegal growers typically use elaborate irrigation systems. In Fiscal Year 2013, the Service removed eighty miles of irrigation tubing from illegal grow sites in California alone.[29] The growers build dedicated structures for drying the final product and use extensive and dangerous pesticides, herbicides and rodenticides. Some of the products seized from grow sites are highly specialized, smuggled into the United States for the sole purpose of growing marijuana. For example, the highly toxic pesticide, Carbofuran, was completely banned by the EPA in 1994 and cannot be purchased legally anywhere in the United States. Yet it has been found at a number of illegal grow sites.

The expected annual profits for those who choose to engage in illegal marijuana cultivation are significant – a conservative estimate is between one to two million dollars per grow site. The Forest Service estimates that most illegal grow sites in national forests are between four and six acres, with about three to four thousand plants each. The estimates on the average yield per plant vary from less than one half pound to more than five pounds.[30] The average wholesale price per pound also varies greatly by study and by region, from about five hundred dollars per pound, to several thousand.[31] The Rand Corporation reports that 2,000 to 3,000 pounds of dry cannabis can be anticipated per acre, in addition to 575 pounds to "bud."[32]

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[28] *Id.* at 8.

[29] *Id.* at 5.

[30] *See* Jonathan P. Caulkins, *Estimated Cost of Production for Legalized Cannabis*, Table 2, 15 (Rand Corporation Working Paper) (July, 2010). For sentencing purposes, §2D1.1 in the current Guidelines use the actual weight of each marijuana plant, but the Guidelines assume a floor of 100 grams per plant when the actual weight is not available. USSG §2D1.1(c). Notes to Drug Quantity Table (E).

[31] *Id. See also* Press Release, DEA Phila. Div., *Philadelphia Lawyer Convicted in Marijuana Grow House Case* (Dec. 10, 2010) (available at http://www.justice.gov/dea/divisions/phi/2010/phila121710p.html (15-20 pounds of high grade marijuana sold for $5,000 to $5,500 per pound)); Press Release, DEA Phoenix Div., *Three Convicted by Jury of Charges Related to a Large Scale Marijuana Trafficking Organization* (Apr. 24, 2009) (available at http://www.justice.gov/dea/divisions/phx/2009/phnx042409p.html (seized marijuana part of a planned 760 pound deal with a negotiated price of $550 per pound)); Press Release, D. Mont. U.S. Attorney's Office, *Saul Nuno Pleads Guilty In U.S. Federal Court* (Jan. 27, 2009) (available at http://www.justice.gov/usao/mt/pressreleases/20090127162939.html (pound quantities of marijuana for sale in Billings at $800 per pound)).

[32] Caulkins, at 14.

Even if an illegal grower uses only the bud and throws away the rest of the plant (the Service has not received reports of discarded dry cannabis at any illegal grow cites), it is a conservative estimate that a typical illegal marijuana grow site yields about 2,300 pounds of marketable marijuana, worth one to two million dollars.

C. Recommendation

We do not believe the current guidelines sufficiently address the significant environmental harms and public safety risks associated with illegal marijuana cultivation. With the Environmental Protection Agency and the Forest Service, we think the Commission should consider amending the guidelines to better capture these harms and risks, just as the guidelines currently do for the environmental risks associated with the production of methamphetamine. The guidelines currently provide for a three-level increase when there has been a substantial risk of harm to human life or the environment as a result of the production of methamphetamine.[33] We believe that such an increase is also appropriate in the context of the illegal production of marijuana. We further believe guideline commentary should make clear that the presence of a significant amount of dangerous rodenticide, pesticide, or herbicide will normally trigger this enhancement.

[33] USSG §2D1.1(b)(13)(C)(ii) (2013).

4. Circuit Conflict Involving Felon in Possession Offenses

The Commission presents two options for clarifying how principles of relevant conduct affect sentencing for firearms offenses. There are two fact patterns for which guideline application has been particularly inconsistent: (1) when a defendant unlawfully possessed a firearm on one occasion and a different firearm on another occasion, and (2) when a defendant unlawfully possessed a firearm and also used that firearm in connection with another offense. In such circumstances, the court must determine, under §2K2.1, whether to apply the specific offense characteristic at (b)(6)(B) (which raises the offense level "if the defendant . . . used or possessed any firearm . . . in connection with another felony offense"), the cross reference at (c)(1) (which raises the offense level "if the defendant used or possessed any firearm . . . in connection with the commission or attempted commission of another offense"), or both, and this determination must be guided by §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) subsections (a)(1) through (a)(4). Circuit courts have varied in their application of (b)(6)(B) and (c)(1), primarily as a result of divergent views on whether and to what extent limiting principles apply in the §1B1.3 relevant conduct analysis.

The Department recommends the Commission adopt Option 2 to clarify the operation of the guidelines in these firearms cases. Option 2 would amend the commentary to §2K2.1 to clarify that subsections (b)(6)(B) and (c)(1) are not limited to firearms identified in the offense of conviction, provide the manner in which the two subsections function together, and explain how the §1B1.3 factors govern the scope of these subsections in the context of the two given situations.

For the situation where a defendant unlawfully possessed a firearm on one occasion and a different firearm on another occasion, the new commentary included in Option 2 makes clear that the court may take the prior possession into consideration and that (c)(1) would apply *in addition* to (b)(6)(B) if the application of (c)(1) would result in a greater offense level. The commentary adopts the §1B1.3 limitation that the court must first find the two unlawful possession offenses to be part of the same course of conduct or common scheme or plan (§1B1.3(a)(2)). The courts are in general agreement that the prior firearm possession is probative of a defendant's dangerousness and that both the specific offense characteristic and the cross reference can apply; this can be seen in the cases cited in the Commission's proposal.[34] The divergence among the cases lies with the limiting principle – most have held that §1B1.3 requires a clear connection between the two offenses, while one has held that §1B1.3 does not apply at all (though the offenses must at least be related). The new commentary resolves this conflict by not only making it clear that a §1B1.3 analysis is required for this situation, but also by listing (a)(2) ("all acts . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction") as one of the specific subsections the sentencing court should look to. The Department considers the resolution of this conflict important as it will promote

[34] *See United States v. Mann*, 315 F.3d 1054, 1055-57 (8th Cir. 2003); *United States v. Jardine*, 364 F.3d 1200, 1207 (10th Cir. 2004); *United States v. Williams*, 431 F.3d 767, 769-71 (11th Cir. 2005).

judicial consistency as well as fairness to defendants and the public, and Option 2 best accomplishes this.

Regarding the second situation, in which a defendant unlawfully possessed a firearm at one time and also used that firearm in connection with another offense, Option 2 includes commentary that will similarly clarify the application of the guidelines consistent with the purpose of sentencing policy for firearms offenses. As in the earlier situation, the new commentary clarifies that it is permissible to take the prior conduct into consideration and that (b)(6)(B) *and* (c)(1) can apply if the application of (c)(1) results in a greater offense level. And also like the situation above, the new commentary settles what if any threshold analysis is required by the §1B1.3 constraint. There is disagreement among circuits as to whether any relevant conduct analysis is necessary, if it is, which subsections should be used, and, even when a particular subsection is used, what is required by that subsection.[35] The proposal resolves this issue by guiding that "the use of the [firearm] in connection with [another offense] . . . *is* relevant conduct under §1B1.3(a)(4) [("any other information specified in the applicable guideline")]" (emphasis added). In abrogating the threshold analysis requirement and simply providing that in this situation relevant conduct is established *per se*, the application of the (b)(6)(B) and (c)(1) will be simplified and made consistent across districts, further advancing the goals of sentencing.

The Department believes that taking into account the prior conduct discussed in *both* types of cases is the best sentencing policy, for doing so will best achieve the purposes of sentencing. The very aim of the firearms guideline is to identify the more dangerous offenders, using information beyond the elements of the offense of conviction, and provide for proportionate sentences in relation to dangerousness. Option 2 does just that. Option 1 does the opposite, artificially eliminating from consideration critical and unquestionably relevant aggravating information from the sentencing calculus. We also believe there should be more consistency between circuits in the way the limiting principles govern the application of these guidelines. The additions to the commentary proposed by the Commission in Option 2 address these concerns, give appropriate guidance to the courts, and fall within the legal and equitable framework of the Guidelines.

Option 2 reflects, generally, the current thinking accepted by the circuits, and codifying these principles into the guidelines will promote stability and continuity. For the two issues where there is disagreement, namely the application of the limiting principle, Option 2 brings the circuits together in a straightforward, coherent, and reasonable fashion on *both* applications.

The Commission also requests comment on whether the scope of the provisions should be narrowed and whether the cross reference in (c)(1) should be deleted. We do not think the Commission should narrow the scope of these provisions, nor should it delete subsection (c)(1), as the current formulation of the guidelines (with additional commentary proposed by Option 2) affords and ensures courts important authority to account for unquestionably relevant aggravating factors and indicators of dangerousness.

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[35] *See United States v. Gonzales*, 996 F.2d 88, 92 n. 6 (5th Cir. 1993); *United States v. Horton*, 693 F.3d 463, 478-79 (4th Cir. 2003); *United States v. Kulick*, 629 F.3d 165, 170 (3rd Cir. 2010).

5. Alien Smuggling in Dangerous Locations

The Commission proposes amending Application Note 5 in §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to clarify application of the two-level enhancement for "intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person." As noted by the Commission, the Fifth Circuit has held that the enhancement should not apply *per se* to aliens transported through the South Texas brush country, but rather that the district court must base the enhancement on additional facts presented to the court.[36]

The Commission proposes amending Application Note 5 by adding the phrase "or guiding persons through, or abandoning persons in, dangerous terrain without adequate food, water, clothing or protection from the elements" as an example of intentionally or recklessly creating a substantial risk of death or serious bodily injury to another.[37] **We support the proposed amendment.** We suggest, though, that the term "dangerous terrain" be changed to "dangerous or remote geographic area" to ensure that it includes dangerous river and canal crossings and other appropriate locations.

When a defendant has guided persons through or abandoned persons in dangerous or remote locations without adequate food, water, clothing or protection from the elements, such conduct is a serious aggravating factor that should be recognized at sentencing. Such conduct increases the risk of serious bodily injury or death and contributes to more deaths along the border. We think – in response to issue for comment 1(A) – that transporting aliens through desert-like terrain, or through mountainous regions, is inherently dangerous.

According to the Department of Homeland Security, among the 350,000 or so alien apprehensions along the southwest border by the U.S. Border Patrol during Fiscal Year 2012, 1,312 required emergency rescues, 463 involved the death of an alien, and 549 involved the assault of an alien.[38] Based on data provided by the Border Patrol, the National Foundation for American Policy reports that the number of "immigrant deaths" has increased nearly 80 percent from 1998 to 2012, despite the fact that the number of apprehensions has actually declined.[39] The report concludes that the lethality of "immigrant deaths" at the border has increased about

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[36] *See United States v. Mateo Garza*, 541 F.3d 290, 294 (5th Cir. 2008).

[37] Proposed Amendments to the Sentencing Guidelines, 2L1.1, January 17, 2014, 81, available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20140114_RFP_Amendments.pdf.

[38] United States Border Patrol, Sector Profile - Fiscal Year 2012 (Oct. 1st through Sept. 30th), available at http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/usbp_sector_profile.ctt/usbp_sector_profile.pdf.

[39] Stuart Andersen, *How Many More Deaths? The Moral Case For A Temporary Worker Program, National Foundation for American Policy*, NFAP Policy Brief, March 2013, 2, available at http://www.nfap.com/pdf/NFAP%20Policy%20Brief%20Moral%20Case%20For%20a%20Temporary%20Worker%20Program%20March%202013.pdf.

six-fold, from about two per 10,000 in 1998 to more than 13 per 10,000 in 2012. We think the proposed amendment is an important step in recognizing and addressing the dangerous behavior taking place along the border.

Regarding issues for comment 1(B) and 1(C), the Commission should also consider adding language to account for other aggravating conduct such as when private land or ranch property has been damaged or destroyed in excess of a specific dollar amount (perhaps $10,000) or where the rescue of smuggled aliens by special border patrol teams results in substantial costs to the government.

6. Circuit Conflict Involving Supervised Release Terms

I. When a Statutory Minimum Term of Supervised Release Applies

The Commission has proposed two options for resolving a circuit conflict involving the range of possible terms of supervised release when a statute provides a minimum term that is greater than the minimum term recommended by the guidelines. Subsection (c) of §5D1.2 is intended to resolve any inconsistency, but the courts have interpreted subsection (c) in conflicting ways.

Option 1 would create a new Application Note 6 to resolve the conflict and would spell out the guideline application in two circumstances. First, when the range of supervised release terms provided in §5D1.2(a) overlaps with the range provided by statute, but the guidelines range begins at a lower point (for example, when the statutory range is three years to life, but the guidelines range is two to five years), the bottom of the statutory range would provide only the floor (in the previous example, the guideline range would become three to five years). When the ranges provided by §5D1.2(a) and by the relevant statute overlap only at the maximum of the guideline range and the minimum of the statutory range, that one point would become the recommended guideline term. For example, if the guidelines range is two to five years, and the relevant statute provides for five years to life, the recommended guideline term, through the operation of §5D1.2 (c), would become precisely five years.

In contrast, Option 2 specifies that when the ranges of supervised release terms provided by §5D1.2(a) and the relevant statute are inconsistent, the statutory range supersedes the range provided by §5D1.2(a) and becomes the guideline recommended range. For example, when the statutory range is three years to life, but the guidelines range at §5D1.2(a) is two to five years, by operation of §5D1.2(c), the guideline range would become three years to life.

The Department supports Option 1. We believe Option 1 – which provides that the statutory minimum term of supervised release becomes the floor of the recommended guideline range, or, where the entire guideline range is lower than the minimum, becomes the recommended guideline term – is preferable for two reasons. First, Option 1 is consistent with the treatment in the guidelines of statutory mandatory minimum terms of imprisonment. Moreover, it is consistent with the very purpose of the guidelines: to narrow the statutory ranges of punishment provided by Congress through the evaluation of detailed information, policy analysis and public comment.

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

Application Note 1 to §5D1.2 currently defines "sex offense" in part as "(A) an offense, perpetrated against a minor" under a number of chapters of Title 18, United States Code, including chapter 109B. The proposed amendment would delete subsection (A)'s reference to chapter 109B, which includes two offenses: 18 U.S.C. § 2250(a) (failing to register as a sex offender) and 18 U.S.C. § 2250(c) (commission of a crime of violence while in failure to register

status). Although we agree that the definition of "sex offense" in §5D1.2 should be amended to account for the problems identified in the *Goodwin* case, we oppose the way the Commission proposes to treat chapter 109B offenses for purposes of supervised release.[40]

Those who violate the offenses under chapter 109B are convicted sex offenders who have further violated the law by failing to register as required by the Sex Offender Registration and Notification Act (SORNA). Section 2250(c) offenders additionally have committed a crime of violence under federal, state or tribal law. Given the repeated failures of these defendants to comply with the law and the very serious criminal histories associated with many of these defendants, the minimum five-year term of supervised release is inadequate to ensure public safety and provide sufficient reentry services and monitoring for at least some of these offenders.

Thus, while we agree with the proposed amendment's deletion of chapter 109B offenses from subsection (A) of the "sex offense" definition, we recommend that for such offenses, sentencing courts be directed to impose supervised release terms greater than five years in relation to a defendant's criminal history, instant offense and duration of the obligation to register as a sex offender. We think it is sensible sentencing policy, for example, to recognize that a defendant convicted under § 2250(c) should be treated differently than a defendant convicted under § 2250(a), because of the nature of the instant conviction.

Depending upon the nature of the prior sex offense or crime of violence committed, a greater term of supervised release will be appropriate, as will be additional conditions of supervised release. A shorter supervised release term may be appropriate for the least serious offenders. But certainly, such a term will be inadequate for others. We think the best course of action for the Commission is to follow the framework in §2A3.5 – the existing sentencing guideline for failure to register as a sex offender – which uses an offender's "Tier" level (as defined by statute) to determine the applicable base offense level. Specifically, we think §5D1.2 should recommend a term of supervised release that corresponds, at least, to the original duration of the offender's obligation to register as a sex offender. We suggest that chapter 109B offenses be added as a separate subsection (3) to §5D1.2(b) and that a policy statement be added providing that if the instant offense of conviction is an offense under chapter 109B, the recommended term of supervised release should be – (1) at least fifteen years if the offender was required to register as a Tier I offender; (2) twenty-five years if the offender was required to register as a Tier II offender; and (3) life if the offender was required to register as a Tier III offender. These terms correspond to the statutory registration periods for each tier as set out at 42 U.S.C. § 16915(a).

[40] See *United States v. Goodwin*, 717 F.3d 511 (7th Cir. 2013).

7. Cases Involving An Undischarged Term of Imprisonment

I. Revision to Subsection (b)

The first of the three amendments proposed by the Commission to §5G1.3 relating to undischarged terms of imprisonment – Part A – revises subsection (b) by removing the requirement that the offense for the undischarged term of imprisonment be "the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)."[41] If amended, this subsection would only require that the offense for the undischarged term of imprisonment be "relevant conduct" in relation to the instant offense of conviction, as defined by sections §§1B1.3(a)(1), (a)(2), or (a)(3), in order for a court to adjust the sentence and impose a concurrent term.

The Department supports the first proposed amendment. In an earlier version of §5G1.3, subsection (b) applied if the undischarged term of imprisonment "resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense."[42] In 2003, this language was changed to the current version of subsection (b) (applying to "another offense that is relevant conduct . . . and that was the basis for an increase in the offense level . . ."[43]), in an amendment the Commission characterized as "clarifying."[44] A clarifying amendment "changes nothing concerning the legal effect of the guidelines, but merely clarifies what the Commission deems the guidelines to have already meant."[45] In contrast, "[s]ubstantive amendments typically reflect new policy choices by the Commission."[46] Despite the Commission's stated intent in revising the 1992 version of §5G1.3(b), the interpretation of the current language effectively alters the substance of the provision. The proposed Part A amendment would restore the prior meaning of subsection (b). Moreover, we think the policy embodied by the proposed amendment will best ensure sentencing proportionality, by providing concurrent terms where two separate sentences are based on identical conduct.

II. Adjustment to Certain Sentences

The second proposal – Part B – provides for an adjustment to a federal sentence in cases in which §5G1.3(a) does not apply but there is an anticipated, but not yet imposed, term of imprisonment for another offense that is relevant conduct to the instant offense of conviction

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[41] USSG §5G1.3(b) (2013).

[42] *See* USSG §5G1.3(b) (1992).

[43] USSG § 5G1.3(b) (2013)

[44] *See* USSG App. C Amend. 660, (effective: Nov. 1, 2003).

[45] *United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995) (internal quotation marks omitted).

[46] *United States v. Goines,* 357 F.3d 469, (4th Cir. 2004).

under subsections §§1B1.3(a)(1), (a)(2), or (a)(3). In addition, the Commission seeks comment on specific language regarding whether a sentencing court "shall" or "may" adjust such a sentence. The Commission also seeks comment on whether the other relevant offense must be the basis for a Chapter Two or Chapter Three increase in the offense level or whether, as in Part A, this requirement should be removed.

The Department opposes the second proposed amendment. There is broad variation in sentencing decisions between jurisdictions and among individual judges, and anticipated terms of imprisonment are sometimes never imposed or sometimes vacated after being imposed. The Commission should not advise federal courts to reduce a sentence on the basis of an anticipated state sentence. Instead, to address the legitimate proportionality concerns that generated this proposal, we recommend a provision directing sentencing courts to impose the federal sentence to run concurrently with any projected and related sentence. In *Setser v. United States*, the Supreme Court held that a district court has discretion to order that a federal sentence run consecutively to a state sentence to be imposed in the future for a probation violation.[47] The reasoning in *Setser* also supports an order that a future sentence run *concurrently* to the state sentence. This is a better alternative to the Commission's Part B proposal, which would create distortions for cases subject to unforeseeable state court proceedings. We recognize that there may be circumstances where defendants first complete their federal sentence before returning to state jurisdiction. However, we believe the responsibility for ensuring a fair total outcome in those cases lies with the state courts and that such courts are well able to fulfill this responsibility.

With respect to the precise language of the Part B amendment, the Department suggests the new provision state: ". . . the court shall impose the sentence to run concurrently with any anticipated state term of imprisonment." We believe "shall" – as opposed to "may" – is appropriate here as it reflects sensible policy and will eliminate defendants serving consecutive terms of imprisonment for relevant and related offenses. On the second issue for comment, the Department does not believe there should be a requirement that the other offense be the basis for a Chapter Two or Chapter Three increase in the offense level for reasons stated in our comments on Part A.

III. Addition of New Subsection (c)

The third Commission proposal – Part C – adds a new subsection (c) to provide for an adjustment if a defendant is a deportable alien who is likely to be deported after imprisonment and the defendant is serving an undischarged term of imprisonment for an unrelated offense. The Commission also seeks comment on whether a sentencing court "shall" or "may" adjust such a defendant's sentence. The Commission has also bracketed for comment whether this new subsection (c) should apply regardless of whether §5G1.3(a) or §5G1.3(b) would ordinarily apply to the defendant or whether subsection (c) should only apply if subsection (a) does not otherwise apply. The Commission's Part C proposal further amends §5K2.23 to provide that if a

[47] *Setser v. United States*, 132 S. Ct. 1463, 1468 (2012).

defendant who is a deportable alien likely to be deported after imprisonment has completed serving a term of imprisonment and the proposed §5G1.3(c) would have provided for an adjustment had the completed term been undischarged at the time of sentencing for the instant offense, a departure is warranted.

The Department opposes the third proposed amendment. Affording deportable aliens an adjustment or departure in the federal sentence because of a prior, unrelated offense would provide unwarranted sentencing reductions, effectively disregarding and leaving unaccounted for the criminal conduct of the unrelated conviction. There is no readily apparent reason why deportable aliens should serve reduced sentences relative to similarly situated defendants unlikely to be deported after incarceration. The guidelines foundational design is to ensure incremental additional punishment for additional significant aggravating conduct. We see no reason to diverge from this design in this one particular situation. The proposed amendment simply runs counter to the purposes of sentencing.[48]

Our same line of reasoning applies to the Commission's proposed amendment to §5K2.23. Sentencing courts already have the discretion to grant a departure in any case in which the current guideline range is excessive in light of the defendant's history or because of the likelihood of deportation. There is no discernible reason to codify the credit as suggested by this proposed amendment.

In the event the Commission does adopt Part C, we recommend the new subsection state that a sentencing court "may" adjust the applicable defendant's sentence. The use of "may" as opposed to "shall" would comport with courts' current discretion to do so based on the circumstances of a particular case.

IV. Issues For Comment

We support amending §5G1.3(b) to expand application of the provision to undischarged terms of imprisonment for offenses constituting relevant conduct under §1B1.3(a)(4). We believe sensible sentencing policy suggests that any offense qualifying as "relevant conduct" pursuant to any of the §1B1.3(a) subsections should be eligible for §5G1.3(b) application.

We believe our recommendation substituting the proposed Part B amendment for a provision directing the court to impose a sentence to run concurrently with the anticipated state sentence should also apply to pretrial custody in connection with the projected state sentence. As we have previously stated above, we are opposed to a guideline instructing district courts to adjust a sentence or provide for a departure provision to account for an *anticipated* state term of imprisonment. Nevertheless, if a defendant has *already* spent time in pretrial custody for a state offense that constitutes relevant conduct (under §1B1.3(a)) in relation to the instant federal

[48] Furthermore, this amendment, like the proposed Part B, directs courts to adjust sentences based on a future occurrence – possible deportation. We do not think a sentence should generally be dependent upon speculation of future events.

offense, then, regardless of whether a state sentence is actually imposed, the guidelines should direct sentencing courts to adjust the sentence for the instant federal offense to reflect time spent in pretrial custody. This way, any time a defendant has already spent in custody (albeit pretrial custody) for related offenses, whether state or federal, can count toward the federal term of imprisonment without the district court needing to anticipate the sentencing decision of a state court.

Finally, for the reasons we oppose the proposed Part C amendment, we believe revising §2L1.2 to provide for a downward departure along the lines suggested in the issue for comment would be imprudent. Like the Part C amendment, such a departure would appear to reward deportable aliens for having committed a state offense in addition to unlawfully entering or remaining in the United States. Moreover, the disconnect between the offense for the undischarged term of imprisonment and the cause for deportation further suggests each offense should be addressed and sentenced independently of the other.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel