United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 18, 2014

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

RE: Response to Request for Comment on Proposed 2014 Amendments and Related Issues

Dear Chief Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments in response to the Commission's proposed amendments and issues for comment for the amendment cycle ending May 1, 2014. As you know, the PAG submitted written testimony on two topics in advance of the Commission's March 13, 2013 public hearing. For ease of reference we attach that testimony, which addressed the issues of **Drug Offenses**, and **Firearms Offenses**.

In this letter, we address (i) **§1B1.10 (Reductions in Terms of Imprisonment as a Result of Amended Guideline Range),** (ii) **the Violence Against Women Reauthorization Act;** (iii) **§2L1.1 (Alien Smuggling),** (iv) **§5D1.1 (Supervised Release),** and (v) **§5G1.3 (Undischarged and Anticipated Terms of Imprisonment)**. We also include some additional thoughts on the **firearms** proposals and make an early pitch to put **sentence reductions under §1B1.13** back on the Commission's list of priorities for the next amendment cycle.

1B1.10 – Reductions in Terms of Imprisonment as a Result of Amended Guideline Range

The Commission is considering amendment of §1B1.10 and its policy statement to resolve two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in sentencing modification proceedings under 18 U.S.C. § 3582(c)(2). The Commission has proposed two options for responding to these conflicts. The PAG recommends that the Commission amend §1B1.10 using the first of these options, Option 1, so that the amended guideline range for resentenced offenders will be determined without regard to the operation of §5G1.1 and §5G1.2.

Option 1's adoption of the approach of the Third Circuit in *United States v. Savani*, 733 F.3d 56, 66-67 (3d Cir. 2013) and the D.C. Circuit in *In re Sealed Case*, 722 F.3d 361, 369-70

(D.C. Cir. 2013) will give judges wider latitude to determine the appropriate extent of a sentence reduction for defendants who cooperated with the government. That, in turn, would lessen the impact of mandatory minimums on deserving offenders, and it would better address the prison overcrowding and overuse of incarceration concerns shared by the PAG, the Department of Justice ("DOJ"), Congress, and the Commission.[1] There is a critical mass of participants in the sentencing process who are now of the unified view that steps should be taken, where appropriate, to address these concerns, and adoption of Option 1 is an important step in the right direction.[2] In addition, Option 2 would be contrary to the policy considerations that motivated Congress to pass the Fair Sentencing Act ("FSA") and would require judges to treat unequally defendants whose only difference is the date they were sentenced.

In recent remarks to the New York State Bar Association, Deputy Attorney General James Cole spoke about "the crisis we have in our criminal justice system."[3] "This crisis," he stated, "is the crushing prison population." Deputy Attorney General Cole observed that the United States "has a greater percentage of our population in prison than any other industrialized country, and the cost to maintain this is unsustainable." As Mr. Cole noted, more than half the prison population consists of drug offenders. Low level, non-violent drug offenders are those most likely to benefit from the more ameliorative mechanism of Option 1. Deputy Attorney General Cole recognized that "consideration of sentence reductions for those who, at an earlier time, encountered severe and inflexible sentencing laws," is central to "the issue of fairness." The offenders whose sentence reduction motions would be affected by the adoption of Option 1 fit squarely into the category described by the Deputy Attorney General. Indeed, in his remarks about the need to reexamine and extend the reach of executive clemency, Deputy Attorney General Cole noted that "older, stringent punishments, that are out of line with sentences imposed under today's laws, erode people's confidence in our criminal justice system." Adoption of Option 2 would increase the risk of this erosion of confidence, because it would reduce the field of eligible offenders who could benefit from a reduction at resentencing if a sentencing judge agrees their punishment is too severe in light of changes to the law now applicable to their offense.

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1 *See, e.g.,* Statement of Chief Judge Patti Saris, Chair, U.S. Sentencing Commission, For the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" Before the Committee on the Judiciary, United States Senate 8 (Sept. 18, 2013)("Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially."), found at: http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/091813RecordSub-Leahy.pdf

2 *See* 28 U.S.C. § 994(g) ("The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.").

3 The full text of the Deputy Attorney General's January 30, 2014 remarks is available at: http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html

Against this backdrop, the DOJ has encouraged the Commission to adopt Option 1 as the better of the choices.[4] In its submission to the Commission, the DOJ noted that "[a]llowing 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," and that denying the relief that would be available through Option 1 "will leave some substantial assistance unaccounted for and create unwarranted disparities in sentencing."[5] The PAG agrees.

Congressional developments suggest that many Members of Congress agree with Deputy Attorney General Cole. Coinciding with his remarks, the Senate Judiciary Committee voted the Smarter Sentencing Act ("SSA") for consideration by the full Senate. The Committee's vote was preceded by Attorney General Holder's endorsement of that bipartisan measure, which, he stated, was a reform needed to "reduce the burden on our overcrowded prison system."[6] The SSA, Mr. Holder stated, "would give judges more discretion in determining appropriate sentences for people convicted of certain federal drug crimes."

In addition to bipartisan support for the SSA, there have been recent expressions of support by Members of Congress for lessening the penalties that disproportionately impact low level, nonviolent drug offenders. Senator Durbin's letter to the Commission in 2010, following the passage of the FSA, is a good example. At the time, when the Commission was considering the possibility of an increase to the crack cocaine guidelines in a proposed emergency amendment to the guidelines, Senator Durbin wrote:

> It would be counterintuitive for the Sentencing Commission, which has called for a reduction in the sentencing disparity since 1995, to respond to Congress finally lowering the penalties for crack cocaine by significantly increasing the base offense levels assigned to crack cocaine. Indeed, under the level 26 option, some low-level offenders would receive the same sentences they would have received prior to the passage of the Fair Sentencing Act. The level 24 option is more consistent with Congress's clearly stated goals in passing the Fair Sentencing Act, including reducing racial disparities in drug sentencing; increasing trust in the criminal justice system, especially in minority communities; reducing over-incarceration of nonviolent drug offenders; and shifting the focus of federal drug enforcement from low-level offenders to drug kingpins.[7]

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4 United States Department of Justice, Office of Policy and Legislation March 6, 2014 Commentary on the Proposed Amendments to the Sentencing Guidelines (hereinafter "DOJ Comments") at 3-4, available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20140313/Testimony_DOJ.pdf

5 DOJ Comments at 4.

6 Attorney General Holder's statement is available at: http://www.justice.gov/opa/pr/2014/January/14-ag-068.html

7 Senator Durbin's letter available at:

Senator Durbin opened his letter by thanking the Commission for its leadership in reducing sentencing disparity.

The PAG agrees with the DOJ that adoption of Option 2 would create unwarranted disparity.[8] As the *Savani* court noted when considering the result that Option 2 would compel, it would render offenders "ineligible for sentencing reductions merely because they were sentenced prior to the adoption of retroactive Amendment 750" in the FSA, leading to a result "antithetical to the Fair Sentencing policy concerns that motivated Congress in passing the FSA."[9] In other words, selection of Option 2 will increase unfair disparity between similar offenders whose circumstances are otherwise identical except for the date they are sentenced.

Consider the following scenario using the first example in the Commission's synopsis of the proposed amendment.[10] Assume defendant A and defendant B were lower-level participants in the same drug trafficking conspiracy. Their role and culpability levels are exactly the same, and their guidelines calculations are both identical to those in the Commission's example. Both provide substantial assistance to the government, including testimony against two different leaders of the conspiracy. The two leaders of the conspiracy are tried separately. The court agrees to put off defendant B's sentencing because he will be testifying at the second trial. Amendment 750 takes effect between the sentencings of the two defendants. Meanwhile, defendant C has pleaded guilty and cooperated after being involved in a separate drug trafficking conspiracy. His guidelines calculations and his level of assistance to the government are the same, but he is the first to be sentenced in his case—on the same day that defendant B is sentenced.

As stated in the example, defendant A is sentenced to 160 months—a 39% reduction from the bottom of the range—because the judge concludes that the cooperation is comparable to that in other cases where the judge gave a 39% reduction from the applicable range. At defendant B's sentencing (after the amendment), the judge concludes that his cooperation was also comparable to that of defendants who deserved a 39% decrease from the normally applicable range. Because the bottom of his range under amendment 750 is 168 months, that would call for 102 months. But if Option 2 is in effect, the judge has a serious dilemma.

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http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/SenDurbin_comment_100810.pdf

8 *See* DOJ Comments at 4.

9 *Savani*, 733 F.3d at 67 (citing *United States v. Flemming*, 617 F.3d 252, 271-72 (3d Cir. 2010)).

10 In the first example, the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. On resentencing pursuant to Amendment 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months.

Defendant C is going to get 102 months—a 39% reduction from the bottom of his range. But defendant A—the co-defendant who is equal to defendant B in every way except for the date of sentencing—will only be eligible for a reduced sentence of 146 months. Should the judge create unwarranted disparity between defendant B and defendant C, or should the judge create unwarranted disparity between defendant A and defendant B? Option 1 avoids this dilemma by allowing the judge to treat all three of these similarly situated defendants the same.[11]

By narrowing the relief available to offenders sentenced before a favorable change in the sentencing law, adoption of Option 2 would deprive offenders who might otherwise be entitled to a reduction in sentence (if, and only if, the sentencing judge agrees it is appropriate) from relief for no reason other than bad timing. Depriving some earlier-sentenced offenders of the relief that later-sentenced but otherwise identically situated offenders receive would be arbitrary, capricious, and fundamentally unfair.

In addition to causing unfair disparity, adoption of Option 2 would contribute to the problems of rising federal prison costs and prison overcrowding. The Commission is taking the lead in urging Congress and criminal justice stakeholders to reduce prison overcrowding by decreasing the overuse of prison as punishment where increased incarceration is not appropriate or necessary. Indeed, on January 30 – the day the SSA moved to the Senate floor – Commissioner Saris stated: "I hope that the full Senate and the House of Representatives will act to pass this legislation which will begin to address concerns about prison costs and population and to improve the fairness of federal sentences."[12]

The PAG urges the Commission to continue its efforts to reduce the impact of mandatory minimum penalties on prison overcrowding and incarceration overuse. Option 1 is the better and fairer option to address those concerns.

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[11] The same sort of dilemma occurs when Option 2 is applied to the Commission's second example. There, defendant A receives a 96 month sentence (31% below the Sentencing Table range of 140-175 months). Defendant C would get 76 months (31% below the new Sentencing Table range of 110-137 months) from a judge who measures the substantial assistance departure by reference to the Sentencing Table range, as is often the case in our experience. But under Option 2, defendant A is not even *eligible* for a sentence reduction.

[12] Chair Saris's statement is available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20140130_News_Advisory.pdf ; *see also* Chair Saris's November 26, 2013 letter to the Senate Judiciary Committee, available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20131126-Letter-Senate-Judiciary-Committee.pdf (recommending statutory changes aimed at addressing the concerns of "rising federal prison costs" and "federal prison populations far exceeding prison capacity").

Violence Against Women Reauthorization Act

The Commission is considering amendment of §2A2.2 (Aggravated Assault), §2A2.3 (Minor Assault), §2A6.2 (Stalking or Domestic Violence) and the Appendix A (Statutory Index) in response to the Violence Against Women Reauthorization Act of 2013, Pub. L. 111-4 (March 7, 2013). The Act provided new and expanded criminal offenses for certain crimes involving assault, sexual abuse, stalking, domestic violence, harassment, and human trafficking.

We offer the following input on the proposed amendments for offenses sentenced under Chapter 2A of the Manual:

1. Option 1 versus Option 2, applying certain enhancements for strangling and suffocating in **§2A2.2** (Aggravated Assault).

The Commission has proposed two options for amending §2A2.2 for aggravated assault cases where the offense involved strangling, suffocating or attempt to strangle or suffocate. Section §2A2.2 provides in relevant part:

> (b) Specific Offense Characteristics
>
> (1) If the assault involved more than minimal planning, increase by 2 levels.
>
> (2) If (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.
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> (3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:
>
> Degree of Bodily Injury Increase in Level
>
> (A) Bodily Injury add 3
>
> (B) Serious Bodily Injury add 5
>
> (C) Permanent or Life-Threatening Bodily Injury add 7
>
> (D) If the degree of injury is between that specified in subdivisions (A) and (B), add 4 levels; or
>
> (E) If the degree of injury is between that specified subdivisions (B) and (C), add 6 levels.
>
> However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.

> **[Option 1**: (4) If (A) subdivision (3) does not apply; and (B) the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by [3]-[7] levels.**]**
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> **[Option 2**: (4) If the offense involved assault by strangling, suffocating, or attempting to strangle or suffocate, increase by [3]-[7] levels. [However, the cumulative adjustments from application of subdivisions (3) and (4) shall not exceed [10]-[12] levels.**]**

The PAG urges the Commission to adopt Option 1 and limit the increase to 3 levels. Option 1 comports with the legislative purpose of the statute to insure that in cases involving strangulation, suffocation or attempts to strangle or suffocate, the defendant is punished for that conduct. The statute was purportedly amended to include strangulation and suffocation based on the anecdotal evidence that strangulation and suffocation often do not result in visible physical injury or leave physical evidence of abuse. Option 1 embodies this legislative intent and places strangling and suffocation that would not otherwise warrant a bodily injury enhancement under Section (b)(3) on equal footing. If physical injury is present, Option 1 allows a court to take that into account. Option 2, on the other hand, provides enhanced penalties for strangling and suffocation, above and beyond other types of assault. For example, Option 2 elevates an aggravated assault committed by strangling above an aggravated assault committed with a weapon.

Specifically, an aggravated assault committed with a firearm that caused serious bodily injury would result in a 10 level enhancement to the base level 14 under this section. An aggravated assault that caused serious bodily injury committed by strangulation under Option 2 could result in a 12 level enhancement to the base offense level 14. This disparity is not warranted.

Furthermore, in order to maintain proportionality, the cap on enhancements set forth in proposed §2A2.2 should apply to (b)(2)(3) and (4), and not just (b)(3) and (b)(4). This would avoid further duplication and overlap of enhancements.

2. Option 1 versus Option 2 (bodily injury enhancement) to **§2A2.3** (Minor Assault).

The Commission has proposed two options for amending §2A2.3 (minor assault) when a victim sustains bodily injury. The proposed options are as follows:

> (b) Specific Offense Characteristic
>
> **[Option 1**: (1) If (A) the victim sustained bodily injury, increase by 2 levels; or (B) the offense resulted in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual under the age of sixteen years, increase by 4 levels.**]**

> **[Option 2**: (1) If (A) the victim sustained bodily injury, increase by 2 levels; or (B) the offense resulted in substantial bodily injury increase by 4 levels.**]**

The PAG urges the Commission to adopt Option 1. Section 113(a)(7) was amended to include an assault resulting in "substantial bodily injury" to a spouse or intimate partner or dating partner. Option 1 implements that statute by adding an enhancement for a victim who is a spouse, intimate partner, dating partner or an individual under the age of 16 years. Option 2 provides a broader enhancement that will apply in any instance. There is no empirical evidence to warrant a broader amendment to 2A2.3, and testimony offered at the February 13, 2014, hearing by Neil Fulton, Federal Public Defender in the Districts of North and South Dakota properly urged restraint in adopting sweeping amendments to these guidelines, due to the lack of evidence about how these new tools will be used by prosecutors, received by judges and impact the community.

3. Option 1 versus Option 2 (applying an enhancement for strangling and suffocation) in §**2A6.2** (Stalking or Domestic Violence).

The Commission has proposed two options for amending §2A6.2 (Stalking or Domestic Violence). This section provides, in relevant part:

> **§2A6.2. Stalking or Domestic Violence**
>
> (a) Base Offense Level: **18**
>
> (b) Specific Offense Characteristic
>
> **[Option 1:** (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; (D) possession, or threatened use, of a dangerous weapon; or (E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of these aggravating factors subdivisions (A), (B), (C), (D), or (E), increase by 4 levels.**]**
>
> **[Option 2:** (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury or strangling, suffocating, or attempting to strangle or suffocate; (C) possession, or threatened use, of a dangerous weapon; or (D) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of these aggravating factors subdivisions (A), (B), (C), or (D), increase by 4 levels.**]**

Option 1 establishes "strangling, suffocating," as a separate aggravating factor. Option 2 incorporates "strangling, suffocating" within the existing bodily injury aggravating factor. The PAG urges the Commission to adopt Option 2. By setting forth "strangling, suffocating" as an

additional aggravating factor, the guideline virtually insures that every instance of strangling or suffocating will result in a 4-level enhancement. This could result in a higher sentence for a defendant who briefly attempted to strangle a victim, than a defendant who held a gun to a victim's head. This argument is supported by the testimony at the Commission's February 13, 2014 hearing. During that hearing, Dr. Jacqueline Campbell testified that physical harm frequently results from strangling or suffocation. Dr. Campbell said "it only takes 5 to 10 seconds of pressure to lead to unconsciousness in a strangulation event, and there's a lot of research now that's been done in terms of how much damage is done when someone loses consciousness from a strangulation event…in terms of long-term neurological problems…And it can be considered a traumatic brain injury…" (February 13, 2014 hearing testimony, p. 120). Dr. Campbell testified that "there is severe bodily harm involved in most episodes of strangulation…" (Id. at p. 123). This testimony demonstrates that strangling and suffocating should not be separated from bodily injury as an aggravating factor.

2L1.1 – Alien Smuggling

The Commission proposes to amend the Commentary to USSG §2L1.1 to state that courts should apply §2L1.1(b)(6)'s two-level increase and offense level floor of 18 for "guiding persons through, or abandoning persons in, dangerous terrain without adequate food, water, clothing, or protection from the elements." The PAG opposes the proposed amendment because it is unnecessary, and could cause unwanted consequences – including unwarranted sentences.

The PAG readily acknowledges the greater culpability of defendants who intentionally or recklessly expose illegal immigrants to a substantial risk of death or serious bodily injury when bringing them into this country. The plain language of §2L1.1(b)(6) applies in any such case: *i.e.*. those in which the offense involved "intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person." Further, the Fifth Circuit has already recognized that guiding people through or abandoning them in dangerous lands without adequate food, water, clothing or protection meets that standard. *See, e.g., United States v. Garcia-Guerrero*, 313 F.3d 892, 896-97 (5th Cir. 2002) (enhancement applies where people were guided through desert-like brush for two days with one bottle of water that ran out after six hours and two cans of food, where temperatures reached 105 degrees, and people were misinformed about length of journey and denied adequate rest periods).

The Commission points to *United States v. Mateo Garza*, 541 F. 3d 290 (5th Cir. 2008), as a case which illustrates the concern that the guidelines may not adequately account for the harms involved in such cases. Respectfully, the PAG believes that *Mateo-Garza* was correctly decided and helps demonstrate why the §2L1.1 Commentary should not be amended as proposed.

In *Mateo Garza*, the Fifth Circuit remanded the case for re-sentencing after finding that the district court "premised its ruling on the notion that transporting aliens through the brush *necessarily and always* involves subjecting them to a substantial risk of death or serious bodily injury." *Mateo Garza*, 541 F.3d at 294 (emphasis added). The Fifth Circuit explained:

> We have no reason to doubt the court's understanding of the conditions that exist along the border, but our case law does not support establishing a per se rule that traveling through the South Texas brush creates a "substantial risk of death or bodily injury." In fact, we have implied that we will not create such per se rules. *See Solis-Garcia*, 420 F.3d at 516 (explaining that "[d]efining the contours of this enhancement is dependent upon carefully applying the words of the guideline in a case-specific analysis").

Mateo Garza, 541 F.3d at 294. Moreover, as the Court recognized, "[t]he South Texas brush, as inhospitable as it may be, cannot be analogized to trunks and engine compartments. As the district court acknowledged, people do live there." *Id*. In light of this reasoning, the Court concluded that§ 2L1.1(6) should only apply where the situation was "dangerous on the facts presented and used by the district court." *Id*. at 295.

We submit that *Mateo Garza* appropriately recognized that §2L1.1(6) should only apply where the particular facts and circumstances of the case before the court warrant its application. The proposed Commentary amendment risks undermining the importance of this case-specific factual analysis, and risks its improper application – for instance, where the conduct involved only the South Texas brush (where people actually live) and no other material facts. *Mateo-Garza*, 541 F.3d at 29. The Fifth Circuit did not reject the application of the enhancement to a defendant in that case; instead, it rejected a *per se* rule for all cases involving travel through a particular area.

The Commission also seeks comment on whether the guidelines should be amended to take into account aggravating or mitigating factors in cases where defendants "guide persons through, or abandon persons in, dangerous terrain (e.g., on the southern border of the United States)." The Commission first notes that some have argued transport through desert-like terrain is inherently dangerous and asks whether the risks of desert (or mountainous) transport justify a per se application of §2L1.1(b)(6)'s two-level enhancement and offense level floor. Next, the Commission asks whether §2L1.1 should be amended in cases in which ranch property is damaged or destroyed in order to account for such damage. Finally, the Commission asks whether §2L1.1 should be amended to account for the additional resources required in cases involving the rescue of aliens by special border patrol search and rescue teams.

For the reasons discussed above, the PAG opposes a *per se* application of §2L1.1(b)(6) to cases involving transportation through dangerous terrain. As far as the PAG can tell, no Court of Appeals has endorsed a *per se* application of §2L1.1(b)(6), and for good reason. As *Mateo Garza* recognized, *per se* application of §2L1.1(b)(6) is not appropriate, and would have the unwanted consequences discussed earlier. We similarly question whether amendments to §2L1.1 are appropriate to address cases involving damage to ranch property or the rescue of aliens by border patrol teams. Courts already have the discretion to consider such facts at sentencing, and we believe that such discretion should be maintained with respect to these issues as well.

Moreover, we are not aware of sentencing data supporting an amendment to §2L1.1 to require the *per se* application of §2L1.1(b)(6), or addressing cases involving damage to ranch property or the rescue of aliens by border patrol teams. In fact, the Commission's most recent statistics show that the vast majority of offenders who are sentenced under §2L1.1 are sentenced at or below the existing guideline range, and that the government requested the below-guideline sentence in a high majority of such cases. Thus, there is little reason to believe that application of §2L1.1 fails to recommend appropriate sentences.

5D1.1 – Supervised Release

With respect to the two circuit splits identified in Proposed Amendment 6, the PAG suggests that the Commission resolve both in favor of the Seventh Circuit's approach. First, with respect to Part (A), *i.e.*, how to treat terms of supervised release where the statutory minimum term is greater than the maximum guidelines term, the PAG believes that the approach of the Seventh Circuit in *United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009) is consistent with current Guidelines application and practice with respect to mandatory minimum terms of imprisonment. Pursuant to USSG §5G1.1(b), "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." Accordingly, USSG §5D1.2(a) should operate the same. The approach advocated by the Eighth Circuit in *United States v. Deans*, 590 F.3d 907, 911 (8th Cir. 2010) simply is inconsistent with Guideline practice. Accordingly, the PAG recommends Option 1.

Second, with respect to Part (B), *i.e.*, how to treat defendants convicted of failure to register as a sex offender, the PAG agrees with the Seventh Circuit in *United States v. Goodwin*, 717 F.3d 511, 518-20 (7th Cir. 2013) that a failure to register can never be a sex offense. Accordingly, the PAG agrees that the commentary at USSG §5D1.2 should be amended to clarify that § 2250 violations are not sex offenses. With respect to the specific issues the Commission seeks comment on, the PAG responds as follows:

(i) The PAG takes no position on this issue.

(ii) & (iii) The PAG recognizes that there are valid reasons, reflected in many criminal statutes, to view crimes committed against minors as more egregious than crimes committed against adults. That said, the PAG believes that the sentencing court is in the best position to assess whether, in each particular case, the specific facts and circumstances of the crime at issue warrant a longer or shorter term of supervised release or a longer or shorter list of conditions of supervision. Accordingly, the PAG opposes any categorical increases based on the age of the victim; rather, the Commission should note that the age of the victim is one of many relevant considerations that the sentencing court should take into account in deciding on a term and conditions of supervised release.

Finally, the PAG takes this opportunity to recommend that the Commission delete in its entirety the policy statement at USSG §5D1.2, which reads: "If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended." As the Commission noted in its recent Report to Congress on Federal Child Pornography Offenses:

> Before the PROTECT Act of 2003, the vast majority of child pornography offenders sentenced to imprisonment received three-year terms of supervised release, the statutory maximum term then in effect for all child pornography offenders without predicate convictions for sex offenses. After the PROTECT Act, all child pornography offenders are subject to a statutory mandatory minimum term of five years of supervised release and a statutory maximum term of lifetime supervision. . . .
>
> The sentencing guideline provision concerning supervised release for sex offenders, including child pornography offenders, recommends the "statutory maximum" term of supervised release for all such offenders. Because the PROTECT Act increased the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all offenders convicted of any offense in 18 U.S.C. §§ 2252 & 2252A, the guideline effectively recommends a lifetime term of supervision for all child pornography offenders. Judicial critics of this provision have contended that the guideline's recommendation sweeps too broadly by failing to require judges to assess the specific risks posed by particular offenders and their corresponding need for a lifetime term. The Commission intends to study whether the guideline should be amended in response to this criticism.

Federal Child Pornography Report 291 (2012) (footnote omitted). Because the lifetime recommendation of supervised release appears to be an accidental artifact of the PROTECT Act, the PAG urges the Commission to delete this policy statement as well. Not only would it cure this oversight, it would make §5D1.2 more consistent with our other recommended changes and would allow district judges to exercise their traditional discretion of deciding the length of supervised release on a case-by-case basis.

5G1.3 - Undischarged and Anticipated Terms of Imprisonment

The PAG supports each of the Commission's three proposed amendments to §5G1.3.

§5G1.3 – Proposal One

The first part of the proposed amendment addresses cases in which the defendant is subject to an undischarged term of imprisonment that is relevant conduct but does not result in a Chapter Two or Chapter Three Increase. Under the current guideline, a concurrent term of imprisonment, as well as credit for time already served on an undischarged term of

imprisonment, is recommended only if the prior offense is relevant conduct *and* resulted in a Chapter Two or Three increase.

The PAG supports the Commission's proposal to eliminate the requirement that the other sentence have resulted in a Chapter Two or Three increase. To assist courts in fulfilling § 3553(a)'s "sufficient but not greater than necessary mandate," the Guidelines should encourage concurrent sentences whenever the other sentence results from an offense that was accounted for in *any* way in the sentence for the instant offense, regardless of whether, or how, it increases the offense level. The requirement that the other sentence have resulted in a Chapter Two or Three Increase is also inconsistent with §4A1.2, which precludes enhanced penalties from increased criminal history scores where a "prior sentence" involves conduct that is part of the instant offense." *See* §4A1.2(a), cmt., n.1. In this regard "[p]art of the instant offense" means "conduct that is relevant conduct to the offense under the provisions of §1B1.3 (Relevant Conduct)." *Id.* The Commission's elimination of the requirement that the prior offense have resulted in a Chapter Two or Three Increase thus prevents unjustified, cumulative punishments for the same and related offense conduct and properly reconciles Chapter Five with Chapter Four of the Guidelines.

With respect to the specific issue for comment, the PAG agrees that the Guideline should not exclude from the relevant conduct reference subsection (a)(4) of §1B1.3,"any other information specified in the applicable guideline." Rather than adding a reference to (a)(4), we note that the Commission's goal could be accomplished more simply by referencing §1B1.3(a) only, i.e., rewriting the relevant portion of § 5G1.3 so it reads: "… that is relevant conduct to the instant offense of conviction under the provisions of §1B1.3(a)."

§5G1.3 – Proposal Two

Part two of the proposed amendment to §5G1.3 addresses the situation in which a federal court "anticipates that a period of time spent by the defendant in pretrial custody in connection with the anticipated state sentence will not be credited to the federal sentence by the Bureau of Prisons." The PAG supports the addition of proposed subsection (c), and conforming commentary. As to the bracketed questions, the Commission should, as discussed above, delete the reference to Chapter Two and Chapter Three, and mandate (by use of the word "shall") adjusting the sentence downward if the "anticipated state term of imprisonment . . . will not be credited to the federal sentence by the Bureau of Prisons." Subsection (b)(1) provides exactly for such an adjustment as to undischarged sentences by using the word "shall," and there is no reason to treat the case of time already served on anticipated state sentences any differently. Indeed, in our experience, the most common scenario contemplated by *Setser v. United States*, 132 S. Ct. 1463 (2012), is a defendant in primary state custody (i.e. arrested and detained by state law enforcement agents pending resolution of state criminal charges) who is then subject to federal prosecution. The pretrial custody time in that situation is not credited by the Bureau of Prisons. *See* 18 U.S.C. § 3585(b). Thus, so that sentencing courts have the same flexibility in cases involving anticipated sentences as they do in those involving undischarged terms of imprisonment, the language in proposed subsection (c) should be identical to that in (b)(1).

While not addressed in the Commission's proposed amendments, the PAG recommends that conforming changes be made to current Policy Statement (c) to ensure that it, too, applies to anticipated terms of imprisonment. Current subsection (c) provides that in "any other case" – i.e. those cases where §5G1.3(a) and (b) do not apply – the sentencing court may impose its sentence consecutive, concurrent, or partially concurrent to the undischarged term of imprisonment so as to achieve a "reasonable punishment for the instant offense." §5G1.3(c) (Policy Statement). Given *Setser*'s holding explicitly authorizing district courts to impose sentences to run consecutively or concurrently with anticipated sentences, whether or not those other sentences stem from relevant conduct to the instant offense, subsection (c) should apply equally in cases involving anticipated terms of imprisonment. This could be accomplished by inserting the phrase "or anticipated" after "undischarged."

§5G1.3 – Proposal Three

Finally, the Commission has proposed a new subsection to allow a downward adjustment for a deportable alien who "is likely to be deported after imprisonment and is serving an undischarged term of imprisonment that resulted from an unrelated offense" and the court determines that any period already served will not be credited by the Bureau of Prisons. The PAG supports the Commission's proposal, as illegal re-entry defendants are often brought to federal court for prosecution after they have served significant time on state charges (frequently the event that triggers them having been "found" in the United States). As the Commission notes in its "Issue for Comment," several courts have recognized and granted departures or other adjustments for such defendants where the delay in bringing the illegal re-entry charges has resulted in a "lost opportunity" for concurrent time. The PAG believes that the length of the federal sentence should not turn on the fortuity of when the illegal re-entry defendant was "found." Thus, in order to avoid unwarranted disparities among similarly situated defendants and prevent needlessly long sentences, the PAG believes that this issue is best addressed as a downward adjustment, rather than a departure.[13]

The Commission Should Also Clarify A Sentencing Court's Departure Authority

Given the proposed amendments to §5G1.3, the PAG believes that the Commission should also modify the Guideline's related departure provisions. First, the Commission should make clear that district courts have full discretion to depart downward to account for time already served on undischarged terms of imprisonment, if such departure is necessary to achieve a "reasonable punishment for the instant offense." Currently, Application Note 3(E) provides that when §5G1.3(b)(2) does not apply, *i.e.*, the "any other case" referenced in current subsection (c), a downward departure to credit a defendant with time *already* served on the undischarged term of imprisonment is appropriate only in the "extraordinary case." The "extraordinary case" language should be deleted. If a district court determines that concurrent sentences are appropriate in order to achieve a "reasonable punishment for the instant offense," *see* § 5G1.3(c),

[13] In the event that the Commission chooses instead to add a specific departure provision to §2L1.2, the PAG believes that Option 1 is more easily applied than Option 2.

then it should be empowered to depart downward to credit the defendant with the time already served on that same sentence. Otherwise, the length of a sentence may depend on how much of the undischarged sentence remains to be served at the time of the federal sentencing, rather than what constitutes a "reasonable" punishment for the offense.

Second, the PAG believes the Commission should expand the scope of §5K2.23 (Policy Statement), regarding downward departures for defendants who have a previously discharged term of imprisonment. Section 5K2.23 is currently limited to situations where "subsection (b)" of §5G1.3 would have "provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense." Departures are thus not permitted when the provisions of §5G1.3(c) would have applied had the sentence been undischarged, namely, when concurrent sentences would have been necessary to "achieve a reasonable punishment for the instant offense." U.S.S.G. §5G1.3, cmt., n. 3. *See also* §5G1.3, cmt., n. 4 (noting that departures "are not prohibited" when the discharged sentence would have triggered application of subsection (b) had it been undischarged at the time of sentencing).

The PAG believes there is no reason to impede or discourage district courts from departing where there is a prior discharged term of imprisonment that did not satisfy §5G1.3(b), either in its current or amended form. Indeed, *Setser*'s broader implication is that sentencing courts should have full power to consider the impact of other sentences, whether imposed or anticipated, discharged or undischarged. Accordingly, Application Note 4, which suggests that departures for discharged terms of imprisonment are otherwise prohibited, should be deleted in its entirety, and §5K2.23's reference to §5G1.3(b) should be struck.

Firearms

In addition to our written and oral testimony on the firearms proposals, the hearing has prompted the following two points to consider:

1. The testimony at the hearing has only strengthened our view that the cross-reference at 2K2.1(c)(1) should be eliminated. This provision can lead to—and, in fact, is designed to result in—the application of an entirely different guideline for an offense that the government has elected not to charge. As we testified, other cross-references bear a natural relationship to the offense of conviction. Not so with §2K2.1(c)(1). Even assuming the government charges a defendant with possessing a firearm *on the same day as* the uncharged offense, the two offenses are very different. In a guilty plea under 18 U.S.C. § 922(g), the only real factual issue that the defendant must admit is that he was in possession of the firearm. (The government frequently provides the factual basis for the commerce element, and the existence of a felony conviction is rarely disputed.) But for the cross reference to apply, the government will need to prove all of the elements of a different offense, such as a murder or robbery. The difference is that the government will do this without needing to follow the Rules of Evidence, without a jury, without the right for the defendant to confront witnesses, and with a preponderance standard rather than the burden of proving each element beyond a reasonable doubt.

At sentencing, the court is tasked in large part with finding a punishment that fits the crime, not finding a crime that fits the punishment. The guideline already has a specific offense characteristic that adds 4 levels (with a floor of 18) for committing another offense with a firearm. A 4-level increase is significant. For example, the bottom of the range for level 26, CHC II is 70 months (with the top at 87 months). Add four levels—offense level 30, CHC II—and the guidelines allow a sentence of up to 135 months. That allows a judge to impose a prison term nearly *twice* what otherwise identical defendants can receive under the guideline. The cross-reference is not only unjust; it is unnecessary.

2. The DOJ witness noted that courts are not supposed to be limited in the information they consider about a defendant's dangerousness. We have no quarrel with that truism. But it avoids the real question: Should proposed findings of dangerousness (i) about a different offense (ii) that was neither charged nor proven in the manner that our Constitution demands displace a sentencing hearing for the conviction that *was* obtained in accordance with the Fifth and Sixth Amendments. Judges already have sufficient latitude to take unconvicted or uncharged conduct into account by sentencing at the high end of the range, or departing or varying upward when the circumstances are sufficient to warrant that unusual result.

1B1.13 – Reduced Prison Terms On Motion of BOP

Because it's never too early to think about the next amendment cycle, the PAG urges the Commission to add back to its list of priorities the possibility of amending U.S.S.G. §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), to give additional guidance to courts and to the Bureau of Prisons considering prisoner requests for sentence reduction under 18 U.S. C. § 3582(c)(1)(A)(i). Despite the dramatic increase in the federal prison population in the past 20 years, the number of motions filed each year under this authority has remained relatively constant.[14] Even the promulgation of §1B1.13 in 2006 and its substantial amendment in 2007 appear to have had little or no effect to date on the number or type of actions taken under this early release authority, one of the few in federal sentencing law. This is largely because the Bureau of Prisons has been unwilling to file the motion necessary to trigger the court's jurisdiction unless a prisoner is terminally ill and within months of death, or severely and permanently incapacitated.[15]

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[14] The number of motions for sentence reduction under § 3582(c)(1)(A)(i) filed each year between 1992 and 2012 is set forth in *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* 35 (Human Rights Watch and Families Against Mandatory Minimums, 2012), http://www.hrw.org/reports/2012/11/30/answer-no.

[15] *See The Answer is No, supra* at 32-35. A recent report of the DOJ Inspector General found that BOP's administrative process is so cumbersome and confusing that many cases meeting its stringent criteria are never brought to the court's attention. *See* Office of the Inspector General, U.S. Department of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* 53 (April 2013) ("[T]he existing BOP compassionate release program is poorly managed and . . . its inconsistent and ad hoc implementation has likely resulted in potentially eligible inmates not being considered for release. It has also likely resulted in terminally ill

The PAG believes that BOP's narrow interpretation and limited exercise of its authority under § 3582(c)(1)(A)(i) have frustrated Congress' intent to make courts primarily responsible for deciding whether to reduce a prisoner's sentence for "extraordinary and compelling reasons."[16] We appreciate that in the summer of 2013 BOP expanded its policy on the situations in which it will seek a reduction in sentence under § 3582(c)(1)(A)(i).[17] However, this new policy still appears to be more restrictive than the grounds specified in the Application Notes to §1B1.13. Moreover, BOP has recently proposed to amend its regulations to institutionalize a role for the United States Attorney and the Deputy Attorney General in all sentence reduction cases, a development that may well discourage any expanded use of this authority.[18]

It would be reasonable for the Commission to give BOP's new policy a chance to produce the kind of results that the statute contemplates. But in the absence of dramatic changes in the very near future, we urge the Commission to return §1B1.13 to its priorities list. Additional and more specific policy guidance from the Commission should serve to encourage BOP to further broaden its policy, and generally to bring more sentence reduction applications to the courts for decision, rather than effectively deciding their merits itself.

The PAG believes that clarification by the Commission of the general criteria for sentence reduction under § 3582(c)(1)(A)(i) will produce a fairer and more efficient use of this important early release authority. As in 2006, we recommend discussion in §1B1.13 of the basic premise of "changed circumstances" that informs the idea of "extraordinary and compelling reasons."[19] We also recommend making the examples of such reasons in the Application Notes

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inmates dying before their requests for compassionate release were decided.")

16 With rare exceptions, a prisoner who has sought to file sentence reduction motions directly with the court has been turned away based on the government's argument that courts lack authority to reduce a sentence absent a motion from BOP. *See The Answer is No* at 68-74.

17 *See* Program Statement 5050.49, August 12, 2013 ("Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)").

18 *See* Proposed amendment to 28 CFR Part 571, 78 Fed. Reg. 73083 (Dec. 5, 2013) ("Compassionate Release").

19 In 2006, we joined with other organizations (including the American Bar Association, the Federal Community and Public Defenders, and Families Against Mandatory Minimums) in proposing three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances. The law has subsequently been changed to permit the court to take those considerations into account; and the

more specific and easier to apply. In particular, we propose separating reasons relating to physical or mental infirmity from reasons relating to advanced age, rather than grouping them in a single paragraph. See ¶ (1)(A)(ii).[20] We also suggest that the Commission reconsider other proposals made by the PAG in 2006 but not adopted, such as allowing consideration of more than one compelling reason in determining eligibility for sentence reduction, including post-sentencing changes in the law and extraordinary rehabilitation while in prison.[21]

Finally, we suggest that the Commission make clear in Section 1B1.13 that changes in a defendant's circumstances need not have been unforeseen at the time of sentencing.[22] This last point is especially important because judges have been prohibited in many cases under mandatory sentencing provisions from taking into account such compelling circumstances as a

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change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2). *See* Proposed Policy Statement dated July 12, 2006, submitted by the American Bar Association (hereinafter "2006 Proposed Policy Statement").

[20] *See* 2006 Proposed Policy Statement at 1(c) ("the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process").

[21] *See* 2006 Proposed Policy Statement at (2):

> Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

We note that the Application Notes currently recognize the provision in 28 U.S.C. § 994(t) that "rehabilitation of the defendant alone is not, by itself, an extraordinary and compelling reason." At the same time, § 994(t) also appears to contemplate that rehabilitation may at least be considered as a factor in assessing the totality of a defendant's circumstances, and we therefore suggest that rehabilitation should be listed among the "extraordinary and compelling reasons" set forth in ¶ 1(A) of the Application Notes. We proposed in 2006 that changes in the law should also fall into the category of reasons that by themselves should not be sufficient to constitute "extraordinary and compelling reasons" warranting sentence reduction.

[22] The legislative history of § 3582(c)(1)(A)(i) indicates only that Congress intended the sentence reduction authority to be available whenever there is a "fundamental change" in a prisoner's circumstances, and does not support the further requirement heretofore imposed by BOP that such a change not be foreseen by the court at sentencing. A defendant relatively healthy in the early stages of a disease might have become bedridden in its later stages, just as a defendant relatively fit and healthy when sentenced in his early seventies might have become a geriatric invalid ten years later. We are gratified to see that BOP now appears to recognize this in its August 2013 program statement. *See* http://www.bop.gov/policy/progstat/5050_049.pdf

defendant's serious illness or disability, or the serious illness or disability of the sole caregiver of a defendant's minor children.[23]

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input for the 2014 amendment cycle. We look forward to an opportunity for further discussion as the proposed changes are finalized.

Sincerely,

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Commissioner Isaac Fulwood, Jr.
Commissioner Jonathan J. Wroblewski
Kenneth Cohen, Chief of Staff
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[23] The American Law Institute's revision of the Sentencing Articles of the Model Penal Code may be a useful reference point. *See* Discussion Draft # 2, § 305.7 ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons") (March 25, 2011). The Reporter's Note (pp. 103-109) contains numerous citations to state statutes and policies providing for sentence reduction in the specified circumstances. The ALI declined to interpose a corrections authority as gatekeeper for courts considering compelling cases for sentence reduction based largely on testimony about BOP's administration of 3582(c)(1)(A)(i). *See id*. at 101 ("the Federal Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal compassionate-release provision a virtual nullity").

Testimony Before The United States Sentencing Commission

March 13, 2014

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Written Testimony
Regarding the Proposed Amendments to USSG §2K2.1

March 13, 2014

It is my privilege to have the opportunity to testify on behalf of the Practitioners Advisory Group regarding the proposed amendments to the guidelines governing firearms offenses. The members of the PAG appreciate the opportunity to give the Commission our thoughts on this important issue.

The PAG believes that Option One set forth in the proposed amendments is superior to Option Two. We also propose ways in which Option One should be modified to make the application of the firearms guidelines more consistent with the purposes of sentencing and consonant with fundamental principles of fairness.

Proposed Amendment

USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) sets forth eight possible base offense levels between 6 and 26 for a defendant who is convicted of being a felon in possession of a firearm, as well as seven additional specific offense characteristics and a cross reference.

The Commission's proposed amendment addresses the special offense characteristic found at subsection (b)(6). In relevant part, that provision adds four levels and an offense level floor of eighteen if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." *See* USSG §2K2.1(b)(6)(B). In addition to that enhancement, §2K2.1 contains a cross reference in cases where "the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense." *See* USSG §2K2.1(c)(1).

As described in the Notice for Comment, the Courts of Appeal have developed differing approaches for whether and how the relevant conduct guideline interacts with subsections (b)(6) and (c)(1) in two situations. Situation 1 involves cases where the defendant unlawfully possessed one firearm on one occasion, and also possessed a different firearm on another occasion. Situation 2 involves cases where the defendant is convicted of unlawfully possessing a firearm, and there is also evidence that he used a firearm in connection with another offense. In each of these two situations, courts routinely apply subsections (b)(6)(B) and/or (c)(1) even if the defendant was acquitted of the underlying conduct.

The Commission proposes two options to clarify the operation of the firearms guideline in these situations. Option One would address Situation 1 by limiting application of subsections (b)(6)(B) and (c)(1) to the firearm or firearms identified in the offense of conviction. In cases involving Situation 2, however, where the court finds that the defendant used the firearm in connection with another offense, Option One would create a *per se* rule that the use of the

firearm in the second offense is relevant conduct because it "is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4)."

Option Two would address Situation 1 by clarifying in the Commentary that the court must determine as a threshold matter whether possessing the second firearm was part of the same course of conduct or common scheme or plan as the unlawful possession underlying the offense of conviction under §1B1.3(a)(2). Thus, Option Two would continue to allow courts to sentence defendants on the basis of uncharged, dismissed or acquitted conduct relating to a different firearm, so long as the court found that §1B1.3(a)(2)'s standard was met. For Situation 2, Option Two would apply the same *per se* approach to the relevant conduct analysis as proposed in Option One.

The Commission seeks comment on whether the proposed amendments adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in these situations. In addition, the Commission seeks comment on the operation and scope of subsections (b)(6)(B) and (c)(1), including whether the Commission should consider narrowing or clarifying the scope of the provisions, and whether the cross reference in subsection (c)(1) should be deleted.

The PAG supports Option One insofar as it would limit application of the enhancement and cross reference to the particular firearm or firearms identified in the offense of conviction. But Option One is an incomplete solution, because it does not rectify the problem that a defendant convicted of one crime (unlawfully possessing a firearm) can be sentenced for another (*e.g.*, murder) regardless of the difference in the severity of the unconvicted offense or the absence of a common scheme or same course of conduct. *See, e.g., United States v. Horton*, 693 F.3d 463, 473 n.10 (4th Cir. 2012) (defendant convicted of unlawfully possessing firearm sentenced to life in prison under cross reference to murder guidelines). The best fix for this problem is to delete subsection (c)(1) and subsection (b)(6)(B) in their entirety.

The use of uncharged, dismissed or acquitted conduct to enhance a defendant's sentence violates fundamental principles of fairness and transparency, creates unwarranted disparity, and promotes disrespect for the law.[1] The unfairness is particularly severe under these two subsections in Section 2K, because those enhancements—unlike the usual use of relevant conduct—are almost always based on conduct very different from the elements of the offense of conviction.

To see the point, it helps to consider the two most familiar uses of relevant conduct in the guidelines: drug trafficking offenses and theft or fraud offenses. When a drug defendant gets a higher offense level for drugs he trafficked as part of the same course of conduct or common

[1] *See, e.g.*, PAG's Response to Request for Public Comment on Proposed Priorities (August 18, 2010) at 6; *see also* comments to USSC, submitted by Federal Public Defenders (May 17, 2013) at 24-31 (citing authorities, including federal judges, who question use of acquitted, dismissed and uncharged conduct under relevant conduct rules); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599 (2012); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420 (2008).

scheme or plan, the increased penalty is based on proof that he did "more of the same." It is one thing to hold a drug dealer responsible for engaging in the same sort of conduct on different occasions (assuming the close relatedness required by the relevant conduct rules). But subsections (b)(6)(B) and (c)(1) operate differently. Under those subsections, a defendant convicted of a possessory offense such as felon-in-possession, which merely requires proof that the felon had the ability to exercise control over a firearm, is sentenced for a robbery or a murder or some other active use of the firearm. Rather than prove to a jury that the defendant is a robber or a murderer (or have guilt for such an offense establish through a guilty plea), the government charges a different and often much less severe kind of offense and relies on the sentencing phase to establish the different offense that will drive the sentence.

Option One is a step in the right direction because it would require the defendant to be sentenced for using only the firearm he was convicted of possessing. Under this option, there is no need to put the parties and the court through the often difficult process of figuring out what to do about a firearm that is not included in the offense of conviction. Rather, if the government intends to prove that the defendant used or possessed any additional firearms, it is free to charge the defendant with that use or possession.

Although we prefer Option One over Option Two, our main difficulty with it is that, by retaining the enhancement and cross reference, it would continue to allow a defendant convicted of unlawfully possessing a firearm to be sentenced for a completely different crime involving that firearm – even if the government never charged him with that crime, or a jury acquitted him of it. The PAG appreciates that the proposed amendment may be one brick in the wall that will ultimately foreclose the use of dismissed, uncharged and acquitted conduct at sentencing, and for that reason, we support it over Option Two. It is still only one brick, however, and more sweeping reforms are sorely needed.

The PAG also opposes Option One's proposed Commentary change for cases in which the defendant is found to have used a firearm from the count of conviction to commit a different offense. We believe that the language would be confusing because it is circular at best. The proposed Commentary language states that the court should "consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1) – (4) and accompanying commentary." The example following that statement, however, essentially directs the court to find that the use of the firearm of conviction in a second offense is *per se* relevant conduct simply because it "is a factor mentioned in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4) ('any other information specified in the applicable guideline')." The proposed example thus contradicts the Commission's overarching principle that courts should consider the relationship between both offenses by applying the relevant conduct rules set forth in §1B1.3(a)(1) through (4). Moreover, the reference to §1B1.3(a)(4) in this context is confusing at it creates a tautological rule for no apparent purpose.

One way to harmonize the proposed language and resolve the Circuit split might be to amend Application Note 14(E) to read as follows:

> (E) Relationship Between the Instant Offense and the Other Offense. – In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense. A sufficient relationship exists if:
>
> (i) the other offense was
>
> (a) an act or omission that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused, or
>
> (b) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), a reasonably foreseeable act or omission of another in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for the offense; or
>
> (ii) the other offense was an act or omission described in (E)(i)(a) or (E)(i)(b) that was part of the same course of conduct or common scheme or plan as the offense of conviction.
>
> For example:
>
> Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A acquired that shotgun so that he could use it in a robbery, and further determines that Defendant A followed through on his plan by committing the robbery with that shotgun. Because the use of that shotgun during the planned robbery was part of Defendant A's common scheme or plan, the "in connection with" requirements of subsections (b)(6)(B) and (c)(1) are satisfied.

* * * * *

This proposed approach would strike a fair compromise by incorporating the familiar relevant conduct principles of § 1B1.3(a)(1) - (2) but eliminating the requirement under (a)(2) that the offenses also be groupable under § 3D1.2(d). The PAG believes that the requirement of a common scheme or plan or the same course of conduct, as illustrated in the example, will allow judges to account for conduct with a close nexus to the offense of conviction without opening the door to conduct that should be charged and proven if the defendant is to be sentenced for it**.**

Thank you again for the opportunity to present the views of the PAG.

Testimony Before The United States Sentencing Commission

March 13, 2014

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Written Testimony Regarding Drug Guidelines

I am pleased to have the chance to testify on behalf of the Sentencing Commission's Practitioners Advisory Group regarding the proposals and issue for comments that deal with the drug guidelines. As one of the Commission's three standing advisory groups, the PAG strives to provide the perspective of those in the private sector who represent individuals investigated and charged under the federal criminal laws. We appreciate the Commission's willingness to listen to and consider our thoughts on various possible approaches to issues that arise under the guidelines.

I. The PAG Strongly Supports The Proposal To Change The Drug Quantity Table Across Drug Types

The Commission has requested comment on whether any changes should be made to the Drug Quantity Table and has offered a proposed amendment to reduce by 2 levels each base offense level in the drug quantity table that triggers mandatory minimum penalties. For the reasons stated below, the PAG supports the proposed 2-level reduction.

A. The Proposed Amendment Is An Appropriate Step In Reducing and Eventually Eliminating the Impact of Mandatory Minimum Penalties on Defendants to Whom a Mandatory Minimum Does Not Apply

The PAG strongly supports the Commission's increased efforts to address the unduly harsh sentences that result from the penalty structure of federal drug laws. These efforts include, most recently, the Commission's recommendations to Congress to reduce mandatory minimums in drug offenses, to make the Fair Sentencing Act retroactive and to expand the safety valve. We welcome the proposed 2-level reduction across the drug quantity table because it is a step in the direction of eventually eliminating the influence that the mandatory minimum penalties have on defendants who have not engaged in the conduct those harsh and inflexible statutory penalties are intended to punish. It is the PAG's position that the Drug Quantity Table should be completely delinked from the mandatory minimums. Indeed, such a link is contrary to Congress' original intent of applying mandatory minimums to the most serious offenders, i.e., the kingpins, managers and leaders of drug operations, because that linkage means that the mandatory minimums increase the penalties for drug defendants who are not the most serious offenders.

The Commission's 2011 report to Congress regarding mandatory minimums recognized that the intent of the Anti-Drug Abuse Act of 1986 ("ADAA") was to create a two-tiered penalty structure for specific types of drug traffickers. Specifically, the Commission's 2011 report quoted the following statement made on the floor of the Senate by then Senate Minority Leader Robert Byrd:

> For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is ten years. . . . Our proposal would also provide mandatory

> minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail – a minimum of 5 years for the first offense.

U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011).

It is clear that Congress's intent in enacting the ADAA was to assign mandatory minimums to serious drug traffickers, i.e., the kingpins and middle-level dealers. But linking the Drug Quantity Table to the mandatory minimums has allowed a single factor—the quantity of drugs involved in the *offense*—to subject lower level offenders to guidelines ranges at or near the ranges for the most serious violators. Thus, the current guidelines ranges allow drug quantity to subject *all* drug offenders to the harsh penalty hierarchy created by mandatory minimums regardless of their role in the offense. That is flatly inconsistent with the reality that "[t]he overwhelming majority of drug trafficking offenders are neither managers or leaders – in Fiscal Year 2011, roughly 93% of trafficking offenders did not fall into either of those leadership categories." *U.S. v. Diaz*, No. 11-CR-00821, 2013 WL 322243, at *6 (E.D.N.Y. Jan. 28, 2013). In fact, the Department of Justice has long recognized that drug quantity does not serve as a good proxy for identifying the type of drug trafficker:

> Regardless of the functional role a defendant played in the drug scheme, the drug amounts involved in the offense are similar across the roles. After applying Guideline adjustments and downward departures, there is a great deal of overlap in the distribution of sentences among high-level dealers, street level dealers, couriers, and those with a peripheral role.

U.S. Dept. of Justice, Nat'l Inst. Of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994, February).

Because drug quantity overstates an offender's culpability in a drug trafficking crime, the PAG believes that the Drug Quantity Table should be completely delinked from the ADAA's mandatory minimums. As such, the PAG welcomes the proposed 2-level reduction as a step in that direction. Furthermore, the PAG believes that the proposed 2-level reduction should be applied to all drugs.[1]

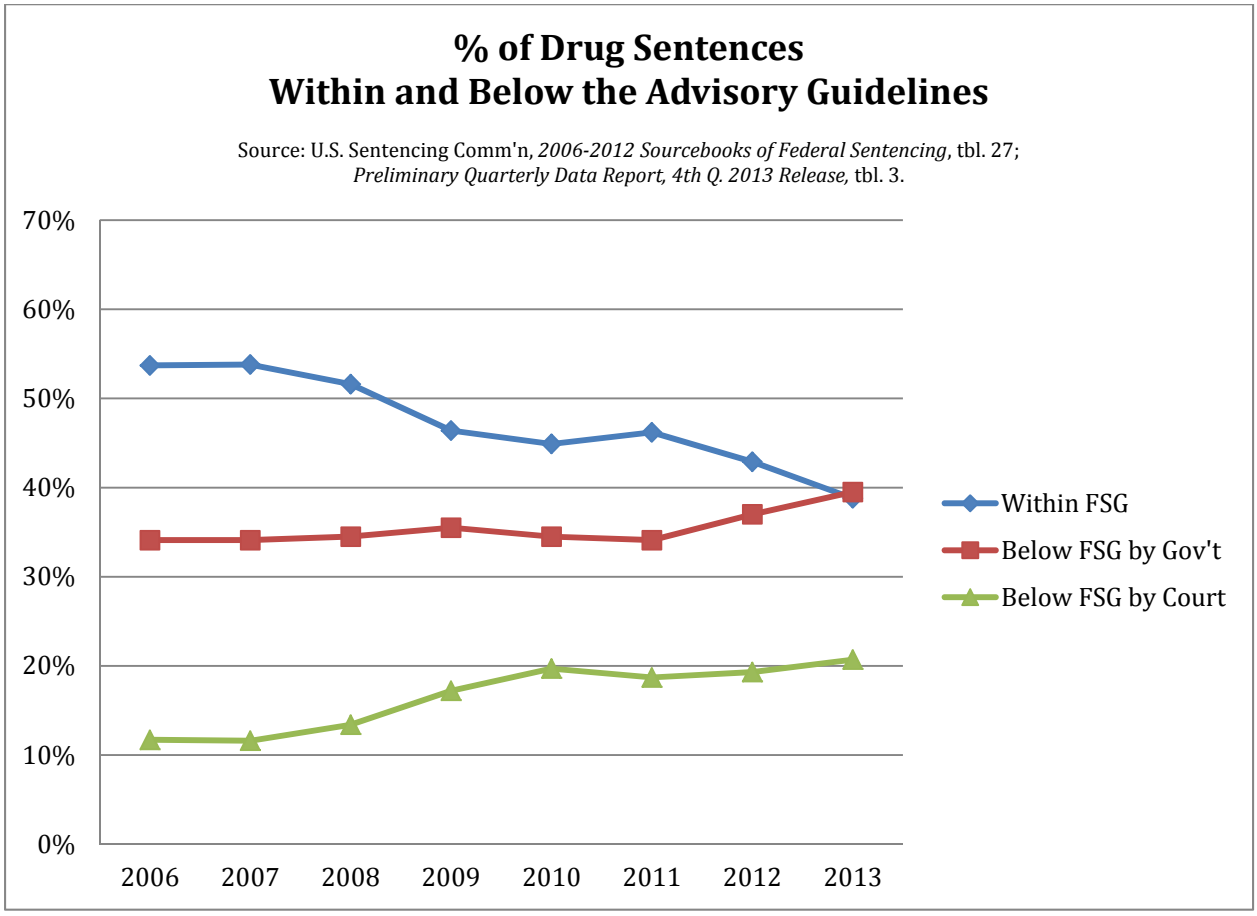
B. Empirical Sentencing Data Support the Proposed 2-Level Reduction

Empirical sentencing data suggest that the current guidelines ranges for drug trafficking offenses overstate the appropriate punishment for the offender. Based on the Commission's

[1] The Commission also should consider the recent trend among States to decriminalize marijuana when assessing whether a further reduction for marijuana offenses is warranted in the future. For example, Washington and Colorado have decided to fully legalize marijuana and many other states have at least partially legalized marijuana in some form, such as for medical uses.

published reports, Figure 1 below illustrates that within guideline sentences for drug trafficking offenses (sentenced primarily under USSG §2D1.1) have consistently decreased since *Booker*. At the same time, the rate of below-guideline sentences has increased significantly, with judge-imposed downward variances increasing from 11.7% in 2006 to 20.7% in the 4th Quarter of FY 2013.

Figure 1



These within-guidelines and variance rates for drug offenses are in sharp contrast to the overall rates for all federal offenses, as depicted in Figure 2 below. In contrast to a 51.2% overall within-guidelines rate, a mere 38.8% of drug sentences now are imposed within the guidelines.

Figure 2

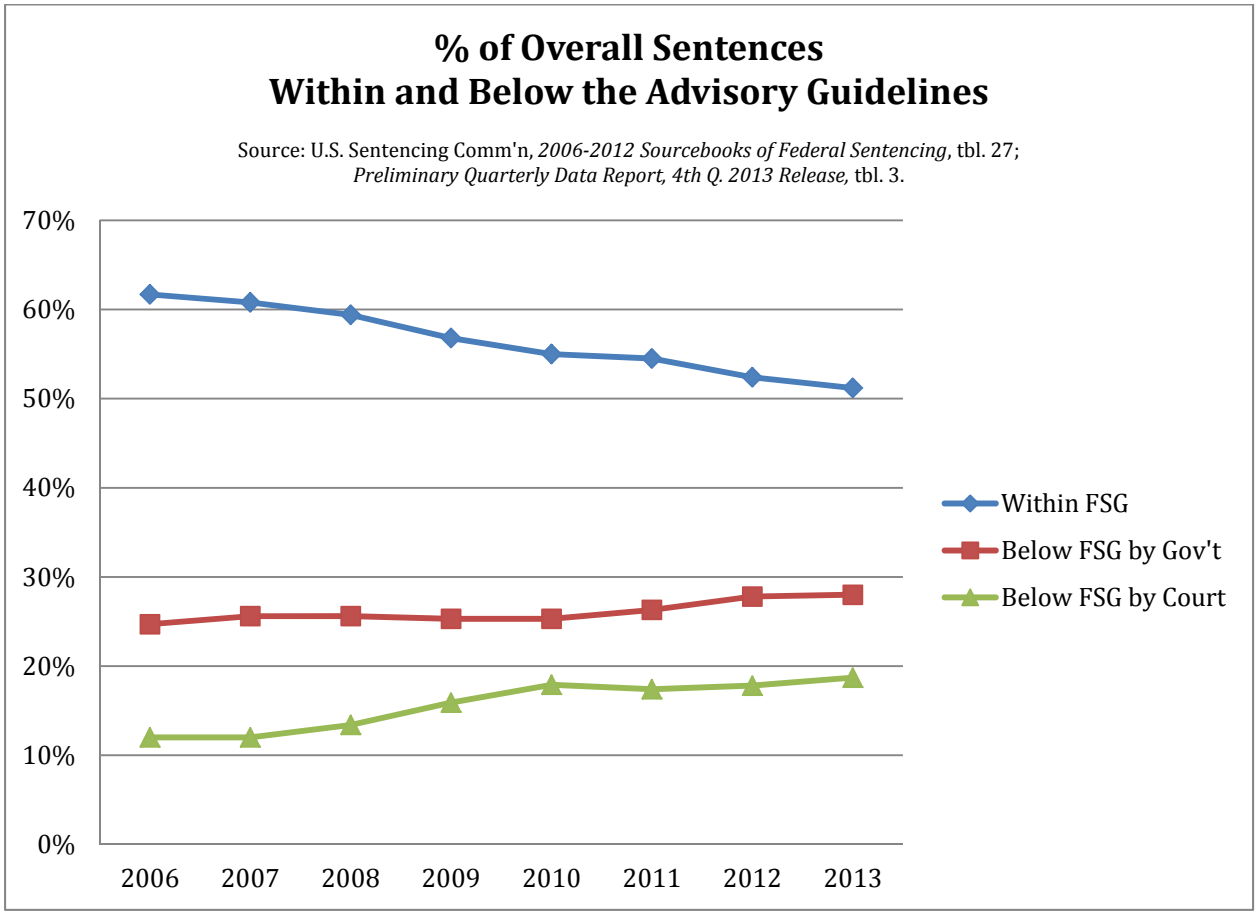
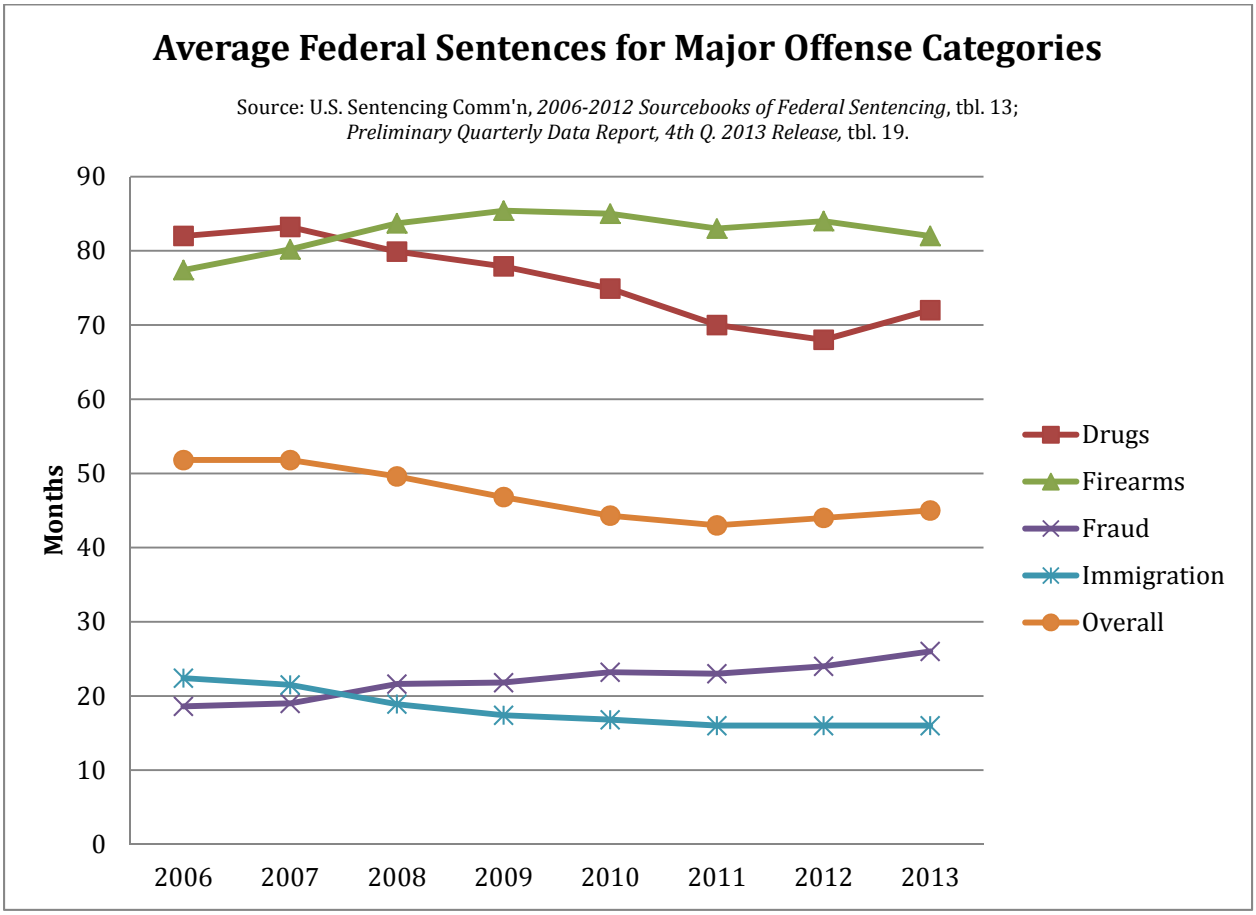


Figure 3 illustrates the average sentence-length imposed among major offense categories since 2006. Not surprisingly, in light of the rates just discussed for drug sentences, the average sentences imposed under USSG §2D1.1 generally have decreased from 82 months in 2006 to 72 months in the 4th Quarter of FY 2013. Given these statistics, the proposed 2-level reduction is necessary to better reflect an appropriate sentence for those who commit drug trafficking offenses.

Figure 3



Finally, it should be noted that the PAG is unaware of any empirical studies indicating that slightly lower sentences for drug trafficking offenses would cause increased rates of recidivism. Indeed, longer prison sentences may actually contribute to recidivism while shorter terms of imprisonment or use of alternatives can and often do contribute to lowering rates of recidivism. As Judge Weinstein observed in *United States v. Bannister*, 786 F. Supp. 2d 617, 658 (E.D.N.Y. 2011), "[e]xcept for the incapacitation effect of incarceration, there is little apparent correlation between recidivism and the length of imprisonment. Those who serve five years or less in prison have rearrest rates of 63 to 68 percent, with no discernible pattern relating to sentence length." (citing Patrick A. Langan & David J. Levin, Bureau of Justice Stat., *Dep't of Justice, Recidivism of Prisoners Released in 1994* 17 (2002), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (reporting results for prisoners released since 1994)); *see also* Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) (noting that sanctions can inhibit reintegration and rehabilitation and can increase recidivism); Elena Saxonhouse, Note, *Unequal Protection:*

Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination, 56 STAN. L. REV. 1597, 1611 (2004).

As the Commission is well aware, lengthy terms of imprisonment also exacerbate the population problem that has confronted the Bureau of Prisons for a generation. Figure 4 is a snapshot from the Bureau of Prison's website illustrating that drug offenders comprise just over half of its total population—a population now at 138% of rated capacity. There can be no doubt that by easing prison overpopulation, the proposed amendment would address the Commission's intent to "consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." 78 FR 51820 (August 21, 2013).

Figure 4

Offenses

Updated Monthly -- Last Updated: Saturday, 25 January 2014
Please Note: Data is limited due to the availability of offense-specific information.

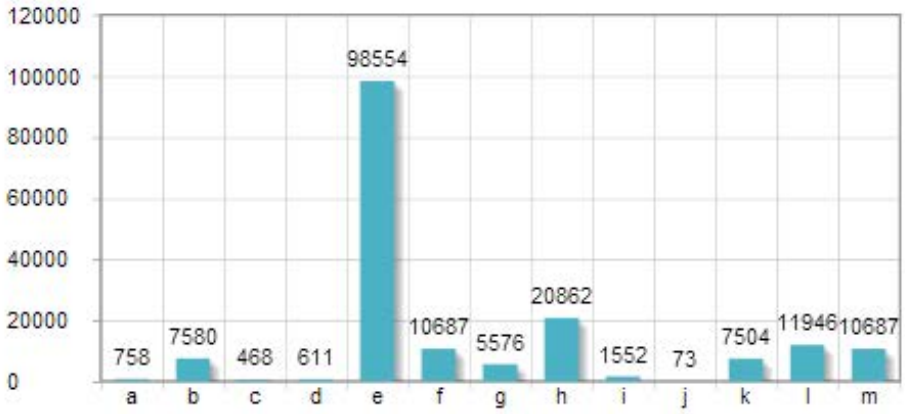


Chart Label	Offense	# of Inmates	% of Inmates
a	Banking and Insurance, Counterfeit, Embezzlement	758	0.4%
b	Burglary, Larceny, Property Offenses	7,580	3.9%
c	Continuing Criminal Enterprise	468	0.2%
d	Courts or Corrections	611	0.3
e	Drug Offenses	98,554	50.1%
f	Extortion, Fraud, Bribery	10,687	5.4%
g	Homicide, Aggravated Assault, and Kidnapping Offenses	5,576	2.8%
h	Immigration	20,862	10.6%
i	Miscellaneous	1,552	0.8%
j	National Security	73	0.0%
k	Robbery	7,504	3.8%
l	Sex Offenses	11,946	6.1%
m	Weapons, Explosives, Arson	10,687	5.4

C. Any Reduction in the Drug Quantity Table Should be Accompanied by a Mitigating Role Tiered Reduction

Given an amendment to the Drug Quantity Table, the Commission also asks if there are any circumstances that should be wholly or partially excluded from such an amendment and what conforming changes should be made to other provisions of the Guidelines Manual. As an initial matter, the PAG does not believe that there are any circumstances that should be wholly or partially excluded from an amendment to the Drug Quantity Table. However, in applying an amendment to other portions of the Guidelines Manual, the PAG believes that the 2-level reduction should also apply to the mitigating role tiered reduction outlined in §2D1.1(a)(5). This provision currently provides that if the defendant receives an adjustment under §3B1.2 for mitigating role and the base offense level is 32, reduce by 2 levels; if the base offense level is 34 or 36, reduce by 3 levels; and if the base offense level is 38, reduce by 4 levels. With the proposed 2-level across-the-table decrease, the reduction in §2D1.1(a)(5) should apply to defendants with a base offense level starting at level 30, rather than 32 (with similar adjustments for the higher base offense levels). Such a reduction is consistent with the intent, under the proposed amendment, to reduce the impact of drug quantity across the board, and it would address concomitant concerns over the increasing costs of incarceration and prison overcrowding. As there are very few reductions available to address mitigating circumstances in drug cases, the PAG believes that including §2D1.1(a)(5) in the proposed amendment would be a positive step toward fully accounting for the differences in culpability across drug offenders.

II. No Changes Should Be Made Regarding Drug Productions Operations

The Commission also requested comment on whether the guidelines for offenses involving drug production operations provide penalties that adequately account for the environmental and other harm caused by the offenses. The PAG believes that the guidelines adequately address all environmental and other harms caused by drug production operations. In keeping with the Commission's stated intention to consider the costs of incarceration and the overcapacity of prisons, the PAG believes that no changes should be made to increase the punishment for drug production operations, especially in the absence of evidence suggesting change is warranted.

Conclusion

On behalf of the PAG, thank you again for the opportunity to provide our perspective on these very important issues.