Written Statement of Lisa Hay

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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Acceptance of Responsibility and *Setser*

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My name is Lisa Hay and I am an Assistant Federal Public Defender in the District of Oregon. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding two of the Commission's proposed amendments: Acceptance of Responsibility and *Setser*.

I. Proposed Amendment: Acceptance of Responsibility

As a result of circuit conflicts regarding the proper interpretation of subsection (b) of § 3E1.1 as amended by Congress in 2003, the Commission proposes amending the commentary to § 3E1.1 and requests comment on two circuit splits.

First, the Commission seeks comment on its proposed amendment to Application Note 6, which adopts the approach of one circuit to suggest that a district court may deny the third-level reduction for acceptance of responsibility under subsection (b) when the government has determined that the defendant's timely guilty plea permitted it to avoid preparing for trial and has filed the requisite motion requesting the reduction. The Commission also requests comment on whether it should adopt a different approach.

Second, the Commission asks whether—and if so, how—it should resolve the circuit conflict regarding whether the government may refrain from making a motion for a third level reduction under § 3E1.1(b), even if the defendant has timely notified the government of an intent to plead guilty, thereby permitting the government to conserve resources by avoiding preparation for trial. 78 Fed. Reg. 4197, 4206-07 (Jan.18, 2013).

Because the vast majority of federal prosecutions end in guilty pleas, the acceptance of responsibility guideline has an effect in almost every case. In fiscal year 2011, § 3E1.1 applied in 95.1 percent of all guideline calculations, affecting 72,529 defendants. *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl.19 (2011). Subsection (b) was applied in nearly 61 percent of cases, affecting 46,350 defendants. *Id.* Consistent application and interpretation of the guideline within and among circuits is critical to ensure equal treatment of defendants and to foster predictability in sentencing.

For the reasons that follow, the Federal Defenders oppose the Commission's proposed commentary and instead urge the Commission to clarify that the reduction in subsection (b) applies whenever (1) the court determines that the defendant qualifies for the two-level reduction under subsection (a); (2) the defendant's offense level before the two-level reduction is 16 or greater; and (3) the government has made a formal motion containing the statement required by the guideline. The Defenders further urge the Commission to clarify that the government is required to move for this additional one-level reduction if the defendant timely notifies authorities of his intention to plead guilty, thereby permitting the government to avoid expending resources on preparing for trial.

These clarifications are consistent with the structure and syntax of §3E1.1(b) as interpreted by every court of appeals before 2003—and which Congress left intact. By reaffirming the link between the third-level reduction and the preservation of trial resources that results from a defendant's timely decision to plead guilty, these clarifications will appropriately check prosecutors' use of their authority under subsection (b) to obtain waivers of constitutional and statutory rights, or to withhold the third-level reduction because the defendant exercised such rights, in a manner contrary to the guideline and the statute upon which it is based. The requested clarifications will not alter or amend the amendments made by Congress.

A. Background

At the guidelines' inception, the Commission's data showed that defendants who pled not guilty and were convicted at trial received sentences that averaged about 30 to 40 percent higher than defendants who pled guilty.[1] This suggested that some differential in sentences as an incentive for pleading guilty would be helpful to the government and defendants and consistent with past practice. In considering the two-level reduction for accepting responsibility, the original Commission was concerned about the fine line between providing incentives to induce defendants to plead guilty and unconstitutionally punishing those who go to trial. The Commission believed that it had resolved the problem by placing the decision in the hands of the sentencing judge, and by making clear that the reduction was not automatically precluded if the defendant went to trial and did not automatically apply if the defendant pled guilty. *See* USSG § 3E1.1 (1987); U.S. Sent'g Comm'n, Public Hearing on Plea Agreements, at 3-4 (Sept. 23, 1986) (recognizing that the sentencing judge's discretion provided the critical element to avoid constitutional difficulties).[2]

The two-level adjustment originally provided under the guideline resulted in average reductions of just 25 percent, significantly less than was typical of past practice. Research conducted by the Commission showed that prosecutors were fashioning incentives for plea bargains, for example, through charge and fact bargaining, in addition to the incentives provided by the guidelines.[3] At the same time, the Judicial Conference recommended that the Commission increase the amount of reduction available under the guideline. *See* Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines 1991, at 10, *reprinted in* U.S. Sent'g Comm'n, *Acceptance of Responsibility Working Group Report*, Appendix (1992). It recommended that the Commission consider "increasing the two-level adjustment for acceptance of responsibility and also give

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[1] William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 191 (1988).

[2] *Id.* at 190-92 & n.64.

[3] Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 535, 557 (1992).

consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants who in anticipation of long periods of incarceration may without adequate incentive go to trial." *Id.* at App'x 10-11.

In 1992, the Commission amended § 3E1.1 to allow for an additional one-level reduction if specified conditions were met. Courts were instructed under new subsection (b) to "decrease the offense level by 1 additional level" if:

(1) the defendant qualified for the 2-level reduction under subsection (a) for "clearly demonstrating acceptance or responsibility";

(2) the offense level before the 2-level reduction under subsection (a) was 16 or greater; and

(3) the "defendant has assisted authorities in the investigation or prosecution" of his offense by either (a) "timely providing complete information to the government concerning his own involvement in the offense" or (b) "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently."

USSG § 3E1.1(b) (1992). The Commission also added background commentary stating that a defendant who has "taken one or more of the steps specified in subsection (b) . . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction." *Id.*; *see* USSG § 3E1.1 backg'd cmt.

In 2003, as part of the PROTECT Act, Congress directly amended subsection (b) by striking the two-pronged third condition and replacing it with the following single-pronged condition: The government has made a motion "stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." PROTECT Act, Pub. L. No. 108-21, § 410(g)(1) (2003). And it added a sentence to the end of Application Note 6 to state:

> Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.

Id. § 401(g)(2). Congress otherwise retained the structure of the guideline, which instructs courts to "decrease the offense level by 1 additional point" when all three conditions are met. And it retained the background commentary stating that a defendant "merit[s]" the additional level if he has "taken the steps specified in subsection (b)." USSG § 3E1.1 backg'd cmt. At the same time, Congress directed that the Commission may "at no time . . . alter or repeal the amendments" made by Congress to § 3E1.1. *Id.* § 401(j)(4). The Commission immediately

implemented these amendments by incorporating them in the guideline as written. USSG App. C, amend. 649 (Apr. 30, 2003).

As Defenders explained during the Commission's regional hearings in 2009, prosecutors in some districts have successfully invoked the government motion requirement under subsection (b) to obtain concessions well beyond timely guilty pleas and to impose a cost for the exercise of constitutional rights. This application of subsection (b) strays far from the terms of the guideline and the underlying statute, upsetting the Commission's resolution of the fine line between reward and potentially unconstitutional punishment, and creating hidden, unreviewable, and unwarranted disparity.[4] The practice is widespread and ill-advised, and for that reason, we address it first.

B. The Commission Should Clarify That the Government May Not Refuse To Move for the Third Level of Reduction If the Defendant Timely Notifies the Government of an Intent To Plead Guilty, Thereby Allowing the Government To Avoid Preparing for Trial.

Prosecutors routinely invoke the government motion requirement under subsection (b) to induce defendants to waive constitutional or statutory rights or to impose a cost for exercise of those rights, even though courts could not have conditioned the third level on the loss of these rights under the pre-2003 guideline and to do so now is likewise contrary to the current guideline. The guideline and the statute upon which it is based contemplate that the government must file the motion when the defendant spares the government the need to prepare for trial by giving timely notice of his intention to plead guilty. The Commission should clarify that the government's discretion under subsection (b) is not unfettered; it is limited by the specific terms of the guideline.

1. Routine misuse of the adjustment for purposes not intended by Congress or the Commission.

It is well-established that when prosecutors misuse their charging discretion or convert guideline adjustments into bargaining levers that have no relation to their intended purposes—and when judges are prevented from checking such practices—the fairness and proper functioning of plea negotiations is negatively affected.[5] The guideline system strives for honesty

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[4] *See* Statement of Alan Dubois & Nicole Kaplan, Public Hr'g Before the Sent'g Comm'n, Atlanta, Ga., at 32-33 (Feb. 10, 2009); Statement of Thomas W. Hillier III & Davina Chen, Public Hr'g Before the Sent'g Commission, Stanford, Calif., at 18 (May 27, 2009); Statement of Julia O'Connell, Public Hr'g Before the Sent'g Comm'n, Austin, Tex. at 16-17 (Nov. 19, 2009).

[5] *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines,* 81 Cal. L. Rev. 1471, 1476 (1993) (describing how, with plea bargaining unconstrained by judicial control in the mandatory guidelines era, prosecutors exercised a monopoly to control sentences, while using structural incentives to exploit their power, act in bad faith, or bargain in a discriminatory fashion); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 Am. Crim. L. Rev. 137 (1995) (describing how, during the mandatory guidelines era, the traditional adversarial system declined and was replaced by an "administrative" system dominated by the bureaucratic interests of the Department of Justice); Margareth Etienne, *The Declining Utility of the Right*

and transparency in sentencing, but this goal is thwarted when pleas reflect hidden negotiations or agendas that determine the guideline range. [6] When incentives intended for a limited purpose are converted by some prosecutors in some districts to other uses, unfairness and disparity in sentencing results.

The one-level adjustment under subsection (b) was intended by Congress and the Commission as an incentive to encourage defendants to give timely notice of their intention to plead guilty, in order to spare the government the cost of needlessly preparing for a trial that will not occur. Because the government is in the best position to know if in fact trial preparation was averted by the defendant's timely notice, Congress wrote a guideline delegating to the government the authority and responsibility to file a motion requesting the one-level adjustment. Prosecutors in some districts, however, misuse their responsibility under subsection (b), wielding it as an offensive tool to impose a cost on defendants for the filing of pretrial motions, sentencing challenges, appeals, or any other legal challenge that might require time or effort. Defendants who proceed with legal challenges despite contrary direction from a prosecutor will be denied the one-level reduction for acceptance of responsibility, if the case reaches sentencing. For example, based on a survey of Federal Public and Community Defenders, prosecutors have invoked their authority under subsection (b) to induce concessions by threatening to withhold, and to unfairly withhold, the third-level reduction for defendants who engage or would otherwise engage in a broad array of constitutionally or statutorily protected conduct:

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to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines, 92 Cal. L. Rev. 425, 429-30, 455-56, 468-70 (2004) (documenting negative effects of mandatory guidelines and mandatory minimums—with their structural transfer of control to prosecutors and chilling effect on defense advocacy—on the adversarial system); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 99-100 (2003) ("[T]ogether the Sentencing Guidelines and plea bargaining provide a dangerous mix that the judiciary has little power to check. . . . When plea bargaining takes place in the shadow of this regime, fewer defendants will take the risk of a trial. Instead, they will accept just about whatever bargain they can get from the prosecutor, as long as the ultimate deal leaves them better off than they would be going to trial."); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1425 (2008) (in the mandatory guidelines era, prosecutors were provided with "indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines"); Erik Luna, *The Curious Case of Corporate Criminality*, 46 Am. Crim. L. Rev. 1507, 1513 (2009) ("Today, it is scarcely debatable that prosecutors exercise vast and largely unchecked discretion at each stage of the criminal process. Likewise, most agree that this discretion is subject to outrageous abuses, due to the belligerent nature of American adversarialism, the politicization of the criminal justice system, and the self-interests of prosecutors, whose success and career prospects are often measured by the quantity and notoriety of their convictions."); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. L. J. Crim. L. 369, 373-90 (2009).

[6] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (2005) (documenting that the Department of Justice seeks harsher penalties to enhance their bargaining power and "make prosecutors' jobs easier," not because it believes the harsher penalty is appropriate for the crime).

- Refusing to agree to a broad waiver of the right to appeal
- Refusing to sign a plea agreement stipulating how the guidelines will apply
- Refusing to waive the right to collaterally attack conviction
- Refusing to agree to the truth of a stipulation that must be entered at or near the time of arraignment
- Filing or litigating a motion to suppress evidence
- Filing a motion challenging the voluntariness of a confession
- Litigating a discovery issue, resulting in the government having to redact documents
- Entering a conditional guilty plea in order to appeal a denial of a motion to suppress
- Objecting to a sentencing enhancement
- Requiring the government to prepare for a hearing to resolve contested sentencing issues
- Refusing to waive the right to present evidence at sentencing
- Refusing to waive a challenge to a guideline computation
- Failure to agree to victim restitution in a child pornography case
- Violating state probation by picking up a new misdemeanor charge while on pretrial release
- Not pleading guilty until after indictment, thereby requiring the government to go to the grand jury with a single witness
- Requesting laboratory testing of alleged controlled substances
- Requiring the government to reweigh drug evidence at an independent laboratory

The government's practice has had a pervasive and chilling effect on pretrial motion practice and appeals. When a tax is imposed on motions to suppress, motions to compel discovery, or motions for a hearing on the voluntariness of a confession, constitutional violations remain hidden from judicial scrutiny. When appeals are too costly for a defendant, reasoned development of the law cannot take place—leaving legal errors uncorrected and legal questions unresolved.

Of course, not all prosecutors believe that their authority under subsection (b) can or should be exercised in this manner. Instead, government practice varies across and within districts, and even among similar cases in the same districts. This lack of a consistent interpretation and application of the guideline creates hidden and unwarranted disparities. For example, in the District of Arizona, the government has announced as a general policy that it will not move for the third-level reduction unless the defendant waives appellate rights. In the Eastern District of Oklahoma, the policy of the U.S. Attorney's office is to refuse to file a motion for the third level if the defendant files any pretrial motion requiring a hearing. In the District of Utah, it is "a matter of policy for [the U.S. Attorney's] office not to move for § 3E1.1(b) departures if a defendant's guilty plea requires further expenditure of government resources" of any kind, "such as reweighing" drugs. *See United States v. Blanco*, 466 F.3d 916, 918 (10th Cir. 2006) (internal quotation marks omitted). In other districts, prosecutors do not threaten to withhold the motion for the third-level reduction if the defendant litigates a suppression motion, refuses to waive appellate rights, or challenges evidence, and the motion is routinely made and granted despite significant pre-plea litigation. In some districts, such as the Middle District of Tennessee, where prevailing law permits a prosecutor to refuse to file the motion when the

defendant litigates a suppression issue, prosecutors generally do not exercise or threaten to exercise that power, though a few do on rare occasions. In one case in that district in which the prosecutor actually withheld the motion because the defendant litigated a clearly nonfrivolous suppression issue, the district court did not award the third level, noted the unfairness of the government's approach, and varied downward to a sentence of probation by relying on 18 U.S.C. § 3553(a).

In short, the government's use of its authority under subsection (b) is not governed by a uniform and predictable policy tied to the specific interest recognized by the guideline, but by hidden and disparate forces tied to district culture and the bargaining decisions of individual prosecutors. While some district courts may exercise their discretion to remedy what they see as disparate treatment by granting a variance under § 3553(a), many do not, leading to further disparity.

2. The law before the 2003 amendment

Before Congress amended § 3E1.1(b) in 2003, every court of appeals read the operative clause of § 3E1.1 ("decrease the offense level by 1 additional level") as mandatory once the court determined that the conditions were met. Thus, once the court found that the defendant had timely notified the authorities of his intention to plead guilty, it had no discretion to deny the additional point. In the leading case, the Fifth Circuit carefully parsed § 3E1.1 and its background commentary and determined that its final clause is written in the "imperative," allowing the district court no discretion to deny the third point if the conditions were met. *See United States v. Tello*, 9 F.3d 1119, 1128 (5th Cir. 1993) ("The final clause of [§ 3E1.1(b)] eschews any court discretion to deny the reduction. That imperative clause *directs* the sentencing court to 'decrease the offense level by 1 additional level,' once all the essential elements and steps and facets of the tripartite test of subparagraph (b) are found to exist.") (emphasis in original); *id.* at 1126 (the background commentary likewise informs the court that "a defendant who has satisfied all three elements of subsection (b)'s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction").

All other courts of appeals to consider the question reached the same conclusion. *See, e.g.*, *United States v. Talladino*, 38 F.3d 1255, 1264 (1st Cir. 1994) ("Nothing in the language of [] § 3E1.1 makes any reference, veiled or otherwise, to judicial power to withhold the one-level reduction . . . . The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied."); *United States v. Townsend*, 73 F.3d 747, 755 (7th Cir. 1996) ("The guideline directs rather than allows the sentencing court to reduce the defendant's offense level if the qualifying conditions are met. . . .The language of § 3E1.1 is mandatory, not permissive."); *United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999) ("If the sentencing court finds that the defendant accepted responsibility for his or her offense and entered a timely guilty plea, then the defendant is automatically entitled to the full three-level reduction. The language of § 3E1.1(b)(2) is mandatory; when all of its conditions are met, the court has no discretion to deny the extra one-level reduction."); *United States v. Savin*, 349 F.3d 27, 38 (2d Cir. 2003) ("The logical structure of the Guideline ('if A, then B') clearly commands that a definite result . . . must follow the occurrence of a stated conditional event."); *United States v. Price*, 409 F.3d 436, 443-44 (D.C. Cir. 2005) (once the stated conditions were met, the

plain language of § 3E1.1 provided that the defendant was "entitled" to the third level of reduction); *United States v. Marquez*, 337 F.3d 1203, 1212-13 (10th Cir. 2003) (where defendant timely notified the government of his intention to plead guilty, defendant was "entitled" to the third level of reduction); *United States v. Johnson*, 581 F.3d 994, 1011 (9th Cir. 2009) (Smith, J. concurring) (recognizing that under the pre-2003 guideline, once a defendant's plea satisfied the "pertinent plain terms" of subsection (b), "this determination would have ended our inquiry, and [the defendant] would have been entitled to the downward adjustment").

The operative inquiry was whether the defendant's notice of his intent to plead guilty permitted the government to avoid preparing for trial and the court to schedule its calendar efficiently. USSG § 3E1.1 cmt. (n.6) (2002). Thus, for example, courts of appeals held that it was error for a district court to deny the reduction where the defendant timely pled guilty but the defendant litigated a motion to suppress. *See, e.g.*, *United States v. Price*, 409 F.3d 436, 443-44 (D.C. Cir. 2005) ("While the Government did have to prepare for a suppression hearing, the Government does not dispute that it never had to prepare for trial."); *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003) ("[P]reparation for a motion to suppress is not the same as preparation for a trial. Even where, as here, there is substantial overlap between the issues that will be raised at the suppression hearing and those that will be raised at trial, preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples."); *United States v. Vance*, 62 F.3d 1152, 1157 (1995) (holding that a defendant's motion to suppress evidence is not a valid reason for refusing to grant the third level). In *United States v. Marroquin*, 136 F.3d 220 (1st Cir. 1998), the First Circuit held that a defendant who filed eight "appropriate" pre-trial motions, including a motion to suppress and a motion to sever, which required the government to inspect evidence and do research, was entitled to the third level of reduction. *Id.* at 225 (no evidence government was required to prepare for trial).

These courts recognized that defendants may not be punished for acting to protect their constitutional rights. *See United States v. Kimple*, 27 F.3d 1409 (9th Cir. 1994) (if the guilty plea is otherwise timely, a district court may not deny the one-level adjustment under § 3E1.1(b) solely because the defendant has acted to protect his constitutional rights through the filing of pretrial motions); *id.* at 1413 ("The denial of a reduction under subsection (b)(2) is impermissible if it penalizes a defendant who has exercised his constitutional rights."). As the First Circuit put it, "the Guidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease [under § 3E1.1(b)(2)]." *Marroquin*, 136 F.3d at 225; *see also Marquez*, 337 F.3d 1203, 1211 (10th Cir. 2003) (observing that "[a] defendant, of course, is entitled to bring a motion to suppress to protect his or her constitutional rights" and agreeing that the guidelines do not force the defendant to forgo filing routine pre-trial motions in order to receive the third level of reduction).

Courts also held that it was error to deny the third level of reduction for other reasons not related to timeliness or the exercise of a constitutional right, such as when the defendant timely pled guilty but "falsely denied relevant conduct," *Townsend*, 73 F.3d at 750, 755; or obstructed justice in a manner that did not affect the timeliness determination, *e.g.*, *Tello*, 9 F.3d at 1128; *Talladino*, 38 F.3d at 1266; or allegedly escaped, not affecting any determination of timeliness, *United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir. 1997). And a district court had no

discretion to deny the third level where the defendant timely pled guilty but contested matters solely related to sentencing. *United States v. Cunningham*, 201 F.3d 20, 24 (1st Cir. 2000).

3. The 2003 amendment

When Congress amended the guideline in 2003, it changed only two relevant aspects of the existing guideline. First, it transferred the responsibility from the court to the government to determine whether the defendant met the condition for the third level. Second, it made a minor alteration in the condition itself with the underlined words: "the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting <u>the government and</u> the court to allocate <u>their</u> resources efficiently." Congress also added commentary stating that the government is to "determine whether the defendant has assisted authorities in a manner *that avoids preparing for trial*." USSG § 3E1.1 cmt. (n.6) (emphasis added). It left intact the background commentary stating that a defendant who has "taken the steps specified in subsection (b) . . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately *meriting* an additional reduction." USSG § 3E1.1 backg'd cmt. (emphasis added).

4. The current circuit split

The circuits have now split regarding the scope of the government's power to refuse to file a motion under subsection (b). Consistent with the established interpretation of the structure and syntax of the guideline before the 2003 amendment, the Second and Fourth Circuits have held that the government abuses its power if it withholds the motion after a defendant has "timely" notified authorities of his intention to plead guilty, and *by that means*, permitted the government to avoid preparing for trial and the government and the court to efficiently allocate their resources.

In *United States v. Lee*, 653 F.3d 170 (2d Cir. 2011), the Second Circuit held that "the government abuses its authority by refusing to move for a third point reduction under § 3E1.1(b) on the grounds that the defendant has invoked his right to a *Fatico* hearing" to resolve contested sentencing issues. *Id.* at 174-75. The Court determined that "the plain language of § 3E1.1(b) refers only to the prosecution resources saved when the defendant's timely guilty plea 'permit[s] the government to avoid preparing *for trial*." *Id.* at 174 (emphasis added).

In *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011), the Fourth Circuit held that the government may refuse to move for the additional reduction "only on the basis of an interest recognized by the guideline itself," which is whether the defendant has saved resources by relieving the government of preparing for trial. *Id.* at 346-47. As a result, the government abused its power when it did not contend that the defendant failed to timely plead guilty, but withheld the motion because the defendant refused to sign a plea agreement waiving his right to appeal. The court remanded the case for further proceedings, directing that "[i]f the Government cannot provide a valid reason for refusing to move for an additional one-level reduction under U.S.S.G. § 3E1.1(b) and continues to refuse to move for such a reduction, the district court should order the Government to file the motion." *Id.* at 350.

These courts hold that the power conferred on the government under subsection (b) continues to turn on the defendant's assistance to the government (and the court) in the form of a timely guilty plea and resources thereby saved, as plainly stated in the guideline, and does not include the power to "withhold a motion for a one-level reduction because the defendant has declined to do some other task to assist the Government." *Divens*, 650 F.3d at 348; *Lee*, 653 F.3d at 175 (quoting *Divens*). As the Second Circuit put it, for the government to withhold the motion because the defendant forced the government to prepare for a hearing on contested sentencing issues is "unlawful and grounds for reproach because it ignores the language of the guideline, its purpose, and the intent of Congress." *Lee*, 653 F.3d at 174 (internal quotation marks omitted).

In contrast, several other circuits have held that, just as with motions for substantial assistance under USSG § 5K1.1, the government enjoys nearly unfettered discretion and may refuse to file a motion under § 3E1.1(b) so long as its decision is rationally related to "any legitimate governmental interest" and is not animated by an unconstitutional motive. *See, e.g.*, *United States v. Collins*, 683 F.3d 697, 704-08 (6th Cir. 2012); *United States v. Deberry*, 576 F.3d 708 (7th Cir. 2009); *United States v. Johnson*, 581 F.3d 994, 1001 (9th Cir. 2009); *United States v. Beatty*, 538 F.3d 8, 14 (1st Cir. 2008); *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008); *United States v. Blanco*, 466 F.3d 916, 918-19 (10th Cir. 2006). In *Blanco*, for example, the Tenth Circuit upheld the government's refusal to move for the third level because it accommodated the defendant's request that drug evidence, including crack, be reweighed at an independent laboratory, in a case in which drug quantity could trigger a five-year mandatory minimum. 466 F.3d at 918-19. In *Newson*, 515 F.3d at 377, the Fifth Circuit upheld the government's refusal to move for the third level "solely because [the defendant] would not accept the appellate waiver provision in its proposed plea agreement." In *Johnson*, the Ninth Circuit held that, although the defendant had otherwise timely entered a conditional guilty plea, the government's allocation of resources for purposes of defending an appeal of a denial of a motion to suppress "is a rational basis for declining to move for the third reduction point." 581 F.3d at 1002.

In addition to relying on caselaw interpreting the government's power under § 5K1.1, these courts reason that Congress's 2003 amendment "materially altered § 3E1.1(b)" because it "expressly inserted consideration of the government's resources into the calculus" by adding that a defendant's timely guilty plea "thereby permit[s] *the government* . . . to allocate [its] resources efficiently." *Johnson*, 581 F.3d at 1005-06 (emphasis in original); *see also Collins*, 683 F.3d at 706. They reason that "if the government were *required* to move for the third-level reduction when the defendant enters a timely plea, thereby saving the government the expense of trial preparation, the amended language requiring that the government file a motion would be a nullity." *Beatty*, 538 F.3d at 15; *see also Johnson*, 581 F.3d at 1006 n.9; *Collins*, 683 F.3d at 706.

5. What the Commission should do

The Defenders urge the Commission to adopt the approach of the Second and Fourth Circuits by clarifying that the government may not refuse to move for the third level under subsection (b) when a defendant's timely notice of his intention to plead guilty permitted the government to avoid expending resources to prepare for trial. As the Fourth Circuit noted, a

statutory grant of discretion is "not a roving license to ignore the statutory text" but is instead a "direction to exercise discretion within defined statutory limits." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), *quoted in Divens*, 650 F.3d at 347. Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), and so is presumed to have known that, when it left unchanged the structure, syntax, and use of the imperative in subsection (b), it thereby incorporated the courts of appeals' limiting interpretation of the discretion granted by subsection (b), which did not permit a district court to deny the motion once it determined that the defendant had timely given notice of his intention to plead guilty, thus permitting the government to avoid preparing for trial and the court to allocate its resources efficiently. Thus, while Congress clearly transferred to the government the authority to decide *whether* the defendant has met the requirements under subsection (b), it transferred the authority as already interpreted by the courts of appeal, which required that it be exercised by reference to the specific terms and purpose of the guideline.

The fact that Congress added the consideration that the defendant's timely guilty plea has "thereby" permitted the government, in addition to the court, to allocate resources efficiently does not alter the analysis. As the Fourth Circuit recognized, "the syntax of the guideline dictates that the furtherance of the[] interests [of resource allocation and trial avoidance] must . . . derive from the same single source: the defendant's timely noti[fication of] authorities of his intention to enter a plea of guilty." *Divens*, 650 F.3d at 348 (alteration in the original). It is "by *that* means"—*i.e.*, the means of timely pleading guilty—that the defendant has assisted the government in avoiding preparing for trial and in allocating its resources efficiently. *Id.* (emphasis in original). A defendant who requires the government to prepare for a suppression hearing, prepare for a hearing on contested sentencing issues, or defend a conviction or sentence on appeal, has not required it to expend resources *preparing for trial*. *See Johnson*, 581 F.3d at 1011 ("[T]he only 'resources' that may be considered in gauging the defendant's satisfaction of the guideline are those resources devoted to trial preparation.") (Smith, J., concurring).

Moreover, circuit courts have erred in relying on an analogy to government discretion under § 5K1.1 as they interpreted the scope of § 3E1.1, because the terms and structure of § 3E1.1 and § 5K1.1 are materially distinguishable. Section 3E1.1 is a *guideline* that, by its terms and historical interpretation, mandates the third-level adjustment to the guideline calculation when the defendant has taken the requisite steps and the government has filed the requisite motion. Section 5K1.1 is a *policy statement* that gives the government wide discretion to decide whether to file a motion for a *departure* for substantial assistance, which the sentencing judge "may" grant. In commentary, the Commission states that a defendant's substantial assistance under § 5K1.1 "may justify" a sentence below the mandatory minimum; and in background commentary, the Commission states that "[l]atitude" is afforded to the sentencing judge. USSG § 5K1.1 cmt. (n.1) & backg'd cmt.

Rather than amend the commentary to § 3E1.1 to conform with the government's discretion under § 5K1.1 to decide whether to move for a departure for substantial assistance, Congress left unchanged the background commentary to § 3E1.1—which has no analogue under § 5K1.1—which states that a defendant who has taken the steps specified in subsection (b) "merit[s]" the reduction. At the same time, Congress inserted language in Application Note 6 making clear that the government's discretion is limited to determining "whether the defendant

has assisted authorities in a manner that avoids preparing for trial." *See Divens*, 650 F.3d at 346, 347. Under the guideline and its commentary as rendered by Congress, a defendant who has timely notified authorities of his intention to plead guilty and thereby relieved the government of expending resources in preparing for trial, has taken the only step specified in the guideline that is within his power to take, and thus "merit[s]" a reduction.

This reading does not render the motion requirement a "nullity." *Cf. Beatty*, 538 F.3d at 15. The government retains the discretion to determine *whether* the defendant's guilty plea permitted it to avoid trial preparation and its attendant expenditure of resources. As before the 2003 amendment, the question of timeliness is a factual determination to be made on a case-by-case basis, *see, e.g.*, *United States v. McConaghy*, 23 F.3d 351, 353 (11th Cir. 1994); USSG § 3E1.1(b) cmt. (n.6), and the government may well determine, as courts were previously empowered to do, that because it expended resources *preparing for trial*, it will not move for the third level.

Notably, the government itself has recognized that a defendant who challenges a legal issue but otherwise pleads guilty "before the commencement of trial"—including one who enters a conditional guilty plea in order to appeal the denial of a motion to suppress or other purely "legal" issue—may properly be viewed as having accepted responsibility. Statement of Paul L. Malony, Dep. Ass't Attorney Gen., Crim. Div., U.S. Dep't of Justice, Before the Sent'g Comm'n (Mar. 15, 1990) (addressing § 3E1.1). Indeed, it took the position that the conditional plea is the *proper vehicle* for accepting responsibility while preserving the right to challenge constitutional issues and avoiding trial. *Id.* ("[S]uch a defendant could have availed himself of the conditional plea and thereby have manifested an acceptance of responsibility for the acts charged, subject to the resolution of the legal issue."). *Id.* It recommended that the guideline "require the defendant to enter a plea or conditional plea . . . prior to the commencement of trial to be eligible for the guideline reduction based on acceptance of responsibility." *Id.*[7] While the government took this position in 1990 and in the context of asking the Commission to limit the application of the two-level adjustment only to those who evidence an intent to plead guilty before trial begins, it clearly recognized that the question whether a defendant has timely pled guilty is not measured by the fact that a defendant has litigated or plans to litigate a legal or factual issue before trial, at sentencing, or on appeal, or has entered a conditional guilty plea, but by whether the government has avoided trial. The later amendments by the Commission and Congress are entirely consistent with the government's previous position, while the current practice of some U.S. Attorney's Offices and some prosecutors is starkly inconsistent with it.

Finally, to require the government to adhere to the terms of the guideline will ensure that the incentive intended by Congress will work in a predictable and effective manner. Congress gave the government the power to "determine whether the defendant has assisted authorities in a manner that avoids preparing for trial" in order to ensure that the reduction was used as an

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[7] Again in 1992, when the government opposed amending the guidelines to explicitly provide the two-level reduction for a defendant who goes to trial only to preserve a legal or other issue not related to factual guilt, the government took the position that the proper avenue for a reduction for acceptance of responsibility is a conditional guilty plea. *See* Letter from Paul L. Maloney, Senior Counsel for Policy, U.S. Dep't of Justice, to Hon. William W. Wilkins, Jr., at 20 (Mar. 16, 1990) ("Such defendant should enter or at least seek to enter conditional plea . . . .").

incentive for early pleas and not for unrelated reasons. By providing that the third level "may only be granted upon a formal motion by the government," Congress meant only to ensure that the reduction would be granted if, and only if, doing so would achieve its intended purpose. Given the prevailing law at the time, Congress could not have meant to give the government *carte blanche* to refuse to move for the reduction even when the defendant timely pled guilty and saved it from expending resources preparing for trial.

To bring consistency and clarity back to the circuits' interpretations of this subsection, and consistent with the language and purpose of subsection (b), the Commission should clarify that if the defendant qualifies for a reduction under subsection (a) and has an offense level of 16 or greater before that reduction, and if the defendant timely notifies the government of an intent to plead guilty and thereby saves the government from expending resources on trial preparation, the government must file a motion for the third-level reduction under subsection (b). In the alternative, the Commission should invite district courts to depart downward by one level if the government has declined to move for the additional level but there is no evidence that the government was required to expend resources preparing for trial.

C. The Commission Should Clarify That, For Purposes of Correctly Calculating the Guideline Range, the Court Must Apply the Third Level of Reduction When the Defendant Qualifies for the Two-Level Reduction and the Government Has Filed the Requisite Motion with the Requisite Statement.

1. The law before the 2003 amendment

As set forth above, before Congress amended § 3E1.1(b) in 2003, every court of appeals read the operative clause of § 3E1.1 ("decrease the offense level by 1 additional level") as mandatory once the court determined that the conditions were met. In the leading case, *United States v. Tello*, 9 F.3d 1119 (5th Cir. 1993), the Fifth Circuit carefully examined the structure and syntax of the guideline and found that the final clause is in the "imperative" and "*directs* the sentencing court to 'decrease the offense level by 1 additional level,' once all the essential elements and steps and facets of the tripartite test of subparagraph (b) are found to exist."*Id.* at 1128 (emphasis in the original); *id.* at 1126 ("[A] defendant who has satisfied all three elements of subsection (b)'s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction"). All other courts of appeal followed suit.

2. The current circuit conflict

In 2010, the Fifth Circuit considered a case in which the defendant originally proceeded to trial and was found guilty by the jury, but the judgment of conviction was overturned because the jury selection was tainted by race-based preemptory challenges, in violation of the Due Process Clause of the Fifth Amendment. *United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008). On remand, the government charged the defendant with a lesser offense, and the defendant pled guilty pursuant to a written plea agreement. *United States v. Williamson*, 598 F.3d 227, 228 (5th Cir. 2010). The government moved for the third level of reduction, based on its determination that the defendant had permitted it to avoid preparing for retrial and thereby save resources. *Id.* The district court refused to apply the third level of reduction because the

case initially went to trial and "it would not have taken many resources to prepare for a retrial." *Id.* at 230.

The Fifth Circuit affirmed, holding that, under subsection (b) as amended by Congress, the district court has the discretionary power to deny the third level of reduction even when all three conditions set forth in the guideline are met. *Id.* at 229-30. The Fifth Circuit did not rely on the language of the guideline itself, which it curiously described as an "isolated passage" and "not a model of clarity." Nor did the Fifth Circuit acknowledge or address its own earlier analysis of the imperative structure of the guideline in *Tello*. Instead, it relied primarily on the fact that there is "no additional language [in the guideline] precluding a role for the court" in making the determination of timeliness. *Id.* at 229. It further relied on the language Congress added to Application Note 6, which states that the third level of reduction "*may* only be granted upon formal motion of the government" (emphasis added), describing it as "permissive" and indicative of the court's retained discretion to withhold the reduction. *Id.* And it relied on the absence of any language limiting the reach of Application Note 5, which refers to the deference to be accorded to the court's determination whether the defendant has accepted responsibility, which the court admitted might arguably be "more applicable to" subsection (a). *Id.*

In 2012, the Seventh Circuit considered the same question and came to the opposite conclusion. It held that once the sentencing court has determined that the first two conditions are met and the government has made the required motion, the additional level of reduction is not discretionary with the court, but must be awarded as part of the correct calculation of the applicable guideline range. *United States v. Mount,* 675 F.3d 1052 (7th Cir. 2012). It relied on the fact that Congress's 2003 amendment "left intact" the "command to 'decrease the offense level by 1 additional level' if all the subsection (b) conditions were met." *Id.* at 1056-57. It noted that Congress itself chose to reaffirm this operative command, and that its interpretation was consistent with the universal interpretation of § 3E1.1(b) before the 2003 amendment, including the Fifth Circuit's, and consistent with the universal interpretation of the analogous obstruction of justice enhancement at § 3C1.1, "which tells sentencing courts to 'increase the offense level by 2 levels' if the criteria for finding obstruction of justice are met." *Id.* at 1057. It found that Application Notes 5 and 6 were "inconclusive at best," and thus not controlling. *Id.* The Seventh Circuit emphasized that the district court's lack of discretion under subsection (b) is strictly a matter of correctly calculating the guideline range, and that the sentencing court otherwise has discretion under § 3553(a) to "take proper account of the sentencing considerations outlined in § 3553(a)" and to "choose a proper sentence." *Id.* at 1055, 1058, 1059.

3. What the Commission should do

The Commission proposes to adopt the Fifth Circuit's approach by adding a sentence to the end of Application Note 6 to suggest that the district court may deny the government's motion and refuse to award the third level of reduction if the court determines that the condition set forth in subsection (b)—which the government has determined were met—were not met. Under the proposed amendment, the court "may grant" the government's motion if the court "determines that the defendant . . . timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." 78 Fed. Reg. 4197, 4207 (Jan.

18, 2013). The Commission also requests comment on whether it should resolve this conflict in a different manner. We think it should, and that it should adopt the Seventh Circuit's approach.

The proposed amendment to Application Note 6 (and the Fifth Circuit's approach) is inconsistent with the plain language of the guideline itself. As before the 2003 amendment, and now as written by Congress, subsection (b) unambiguously instructs the sentencing court to "decrease the offense level by 1 additional point" when the court determines that the defendant qualifies under subsection (a), the offense level is 16 or greater, and the government makes the motion under subsection (b). Congress has directed that the third condition is met once the government "state[s]" by formal motion "that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." By its terms, subsection (b) leaves no room for the court to refuse to award the third level of reduction when the first two conditions are met and the government has made the requisite motion "stating" the requisite conditions.

Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), so it is presumed to have been aware of prevailing law regarding the non-discretionary nature of the final clause—"decrease the offense level by 1 additional level"—once the conditions are met. As the Seventh Circuit recognized, *see Mount*, 675 F.3d at 1056-57, Congress did not amend the final clause, but affirmatively retained it, and thus incorporated the prevailing law regarding its non-discretionary nature for purposes of calculating the guideline range. And although the Seventh Circuit suggested that it "would defer to the application notes to the guideline if they shed some light on this," *Mount*, 675 F.3d at 1057, guideline commentary is authoritative only if it is not "inconsistent with, or a plainly erroneous reading of" the guideline and does not violate a statute. *See Stinson v. United States*, 508 U.S. 36, 38, 45, 47 (1993) (commentary that is inconsistent with a guideline or statute is invalid). Because the Commission's proposed commentary is inconsistent with the guideline as written by Congress, it would not control the application of § 3E1.1(b) and thus would not efficiently resolve the circuit conflict.

The Commission provides no reason for adopting the Fifth Circuit's approach, which ignores the text of the guideline, its history, and the Fifth Circuit's own previous analysis of the identical guideline structure. *See Mount*, 675 F.3d at 1058 (noting that the Fifth Circuit's analysis is "in considerable tension with other cases from that circuit"). In addition, encouraging judges to deny the third level when the government has made the motion would undermine Congress's intent for the incentive to work in a predictable and effective manner. If defendants come to doubt that their timely plea of guilty will result in an additional one-level reduction, the anticipated reward of a timely plea may be outweighed for some defendants by the hoped-for benefits of delay.

If the Commission believes as a matter of policy, as it did at the guidelines' inception, that judges should be the final arbiter of whether the defendant has met the criteria for timeliness under subsection (b), and if the Commission would prefer this power be exercised within the framework of the guidelines, it should ask Congress to remove the government motion

requirement. Meanwhile, the Commission should reject the Fifth Circuit's approach and adopt the Seventh Circuit's approach by clarifying that Application Note 5 applies only to the court's determination whether to grant the two levels under subsection (a), and amending Application Note 6 to clarify that the third level of reduction applies when all three conditions are met.

D. Recommendations

For the reasons stated above, we urge the Commission to amend the commentary to add the following clarifying language (suggested changes in *italics*):

> Application Note 6
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> * * *
>
> Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108-21. *If the defendant timely notifies authorities of his intention to plead guilty and thereby permits the government to avoid preparing for trial, the government shall make such formal motion. Upon the government's motion stating that the defendant qualifies for the additional level as required by subsection (b), and if the court has determined that the defendant qualifies for the two-level decrease under subsection (a) and that the defendant's offense level before the two-level reduction is 16 or greater, the court shall decrease the offense level by one additional level.*

II. Proposed Amendment: *Setser*

The Commission proposes amending the language of USSG §5G1.3 to recommend that federal district court judges treat anticipated terms of imprisonment as they do undischarged terms of imprisonment. Thus, the proposed amendment recommends that a district court order the instant sentence to run concurrently with an anticipated term of imprisonment where the conduct underlying the anticipated sentence is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level. When the conduct underlying an anticipated sentence is not relevant conduct that increased the offense level, the proposed amendment recommends that the district court order the instant sentence to run concurrently, partially concurrently, or consecutively to the anticipated term of imprisonment.

This proposed amendment states that it responds to the Supreme Court's decision in *Setser v. United States*, 132 S. Ct. 1463 (2012). In *Setser,* the Court held that the decision whether a federal sentence is to be served consecutively to or concurrently with a state sentence that has not yet been imposed is a judicial function at sentencing, and not a decision for the Bureau of Prisons ("BOP"). *Setser*, 132 S. Ct. at 1471 n.5 ("[W]e are simply left with the question whether judges or the Bureau of Prisons is responsible for [yet-to-be-imposed sentences]. For the reasons we have given, we think it is judges."). Thus, at sentencing, federal district courts have the authority to order that the instant federal sentence be served consecutively

to, or concurrently with, a state sentence that has not yet been imposed. *Id.* at 1468, 1470, 1473. Importantly, simply because a federal district court has the authority to so order, does not mean that it must, or that it should. Instead, "a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information, and may forbear, but in other situations, that will not be the case." *Id.* at 1472 n.6.

The Court's holding turned on its interpretation of two statutes, 18 U.S.C §§ 3584 and 3621(b). Section 5G1.3 of the sentencing guidelines was not at issue in the case. Thus, there is no need for the Commission to amend the guideline to respond to *Setser.* Federal courts have signaled no desire or need for any guidance from the guidelines on anticipated, but yet-to-be-imposed state sentences. The proposed amendment ignores critical aspects of *Setser*, and reaches far beyond its holding. In so doing, the proposed amendment will only complicate an already confusing area of sentencing,[8] and inject, rather than relieve, unwarranted disparity.[9] For these reasons, and others discussed below, the Defenders oppose the proposed amendment.

A. The Proposed Amendment Injects Unnecessary Complexity and May Result In Unwarranted Disparity Because it Fails to Acknowledge a Critical Component of *Setser*.

The proposed amendment requires a district court in every case where there is an anticipated term of imprisonment to determine whether the sentence for the instant offense will run concurrently with or consecutively to that anticipated sentence. In so doing, the proposed amendment fails to incorporate forbearance, even though this is a critical component of the decision in *Setser*.[10] As a result, the proposed amendment adds unnecessary complexity to the guidelines, and may increase unwarranted disparity between sentences.

In *Setser*, the Court specifically advised that "a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a

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[8] In a memorandum detailing how the BOP computes federal sentences when a defendant is under the primary custodial jurisdiction of state authorities, Regional Counsel for the BOP described this as "probably the single most confusing and least understood sentencing issue in the Federal system." Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction*, at 1 (July 7, 2011), http://www.bop.gov/news/ifss.pdf.

[9] Unwarranted disparity occurs both when there is "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases omitted).

[10] Both the majority and the dissent in *Setser* endorse forbearance. The dissent would have it be the only option because it does not read the statute to authorize anything else. *Setser*, 132 S. Ct. at 1474 (Breyer, J., dissenting). The dissent's interpretation of the statute is based in part on the practical reality that federal district courts typically lack sufficient information about anticipated state court sentences, and that premature rulings risk mistakes that could lead to sentencing disparity. *Id.* at 1476-77 (Breyer, J. dissenting).

district court may have inadequate information and may forbear." *Setser*, 132 S. Ct. at 1472 n.6. Although "nothing in the Sentencing Reform Act, or in any other provision of law… foreclose[s]" a district court from ordering that a sentence run concurrently with or consecutively to an anticipated state court sentence, *id.* at 1468, district court judges are not required to exercise this power in every case.[11] Under *Setser*, a federal district court may, but need not, and in some instances should not, enter an order regarding the anticipated state sentence.[12]

The Commission's proposed amendment to §5G1.3 breaks from *Setser*, and recommends that district courts make a decision in *every* case about whether the federal sentence should be served concurrently with or consecutively to an anticipated state sentence. The proposed amendment makes it an either/or proposition and excludes the important option of forbearance. This is inconsistent with *Setser* and a grave mistake.

There is good reason for forbearance in some circumstances. One "fact about the world" is that "the initial sentencing judge typically lacks important sentencing-related information about a second sentence that has not yet been imposed." *Id.* at 1477 (Breyer, J., dissenting).[13] This is particularly true because the term "anticipated term of imprisonment" is broad enough to apply where there has not yet been a conviction in state court.[14] In *Setser*, for example, at the time of the federal sentencing, Mr. Setser had not yet pled guilty to the pending state drug charges, and the state had not yet revoked his probation. When a defendant's conviction is not certain, or when it is unclear "what factors the state court w[ill] use in sentencing him," the federal court may decide that "an opinion on whether the sentences [a]re to be concurrent or

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[11] *See*, *e.g.*, *Hudson v. United States*, 2012 WL 3257522, *2 (N.D. Ind., Aug. 7, 2012) (acknowledging forbearance is an option under *Setser*); *Kirk v. United States*, 2012 WL 5837588, *3 (W.D. Pa., Nov. 16, 2012) ("Even now, assuming the power to order a federal sentence to run concurrently or consecutively with a not-yet- imposed state sentence does lie within the court's discretion following *Setser*, we find no authority *requiring* the exercise of such power.").

[12] This does not mean that the decision on whether the sentences will be served concurrently or consecutively will be left to the BOP. That would be contrary to *Setser*. The core of *Setser* is that judges, not the BOP, decide whether the sentences they impose run consecutively to or concurrently with other sentences. When a federal court makes the decision to forbear, it does so knowing that the state court, which will have the benefit of "all of the information before it when it acts," *Setser*, 132 S. Ct. at 1471, could order the sentence to run consecutively to or concurrently with the federal sentence. If neither court specifies the relationship between the two sentences, the statute provides the default rules. *See* 18 U.S.C. § 3584(a).

[13] The majority and dissent in *Setser* both agree that there will be times when the federal district court lacks sufficient information to make an intelligent decision. On this issue the only disagreement appears to be regarding the frequency with which this will occur. While the dissent believes federal courts will "normally", "typically", and "often" lack sufficient information, the majority takes a more neutral position on frequency, noting that in "some situations" the courts will lack sufficient information and in "other situations, that will not be the case." *Compare Setser*, 132 S. Ct. at 1476, 1477 (Breyer, J., dissenting) *with id.* at 1472 n.6.

[14] It is possible some may argue the term even applies when there has not yet been an arrest. Should that occur, Defenders anticipate litigation regarding the parameters of the term.

consecutive [i]s premature." *See*, *e.g.*, *Hudson v. United States*, 2012 WL 3257522, *2 (N.D. Ind., Aug. 7, 2012) (no error where the "court had inadequate information and forbore.").

The list of questions that cannot be answered, and information that will not be available, at the initial federal sentencing about the anticipated state sentence, is long. A few examples include:

- Did the defendant cooperate?
- Is the defendant guilty of the charges pending in state court?
- What if the defendant is charged in state court with 20 counts at the time of the federal sentencing, but eventually only pleads to, or is convicted of, one of those counts or a lesser included offense? Of the range of charged conduct, which conduct is the basis of the conviction and sentence?
- What if the state adjudication is deferred?[15]
- Did the defendant receive a deferred sentence to participate in drug treatment?[16] Did the defendant complete the drug treatment?
- Was the defendant's sentence suspended in state court?
- Did the defendant receive a term of shock probation in state court?[17]
- Are there complex legal issues to be argued at sentencing in state court, such as the effect on sentencing of an imperfect coercion defense?
- Did the defendant receive an enhanced penalty in state court? What conduct provided the basis for the enhancement?
- Did the defendant, who was exposed to an enhanced penalty in state court, negotiate a non-enhanced penalty?

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[15] *See*, *e.g.,* Md. Code Ann., Crim. Proc. § 6-220 (probation before judgment) (following a plea of guilty or nolo contendre, or a finding of guilt, the court can stay the judgment, put the defendant on probation and, once the conditions of probation are fulfilled, discharge the defendant from probation without a judgment of conviction); Iowa Code §907.3 (Deferred judgment, deferred sentence, or suspended sentence) (upon a plea of guilty or verdict of guilty a court may defer judgment, place the defendant on probation, and once the conditions of probation are fulfilled, discharge the defendant from probation without judgment); Cal. Pen. Code § 1000 et seq. (following a guilty plea to certain controlled substance offenses, a court may defer judgment and order the defendant to participate in programs related to education, treatment and rehabilitation, and upon successful completion of the program, the court will dismiss the charges).

[16] *See*, *e.g.*, Washington's Drug Offender Sentencing Alternative, Wash. Rev. Code §9.94A.660.

[17] *See, e.g.,* Tex. Crim. Proc. Code Ann. § 42.12(6)(a).

By recommending that courts always press forward and attempt to make a decision when much may be unknown about the anticipated state sentence at the time of the initial federal sentencing, the proposed amendment injects unnecessary complexity and confusion into federal sentencing.[18]

The current guideline has already generated significant confusion, debate and litigation about whether an undischarged sentence is for an offense that is relevant conduct that increased the offense level for purposes of §5G1.3(b). Defenders believe this would only get worse when parties and the court attempt to apply this provision to anticipated sentences that have not yet been imposed. Often charging documents and the plea proceedings refer to a broad range of conduct, and no one in the federal proceeding will know which, if any, of that conduct will ultimately be the basis for a sentence in state court (or in pre-conviction settings, the basis of the conviction). The parties will surely debate whether this yet-to-be imposed sentence, or yet-to-be imposed conviction, will be based on relevant conduct that is the basis for an increased offense level in the federal proceeding, or not. And the district court will have to make a guess.

For example, imagine a scenario where the police pull over a defendant on the highway and find in his car contraband drugs, a stolen firearm, and stolen auto parts. He is charged in state court with theft over $500 and carrying a firearm without a permit. He is charged in federal court with possession with intent to distribute controlled substances. In calculating the guidelines in federal court, if the court increases the offense level by 2 levels under §2D1.1(b)(1) for possession of a dangerous weapon, it may be that under the proposed amendment the state and federal sentence should be concurrent because the anticipated sentence is relevant conduct to the instant offense. If the defendant is convicted and sentenced in state court just for carrying a firearm without a permit, the application of the proposed amendment is relatively straightforward: the federal district court should order the federal sentence to run concurrently with the anticipated state sentence because the conduct in the state offense is relevant conduct to the instant offense that increased the offense level under Chapter Two. USSG §5G1.3(b).

Assume, however, that at the time of the federal sentencing, the defendant has been convicted for theft, and the firearm without a permit charge has been dismissed. Because the state court has not yet imposed a sentence on the theft conviction, the federal court will not know whether the state sentence will be based on the theft of the firearm, the auto parts or both. That issue may still be litigated in the state sentencing. But under the proposed amendment, the answers are important. If the theft is for the firearm only, the proposed amendment recommends that the federal sentence be concurrent with the anticipated sentence. USSG §5G1.3(b). If the theft is for only auto parts or auto parts and the firearm, the proposed amendment indicates the court may choose whether the sentence is to run "concurrently, partially concurrently, or

[18] In applying the proposed guideline, it may be difficult for courts to comply with the Rules of Criminal Procedure, including Rule 32's requirement that courts must "for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3). In some circumstances, it may not be possible for courts to make the rulings required by Rule 32 about proceedings that have not yet occurred.

consecutively." USSG §5G1.3(c) & cmt. (n. 2). The district court may have insufficient information to make this decision.

Additional problems arise if state charges are pending but the defendant has not yet been convicted. How does the federal court know whether the state conviction will be for all of the charged conduct or some of it? What if the state court conviction is only for theft? What if the theft is based on the stolen firearm? What if the theft is based on the stolen firearm and the stolen auto parts? What if the theft is based just on the stolen auto parts? Despite these questions the proposed amendment would nevertheless recommend that the district court make a decision on the relationship between the federal and state sentence.

Guesswork about what will happen in the future will "risk confusion and error." *Setser*, 132 S. Ct. at 1477 (Breyer, J., dissenting). As Justice Breyer noted, "[a] sentencing judge who believes… that the future conviction will be based upon different relevant conduct (and consequently orders a consecutive sentence) could discover that the second conviction rests upon the same relevant conduct (warranting a concurrent sentence)." *Id.* The mistakes that may occur are troubling for a variety of reasons. First, they directly affect individual liberty. The amount of time a person spends in prison should not be based on speculation about what will happen in a future sentencing proceeding. Second, these kinds of mistakes are detrimental to the system because they increase the risk of unwarranted disparity – similarly situated individuals will be treated differently, and individuals who are dissimilarly situated will be treated similarly. Such mistakes do not serve the goals the Commission itself has set for the guidelines, including "assur[ing] that different individuals who engage in the same criminal behavior will typically receive roughly comparable sentences." *Setser*, 132 S. Ct. at 1476 (Breyer, J., dissenting); 28 U.S.C. § 991(b)(1)(B).

Defenders believe that there will be fewer mistakes, and less unwarranted disparity, if §5G1.3 remains in its current form, without amendment. Although the Supreme Court has clarified that federal courts have the authority to issue orders about anticipated state court sentences, courts may choose not to exercise that authority or may do so sparingly.

B. The Proposed Amendment May Create Confusion and Unwarranted Disparity By Reaching Beyond the Holding in *Setser*.

In *Setser*, the Court only addressed a federal court's authority to order a sentence to run consecutively to or concurrently with an anticipated state sentence. In contrast, the proposed amendment uses language that would apply to *all* anticipated sentences – both state and federal. By extending *Setser*, the proposed amendment adds confusion to the sentencing process, and may increase unwarranted disparity between sentences.

In *Setser*, the Court specifically declined to address whether one federal district court may order a sentence be served consecutively to, or concurrently with, an anticipated *federal* sentence. *Setser*, 132 S. Ct. at 1471 n.4 ("It suffices to say… that this question is not before us."). Moreover, the Court noted an argument "that § 3584(a) impliedly prohibits such an order because it gives that decision to the federal court that sentences the defendant when the other sentence is 'already' imposed." *Id.* That is, because the statute explicitly gives authority to the second federal court to make the concurrent/consecutive decision for an undischarged sentence

that has "already" been imposed, it arguably does not give authority to the first federal court to make that decision when the anticipated sentence is a federal one.

The problems that would arise if both a first and second federal court were authorized to decide whether the two sentences were to run consecutively to or concurrently with one another are not difficult to imagine. For example, what happens if the first court orders the sentence to run concurrently with an unadjudicated federal case, and the second court decides the second sentence should run consecutively to the first? And what of the opposite situation, where the second court, faced with a statutorily mandated minimum sentence wants the sentence to run concurrently with the previous sentence because of intervening cooperation or other unconsidered mitigation, but the first court has already ordered that the sentences are to run consecutively? In light of these inevitable tensions, and because the Supreme Court both expressly identified this as an unresolved issue and offered an argument as to why federal courts do *not* have authority under 18 U.S.C §3584 to order that a sentence run consecutively to or concurrently with a yet-to-be-imposed federal sentence, it is almost certain the issue will be litigated in the near future. Accordingly, Defenders believe it would be premature for the Commission to promulgate an amendment that purports to interpret the statutory authority of one federal court to run a sentence consecutively to or concurrently with a yet-to-be-imposed sentence from another federal court.

Revising the proposed amendment to refer to anticipated *state* sentences would address this particular problem, but would aggravate the complexity beyond that discussed above, and would further contribute to unwarranted disparity by treating similarly situated individuals differently based solely on the jurisdiction (state or federal) of the second sentence. Questions of comity and disparate treatment among sovereigns would also be raised. For all of these reasons, Defenders oppose the proposed amendment.

Although Defenders believe that no change is needed to §5G1.3, the Commission could choose to acknowledge the *Setser* decision in the commentary or background notes to §5G1.3. For example, a new note 5 or a new sentence in the background section could state: Nothing in this guideline alters a court's authority as described in *Setser v. United States*, 132 S. Ct. 1463 (2012), to specify whether a federal sentence should run concurrently with or consecutively to an unimposed but anticipated state sentence, when the circumstances warrant.