Written Statement of Alan DuBois

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on USSG §5G1.3

March 13, 2014

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

Section 5G1.3 provides guidance to courts imposing sentences where the defendant is subject to an undischarged term of imprisonment. As the Supreme Court has noted:

> There are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and §5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time.[1]

The Commission proposes three separate amendments to this guideline, each one of which aims to improve the coordination of sentences from different proceedings. Defenders support all three of the proposed amendments.

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

1. Proposed Amendment

Under §5G1.3(b), the guidelines direct courts to impose the federal sentence concurrently with an undischarged term of imprisonment for another offense if that other offense is (1) "relevant conduct to the instant offense of conviction under (a)(1), (a)(2), or (a)(3) of §1B1.3" and (2) that relevant conduct was "the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)." We support the Commission's proposed amendment to eliminate the second requirement that the other offense at issue be the basis for an increase in the offense level under Chapters Two or Three.

[1] *Witte v. United States*, 515 U.S. 389, 404 (1995).

The Supreme Court has observed that "§5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence."[2] The additional requirement that the relevant conduct increase the offense level impedes §5G1.3 from performing this function, and serves no important purpose.

While we do not see it often, there are cases where our client is subject to an undischarged sentence that is relevant conduct to the instant federal offense, but that relevant conduct does not increase the offense level. This can occur in a drug case where the drug quantity from a related state offense was relevant conduct to the federal sentence but did not increase the offense level for the federal sentence, or in a fraud case where the loss amount from the related state offense was relevant conduct to the federal sentence, but did not increase the offense level.[3] This creates unwarranted disparity. Consider, for example, Case A, where 10 KG of marihuana in a state drug offense is considered relevant conduct to a federal offense involving 22 KG of marihuana, and Case B, where 20 KG of marihuana in a state drug offense is considered relevant conduct to a federal offense involving 22 KG of marihuana. Under the current version of §5G1.3, Case A is treated differently than Case B simply because the 10 KG from the state offense does not increase the drug quantity enough to reach the next higher offense level in the Drug Quantity Table, whereas the 22 KG in Case B does increase the offense level from 18 to offense level 20 under §2D1.1(c)(10)-(11). In both cases the federal sentence reflects the drug quantity involved in both the state and federal offense. In Case A, however, the guidelines do not direct that the sentences run concurrently because the quantity included in the state offense was too low to result in an increased offense level. Whereas in Case B, with the higher drug quantity, the guidelines direct the sentences run concurrently. We see no reason why Case A and Case B should be treated differently. The directions in §5G1.3(b) to adjust the federal sentence and run it concurrently to the state sentence should apply in both scenarios because in both, based on relevant conduct, the federal sentence accounts for both the state and federal conduct.

In addition, the requirement that the relevant conduct increase the offense level is not playing an important role, and thus adds unnecessary complexity to the guidelines. In most cases, if the offense qualifies as relevant conduct under §1B1.3(a)(1)-(a)(3), it also increases the offense level. Relevant conduct does the heavy lifting in §5G1.3(b), and the additional requirement that it also increase the offense level does not filter out many additional cases. It

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[2] *Witte*, 515 U.S. at 405.

[3] *See, e.g.*, *United States v.Carrasco-de-Jesus*, 589 F.3d 22 (1st Cir. 2009) (case does not fall within subsection (b) of §5G1.3 because loss amount of $101.60 from the state offense would not increase her offense level in federal case which "exceeded $50,000" and was enhanced by six levels for a loss amount falling between $30,000 - $70,000).

would simplify guideline application to delete this second requirement as the Commission proposes.

2. Issue for Comment

The Commission asks whether §5G1.3(b) should include offenses that are relevant conduct under §1B1.3(a)(4), the only subsection of §1B1.3 (Relevant Conduct) that is not excluded from the current version.[4] Defenders' short answer is yes. Any prior offense that is considered relevant conduct should be included in §5G1.3(b) because that offense has been accounted for in the federal sentence. This change could be easily accomplished. For example:

> If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions ~~subsections (a)(1), (a)(2), or (a)(3)~~ of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows….

This would simplify application of §5G1.3(b) by bringing consistency across guidelines regarding what conduct is considered part of the instant offense. For example, including all relevant conduct under §1B1.3 would make §5G1.3 consistent with the commentary to §4A1.2 which provides: "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)."[5]

No good reason justifies excluding conduct that is deemed "relevant conduct" under §1B1.3(a)(4). If another offense is relevant conduct to the instant offense, then the federal sentence accounts for the other offense, and should be treated the same, regardless of the reason it is considered relevant conduct. This is particularly important if the Commission expands its use of §1B1.3(a)(4), as suggested in the proposed Felon in Possession amendment.[6]

Because there is no reason to exclude (a)(4), doing so results in unwarranted disparity. As discussed above, §5G1.3 is supposed to "mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence."[7] It makes no sense to deny

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[4] Section 1B1.3(a)(4) provides that base offense level, specific offense characteristics, cross-references and adjustments "shall be determined on the basis of … (4) any other information specified in the applicable guideline."

[5] §4A1.2, comment. (n.1).

[6] *See* Statement of Alan DuBois on Felon in Possession Guideline Before the U.S. Sentencing Comm'n, Washington, D.C., at 11-12 (Mar. 13, 2014).

[7] *Witte*, 515 U.S. at 405.

this mitigation – and to allow what amounts to double counting of the relevant conduct – for some relevant conduct but not all.

B. Adjustment for an Anticipated State Term of Imprisonment

We also support the Commission's proposed amendment to provide a new subsection in §5G1.3, and conforming commentary, addressing adjustments for anticipated state court sentences, as the guidelines already do for undischarged sentences. Consistent with our comments above, we believe the requirement that the other offense be relevant conduct to the instant offense is alone sufficient, and there is no need for the additional requirement that the relevant conduct was a basis for an increase in the offense level under Chapters Two or Three. And for the reasons mentioned above, we believe this new subsection should apply to *all* relevant conduct, and should not exclude conduct that is relevant under §1B1.3(a)(4).

The Supreme Court in *Setser v. United States*, 132 S. Ct. 1463 (2012) held that the district court, not the Bureau of Prisons (BOP), has discretion to order that the federal sentence imposed will run concurrently or consecutively to another state sentence that is anticipated but not yet imposed. The BOP has not provided guidance on how it handles credit for time the defendant spent in pretrial custody in connection with an anticipated state sentence. Absent such guidance, what we do know is that for *undischarged* sentences, even when a federal court runs a federal sentence concurrently with a state sentence, a defendant will not always receive full credit for time spent in state pretrial detention without some adjustment in his federal sentence by the district court. The guidelines currently authorize adjustments for undischarged sentences,[8] and should do the same, as this amendment proposes, for anticipated sentences. Defendants should not be treated differently based solely on the order in which the state and federal sentence are imposed.

Anticipated sentences differ from undischarged sentences in obvious ways. Generally, less is known about them at the time of the federal sentencing. But one thing the court does know, whether or not the state sentence has been imposed, is how much time the defendant has served in pretrial detention. Currently, if the requirements of §5G1.3 are met, the court may adjust the federal sentence to account for this time – the time spent in state pretrial detention – if the state sentence has been imposed and is being served. It should have the same authority to make this identical adjustment where the state sentence has not yet been imposed. In both cases, the specific amount of time is known at the time of federal sentencing and easily calculated by the district court but will generally not be credited against the federal sentence absent this type of adjustment.

[8] §5G1.3(b)(1).

Adjusting the federal sentence allows a federal judge, consistent with her duties under 18 U.S.C. § 3553(a), to impose a term no greater than necessary, and to "avoid a situation in which the happenstance of how much of the prior sentence has been served when the federal sentence is imposed … determine[s] the length of the defendant's imprisonment."[9] Judge Posner, writing for the Seventh Circuit provided this example to illustrate the point:

> Suppose the federal statutory minimum were 10 years…. And one defendant had served 1 year of a related state sentence and another defendant 9 years. Without an adjustment the total length of imprisonment for the first defendant would be 19 years and of the second defendant 11 years; to make each defendant serve total prison time of 10 years (supposing the sentencing judge found them equally deserving of that amount of time), the first defendant would require a 9-year reduction and the second defendant a 1-year reduction.

Adjustments thus play a key role in avoiding unwarranted disparity. We support the proposed amendment because courts should be directed to make these adjustments both when the state sentence is undischarged and when it is anticipated.

Defenders believe the proposed amendment to the guideline is the best way to account for these cases. Short of that, a departure provision would be better than nothing.

C. Sentencing of Deportable Aliens With Unrelated Terms of Imprisonment

Defenders support the Commission's proposed amendment to add a new subsection to §5G1.3 directing courts to adjust the federal sentence for undischarged offenses that are unrelated to the current offense where "the defendant is a deportable alien who is likely to be deported after imprisonment." This amendment serves at least two important purposes: it promotes the Commission's goal of avoiding unwarranted disparity and furthers the Commission's obligation to ensure that the guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons."[10]

This proposed amendment helps address the unwarranted disparity in sentences for our clients who have previously been deported, return to the United States, and are charged with entering or being found in the United States in violation of 8 U.S.C. § 1326(a). Sometimes clients are "found in" the United States for purposes of § 1326 while they are serving a sentence

[9] *United States v. Cruz*, 595 F.3d 744, 746 (7th Cir. 2010).

[10] *See* 28 U.S.C. § 994(g). *See also* USSC, Notice of Final Priorities, 78 Fed. Reg. 51820, 51821 (Aug. 21, 2013) ("Pursuant to 28 U.S.C § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.").

for an unrelated offense in state court. Some are found at the beginning of the term for their other offense, and some are not found until later in their term. Sometimes they are prosecuted for the federal offense immediately, and sometimes they are not. Generally, the timing of when they are found, and the promptness of the prosecution is entirely arbitrary, although sometimes there is reason to suspect intentional delay on the part of the federal authorities. When the § 1326 offenses are prosecuted right away, the federal court has the authority to run the federal sentence concurrently with the undischarged state court sentence.[11] But for those who happen to be prosecuted near or at the end of their state term, the federal sentence will run fully consecutively, or nearly so, to the other offense. The only reason for this different treatment is the happenstance of how much time is left to serve on the undischarged state offense. This creates unwarranted disparity. The proposed amendment addresses the problem.[12]

It also helps address concerns regarding the cost of incarceration and prison overcrowding by ensuring that sentences are not longer than what the federal sentencing court determines necessary, simply because of the timing of the federal prosecution in relation to the state sentence.

In response to one of the options in the proposed amendment, the Defenders encourage the Commission to take this opportunity to make clear that subsection (a) would not require consecutive sentences in these cases. Courts have routinely declined to apply §5G1.3(a) in these illegal reentry cases.[13] It makes sense to reserve the limitations of §5G1.3(a) for those who

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[11] *See* 18 U.S.C.§ 3584.

[12] Some courts have addressed these issues by using downward departures to adjust the sentence. *See United States v. Barrera-Saucedo*, 385 F.3d 533 (2004) (holding that "even in a case of innocent delay," "it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of the time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody"); *United States v. Los Santos*, 283 F.3d 422 (2d Cir. 2002) (holding departures for lost opportunity are allowed when the delay was "in bad faith" or "longer than a reasonable amount of time for the government to have diligently investigated the crime involved"); *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 564 (9th Cir. 1998) (en banc) (affirming the district court's downward departure where there was "a lost opportunity" to reduce the defendant's "total time in custody" that was "entirely arbitrary"). As discussed below, defenders believe the proposed amendment to §5G1.3 is preferable to adding an invited departure in §2L1.2.

[13] *See, e.g.*, *United States v. Gutierrez-Silva*, 353 F.3d 819 (9th Cir. 2003) ("[b]ecause Gutierrez-Silva was serving an undischarged state term at the time that he was sentenced in federal court for illegal reentry, the district court was empowered by" §5G1.3(c) to run the federal sentence "concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment"; subsection (a) of §5G1.3 does not apply because "Gutierrez-Silva committed the offense of illegal reentry before he was convicted and sentenced for the state drug trafficking charge" and state charge was not considered in calculating federal offense level); *Los Santos*, 283 F.3d at 426 (without discussing §5G1.3(a), deciding that while subsection (b) of §5G1.3 did not apply, the "district court could have imposed a concurrent sentence" under §5G1.3(c) where defendant charged under § 1326 was "found" while in a state custodial

actively commit crimes while in prison.[14] It should not be applied in situations like illegal reentry cases where the defendant "committed no act in furtherance of his crime" while in prison but "was simply found by the INS, completing the offense of unlawful re-entry."[15]

Defenders also support use of the word "shall" rather than "may", to help ensure the benefits that attend this proposed amendment are fully embraced and implemented.

In response to the Commission's Issue for Comment, Defenders believe the proposed amendment to §5G1.3 is superior to adding a new departure provision in §2L1.2. Where, as here, the issue is about coordinating multiple sentences, it is best addressed in §5G1.3 to provide the context that this is but one of many situations where courts take steps to ensure that when there are multiple jurisdictions involved, the federal sentencing court is still able to determine and effectuate the appropriate sentence for the federal offense, and make sure the defendant is not subject to unduly harsh punishment.

If, however, the Commission opts not to make the proposed amendment to §5G1.3, Defenders believe adding a specific departure provision to §2L1.2 would be better than leaving things as they are. Defenders believe proposed Example 1 is better than Example 2 because it is simpler and likely easier to apply. Specifying, as Example 2 does, that the departure is for the "lost opportunity" will likely lead to litigation regarding exactly which dates correspond with the "lost opportunity." The general language in Example 1 provides adequate guidance without the potential for litigation that accompanies greater specificity.

Finally, whether the Commission adopts the proposed amendment, or opts to instead provide for a departure, we encourage the Commission to include language that would cover anticipated as well as undischarged sentences that include periods of imprisonment that will not be credited to the federal sentence by the BOP.

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drug treatment program); *United States v. Medrano*, 89 F.Supp. 2d 310, 315-18 (E.D.N.Y. 2000) (concluding that §5G1.3(a) would have applied if the instant offense of being found in the United States had been prosecuted while the defendant was still subject to that sentence, but that a departure would have been appropriate because illegal reentry is outside the heartland of cases where §5G1.3(a) applies, and would create unwarranted disparity); *United States v. Contreras-Hernandez*, 277 F.Supp. 2d 952, 955 (E.D. Wis. 2003) (exercising discretion to depart and impose a concurrent sentence under §5G1.3(c) in a § 1326 case because it presents "a circumstance not adequately taken into account by the Commission in drafting §5G1.3(a)"). *See also United States v. Santana-Costellano*, 74 F.3d 593, 599 (5th Cir. 1996) (noting the issue but declining to decide whether §5G1.3(a) or §5G1.3(c) applied where the instant offense of being found in the United States after having been arrested and deported in violation of 8 U.S.C.§ 1326(a), occurred while he was serving a sentence in Texas for anther offense).

[14] *See Contreras-Hernandez*, 277 F.Supp. 2d at 955; *United States v. Medrano*, 89 F.Supp. 2d at 316.

[15] *Contreras-Hernandez*, 277 F.Supp. 2d at 955.