NEW YORK COUNCIL OF DEFENSE LAWYERS

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By E-mail - Public_Comment@ussc.gov
Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on 2014 Proposed Amendments to the Sentencing Guidelines, Policy Statements, And Official Commentary

Dear Judge Saris:

This letter is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). We would like to thank the Sentencing Commission for the opportunity to present the NYCDL's views on the 2014 Proposed Amendments to the Sentencing Guidelines (the "Guidelines"), policy statements, and official commentary.

The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of white collar criminal cases in federal court. Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender.

The NYCDL's members thus have gained familiarity with the Guidelines both as prosecutors and as defense lawyers.

The organization believed that two amendments in particular, to Sections 5D1.2 and 5G1.3 of the Guidelines, presented issues that could arise in the representation of our clients and wanted to take this opportunity to submit the short comments contained below on those two particular amendments. The contributors to these comments include members of the NYCDL's Sentencing Guidelines Committee, Catherine M. Foti (Chair), Richard F. Albert, Michael Bachner, Laura Grossfield Birger, Christopher P. Conniff, James M. Keneally, Sharon L. McCarthy, Brian Mass, and Marjorie J. Peerce. In addition, the following individuals helped the Committee in their review and consideration of the amendments: Sean Nuttall, Nathaniel I. Kolodny, Lauren Gerber Lee and Joseph Harrington.

I. PROPOSED AMENDMENT: SUPERVISED RELEASE (5D1.2)

The Commission has asked for comments on a proposed amendment to the Commentary of the Sentencing Guidelines that would add a new note regarding the interpretation of Section 5D1.2(c). Section 5D1.2(c) states that the "term of supervised release imposed shall not be less than any statutorily required term of supervised release." As the Commission described in its proposal, courts have split on how to calculate the supervised release Guideline range when there is a statutory minimum term of supervised release. The Seventh Circuit held that if the statutory term of supervised release is greater than both the minimum and maximum term prescribed by Section 5D1.2(a), the bottom of the Guidelines range should be raised to match the statutory minimum, but the top of the Guidelines range should remain the same. *See U.S. v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009). Under this approach, if the statutory minimum meets or exceeds the top of the range specified in Section 5D1.2(a), the "range" is simply the statutory minimum. The Eighth Circuit, however, held that when the statutory range differs from the Guidelines range, the statutory range "trumps" – *i.e.*, replaces – the Guidelines range, thereby raising, sometimes significantly, both the top and the bottom thresholds of the Guidelines. *See U.S. v. Deans*, 590 F.3d 907, 911 (8th Cir. 2010).

The Commission has proposed two options for a clarifying note to address this circuit split. Option 1 adopts the Seventh Circuit approach and Option 2 adopts the Eighth Circuit approach. NYCDL supports Option 1. In our view, Option 1 correctly construes the language of Section 5D1.2(c) and is consistent with how statutory minimum terms are applied in the context of imprisonment.

Section 5D1.2(c) states that the "***term*** of supervised release shall not be ***less than*** the statutorily required term." (emphasis added). In other words, Section 5D1.2(c) specifies only that the minimum term of supervised release shall not be less than what the applicable statute requires; the Guideline provides that the floor of the statutory provision controls if it is higher than the minimum under Section 5D1.2(a). Importantly, Section 5D1.2(c) does *not* mandate that the *maximum* guidelines term must also be adjusted to meet the statutory maximum – it solely addresses the minimum term. Option 1 therefore reflects the correct application of the existing Guideline provision by directing courts to raise the floor of the Guidelines range to meet the statutory minimum while leaving the ceiling, or the maximum term, alone.

Option 1 is also consistent with how the Guidelines are applied in accordance with statutory minimums with respect to terms of imprisonment. Pursuant to Section 5G1.1(b), where a statutory minimum term of imprisonment exceeds the maximum of the applicable Guidelines range, the statutory minimum is the Guidelines sentence. Courts retain the authority to impose a greater sentence, up to the statutory maximum, but such sentences must be explained as either upward departures or above-Guidelines sentences. There is no reason to take a different approach in the context of supervised release. *See U.S. v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009). Option 1 gives courts similar flexibility in the supervised release context to impose a supervised release term exceeding the range determined under Section 5D1.2 in an appropriate case and with a sufficient explanation, without entirely supplanting the Guidelines range with the statutory minimum and maximum. Option 2, by contrast, would replace the Guidelines range with the statutory minimum and maximums, and thereby encourage courts to impose extremely lengthy terms of supervised release (in excess of those advised by Section 5D1.2) without requiring specific explanations or justifications.

II. PROPOSED AMENDMENT: UNDISCHARGED TERM OF IMPRISONMENT (5G1.3)

The Commission has proposed adding a new subsection (c) to 5G1.3, which would allow for an adjustment for an anticipated state term of imprisonment (the "Amendment"). The text of the proposed subsection follows, with areas on which the Commission seeks comment in brackets:

> (c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) [and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or

> Chapter Three (Adjustments)], the court [may][shall] adjust the sentence for any anticipated state term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.

The Amendment also adds an application note to the commentary:

> Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant may be sentenced in state court and will serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) [and was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)], the court [may][shall] adjust the sentence for the period of time anticipated to be served in state custody. To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any such adjustment be clearly stated on the Judgment in a Criminal Case Order as an adjustment pursuant to §5G1.3(c), rather than as a credit for time served.

The NYCDL supports the proposed inclusion of subsection (c) and would urge the Commission to make the consideration of this anticipated sentence mandatory by using the "shall" language. By adopting this proposed amendment, the Commission is merely applying the same treatment to anticipated state sentences as is currently applied to undischarged terms of imprisonment. *See* U.S.S.G § 5G1.3(b). The Amendment thus equalizes treatment of related sentences, regardless of which sentence was imposed first.

Both subsection (b) and proposed subsection (c) share the requirement that sentences may be adjusted only for prison terms based on "relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3." Subsections 1B1.3(a)(1-3) define as relevant conduct "acts and omissions [attributable to] the defendant" or "others in furtherance of [a] jointly undertaken criminal activity," occurring "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Like subsection (b), proposed subsection (c) limits anticipates sentences that may provide the basis for adjustments to those imposed for relevant conduct, as defined by the Guidelines.

Both subsection (b) and proposed subsection (c) also share the requirement that the sentencing court determine that the related "period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons." Under 18 U.S.C. § 3585(b), the Bureau of Prisons can give a defendant credit on his or her federal sentence for prior time served under certain circumstances. Where the same offense served as the basis for both sentences, or where the prior time served resulted from any other charge for which the defendant was arrested after the commission of the present offense, only the Bureau of Prisons can give credit for prior time. Courts have held that sentence adjustments made for prior time served as described in Section 3585(b) are invalid, reasoning that "the power to grant credit for time served lies solely with the Attorney General and the Bureau of Prisons." Thus, both subsection (b) and proposed subsection (c) apply only to the subset of adjustments outside of the Bureau of Prisons' exclusive jurisdiction.

In sum, we recommend including subsection (c) to U.S.S.G §5G1.3. Doing so will rationalize sentencing by putting anticipated state sentences on equal footing with undischarged sentences based on the same kind of conduct.

III. Conclusion

Thank you again to the Commission for the opportunity to comment on the proposed amendments. The NYCDL welcomes any additional questions the Commission may have of our organization.

Very truly yours,

Alexandra A. E. Shapiro
President

cc: (by mail) Hon. Ketanji Brown Jackson, Vice Chair
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Hon. Charles R. Breyer, Vice Chair
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