



U.S. Department of Justice  
Criminal Division

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July 31, 2017

The Honorable William H. Pryor, Jr.  
Acting Chair, U.S. Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Pryor:

The Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the Sentencing Commission under 28 U.S.C. § 994(o). Consistent with § 994(o), this report comments on the operation of the sentencing guidelines, suggests changes to the guidelines, and assesses the Commission's work. Please allow this report to also serve as the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2017-2018.<sup>1</sup> Thank you in advance for considering the Department's views on these important matters.

It is the Department of Justice's chief responsibility to protect the American people from criminal activity. That responsibility guides the Department's actions in all areas, but especially its positions on sentencing-related matters. The Department believes that its criminal justice priorities should reflect what is happening on America's streets. After nearly three decades of decline, violent crime is rising.<sup>2</sup> The murder rate increased by 10.8% nationally in 2015,<sup>3</sup> and some cities are experiencing record-breaking numbers.<sup>4</sup> At the same time, a deadly opioid

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<sup>1</sup> Notice of Proposed Priorities and Request for Public Comment, 82 Fed. Reg. 28381 (June 21, 2017), <https://www.federalregister.gov/documents/2017/06/21/2017-12868/proposed-priorities-for-amendment-cycle>.

<sup>2</sup> Federal Bureau of Investigation, Uniform Crime Report: Violent Crime <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/violent-crime> (last visited July 28, 2017) ("In 2015, an estimated 1,197,704 violent crimes occurred nationwide, an increase of 3.9 percent from the 2014 estimate.").

<sup>3</sup> Federal Bureau of Investigation, Uniform Crime Report: Murder <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/murder> (last visited July 28, 2017) ("In 2015, the estimated number of murders in the nation was 15,696. This was a 10.8 percent increase from the 2014 estimate...").

<sup>4</sup> See, e.g., Justin Fenton, *Through May, Record Number of Killings in Baltimore*, THE BALTIMORE SUN, June 1, 2017, available at <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-may-homicides-20170601-story.html> ("A fatal shooting late Wednesday in West Baltimore brought the number of people killed in the city to 146, the most on record through the first five months of the

epidemic is devastating our communities. The numbers are astonishing. In 1990, there were approximately 8,000 drug overdose deaths.<sup>5</sup> In 2015, that number skyrocketed to more than 52,000.<sup>6</sup> Opioids such as heroin and fentanyl caused approximately 33,000 of those overdose deaths.<sup>7</sup> The final numbers for 2016 will be even worse,<sup>8</sup> with drug overdoses now the number one cause of death for Americans under the age of 50.<sup>9</sup>

These recent trends are unacceptable. And, the Department of Justice will do everything within its power to turn back the tide. To that end, the Attorney General has instructed federal prosecutors to prioritize violent crime and drug trafficking cases. The Department encourages the Commission to focus its efforts in the same areas. In order to reduce crime and protect the public, the sentencing ranges produced by the guidelines must be sufficient to deter, incapacitate, and provide just punishment. There are a number of provisions that the Department believes should be modified to achieve those goals. Those provisions are discussed in more detail below.

**I. The Commission Should Eliminate the Categorical Approach for Determining Whether a Defendant’s Prior Conviction is a “Crime of Violence” Under the Enumerated Felonies Clause of the Career Offender Guideline.**

The congressionally mandated career offender guideline plays a crucial role in the Department’s fight against dangerous recidivists. Its effectiveness, however, has been hampered by applying the “categorical approach” to determine if prior

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year.”); Joe Sonka, *Louisville Homicides in 2017 Already Outpace Last Year’s All-Time High*, INSIDER LOUISVILLE, Apr. 18, 2017, available at <https://insiderlouisville.com/metro/louisville-homicides-in-2017-already-outpace-last-years-all-time-high/> (“Jefferson County [Kentucky] suffered through a record-high number of homicides in 2016, but new statistics provided by the Louisville Metro Police Department show that this year’s total already has outpaced last year’s mark.”).

<sup>5</sup> Editorial, *Arrests Not Enough to Stem Drug Crisis*, HERALD TRIBUNE, Apr. 17, 2017, available at <http://www.heraldtribune.com/opinion/20170417/editorial-arrests-not-enough-to-stem-drug-crisis> (reporting that in 1990 there were 8,413 drug overdose deaths nationwide).

<sup>6</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm> (last visited July 28, 2015) (“During 2015, drug overdoses accounted for 52,404 U.S. deaths, including 33,091 (63.1%) that involved an opioid.”).

<sup>7</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, OPIOID OVERDOSE, <https://www.cdc.gov/drugoverdose/index.html> (last visited July 28, 2017) (“Opioids (including prescription opioids and heroin) killed more than 33,000 people in 2015, more than any year on record.”).

<sup>8</sup> Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, NEW YORK TIMES, June 5, 2017, available at <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html> (estimating that over 59,000 people died in 2016 from drug overdoses).

<sup>9</sup> *Id.*

convictions qualify as predicate “crimes of violence.”<sup>10</sup> That is especially true in cases where the issue is whether the defendant’s prior conviction qualifies under the enumerated felonies clause found in §4B1.2(a)(2). As it relates to the enumerated felonies clause, the categorical approach is an unnecessarily complicated litigation-generator that favors abstraction over reality.<sup>11</sup>

Congress directed the Commission to create the career offender guideline to ensure that repeat drug traffickers and violent recidivists receive lengthy sentences.<sup>12</sup> The Commission’s research underscores the threat posed by career offenders—an estimated 66.2% of career offenders recidivate, compared to 48.7% of other offenders.<sup>13</sup> Furthermore, the Commission’s research shows that career offenders commit an average of three new offenses *after* release from custody.<sup>14</sup>

A defendant who is convicted of a “crime of violence” or a “controlled substance offense” qualifies as a career offender if he has at least two prior convictions for crimes of violence or controlled substance offenses. Section 4B1.2 currently defines the phrase “crime of violence” in two separate clauses. One is the “elements clause” in §4B1.2(a)(1). The other is the “enumerated felonies clause” in §4B1.2(a)(2). Although the categorical approach may be unavoidable when dealing with the elements clause, the Department believes the categorical approach is unnecessary when dealing with the enumerated felonies clause.

In cases involving the enumerated felonies clause, the categorical approach requires courts to “focus solely on whether the elements of the crime of conviction sufficiently match the elements of [a] generic version of the crime.”<sup>15</sup> This approach

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<sup>10</sup> See generally *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring) (stating in the Armed Career Criminal Act context that the “categorical approach, too aggressively applied, eviscerates Congress’s attempt to enhance penalties for violent recidivist behavior”).

<sup>11</sup> See generally U.S. SENT’G COMMISSION, REPORT TO THE CONGRESS: CAREER OFFENDER SENT’G ENHANCEMENTS 51 (Aug. 2016), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf). (reporting that “[t]he scope and requirements of the categorical approach have resulted in significant litigation and over a dozen Supreme Court opinions over the last 26 years, including an opinion as recently as this term”).

<sup>12</sup> 28 U.S.C. § 994(h) (“The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant

is eighteen years old or older and— (1) has been convicted of a felony that is— (A) a crime of violence ... and (2) has previously been convicted of two or more prior felonies, each of which is— (A) a crime of violence...”).

<sup>13</sup> U.S. SENT’G COMMISSION, REPORT TO THE CONGRESS: CAREER OFFENDER SENT’G ENHANCEMENTS 39 (Aug. 2016), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

is not constitutionally required for the guidelines,<sup>16</sup> and it focuses on the abstract elements and largely ignores the conduct that the defendant actually committed.<sup>17</sup> This approach has resulted in some repeat violent offenders—the very people Congress targeted with the career offender guideline—receiving a sentencing range that is lower than their conduct and criminal history warrant. The categorical approach also consumes an inordinate amount of time for trial court judges, appellate court judges, probation officers, prosecutors, and defense attorneys. And, the Commission’s staff has devoted considerable effort over the years to training probation officers and others regarding the categorical approach.<sup>18</sup> The Commission has previously published issues for comment regarding the categorical approach.<sup>19</sup> The time has come to abandon the categorical approach in those cases involving the enumerated felonies clause. The Department would be pleased to work with the Commission to develop a workable and fair approach that focuses less on formalism and more on the defendant’s conduct.

## II. The Commission Should Define “Murder” in Application Note 1 to §4B1.2.

The Commission should amend Application Note 1 to §4B1.2 by defining the recently enumerated crime of “murder” to include the four common law variants: (1) intent to kill murder; (2) intent to cause serious bodily injury murder; (3) felony murder; and (4) depraved heart murder.<sup>20</sup> Such an amendment will reduce subsequent litigation by making clear the types of “murder” convictions that qualify as career offender predicates. In the absence of such a definition, it is inevitable that defendants who have been convicted of felony murder or depraved heart murder will attempt to argue that the term “murder” as enumerated in § 4B1.2(a)(2) should be interpreted narrowly.<sup>21</sup> Defining the term in Application Note 1 to §4B1.2 will not only preempt litigation, it will also ensure that the career

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<sup>16</sup> See, e.g., *United States v. Wilson*, 951 F.2d 586, 589-590 (4th Cir. 1991) (adopting categorical approach instead of fact-based approach to interpreting §4B1.1 and explaining the statutory interpretation rationale behind that decision).

<sup>17</sup> Under this approach, the court “look[s] only to the fact of conviction and the statutory definition of the prior offense” and may not consider the “particular facts disclosed by the record of conviction.” *Shepard v. United States*, 544 U.S. 13, 17 (2005).

<sup>18</sup> See, e.g., Ebise Bayisa, *The Categorical Approach: A Step-by-Step Analysis*, U.S. SENT’G COMMISSION 2016 ANNUAL SEMINAR (2016), available at [http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgroundunder\\_categorical-approach.pdf](http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgroundunder_categorical-approach.pdf).

<sup>19</sup> U.S. SENT’G COMMISSION, *Categorical Approach*, <https://www.ussc.gov/topic/categorical-approach>

<sup>20</sup> See generally WAYNE R. LAFAVE, *CRIMINAL LAW* 765 (5th ed. 2010) (explaining that “murder” at common law included these four categories).

<sup>21</sup> See generally *United States v. Castro-Gomez*, 792 F.3d 1216, 1218 (10th Cir. 2015) (determining the “generic” definition of murder for purposes of whether the defendant’s prior conviction was a “crime of violence” for purposes of §2L1.2); *United States v. Godoy-Castaneda*, 614 F. App’x 768, 769 (5th Cir. 2015) (analyzing whether second degree murder under New York was consistent with “generic” murder such that it qualified as a “crime of violence” for purposes of §2L1.2).

offender guideline is applied in a way that is consistent with Congress's goal of ensuring that violent recidivists receive lengthy sentences.

### **III. The Commission Should Increase the §2D1.1(b)(1) Enhancement for Possessing a Dangerous Weapon and the §2D1.1(b)(2) Enhancement for Using, Threatening, or Directing Violence in Connection with Drug Trafficking.**

Drug dealing is an inherently violent business, and drug dealers who either possess dangerous weapons or use, threaten, or direct violence should face stiff punishment. The guidelines currently provide a two-level enhancement in §2D1.1(b)(1) for possession of a dangerous weapon in connection with a drug trafficking offense. Similarly, there is a two-level enhancement in §2D1.1(b)(2) for drug dealers who use, direct, or threaten violence. These two-level enhancements are insufficient to account for the serious threat to public safety posed by such conduct. Indeed, under the current guidelines an armed drug dealer and a drug dealer who uses violence receive the same level of enhancement as a drug dealer who distributes anabolic steroids to an athlete.<sup>22</sup> That makes little sense given the significant differences in the risk of harm posed by the conduct. The Department, therefore, believes that the enhancements found in §2D1.1(b)(1) and (2) should be increased to more adequately reflect the dangerousness of the defendant's conduct.

The possession of a dangerous weapon is a common component of drug trafficking offenses, and it greatly increases the threat to public safety.<sup>23</sup> Using, threatening, or directing violence in connection with drug trafficking is equally dangerous—if not more so. The current two-level enhancement is inconsistent with other sentencing guidelines that distinguish between possessing, brandishing, and using a weapon.<sup>24</sup> Increasing the enhancement in §2D1.1(b)(1) and (2) will eliminate this disparity and will better reflect the seriousness of the underlying conduct. Furthermore, increasing the enhancement will complement 18 U.S.C. § 924(c) by ensuring that drug dealers who carry weapons and/or make threats receive an appropriately stiff sentence, even if their conduct falls outside the scope of § 924(c).

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<sup>22</sup> U.S. SENTENCING GUIDELINES MANUAL §2D1.1(b)(9).

<sup>23</sup> U.S. SENTENCING GUIDELINES MANUAL §2D1.1, cmt. n.11(A) (“The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons.”).

<sup>24</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL §2A2.2 (aggravated assault guideline providing five-level increase for discharge, a four-level increase for otherwise using, as defined in §1(b)(1), n. 1(I), and a three-level increase for brandishing).

#### IV. The Commission Should Amend Application Note 6 to §2D1.1 to Address Synthetic Drugs.

The Department appreciates the Commission's hard work so far on synthetic drugs. As the Commission knows, synthetic drugs are a driving force behind our national overdose epidemic.<sup>25</sup> The chemical composition of these drugs is ever evolving, and the current legal framework (both the statutes and the guidelines) is inadequate to ensure that the criminals who sell these deadly poisons face appropriate punishment. The process set forth in Application Note 6 to §2D1.1 for addressing synthetic drugs is cumbersome, inefficient, and resource-intensive. It turns sentencing hearings into lengthy chemistry and pharmacology lectures, often complete with dueling experts. This process has led to inconsistent and inadequate determinations of offense severity. To remedy this problem, the Commission should amend Application Note 6 and adopt a class approach that would treat a new synthetic drug the same as other substances in the same drug class. This would result in sentences that are more appropriate, fair, and consistent.

Frequently, the guidelines range for a defendant convicted under the Controlled Substance Analogue Enforcement Act, 21 U.S.C. § 813, is determined by Application Note 6 to §2D1.1. Note 6 requires courts to determine the degree to which the substance involved is "substantially similar" to a referenced substance, the similarity of the stimulant, depressant and/or hallucinogenic effect of the non-referenced substance to those that are referenced, and the potency of the non-referenced substance, as compared to referenced substances. Sentencing-related filings in such cases are often lengthy documents that include scientific analysis and summaries of chemistry and pharmacology research. Those filings are often followed by lengthy hearings that involve testimony from expert witnesses. The court then must wade through the highly technical information to select a drug equivalency. The inefficiency and complexity of the Application Note 6 process hampers the Department's ability to effectively address the synthetic drug problem.

The Department recognizes that the Commission is already engaged on this topic and is actively exploring possible amendments to Application Note 6. The Department requests that the Commission strongly consider adopting the following approach. First, if the Attorney General has published (through either permanent or temporary scheduling) an equivalency to a controlled substance, that equivalency should be followed. Second, if the Attorney General has not published such an equivalency, then the equivalency should be based on which of the following classes

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<sup>25</sup> CENTER FOR DISEASE CONTROL AND PREVENTION, INCREASES IN DRUG AND OPIOID-INVOLVED DEATHS – UNITED STATES 2010-2015 (2016), available at <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm>; see also Peter Holley & William Wan, *Deadly Chinese Drugs are Flooding the U.S., and Police Can't Stop Them*, THE WASHINGTON POST, June 22, 2015, available at <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/22/deadly-chinese-drugs-are-flooding-the-u-s-and-police-cant-stop-them>.

the drug falls into: (A) Synthetic Opioids; (B) Synthetic Cathinones; (C) Synthetic Cannabinoids; (D) Tryptamines; (E) Phenethylamines; (F) Piperazines; (G) Benzofurans; (H) Arylcyclohexylamines; (I) Phenidates, and (J) Benzodiazepines. The Commission should establish an equivalency for each of those drug classes. Third, if neither of the first two options are available, then the guidelines should set forth a process similar to that currently found in Application Note 6.

This approach will increase efficiency, promote consistency, and provide notice of the consequences of trafficking in synthetic drugs. The Department appreciates that the Commission may not be able to address all of the drug classes set forth above this year. Thus, the Department respectfully suggests that the Commission prioritize synthetic opioids, synthetic cathinones, and synthetic cannabinoids.

#### **V. The Commission Should Amend the Drug Quantity Table in §2D1.1 to Decrease the Quantity Thresholds for Fentanyl and Fentanyl Analogue.**

As previously mentioned, fentanyl and fentanyl analogues are fueling the opioid epidemic and killing people at an alarming rate. Fentanyl is so powerful that a quantity equal to five to seven grains of table salt can kill a person.<sup>26</sup> Even worse is the fentanyl analogue carfentanil, which is an elephant tranquilizer that is 100 times more powerful than fentanyl and 10,000 times more powerful than morphine.<sup>27</sup> The Drug Quantity Table in §2D1.1 does not adequately reflect the serious danger posed by these drugs. Currently, §2D1.1 provides that four grams of fentanyl and one gram of fentanyl analogue should receive a base offense level of 12. If no other adjustments apply, an offense level of 12 and a criminal history category of I yields a Zone C guidelines range of 10-16 months.<sup>28</sup>

The average lethal dose for fentanyl is approximately two milligrams,<sup>29</sup> which means that four grams of fentanyl is sufficient to kill approximately 2,000 persons.

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<sup>26</sup> DRUG ENFORCEMENT ADMINISTRATION, FENTANYL: A BRIEFING GUIDE FOR FIRST RESPONDERS 15 (2017), [https://www.dea.gov/druginfo/Fentanyl\\_BriefingGuideforFirstResponders\\_June2017.pdf](https://www.dea.gov/druginfo/Fentanyl_BriefingGuideforFirstResponders_June2017.pdf) (last visited July 28, 2017).

<sup>27</sup> Press Release, DEA Issues Carfentanil Warning to Police and Public (Sept. 22, 2016), <https://www.dea.gov/divisions/hq/2016/hq092216.shtml> (DEA advisory stating that “Carfentanil is a synthetic opioid that is 10,000 times more potent than morphine”).

<sup>28</sup> Such a defendant would typically receive a base offense level of 10 after pleading guilty, which places the defendant in Zone B (6-12 months). The Commission has recently published proposed amendment language which would “authorize” probation when the minimum term of imprisonment in the applicable guideline range is up to 12 months of imprisonment (currently the threshold is nine). See U.S. Sent’g Commission, Proposed Amendments to the Sentencing Guidelines, 81 Fed. Reg. 92003 (December 19, 2016), available at [http://www.uscourts.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219\\_rf\\_proposed.pdf](http://www.uscourts.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf).

<sup>29</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, FENTANYL DRUG PROFILE, PHARMACOLOGY (Jan. 8, 2015), <http://www.emcdda.europa.eu/publications/drug-profiles/fentanyl/>; see also Mark Ockerbloom & Jason Solowski, *DEA: Just Touching or Inhaling Fentanyl Could Kill You*,

A base offense level of 12 is wholly inadequate for a defendant who has placed that many deadly doses of fentanyl onto our streets. In the Department's view, fentanyl is so dangerous to users and non-users (such as law enforcement officers<sup>30</sup> and children<sup>31</sup> who touch or inhale it inadvertently) that defendants who distribute seemingly small quantities of fentanyl should face prison time. The Commission should study this issue with the goal of adjusting the thresholds so that the base offense levels more accurately reflect the dangerousness of fentanyl and fentanyl analogue.

## VI. The Commission Should Increase the Base Offense Level in §2L1.1 for Alien Smuggling.

The recent deaths of ten people in the back of a sweltering tractor-trailer in San Antonio serve as a tragic reminder that alien smuggling is a serious crime.<sup>32</sup> The current base offense level of 12 set forth in §2L1.1 fails to reflect the severity of the crime and provides an insufficient deterrent. Interdicting and dismantling transnational criminal organizations that operate sophisticated human, drug, and firearms smuggling networks on both sides of the U.S.-Mexico border is essential to public safety.<sup>33</sup>

The once clear line between alien smuggling and human trafficking has blurred in recent years.<sup>34</sup> Today, migrants who hire smugglers often fall victim to extortion, brutal acts of violence, false imprisonment, and even murder.<sup>35</sup> Alien-smuggling profits support violent transnational criminal organizations, such as drug cartels

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BOSTON 25 NEWS, Nov. 8, 2016, <http://www.fox25boston.com/news/dea-just-touching-or-inhaling-fentanyl-could-kill-you/465005070> (reporting that "approximately 2mg of fentanyl is a lethal dose").

<sup>30</sup> Megan Cerullo, *Ohio Police Officer Accidentally Overdoses on Fentanyl by Brushing it Off Shirt After Drug Bust*, NY DAILY NEWS, May 16, 2017, <http://www.nydailynews.com/news/crime/ohio-police-officer-accidentally-overdoses-fentanyl-article-1.3170821> (discussing Ohio police officer who overdosed on fentanyl after inadvertently coming into contact with it after an arrest).

<sup>31</sup> *Fentanyl Overdose Kills 10-Year-Old Boy, Authorities Confirm*, FOX NEWS, July 18, 2017, <http://www.foxnews.com/health/2017/07/18/10-year-old-boy-might-be-floridas-youngest-opioid-victim.html> (reporting that a ten-year-old boy died in Florida of an overdose after inadvertently being exposed to fentanyl).

<sup>32</sup> Travis Fedschun, *San Antonio Trailer Deaths: Driver Charged After 10 Die in Sweltering Truck*, FOX NEWS, July 24, 2017, <http://www.foxnews.com/us/2017/07/24/san-antonio-trailer-deaths-suspect-due-in-court-after-10-die-in-sweltering-truck.html>

<sup>33</sup> Exec. Order, *Border Security and Immigration Enforcement Improvements* (January 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

<sup>34</sup> *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission*, 180 (2016) (statement of Chief Victor M. Manjarrez, Jr., Associate Director, Center for Law and Human Behavior).

<sup>35</sup> *Id.* at 182; see also *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines before the United States Sentencing Commission*, 145, 146 (2016) (statement of Richard L. Durbin, Jr., United States Attorney, Western District of Texas).



like Los Zetas and gangs like MS-13.<sup>36</sup> It is believed that these drug cartels and gangs earn from \$3,500 to \$8,250 per migrant smuggled into the United States.<sup>37</sup> By contrast, the price for a kilogram of marijuana smuggled across the southern border is roughly \$400.<sup>38</sup> In other words, alien smuggling has become a lucrative business for the drug cartels and gangs. Each year, smugglers assist approximately 3,000,000 Mexican migrants in illegally crossing the southern border of the United States.<sup>39</sup> Clearly, alien smuggling is a dangerous activity that should be punished accordingly. The Department, therefore, hopes that the Commission will study the issue and work with the Department to ensure that the sentencing ranges for alien smuggling reflect the severity of the offense.

## **VII. The Commission Should Remove §5D1.1(c) Regarding the Imposition of Supervised Release in Cases Where the Defendant is a Deportable Alien.**

The Commission should amend the guidelines by removing §5D1.1(c). Doing so would return §5D1.1 to the pre-2011 policy of encouraging judges to impose supervised release in cases where the defendant is an illegal alien subject to deportation upon release from imprisonment. Section 5D1.1(c) currently provides that when a defendant is a deportable alien, “the court ordinarily should not impose a term of supervised release” unless required by statute.<sup>40</sup> This provision was added to the guidelines in 2011. The Department opposed the addition of §5D1.1(c) then,<sup>41</sup> and it continues to believe that deportable aliens—[like other federal defendants—should ordinarily be placed on supervised release after imprisonment.

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<sup>36</sup> See RAY WALSER ET AL., THE HUMAN TRAGEDY OF ILLEGAL IMMIGRATION: GREATER EFFORTS NEEDED TO COMBAT SMUGGLING AND VIOLENCE 2568 (Heritage Foundation, June 22, 2011), available at <http://www.heritage.org/immigration/report/the-human-tragedy-illegal-immigration-greater-efforts-needed-combat-smuggling> (discussing the relationship between Los Zetas cartel and the illegal immigration market, including cases in which voluntary migrants become victims of kidnapping, extortion, and mass murder); Gregg W. Etter, Sr., *Mara Salvatrucha 13: A Transnational Threat*, 17 J. OF GANG RESEARCH 1, 5, 8 (2010) (discussing the criminal activities, including alien smuggling, in which MS-13 engages).

<sup>37</sup> E-mail from Chief Victor M. Manjarrez, Jr., Associate Director, Center for Law and Human Behavior, to George E. Rudebusch, U.S. Department of Justice (June 13, 2017, 05:07 PM EST) (data provided by El Paso Sector Intelligence Division, U.S. Customs and Border Protection (2016) and Arizona SAC Office Intelligence Division, U.S. Immigration and Customs Enforcement (2016)) (on file with addressee).

<sup>38</sup> ORG. OF AM. STATES, THE DRUG PROBLEM IN THE AMERICAS: STUDIES: THE ECONOMICS OF DRUG TRAFFICKING 22 (2013).

<sup>39</sup> U.N. OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT (2010), [https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf).

<sup>40</sup> U.S. SENTENCING GUIDELINES MANUAL §5D1.1(c), cmt. n. 5.

<sup>41</sup> *United States Sentencing Commission Public Hearing* (Feb. 16, 2011) (testimony of Sally Quillian Yates, United States Attorney for the Northern District of Georgia), available at [https://www.ussc.gov/sites/default/files/Hearing\\_Transcript\\_2.pdf](https://www.ussc.gov/sites/default/files/Hearing_Transcript_2.pdf); see also Written Statement of Sally Quillian Yates Before the United States Sentencing Commission (February 16, 2011), available

As the Commission heard in 2011, revocation proceedings are a particularly important and efficient tool for combating illegal immigration in the border districts.<sup>42</sup> The Department urges the Commission to restore that tool by removing §5D1.1(c) and replacing it with a provision that recommends supervised release in all cases involving deportable aliens. This would increase the efficiency of the federal criminal justice system along the southwest border and help alleviate the burden in districts that are already overwhelmed by illegal reentry cases.

### VIII. The Commission Should Pass a Technical Amendment to Correct a Flaw in the Illegal Reentry Guideline, §2L1.2(b)(2).

The Commission should pass a technical amendment to remedy a flaw in the reentry guideline, § 2L1.2(b)(2) that was discovered after the 2016 amendments to that provision. Under the revised reentry guideline, there is an offense level increase for two categories of prior non-illegal-reentry convictions. The two categories address prior non-illegal-reentry convictions that occurred before and after a defendant's first order of removal, as follows:

- (1) "If, *before* the defendant was ordered deported or ordered removed . . . , the defendant sustained" a **conviction**, there's an offense level increase based on the severity of the sentence imposed. *See* §2L1.2(b)(2).
- (2) "If, at any time *after* the defendant was ordered deported or ordered removed . . . , the defendant engaged in **criminal conduct** resulting in" a conviction, there's an offense level increase based on the severity of the sentence imposed. *See* §2L1.2(b)(3).

Convictions that occur before a first order of removal and criminal conduct that occurs after a first order of removal (and results in a conviction) are covered. But, this scheme creates a gap in the narrow, but not entirely uncommon situation, where an illegal alien who is wanted on a criminal warrant is apprehended and ordered removed before being tried and convicted on the outstanding warrant. In such cases, the conviction occurs after the defendant was ordered removed, so it does not qualify under §2L1.2(b)(2). And, the underlying criminal conduct resulting in the conviction has occurred before the defendant was ordered removed, so it does not qualify under §2L1.2(b)(3). The Commission should make a technical amendment to the guidelines to close this loophole.

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at [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/DOJ\\_Yates.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/DOJ_Yates.pdf).

<sup>42</sup> Written Statement of Sally Quillian Yates Before the United States Sentencing Commission at 4 (February 16, 2011), available at [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/DOJ\\_Yates.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/DOJ_Yates.pdf) (explaining that "[r]evocation of supervised release is a particularly important tool of the southwest border districts in combating immigration offenses").

**IX. The Commission Should Add an Enhancement for Cyber Intrusions with a Foreign Nexus.**

Some of the most significant and malicious cyber activity in recent years has been committed by sophisticated intelligence services and their proxies reaching across our borders from perceived safe harbors.<sup>43</sup> The global nature of the Internet means that nation-states, their proxies, and foreign terrorist organizations can easily victimize more people and entities within the United States. The most commonly charged statutes in such situations are 18 U.S.C. §§ 1028 (identity theft), 1029 (access device fraud), 1030 (computer fraud), and 2511 (interception of electronic communications). The Commission should amend the guidelines for those offenses by adding an enhancement if the defendant knew or intended that his actions would benefit a foreign government, foreign instrumentality, or foreign agent. Amending the guidelines in this respect would be consistent with the enhancement that the Commission added to §2B1.1 in 2013 for trade secret offenses.<sup>44</sup>

**X. The Commission Should Amend the Guidelines Regarding Attempts and Conspiracies to Provide Material Support to Foreign Terrorist Organizations.**

The Commission should amend the material support to terrorism guidelines provision, §2M5.3, to include attempts and conspiracies. It should also amend Application Note 1 to §2X1.1(d) by listing 18 U.S.C. § 2339B as one of the terrorism-related offenses for which the three-level reduction for attempts and conspiracies is inappropriate. The Department believes this is a technical amendment that would clarify the guidelines and be consistent with the intent behind §2M5.3. It appears

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<sup>43</sup> See, e.g., Indictment, *United States v. Dokuchaev*, No. 3:17-cr-00103-VC (N.D. Cal. Feb. 28, 2017) (alleging that defendants used unauthorized access to Yahoo's systems to steal information from at least 500 million Yahoo accounts and then used some of that stolen information to obtain unauthorized access to the contents of accounts at Yahoo, Google and other webmail providers); Indictment, *United States v. Wang Dong*, No. 2:14-cr-00118-UNA (W.D. Pa. May 1, 2014) (charging five Chinese military hackers for computer hacking, economic espionage, and other offenses directed at six American victims in the U.S. nuclear power, metals, and solar products industries); Criminal Complaint, *United States v. Romar*, No. 1:15-mj-00498 (E.D. Va. Sept. 29, 2015) (Syrian national affiliated with the Syrian Electronic Army pleaded guilty in 2015 to felony charges of conspiring to receive extortion proceeds and conspiring to unlawfully access computers engaged in a multi-year criminal conspiracy to conduct computer intrusions against perceived detractors of Syrian President Bashar al-Assad); Indictment, *United States v. Fathi*, No. 16-CR-48 (S.D.N.Y. Jan. 21, 2016) (indicting seven Iranian nationals who performed work on behalf of the Iranian Government on computer hacking charges related to their involvement in an extensive campaign of over 176 days of distributed denial of service (DDoS) attacks).

<sup>44</sup> U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(13)(B) (providing a four-level enhancement in a trade secret case if the defendant knew or intended "that the offense would benefit a foreign government, foreign instrumentality, or foreign agent").

that when §2M5.3 was created, the Commission intended it to apply to all convictions under § 2339B, including convictions for conspiring and attempting to provide material support to a designated foreign terrorist organization. For conspiracy, attempt, and solicitation offenses, §2X1.1 provides a three-level reduction from the guidelines level applicable to the underlying substantive offense. Section 2X1.1(c) instructs courts not to apply that reduction if the guideline for the substantive offense expressly covers attempt, conspiracy, or solicitation.

Conspiracy and attempt to commit material support under § 2339A are largely exempt from this reduction, and, for purposes of the statutory maximum sentences available under both §§ 2339A and 2339B, Congress treated conspiracy and attempt to commit material support the same as the respective substantive offenses. The Department has no reason to believe the Commission intended to authorize lesser punishments for conspiracies and attempts under § 2339B than under § 2339A or other terrorism-related statutes. This clarifying amendment should be adopted to eliminate any argument that § 2339B conspiracy and attempt convictions should be subject to a three-level reduction under §2X1.1. The potential for widespread harm as a result of terrorist attacks certainly warrants treating attempt and conspiracy material support convictions as seriously as convictions for completed material support offenses, whether under §§ 2339A or 2339B.

#### **XI. The Commission Should Amend Application Note 3 to §2B1.1 by Clarifying the Scope of the “Government Benefits Rule.”**

There is currently a circuit split regarding the loss amount calculation in cases where the defendant fraudulently obtained government procurement contracts that were reserved for minority-owned businesses.<sup>45</sup> The Commission should resolve the circuit split by amending Application Note 3 to §2B1.1 to make clear that the “government benefits rule” applies to cases where the defendant fraudulently obtained minority-owned business contracts.

Under the Small Business Jobs Act of 2010,<sup>46</sup> federal agencies are to set aside a certain proportion of contracts for “socially and economically disadvantaged individuals.”<sup>47</sup> There is now a circuit split regarding whether courts should deduct from the sentencing loss calculation the fair market value of services rendered under contracts set aside for minority-owned businesses that have been obtained fraudulently.<sup>48</sup> The Commission should resolve the circuit split by making clear

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<sup>45</sup> Compare *United States v. Harris*, 821 F.3d 589, 602 (5th Cir. 2016), with *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009).

<sup>46</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

<sup>47</sup> 15 U.S.C. § 644(g)(2)(A)-(B).

<sup>48</sup> Compare *United States v. Harris*, 821 F.3d 589, 600-602 (5th Cir. 2016) (rejecting the government benefits rule for procurement contracts) and *United States v. Martin*, 796 F.3d 1101, 1109 (9th Cir. 2015), with *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009) (applying the

that the “government benefits rule”<sup>49</sup> and not the “credits against loss rule” applies in these cases. This change will ensure that defendants who commit this type of fraud face appropriate punishment.

## **XII. The Department’s Comments Regarding the Commission’s Notice of Proposed Priorities for 2017-2018.**

The Department appreciates the opportunity to comment on the Commission’s Notice of Proposed Priorities for 2017-2018 as published in the Federal Register. The Department supports the Commission’s desire to study approaches that would simplify the guidelines, promote proportionality, and reduce sentencing disparities. And, the Department looks forward to working with the Commission as it explores the various ways to achieve those laudable goals.

Similarly, the Department supports and appreciates the Commission’s continued work in the area of synthetic drugs. The Commission should address this critically important issue as soon as possible. Commission staff has previously met with representatives from the DEA on this issue, and the Department remains ready and willing to assist the Commission’s efforts to develop a more effective and efficient approach than that currently found in Application Note 6 to §2D1.1. Furthermore, the Department supports the Commission’s desire to study and learn more about recidivism. The results of that study will help the Department protect the public from dangerous repeat offenders.

The Department would like to specifically address three of the Commission’s proposed priorities. The first is the Commission’s proposed priority regarding mandatory minimums. The Department firmly believes that mandatory minimums play an important role in federal sentencing. That role is especially significant in the post-*Booker* world of advisory guidelines. Mandatory minimums are essential tools that Congress has provided to federal prosecutors. Mandatory minimums are effective at incapacitating some of the most violent and significant offenders, deterring criminal activity, motivating cooperation, and reducing sentencing disparities. The Department believes that mandatory minimums reflect the will of the people (as expressed through their elected representatives), and it further believes that mandatory minimums have helped reduce crime in America. The Department appreciates the hard work that went into the Commission’s production of the *Mandatory Minimum Penalties in the Federal Criminal Justice System* report. The data contained in the report is certainly valuable. The Department respectfully disagrees, however, with the Commission’s desire to prioritize the advocacy of mandatory minimum sentencing reform.

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government benefits rule in this context), *United States v. Leahy*, 464 F.3d 773, 789-790 (7th Cir. 2006) (same), *and United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-318 (4th Cir. 2000).

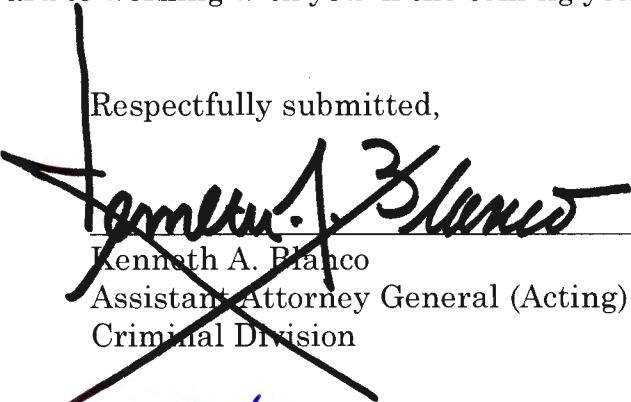
<sup>49</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3.

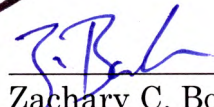
Second, the Department opposes modifying the guidelines to change the way juvenile convictions are counted for criminal history purposes. In a rational system of sentencing, it simply cannot be the case that a defendant who is convicted of Hobbs Act robbery at age nineteen is placed in Criminal History Category I, despite having prior juvenile convictions for rape and armed robbery. The guidelines as written appropriately ensure that such a violent recidivist faces a higher sentencing range than a nineteen-year-old who is convicted of Hobbs Act robbery, but has no prior criminal convictions, juvenile or otherwise. There is simply no good reason for pretending as though these two very different offenders have similar criminal histories. In those rare cases where a defendant's criminal history category may be over-representative due to points assessed for juvenile convictions, existing law provides two options for relief: (1) a departure under §4A1.3(b)(1); or (2) a variance under 18 U.S.C. § 3553(a). The Department respectfully requests that the Commission reject this proposed priority.

Third, the Department does not support combining Zones B and C on the Sentencing Table in order to create more probation-eligible defendants. The Department believes that the current structure properly recognizes the difference in conduct that typically differentiates defendants in Zone B from those in Zone C. The Department, therefore, respectfully requests that the Commission reject this proposed priority.

Thank you for considering the Department's perspective on these matters. The Commission serves an important purpose in our criminal justice system, and the Department looks forward to working with you in the coming year.

Respectfully submitted,

  
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