



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530

July 23, 2012

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Saris:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2013. *Notice of Proposed Priorities and Request for Public Comment*, 77 Fed. Reg. 31069 (May 24, 2012).

*The Imperative to Increase the Productivity of Public Safety Expenditures
in an Era of Governmental Austerity*

In the last 50 years, the United States experienced an extraordinary increase, followed by an equally extraordinary decrease, in the number of Americans victimized by violent crime. Between 1960 and the early 1990s, violent crime in the United States increased dramatically. According to the Federal Bureau of Investigation's Uniform Crime Reports, the number of violent crimes in the United States rose from 288,460 in 1960 to 1,932,274 in 1992.¹ The number of murders rose from 9,110 in 1960 to 23,760 in 1992. The number of rapes rose from 17,190 in 1960 to 109,062 in 1992; robberies from 107,840 in 1960 to 672,478 in 1992; and aggravated assaults from 154,320 in 1960 to 1,126,974 in 1992.² According to the Bureau of

¹ FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS - STATISTICS TABLE-BUILDING TOOL, <http://www.ucrdatatool.gov/Search/Crime/State/StateCrime.cfm>.

² *Id.* The rate of violent crime – the number of violent crimes per 100,000 population – also increased dramatically during this period. The rate of violent crime rose from 160.9 per 100,000 in 1960 to 757.7 in 1992. The rate of murders rose from 5.1 per 100,000 in 1960 to 9.3 in 1992. The rate of rapes rose from 9.6 per 100,000 in 1960 to 42.8 in 1992. The rate of robberies rose from 60.1 per 100,000 in 1960 to 263.7 in 1992. The rate of aggravated assaults rose from 86.1 per 100,000 in 1960 to 441.9 in 1992.

Justice Statistics' National Victimization Survey, 10,015,769 Americans were victims of violent crime in 1992, up from 7,827,356 in 1973 (the first year of the survey).³ The causes underlying these increases have been debated for decades in universities, in legislatures, and around kitchen tables. But one fact is beyond debate: the country reacted to this extraordinary increase in violent crime with extraordinary policy changes and public safety investments at all levels of government.

The policy changes and investments included reforms to policing, and increases in the number of police on the streets; reforms to criminal sentencing, and increases in prison and detention populations; a commitment to reducing illegal drug use and drunk driving, and increases in treatment capacity; a recognition that almost all those who go to prison are someday released, and renewed efforts to reduce reoffending and promote effective prisoner reentry. The country has seen criminal justice innovations ranging from drug courts, to "hot spot" policing and CompStat, to the AMBER Alert system, to a new commitment to victims of crime and their right to be treated with dignity and respect.

As a country, over several decades, we steadily increased funding for criminal justice agencies at all levels of government, supporting numerous programs and initiatives that changed the way the nation approached crime and criminal justice. According to data from the Bureau of Justice Statistics, state and local criminal justice spending (including law enforcement, criminal prosecution, courts, and corrections) rose from approximately \$32.6 billion to \$186.2 billion between 1982 and 2006.⁴ Analysis of state budget trends by the National Association of State Budget Officers (NASBO) shows overall state spending on all categories of programs (including corrections, law enforcement and criminal justice programs) continued to rise until 2009, when the recent recession began to affect states' budgets.⁵ Similarly, federal justice system expenditures steadily increased from \$4.5 billion in 1982 to \$41 billion in 2006.⁶ The Department of Justice's outlays rose from approximately \$2.3 billion in 1982 to approximately \$30 billion today.⁷ These investments have meant more police on the streets, more court personnel of all kinds, more offenders behind bars, more treatment, prevention and intervention programs, and greater research and innovation across the criminal justice system.

³ In 1993, the National Crime Victimization Survey (NCVS) underwent a significant redesign. The data reported by the Bureau of Justice Statistics (BJS) for this letter were adjusted so that they are comparable to the numbers after the redesign. In addition to the redesign in 1993, BJS has changed the way it counts separate crimes against the same victim that occurred in rapid succession (series victimization). For purposes of this report, both the pre-1993 and post-1993 data *exclude* the series victimization adjustments and are comparable across all years.

⁴ BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.1.2.2006 (Kathleen Maguire ed., 2012), <http://www.albany.edu/sourcebook/pdf/t122006.pdf>.

⁵ NATIONAL ASSOCIATIONS OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT, FISCAL YEAR 2010 2-6 (2011), available at <http://www.nasbo.org/publications-data>.

⁶ BUREAU OF JUSTICE STATISTICS, *supra* note 4.

⁷ See OFFICE OF MANAGEMENT AND BUDGET, Historical Tables, tbl.4.1, Outlays by Agency: 1962-2017, <http://www.whitehouse.gov/omb/budget/Historicals>.

The result of these and many other policy changes and investments has been the mirror image of the violent crime increases of the 1960s, 70s and 80s. Last month, the Federal Bureau of Investigation reported that in 2011, the number of violent crimes fell by 4 percent across the country, and the number of murders fell by 1.9 percent.⁸ These are the latest bits of extraordinarily good news about violent crime in the United States that span back to 1992. The good news – a massive reduction in violent crime – marks a tremendous achievement of government. Violent crime in the United States is now at the lowest levels in generations, when only 20 years earlier, we were experiencing the highest levels of violent crime in the post-war period. Between 1992 and 2010, the number of violent crimes in the United States dropped remarkably.⁹ The number of murders in 2010 was down to 14,748 from 23,760 in 1992. The number of rapes was down to 84,767 from 109,062 in 1992. The number of robberies was down to 367,832 from 672,478 in 1992, and the number of aggravated assaults was down to 778,901 in 2010 from 1,126,974 in 1992.¹⁰ According to the Bureau of Justice Statistics' National Crime Victimization Survey, about 3,817,380 Americans were victims of violent crime in 2010, down from 10,015,769 in 1991. And these accomplishments were achieved at the same time the enforcement community made a new commitment to prevent and detect terrorist activity at home and abroad.

While not every U.S. city experienced the reduction in violent crime numbers, the broad trend touched most of the country. Our two largest cities have seen among the biggest drops in violent crime over the past two decades. New York City experienced a 73 percent reduction in the number of murders reported and a 75 percent reduction in the overall number of violent crimes reported between 1993 and 2011.¹¹ Los Angeles saw a 71 percent reduction in the number of murders reported and a 73 percent decline in the overall number of violent crimes reported from 1992 to 2009.¹² In 2011, 64 percent of all large U.S. cities reported a decrease in violent crime. By working together and by investing in public safety, federal, state, local, and tribal governments – including the heroic men and women of the law enforcement community – have been able to bring the nation's crime rates to historic lows. In a stunning and all-too-easily forgotten way, our governmental collaboration has improved the day-to-day safety of communities large and small, rich and poor, and the day-to-day lives of men, women and children throughout the nation.

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⁸ FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T. OF JUSTICE, PRELIMINARY ANNUAL CRIME REPORT, JANUARY-DECEMBER 2011 (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-dec-2011>.

⁹ FEDERAL BUREAU OF INVESTIGATION, *supra* note 1.

¹⁰ *Id.* The rate of violent crime – the number of violent crime per 100,000 population – also decreased dramatically during this period. The rate of violent crime fell from 757.7 per 100,000 in 1992 to 403.6 in 2010. The rate of murders fell from 9.3 per 100,000 in 1992 to 4.8 in 2010. The rate of rapes fell from 42.8 per 100,000 in 1992 to 27.5 in 2010. The rate of robberies fell from 263.7 per 100,000 in 1992 to 119.1 in 1992. The rate of aggravated assaults fell from 441.9 per 100,000 in 1992 to 252.3 in 2010.

¹¹ NEW YORK CITY POLICE DEPARTMENT, COMPSTAT REPORT COVERING THE WEEK 6/11/2012 THROUGH 6/17/2012 (2012), http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/escity.pdf.

¹² *Crime Statistics Summaries Archive*, OFFICIAL WEBSITE OF THE LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098.

Recently, though, the situation has changed. As has been well documented, the financial crisis of 2008 – and the recession that followed – brought steep cuts in state and local government spending. As a result, state and local investments in criminal justice programs have been declining for several years.¹³ Analysis by NASBO shows that state spending on corrections (and certain other criminal justice programs) dropped between 2009 and 2011.¹⁴ Reports on spending at the county and city level, including spending on public safety, show significant declines.¹⁵ Some of these spending cuts were offset in 2009 and 2010 by expenditures authorized by the American Recovery and Reinvestment Act of 2009. But as the Recovery Act funds have ended, and with the passage of the Budget Control Act of 2011, overall public safety spending and investments have been decreasing. For example, according to a report by the Office of Community Oriented Policing Services, thousands of state and local police officers have been laid off as a result of the economic downturn.¹⁶

At the federal level, the Budget Control Act sent a clear signal that the steady growth in the budgets of the Department of Justice, other federal enforcement agencies, and the federal courts experienced over the past 15 years has come to an end. Overall budgets have mostly been flat over the past three years. However, as prison and detention spending has increased, other criminal justice spending, including aid to state and local enforcement and prevention and intervention programs, has decreased. In fact, the trend of greater prison spending crowding out other criminal justice investments goes back at least a decade and has caused a significant change in the distribution of discretionary funding among the Department's various activities.

In FY 2002, funding for federal law enforcement, prisons and detention, and prosecution programs accounted for 75 percent of DOJ's total budget, while funding for state, local, and tribal justice assistance and prevention and intervention programs made up 24 percent. By FY 2012, however, funding for federal law enforcement, prisons and detention, and prosecution programs had risen to 91 percent of the DOJ annual budget, while just 8 percent of that budget was allocated to funding for state, local, and tribal assistance and prevention and intervention programs. In FY 2012, overall funding for state, local, and tribal justice assistance and prevention and intervention programs reached its lowest level in the past 15 years.¹⁷

¹³ NATIONAL ASSOCIATIONS OF STATE BUDGET OFFICERS, FISCAL SURVEY OF STATES, FALL 2011, vii–ix, 1-2 (2011) available at <http://www.nasbo.org/publications-data>; NATIONAL ASSOCIATIONS OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT, FISCAL YEAR 2010 2-6, 51-53, 69-70 (2011), available at <http://www.nasbo.org/publications-data>.

¹⁴ NATIONAL ASSOCIATIONS OF STATE BUDGET OFFICERS *supra* note 5 at 6; NATIONAL ASSOCIATIONS OF STATE BUDGET OFFICERS, FISCAL SURVEY OF STATES, FALL 2011 vii–ix (2011) available at <http://www.nasbo.org/publications-data>.

¹⁵ See, e.g., CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, CITY FISCAL CONDITIONS IN 2011 (2011), <http://www.nlc.org/find-city-solutions/research-innovation/finance/city-fiscal-conditions-in-2011>.

¹⁶ OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (2011), http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Impact.pdf.

¹⁷ Office of Policy and Legislation, U.S. Dep't of Justice, Analysis of Department of Justice budget trends from Fiscal Years 2002 and 2012 (2012).

Taken together, reductions in public safety spending that have already occurred and that are likely to continue in the coming years mean that the remarkable public safety achievements of the last 20 years are threatened unless reforms are instituted to make our public safety expenditures smarter and more productive. In late 2011 and early 2012, we have already seen some cities experience increases in violent crime. The question our country faces today is how can we continue to build on our success in combating crime and ensuring the fair and effective administration of justice in a time of limited criminal justice resources at all levels of government? In other words, how will the country ensure sufficient investments in public safety, and how will those involved in crime policy ensure that every dollar invested in public safety is spent in the most productive way possible?

With declining public safety budgets, our ability to increase the productivity of public safety spending of all kinds will largely determine whether we build on the reductions in crime we've experienced over the last twenty years or whether we see setbacks. Our federal, state, and local governments are making decisions now that could have significant effects on the nation's justice system for years to come.

These budgetary dynamics have serious ramifications for the federal criminal justice system and in particular for the federal sentencing and corrections system. Our goals for federal sentencing and corrections policy have been quite clear for the last several years. As Attorney General Holder has said, we must "create a sentencing and corrections system that protects the public, is fair to both victims and defendants, eliminates unwarranted sentencing disparities, reduces recidivism, and controls the federal prison population." With these goals as our guide, we believe that federal sentencing and corrections policy today faces serious challenges, especially around the need to control federal prison spending. We must ensure that our federal sentencing and corrections system is strong but smart; credible, productive and just; and budgetarily sound.

Our budget outlook demands a more exacting accounting and deployment of federal criminal justice resources, including federal sentencing and corrections resources. The federal prison system is a product of federal sentencing in its size and scope. And as we said in our report to the Commission last year, prisons are essential for public safety. But maximizing public safety can be achieved without maximizing prison spending. In an era of governmental austerity, maximizing public safety can only be achieved by finding a proper balance of outlays that allows, on the one hand, for sufficient numbers of police, investigative agents, prosecutors and judicial personnel to investigate, apprehend, prosecute and adjudicate those who commit federal crimes, and on the other hand, a sentencing policy that achieves public safety correctional goals and justice for victims, the community, and the offender. The federal prison population – and prison expenditures – have been increasing for years. In this period of austerity, these increases are incompatible with a balanced crime policy and are unsustainable.

Given the budgetary environment, the current trajectory of corrections spending will lead to further imbalances in the deployment of justice resources. While this is a long-term problem that requires a systemic solution, there are also immediate concerns. The Bureau of Prisons is currently operating at 38% over rated capacity. This is of special concern at the prisons housing

the most serious offenders, with 53% crowding at high-security facilities and 49% at medium security facilities.¹⁸ This level of crowding puts correctional officers and inmates alike at greater risk of harm and makes recidivism reduction far more difficult. And as we indicated last year, the Department's Inspector General indicated that the Bureau of Prisons must contend not only with a growing inmate population, but also with aging facilities, higher inmate-to-staff ratios, and many other challenges, including the need to provide jobs and training programs for inmates while they are incarcerated.

The Commission – and federal sentencing policy – must be part of an inter-branch discussion to find the right balance of investigative, prosecution, defense, judicial, prison, and reentry resources to maximize public safety and justice. Sentencing policy is a significant component in finding that balance. We believe federal sentencing policy should be reviewed – both systemically and on a crime-by-crime basis – through the lens of public safety spending productivity. Adopting that perspective, we think it is clear that there are many areas of sentencing policy that can be improved. We have identified many of the crime-specific areas over the last several years that warrant substantive reexamination. And we have also put forward legislative proposals to make systemic changes that would help control prison costs in a responsible way that furthers public safety. As to the guidelines process itself, we think reforms – including some simplification of the guidelines and some limits on sentencing appeals – are worth fully considering.

Achieving reform of the type we suggest here will not come quickly or easily. We think it can only be achieved through building consensus among federal and non-federal criminal justice stakeholders. If Congress, the Judiciary, the Administration, the Sentencing Commission, and the many other criminal justice stakeholders come together to find common ground, we believe these challenges can be successfully addressed and federal criminal justice can be a leader in setting a course for a better, more just, and more productive crime policy in an age of governmental austerity.

* * *

At the same time that prison populations and prison expenditures have been rising, federal sentencing practice has trended away from guideline sentencing. The Commission has documented these trends; they involve the continuing erosion of the guidelines and increasing unwarranted disparities in sentencing within courthouses and across the country. As the Commission has heard often, for many crime types, certainty of punishment has a greater impact on public safety than the severity of punishment. We have written and spoken extensively about our concerns with reduced certainty and increased unwarranted disparities in sentencing, and we will not repeat all of those concerns here. Suffice it to say that these concerns – which are shared by others in and out of government – will need to be addressed as part of any serious reform of federal sentencing and corrections law and policy.

¹⁸ See UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS - ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES' TIME IN PRISON (2012).

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As we've noted before, the passage of the Sentencing Reform Act of 1984 was a unique bipartisan moment; Senators Kennedy, Thurmond, Biden, Hatch, and many others came together to address acute crime and justice problems that existed at that time. Crime rates had skyrocketed and unwarranted sentencing disparities were a genuine concern. The solution these leaders devised was not perfect, but it did contribute to reductions in both crime and unwarranted sentencing disparities.

There can be little doubt that the criminal justice investments and reforms of the 1960s, '70s, '80s and '90s – including the SRA – achieved remarkable results over the last two decades. Dramatically lower crime rates have meant tens of millions fewer victims of crime, a fact that is too often overlooked in the discussion about sentencing and corrections policy. However, this achievement came at a high economic and human price, including the incarceration of over two million Americans. Today, we face real criminal justice challenges, especially around decreasing investments in public safety. We must work together to find solutions to these challenges and forge policies that will continue to increase public safety while reducing the costs to our country and our citizens.

We think the Commission can contribute to a new bipartisan and inter-branch engagement on the sentencing and other criminal justice challenges of our day. A strong federal sentencing system is critical to keeping national crime rates low, moving them still lower, and addressing some specific and acute crime problems. Given new and emerging crime challenges, limited federal resources, the need to deploy investigative and prosecutorial resources more efficiently and effectively, the critical need – identified and discussed many times by the President and the Attorney General – to reduce reoffending by those released from custody, and the growing disparities of the post-*Booker* sentencing system, we think a candid discussion among criminal justice stakeholders is needed.

Other Priorities

We largely support the priorities identified by the Commission in its recent Federal Register notice.

A. Congressional Directives and Other Enactments

As is true in most years, one Commission priority for the coming amendment year must be to respond to directives and other enactments from Congress. The Commission is a product of Congress, exercises authority delegated by Congress, and should make its first priority to respond to congressional action.

We believe the Commission should make it a priority to complete work on any congressional directives addressing particular guideline areas as well as any other congressional enactments involving criminal law. There are several bills making their way through Congress that include directives to the Commission or changes to criminal law and that have a substantial

likelihood of being enacted. These bills address high-priority areas and should be addressed in the coming amendment year.

B. The “Categorical Approach” to Reviewing Predicate Offenses

We continue to encourage the Commission to complete its review of the term “crime of violence” as it is used in sentencing statutes and guidelines, and the use of the “categorical approach” to determine whether certain prior convictions trigger higher statutory and guideline sentences. Few statutory and guideline sentencing issues lead to as much litigation as determining whether a prior offense is categorically a “crime of violence,” an “aggravated felony,” or a “drug trafficking offense.” The litigation burden is particularly onerous on courts, U.S. Attorneys’ offices, and defenders with significant immigration dockets. Although the Supreme Court has employed the often murky “categorical approach” to define these terms as they appear in statutes (*see Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); and *Chambers v. United States*, 555 U.S. 122 (2009)), because of the advisory nature of the guidelines, we believe the Commission is free to simplify the determination within the guidelines manual and to advise Congress on how to do the same in federal statutes.

The examples of problems caused by this approach are countless, and we think this should concern the Commission because the approach has led the courts to inconsistent sentencing results. We have catalogued these inconsistent results for the Commission in the past. We do not believe defendants should receive dramatically different sentences simply because of varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. We are hopeful that the Commission’s study will result in a resolution of this problem that will ultimately reduce the resources needed to litigate these cases – an important goal, particularly in light of the tremendous impact of the illegal immigration docket on the courts.

C. Child Exploitation Crimes

We believe the Commission should complete its review of the sentencing guidelines applicable to child exploitation crimes and prepare a report to Congress that includes recommendations regarding the current child exploitation guidelines. Any such recommendations should ensure that the sentences for child exploitation offenses adequately reflect the seriousness of the crimes and the offenders.

D. Review of Supervised Release Violators

We fully support the Commission’s intent to review the circumstances under which offenders who violate their terms of supervised release have those terms of supervision revoked and are returned to federal prison. Innovative work from across the country involving probation and supervision violators suggests there may be opportunities for public safety improvements and cost savings regarding this group of offenders.

E. Export Offenses Relating to National Security

We propose a minor amendment to Appendix A of the guidelines regarding §2M5.1 (and perhaps the commentary to §2M5.1, as well) so that convictions under 18 U.S.C. § 554 are referenced in the guidelines to both §2M5.1 and §2M5.2. Section 554, which prohibits smuggling goods from the United States “contrary to any law or regulation of the United States,” is an “umbrella” statute for several export control violations. Section 554 offenses are currently referenced in Appendix A to §2M5.2 (and listed in the commentary to §2M5.2 – Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). However, § 554 offenses may involve circumstances beyond arms, munitions and military equipment exports and for which §2M5.1 may be the more appropriate guideline. For instance, 18 U.S.C. § 554 may apply when there are violations of economic sanctions but not involving munitions. In such circumstances, we believe §2M5.1 (Evasion of Export Controls; Financial Transactions With Countries Supporting International Terrorism), would be the more appropriate guideline. As more “defense articles” (especially munitions) are moved from licensing under the Arms Export Control Act (violations of which are properly sentenced under §2M5.2) to licensing under IEEPA/Export Administration Regulations (which offenses are sentenced under §2M5.1), there is an increased need for clarity on the appropriate guideline provision for sentencing involving § 554 offenses, especially those involving “dual-use” goods. We therefore recommend referencing 18 U.S.C. § 554 in Appendix A to both §2M5.1 and §2M5.2 (and perhaps in the commentary to §2M5.1, as well).

F. Definition of “Controlled Substance Offense”

In 2008, the Commission amended the guidelines to clarify that the term “drug trafficking offense” includes “offers to sell” illegal drugs.¹⁹ We believe a similar amendment should now be made to make clear that the term “controlled substance offense” as used in the guidelines also includes offers to sell. There has been litigation over the term “controlled substance offenses” and whether it includes offers to sell. *See, e.g., United States v. Savage*, 542 F.3d 959 (2d Cir. 2008) (federal sentence vacated and remanded because previous conviction under Connecticut statute which criminalized offers to sell illegal drugs not necessarily a “controlled substance offense” under the guidelines); *United States v. Price*, 516 F.3d 285, 288 (5th Cir. 2008) (federal sentence vacated and remanded because Texas controlled substance offense included a broader range of offenses, including offers to sell, unlike “controlled substance offense” as defined in the guidelines). We think an amendment to the guidelines clarifying the term in a manner consistent with the 2008 amendment would be appropriate.

Circuit Conflicts and Erroneous Court Decisions

We continue to urge the Commission to make the resolution of circuit conflicts a priority for this guideline amendment year, pursuant to its responsibility outlined in *Braxton v. United States*, 500 U.S. 344, 347-49 (1991). There are many circuit conflicts that deserve the Commission’s attention.

¹⁹ *See*, U.S. Sentencing Commission, *Guidelines Manual*, Amendment 722 (November 1, 2008).

For example, there is an important circuit conflict surrounding §3E1.1, which provides for a two-level reduction for defendants who clearly demonstrate acceptance of responsibility for their offense and a further one-level reduction to qualifying defendants but only upon a government motion. The qualifications for the one-level reduction are, among other things, that the defendant pleads guilty and timely notifies authorities, thus permitting the government to avoid “preparing for trial and permitting the Government and the court to allocate their resources efficiently.” The requirement that there be a government motion was added in 2003 as a result of the PROTECT Act,²⁰ prior to which §3E1.1(b) was interpreted to require sentencing courts to grant all qualifying defendants the additional one-level reduction. *United States v. Sloley*, 464 F.3d 355, 359-360 (2d Cir. 2006).

Recently, the Second and Fourth Circuits have interpreted §3E1.1(b) such that the government may only refuse to move for the one-level reduction if it determines that it has been required to prepare for trial. *See United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011) (government may not refuse to file motion when defendant pleads guilty but acts in a manner requiring a *Fatico* hearing); *United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011) (government may not refuse to file motion when defendant fails to sign an appellate waiver). Other circuits, at our urging, have taken a different view, finding that the government may not withhold the motion for an unlawful reason, but that it may evaluate in a more general manner the resources saved by the defendant’s timely plea, beyond simply whether the government was saved from preparing for trial. *See United States v. Johnson*, 581 F.3d 994 (9th Cir. 2009) (government did not abuse its discretion for failing to file the motion when defendant refused to waive right to appeal), and *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008) (same). Some circuits see the Second and Fourth Circuits’ interpretation as defeating the objectives of the 2003 PROTECT Act amendments, bringing into question the need for a government motion in the first place.

We think the Commission should make the resolution of a number of circuit conflicts a priority for the coming amendment year. The Commission should particularly review the circuit conflict discussed above and provide clarity on the scope of the government’s discretion in filing motions under §3E1.1(b), so that this provision of the guidelines is fairly and evenly applied in all of our nations federal courts.

Conclusion

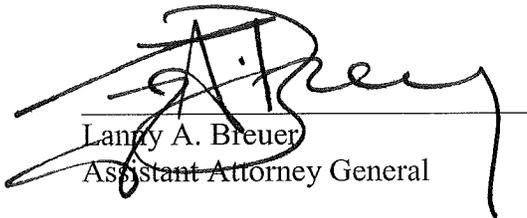
The policy agenda we suggest here is substantial. The range of issues represents the range of the Commission’s statutory responsibilities, including overseeing the systemic health of the federal sentencing system and its structural elements, addressing individual guidelines in need of reform, resolving circuit conflicts, and more. We look forward to discussing all these issues with you and the other Commissioners with the goal of refining the sentencing guidelines

²⁰ Prosecutorial Remedies and Tools Against Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671-72 (2003).

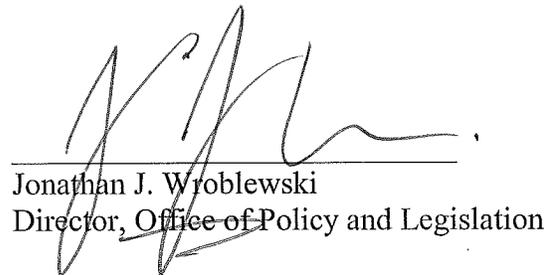
and laying out a path for developing effective, efficient, fair, and stable sentencing policy long into the future.

Crime rates are at generational lows, and our goal is to continue to improve public safety while ensuring justice for all by means of the efficient use of enforcement, judicial and correctional resources. We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,



Lanny A. Breuer
Assistant Attorney General



Jonathan J. Wyblewski
Director, Office of Policy and Legislation

cc: Commissioners
Judy Sheon, Staff Director
Ken Cohen, General Counsel