



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530

July 11, 2013

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 to the guidelines that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o) (2006). 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, 2014. *Notice of Proposed Priorities and Request for Public Comment*, 78 Fed. Reg. 32,533 (May 30, 2013).

*Facing the Imperative for Structural Federal Sentencing Reform; and
Learning from Our State Partners, Our Successes, and Our Failures*

Sentencing and corrections policy is once again being transformed in states around the country. The changes are being driven by both budgetary realities and advances in knowledge of human behavior as it relates to the criminal justice process,¹ especially advances in understanding the risks of offending and reoffending. Federal criminal justice policy makers, including the U.S. Sentencing Commission, can learn much from these changes coming from our state partners, as well as from our own past successes and failures, in order to address the significant challenges facing the federal criminal justice system today. Together, we must reform federal sentencing policy in the months ahead so that federal criminal justice can continue to contribute to improved public safety across the country – as it has over the past decades – and at the same time so that it can contribute to greater justice for all.

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¹ 28 U.S.C. § 991 (2006).

In the 1970s and 80s, a seismic shift occurred in much of U.S. sentencing law. In state after state – and in the federal criminal justice system in the form of the Sentencing Reform Act of 1984 – the rehabilitative model of sentencing that had been in place from the earliest days of the Republic was replaced by a new sentencing framework. The foundation of the new system was a belief that reducing reoffending was a fool’s errand – that nothing worked to change offending behavior – and that excessive discretion in charging and sentencing had led to unwarranted disparities and discriminatory impacts on the poor and people of color. It was thought that certainty in sentencing – certainty in both the imposition of a particular sentence for a particular crime, and in the time to be served for a sentence imposed – would simultaneously improve public safety by incapacitating the criminal and deterring new criminality, and also increase fairness in sentencing by reducing unwarranted sentencing disparities.

The new system of determinate sentencing was part of a series of policy changes and investments in the U.S. criminal justice system that came in the wake of unprecedented increases in violent crime in cities and towns across the country in the 1960s and 70s. These changes included reforms to policing and increases in the number of police on the streets; a commitment to reducing illegal drug use and drunk driving and increases in treatment capacity; and a new commitment to victims of crime and their right to be treated with dignity and respect. As a country, 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 justice.

These and other reforms led to great success; but they also took a great human and fiscal toll. On the one hand, over the past 20 years there has been a massive reduction in violent crime in the United States, including gun violence.² Violent crime in the United States is now near generational lows, when only 20 years earlier, we were experiencing the highest levels of violent crime in the post-war period.³ Where there were 23,760 murders in 1992 in the U.S., by 2011, there were 14,612 (while the population grew by approximately 22%).⁴ Where there were 109,062 rapes reported to law enforcement in 1992, there were 83,425 in 2011.⁵ Where there were 672,478 robberies reported in 1992, there were 354,396 in 2011.⁶ These numbers represent a remarkable success of government; one that is easy to overlook and that we ignore at our peril. We clearly have far more to accomplish in improving public safety, but there is also much to celebrate.

At the same time, though, the U.S. prison population exploded and overall criminal justice spending with it. For most of the country’s history, imprisonment rates were stable at less than 150 persons per 100,000 in population.⁷ In the last several decades, though, the rate has

² Criminal Justice Info. Servs. Div., Fed. Bureau of Investigation. Crime in the United States (Sept. 2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1>.

³ See Fed. Bureau of Investigation, State-by-state and national crime estimates by year(s), <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (Choose “United States-Total” and “Number of violent crimes” from boxes “a” and “b”, respectively).

⁴ Criminal Justice Info. Servs. Div., *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ John Schmitt, Kris Warner, and Sarika Gupta, Center for Economic and Policy Research, The High Budgetary Cost

more than quadrupled to over 700 per 100,000.⁸ Many have documented the impact that such imprisonment rates have had on individuals and communities, including the erosion of trust and confidence in criminal justice among many citizens, particularly in disadvantaged communities and communities of color.

Our extraordinary use of incarceration has also led to an explosion in the number of people returning to the community each year from stints in prison. Then-Attorney General Janet Reno and then-National Institute of Justice Director Jeremy Travis recognized this phenomenon in the late 1990s, and much has been done to focus on the issue. But our efforts to reduce reoffending have not been as robust as necessary and our results to date, while laudable, leave room for improvement. Similarly, the goals of eliminating unwarranted sentencing and other criminal justice disparities have not been achieved. While studies do point to sporadic improvements in consistency as a result of the guidelines and other determinate sentencing elements, there is much more that can and must be done to ensure Equal Justice Under Law for all.

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At the state level, leaders in and out of government have recognized both the costs and benefits of the sentencing reforms of the late 20th Century. From that recognition – derived from a variety of studies of these 20th Century reforms – a new transformation in sentencing and corrections policy is taking place in much of the country. The dichotomy of determinate and indeterminate sentencing is breaking down and is being replaced by a pragmatism that recognizes that (1) budgets are finite; (2) imprisonment is a power that should be exercised sparingly and only as necessary; and (3) while determinate sentencing elements do indeed promote some of the core purposes of sentencing, reducing reoffending and promoting effective reentry are also core goals that can be successfully achieved and must be included in any effective sentencing and corrections framework.

These changes have no doubt sprung in part out of budgetary necessity. But they have also come from a growing understanding of new research into what works among various approaches to sentencing and corrections. State leaders are being driven more by practical, on-the-ground knowledge and data than theory and ideology. The reforms are, in turn, founded on evidence, and in part because of that, they have been embraced across the political spectrum.

For example, Justice Reinvestment initiatives have spread to many states. These initiatives have decreased corrections spending while improving public safety in many of these states by redirecting some resources that might otherwise go to expensive imprisonment towards less expensive community-based efforts to reduce recidivism and strengthen communities. These initiatives have received overwhelming bipartisan support and have been championed simultaneously by executive, legislative and judicial branches of government. Though the

of Incarceration 1, 6 (June 2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

⁸ Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 2010 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

content of Justice Reinvestment legislation differs according to the specific needs and challenges of the communities, state reforms commonly include two elements we believe are needed at the federal level: redirected funding and incentives to reduce reoffending, and adjustments to sentencing for non-violent drug offenders.

Justice Reinvestment is typically accomplished in three phases: (1) an analysis of criminal justice data to identify drivers of corrections spending (one of the most expensive elements of criminal justice) and the development of policy options to reform such spending to more efficiently and effectively improve public safety; (2) the adoption of new policies to implement reinvestment strategies, typically by directing a portion of the savings generated from increased corrections efficiency to community-based interventions; and (3) performance measurement.

To date, 21 states have implemented Justice Reinvestment initiatives, including: Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Vermont. Six additional states have been pursuing Justice Reinvestment, but have not yet implemented legislation: Alabama, Indiana, Louisiana, Michigan, West Virginia, and Wisconsin.

For federal criminal justice policy makers, much can be gleaned from these state initiatives. For example, in Texas, Arkansas, and Kentucky, reforms have been instituted to adjust sentencing for non-violent drug offenders and to provide increased funding and incentives to reduce reoffending. The initiatives in Texas and Arkansas and other states have already produced tangible results in corrections spending, prison population management, and public safety.

Texas. The Texas prison population increased 300% between 1985 and 2005,⁹ and between 1997 and 2006, probation revocations to prison increased 18%.¹⁰ In 2007, Texas' non-partisan Legislative Budget Board projected that the state would need an additional 17,000 prison beds by 2012 at a cost of \$2 billion.¹¹ That same year, the legislature was planning to spend \$523 million on new prison construction.¹²

The Texas legislature enacted Justice Reinvestment legislation in May 2007. The legislation reformed corrections by reducing sentencing terms for drug and property offenders from a maximum of ten years to a maximum of five years, and by increasing prison capacity for drug and mental health treatment.¹³ The law also reinvested in performance incentives for counties to implement progressive sanctioning models, social/behavioral intervention programs,

⁹ *Commerce, Justice, Science, and Related Agencies Appropriations for 2010: Hearing on Justice Reinvestment Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Appropriations Comm.*, 111th Cong. 509 (2009) (statement of Jerry Madden, Texas House of Representatives).

¹⁰ The Council of State Gov't's Justice Ctr., *Justice Reinvestment State Brief: Texas* (2007).

¹¹ Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 12 (2010).

¹² The Council of State Gov't's Justice Ctr., *supra* note 10 at p. 2.

¹³ *Id.* at 5.

and expansion of drug and other specialty courts, and to hire new staff to reduce community supervision officers caseloads.¹⁴

The law immediately reduced corrections spending: the initiative cost \$241 million, instead of the original \$523 million designated for prison expansion.¹⁵ Moreover, between September 2007 and April 2009, the prison population remained stable,¹⁶ and from December 2008 to August 2010, the prison population decreased by 1,125 individuals.¹⁷ The Texas Legislative Budget Board predicts that the prison population will continue to remain stable and below operating capacity through 2015.¹⁸

The effect of Texas' Justice Reinvestment has resulted in a 25% decrease in parole revocations from September 2006 to August 2008.¹⁹ More importantly, according to the FBI Uniform Crime Reports, violent crime in Texas has decreased from 510.6 offenses per 100,000 population in 2007, to 408 per 100,000 in 2011.²⁰

Arkansas. From 2009 to 2010 alone, the prison population in Arkansas grew 7%, pushing state spending on corrections to an all-time high. By 2020, the prison population was predicted to increase as much as 43%, requiring over \$350 million in additional spending on new prisons and \$120 million to house new inmates. The state also struggled with recidivism rates that exceeded 40%.²¹

In response to these and other challenges, in 2011, the Arkansas state legislature passed the Public Safety Improvement Act with a bipartisan majority. The Act reformed sentencing and corrections law and policy by revising drug statutes to distinguish between drug users and career criminals, established proportional penalties for theft, and implemented a system of good time credits for supervision terms. The Act also instituted graduated and administrative sanctioning for supervision violators, and required the use of risk-needs assessments. Moreover, the legislation provided financial incentives to increase compliance with sentencing guidelines, as well as grants to strengthen community-based supervision, sanctions, and programs.²²

¹⁴ See generally, Marshall Clement, Matthew Schwarzfeld, and Michael Thompson, Council of State Govt's Justice Ctr., *The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* (2011); National Alliance for Model State Drug Laws, *Justice Reinvestment Initiatives* (2012).

¹⁵ Clement, Schwarzfeld, & Thompson, *supra* note 14.

¹⁶ *Id.* at 58.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Fabelo, *supra* note 11.

²⁰ Criminal Justice Info. Servs. Div., Fed. Bureau of Investigation, *Crime in the United States*, <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Crime>. Because this reduction in violent crime is part of a larger trend that began in the early 1990's, it is not yet possible to conclude whether there is a causal relationship with Justice Reinvestment policies.

²¹ The Pew Ctr. on the States, *Arkansas' 2011 Public Safety Reform: Legislation to Reduce Recidivism and Curtail Prison Growth* (July 2011).

²² *Id.*

Preliminary statistics suggest that Arkansas' Justice Reinvestment initiative has had an immediate effect on prison growth and public safety. A monthly breakdown of 2011 data shows that there was a 30% decrease in parole revocations for the year, a 15% drop in probation revocations, and a 7.1% decrease in the prison population.²³ The Act is also projected to avert \$875 million in prison construction and operating costs through 2020.²⁴

Kentucky. Between 1985 and 2010, Kentucky's prison population increased 260%. From FY 1990 to FY 2010, the general corrections fund increased 214%, and between FY 2005 and FY 2009, average state spending per prisoner rose 10%. At the end of 2007, the state's recidivism rate was 40%.²⁵

In response to these challenges, the Kentucky state legislature unanimously passed the Public Safety and Offender Accountability Act in 2011. The Act adjusted drug sentencing to differentiate between traffickers and peddlers, and authorized a new system of good time credits for parolees and probationers. The Act also instituted graduated sanctions, required supervision terms for some offenders, and required the use of risk-needs assessments. Some funds will be reinvested in local corrections, pilot projects intended to reduce recidivism, and community and in-prison interventions to decrease the likelihood of new criminal behavior.²⁶

Kentucky's Justice Reinvestment initiative is expected to save \$422 million over the next 10 years, as well as improve public safety and the performance of Kentucky's corrections system.²⁷ It also is estimated that over the next 10 years, the initiative will decrease the inmate population by 3,000 individuals.²⁸

These are just a few examples of state Justice Reinvestment initiatives. We recognize, and we believe all must recognize, that there are significant differences between the criminal justice system of these three states – and all state criminal justice systems – and the federal criminal justice system. The federal criminal justice docket is dominated by immigration, drug and economic crimes, and includes cases involving regional, national and transnational crimes and conspiracies of great and unique import. Nonetheless, we think there is much to be learned from the experience of the states and the work they have done to reform sentencing and corrections law and policy in light of recent challenges and new research and knowledge.

These experiences include Justice Reinvestment initiatives, but go beyond them too. We have spoken repeatedly to the Commission about the innovative HOPE Program in Hawaii that is

²³ Rob Moritz, *Early indicators show sentencing law working, panel told*, Arkansas News, Sept. 25, 2012, <http://arkansasnews.com/sections/news/arkansas/early-indicators-show-sentencing-law-working-panel-told.html> (last visited June 10, 2013).

²⁴ The Pew Ctr. on the States, *supra* note 21.

²⁵ The Pew Ctr. on the States, *Kentucky: A Data Driven Effort to Protect Public Safety and Control Corrections Spending* (2010).

²⁶ The Pew Ctr. on the States, *2011 Kentucky Reforms Cut Recidivism, Costs* (2011).

²⁷ *Id.*

²⁸ Nat. Council of State Legislatures, *Public Safety and Offender Accountability Act (HB 463): Justice Reinvestment Summary*, <http://www.ncsl.org/documents/nalfo/JusticeReinvestmentMikeMullins.pdf> (last visited June 10, 2013).

reimagining community corrections around the not-so-novel idea of swift, certain, and meaningful but modest sanctions for supervision violations. The preliminary research on the Program is very promising,²⁹ and we continue to request the Commission to review federal supervision programs to see whether a HOPE-like experiment in the federal system might be implemented – and studied – to determine whether it would be beneficial to federal community corrections and help effectively, and less expensively, supervise offenders in the community.

* * *

We have documented in our reports to the Commission over the past several years why we believe current federal sentencing policy is failing to achieve many of the goals set out by Congress in the Sentencing Reform Act and why we believe reform is needed.

The Budget Control Act of 2011³⁰ 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. *Before sequestration*, overall budgets had mostly been flat over the past four years. However, even then, as prison and detention spending had increased, other criminal justice spending, including aid to state and local enforcement and prevention and intervention programs, had decreased. In fact, the trend of greater prison spending crowding out other crucial 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.

Now with the sequester, the challenges for federal criminal justice have increased dramatically and the choices we all face – Congress, the Judiciary, the Executive Branch – are that much clearer and more stark: control federal prison spending or see significant reductions in the resources available for all non-prison criminal justice areas.³¹ If the current spending trajectory continues and we do not reduce the prison population and prison spending, there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs, and cuts along a range of other criminal justice priorities.

As we indicated last year, 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. 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

²⁹ Nat'l Institute of Justice, U.S. Dep't of Justice, <http://www.nij.gov/topics/corrections/community/drug-offenders/hawaii-hope.htm> (last visited June 10, 2013).

³⁰ Pub. L. 112-25, 125 Stat. 240 (2011)

³¹ The Government Accountability Office has noted that the federal prison system has taken many steps to control spending, but that it does not have the authority to implement on its own many of the reforms states have adopted. To achieve significant cost reductions, changes to prosecutorial policies, sentencing practices, or statutory penalties and sentencing structure will be required.

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?

* * *

As we have stated before, 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 – should be addressed as part of any serious reform of federal sentencing and corrections law and policy.

While we are concerned about increased sentencing disparities, we also agree with many commentators who find fault with the Commission's approach to measuring consistency in sentencing and the extent of such disparities. We recognize, as we must, that consistency and fairness are driven not only by judicial decision making, but also by litigation dynamics, including charging decisions and plea bargain negotiations. We further recognize that the structure of the federal sentencing guidelines itself contributes to inconsistent application of the federal sentencing guidelines and inconsistent sentencing outcomes.

There has been much research of state sentencing guideline systems. These systems, by and large, differ structurally from the federal sentencing guidelines in that they have simpler sentencing grids, fewer grid cells, and less complex guideline formulas – i.e. fewer aggravating and mitigating factors *embodied in rules* for litigators to fight over. Conventional thinking would suggest that greater numbers of cells and greater numbers of factors embodied in rules would create a greater number of sets of similarly situated offenders and therefore a greater degree of sentencing consistency and meaningful differentiation among offenders. The available research, though, does not support this notion, finding that greater granularity in the sentencing grid and sentencing formulas does not better sort offenders into more meaningful categories for purposes of sentencing decisions.³² We think these research findings should guide the Commission in its work evaluating unwarranted disparities as much as data on guideline compliance by federal judges. Moreover, we think these findings should guide the Commission – along with many other factors – into a consideration of a simpler guideline system and structural guidelines reform.

³² See, e.g., Brian J. Ostrom, Charles W. Ostrom, Roger A. Hanson, and Matthew Kleiman, Nat'l Ctr. For State Courts, *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States* (August 2008).

* * *

To address both the budgetary realities and concerns over unwarranted disparities, to better meet the goals of the Sentencing Reform Act, and to reflect advances in knowledge of human behavior as it relates to the criminal justice process, we believe reforms to federal sentencing policy are needed. The approach to reform we suggest is the one embodied in the Sentencing Reform Act itself and in the President's Executive Order on Improving Regulation and Regulatory Review.³³ It is to keep focus on all the various purposes of sentencing, to understand the full costs and benefits of various policy options, and to recognize the benefits of a more understandable and simpler framework for the federal sentencing guidelines. [It is a profound weakness that victims, defendants and the general public cannot easily understand the way the federal sentencing guidelines work.]

We do not seek perfection in reform; we do not know of a perfect system of sentencing. But we do believe we can and must make our current federal sentencing system better. And we further believe that much can be learned from the states, including how to control prison spending; how to improve prisoner reentry and reduce reoffending; and how a simpler form of sentencing guidelines can improve consistency, reduce unwarranted sentencing disparities, and better allocate sentencing decisions among the stakeholders in the criminal justice system.

The reforms we are focused on – and that we think the Commission can help bring about – are changes to statutory and guideline drug penalties; improving reentry programming and providing greater incentives to offenders to participate in these programs; and simplifying and reforming the guidelines to better meet all the goals of the Sentencing Reform Act, including controlling the prison population. We believe drug penalties can be reformed, like many states have done, to focus severe penalties on serious and repeat drug traffickers, while providing alternatives or reduced sentences for non-violent, less serious offenders. We believe that both changes to the statutory minimum penalties in title 21 and changes to the so-called “safety valve” exception to mandatory minimum penalties are needed.

We are already working towards reforming some mandatory minimum laws along these lines – and along the lines suggested by the Commission in its report on the subject. Similarly, prison credits or other incentives can be reformed to promote more effective and efficient use of prison resources while simultaneously reducing reoffending. The President's last two budgets have included proposals in this area, and we think now is the time to enact them. In addition, we believe the guidelines can be reformed – by making them simpler – to reduce litigation and prison costs, reduce manipulation of sentences by litigants, and improve sentencing consistency.

A strong and effective federal sentencing system is critical to keeping national crime rates low, moving them still lower, and addressing specific and acute crime problems. So is a strong corps of federal investigators and prosecutors. So is a strong judiciary – including a strong probation system. And so is strong federal support for our state and local partners and for prevention, intervention and treatment programs. Given new and emerging crime challenges,

³³ Exec. Order No. 13,563, 76 Fed. Reg. 14 (January 18, 2011).

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 it is time for reform.

Other Priorities

We think the Commission can and must, simultaneous to considering systemic reforms along the lines discussed above, consider crime-specific issues under the current sentencing guidelines structure.

A. Immigration Legislation, Other Congressional Enactments, and the “Categorical Approach”

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

As our brothers and sisters in the Federal Public Defender community indicated in their annual letter of priorities to the Commission, immigration legislation, if enacted, will likely require a substantial revision to the sentencing guidelines for immigration crimes. Like the defenders, we welcome such a revision. As the Commission well knows, application of the current immigration guidelines is a major part of the most vexing application issue in federal sentencing: determining whether certain prior convictions trigger higher statutory and guideline sentences. We have repeatedly encouraged the Commission to review the term "crime of violence" as it is used in federal sentencing statutes and guidelines, and the use of the "categorical approach" to determine whether 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. In light of the Court's

recent decision in *Descamps v. United States*, 570 U.S. ___, No. 11-9540, slip op. (June 20, 2013), we also hope the Commission will work with us to develop a legislative proposal to reform the Armed Career Criminal Act and other statutes implicated by the categorical approach.

The examples of problems caused by the doctrine are countless, and we think this issue should concern the Commission because the categorical approach has led the courts to very 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 or because of varying drafting conventions among state legislatures. We are hopeful the Commission's work 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 – and increase sentencing consistency.

B. Child Exploitation Crimes

As you know from our March 5, 2013 letter, the Department shares the Commission's view that child pornography offenses are serious crimes that have a profound impact on victims and their families. We also agree with the Commission that technological advancements have changed the way offenders obtain and distribute child pornography, so much so that the specific offense characteristics ("SOCs") in the current guidelines no longer reliably capture the seriousness of offender conduct, nor fully account for differing degrees of offenders' dangerousness. The Department has repeatedly called for reform of the sentencing guidelines for non-production child pornography crimes, but has stated such reform must keep the threat offenders pose to children front and center.

Specifically, the Department is hoping to work with the Commission to obtain congressional authority to amend §2G2.2 of the guidelines. As detailed in our March 5th letter, we believe §2G2.2 (under the current guideline structure) should be amended in a number of ways. For example, we believe an SOC should be added to account for offenders who communicate or associate with others concerning the sexual abuse or exploitation of a minor. This SOC could be tiered to address a range of conduct, from informal communication with others, to participation in groups dedicated to child pornography and child sexual abuse. It could enhance penalties for offenders who encourage the production of new child pornography images or who lead or administer organizations centered on child pornography and child sexual abuse. We also recommend adding an SOC for offenders who engage in repeated and long term child pornography trafficking and collecting, or who use multiple methods of obtaining or sharing child pornography. There should also be an enhancement to account for the sophistication of the offender's behavior, particularly with respect to measures taken to avoid detection, such as using encryption or anonymization.

We also recommend revisions to some of §2G2.2's existing SOCs. For example, the pattern of activity enhancement in §2G2.2(b)(5) should be modified so that it applies even if there is only one prior instance of the sexual abuse or sexual exploitation of a minor, and so that

it provides for increasing penalties in cases where the defendant has a more extensive history of exploiting or abusing minors. The image quantity table in §2G2.2(b)(7) should be revised to increase the numeric thresholds so as to better distinguish between occasional and habitual collectors of child pornography. With respect to image severity, the SOCs should continue to account for images of sadistic or masochistic conduct and images of prepubescent children, but they should also inversely correlate punishment severity with the age of the victim depicted, punishing most severely those who have images of infants, babies, or toddlers. Finally, we believe the distribution SOC in §2G2.2(b)(3) remains meaningful, while the enhancement for the use of a computer in §2G2.2(b)(6) is no longer useful and should be eliminated.

As was reflected in our letter, we disagree with certain conclusions and recommendations in the Commission's Report. In particular, we reject the Report's conclusions that child pornography offenders present a low risk of recidivism and that existing research shows that treatment is effective at preventing recidivism. With respect to statutory sentences, while we agree that consideration should be given to aligning sentences for possession and receipt of child pornography, we do not support the elimination or dramatic reduction of any existing mandatory minimum penalties.

After undertaking a multi-year examination of sentencing in child pornography cases, the Commission concluded in its Report that ". . . the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability." As a consequence, the child pornography guideline is currently being followed in only a third of the cases. This matter needs immediate attention. We urge the Commission to continue its work in this area to resolve this situation as soon as possible.

The Report recommended that Congress enact legislation providing the Commission with express authority to amend the current guideline provisions. As stated above, we agree that such legislation is needed in order to revise the guidelines and implement the changes we suggest here. We look forward to working with the Commission and Congress to enact such legislation and develop a guideline that incorporates these ideas and more accurately calibrates the sentences of child pornography offenders. In the meantime, we will continue to work with the Commission to implement any revisions to the guidelines that may be undertaken within the confines of existing law.

C. Review of Supervised Release Violators

We fully support the Commission's review of recidivism and reoffending. We reiterate our hope that the review will focus in significant part on the circumstances under which offenders who violate their terms of supervised release have those terms of supervision revoked so that they are returned to federal prison. As indicated above, innovative work – like the HOPE Program – happening across the country and involving probation and supervision violators, suggests there may be opportunities for public safety improvements and cost savings regarding this group of offenders in the federal system.

D. 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.³⁴ 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) (vacating and remanding a federal sentence because the previous conviction under Connecticut statute that criminalized offers to sell illegal drugs was not necessarily a “controlled substance offense” under the guidelines); *United States v. Price*, 516 F.3d 285, 288 (5th Cir. 2008) (vacating and remanding a federal sentence 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.

E. Definition of “Criminal Justice Sentence”

Over the last several years, the Commission has revised §§4A1.1 and 4A1.2 of the guidelines by, among other things, eliminating the two-level adjustment to the criminal history score for recent criminal conduct and limiting the reach of the adjustment for offenders who commit their crimes while already serving a criminal justice sentence. Pursuant to §4A1.1(d), a defendant now receives two criminal history points if he commits “the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.” The introductory commentary to §4A1.1 explains the rationale for the adjustment: “Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation” and that a defendant’s “likelihood of . . . future criminal behavior” must be considered.

However, the applicability of the adjustment for offenders who commit the instant offense while already serving a sentence is limited to sentences countable under §4A1.2. In 2007, the Commission amended §4A1.2 to exclude certain misdemeanor offenses from the criminal history score.³⁵ Defendants no longer receive the two criminal history points under §4A1.1(d) if the instant offense was committed while under a term of probation of exactly one year for misdemeanor convictions for reckless driving, contempt of court, disorderly conduct, disturbing the peace, driving without a license or with a revoked or suspended license, giving false information to a police officer, gambling, hindering or failing to obey a police officer, writing a bad check, leaving the scene of an accident, failure to pay child support, prostitution, resisting arrest and trespassing. *See* §4A1.2(c)(1).

In many cases – including violent crime, firearms and narcotics cases – defendants are serving a term of probation at the time of the federal offense for one of the offenses listed in §4A1.2(c)(1). As the Commission itself has recognized, this fact evidences an increased

³⁴ *See*, U.S. Sentencing Commission, *Guidelines Manual, Appendix C*, Amendment 722 (November 1, 2008).

³⁵ U.S. Sentencing Commission, *Guidelines Manual, Appendix C*, Amendment 709 (November 1, 2007).

likelihood of recidivism. Nonetheless, under the current guideline, the two point increase does not apply.

We believe that anytime a defendant commits a federal offense while serving a period of state parole or probation, that defendant should receive two additional criminal history points to reflect an increased risk of recidivism. We think the Commission should review this issue and consider amending Chapter Four accordingly.

F. “Hidden Foreign Bank Accounts” Involved in Tax Crimes

By law, U.S. taxpayers are required to report worldwide income from all sources, including income from offshore accounts.³⁶ Similarly, the law requires a U.S. taxpayer to report to the U.S. Treasury Department his or her foreign accounts with balances in excess of \$10,000 as to which he or she has certain ownership interests and/or control.³⁷ The use of bank or investment accounts maintained in a tax haven with strict bank secrecy laws is often done less for customary investment purposes (due to low rates of return and high fees) than because it increases the difficulty of U.S. law enforcement agencies to discover the accounts and enforce U.S. laws.

Our national tax enforcement program is enhanced when wrongdoers are appropriately sentenced, and those who would contemplate engaging in similar conduct are deterred. Conversely, the program is impaired and tax revenue is correspondingly lost when the offshore cases that are criminally prosecuted result in sentences that do not deter continued evasion. For example, where there is insufficient evidence to prove that the assets in an offshore bank account are themselves untaxed income, the tax loss (which determines the guideline offense level) is limited to the income earned on the offshore account, which can be low even if the account balance is high (as a result of low rates of return and high fees charged in exchange for the secrecy procured).

We propose that the Commission amend the commentary in §2T1.1 to recognize that an upward departure may be warranted where the tax loss, the customary proxy for harm in tax-related cases, substantially understates the seriousness of the offense. We believe a provision patterned after Application Note 19 in §2B1.1 would best accomplish this and be most consistent with the current guideline structure. We propose a new Application Note 8 to §2T1.1 as follows:

8. *Upward Departure Consideration*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted.

For example, a defendant who willfully fails to disclose an offshore bank account may have unreported income from the account that is relatively small in comparison with the value of the assets hidden, as a result of low rates of return and high fees charged in

³⁶ Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 97 (codified as amended in scattered sections of 26 U.S.C.)

³⁷ 31 C.F.R. § 1010.340 (2010).

exchange for the secrecy procured. In such a case, the tax loss table in §2T4.1 may produce an offense level that substantially understates the seriousness of the offense. If so, an upward departure may be warranted.

G. “Compassionate Release”

Section 3582(c) of title 18, United States Code, authorizes a court to reduce an offender’s sentence, upon motion of the Director of the Bureau of Prisons, if the court finds extraordinary and compelling reasons that warrant such a reduction. This provision, also known as “Compassionate Release” or “Reduction in Sentence” (RIS), has been historically used only for inmates with serious medical conditions or illnesses.³⁸ As we have discussed with the Commission, the Department is in the midst of reviewing and modifying aspects of the RIS Program. We have already issued new medical criteria for evaluating RIS requests, and we are now in the process of considering non-medical criteria. We will keep the Commission apprised of any further changes we make in the Program.

H. Firearms Offenses

The Commission has identified the review and possible amendment of the guidelines applicable to firearms offenses as a possible priority for the coming amendment year. We think amendments to these guidelines can indeed strengthen the national efforts to deter and punish criminal activity involving firearms, and we urge the Commission to take up the issue this year.

First, we recommend the Commission consider providing higher guideline penalties for offenses under 18 U.S.C. §§ 922(a)(1)(A) and 922(d), involving firearms trafficking. We are concerned that current guideline penalties do not sufficiently address the substantial harm to individuals and communities caused by firearm trafficking, including the impact of such trafficking in the context of violent gangs, drug-distribution organizations, or other large criminal enterprises. The Commission should consider a variety of possible guideline amendments, including adjusting the enhancement for firearms trafficking in §2K2.1(b)(5) and for the number of firearms involved in trafficking offenses.

Second, we suggest the Commission examine whether guideline penalties are sufficient for firearms purchases knowingly or intentionally made on behalf of other persons. While we fully agree with the current guideline approach that provides enhanced penalties for illegally providing firearms to prohibited persons, we also believe that any purchaser who lies or misleads in order to procure a firearm for another person commits a serious offense. A stronger approach to straw purchasing – perhaps including increasing the enhancements under §2K2.1(b)(1) for the number of firearms involved in the offense – would further support the firearm background check system and serve as a valuable deterrent to potential buyers considering lying during a firearms purchase.

³⁸ See generally, Office of the Inspector Gen., U.S. Dep’t of Justice, The Federal Bureau of Prisons’ Compassionate Release Program (April 2013), available at <http://www.justice.gov/oig/reports/2013/e1306.pdf>.

Finally, we believe the Commission should eliminate the substantial sentencing reduction in §2K2.1(b)(2) for the unlawful possession of a firearm or ammunition when that possession was for sporting purposes or collection. There is nothing in the underlying firearms laws that recognize or mandate a sentence reduction for felons or other prohibited persons who possess firearms for sporting purposes or collection. To the contrary, the statutory ban on firearm and ammunition possession by prohibited persons is an absolute one. Just as the statute makes no exceptions based on possession for sporting purposes or collection, neither should this guideline.

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). We also urge the Commission to clarify the guidelines in light of issues identified by the appellate courts in case law.

A. Section 2Q1.2 and Recordkeeping Offenses

Section 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) applies to prosecutions brought pursuant to a host of environmental criminal statutory provisions.³⁹ When the violation is a "recordkeeping offense," subsection 2Q1.2(b)(5) applies and provides, "If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense." Application Note 1 defines recordkeeping offense to include ". . . both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed."⁴⁰ In defining the term broadly, the Sentencing Commission recognized that in the environmental context, recordkeeping violations can have significant repercussions that should be punished consistent with substantive environmental violations that have the same consequences.

Nevertheless, there is a split among the circuit courts of appeals on how to apply subsection 2Q1.2(b)(5). The Tenth Circuit (and a district court in the Seventh Circuit) has held that the enhancements in §2Q1.2(b)(1) - (4) apply to recordkeeping violations regardless of the motive for the violation. In contrast, the Sixth and Second Circuits have held that when the motive is at least in part other than to conceal an environmental violation, those enhancements do not apply. In other words, if a defendant's motive to falsify records or not disclose information as required is motivated by some other factor, such as to save money, to save time, or simple laziness, the Sixth and Second Circuit law is that the enhancements do not apply even though the

³⁹ These include, among others, the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act. Section 2Q1.3 is applicable to charges brought pursuant to the same provisions, but generally applies to violations involving other, less hazardous substances. It has a base offense level of 6.

⁴⁰ The Background explains: "The first four specific offense characteristics [§2Q1.2(b)(1)-(4)] provide enhancements when the offense involved a substantive violation. The fifth and sixth specific offense characteristics [§2Q1.2(b)(5)-(6)] apply to recordkeeping offenses."

result of the violation was a discharge into the environment, a death, an evacuation, or a disposal without a permit. We believe that the Commission should resolve the conflict by clarifying that the Tenth Circuit's interpretation is the correct one.

B. Supervised Release Terms in Certain Sex Offenses

The Commission may wish to address two issues regarding recommended terms of supervised release in light of the Seventh Circuit's decision in *United States v. Goodwin*, No. 12-2921, 2013 WL 1891302 (7th Cir. May 8, 2013). The court in *Goodwin* held that a conviction for failure to register as a sex offender under 18 U.S.C. § 2250(a) does not qualify as a "sex offense" for purposes of §5D1.2(b), which increases the maximum supervised release term to life and recommends (in a policy statement) that courts impose the maximum term for sex offense convictions. The Seventh Circuit recognized that the application note defining the term "sex offense" references the chapter of Title 18 containing § 2250(a), but the court concluded that failure to register offenses do not satisfy the other criterion in the application note, namely that the offense have been "perpetrated against a minor." *Goodwin*, 2013 WL 1891302, at *6-*7. The government conceded error on this point in *Goodwin*, as it had previously done in *United States v. Herbert*, 428 F. App'x 37 (2d Cir. 2011).

Having concluded that the defendant's conviction did not qualify as a sex offense, the *Goodwin* court addressed a second issue: what the advisory supervised release range becomes when, as with § 2250(a) convictions, the statutory minimum term of supervised release is higher than the maximum set forth in §5D1.2(a). *See also* §5D1.2(c) ("The term of supervised release imposed shall be not less than any statutorily required term of supervised release."). The Seventh Circuit had previously held in the context of a drug trafficking conviction under 21 U.S.C. § 841 that the advisory range in such a situation becomes a single point: the statutory minimum. *See United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009). Applying that precedent, the court in *Goodwin* held that the advisory range for a § 2250(a) violation was similarly the statutory minimum term of five years set forth in 18 U.S.C. § 3583(k). 2013 WL 1891302, at *8.

The Eighth Circuit, however, reached a different result in *United States v. Deans*, 590 F.3d 907 (8th Cir. 2010). The court in *Deans*, a drug distribution case, held that a statutory minimum "expressly trumps the generally applicable terms of supervised release" that form "the statutory basis for §5D1.2(a)." *Id.* at 911. As a result, the court concluded that a supervised release term above the range set forth in §5D1.2(a) did not constitute "an upward departure." *Id.*; *see also United States v. Joe*, 696 F.3d 1066, 1073-74 (10th Cir. 2012) (holding, under plain error review, that the sentencing judge did not commit clear or obvious error in treating the advisory supervised release term as five years to life); *United States v. Poe*, 556 F.3d 1113, 1128-29 (10th Cir. 2009) (same).

In light of these authorities, the Commission may wish to clarify (1) whether failure to register violations under 18 U.S.C. § 2250(a) qualifies as a "sex offense" for purposes of §5D1.2(b); and, if not, (2) whether the advisory supervised release term for § 2250(a)

convictions is a single point of five years or, instead, is equivalent to the statutory range of five years to life. *See* 18 U.S.C. § 3583(k).

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 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,



Jonathan J. Wroblewski
Director, Office of Policy and Legislation



cc: Commissioners
Ken Cohen, Staff Director