U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530*

September 2, 2011

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, 2012. *Notice of Proposed Priorities and Request for Public Comment*, 76 Fed. Reg. 45007 (July 27, 2011).

The Challenges Facing Federal Sentencing and Corrections Policy

In 2009, in a speech for the Charles Hamilton Houston Institute for Race and Justice, Attorney General Eric H. Holder, Jr. set out this Administration's goals for federal sentencing and corrections policy. General Holder said that 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 federal sentencing and corrections policy today faces serious challenges.

The Administration and Congress are confronting an unprecedented budget outlook that demands a more exacting accounting and deployment of federal criminal justice resources. Federal outlays directed towards law enforcement are severely constrained, and the federal prison system, which is in size and scope a product of federal sentencing, makes up a significant and increasing share of these outlays.

Prisons are essential for public safety. But maximizing public safety can be achieved without maximizing prison spending. A proper balance of outlays must be found that allows, on the one hand, for sufficient numbers of 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 Department of Justice has been under a general hiring freeze for some time, which means that vacant executive positions of all kinds – including investigators, prosecutors, forensic analysts, and more – cannot be filled. At the same time, the federal prison population – and therefore prison expenditures – have been increasing. In fact, the federal correctional population has jumped by more than 7,000 prisoners this fiscal year, the equivalent of about four prisons worth of inmates.

This is all relevant to federal sentencing, because prison spending to support these population increases has been rising for years and the prison population remains on an upward trajectory. Given the budgetary environment, that trajectory will lead to a further imbalance in the deployment of justice resources. While this is a long term problem that requires a long term and systemic solution, there are also immediate concerns. As former Bureau of Prisons Director Harley Lappin testified before the Commission in March, the Bureau of Prisons is currently operating at 35% over rated capacity. This is of special concern at the prisons housing the most serious offenders, with 50% crowding at high security facilities and 39% at medium security facilities. This level of crowding puts correctional officers and inmates alike at greater risk of harm and makes far more difficult the delivery of effective recidivism reducing programming. Even more troubling, former Director Lappin testified that the Bureau of Prisons estimates that its inmate population will continue to grow by about 5,000 prisoners a year for the foreseeable future.

Further emphasizing the importance of managing federal prison costs, in November 2010, then-Department of Justice Inspector General, Glenn Fine, identified detention and incarceration as top management and performance challenges for the Department of Justice. As he noted, "[s]afely, securely, and economically handling the large federal inmate and detainee populations is a difficult challenge for the Department." Mr. Fine recognized 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, if but only one, component in finding that balance. We urge the Commission to work with the three branches to devise a national strategy for controlling and managing all criminal justice outlays to help find the balance that will maximize public safety in the most efficient and effective way possible.

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At the same time that the prison population and prison expenditures have been rising, federal sentencing practice has continued to trend away from guideline sentencing. As the Commission's data show, the percentage of defendants sentenced within the guidelines has decreased significantly since the Supreme Court's decision in *United States v. Booker*. The

national rate of within-guideline sentences has fallen more than 16 percentage points since the *Booker* decision, from 71% in 2004, to just 55% in 2010.

Moreover, the data show that federal sentencing practice continues to fragment into at least two distinct sentencing regimes: one that remains closely tied to the foundational principles of the SRA and the Commission, and one that increasingly does not. Disaggregating the national numbers from Fiscal Year 2010 illustrates the trend. For example, the Southern and Western Districts of Texas, which alone account for more than 20% of the entire federal criminal docket and which traditionally have followed the guidelines closely, saw their combined within-guideline sentencing rate remain stable and above 71.5% in FY 2010. On the other hand, many of the districts with the lowest within guideline sentencing rates saw their compliance rates fall significantly further in FY 2010. For example, the within-guideline rate in the Southern District of New York fell to 32.6% in FY 2010 from 42.6% in FY 2009; the rate in the Eastern District of Wisconsin fell to 29.7% from 37.9%; and the rate in the Eastern District of Washington fell to 36.0% from 42.7%.

We do not mean to suggest from this data that the pre-*Booker* SRA scheme was the perfect sentencing system or that the only performance measure of successful sentencing policy is the within-guideline sentencing rate. The sentencing system in place from 1987 through the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), was without doubt imperfect. Moreover, as the Attorney General has stated, "we must also be prepared to accept the fact that not every disparity is an unwelcome one."

But the data and the Commission's own research are concerning, for they suggest that unwarranted sentencing disparities are, in fact, increasing. Last year, the Commission published a report on demographic differences in federal sentencing practice. In the report, the Commission found that after controlling for offense type and other relevant legal factors, demographic factors – including race and ethnicity – were "associated with sentence length to a statistically significant extent" in the post-*Booker* time period. The Commission found that in the period just prior to the *Booker* decision, controlling for relevant factors, "black male offenders received sentences that were 5.5 percent longer than those for white males." In the period immediately following *Booker*, "black male offenders received sentences that were 15.2 percent longer." And more recently, following the Supreme Court's decision in *Gall v. Untied States,* the Commission found that "black male offenders received sentences that were 23.3 percent longer than those imposed on white males." This is very troubling.

We are also concerned because we see growing doctrinal tension within federal sentencing. This year's Supreme Court's decisions in *Tapia v. United States*, 564 U.S. ___, No. 10-5400 (2011), and *Pepper v. United States*, 562 U.S. ___, No. 09-6822 (2011), are illustrative of this trend. In *Tapia*, a unanimous Supreme Court recognized that the SRA was a landmark piece of legislation in part because it defined a new doctrinal framework for federal sentencing. The SRA rejected indeterminate sentencing – a model of sentencing "premised on a faith in rehabilitation" – that predominated across the country for most of our history, the Court noted. *Tapia*, slip opinion at p. 3. This pre-SRA model, in place at both the state and federal level, fell into disfavor in the 1970s and 1980s and was replaced by a determinate sentencing

system, where terms of imprisonment are based primarily on the crime committed by the offender and the offender's criminal history.

For purposes of imprisonment, the SRA system discounted the offender's socio-economic status, educational achievement and family and community ties, aiming to mete out the imprisonment component of the sentence based primarily on the criminal act. *See, e.g.*, 28 U.S.C. § 994(e). A set period of supervised release would follow nearly all prison sentences and would be the focal point for rehabilitation and the delivery of needed assistance to offenders to effectively reenter the community. The goals of the system were greater certainty and consistency in sentencing and the reduction of unwarranted sentencing disparities based on race, gender, socio-economic status and other suspect factors.

While we firmly believe that inmate rehabilitation and improving the rate of successful prisoner reentry are critical obligations for any correctional system, the *Tapia* court made clear that the prohibition on selecting a term of imprisonment based on rehabilitative considerations – a prohibition put in place as part of the overall vision and structure of sentencing under the SRA that discounts offender characteristics – must remain a hallmark of federal sentencing post-*Booker*. At the same time, however, in *Pepper,* decided earlier in the term, the Court endorsed the notion that post-*Booker* sentencing must focus as much on the offender, his individual background, and his need for services and rehabilitation as on the offense committed. Citing pre-SRA sentencing doctrine, principles and case law, the Court in *Pepper* emphasized that individual offender characteristics are "[h]ighly relevant – if not essential – to [the] selection of an appropriate sentence . . . ." *Pepper*, slip opinion at pp. 9-10. This and other post-*Booker* jurisprudence now place an offender's personal history – including socio-economic status, educational achievement and family and community ties – on equal footing as sentencing factors with the offense committed.

We believe these two lines of thought and doctrine – one that insists that the length of federal imprisonment terms be based primarily on the offense and criminal history, and one that insists that offender characteristics and rehabilitation be co-equal determinants of all aspects of sentencing – conflict with one another and must be reconciled in order to create a coherent, national system. We believe the post-*Booker* sentencing regime, which gives sentencing courts an unbounded menu of sentencing principles from which to devise the ultimate sentence, will continue to lead, if not reformed, to unwarranted disparities in sentencing outcomes. Together with the Commission's study exposing an increase in unwarranted racial and ethnic disparities in post-*Booker* federal sentencing practice, we have real concerns that current policy is not meeting the long terms goals of the federal criminal justice system, including the goals of fostering trust and confidence in the criminal justice system and eliminating unwarranted disparities in sentencing.

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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 sentencing reforms of the 1970s and 1980s – including the SRA – in combination with other criminal justice reforms and investments, achieved remarkable results over the last two decades. Dramatically lower crimes 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, including challenges in sentencing and corrections policy. We must work together to find systemic 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 has an opportunity to help contribute to a new bipartisan and inter-branch engagement on the sentencing challenges of our day. A strong federal sentencing system is critical to keeping national crime rates low, moving them still lower, and addressing our 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 focus on reducing reoffending by those released from custody, and the growing fragmentation and doctrinal tension of the post-*Booker* sentencing system, we think a candid discussion among the branches of the federal government about federal sentencing policy is needed. That discussion is needed to think through federal sentencing's role in meeting today's criminal justice challenges as well as possible long term reforms to achieve agreed-upon goals, understanding the limitations of the Constitution and resources. We believe the Commission should participate in this discussion with other federal criminal justice stakeholders over the coming months and years.

The first step in such a national discussion must be to articulate and come together around the goals of sentencing and the criminal justice system at large. We remain committed to supporting and implementing programs that have a proven record of preventing crime and reducing recidivism. And we believe the goals of any restructured federal sentencing system should be the goals the Attorney General has articulated: public safety, reasonable consistency in sentencing, avoidance of unwarranted disparities, fairness, justice, rehabilitation, and the efficient, balanced, and effective use of federal criminal justice resources. Any restructuring or reform must address the crowded prison system and the critical need to reduce the number of released inmates who reoffend, which are, after all, inextricably intertwined. There are many criminal justice professionals and scholars who are thinking through these issues. We believe the Commission should explore the issues with these professionals and scholars.

This kind of systemic examination should make up much of the Commission's work for the next year. The work may include meetings with Congress, the Executive Branch, and outside individuals and groups. The hearings the Commission undertook over the last year or two were a good first step, but we believe a more focused conversation is now needed. We think the

Commission might also consider holding a symposium on these issues and producing publications to further the discussion. And as we've stated before, we think the Commission should issue a report on post-*Booker* sentencing and use that report to further encourage the discussion we suggest.

Congressional Directives

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

A. Report on Mandatory Minimum Sentencing Statutes

In the National Defense Authorization Act signed into law by President Obama in 2009, Congress directed the Sentencing Commission to submit a report to the House and Senate Judiciary Committees on mandatory minimum sentencing provisions in federal law. The congressional directive includes a variety of requirements for the report.

We believe the Commission should complete its review and analysis of mandatory minimums – a key structural component of the federal sentencing policy – and submit the mandated report to Congress this year. As U.S. Attorney Sally Yates indicated in her testimony to the Commission at last year's hearing on mandatory minimums, we hope the Commission's report will examine not only the data surrounding mandatory minimum sentencing laws, but also their place in achieving the goals of sentencing and improving public safety, their evolving role in light of the post-*Booker* advisory sentencing guidelines system, their severity levels, their contribution, if any, to racial and ethnic disparities in sentencing, and their impact on the federal prison population.

B. Guideline Amendments to Address Congressional Directives

We believe the Commission should also make it a priority to complete work on congressional directives addressing particular guideline areas. For example, the Dodd-Frank Wall Street Reform Act directed the Commission to review the guidelines applicable to certain economic crimes. Last year, the Department urged the Commission to review the guidelines for economic crimes with a special focus on high-loss fraud cases. In addition, the Department recently asked the Commission to consider adjustments for sophisticated insider trading conduct and insider trading which does not result in financial profit, despite a defendant's best efforts. In the mortgage fraud context, the Commission may want to examine cases in which there is no clearly identifiable loss despite repeated criminal acts, where there are victims other than banks – such as innocent purchasers – and where straw buyers are involved. We continue to believe the Commission should consider adding a sentencing enhancement in mortgage fraud cases where the defendant participated as a real estate or mortgage professional, an appraiser, mortgage broker or banker.

We think the Commission should complete the work of implementing the Dodd-Frank directive in the next year or so, as well as addressing any other congressional directives enacted by Congress. There are a number of bills making their way through Congress that include directives to the Commission and that are likely to be enacted. These bills address high priority areas, including environmental crime, public corruption and intellectual property offenses.

Other Guideline Issues

A. 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 should 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*, 129 S. Ct. 687 (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.

B. 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.

Circuit Splits 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. For example, whether a felony conviction for burglary of a commercial dwelling is a "crime of violence" under section 4B1.2 of the guidelines has been the subject of numerous conflicting court decisions for many years. *See, e.g.*, *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009), *cert. denied*, 130 S.Ct. 2364 (2010); *United States v. Matthews*, 374 F.3d 872, 880 (9th Cir. 2004); *United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995), *cert. denied*, 519 U.S. 1000 (1996). We think the Commission should compile a comprehensive inventory of conflicting appellate court guideline decisions and make the resolution of a substantial number of them part of its work for the coming amendment year.

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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 and the efficient use of enforcement, judicial and correctional resources. We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,

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cc: Commissioners
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