THE OHIO STATE UNIVERSITY
Moritz
College of Law

July 15, 2013

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington DC 20002-8002

Attention: Public Affairs – Priorities Comment

VIA MAIL AND EMAIL (pubaffairs@ussc.gov)

Dear Chair Saris and other Commissioners,

I write in response to the Commission's request for comment on possible priority policy issues for the amendment cycle ending May 1, 2014. Though I could write at great lengthy concerning federal sentencing "hot spots" meriting the Commission's attention, I wish in this brief missive to highlight and stress just two basic ideas which I believe should shape Commission activities in the months and years ahead. Specifically, at this uniquely important moment in the evolution of federal sentencing law and policy, I think it is especially important for the United States Sentencing Commission (1) to be a much more proactive and dynamic voice in big federal criminal justice discussions, and (2) to be much more focused on small remedial amendments to unduly severe guidelines.

Be a much more proactive and dynamic voice in big criminal justice discussions

To its credit, the U.S. Sentencing Commission already speaks a whole lot about a whole lot of federal sentencing issues. Through quarterly and annual reports, the Commission shares a whole lot of data about the operation of the federal sentencing system, especially with respect to guidelines application and sentencing patterns. Through three major reports to Congress, the Commission recently said a whole lot about child pornography offenses, mandatory minimum penalties, and the continuing impact of *Booker* on the federal sentencing system.

I fear, however, that the Commission's understandable effort to be thorough and cautious with its data and reports can often mean the federal sentencing forest gets lost in data-crunching trees. It is very difficult, even for academic researchers and policy advocates who closely study the federal sentencing system, to identify the most important themes and critical take-away points from the Commission's massive reports and data runs. Members of Congress likely must rely on media accounts or cursory summaries of your reports because they are so immense and so dense. Rarely do we see federal judges and practitioners making considerable use or even referencing the Commission's data and reports in their day-to-day work — even though the Commission's data analyses are, in my view, essential for district and circuit judges to properly discharge their post-*Booker* sentencing responsibilities.

Moreover, the Commission's understandable effort to be thorough and cautious with its data and reports seems also to result in the Commission sometimes failing to be involved in critical federal criminal justice developments and discussions. The Commission's website stresses that one of its principal purposes is "to advise and assist Congress and the executive branch in the development of effective and efficient crime policy." But the Commission this year has yet to address (at least in public) any of the most pressing and potent crime policy issues now being debated within Congress and the executive branch. To my knowledge, the Commission has not said a single public word concerning, for example, the Justice Safety Valve Act introduced in both houses of Congress, or the work of the new House of Representative's Over-Criminalization Task Force, or federal policies and practices concerning marijuana offenses or computer fraud. Perhaps most notably and most problematically, the Commission has not yet made any public statements or been involved in public discussions about the profound impact that the sequester is having on the day-to-day operation of the federal criminal justice system. The Commission is well-positioned to help members of Congress better understand the dire practical consequences and potential constitutional problems that may result from crude cuts in federal criminal justice funding.

I raise these points not to assail the Commission's work or priorities in the past, but rather to encourage the Commission to recognize that it can and will be a more engaged and effective agency if it commits itself to being a much more proactive and dynamic voice in federal criminal justice discussions. Consider, for example, producing and publishing 4-page "fact sheets" each week on hot sentencing topics rather than only 400-page reports each year. Consider writing public letters to members of Congress who introduce criminal justice legislation in order to encourage them to request a detailed Commission analysis of whatever sentencing issues are implicated by their bills. Consider encouraging more judges and practitioners to make public requests for data analyses on key issues raised in significant sentencing litigation. Consider moderating on your website real-time discussions among criminal justice practitioners about important federal sentencing issues. Perhaps even consider conducting a contest to challenge researchers and advocates to draft brand new guidelines to address Commission-identified "problem areas" like the career offender and child pornography and drug and fraud guidelines.

It is, of course, easy for me to sit in my ivory academic tower and make all sorts of (far-fetched?) suggestions about how the Commission could become a much more proactive and dynamic voice in on-going federal criminal justice discussions. I readily acknowledge that there may be many obvious and not-so-obvious reasons why the Commission operates as it now does and cannot readily alter its standard practices. Nevertheless, it is because the Commission already does profound and profoundly important work that I am eager to encourage the Commission to operationalize its work more effectively; doing so will help ensure all federal criminal justice actors and decision-makers fully understand the extraordinary contributions the Commission makes to the just and effective evolution federal sentencing law and policy.

Be much more focused on small remedial amendments to unduly severe guidelines

The Commission has already identified in its statement of tentative priorities many of the federal sentencing "hot spots" meriting focused attention. But repeated references to "multi-year" studies leads me to fear the Commission is hesitant to remedy via concrete guideline amendments any identified problems unless and until it has devised what seems to be a comprehensive solution. I suggest, rather than risk letting "the best be the enemy of the good," the Commission should focus its guideline reform attention to making immediate (even if just very small) remedial amendments to unduly severe guidelines.

In my written testimony to the Commission as part of public hearings last year, I suggested unwarranted sentencing severity is the root cause of many sentencing disparities and that reducing unwarranted guideline severity will help reduce unwarranted sentencing disparities. Tellingly and unsurprisingly, the types of offenses for which there has most often been expressions of concern about post-*Booker* disparities — e.g., high-loss fraud offenses, some drug offenses, and child pornography downloading offenses — all involve guidelines with the most severe and jurisprudentially questionable enhancements and which too often recommended long prison terms even for first offenders with significant mitigating circumstances. Because these guidelines regularly recommend relatively lengthy prison terms even for relatively less serious offenders, it is almost inevitable that different district judges will reach different good-faith judgments about whether and how much to depart from these "broken guidelines" in light of the mandate from Congress that judges impose sentences "sufficient, but not greater than necessary" to achieve the purposes of punishment set forth in the Sentencing Reform Act.

If this Commission were just to make even minor reforms to the most problematic parts of unduly harsh guidelines so that they better differentiate among more mitigated and aggravated offenders — i.e., if the Commission were to commit itself to fixing the most obviously problematic parts of those guidelines perceived to be much too harsh as evidenced by high departure and variance rates — it is likely that district judges nationwide will show more respect for, and more regularly sentence within, the new and improved guidelines. The latest Commission data reveal that sentences now are more often imposed outside rather than inside the guidelines for fraud, drug trafficking and child pornography offenses. The Commission could and should commit itself to amending one or more of the most problematic and jurisprudentially questionable enhancements in these broken guidelines — by, for example, simply eliminating the "use of a computer" adjustment in the child pornography guideline and adjusting downward the larger quantity-based enhancements in the fraud and drug guidelines which far too often excessively elevate guideline sentencing ranges even for less culpable offenders.

This Commission surely recognizes and appreciates that recent comments and actions by members of all three branches of the federal government indicate that everyone focused on the modern federal criminal justice system has serious and sustained concerns about the undue severity of at least some aspects of federal sentencing law. Indeed, just a few months ago,

Attorney General Eric Holder publically stated in no uncertain terms that "too many people go to too many prisons for far too long for no good law enforcement reason." I believe, sadly, that Attorney General Holder might also have stated that the U.S. Sentencing Commission has waited far too long to make even modest changes to those guideline provisions that the Commission itself has already identified as playing a role in sending too many people to too many prisons for far too long for no good law enforcement reason.

The time for concrete action is now. Put simply, the Commission should, on all the important issues identified in its list of tentative priorities and on others brought to its attention, focus guideline reform efforts on making immediate (even if just small) remedial amendments to unduly severe guidelines.

Sincerely,

Douglas A. Berman
Robert J. Watkins/Procter & Gamble Professor of Law