

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**DOCKET NO. 0208 1:15 CR 397-01 (JMF)**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**HARRY FALTERBAUER,**

**Defendant,**

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**DEFENDANT HARRY FALTERBAUER'S RESPONSE TO THE PRESENTENCE  
INVESTIGATION REPORT  
and  
REQUEST FOR A NON-CUSTODIAL SENTENCE**

The defendant, Harry Falterbauer, by and through his undersigned counsel, and pursuant to U.S.S.G. § 6A1.2-3, p.s., Fed. R. Crim. P. 32 (d), (e)(2) and (f), and the Fifth and Sixth Amendments to the United States Constitution, respectfully files his Response to the Presentence Investigation Report (PSR) and Request for a Non-Custodial Sentence and as grounds therefore, states as follows:

**I. INTRODUCTION:**

Harry Falterbauer is a 60 year old husband and father who, before July 21, 2015, had never been arrested, let alone incarcerated. Raised in Pennsylvania and Switzerland, he has been a resident of South Florida for more than 30 years. He has owned and operated real estate businesses during those latter years.

As to the instant offense, Mr. Falterbauer opened a foreign bank account at LLB-Vaduz in Liechtenstein in 1988. He deposited after-tax income into the account and did so to protect his

assets.<sup>1</sup> Mr. Falterbauer has admitted, by way of his guilty plea, he did not declare the existence of this foreign account, nor did he declare the interest earned on the account as taxable income on his personal tax returns. He has further admitted that on April 18, 2013, years after the account was closed in March 2008, he initially denied to IRS agents he had such an account. However, in the summer of 2014, Mr. Falterbauer paid all taxes and interest owing in this case and filed amended tax returns.

Mr. Falterbauer was arrested in this case on July 21, 2015, and he pled guilty ten weeks later. As a result of his immediate acceptance of responsibility in this case, he understands he will remain a convicted felon for the remainder of his life and will, most likely, lose his real estate broker license, which will effectively put him out of business. The parties have agreed, and the PSR recommends, the *advisory* guideline range is 10 to 16 months, placing him firmly within Zone C of the Sentencing Table. He has further agreed to pay a civil penalty to the IRS of \$794,500, representing 50-percent of the highest total balance of the foreign financial account he failed to report between 2006 and 2008, and he is prepared to pay this in full at his sentencing hearing.<sup>2</sup> With all that said, Mr. Falterbauer, through counsel, will ask this Court to consider the 18 USC § 3553 factors identified in this filing and impose a non-custodial sentence in Mr. Falterbauer's case for conduct that occurred several years ago.

The court in *Pepper v. United States*, 131 S. Ct. 1229 (2011), addressed the importance of considering events that transpire between the criminal conduct and

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<sup>1</sup> Mr. Falterbauer admittedly has always had an exaggerated fear of civil law suits.

<sup>2</sup> PSR, paragraph 5k. However, the PSR does not indicate that half of the foreign account belonged to Mr. Falterbauer's older brother, Rudy, and that he returned half the money to Rudy when the account was closed in March 2008. Rudy recently died in May 2015.

the sentence in the punishment decision.

Pursuant to *U.S. v. Booker*, 543 U.S. 220 (2005), the federal sentencing process has adopted a three step approach. (See Fed. R. Crim. P. 11(M), amended December 1, 2007, and Amendment 741 of the Sentencing Guidelines, effective November 1, 2010. First, the Court is to resolve any disputed guideline issues and determine the *advisory* guideline range. To that end, the PSR is consistent with the understanding of the parties; the *advisory* guideline range is 10 to 16 months, within Zone C of the Sentencing Table. With that said, Mr. Falterbauer has no objections.

Second, the Court is to consider if there are any factors that may warrant a departure from the *advisory* guideline range. As before *U.S. v. Booker*, 543 U.S. 220 (2005), the court is to depart when it is warranted under the facts and circumstances of a particular case. “The application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered,” *U.S. v. Jordi*, 418 F. 3d 1212, 1215 (11<sup>th</sup> Cir. 2005). The PSR does not identify any factors that may warrant a downward departure and, although Mr. Falterbauer and counsel believe such factors do exist, we will identify those factors under 18 USC § 3553 in requesting a sentence below the *advisory* guideline range.

Lastly, the Court is to consider all of the sentencing factors of 18 USC § 3553(a) and impose a sentence which is “reasonable” and not greater than necessary to achieve the sentencing objectives set forth in 18 USC § 3553(a). As set forth more fully below, Mr. Falterbauer, through counsel, believes there are factors worthy of this Court’s consideration.

## **II. OBJECTIONS TO THE PSR:**

1. Mr. Falterbauer has no objections to either the Offense Conduct or Guideline sections

of the PSR.

2. Any objections/clarifications to non-sentencing issues have been communicated directly with the probation office.

### **III. SENTENCING SUBMISSION AND REQUEST FOR ALTERNATIVE SENTENCE:**

Harry Falterbauer has pled guilty to willful failure to file a report of foreign bank and financial accounts, in violation of 31 USC §§ 5314 and 5322(a). The PSR recommends a total offense level 12, and since Mr. Falterbauer is a first-time offender, an *advisory* guideline range of 10 to 16 months which places him within Zone C of the Sentencing Table. This is consistent with the understanding between the parties and there are no objections. Additionally, no Chapter Five downward departures have been requested.

Notwithstanding the above, this Court is fully aware the guidelines have been *advisory* since 2005, *U.S. v. Booker*, 543 U.S. 220 (2005), followed by *Gall v. United States*, 128 S. Ct. 586, and *Kimbrough v. United States*, 128 S. Ct. 558, both decided on December 10, 2007. *United States v. McBride*, 511 F. 3D 1293 (11<sup>TH</sup> Cir. 2007), made clear that district courts are only required to give “some weight” to the advisory guidelines, as they are to the other 18 USC § 3553 factors. To that end, Harry Falterbrauer offers the following:

**Nature and Circumstances of Offense:** The PSR, at paragraphs 7 through 23, outlines the offense conduct in this case. As stated, Mr. Falterbauer has admitted he failed to report a foreign bank account and the interest income it had earned several years ago, from 2006 to 2008. Paragraph 23 of the PSR states there is a tax loss of \$15,013.52 and this should be amended to

indicate all taxes and interest have now been paid in full.<sup>3</sup> Although Mr. Falterbauer has admitted he also initially denied knowledge of the account years later, on April 18, 2013, paragraph 24 of the PSR correctly indicates the Government does not believe his conduct on that date warranted an enchantment under the guidelines. Further, Mr. Falterbauer has remained cooperative with the Government for the past two and a half years.

**Speedy Resolution of Criminal Liability:** Mr. Falterbauer was arrested in this case on July 21, 2015. In ten short weeks, Mr. Falterbauer accepted responsibility, signed a written agreement with the Government, and pled guilty. He has done everything possible to quickly resolve his criminal liability in this case. In fact, he has been trying to resolve the matter for over a year with communication from the government. He has previously filed amended tax returns including any income made on the account in question. Copies of which can be provided in open court.

**Harry Falterbauer's Personal and Family History:** Harry Falterbauer is a 60 year old native of Doylestown, a suburb of Philadelphia, Pennsylvania. He is the son of Benno and Marlis Bertshi, the brother of Rudy Bertshi, the husband of Connie Schwartz Miller since 2002, and the father of two grown children.

As the Personal and Family Data section of the PSR outlines, Mr. Falterbauer's parents divorced when he was five years old. It was a bitter divorce that left each parent with little money to care for him. The result was he and his brother were shipped off to their maternal grandparents in Switzerland. He had never spoken, let alone met his grandparents before. The

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<sup>3</sup> Mr. Falterbauer paid \$16,352 with three checks by July 28, 2014.

move was traumatic. His grandfather was an alcoholic who physically abused him, his grandmother often expressed her bitterness having to care for him and, as a result, Mr. Falterbauer was a frequent runaway. Neither grandparent spoke English and it was necessary for him to learn Swiss and German to get by in school. Finally, when he was 12 years old, he wrote his aunt from Switzerland and begged to come home. He had had no contact with his mother or father in seven years.

Mr. Falterbauer returned to the United States at age 12 and went to live with his father and his new wife, Anneliese. He lived in Montgomery County, a Philadelphia suburb, and attended public school. He still resented his father for sending him away and they rarely spoke. His contact with his mother remained limited until they eventually lost contact with each other. However, Anneliese became a real mother to him.

He graduated high school at 18 and studied criminal justice at Montgomery Community College until he was 19. By 20, he was on his own. He completed the Pennsylvania State Police Academy and worked for the Norristown Sheriffs Office, transporting prisoners and serving warrants. At the age of 21, he married Lynne McGann. Jeffrey was born four years later, followed by Benno. He and Lynne were married for eight years and, during those years, the family bought a home in Blue Bell, another Philadelphia suburb. Mr. Falterbauer's law enforcement career advanced; he became a major crimes detective for the district attorney's office and a part-time patrol officer for a Montgomery County township. Lynne remained a housewife. They divorced in 1983 and Mr. Falterbauer moved to South Florida the following year. However, he always paid child support and visited with his children regularly.

When he first came to Florida, Mr. Falterbauer lived with his father and Anneliese, who

had moved to Florida a few years earlier, in an apartment in Delray Beach. Between 1985 and about 1993, he was a minority owner of South Florida Immobilien and lived between Broward County and Charlotte County, where the company bought land and built homes mostly in the Punta Gorda area. By then, Mr. Falterbauer was also a certified private airplane and commercial helicopter pilot, and he could fly between the east and west coast of Florida for business. In 2002, he married Connie Schwarzmiller, who works as a real estate agent.<sup>4</sup> He helped raise Nicole, Connie's daughter by a previous marriage, who was three years old when they met. By then, Mr. Falterbauer changed the name of South Florida Immobilien to Global Elite Realty, and he has continued to own this business. This is a real estate investment company that purchases, develops and re-sells residential property. Mr. Falterbauer possesses a real estate broker's license which also allows his wife to sell real estate. However, as a convicted felon by way of his guilty plea in this case, Mr. Falterbauer will most probably lose his broker license and put him out of business.

Mr. Falterbauer was arrested at his home in the early morning hours of July 21, 2015. He was released that day and has since abided by all the terms of his release.

**Mr. Falterbauer is a 60 Year Old First Time Offender With Health Problems:**

Because the guidelines fail to consider the length of time a defendant refrains from the commission of his first crime, Mr. Falterbrauer may receive some consideration in sentencing, pursuant to *United States v. Ward*, 814 F. Supp. 23 (E. D. Va. 1993, which recognized that a

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<sup>4</sup> Connie's 82 year old mother recently suffered a stroke. Connie now cares for her mother full-time and does not work much these days. However, she will need to find other employment when her husband loses his real estate broker's license.

departure was warranted because the guidelines failed to consider that Ward had not committed his first offense until he was 49 years old. Mr. Falterbauer also believes that, post-*Booker*, this argument is most compelling when considered with the following argument that age makes recidivism less likely.

Mr. Falterbauer also believes this Court may consider that as a first-time offender at age 60, and already facing significant health problems, he presents a lower risk of recidivism than most offenders. In *United States v. Lucania*, 379 F. Supp. 2d 288, 297 (E.D. N.Y. 2005), the district judge found that “Post-*Booker* courts have noted that recidivism is markedly lower for older defendants” and in *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005)(unpub.), the court cited lower recidivism rates for older defendants and granted a downward departure. In this case, Mr. Falterbauer asks this be considered as a sentencing factor under 18 USC § 3553 in fashioning a reasonable and not greater than necessary sentence.

In 2000, Mr. Falterbauer underwent emergency surgery to remove a portion of his colon. Although he has since fully recovered from the surgery, the condition requires he receive regular vitamin-B injections from Dr. Berenson in Boca Raton.<sup>5</sup> He is also in need of a double-hernia operation at this time.

Mr. Falterbauer has also suffered from depression since 2012. He had informed Dr. Berenson he was suffering from depression during a routine checkup and was prescribed Zoloft, an antidepressant. Mr. Falterbauer’s dosage of Zoloft has been increased since his arrest in this case.<sup>6</sup>

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<sup>5</sup> PSR, paragraph 55

<sup>6</sup> PSR, paragraph 57



Pursuant to the most recent amendment (739) to § 5H1.4, a defendant's physical condition, individually or in combination with other offender characteristics, such as age and the length of any expected sentence, may be considered as sentencing factors in fashioning a *reasonable but not greater than necessary sentence*.

In an August 21, 2006 memorandum to all district court judges, the Administrative Office of the U.S. Courts indicated that the Bureau of Prisons will consider the presentence investigation report, the statement of reasons and judicial placement recommendations in assigning a CARE level to an inmate. There are four levels in the BOP CARE level system, which classifies inmates according to their healthcare needs. At 60 years of age and Mr. Falterbauer's health history, we believe he is already precluded from Level 1. Level 2 is reserved for inmates who are stable out-patients, who can handle their own daily living activities, and their need for acute medical services is less than three months in duration, occur no more than every two years, and can be resolved without hospitalization. With an *advisory* guideline range of 10 to 16 months, it is not likely Mr. Falterbauer would find himself in the higher care levels of the BOP. However, any prison sentence, however brief, will certainly tax the resources and finances of the Bureau of Prisons, place an added risk to the inmate, and may exacerbate present conditions. Even when the sentencing guidelines were mandatory, downward departures under § 5H1.4 were permissible. Again, Mr. Falterbauer asks that his age and health be considered as sentencing factors under 18 USC § 3553 in fashioning a *reasonable and not greater than necessary sentence*.

The "Silver Tsunami" And Sentencing - Age and Health as Mitigating Factors, by Evan A. Jenness and published in the September/October 2013 *Champion*, discusses the issue of elderly and infirmed inmates. What is "old" when it comes to sentencing a defendant to prison is not the equivalent of "old" in the outside world. The medium age of a federal defendant at

sentencing is 34.<sup>7</sup> The National Institute of Corrections defines prisoners 50 and older as “elderly” and “aging”,<sup>8</sup> and 15 states specifically define an “older” inmate as 50 or older.<sup>9</sup> Only 10.8 % of all federal defendants are over 50.<sup>10</sup> Mr. Falterbauer is 60 years old.

**Rehabilitation, Deterrence and Recidivism:** In addition to this Court considering the sentencing factors of 18 USC § 3553(a)(1), the nature and circumstances of the offense and the history and characteristics of the defendant, this Court must also consider factors in 18 USC § 3553(a)(2), which include fashioning a sentence which reflects the seriousness of the offense, promotes respect for the law, provides just punishment, affords deterrence, protects the public from further crimes by the defendant, and provides rehabilitation. To those ends, Mr. Falterbauer’s arrest and guilty plea, the understanding he will remain a convicted felon for the remainder of his life, his agreement to pay the IRS a great deal of money, and the continued threat of incarceration in this case, all serve as adequate punishment and deterrent not only to this defendant, but anyone else thinking of committing a similar offense.

In support, the Sentencing Commission’s report, “Measuring Recidivism,” offers a statistical analysis of the type of person most likely and least likely to re-offend. The study demonstrates the risk of Mr. Falterbauer re-offending is not likely, and shows how important it is in a case not to impose a jail sentence. The study demonstrated that (1) those who are married

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<sup>7</sup> Sourcebook, Table 6

<sup>8</sup>Dr. Joann B. Morton, An Administrative Review of the Older Inmate, USDOJ, National Institute of Corrections, 4 (1992)

<sup>9</sup> Old Behind Bars, at 17

<sup>10</sup> Sourcebook, Table 6

are less likely to recidivate than those who were not; (2) those who have not used illicit drugs are less likely to recidivate than those who did; (3) non-violent offenders are less likely to recidivate than violent offenders; (4) first time offenders are less likely to recidivate than repeat offenders; (5) those who are employed are less likely to recidivate than those who are not employed; and (6) those who are sentenced to non-jail sentences are less likely to recidivate than those who receive straight jail. Mr. Falterbrauer falls into ALL of those categories.

**New Guideline Amendments:** Amendment 738 of the Sentencing Guidelines, effective November 1, 2010, “ is a result of the Commission’s continued multi-year study of alternatives to incarceration. The Commission initiated the study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent offenders. See generally 28 USC §§ 994(g),(j).”

As part of the study, the Commission held a two-day national symposium at which the Commission heard from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law and the social sciences, corrections and alternatives sentencing practitioners and specialists, federal and state prosecutors and defense attorneys, prison officials, and others involved in criminal justice. See United States Sentencing Commission, Symposium on Alternatives to Incarceration (July 2008). In considering the amendment, the Commission also reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.”

As a result, the amendment expanded Zones B and C of the Sentencing Table in Chapter

Five. “Specifically, it expands Zone B by one level for each Criminal History Category (taking this area from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, under the amendment, defendants in Zone C with an applicable guideline range of 8-14 months or 9-15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12-18 months are moved to Zone C. Conforming changes also are made to § 5B1.1 (Imposition of a Term of Probation) and § 5C1.1. In considering this one-level expansion, the Commission observed that approximately 42 percent of the Zone C offenders covered by the amendment and approximately 52 percent of the Zone D offenders covered by this amendment already receive sentences below the applicable guideline range.” Mr. Falterbrauer’s *advisory* guideline range is 10 to 16 months, and at level 12, he is in Zone C of the Sentencing Table, only 1-level from Zone B and 4-levels from Zone A.

Notwithstanding Amendment 738 to the Sentencing Guidelines, Mr. Falterbrauer also believes there is nothing to prohibit this Court from fashioning a “non-custodial” sentence. Pursuant to 18 USC § 3561, there are no factors under the statute which prohibit a “non-custodial” sentence and, under the guidelines, §§ 5C1.1(d)(e) and (f) are *advisory*, as are all other guideline sections, post-*Booker*. Indeed, in *United States v. Chettiar*, 501 F. 3d 854, 860 (8<sup>th</sup> Cir. 2007), the court found that “switching zones” under § 5C1.1 to achieve a non-custodial sentence amounted to a variance. Therefore, Mr. Falterbrauer believes this Court may sentence him to a non-custodial sentence.

**Kinds of Sentences Available:** A term of probation or its equivalent (time-served with a term of supervised release) for Mr. Falterbrauer with a possible period of home-confinement, would

allow him to remain at home with his wife, work, and continue his medical care with doctors who know him. Courts have agreed, even pre-*Booker/Blakely*, that the imposition of a probation sentence is warranted where a defendant's guideline range is similar, or even exceeds Mr. Falterbauer's *advisory* guideline range.

The Supreme Court explained in *Gall* that a probationary term is not insignificant -

“custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty....Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking...Most probationers are also subject to individual “special conditions” imposed by the court. *Gall*, for instance, may not patronize any establishment that derives more than 50 % of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer.”

*Gall*, 552 U.S. 38, 48 (2007).

Indeed, courts around the country post-*Booker/Blakely* have crafted probationary sentences as variances for first-time, non-violent offenses where it is clear the defendant will not re-offend and can positively contribute to society. *United States v. Tomko*, 562 F. 3d 558 (3<sup>rd</sup> Cir. 2009) (en banc) (district court did not abuse its discretion in sentencing defendant to probation with a year of home detention, community service, restitution, and fine for tax evasion, rather than a term of imprisonment where guideline range was 12 to 18 months, in part because defendant's negligible criminal history, employment record, community ties, and extensive charitable works); *United States v. Rowan*, 530 F. 3d 379 (5<sup>th</sup> Cir. 2008)(where defendant convicted of possession of child pornography and Guidelines were 46 to 57 months, sentence of five years supervised release not unreasonable under *Gall*); *United States v. Bueno*, 549 F. 3d 1176 (8<sup>th</sup> Cir. 2008)(where defendant possessed more than 70 kilograms of cocaine, and Guidelines were 108-135 months, sentence of probation with house arrest for five years not unreasonable noting that "offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty,"...and the district court observed in this case, Bueno is subject to house arrest during the entire five-year period of probation"); *United States v. Whitehead*, 532 F. 3d 991 (9<sup>th</sup> Cir. 2008)(district court did not abuse discretion when it sentenced the defendant to probation with "substantial amount of community service and house arrest" where defendant was convicted of supplying counterfeit access cards causing loss of \$1 million dollars and guideline range was 41-51 months); *United States v. Ruff*, 535 F. 3d 999 (9<sup>th</sup> Cir. 2008)(defendant sentenced to three years supervised release (one-day in jail) where guideline range was 30-37 months and defendant had pled guilty to embezzling \$650,000 from non-profit organization over the course of three years); *United States v. Coughlin*, 2008 WL 313099 (W.D. Ark. Feb. 1, 2008)(where defendant embezzled money and

evaded taxes and Guidelines were 33-41 months, sentence of probation with home detention for 27 months was imposed in part because “home detention and probation can be severe punishments...hugely restrictive of liberty, highly effective in the determent of crime and amply retributive”). Again, Mr. Falterbauer is a first-time non-violent offender with an *advisory* guideline range of 10 to 16 months.

**Latest Sentencing Statistics:** The United States Sentencing Commission’s “Sourcebook” of Federal Sentencing Statistics for fiscal year 2014 provides statistics for 75,836 cases sentenced that year. Specifically, as to 1,689 cases sentenced in the Southern District of New York last year, 71.9 % received sentences below the *advisory* guideline range; 17.2 % because of government sponsored substantial assistance or other motions, and 45.3 % because of other departures and the sentencing factors of 18 USC § 3553. Nationally, the nature and circumstances of the offense and/or history and characteristics of the defendant were cited as reasons for a downward variance in 10,352 cases.<sup>11</sup> Indeed, district courts continue to exercise discretion when imposing sentences below the *advisory* guideline range.

**Conclusion:** Harry Falterbauer is well aware that in fashioning a “reasonable” but not greater than necessary sentence in his case, this Court must consider the nature and circumstances of the offense, 18 USC § 3553(a)(1). To that end, Mr. Falterbauer has admitted he had an overseas bank account which he failed to declare and he also did not pay taxes on the interest earned several years ago, 2006 to 2008. However, he has since accepted responsibility for the instant offense, he

has pled guilty, he has paid all taxes and interest owing, filed amended tax returns, and he will pay in full \$794,500, per his agreement with the Government, at sentencing. With that said, Mr. Falterbauer remains profoundly remorseful.

Subsequent to *Booker*, this Court must also consider the history and characteristics of the defendant, 18 USC § 3553(a)(1). Mr. Falterbauer is now 60 years old. He is in need of a double-hernia operation, he requires regular vitamin injections, and he has a history of depression in which he is prescribed Zoloft. He has enjoyed a stable marriage with Connie since 2002, and they have not been apart in more than 13 years. Clearly, we believe Mr. Falterbauer's offense was an aberration of an otherwise law-abiding life and there is no indication he would ever find himself back before this Court. For reasons stated, we ask this Court to consider a non-custodial sentence within either Zone A or B of the Sentencing Table.

Finally, Assistant Attorney General Lanny A. Breuer spoke to the National District Attorneys Association Summer Conference on July 23, 2012 and stated, in part.....

“The fiscal climate of the past several years, however, has led to significant cuts in state and local government spending, including on criminal justice initiatives. At the Justice Department, our budget has remained essentially flat, and we have been operating under a general hiring freeze since January 2011, which means that we are challenged in filling vacant positions for investigators, prosecutors and other necessary law enforcement personnel. This places additional burdens on current employees and, given natural attrition, means that, over time, our resources will be stretched even thinner.

“At the same time that federal criminal justice spending has stayed roughly flat, the number of federal prisoners has increased, and our prison and detention spending has increased along with it. This has resulted in prison and detention spending crowding out other criminal justice investments, including aid to state and local law

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<sup>11</sup> USSC Sourcebook, Table 25B



enforcement and spending on prevention and intervention programs.

“According to BOP, the growth of the federal inmate population has negatively affected inmates, staff, and infrastructure, but BOP has acted within its authority to help mitigate the effects of this growth. BOP officials reported increased use of double and triple bunking, waiting lists for education and drug treatment programs and limited meaningful work opportunities, and increased inmate-to-staff ratios. These factors, taken together, contribute to increased inmate misconduct, which negatively affects the safety and security of inmates and staff. BOP officials and union representatives voiced concerns about a serious incidents occurring. To manage the growing population, BOP staggers meal times and segregates inmates involved in disciplinary infractions, among other things.

“Beyond moves in the right direction toward sentencing and prison reform, the above provides more useful ammunition to argue against a claimed ‘need’ for incarceration, particularly for first-time and non-violent offenders. It can also be used to buttress a request for a structured community-based sanction in lieu of imprisonment.”

Harry Falterbauer and Counsel thank this Court for considering our Response to the PSR and Request for a Non-Custodial Sentence. Counsel will have further remarks at the time of sentencing.