



March 18, 2014

The Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs

Dear Judge Saris:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to provide comments on the Sentencing Commission's request for comment on proposed amendments to the sentencing guidelines.

These comments focus on the specific areas where The Leadership Conference believes the Commission can improve the fairness and proportionality of the Guidelines; promote individualized review of specific offense conduct; and mitigate excessively punitive provisions that have not only promoted racial disparities in sentencing, but also have sustained a costly explosion in the number of individuals in the federal penal system.

In summary, we strongly support the following proposed amendment to the Sentencing Guidelines:

Amendment of guidelines applicable to drug offenses, including amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types. The proposed amendment contains parts (A), (B), and (C).

The Leadership Conference's comments will address part (A) and (B) of the proposed amendment:

(A) Whether any changes should be made to the Drug Quantity Table across drug types, and other possible changes

(B) Contains a proposed amendment that illustrates one possible set of changes to the Drug Quantity Table (together with conforming changes to the chemical quantity tables and certain clerical changes)

The Leadership Conference's comments will not, however, address part (C) of the proposed amendment:

(C) Whether the guidelines adequately address the environmental and other harms of drug production operations (including, in particular, the cultivation of marijuana) on public lands or while trespassing on private property

Our detailed comments are set out below.

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Overview and Impact of Mandatory Minimum Penalties and the Safety Valve on the Federal Prison System

As documented by a recent report by the Congressional Research Service (CRS), “mandatory minimum” sentencing requirements, under which certain prison sentences for certain crimes, particularly for drug offenses, are automatically required by federal and state lawⁱ are among the most important elements in explaining the record incarceration numbers at the federal level. Over the past 30 years, according to the CRS, the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent.ⁱⁱ Currently, our federal prison system is operating almost 40 percent over capacity in order to house a large population of non-violent drug offenders, at a significant cost to taxpayers.

In a 2011 mandatory minimum report, the Commission determined that “some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them.”ⁱⁱⁱ Mandatory minimum sentencing schemes eliminate judicial discretion and prevent courts from considering all relevant factors, such as culpability and role in the offense, and from tailoring the punishment to the crime and the offender. According to the Commission, “this broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimum penalties could apply do not merit them.” This results in certain mandatory minimum penalties being applied inconsistently among different districts and even within the same districts, across the country.^{iv} In addition, mandatory minimum penalties for drug trafficking have swept more broadly than Congress’ initial intent – “to target “major” and “serious” drug traffickers.”^v

Further, studies have shown that mandatory minimum sentences not only exacerbate racial disparities in the criminal justice system, but are also ineffective as public safety mechanisms, as they increase the likelihood of recidivism.^{vi} One of the few ways to address this unsustainable growth in the Bureau of Prisons (BOP) prison population and disparities in sentencing is to address the length of time offenders are serving sentences in the federal system and increase a sentencing judge’s ability to engage in individualized sentencing.^{vii}

While we categorically oppose mandatory minimum sentencing schemes, we agree with the Commission that “if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.”^{viii}

In addition to concerns around the application of mandatory minimum penalties, their impact on the federal prison population and budget, The Leadership Conference would also like to highlight the Commission’s 2011 recommendation that “Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”^{ix} We urge the Commission reiterate its recommendation to Congress and to support an expansion of safety valve eligibility for non-violent offenders with even more than three criminal history points. Although not as effective as comprehensive reform to mandatory minimums, this eligibility expansion would permit judges to sentence more defendants with studied and thoughtful care given to the 18 U.S.C. § 3553(a) factors and to avoid unjust sentences caused by Congress’s mistaken conflation of drug quantity with culpability in the Anti-Drug Abuse Act of 1986.

As the Commission reported to Congress in fiscal year 2010, “[m]ore than 75 percent . . . of Black drug offenders convicted of a drug offense carrying a mandatory minimum penalty have a criminal history

score of more than one point under the sentencing Guidelines, which disqualifies them from application of the safety valve.”^x By contrast, 53.6 percent of Hispanic offenders, 60.5 percent of White offenders, and 51.6 percent of Other offenders had more than one criminal history point disqualifying them from safety valve relief. Thus, in addition to subjecting non-serious traffickers to harsh mandatory minimums, the current policy has a disproportionately harsh impact on minority offenders.

The safety valve’s criminal history eligibility requirement magnifies racially disproportionate enforcement dynamics that occur at both the state and federal levels. No reasonable justification exists for maintaining a safety valve that applies too narrowly. The Commission should support significantly expanding the safety valve eligibility for nonviolent offenders with more than one criminal history point. Such an expansion would permit judges – in appropriate situations – to avoid imposing lengthy sentences on offenders who do not need and whose conduct does not justify serving long sentences in federal prison.

We recognize that to truly address these two issues along with overall inequities in our criminal justice system, congressional action is necessary. However, as the Commission has correctly noted, it has the ability within its current mandate to make certain policy changes that will work to mitigate the impact of mandatory minimum penalties and the underuse of the current safety valve due to ineligibility.

As a result of these current circumstances, we agree that part (A) of the Commission’s proposed amendment to the Drug Quantity Table in §2D1.1, and the approach the Commission has outlined in part (B) are appropriate steps for the Commission to take in order fulfill Congress’ charge to the Commission to not only establish federal sentencing guidelines and work to ensure that they function as effectively and fairly as possible, but also to assess whether sentencing, penal, and correctional practices fulfilling the purposes they were intended advance.^{xi}

Amendment of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.

- (A) Whether any changes should be made to the Drug Quantity Table across drug types, and other possible changes.

The Leadership Conference strongly urges the Commission to do what it can ameliorate the harshness of drug sentencing. A substantial, across-the-board reduction would mitigate some of the worst harms of the mandatory minimums and their emphasis on quantity rather than actual criminal conduct as a one-size-fits-all proxy for culpability. Currently, the quantity-driven minimums and drug conspiracy liability under the guidelines can lead to defendants with minor to moderate roles in a drug operation receiving decades of prison time based on quantities of drugs they never handled, saw, or even knew about.

In *U.S. v. Diaz*, Judge Gleeson wrote that “the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.”^{xii} The court noted that from the beginning, “the original Commission erred in deciding to base the Guidelines primarily upon typical, or average, actual past practice by analyzing 10,500 actual past cases in detail . . . along with almost 100,000 other less detailed case histories.”^{xiii} He goes on to state that while the “empirical data on drug trafficking offenses were gathered, [] they had *no* role in the formulation of the Guidelines ranges for drug trafficking offenses.”^{xiv} It is clear that the passage of the Anti-Drug Abuse Act of 1986 (“ADAA”) compounded this problem by creating a two-tiered scheme of mandatory minimum and enhanced maximum sentences that

have now become central features of the federal drug sentencing landscape. Under the ADAA, Congress established a five-year mandatory minimum, enlarged the maximum from 20 to 40 years, which was intended for the managers of drug enterprises, and provided a ten-year mandatory minimum, with a maximum of life, which was intended for the organizers and leaders.^{xv}

This legislation made drug type and quantity, rather than “role in the offense,” trigger these harsh mandatory minimums, thereby “creating a problem for the commission, as those sentences were far more severe than the average sentences previously meted out to drug trafficking offenders. . . and it might not look right for a defendant to have a Guidelines range significantly lower than the minimum sentences mandated by Congress in the ADAA.”^{xvi} As a result, the Commission completely “jettisoned its data making the quantity-based sentences in the ADAA proportionately applicable to *every* drug trafficking offense.”^{xvii} These Guidelines are therefore based neither on empirical data nor national experience and “the linkage of the guideline ranges to the ADAA’s weight driven [mandatory minimum] scheme has resulted in far more punitive sentences that Congress intended.”^{xviii}

Further, as the Commission learned with the implementation of reductions to Base Offense Level’s, a two-level reduction in Guideline sentencing could be completed with administrative ease and would still be able to incorporate mandatory minimum sentences, while lowering existing penalties and reducing costs and the population in the BOP. In 2007, the Commission reduced by two levels, the base offense level in sentencing guidelines for crack cocaine and subsequently made those reductions retroactive. This resulted in an average decrease in sentence of about 26 months, which corresponds to a 17 percent reduction in sentence.^{xix} Most importantly, the lowering of base offense levels has not had a negative impact on public safety.

The Commission undertook a study in 2011 to determine whether these reductions imposed any increased public safety risk. It examined the recidivism rates of offenders affected by the change in comparison to offenders who would have qualified for a reduction but were released after serving their full sentence. The Commission analysis showed “no statistically significant difference between the two groups” and concluded that “some reduction in sentences imposed on drug offenders would not lead to increased recidivism and crime.”^{xx} Thus, we urge the Commission to develop amendments to the drug quantity table across drug types to correct a mistake that has had significant human and economic costs.

- (B) Contains a proposed amendment that illustrates one possible set of changes to the Drug Quantity Table (together with conforming changes to the chemical quantity tables and certain clerical changes)

The approach outlined by the Commission’s proposed amendment is consistent with the Commission’s past practice and represents the Commission’s thorough, measured, and reasoned analyses of the current sentencing guidelines and their applicability to certain drug trafficking offenders. The Commission estimates that the current proposal would result in an average sentence reduction of 51 months, which is an average 11 month difference or 17.7 percent reduction.^{xxi}

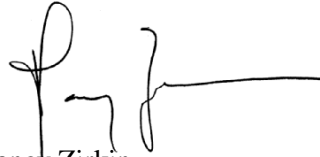
The cost savings that will eventually accrue are substantial and warrant the Commission voting in favor of the proposal as outlined. The Commission estimates that under the proposed amendment, the BOP would have saved 13,938 prison beds.^{xxii} The Commission’s paramount responsibility is to ensure that sentences are not greater than necessary. Accordingly, we encourage the Commission to amend the Drug Quantity Table in 2D1.1 as illustrated in part (B) of the proposal.

Thank you for your attention to our concerns. If you have any questions, please contact Sakira Cook, Senior Policy Associate, at cook@civilrights.org or (202) 263-2894.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

ⁱ Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (Jan. 22, 2013), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>

ⁱⁱ Bureau of Justice Statistics, U.S. Dep't of Justice, *Correctional Populations in the United States, 2010* (2011), available at <http://www.bis.gov/content/pub/pdf7cpus1Q.pdf>.

ⁱⁱⁱ U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011

^{iv} See Statement of Judge Patti B. Saris, "*Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences*," before the Committee on the Judiciary, United States Senate, September 18, 2013.

^v *Id.*

^{vi} Barbara S. Vincent and Paul J. Hofer, "The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings," (Federal Judicial Center, 1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf)

^{vii} See generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.

^{viii} U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, at 345.

^{ix} Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011 at xxxi.

^x *Mandatory Minimum Penalties*, October 2011 at 159-160.

^{xi} See 28 U.S.C §991.

^{xii} *U.S. v. Diaz*, 2013 WL 322243 at *1 (E.D. N.Y. January 28, 2013).

^{xiii} *Diaz*, 2013 WL 322243 at *4 (internal quotation marks and footnotes omitted).

^{xiv} *Id.*

^{xv} *Id.*

^{xvi} *Id.* at 5

^{xvii} *Id.* at 6

^{xviii} *Id.*

^{xix} See Statement of Judge Patti B. Saris, "*Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences*," before the Committee on the Judiciary United States Senate, September 18, 2013

^{xx} *Id.*

^{xxi} Analysis of Drug Trafficking Offenders, January 2014, see http://www.ussc.gov/Videos/Public_Meeting_Presentation_20140109.cfm

^{xxii} *Id.*