



July 23, 2012

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

**RE: ACLU Public Comments on U.S. Sentencing Commission Proposed
Priorities for 2013 as published in Fed. Reg. 77 FR 31069.**

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Dear Commissioners:

On behalf of the American Civil Liberties Union (ACLU), we submit these comments pursuant to the U.S. Sentencing Commission's ("Commission") request for public comment regarding the possible priority policy issues for the amendment cycle ending on May 1, 2013. The ACLU is a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty, equality, and justice embodied in our Constitution and our civil rights laws.

The Commission has identified nine potential priorities for the upcoming amendment cycle. We will address proposed priority number (2) "the continuation of [the Commission's] work with the congressional, executive, and judicial branches of government, and other interested parties, to study the manner in which *United States v. Booker*¹, and subsequent Supreme Court decisions have affected federal sentencing practices, and the role of the federal sentencing guidelines."

Also, we suggest additional subjects for the Commission to consider making priorities: maintaining a single, deferential, abuse-of-discretion standard of review for all sentences imposed under the advisory Guidelines system; expanding safety valve eligibility for nonviolent offenders with more than one criminal history point; replacing the current 500:1 ratio for converting MDMA to marijuana to a ratio of 1:1; and eliminating the recommended Guidelines sentence of life for Offense Level 43 for Criminal History Category I and to adopting instead a new range that follows the incremental mathematical pattern between Level 35 and Level 42.

¹ 543 U.S. 220 (2005)

The ACLU submits these comments with the objective of encouraging the Commission to use its authority to address the growing crisis that exists in the Federal Bureau of Prisons (BOP). Currently, a record 218,000 people are confined within BOP-operated facilities or in privately managed or community-based institutions and jails. The population is projected to increase to approximately 229,300 by the close of FY 2013.² Indeed, over the last 30 years the population of the federal prison system has increased exponentially, nearly 800 percent, largely due to the overrepresentation of those convicted of drug offenses, many of whom are low-level and non-violent. Operating at 40 percent over capacity, overcrowding plagues the federal system, but we cannot build ourselves out of this crisis. Building prisons, alone, will not stop the number of people who are being sentenced to lengthy and harsh sentences in federal courts across the country.

It is critical that the crisis of the surging, unsustainable federal prison population be addressed, lest it “engulf the Justice Department’s budgetary resources.”³ For 2013, we encourage the Commission prioritize policies that will change the course of unrestrained incarceration, and turn its attention to viable and fiscally sound sentencing policies that will make prison a sanction of last resort.

I. The Sentencing Reform Act of 1984

The Supreme Court’s 2005 *Booker* decision ended over two decades of compelled reliance on mandatory sentencing Guidelines that created an unnecessarily harsh sentencing scheme. In assessing the Commission’s ongoing work on federal sentencing practices in the wake of *Booker*, it is important to examine whether the objectives of the Sentencing Reform Act of 1984 (SRA)⁴, the legislation that created the Commission and authorized the creation of the federal sentencing Guidelines, are being met. Examining sentencing decisions made in the seven years since *Booker*, it is clear that the current advisory Guidelines system has resulted in fairer sentences. Such fairness is consistent with the goals of the SRA to reduce *unwarranted* disparities and increase fairness in sentencing – goals which proved elusive under the excessively punitive mandatory guideline system.

As enacted, the SRA codified a framework for a determinate sentencing scheme under federal law.⁵ The SRA’s objective was to reduce unwarranted disparity among defendants with similar records and convicted of similar conduct, and to increase certainty and fairness of sentencing. The SRA enumerates four purposes of sentencing: (1) punishment; (2) deterrence; (3) incapacitation; (4) rehabilitation.⁶ However, the statute provides no clear statement as to how these four purposes were to be weighted. Courts were directed to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing.”⁷

² DOJ Budget Summary.

³ Commerce, Justice, Science, and Related Agencies Appropriations Act, 2012, H.R. 2596, 112th Cong. (2012).

⁴ Sentencing Reform Act of 1984, Pub. L. No. 98-473 §211, 98 Stat. 1837.

⁵ Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1006 (2001).

⁶ 18 U.S.C 3553(a)

⁷ *Id.*

II. *United States v. Booker*

In *United States v. Booker*,⁸ the Supreme Court held that the U. S. Sentencing Guidelines' system of mandatory sentencing ranges based on judge-found facts deprived defendants of their Sixth Amendment right to a jury trial. *Booker* rendered the Guidelines advisory instead of mandatory and thereby freed sentencing judges to vary from the Guidelines on the basis of factors specific to individual criminal cases.

Prior to *Booker*, the statute required sentencing courts to impose sentences within the Guidelines' range barring exceptional circumstances specific to the individual offender.⁹ Trial judges could not account for instances when the guideline sentence for a specific offense failed to effectuate the broad sentencing goals articulated by Congress.¹⁰ *Booker* fundamentally altered the landscape of sentencing by giving judges ultimate authority to sentence defendants anywhere within the statutory sentencing range, provided that judicial discretion be exercised by reference to a statutory framework including, but not limited to, the guideline range, as well as consideration of factors as prescribed by the federal criminal sentencing statute, 18 U.S.C. § 3553(a).

In 2007, the Court in *Rita v. United States*¹¹ reiterated that sentencing courts could no longer “presume[d] that the Guidelines sentence should apply.” But *Rita* emphasized that district courts must take the Guidelines into account when sentencing, even if they are no longer bound by them.

Booker was a reaction to a number of problems in the pre-*Booker* system. As a report by the Constitution Project highlights,¹² the mandatory sentencing Guidelines had several deficiencies, including that:

1. *The Guidelines were overly rigid.*
2. *The Guidelines placed excessive emphasis on quantifiable factors such as monetary loss and drug quantity and not enough emphasis on other considerations, such as the defendant's role in the criminal conduct.*
3. *The basic design of the Guidelines contributed to a growing imbalance among the institutions that create and enforce federal sentencing law and had inhibited the development of more a just, effective and efficient federal sentencing system.*¹³

Notably, the pre-*Booker* world still encompassed many of the same problems the SRA set out to remedy – imbalance, inconsistency and unfairness. While attempting to resolve inconsistency in sentencing, the SRA became too severe and inflexible. With respect to offender characteristics, the Guidelines significantly restricted judges' ability to consider many relevant factors, such as a defendant's age and family circumstances, and instead required a myopic focus

⁸ 543 U.S. 220 (2005)

⁹ *Id.* at 223-24.

¹⁰ 18 U.S.C. Sec. 3553(a)

¹¹ 551 U.S. 338 (2007)

¹² The Constitution Project, *Principles for the design and Reform of Sentencing Systems: A Background Report.* at 13, available at <http://www.constitutionproject.org/pdf/34.pdf>

¹³ *Id.*

on a defendant's criminal record as the most important offender characteristic.¹⁴ As former Chair of the U.S. Sentencing Commission Judge William K. Sessions argued, the Guidelines turned judges into computers, thereby taking away their humanity and reason.¹⁵

III. A Post-Booker Advisory Guideline World

One of the stated goals of the Sentencing Reform Act of 1984 was to assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal criminal cases. Another stated goal was to provide a full range of sentencing options from which to choose the most appropriate sentence in a particular case in order to reduce the use of imprisonment.¹⁶ Specifically, the SRA aimed to produce sentences that were sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C.A. § 3553(a)(2)(A). Indeed, this “parsimony principle” remains the driving force behind federal sentencing. To achieve fair sentences that were neither excessive nor the result of robotic reliance on incarceration, the SRA called for sentencing policies and practices that account for the history and characteristics of the defendant, provide fairness in meeting the purposes of sentencing, and permit individualized sentences when warranted by mitigating or aggravating factors.¹⁷

As is well documented, the mandatory Guidelines scheme that persisted for two decades frustrated Congress's goals in enacting the SRA for a number of reasons. While the SRA was designed to eliminate *unwarranted* disparity, it was not promulgated either to dispense with *warranted* disparity or to create *unwarranted uniformity*. Yet this is exactly what the mandatory Guidelines system did, primarily by mandating excessive uniformity among defendants regardless of differences in culpability, dangerousness, risk of recidivism, or need for rehabilitation. This cookie-cutter approach, in turn, resulted in many punishments that did not fit the offender and were thus not justified by the purposes of sentencing. The quest for uniformity within the harsh mandatory scheme led to an overall increase in lengthy sentences, made it impossible for judges to hand down individualized sentences, and resulted in greater (and excessive) disparity among racial and ethnic groups.

In addition, the Sentencing Commission tied the drug Guidelines to mandatory minimums and despite Congress's authorization for judges to impose probation for any offense with a statutory maximum below 25 years unless expressly precluded for the offense, the Commission made probation unavailable to many prisoners.¹⁸ Simply put, although Congress enacted the SRA because it thought there was “too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment,” the mandatory sentencing scheme struck down by *Booker* relied heavily on lengthy incarceration.¹⁹

¹⁴William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305, 315 (2011).

¹⁵*Id.* at 315.

¹⁶S. Rep. No. 98-225, at 39 (1983)

¹⁷See 18 U.S.C.A. § 3553(a)(1), 28 U.S.C. § 991(b)(1)(B).

¹⁸18 U.S.C. § 3561(a), § 3559(a), (the percentage of prisoners receiving probation has dropped from almost 35% in 1984 to less than 10% in 2010). 1984-1990 FPSSIS Data files, Administrative Office of U.S. Courts; USSC, *Sourcebook of Federal Sentencing Statistics*, tbl.12 (1991-2009); USSC, *Preliminary Quarterly Data Report, Fourth Quarter FY 2010*, tbl.18.

¹⁹S. Rep. No. 98-225, at 59 (1983).

In recent years the Commission, aided significantly by *Booker*'s disposal of the mandatory guideline system, has regained its footing and embraced its original purpose to improve consistency in our federal sentencing system in a way that makes individual sentences fairer and more rational and ensures that sentencing practices remain within a permissible and predictable range of possibilities. In tandem with the Commission's recent work and decisions, the now-advisory Guidelines system reduces both the unwarranted disparities and unwarranted uniformity created in large part by the mandatory system. In this way, the corrections that the Commission and courts have been making post-*Booker* are in no way radical. Rather, they are merely bringing federal sentencing back in line with the original intent of Congress when it enacted the SRA: fairer sentences, fewer unwarranted disparities, more warranted disparities based on individualized factors under § 3553(a), and less uniformity solely for uniformity's sake.

In the wake of *Booker*, therefore, the Sentencing Commission continues to fulfill its role in developing Guidelines, and sentencing courts are still tasked with consulting the Guidelines, which continue to provide judges with consistent sentencing ranges. The advisory Guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record, and certain characteristics (including age and mental condition) that "may be relevant" in granting a departure from the Guidelines range if "present to an unusual degree" may now be considered.²⁰ The Commission has also taken steps to encourage judges to consider the specific characteristics of individual defendants at sentencing.²¹

The post-*Booker* system gives trial judges flexibility but not unbridled discretion. Seventy-five percent of judges surveyed preferred the *Booker* "advisory" system to the "mandatory" system.²² Seventy-eight percent opined that the advisory Guidelines reduced disparity, and 67% felt the advisory Guidelines increased fairness.²³ A majority of federal judges believe that the advisory Guidelines system achieves the purposes of sentencing better than mandatory Guidelines or no Guidelines at all.²⁴ Lanny Breuer, Assistant Attorney General for the Department of Justice's (DOJ) Criminal Division, indicated in a 2010 meeting that DOJ preferred the advisory Guidelines system to other available options.²⁵ Several bar organizations have expressed strong support for the advisory Guidelines system as well.²⁶

²⁰ Sessions *supra* note 14 at 337.

²¹ *Id.*

²² Sessions *supra* note 14 at 328.

²³ *Id.*

²⁴ U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, (75% of judges believe that the current advisory guidelines system best achieves the purposes of sentencing; 8% believe that no guidelines would best achieve the purposes of sentencing; 3% believe that the former mandatory guidelines would best achieve the purposes of sentencing; and 14% believe that mandatory guidelines with broader ranges and jury fact finding, if coupled with fewer mandatory minimums, would best achieve the purposes of sentencing).

²⁵ Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010) (reporting that prosecutors "were not enthusiastic" about a return to a mandatory guidelines structure, and that Department supported current advisory guidelines system).

²⁶ *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary, 112th Congress (2011)*. See Testimony of James E. Felman on behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives at 21-23 (Oct. 12, 2011); Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to the Hon. F. James Sensenbrenner and the Hon. Robert C. (Bobby) Scott (Oct. 11, 2011); Letter from Lisa Monet Wayne on behalf of the National Association of Criminal Defense Lawyers to the Hon. Jim Sensenbrenner and the Hon. Bobby Scott (Oct. 11, 2011).

Booker brought balance, transparency, and increased fairness to federal sentencing. While we have neither achieved full fairness nor a reduction of unwarranted severity yet, and much work remains, federal sentencing post-*Booker*, under advisory Guidelines and appellate review of all sentences under a deferential abuse-of-discretion standard, has brought us a step closer to these goals and should be vigorously protected.

IV. The Standard of Appellate Review Should Remain Abuse-of-Discretion to Determine the Reasonableness of a Given Sentence

As a result of *Booker*,²⁷ the Sentencing Guidelines articulated and made mandatory under the SRA were deemed advisory only. Accordingly, the Court also considered the appropriate standard of appellate review in light of the now-advisory nature of the Guidelines, noting that excision of § 3553(b)(1), which rendered the Guidelines mandatory, also required the excision of § 3742(e), the corresponding section of the Act addressing appeals.²⁸

Ultimately, the Court determined that, going forward, federal appeals courts must apply the familiar abuse-of-discretion standard to determine the reasonableness of a given sentence.²⁹ In its decision in *Gall v. United States* two years after *Booker*, the Court stated explicitly that “while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard.”³⁰ The Court went on to provide more precise guidance, pointing out that, in any given case, the appellate courts have the authority – indeed, the legal obligation – to consider both procedural and substantive issues:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness.³¹

The Court based its decision regarding the appropriateness of the abuse-of-discretion standard, quite logically, on “related statutory language, the structure of the statute, and the ‘sound administration of justice,’” as well as “the past two decades of appellate practice in cases

²⁷ 543 U.S. 220 (2005).

²⁸ 543 U.S. at 260.

²⁹ *Id.* at 260-261.

³⁰ 552 U.S. 38, 41 (2007).

³¹ *Gall*, 552 U.S. at 597.

involving departures.”³² While critics have complained that the review standard announced by the Court in *Booker* and *Gall* has “severely degrad[ed] [courts of appeals’] ability to correct even gross outlier sentences,”³³ a careful review of the Court’s rationale in reaching its decision, as well as the historical context in which the decision was made, reveals the appropriateness and ultimate workability of the abuse-of-discretion standard.

To begin with, despite some commentators’ lamentations that *Booker* “stripped the courts of appeals of the power of *de novo* sentencing review,”³⁴ the fact is that the *de novo* standard was not inserted into § 3742(e) until 2003, just two years before *Booker* was decided. In the two decades prior to that, under the mandatory regime, appellate courts were directed to determine whether a sentence was “unreasonable” in light of the factors articulated in § 3553(a) – an inquiry entirely consistent with the abuse-of-discretion standard the Court found implicit in the SRA, even after the removal of § 3553(b)(1).

Two basic principles underlie the application of the abuse-of-discretion standard.³⁵ First, where a court’s ruling is based, in large part, on the judge’s unique perspective as the finder of fact, due deference should be given to the court’s decision on appeal.³⁶ Hence, the Supreme Court has recognized that “deference was owed to the ‘judicial actor... better positioned than another to decide the issue in question.’”³⁷ In the sentencing context, the abuse-of-discretion standard and the attendant level of deference to the district court are particularly appropriate. In addition to being more intimately familiar with the facts of the case simply by virtue of presiding over the proceedings, the sentencing judge has the opportunity to assess the credibility of witnesses, both at trial and during the sentencing phase, and to observe and interact directly with the defendant. As such, it makes perfect sense for appellate courts to extend significant deference to the district court’s decision.

That said, it is worth noting that, in some important ways, the current review standard provides appellate courts with even more opportunities to alter or correct sentencing decisions than did the original scheme. Under the SRA, appellate courts gave significant deference to sentences within the applicable Guideline range, reviewing only for procedural error. With regard to sentences outside the Guideline range, the SRA imposed a reasonableness standard, using the § 3553(a) factors as the central point of reference, and required due deference to the district court’s decision for the traditional reasons articulated above. But as *Gall* makes clear, the reasonableness inquiry now applies to all sentences – whether inside or outside the guideline range – and includes both procedural and substantive aspects.

The second justification for the use of the abuse-of-discretion standard is “the sheer impracticability of formulating a rule of decision for the matter in issue.”³⁸ That is, because of the fact-specific nature of any given case, the district court is better positioned to come to a

³² *Booker*, 543 U.S. at 260-261.

³³ Otis, William. “The Slow, Sad Swoon of the Sentencing Suggestions.” Engage: Vol. 12, Issue 1, p. 30.

³⁴ *Id.*

³⁵ *United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009).

³⁶ See *Id.* (noting that “deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter.”) (internal citation omitted).

³⁷ *Koon v. United States*, 518 U.S. 81, 98, 99 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988)).

³⁸ *Pierce*, 487 U.S. at 561-562.

reasoned decision, including in the sentencing context, than is the appellate court.³⁹

It is no surprise then that the Supreme Court has found, even prior to *Booker*, that “[a] district court’s decision to depart from the [mandatory] Guidelines...will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.”⁴⁰ The Court in *Koon* went on to add that deference to the district court stems from that court’s “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”⁴¹ Moreover, a *de novo* standard of review in this context would not provide sentencing courts with any consistent guidance going forward. “[A] district court’s departure decision involves the consideration of unique factors that are little susceptible...of useful generalization, and as a consequence, *de novo* review is unlikely to establish clear guidelines for lower courts.”⁴² For these same reasons, the Court, in light of *Booker*, has determined that the abuse-of-discretion standard continues to be the most appropriate in the sentencing realm, notwithstanding the fact that the Guidelines are no longer mandatory. The Court has made clear that “[t]he sentencing judge is in a superior position to find facts and judge their import under §3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.”⁴³ In addition, “district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.”⁴⁴

It is also important to note that the reasonableness standard is a familiar concept for federal appeals courts charged with reviewing sentencing decisions. The courts relied on a reasonableness inquiry prior to *Booker*, with the exception of the short timeframe between passage of the Feeney Amendment in 2003 (establishing a *de novo* review standard) and the Court’s decision in 2005. As expected, given the mandatory nature of the Guidelines at that time, a greater percentage of sentences reviewed by appellate courts pre-*Booker* were within the applicable Guideline range, notwithstanding sentencing courts’ ability to depart from the Guidelines under certain circumstances.⁴⁵ To the extent that there has been an increase in sentences outside the Guidelines range after *Booker*, appellate courts have embraced their increased opportunities to assess the reasonableness of sentencing court decisions, and indeed to strike down sentences outside the applicable range on the ground either that they were procedurally deficient or substantively unreasonable – a trend that has not been to the benefit of defendant-appellants. From a results-oriented perspective, the majority of sentences today end up within the Guideline range, just as they did pre-*Booker*.

Indeed, despite the suggestion that criminal offenders are receiving a windfall as a result of the changes to the appellate procedure, the abuse-of-discretion standard applies with equal force whether the court sentences a defendant above, below, or within the guideline range. Hence, to the extent that this standard of review renders the court’s sentencing decision more

³⁹ See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise.”) (quoting *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

⁴⁰ *Koon*, 518 U.S. at 98.

⁴¹ *Id.*

⁴² *Id.* at 99 (internal citations omitted).

⁴³ *Gall*, 552 U.S. at 51.

⁴⁴ *Id.* at 52. See also *Rita v. United States*, 551 U.S. 338, 357-358 (2007).

⁴⁵ *Otis*, at 28.

difficult to overturn on appeal, all parties are on equal ground. The Sentencing Commission reports that, of the 92 sentences the government appealed in fiscal year 2011,⁴⁶ it boasted a 71.6% success rate.⁴⁷ Eleven of those appeals involved consideration of the 3553(a) factors.⁴⁸ Of those, the government prevailed 64.6% of the time.⁴⁹ Finally, 15 of the 92 sentences challenged by the government involved “reasonableness issues,” and 66.7% of those sentences were reversed.⁵⁰ Defendants challenging their sentences on the grounds that the sentence was too harsh have been much less successful. Of the 13,085 sentences appealed by defendants in fiscal year 2011, the defendant prevailed in just 7.1% of the cases.⁵¹ Some 1,405 of those appeals involved consideration of the 3553(a) factors.⁵² Of those, the defendant prevailed just 2.1% of the time.⁵³ And of the 3,815 sentences involving “reasonableness issues,” only 4.6% were reversed.⁵⁴ Moreover, the overwhelming majority of sentences – nearly 60 percent – still fall within or above the now-advisory Guideline range,⁵⁵ which flies in the face of the notion that *Booker* and *Gall* have applied undue pressure on judges to give undeserving defendants the benefit of downward departures. These numbers suggest that, rather than giving defendants the upper hand, the current appellate review standard is working to the great advantage of the federal government.

Some may argue, and the Court acknowledges, that the “reasonableness” standard will not necessarily lead to the kind of uniformity in sentencing that Congress sought in enacting the SRA. However, “Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create.”⁵⁶ As such, and given that the Guidelines have been deemed advisory, the question becomes “which alternative adheres more closely to Congress’ original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions?”⁵⁷ Although the former will not guarantee absolute uniformity in sentencing, appellate courts’ reasonableness determination, based on an abuse-of-discretion standard, “would tend to iron out sentencing differences,” while the latter would leave parties with no opportunity to appeal at all. Additionally, appellate review under the current standard works in tandem with the continued efforts of the Sentencing Commission to collect sentencing information from around the country, research salient legal issues, and revise the Guidelines as necessary, thus encouraging uniformity in sentencing while also allowing district courts to consider the specific circumstances and characteristics surrounding individual

⁴⁶ The 2011 Sourcebook of Federal Sentencing Statistics notes that, of the 9,651 total sentencing appeals brought in the 2011 fiscal year, 3,776 were excluded from this analysis due to one of the following reasons: type of appeal was “conviction only” (1,970), “Anders Brief” (1,708), or “unknown” (98). Moreover, of the 5,875 remaining cases, 5,822 were excluded because the appeal was by the defendant only.

⁴⁷ United States Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, tbls. 56A, 58.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ United States Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, tbl. 57.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ As Otis acknowledges, a significant portion of the below-Guideline sentences that are doled out result, not from the whims of bleeding-heart liberal judges who refuse to crack down on offenders, but rather from substantial assistance provided by defendants to the government, pursuant to § 5K1.1 of the Sentencing Guidelines. See Otis at 30.

⁵⁶ *Booker*, 543 U.S. at 263.

⁵⁷ *Id.*

defendants.⁵⁸

At bottom, the majority of defendants wishing to challenge their above- or within-Guidelines sentence continue to face very long odds on appeal given the current standard of review. Nevertheless, in light of the fact that the abuse-of-discretion standard gives significant weight to the sentencing court's decisions, encourages adherence to the Guidelines by permitting appellate courts to maintain the presumption of reasonableness with regard to within-Guideline sentences, and thereby discourages frivolous appeals, it is difficult to quarrel with the Court's conclusion that the current standard is the most appropriate in this context.

While it is understandable (though ironic) that prosecutors and others may now, post-*Booker*, find the abuse-of-discretion standard to be a frustrating impediment to successful appeals – a frustration long endured by criminal defendants – the suggestion that the standard is therefore unworkable or unfair is not supported by the statistics. Indeed, the better question seems to be how a *de novo* standard of review, as proposed by some critics, could be squared with the Court's consistent and well-reasoned conclusion, as highlighted above, that sentencing courts maintain a unique and significant advantage over appellate courts in determining the appropriate sentence for criminal defendants. At best, such a standard would encourage duplicative efforts by district and appellate courts. At worst, it would allow appellate judges, far removed from the original proceedings and relying solely on a paper record, to substitute their judgment for that of the sentencing judge who had first-hand access to the proceedings, a phenomenon long frowned upon in our system of justice.

V. Expansion of Safety Valve Eligibility

The ACLU applauds 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."⁵⁹ We urge the Commission to repeat this critical recommendation to Congress and to support an expansion of safety valve eligibility for non-violent offenders with even more than three criminal history points. In the absence of sweeping reform to mandatory minimum sentences, 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.

The recent sentencing of Jamel Dossie demonstrates the need for expanding safety valve eligibility. As summarized by Judge Gleeson in *U.S. v. Dossie*:⁶⁰

Jamel Dossie is a young, small-time, street-level drug dealer's assistant. No one could reasonably characterize him as a leader or manager of anything, let alone of a drug business. Like many young men in our community, he was in the drug business because

⁵⁸ See *Kimrough v. U.S.*, 552 U.S. 85, 107 (2007) (citing *Booker* and noting that "advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'").

⁵⁹ *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011 at xxxi.

⁶⁰ *U.S. v. Dossie*, 2012 WL 1086516 (E.D. N.Y. March 30, 2012).

he is a drug user. Dossie was born in the Brownsville section of Brooklyn. His father's illegal drug use caused a split with his mother before Dossie was even born; Dossie saw his father only three times per year before his father died in 2009. Dossie's mother was (and still is) a bus driver, and she raised Dossie and his two siblings by herself.

By the time Dossie began high school, he was already abusing drugs and alcohol, which got him into trouble regularly. Finally, at age 16, a family court judge ordered him out of his home and into a residential substance abuse treatment program at Phoenix House in the Bronx. Phoenix House reports that Dossie "displayed a poor attitude and unwillingness to engage in treatment" and that he made little academic or clinical progress before his discharge a year later. He never returned to school.

Dossie has a typical criminal history for a young man with his background. A car stop in 2008 led to a simple possession (of marijuana) conviction, and in 2010 he was convicted of a misdemeanor for possessing heroin and crack. His sentences for those misdemeanors were only seven days in custody and probation, respectively, but each conviction nevertheless earned Dossie a criminal history point, terminating any chance he had for safety-valve relief even without considering the two additional points he got for committing his offense while on probation. *See* 18 U.S.C. §3553(f). Dossie has no history of violence except as a victim; he was hit in the leg by a stray bullet while walking down the street in 2008.

Dossie on four occasions was a go-between in hand-to-hand crack sales. On several occasions in 2010, when Dossie was 20 years old, a confidential informant made a recorded phone call to him and asked about buying crack. Finally, on November 9, 2010, Dossie was arrested and he subsequently pled guilty to conspiring to distribute crack.

In sum, Dossie sold a total of 88.1 grams, or 3.1 ounces, of crack. His sole function was to ferry money to the supplier and crack to the informant on four occasions for a total gain to himself of \$140⁶¹. The government charged Mr. Dossie with a violation of 21 U.S.C. § 841(b)(1)(B), triggering a five year mandatory minimum sentence that Congress intended for "serious traffickers."⁶² Because of Mr. Dossie's entirely non-violent criminal history, he was ineligible for the safety valve and the district was forced to sentence him to five years.

It is because of stories like Mr. Dossie's that the ACLU agrees with Judge Gleeson that the Commission's 2011 recommendation to expand safety valve eligibility to include non-violent offenders with "two, or perhaps three, criminal history points"⁶³ is insufficient. As Judge Gleeson explained, "[t]his recommendation is too tepid, given how easy it is for nonviolent offenders to rack up criminal history points."⁶⁴

For instance, in 2010, of the 1,638,846 people arrested for drug abuse violations, 46%

⁶¹ *Id.* at *3-4.

⁶² *Id.* at *5; *Mandatory Minimum Penalties*, October 2011 at 24.

⁶³ *Mandatory Minimum Penalties*, October 2011 at xxxi.

⁶⁴ *Dossie*, 2012 WL 1086516 at *11 n.5.

(750,591) were arrested for marijuana possession.⁶⁵ The ease with which nonviolent offenders get saddled with criminal history points is particularly true among African American, who police often disproportionately target for low-level nonviolent drug offenses, and who – as a result – are disproportionately ineligible for safety valve relief. As the Commission reported to Congress last year, 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.”⁶⁶ By contrast, 53.6% of Hispanic offenders, 60.5% of white offenders, and 51.6% 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 safety valve’s criminal history eligibility requirement magnifies racially disproportionate enforcement dynamics that occur at both the state and federal levels.

Safety valve eligibility will be either too narrow or too broad – as line drawing always is. But no reasonable justification exists for making the safety valve too narrow rather than too broad. If Congress were to expand safety valve eligibility and an offender with a serious criminal history thereby became eligible, a sentencing judge could still determine that the offender deserved a sentence at or above the mandatory minimum. But under the current narrow eligibility safety valve, someone like Mr. Dossie with a criminal history that overstates the seriousness of his past offenses – or the likelihood of his reoffending – is ineligible for the safety valve, which results in an excessive and unjust sentence.

In sum, the ACLU urges the Commission to 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 many years in federal prison. The current criminal history eligibility requirement results in “too many nonviolent, low-level, substance-abusing defendants like Jamel Dossie los[ing] their claim to a future”⁶⁷

VI. Reduction of the MDMA-to-Marijuana Equivalency Ratio

The ACLU recommends that the Commission revisit its 500:1 MDMA (commonly known as “Ecstasy”) marijuana equivalency ratio. The MDMA ratio, as several district courts have recently recognized,⁶⁸ is not empirically sound. The 500:1 MDMA ratio needs to be grounded in empirical evidence and drastically reduced in order to accurately reflect the current state of MDMA research.

The MDMA Guideline is not based on empirical evidence but rather on erroneous and now-discredited beliefs about the harmfulness of MDMA. The Commission did not take into account past sentencing practices when formulating the current MDMA Guideline. Instead, as with the crack cocaine Guideline that the Supreme Court considered in *Kimbrough v. United*

⁶⁵ U.S. Dep’t of Justice, Fed. Bureau of Investigation, Uniform Crime Reports: Crime in the United States 2010 - Arrests, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested/>.

⁶⁶ *Mandatory Minimum Penalties*, October 2011 at 159-160.

⁶⁷ *Dossie*, 2012 WL 1086516 at *1 (internal quotation marks omitted).

⁶⁸ *U.S. v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (rejecting the Commission’s 500:1 MDMA-to-marijuana ratio); *U.S. v. Qayyem*, 2012 WL 92287 (S.D.N.Y. Jan. 11, 2012) (same); *U.S. v. Sanudo*, S.D. Fla., Case Number 11-cr-20559-Seitz (same); *U.S. v. Phan*, W.D. Wa., Case Number 2:10-cr-00027-RSM (same).

States,⁶⁹ the MDMA Guideline is the result of the Commission's response to a congressional directive that was issued in the midst of an uninformed panic about MDMA.

There are strong parallels between the formulation of the Guidelines for MDMA and the development of the crack cocaine Guidelines. Guidelines for both substances were set in response to congressional directives, rather than empirical evidence. With respect to crack cocaine, Congress established harsh mandatory minimums, and the Commission keyed its crack cocaine Guideline to those mandatory minimums, resulting in the 100-to-1 crack-powder disparity.⁷⁰ With respect to MDMA, Congress promulgated the MDMA Anti-Proliferation Act, which directed the Commission to increase penalties for MDMA.⁷¹

Emotional public frenzies over crack cocaine and MDMA drove Congress to act. The "crack epidemic" was widely associated in the minds of the public with rising violent crime, "crack babies," and rampant addiction and overdose. Just over a decade later, the sudden appearance of MDMA among teenagers and the development of a new "rave culture" sparked a similar if less widespread panic.⁷² The potential harms from MDMA were so drastically forecast that Congress directed the Commission to promulgate an "emergency amendment" to the MDMA Guideline, and the Commission, in its haste to respond, "shifted resources from other important policy development areas, such as implementing other congressional directives regarding stalking and sexual offenses against children."⁷³

The Commission formulated the penalty increase by making policy judgments about the comparative harmfulness of cocaine, MDMA, and heroin, and it concluded that MDMA's harmfulness fell somewhere in between that of cocaine and heroin.⁷⁴ Based on this conclusion, the Commission amended the Drug Equivalency Tables in U.S.S.G. 2D1.1 to increase sentences for MDMA dramatically. Prior to the amendment, one gram of MDMA was treated as equivalent to 35 grams of marijuana; the 2001 amendment set one gram of MDMA equal to 500 grams of marijuana.⁷⁵ As a result of this 1328% increase in the ratio, the length of the average MDMA sentence more than doubled.⁷⁶ This drastic change was not the product of careful empirical study; it was the vaguely-reasoned consequence of a congressional directive born out of a groundless and transient public hysteria. The dangers of MDMA were grossly overstated and founded on studies that have since been undermined.

As set forth in the Commission's 2001 Report to Congress, the current MDMA ratio is based on the fundamental (and fundamentally flawed) premise that MDMA is more harmful than cocaine. Based on this assumption, the Commission set the MDMA marijuana equivalency ratio in the 2001 Guidelines at 500:1 with explicit reference to the 200:1 ratio for cocaine.

⁶⁹ 552 U.S. 85 (2007).

⁷⁰ See *Kimbrough*, 552 U.S. at 96-97.

⁷¹ See MDMA Anti-Proliferation Act, Pub. L. No. 106-310 (2000).

⁷² See Marsha Rosenbaum, *Ecstasy: America's New "Reefer Madness," Journal of Psychoactive Drugs* (Apr.-Jun. 2002); *Guidelines Stiffened for Selling MDMA*, Associated Press, Mar. 21, 2001 (quoting the acting director of the Office of National Drug Control Policy: "We never again want another 'crack epidemic' to blindsides the nation").

⁷³ *America at Risk: The MDMA Threat, Hearing on MDMA Abuse Before the S. Comm. On Int'l Narcotics Trafficking*, 107th Cong. 46-47 (2001) (statement of Diana E. Murphy, Chair of the U.S. Sentencing Commission).

⁷⁴ See U.S. Sentencing Comm'n, *Report to Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendments 5* (2001) [*hereinafter* MDMA Report].

⁷⁵ *Id.* at 5-6.

⁷⁶ See *id.* at 6 (noting increase in average sentence from just under 3 years to just over 6 years).

In December 2010, four expert MDMA witnesses testified about this premise in an extensive evidentiary hearing before U.S. District Judge Pauley for the Southern District of New York.⁷⁷ At the two-day evidentiary hearing, experts from both sides rejected outright the Commission’s premise that MDMA is more harmful than cocaine. As a result, the district court varied downward, rejecting the Commission’s unsupportable 500:1 ratio and replacing it with a 200:1 ratio.⁷⁸

The district court concluded that “the Commission’s [2001] analysis of [MDMA’s] impacts – particularly as compared to cocaine – was selective and incomplete.”⁷⁹ “[T]he Commission ignored several effects of cocaine that render it significantly *more* harmful than MDMA.”⁸⁰ The court explained that the evidence presented to it demonstrates that “[c]ocaine is [] far more addictive than MDMA.”⁸¹ A government expert testified that “MDMA is ‘one of the *least* addictive drugs.’”⁸² In addition, MDMA does not cause cardiovascular effects, respiratory effects, or neurological effects.⁸³ By contrast, the Commission has found that cocaine causes all of these side effects.⁸⁴

Furthermore, the court concluded that “the Commission’s statement that cocaine is only a stimulant, while MDMA is both a stimulant and a hallucinogen, is without factual support and largely irrelevant. Experts for both parties testified that MDMA is not properly characterized as a ‘hallucinogen.’”⁸⁵ The court added that “comparing pharmacological properties using broad descriptors like ‘stimulant’ and ‘hallucinogen’ says little – if anything – about the relative harm posed by a drug.”⁸⁶ Indeed, one of the experts at the *McCarthy* hearing testified that “[The Ecstasy Report] almost read[s] like this was supposed to be some sort of arithmetic; cocaine gets a score of one [because] it’s a stimulant and then MDMA gets a score of two because it’s a stimulant and a hallucinogen... [T]hat’s not using good science.”⁸⁷

The district court also relied on recent emergency room data to support its conclusion that MDMA is not more harmful than cocaine. In fact, “cocaine is responsible for far more emergency room visits per year than MDMA.”⁸⁸ According to the U.S. Department of Health and Human Services, cocaine abuse was responsible for 553,530 emergency room visits, or 29.4% of drug-or alcohol-related emergency room visits in 2007, while MDMA was responsible for only 12,748 visits, or 0.7%.⁸⁹ In *McCarthy*, the district court explained that “[e]ven controlling for the fact that cocaine is more commonly used than MDMA, cocaine is still

⁷⁷ *U.S. v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 19, 2011).

⁷⁸ *Id.* at *5.

⁷⁹ *Id.* at *3.

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.*; see also David Nutt et al., *Development of a rational scale to assess the harm of drugs of potential misuse*, 369 THE LANCET 1047, 1051 (2007).

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (“Cocaine Report”) 65 (2007).

⁸⁵ *McCarthy*, 2011 WL 1991146 at *3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ U.S. Department of Health and Human Services, *Drug Abuse Warning Network 2007: National Estimates of Drug-Related Emergency Department Visits* (“DAWN”) 22 (2010).

approximately 16 times more likely to lead to hospitalization.”⁹⁰ A government witness in *McCarthy* testified that “MDMA fatalities are ‘rare.’”⁹¹ In addition, in contrast to MDMA, cocaine trafficking is associated with substantial violence.”⁹² MDMA is also less prevalent and therefore less threatening to society than cocaine. As the district court observed, “there are far more cocaine-related cases in the federal criminal justice system than MDMA-related cases.”⁹³

The district court concluded that the Commission’s 2001 MDMA analysis “disregard[ed] several significant factors suggesting that [MDMA] is in fact *less* harmful [than cocaine].”⁹⁴ The court characterized the Commission’s analysis as “opportunistic rummaging,” commenting that it “is particularly stark when viewed against the Commission’s rationale for adopting lighter sentences for MDMA than for heroin.”⁹⁵ As compared to heroin, the Commission concluded that five factors weighed in favor of lighter sentences for MDMA: (1) number of cases in the federal criminal justice system, (2) addiction potential, (3) emergency room visits, (4) violence associated with use and distribution, and (5) secondary health effects.⁹⁶ In *McCarthy*, the district court concluded that four of these five factors “also weigh in favor of lower sentences for MDMA than for cocaine.”⁹⁷ With respect to the remaining factor – secondary health effects – “MDMA and cocaine are similar.”⁹⁸ Thus, when evaluated against these objective criteria, the 500:1 MDMA-to-marijuana ratio – more than double the 200:1 cocaine-to-marijuana ratio – “is incompatible with the goal of uniform sentencing based on empirical data.”⁹⁹ Reviewing the record in *McCarthy* and conducting its own analysis of the evidence, another the district court came to the same conclusion in *U.S. v. Qayyem*.¹⁰⁰ “[T]he 500:1 marijuana equivalency ultimately chosen by the Commission does not accurately reflect the then-existing research, nor is it supported by more recent evidence.”¹⁰¹

Despite overwhelming evidence that MDMA is less harmful than cocaine, the district courts in both *McCarthy* and *Qayyem* adopted the same marijuana equivalency ratio for MDMA as the Guidelines establish for cocaine – 200:1.¹⁰² While these variances were a significant step in the right direction, 200:1 is still significantly too high insofar as it does not accurately reflect the current state of MDMA research. A 2007 study in *The Lancet*, a prominent British medical journal, assessed the relative harmfulness of illicit drugs based on the harmfulness of the drug to the individual user, the tendency of the drug to induce dependence, and the effect of drug use on society.¹⁰³ MDMA ranked as the eighteenth most harmful out of twenty drugs, whereas heroin

⁹⁰ *McCarthy*, 2011 WL 1991146 at *3, comparing DAWN 22 with U.S. Department of Health and Human Services, *Results from the 2007 National Survey on Drug Use and Health* 252 (2008) (finding that 5,738,000 people over the age of 12 used cocaine in 2007, while 2,132,000 people used MDMA.).

⁹¹ *Id.*

⁹² *Id.* at *4.

⁹³ *Id.* citing See U.S. Department of Justice, Bureau of Justice Statistics, *2008 Statistical Tables* 9 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf>.

⁹⁴ *Id.* (emphasis in original).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at *3.

⁹⁹ *Id.* at *4.

¹⁰⁰ *U.S. v. Qayyem*, 2012 WL 92287, at *5 (S.D.N.Y. Jan. 11, 2012).

¹⁰¹ *Id.*

¹⁰² *McCarthy*, 2011 WL 1991146 at *5; *Qayyem*, 2012 WL 92287, at *8.

¹⁰³ David Nutt et al., *Development of a rational scale to assess the harm of drugs of potential misuse*, 369 THE LANCET 1047 (2007).

and cocaine ranked as first and second, respectively.¹⁰⁴ Marijuana and ketamine (which the Guidelines treat as equivalent to marijuana for sentencing purposes¹⁰⁵) also ranked as more harmful than MDMA, at eleventh and sixth, respectively.¹⁰⁶

The Lancet study suggests, and the ACLU agrees, that an empirically sound MDMA marijuana equivalency ratio would be 1:1. It is clear that in formulating the current MDMA Guideline, the Commission seriously overestimated the harmfulness of MDMA at a time when little was known about the substance. Because the MDMA Guideline is not based on empirical evidence and is instead the product of unsubstantiated fears and old research, the sentences recommended by the MDMA Guideline do not approximate sentences that are tailored to achieve the sentencing objectives in 18 U.S.C. § 3553(a). National experience and scientific research in the intervening years demonstrate that MDMA is less harmful than the Commission and Congress had predicted and that the current MDMA Guideline sentencing ranges are unduly severe.

In light of these developments and the Commission's unique institutional role and expertise, the ACLU urges the Commission to spearhead a revisiting of its MDMA marijuana equivalency ratio. Indeed, two recent district court orders demonstrate that the Commission's leadership is critical to remedying this problem in a uniform way that is consistent with the goals of the Sentencing Reform Act. Diverging from the majority of federal court that have examined the MDMA ratio post-*McCarthy*, in *U.S. v. Kamper*¹⁰⁷ and *U.S. v. Thompson*¹⁰⁸ district courts declined to adopt the reasoning in *McCarthy* and vary from the 500:1 MDMA ratio. Both courts did so in part due to their institutional concerns that the Commission is best situated to undertake a comprehensive assessment of the current state of MDMA research and to determine a more accurate marijuana equivalency ratio.¹⁰⁹

In addition, and at the very least, the Commission should facilitate the development of additional case law on the existing MDMA ratio by providing district courts with a quarterly statistical analysis of variances in MDMA cases. As the district court in *Kamper* explained, “the Commission does not appear to have made available statistics for MDMA sentences. Although the Commission tracks sentences imposed under USSG § 2D1.1 by drug, it does not specifically break out MDMA sentences. Without this statistical information, the Court lacks an important metric – a measure of the sentencing practices of other federal judges dealing with this issue.”¹¹⁰

In sum, because recent scientific research and most federal case law indicates that the 500:1 MDMA marijuana equivalency ratio is empirically unsound, and because “Congress

¹⁰⁴ *Id.* at 1049-50.

¹⁰⁵ U.S. Sentencing Guidelines Manual § 2D1.1, app. note 10(E), at 543 (2009).

¹⁰⁶ *See* Nutt, 369 THE LANCET at 1049-50.

¹⁰⁷ *U.S. v. Kamper*, 2012 WL 1618296 (E.D. Tenn. May 8, 2012).

¹⁰⁸ *U.S. v. Thompson*, 2012 WL 1884661 (S.D. Ill. May 23, 2012).

¹⁰⁹ *Kamper*, 2012 WL 1618296 at *8 (stating that “the Commission is in a better position than the Court to take into account all necessary empirical research and relevant value judgments to formulate a proper MDMA-to-marijuana ratio. In brief, to the extent the MDMA-to-marijuana ratio should be studied and perhaps revised, the Commission – and neither this Court nor any other individual district court – should lead this effort); *Thompson*, 2012 WL 1884661 at *5 (explaining that “[t]he undersigned Judge has considerably less experience with MDMA cases than cocaine cases This relative inexperience does not decrease the Judge’s discretion but is relevant in that the Judge may defer more to the Commission in less familiar territory.”).

¹¹⁰ *Kamper*, 2012 WL 1618296 at *10.

established the Commission to formulate and *constantly refine* national sentencing standards,”¹¹¹ the ACLU encourages the Commission to revisit and revise this aspect of the Sentencing Guidelines by promulgating a ratio of 1:1 for converting MDMA to marijuana, or in the alternative return to the pre- 2001 ratio of 35:1, and to provide district courts with a quarterly statistical analysis of variances in MDMA cases.

VII. Replacing the Recommended Life Sentence Between Offense Levels 42 and 43 for Defendants in Criminal History Category I with a Proportional Increase in the Sentencing Table

The ACLU recommends that the Commission revise an aspect of the Sentencing Guidelines Table that one judge has characterized as “a gaping, inexplicable omission,” and “a strange aberration in [] mathematical calculations.”¹¹² This aberration results in sentences for Offense Level 43 that – unlike the sentences in every other offense level – are not proportionally and rationally graduated, and are therefore not consistent with traditional notions of fairness that Congress sought to codify in the Sentencing Reform Act.

In *U.S. v. Heath*, the district court had to sentence a 22 year-old defendant convicted of multiple counts stemming from a crack cocaine distribution ring.¹¹³ Mr. Heath’s convictions placed him at Offense Level 43 in the Sentencing Table.¹¹⁴ “When the court reviewed the sentencing table . . . the court was struck by a strange aberration in the mathematical calculations: Level 42 . . . provided the possibility [the defendant] could receive a sentence at the lower end of the Guidelines range of 360 months to life; if that occurred, he would at least be eligible for gain time of approximately 15 percent for good behavior in prison. Under those circumstances, he would be released in about 25 ½ years. The next higher level, a sentencing level of 43, is a hope-shattering life sentence in all criminal history categories.”¹¹⁵ As the district court explained:

An examination of this sentencing table beginning with Sentencing Offense Level 34 reveals that the key to understanding the progressively heavier sentences as one moves from one offense level to the next higher one is to look at the lower figure in the imprisonment guideline range in Criminal History Category I.

For example, from Level 34 to Level 35, the interval is 17 months, i.e., the difference between the bottom two figures (151 versus 168) of the respective imprisonment guideline ranges; from Level 35 to Level 36, the interval between the lower figures is 20 months; from Level 36 to 37 the interval is 22 months, i.e. the difference between the bottom two figures of the respective imprisonment guideline ranges: 188 versus 210. When one moves from Level 37 to Level 38, the interval increases by three months to 25 months. When one moves from Level 38 to 39, the difference is 27 months and from Level 39 to 40 the difference is 30 months. The difference from Level 40 to Level 41 is 32 months and from 41 to 42 it is 36 months (the difference between 324 at the bottom of the guideline range for Level 41 and 360 at the bottom of the guideline range for Level 42). Then, for no apparent reason, it leaps to life imprisonment

¹¹¹ *Kimbrough*, 552 U.S. at 108 (emphasis added).

¹¹² *U.S. v. Heath*, 840 F. Supp. 129, 130 (S.D. Fla. 1993).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

in all six categories at level 43.

One can readily observe that the increases in the increments beginning with Level 35 are as follows: 3, 2, 3, 2, 3, 2, and 4 – basically, an average incremental increase of 3. The leap to life imprisonment in the Table does not consider the impact caused to a young defendant. It has a greater practical effect on a 25-year-old defendant compared with the effect on a 65-year-old defendant when one automatically imposes life at Level 43 rather than continuing the incremental trend found for the bottom of the ranges up to Level 42. The sentence ranges are the same in all six Criminal History Categories of Level 42: 360 to life.¹¹⁶

The ACLU echoes the district court's concern in *Heath*. The extreme cliff in the Sentencing Table between Offense Level 42 and Level 43 for defendants in Criminal History Category I is troubling insofar as it departs from the Table's otherwise carefully graduated and proportional increases in sentencing ranges. Further, it punishes defendants in Criminal History Category I as severely as defendants in Criminal History categories II through VI. Particularly with respect to young defendants, this cliff effectively advises district courts to impose sentences that violate Congress's direction in 18 U.S.C.A. § 3553(a) to "impose a sentence sufficient, *but not greater than necessary*..."¹¹⁷ In sum, the ACLU urges the Commission to revisit the recommended sentence of life for Offense Level 43 for Criminal History Category I and to adopt a new range that follows the incremental mathematical pattern between Level 35 and Level 42.

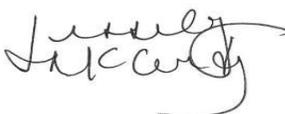
VIII. Conclusion

The ACLU appreciates the opportunity to comment on the Commission's proposed priorities for 2013. If there are any comments or questions, please feel free to contact to Senior Legislative Counsel Jesselyn McCurdy at (202) 675-2307 or jmccurdy@dcaclu.org.

Respectfully submitted,



Laura W. Murphy
Director
Washington Legislative Office



Jesselyn McCurdy,
Senior Legislative Counsel
Washington Legislative Office



Jason D. Williamson
Staff Attorney
Criminal Law Reform Project



Emma Andersson
Staff Attorney
Criminal Law Reform Project

¹¹⁶ *Id.* at 131.

¹¹⁷ 18 U.S.C.A. § 3553(a) (emphasis added).