

**Public Comments submitted to the
United States Sentencing Commission regarding
Proposed Priorities for 2013**



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The Drug Policy Alliance (DPA), the nation's leading organization advancing drug policies that are grounded in health, science, compassion, and human rights, appreciates this opportunity to submit our recommendations to the United States Sentencing Commission's proposed priorities for 2013. The United States has spent a trillion dollars and holds 25% of the world's prison population as consequences of more than 40 years spent waging the failed war on drugs. A recent report by the Global Commission on Drug Policy highlighted the problems with American drug policy's over-reliance on incarceration and called for policies that improve health, instead of perpetuating the criminalization and stigmatization of drug users who do no harm to others.¹ We support the USSC's recommendations to begin to reform policies driving over-incarceration at the federal level in the recent *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, to expand the access to the safety valve, mitigate the cumulative impact of criminal history, diminish the incidence of stacking mandatory minimum sentences, undertake a comprehensive study of recidivism, and generally reduce the use of mandatory minimums.² In addition, we advocate that the USSC use its discretion to reduce all drug sentencing guidelines by two levels in order to conform federal drug sentences to 18 USC § 3553(a)(2), 28 USC § 994(c) and (d), and 28 USC § 994(g).

Our specific recommendations are as follows:

1. Mandatory Minimums in the Federal Criminal Justice System

Expand Access to the Safety Valve

DPA supports the USSC's recommendation to Congress regarding the expansion of the safety valve (18 USC § 3553(f)) to include all drug offenders in Criminal History Category II. In 2010, expanding access of the safety valve to drug offenders in Criminal History Category II would have made 1,127 offenders convicted of drug offenses carrying mandatory minimums eligible for relief from mandatory minimums.³ The current policy's harsh treatment of past offenders ignores the fact that prison sentences do not lead to rehabilitation,⁴ evidence that suggests imprisonment as a response to drug offenses can actually increase recidivism rates,⁵ and racial disparities that are exacerbated by the policy.⁶

Former prisoners find barriers to reentry upon returning to their communities caused by social stigma, civic sanctions,⁷ employment discrimination,⁸ and a lack of social capital.⁹ These obstacles can fuel further criminal activity and recidivism.¹⁰ The current highly restrictive safety valve policy unjustly punishes former prisoners who often recidivate as a response to a broken system.

Restricting the safety valve opportunity perpetuates racial inequality, which permeates our criminal justice system. Although African Americans are no more likely than whites to use illegal drugs, racial profiling in African American neighborhoods has led to African Americans being much more likely to hold past felony drug convictions.¹¹ In fact, although African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.¹² According to testimony delivered, in 2008, to a Senate Judiciary

subcommittee by Federal Public Defender Michael Nachmanoff, “Because African Americans have a higher risk of conviction than similar white offenders, they already have higher criminal history scores and thus higher guideline ranges and are more often disqualified from safety valve relief.”¹³ In 2010, only 9.8% of African American defendants convicted of a drug offense carrying a mandatory minimum were relieved of the penalty through the safety valve, as opposed to 26.9% of White defendants, 36.8% of Hispanic defendants, and 29.5% of defendants of other races.¹⁴ Unfortunately, aggressive policing and racial profiling has placed many minorities in Criminal History Categories III or higher and expanding safety valve access to drug offenders in Criminal History Category II would likely have little effect on demographic disparities.¹⁵ Therefore, the USSC must continue to urge Congress to expand safety valve access to higher criminal history categories in order to address dramatic racial disparities in our drug sentencing laws.

Reassess the Scope and Severity of Recidivist Provisions

The Drug Policy Alliance supports the USSC’s recommendation that Congress reassess the scope and severity of the recidivist provisions at 21 USC § 841 and 960. Current harsh recidivist provisions waste tax payer dollars and have little to no effect on public safety. Studies have shown that harsh penalties do not lead to an increased perception of punishment by the public¹⁶ and have little or no effect on crime rates.¹⁷ A study of California’s similarly severe recidivist provisions, known as the “Three Strikes Laws,” showed results consistent with these findings.¹⁸ The scope of recidivist provisions also shows federal disdain for state law by not consistently incorporating a particular state’s classification of an offense as a felony or misdemeanor and perpetuates racial disparities.

We also believe that the current scope and severity of recidivist provisions is in violation of 18 USC § 3553(a)(1), especially in regards to low-level, non-violent drug offenders. Non-violent drug users should not be punished for multiple manifestations of repeat behavior that is caused by addiction, mental illness, and/or other health issues. To impose mandatory minimums for such repeat behavior is to ignore both the nature and circumstances of the offense and the history and characteristics of the defendant. The USSC should conform repeat offense sentencing to 18 USC § 3553(a)(1) by removing simple possession charges from the list of prior drug offenses used to enact recidivist provisions and expand access to community programs for addiction treatment and/or other medical interventions.

Reduce the Use of Stacking Mandatory Minimums in Relation to 18 USC § 924(c)

The stacking of mandatory minimums sentences as laid out in 18 USC § 924(c) leads to overly severe sentences, regionally inconsistent application, and disproportionate punishment of African American offenders. The average sentence of an offender convicted to stacked mandatory minimums under 18 USC § 924(c) is 200 months greater than those convicted of a single charge under 18 USC § 924(c).¹⁹ Many of these offenses are non-violent offenses where the defendant possessed an illegal firearm and did not involve any physical harm or threat of physical harm.²⁰ The USSC’s sentencing data also shows that the practice of stacking mandatory minimums is being exercised disproportionately in a few select judicial districts, despite no evidence to show that offenses in violation of 18 USC § 924(c) occur more frequently in those districts than in others.²¹ Stacking mandatory minimums also exacerbates racial disparities in our criminal justice system. According to the USSC’s report, *Mandatory Minimums in the Federal Criminal Justice System*, African Americans make-up “61% of offenders convicted of multiple counts of an offense under section 924(c).”²²

DPA supports the USSC’s recommendations to reduce the length of mandatory minimums for 924(c) penalties and amend section 924(c) so that the increased mandatory minimums penalties for a “second or subsequent” offense apply only to previous convictions. These reforms will reduce the incidence of overly severe sentences that are applied disproportionately on the basis of location and race.

Examining Rehabilitative Opportunities

We support the USSC's recommendation to undertake a comprehensive, multi-year study of recidivism and policies that will aid in successful prisoner reentry. In particular, we recommend that the USSC analyze how barriers to reentry, aging, familial connection, and access to addiction treatment impact recidivism rates.

Returning citizens face a multitude of barriers to effective reentry upon returning home from prison. In addition to barriers to employment, housing, public benefits, and civic participation, individuals are often returning to socioeconomically disadvantaged neighborhoods.²³ Returning citizens are in need of social resources, such as addiction treatment, housing, and job placement, in order to successfully reenter society.²⁴ As stated above, these barriers fuel recidivism. The USSC should examine the impact on recidivism of policies that address these barriers, such as "Ban the Box," which prohibits inquiries regarding criminal history on initial job applications, or state-sponsored support programs that provide returning citizens with housing and other necessities. The USSC should also investigate how evidence-based programs can be effectively incorporated into the guidelines, possibly through the use of intensive home confinement programs.

Although the barriers to recidivism affect returning citizens of all ages, according to the USSC's report, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, "Recidivism rates decline relatively consistently as age increases." The report also found that, "offenders are most likely to recidivate (25.6%) when their sentence is a straight prison sentence."²⁵ This data implies that considering age as a factor for imposing community confinement in place of incarceration may save tax payer dollars, reduce prison overcrowding, and improve public safety. The USSC should expand on previous research to study the impact community confinement has on recidivism in relation to the age of the offender.

Another factor that affects returning citizens' success is the extent to which prisoners can stay connected with their families while incarcerated.²⁶ This is especially true among female offenders with children,²⁷ who are less likely than their male counterparts to reoffend.²⁸ In fact, a survey of female prisoners found that they ranked estrangement from their children as their highest concern while incarcerated.²⁹ The distance of the facility from the prisoner's home can be a large barrier to maintaining familial connections while incarcerated.³⁰ The majority of parents in federal facilities are held over 100 miles from their home and 43% are held over 500 miles from their homes.³¹ The lack of connection not only affects parents, but also increases the negative outcomes for children with incarcerated parents, including increased likelihood of being incarcerated themselves.³² Unfortunately, the Bureau of Prisons has activated a new women's facility in Aliceville, Alabama, which is 111 miles from Birmingham and 254 miles from Atlanta and will exclusively house women from around the country.

The USSC should evaluate the impact familial estrangement has on recidivism, as well as examine evidence-based programs that can keep offenders close to home, such as community confinement and localized placement, can have on maintaining these critical relationships. The USSC should consider the effect of maintaining community and familial connections, gender, and parental status in order to amend the Guidelines Manual pursuant to 28 USC § 994(d)(7) and (8) and 18 USC § 3553(a)(2)(C).

The USSC should also examine how drug use, misuse and addiction, and access (or lack thereof) to non-compulsory addiction treatment programs can affect recidivism. The USSC's recidivism report, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing*, found that offenders who had used illicit drugs a year before their instant offense were almost twice as likely to reoffend upon release.³³ While this sheds some light on the connection between drug use and criminal

behavior, it does not distinguish drug *use* from drug *addiction*. In order to more fully understand the impact drugs can have on recidivism, the USSC should collect data on recidivism among both those who struggle with drug addiction and those who use drugs sparingly and responsibly, as the vast majority of drug users in America do. The USSC could also study the connection between drug use and addiction and low-level, non-violent drug possession and low-level sales convictions.

2. Further Recommendation

Reduce All Drug Sentencing Guidelines by Two Levels

Reducing all drug sentencing guidelines by two levels would be an effective method to better conform drug sentences to 18 USC § 3553, 28 USC § 994(c) and (d), and 28 USC § 994(g), while having no negative impact on public safety. Under this approach, statutory mandatory minimums would fall within, rather than below, the guideline's recommended sentence range for first-time, nonviolent drug offenses. If there are aggravating factors present in the USSC of the offense, these offenders could be dealt with through the available enhancements under the guidelines.

The USSC reported in 1995 that it sets the base offense level for drug offenses slightly higher than the mandatory minimum in order to pressure defendants to plead guilty or otherwise cooperate with the government.³⁴ This reasoning proved to be unfounded when the USSC reduced crack cocaine sentences by two levels in 2007 and the rate of guilty pleas and cooperation were unaffected.³⁵ Additionally, low quantity thresholds result in the apprehension of many small-time sellers who, even if they want to cooperate, do not have valuable information to provide prosecutors with to receive substantial assistance.³⁶

Regardless, placing the base offense levels for drug offenses above the prescribed mandatory minimums is an inappropriate mechanism by which to encourage cooperation. In fact, this policy has the unfortunate consequence of punishing *noncooperation*, which raises a host of due process concerns and arguably infringes on a defendant's 6th amendment right to trial. Also, defendants who provide substantial assistance to the prosecution are eligible for substantial reductions in sentences that fall below the mandatory minimums under 18 USC § 3553(e), making the purpose of higher guideline ranges as a means to encourage cooperation superfluous.

In addition, the current guidelines do not accomplish their stated goals to provide just punishment, deterrence, incapacitation, and rehabilitation.³⁷ While the federal government spends an enormous amount of money in the apprehension, prosecution, and incarceration of low- to mid-level drug offenders, it does not have a positive impact on public safety and has led to significant overcrowding in the Federal Bureau of Prisons.³⁸ There is no evidence to support the claim that longer sentences lead to safer communities and studies, including a major study conducted by the Department of Justice, have concluded there is little – if any – connection between fluctuations in criminal activity and incarceration rates,³⁹ especially in reference to drug crimes.⁴⁰ Furthermore, evidence is beginning to show that imprisonment leads to greater rates of recidivism among drug offenders, when compared to probation and other alternatives,⁴¹ and prison has long been abandoned as an ideal space for rehabilitative intervention.⁴²

Lengthy terms of imprisonment do not result in lower rates of drug use or drug-related crime. A 1997 report by the RAND Corporation found that mandatory minimums and long terms of incarcerations are less cost-effective at reducing cocaine consumption and drug-related crime than putting heavy users through treatment programs.⁴³ Research has also found that while imposing longer sentences only on high-level dealers has the potential to be cost-effective in reducing consumption, determining offense seriousness based solely on drug quantity is an ineffective means by which to accomplish this feat.⁴⁴

Additionally, high-level dealers are less likely to possess large amounts of drugs, as they are able to pay others to assume this risk.⁴⁵

These studies show that our draconian quantity-based drug sentencing approach has little to no effect on criminal activity and recidivism, or increasing rehabilitation and public safety, thus highlighting the need for reductions in drug sentencing levels in order to fulfill mandates laid out by Congress in 18 USC § 3553(a)(2)(B), (C), and (D). The U.S. must respond to calls from world leaders⁴⁶ and move away from a criminal justice approach to drug policy in favor of a public health model that expands and emphasizes access to treatment and rehabilitation, such as the decriminalization regime that has proved extremely successful in Portugal since being enacted more than a decade ago.⁴⁷

The current federal guidelines result in the imprisonment of a vast number of non-violent, low- to mid-level drug offenders and trigger a downward spiral of disadvantage and collateral consequences that negatively affects those incarcerated, their families, and their communities. The excessive incarceration in drug sentencing makes thousands of people permanent economic, labor market, and civic outsiders.⁴⁸ It increases and entrenches poverty in our most vulnerable communities.⁴⁹ Individuals suffer when their lives are disrupted by unnecessary imprisonment and the lifetime of legal discrimination that follows. Families suffer when a financial contributor is imprisoned and communities suffer from a cumulative loss of earning power when high concentrations of residents are incarcerated and returning ex-offenders are unable to procure employment.⁵⁰ Tragically, incarceration promotes a cycle of involvement with the criminal justice system for the children of offenders, hindering intergenerational economic mobility, familial stability, and public safety.⁵¹ The literature shows that current drug sentencing guidelines do not adequately take into account the considerations outlined in 28 USC § 994(c) and (d). Reducing all drug sentencing guidelines by two levels would work towards conforming to these standards by more properly addressing both the factors that lead many drug offenders to commit drug related crimes and the consequences of lengthy imprisonment as a response.

Current drug sentencing levels are also in violation of 28 USC § 994(g), which dictates that “guidelines prescribed [by the USSC] shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.”⁵² Since the creation of the USSC, the level of overcrowding in federal prisons has been dramatically increasing and is now approaching 40%.⁵³ In 2010, 23,964 people were convicted of federal drug violations⁵⁴ and a majority of federal prisoners – 103,194 of 191,757 – were housed in federal facilities because of drug convictions.⁵⁵ 87,323 of these prisoners were convicted of an offense carrying a mandatory minimum sentence of at least 5 years. Marijuana offenses accounted for 6,161 – or more than 25% – of the 23,964 drug-related convictions in 2010 and 12,473 federal inmates,⁵⁶ despite the drug being arguably less dangerous than alcohol and having been decriminalized in almost a third of U.S. states.⁵⁷ Reducing all drug sentencing guidelines by two levels would bring sentencing policy in line with 28 USC § 994(g) by significantly reducing overcrowding in federal prisons.

Conclusion

As it stands now, federal drug sentencing places too much emphasis on the punishment of past offenses, are too long, and come at too high a cost to communities and taxpayers. Federal sentences perpetuate a system that is not cost-effective in reducing drug consumption or prohibition-related crime and violence, does not improve public safety, fuels overcrowding in federal prisons, and destabilizes the lives of countless non-violent individuals, their families, and their communities. The Drug Policy Alliance urges the USSC to increase safety valve access, reassess recidivist provisions, reduce the stacking of mandatory minimums, conduct a multi-year study on recidivism, and take a step towards conforming federal drug sentences to Congressional mandates laid out in 18 USC § 3553(a)(2), 28 USC § 994(c) and (d), and 28 USC § 994(g) by reducing all federal drug guidelines by two levels.

The Drug Policy Alliance thanks the Commission for the opportunity to comment.

¹ Global Commission on Drug Policy. *War on Drugs* (June 2011).

² U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 348-360

³ *Ibid.* at 354.

⁴ Charles Tittle, "Prisons and Rehabilitation: The Inevitability of Disfavor," *Social Problems* vol. 21, no. 3 (1974): 385; Also Paula Smith, Claire Goggin, Paul Gendreau, "The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences," *Portfolio of the Solicitor General of Canada*, (2002).

⁵ Cassia Spohn and David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* vol. 40, no. 2 (2002): 331

⁶ Statement of Michael Nachmanoff, Federal Defender for the Eastern District of Virginia, Before the Judiciary Subcommittee on Crime, Terrorism and Homeland Security, February 26, 2008 at 9.

⁷ Nora Demleitner, "Collateral Damage: No Reentry for Drug Offenders," *Villanova Law Review*, vol. 47 (2002).

⁸ Harry Holzer, Steven Raphael, and Michael Stoll, "Employment Barriers Facing Ex-Offender," *Employment Dimensions of Reentry: Understanding the Nexus Between Prisoner Reentry and Work*, NYU Law School, May 19-20, 2003 at 11.

⁹ *Ibid.* at 4.

¹⁰ Nora Demleitner, "Collateral Damage: No Reentry for Drug Offenders," *Villanova Law Review*, vol. 47 (2002).; Also Harry Holzer, Steven Raphael, and Michael Stoll, "Employment Barriers Facing Ex-Offender," *Employment Dimensions of Reentry: Understanding the Nexus Between Prisoner Reentry and Work*, NYU Law School, May 19-20, 2003 at 2.

¹¹ Statement of Professor Christopher Stone, Kennedy School of Government, Before the USSC, New York, NY, July 9-10, 2009 at 418-26.

¹² Statement of Michael Nachmanoff, Federal Defender for the Eastern District of Virginia, Before the Judiciary Subcommittee on Crime, Terrorism and Homeland Security, February 26, 2008 at 8.

¹³ *Ibid.* at 10.

¹⁴ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 159, Figure 8-4.

¹⁵ *Ibid.* at 356.

¹⁶ Gary Kleck et al., "The Missing Link in General Deterrence Research," *Criminology* vol. 43, no. 3 (2005): 623.

¹⁷ Alfred Blumfield, et al, *Criminal Careers and "Career Criminals,"* National Academic Press: Washington, DC (1986); Also Jeffrey Fagan, Tracey Meares, "Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities," *Ohio State Journal of Criminal Law*, vol. 6 (2008); Also Anthony Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice*, vol. 30 (2003).

¹⁸ Mike Males and Dan Macallair, "Striking Out: The Failure of California's 'Three Strikes and You're Out' Law," *Stanford Law and Policy Review*, vol. 11, no. 1 (1999).

¹⁹ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 359

²⁰ *Ibid.* at 359

²¹ *Ibid.* at 361

²² *Ibid.* at 363

²³ Jeremy Travis, "But They All Comeback: Rethinking Prisoner Reentry," U.S. Department of Justice, Pub. No. NCJ 18 1413 (May 2000)

²⁴ Jeremy Travis, "Prisoner Reentry Seen Through a Community Lens," Luncheon Address at the Neighborhood Reinvestment Corporation Training Institute 2 (Aug. 23, 2001)

²⁵ U.S. Sentencing Commission, *Measure Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004): 12-13.

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- ³³ U.S. Sentencing Commission, *Measure Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004): 13.
- ³⁴ U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy at 148 (1995).
- ³⁵ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 55.
- ³⁶ Eric Sevigny and Jonathon Caulkins, "Kinpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons," *Criminology & Public Policy* vol. 3, no. 3 (2004): 401-34.
- ³⁷ U.S. Sentencing Commission, *An Overview of the United States Sentencing Commission* (Washington, DC), 1.
- ³⁸ Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, before the House of Representatives Committee on Appropriations, Sub-Committee on Commerce, Science, Justice and Related Agencies, March 6, 2012.
- ³⁹ James Austin and John Irwin, *It's About Time. America's Imprisonment Binge*, 3rd ed. (Palo Alto, CA: Wadsworth 2000), cited in James Austin and Tony Fabelo, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, The JFA Institute (Washington, D.C.: July 2004); U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (Washington, D.C.: June 2002).
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- ⁴¹ *Ibid.* at 329-357, 351.
- ⁴² Charles Tittle, "Prisons and Rehabilitation: The Inevitability of Disfavor," *Social Problems* vol. 21, no. 3 (1974): 385.
- ⁴³ Jonathon Caulkins, et al., *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* RAND: Drug Policy Research Center (1997): 62.
- ⁴⁴ *Ibid.* at 61-62.
- ⁴⁵ *Ibid.* at 61-62.
- ⁴⁶ Ari Rosmarin and Niamh Eastwood, "A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe," Release Campaign: Drugs – It's Time for Better Laws (2012).
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- ⁵² See 28 USC § 994(g)

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⁵⁴ ⁵⁴ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 162.

⁵⁵ *Ibid.* at 165.

⁵⁶ *Ibid.* at 218.

⁵⁷ Robert Gable, "The Toxicity of Recreational Drugs," *American Scientist*, vol. 94 (2006).; Also Tristan Kirby and Adam Barry, "Alcohol as a Gateway Drug: A Study of US 12th Graders," *Journal of School Health*, vol. 82, no. 8 (2012).