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July 23, 2012

Hon. Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Comments on the use of statutory mandatory minimum penalties for drug offenses and the collection of data on drug defendant function

Dear Judge Saris:

I write on behalf of the Criminal Justice Policy Foundation (CJPF) to convey our recommendations about the issues for comment and proposals regarding: (A) the use of statutory mandatory minimum penalties for drug offenses by the Department of Justice; and (B) the collection of data on defendant function for all drug offenses. CJPF is committed to the reform of the statutory mandatory minimum penalties for drug offenses codified in the Anti-Drug Abuse Act of 1986 (“ADAA”)<sup>1</sup> and respectfully urges the Commission to formally request the DOJ use the law in accord with Congressional intent.

**(A) The Commission should formally request that the Justice Department only bring statutory mandatory minimum charges under the ADAA against drug offenders that Congress intended the law be applied.**

(1) Congressional intent and the ADAA’s mandatory minimum penalties

When Congress passed the ADAA the five and ten-year mandatory minimum penalties were specifically designed to target “serious” and “major” drug traffickers.<sup>2</sup> Even though drug quantity itself was the method to serve as the determiner of the role of a drug offender, Congress was clear as to whom the mandatory minimum penalties should be applied.<sup>3</sup> The Senate Minority

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<sup>1</sup>21 U.S.C. § 841 (2010).

<sup>2</sup>U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (2011) [hereinafter MANDATORY MINIMUM REPORT].

<sup>3</sup>U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (2011) [hereinafter MANDATORY MINIMUM REPORT].

leader at the time, Robert Byrd, stated the ten-year mandatory minimum was to be applied to “kingpins” and “the masterminds who are really running the operations,” while the five-year mandatory minimum penalty was to be applied to mid level dealers.<sup>4</sup> A House Judiciary Subcommittee on Crime report further demonstrates that this was Congresses intent as well. The report concluded that the two-tier mandatory minimum penalty configuration “would encourage the Department of Justice to direct its ‘most intense focus’ on ‘major traffickers’ and ‘serious traffickers’.”<sup>5</sup>

(2) Application of the ADAA’s mandatory minimum penalties

Despite the fact the Congress intended the mandatory minimum provisions of the ADAA be applied to the most serious leaders and managers of drug trafficking enterprises, the percentage of drug defendants for all drug types who receive an upward aggravating role adjustment under §3B1.1<sup>6</sup> compared to the percentage who receive mandatory minimum sentences under 21 U.S.C. §841 (b)(1)(A) and (b)(1)(B) is exceedingly small.<sup>7</sup>

Figure 1 (below) shows the percentage of federal drug offenders who receive a mandatory minimum sentence for powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine for fiscal year 2006-2011.<sup>8</sup> Over the last six years the average percentage of offenders receiving a mandatory minimum sentence for these drugs is 77.8, 78.7, 66.1, 40.3, and 80.4 respectively.<sup>9</sup>

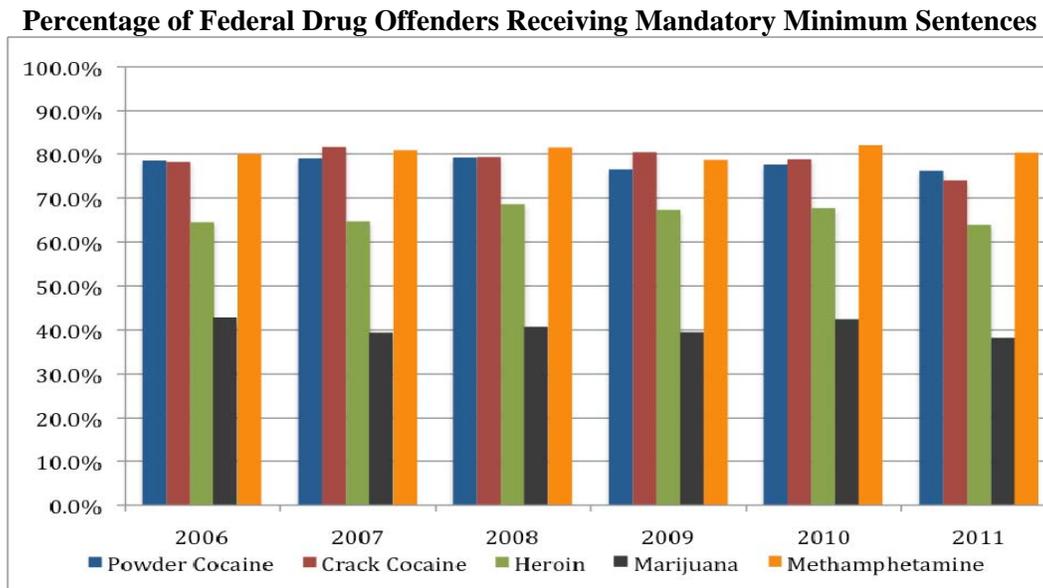


Figure 1, Source: Sourcebook of Federal Sentencing Statistics

<sup>4</sup>U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (2011) [hereinafter MANDATORY MINIMUM REPORT].

<sup>5</sup>U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (2011) [hereinafter MANDATORY MINIMUM REPORT].

<sup>6</sup>U.S. SENT’G COMM’N, GUIDELINES MANUAL, §3B1.1 (Nov. 2011).

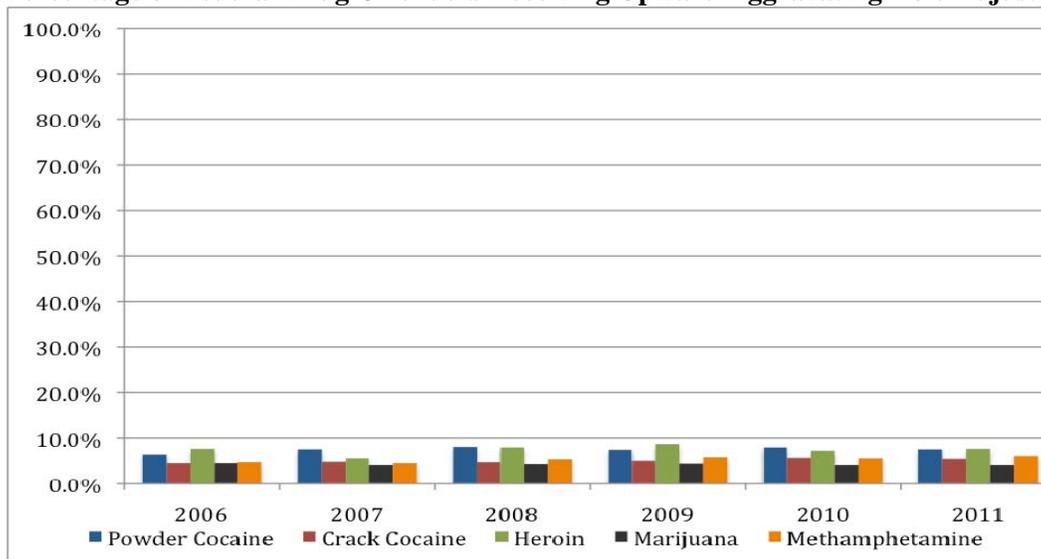
<sup>7</sup>See, U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 40 & 43 (2006-2011).

<sup>8</sup>U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 43 (2006-2011).

<sup>9</sup>U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 43 (2006-2011).

Figure 2 (below) shows the percentage of federal drug offenders receiving an upward aggravating role adjustment under §3B1.1 for powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine for fiscal year 2006-2011.<sup>10</sup> For the last six years the average percentage of offenders who in fact receive a §3B1.1 aggravating role adjustment for these drugs is 7.6, 5.0, 7.5, 4.3, and 5.3 respectively.<sup>11</sup>

**Percentage of Federal Drug Offenders Receiving Upward Aggravating Role Adjustment**



**Figure 2, Source: Sourcebook of Federal Sentencing Statistics**

Moreover, additional data collected in 2005 on the function of powder and crack cocaine defendants bears similar results.<sup>12</sup> That year, 61.5 percent of all crack defendants charged and sentenced in federal court were low-level offenders – including such roles as street dealer, lookout, and courier.<sup>13</sup> Further, only 18.5 percent of the individuals charged and sentenced for powder cocaine offenses were considered to occupy the role of manager, organizer, leader, and high-level supplier of a drug business.<sup>14</sup>

What these statistics show is that federal prosecutors fail to use the mandatory minimum provisions of the ADA in the manner in which Congress intended. Rather than charge drug kingpins and the most serious and high-level traffickers with the mandatory minimum provisions of the ADA, the overwhelming majority of drug offenders who face the brunt of these draconian penalties are low-level offenders. These are not the individuals Congress had in mind when creating the two-tiered mandatory minimum penalty structure found in the ADA. Essentially, low-level drug offenders are being punished by severe mandatory minimum

<sup>10</sup>U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 40 (2006-2011).

<sup>11</sup>U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 40 (2006-2011).

<sup>12</sup>See, Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda* (2011), available at [http://sentencingproject.org/doc/dp\\_WOLA\\_Article.pdf](http://sentencingproject.org/doc/dp_WOLA_Article.pdf).

<sup>13</sup>Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda* 3 (2011), available at [http://sentencingproject.org/doc/dp\\_WOLA\\_Article.pdf](http://sentencingproject.org/doc/dp_WOLA_Article.pdf).

<sup>14</sup>Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda* 4 (2011), available at [http://sentencingproject.org/doc/dp\\_WOLA\\_Article.pdf](http://sentencingproject.org/doc/dp_WOLA_Article.pdf).

penalties because the Justice Department chooses to disregard Congress' purpose in passing the ADA.

This misapplication of the ADA by the Justice Department has led to the massive swelling of the federal prison population.<sup>15</sup> The total number of federal prisoners for both all offenses and drug offenses between 1970 and 1985 held fairly static, but has since ballooned out of control.<sup>16</sup> There has been an increase of over 700% in the total population of federal prisoners from 24,252 in 1980 to 208,118 in 2009 – with the ever-increasing incarceration of drug offenders as the primary culprit.<sup>17</sup> By 2009 drug offenders represented more than half of those housed in federal prisons, while the total number of drug offenders in federal prison has skyrocketed over the last thirty years, from 4,749 in 1980 to 95,205 in 2009.<sup>18</sup>

### (3) Recommendations

Congress clearly intended that the mandatory minimum provisions of the ADA be applied to the drug kingpins, high-level traffickers, and the managers of drug enterprises, but chose to use only drug quantity as the determiner of the role of a drug offender in the statute. Federal prosecutors have seized on the lack of a need to make a showing of a defendant's function in a drug business to prosecute drug offenders who simply meet the threshold requirement of drug quantity to trigger a mandatory minimum charge. The vast majority of drug offenders receiving mandatory-minimum sentences under the ADA are being punished because of the Justice Department's willful disregard of Congress' plain intent in creating the ADA's mandatory minimum penalty system.

Despite the fact that Congress failed to include language requiring a showing that drug offenders charged under the ADA's mandatory minimum penalties occupy the role of high-level traffickers and managers of drug enterprises, no new legislation is required to remedy this problem, as recently pointed out by U.S. District Court Judge John Gleeson.<sup>19</sup>

In *United States v. Dossie*, Judge Gleeson, lamenting the misapplication of the ADA's mandatory minimum provisions suggested that the Justice Department itself can remedy this problem by:

- citing to the ten-year mandatory minimum in an indictment only when the government intends to prove that the defendant occupied a leadership role that warrants a four-level upward adjustment under U.S.S.G. § 3B1.1(a);
- citing to the five-year mandatory minimum only when the government intends to prove a managerial role worthy of a three- or two-level upward adjustment

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<sup>15</sup>See, The Sentencing Project, *The Expanding Federal Prison Population* (2011), available at [http://www.asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236).

<sup>16</sup>The Sentencing Project, *The Expanding Federal Prison Population* 1 (2011), available at [http://www.asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236).

<sup>17</sup>The Sentencing Project, *The Expanding Federal Prison Population* 1-2 (2011), available at [http://www.asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236).

<sup>18</sup>The Sentencing Project, *The Expanding Federal Prison Population* 1-2 (2011), available at [http://www.asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236).

<sup>19</sup>*United States v. Dossie*, 11-CR-237 (JG), 2012 U.S. Dist LEXIS 45691 \*1 (E.D.N.Y. March 30, 2012).

under § 3B1.1(b) or (c); and

- withdrawing the mandatory minimum provision from the case (or reducing it, as the case may be) if the corresponding aggravated role has not been proven by the government or admitted by the defendant.<sup>20</sup>

We agree, and respectfully urge the Commission to formally request that the Department of Justice and Attorney General require federal prosecutors to comply with these reforms. While Judge Gleeson recommends a preponderance of the evidence standard be used to prove a defendant's role, we request, for both jury trials and plea bargains, a beyond a reasonable doubt standard be used.<sup>21</sup>

We favor a reasonable doubt standard for reasons the Supreme Court of the United States elucidated in *In re Winship*:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.<sup>22</sup>

The Supreme Court has made clear that for jury trials, the due process of law and right to a speedy, public trial by a fair and impartial jury provisions of the Fifth and Sixth Amendment's respectively, "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."<sup>23</sup> And although drug quantity is the sole element used in the ADAA in determining the role of an offender in a drug enterprise, this slight omission should not whitewash the clear intention of Congress that the mandatory minimum provisions be applied to high-level traffickers and managers of drug businesses.

Moreover, we also request a showing of the heightened, beyond a reasonable doubt standard for cases resulting in plea bargains due to the pervasive nature of such bargains and the coercive power prosecutors hold in negotiating reductions in charges against drug offenders. From 2006-2011 no less than 95.5 percent of all federal drug cases ended in plea bargains.<sup>24</sup> The plea bargaining system has been abused due to prosecutors use of the trial penalty – threatening significantly lengthier sentences for those defendants who seek to exercise their Constitutional

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<sup>20</sup>United States v. Dossie, 11-CR-237 (JG), 2012 U.S. Dist LEXIS 45691 \*1-2 (E.D.N.Y. March 30, 2012).

<sup>21</sup>United States v. Dossie, 11-CR-237 (JG), 2012 U.S. Dist LEXIS 45691 \*1-2 (E.D.N.Y. March 30, 2012).

<sup>22</sup>*In re Winship*, 397 U.S. 358, 364 (1970).

<sup>23</sup>United States v. Gaudin 514 U.S. 506, 509-10 (1995).

<sup>24</sup>U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11 (2006-2011).

right to trial by jury rather than plead guilty to a lesser sentence.<sup>25</sup> And because judges only see the resulting guilty plea and not the initial charges bargained down from, an admission of guilt is likely motivated by coercion and a pragmatic choice of a defendant to minimize the risks of trial and an exceedingly long prison sentence if convicted, rather than a true admission of guilt.<sup>26</sup> Research bears the coercive nature of plea-bargaining out, as drug offenders are subjected to significant trial penalties.<sup>27</sup>

We believe the coercive nature of the plea bargaining system and the use of the trial penalty calls into question the legitimacy of many “admissions” by offenders in federal drug cases. We therefore request that for cases that end in plea agreements that apply the ADAA’s mandatory minimum penalties, the Justice Department require federal prosecutors to make showings consistent with the reforms suggested above.

**(B) The Commission should gather data and issue a yearly report documenting defendant function for all types of drug offenses.**

CJPF also requests that the Commission collect data and statistics on defendant function for each kind of drug offense and create yearly reports to be made available for the public and federal district court judges. This data will provide judges with a better understanding of whom U.S. Attorney’s are charging with drug offenses under the ADAA in their jurisdictions compared to other jurisdictions and whether or not federal prosecutors are charging offenders under the ADAA as Congress intended when the legislation was passed.

For example, the Commission provided data on defendant function for crack and powder cocaine in 2005, breaking down offender role from street level dealer, to wholesaler, courier, lookout, manager, organizer, etc.<sup>28</sup> CJPF requests that the Commission collect this kind of data for the other drug types (marijuana, heroin, methamphetamine) as well, so a similar breakdown in defendant function can be made freely available to the public and courts in the form of yearly reports.

Collecting this kind of data and issuing reports of this nature will provide judges the ability to determine whether their court’s resources are being used to prosecute the kind of drug offenders Congress had in mind when passing the ADAA or whether the lions share of drug offenders who come before them are low-level offenders. This will provide an insight into the kind of cases that individual U.S. Attorney offices file under the mandatory minimum provisions of the ADAA and if federal prosecutors are simply indiscriminately charging drug offenders regardless of their function or mostly offenders with the role and functions that are consistent with Congressional intent.

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<sup>25</sup>Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIMINAL LAW QUARTERLY 1, 21 (2005).

<sup>26</sup>Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIMINAL LAW QUARTERLY 1, 17 (2005).

<sup>27</sup>Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIMINAL LAW QUARTERLY 1, 24 (2005).

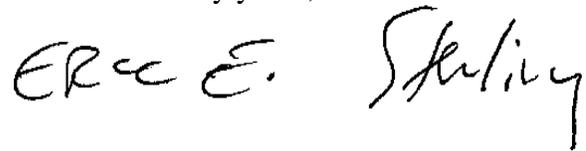
<sup>28</sup>Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda* 4 (2011), available at [http://sentencingproject.org/doc/dp\\_WOLA\\_Article.pdf](http://sentencingproject.org/doc/dp_WOLA_Article.pdf).

These reports may also assist federal law enforcement officials better understand in what jurisdictions kingpins, high-level traffickers, and managers of drug businesses tend to operate – potentially providing valuable information regarding organization locations, supply routes, and the most commonly used points of entry for drug smuggling.

### **Conclusion**

We greatly appreciate and thank the Commission’s attention to our concerns and recommendations regarding the federal government’s use of the mandatory minimum provisions in the ADAA and hope the Commission seriously considers taking the steps we have outlined above.

Sincerely yours,

A handwritten signature in black ink that reads "Eric E. Sterling". The signature is written in a cursive, slightly slanted style.

Eric E. Sterling, J.D.  
President