July 12, 2013

United States Sentencing Commission
One Columbus Circle
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Washington, DC 20002-8002
VIA email: pubaffairs@ussc.gov

Attention: Public Affairs - Priorities Comment

The Drug Policy Alliance (DPA), the nation’s leading organization advancing drug policies that are grounded in science, compassion, health and human rights, appreciates this opportunity to submit our recommendations to the United States Sentencing Commission’s proposed priorities for 2014. 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 war on drugs. The rate of incarceration in the United States is currently “almost five times higher than the historical norm prevailing throughout most of the twentieth century.”¹

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.² In addition, the Organization of American States (“OAS”) released a report in May 2013 calling for a “public health” approach to address drug problems, including exploring alternatives to mass criminalization for people who use or possess drugs.³ Further, Human Rights Watch released a statement in June 2013 asserting that criminalizing people for personal drug use infringes basic human rights.⁴ These reports reflect growing political momentum throughout the United States and Latin America for major reforms of our drug policies.

DPA supports the Commission’s recommendations to evaluate and reform policies driving over-incarceration at the federal level in the recent Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System⁵. In particular, DPA supports repealing mandatory minimums for drug offenses, expanding access to the safety valve, mitigating the cumulative impact of criminal history, diminishing the incidence of stacking mandatory minimum sentences, undertaking a comprehensive study of recidivism. In addition, we urge the Commission to evaluate drug sentencing guidelines, including reducing all drug sentencing guidelines by at least two levels in order to conform federal drug sentences to 18 U.S.C. § 3553(a)(2), 28 U.S.C. § 994(c) and (d), and 28 U.S.C. § 994(g).

Our specific recommendations are as follows:

**Repeal Mandatory Minimum Sentences for Drug Offenses**

Federal sentencing laws and policies, including mandatory minimum sentences for drug offenses, directly contribute to the problem of mass incarceration and prison overcrowding. The federal prison population continues to grow every year⁶ and currently “system-wide [prison] crowding is at 38 percent over rated capacity, with 53 percent and 49 percent at high and
medium security institutions respectively (data as of February 2, 2012). The Federal Bureau of Prisons (BOP) “continues to face unprecedented challenges in managing the growing federal inmate population.” And, absent reforms, the “BOP projects that the inmate population will continue to grow for the foreseeable future.”

The Commission has a duty to ensure that sentencing policies “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[].” In that regard, DPA supports the Commission’s recommendations to evaluate the severity and scope of mandatory minimum penalties for drug offenses, and urges the Commission to prioritize efforts aimed at reducing mass incarceration, including repealing mandatory minimum sentences for drug offenses.

Nearly half (48%) of inmates in federal prison were serving time for drug offenses in 2011 and a majority of drug cases are subject to mandatory minimum sentences. The Commission has acknowledged that “Given that drug trafficking constitutes the largest offense group sentenced in the federal courts, the two-and-a-half time increase in their average prison term has been the single sentencing policy change having the greatest impact on prison populations. (emphasis added)” Further, this “one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination.”

Congress intended mandatory minimum penalties to apply to mid-level and major drug traffickers. However, mandatory sentences effectively prevent judges from applying any mitigating circumstances that may reduce sentences for less culpable offenders. As such, many low-level offenders receive mandatory minimum sentences regardless of their level of culpability. In addition, “mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record.”

Mandatory minimum sentences lead to lengthy and harsh sentences for many low level offenders and contribute to prison overcrowding. The Commission should propose repealing mandatory minimum sentences for drug offenses, especially those tied to drug quantities and those triggering sentence enhancements for prior criminal records.

### Expand Access to the Safety Valve

Congress intended mandatory minimum penalties to apply to mid- and high level offenders, and enacted the safety valve provision as an exception to mandatory minimum sentences. However, the safety valve provision under 18 U.S.C. § 3553(f) applies restrictively and the eligibility requirements are so narrow in scope that many low level offenders are not eligible for the relief it provides.

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 or sell illegal drugs, racial profiling in African American neighborhoods has led to African Americans being much more likely to hold past felony drug convictions. In fact, although African Americans comprise only 15% of drug users, they comprise 74% of those sentenced to prison for a drug offense. According to testimony by Federal Public Defender Michael Nachmanoff to a Senate Judiciary subcommittee in 2008, “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."\textsuperscript{21} 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.\textsuperscript{22} Unfortunately, aggressive policing and racial profiling has placed many minorities in Criminal History Categories III. Therefore, the Commission 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.

The current highly restrictive safety valve policy unjustly punishes former prisoners who often recidivate as a response to a broken system. Former prisoners find barriers to reentry upon returning to their communities caused by social stigma, civic sanctions,\textsuperscript{23} employment discrimination,\textsuperscript{24} and a lack of social capital.\textsuperscript{25} These obstacles can fuel further criminal activity and recidivism.\textsuperscript{26}

Finally, broadening the eligibility criteria for the safety valve would help alleviate prison overcrowding. For example, as the Commission reported, expanding access of the safety valve to drug offenders in Criminal History Category II would have made 1,127 offenders convicted of drug offenses eligible for relief from mandatory minimums in 2010.\textsuperscript{27}

In sum, DPA supports the Commission’s recommendation to Congress regarding the expansion of the safety valve (18 U.S.C. § 3553(f)) to include drug offenders in higher criminal history categories.

\textbf{Reassess the Scope and Severity of Recidivist Provisions}

The Drug Policy Alliance supports the Commission’s recommendation that Congress reassess the scope and severity of the recidivist provisions at 21 U.S.C. § 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 public\textsuperscript{28} and have little or no effect on crime rates.\textsuperscript{29} A study of California’s similarly severe recidivist provisions, known as the “Three Strikes Laws,” showed results consistent with these findings.\textsuperscript{30}

DPA also believes that the current scope and severity of recidivist provisions conflicts with 18 U.S.C. § 3553(a)(1), especially with 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 Commission should conform repeat offense sentencing to 18 U.S.C. § 3553(a)(1) by removing simple possession offenses from the list of prior drug offenses used to apply recidivist provisions. A prior drug felony conviction triggers the recidivist enhancements for any “offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or
The definition of felony drug offense is tremendously broad and encompasses federal, state and foreign laws. Therefore, even minor drug offenses can trigger the recidivist enhancements. For example, a most states classify simple possession of drugs for personal use as a felony punishable by more than 1 year of imprisonment, despite the fact that federal law classifies this conduct as a misdemeanor punishable by 1 year or less of imprisonment. This leads to anomalous results since a person with a prior federal conviction for drug possession could be spared from the recidivist provisions, while another person with a state law conviction for the same conduct would be subject to a doubling of a mandatory minimum sentence.

In addition to leading to disparate outcomes, the current policy’s harsh treatment of past offenders ignores evidence that prison sentences do not lead to rehabilitation, that imprisonment as a response to drug offenses can actually increase recidivism rates, and that racial disparities are exacerbated by the policy. Lengthy sentences for drug use and possession are ineffective at addressing what is fundamentally a health issue. What is needed is an expanded access to community programs for addiction treatment and/or other medical interventions, and DPA supports the Commission’s recommendation that Congress amend the recidivist provisions.

**Reduce the Use of Stacking Mandatory Minimums in Relation to 18 U.S.C. § 924(c)**

The stacking of mandatory minimums sentences as laid out in 18 U.S.C. § 924(c) leads to overly severe sentences, regionally inconsistent application, and disproportionately punishment of African American offenders. The average sentence of an offender convicted to stacked mandatory minimums under 18 U.S.C. § 924(c) is over 16 years greater than those convicted of a single charge under 18 U.S.C. § 924(c). Many of these are for non-violent offenses that did not involve any physical harm or threat of physical harm, yet they face far greater sentences than those who commit the “most serious, violent crimes.” Further, The Commission’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 U.S.C. § 924(c) occur more frequently in those districts than in others. Stacking mandatory minimums also exacerbates racial disparities in our criminal justice system. According to the Commission’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).”

DPA supports the Commission’s recommendations to reduce the length of mandatory minimums for 924(c) penalties and amend section 924(c) to reduce the incidence of overly severe sentences that are applied disproportionately on the basis of location and race.

**Examining Rehabilitative Opportunities**

We support the Commission’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 Commission 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. Returning citizens are in need of social resources, such as addiction treatment, housing, and job placement, in order to successfully reenter society. As stated above, these barriers fuel recidivism. The Commission 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 Commission 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 Commission’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.” 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 Commission 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. This is especially true among female offenders with children, who are less likely than their male counterparts to reoffend. In fact, a survey of female prisoners found that they ranked estrangement from their children as their highest concern while incarcerated. The distance of the facility from the prisoner’s home can be a large barrier to maintaining familial connections while incarcerated. 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. 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. 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 Commission 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 Commission should consider the effect of maintaining community and familial connections, gender, and parental status in order to amend the Guidelines Manual pursuant to 28 U.S.C. § 994(d)(7) and (8) and 18 U.S.C. § 3553(a)(2)(C).

The Commission should also examine how drug use, misuse and addiction, and access (or lack thereof) to non-compulsory addiction treatment programs can affect recidivism. The Commission’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. However, the data does not distinguish drug use from drug addiction. In order to more fully understand the impact drugs can have on recidivism, the Commission 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.

**Review and Amend Sentencing Guidelines Applicable to Drug Offenses**

DPA urges the Commission to amend drug sentencing guidelines, which result in longer sentences for nonviolent offenders than faced by serious or violent offenders. For example, under the base offense level for distributing 300 grams of crack or 500 grams of methamphetamine is 32. However, this ranking is greater than that given for the forcible rape of an adult (30), killing a person in a voluntary manslaughter, disclosing top secret national defense information to the North Koreans (29), arson creating a substantial risk of death (24), and extortion (18). Reducing all drug sentencing guidelines by at least two levels would be an effective method to ensure proportionality in sentencing and better conform drug sentences to 18 U.S.C. § 3553, 28 U.S.C. § 994(c) and (d), and 28 U.S.C. § 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 Commission of the offense, these offenders could be dealt with through the available enhancements under the guidelines.

The Commission 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. This reasoning proved to be unfounded when the Commission reduced crack cocaine sentences by two levels in 2007 and the rate of guilty pleas and cooperation were unaffected. 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 departures from mandatory minimum sentences.

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.

In addition, the current guidelines do not accomplish their stated goals to provide just punishment, deterrence, incapacitation, and rehabilitation. 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. 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, especially in reference to drug crimes. Furthermore, evidence is beginning to show that imprisonment leads to greater rates of recidivism among drug offenders, when compared to probation and other alternatives, and prison has long been abandoned as an ideal space for rehabilitative intervention.

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.

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

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 U.S.C. § 3553(a)(2)(B), (C), and (D). The U.S. must respond to calls from world leaders 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.

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. It increases and entrenches poverty in our most vulnerable communities. 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. 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. The literature shows that current drug sentencing guidelines do not adequately take into accounts the considerations outlined in 28 U.S.C. § 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 U.S.C. § 994(g), which dictates that “guidelines prescribed [by the Commission] shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.” Since the creation of the Commission, the level of overcrowding in federal prisons has been dramatically
increasing and is now approaching 40%. In 2010, 23,964 people were convicted of federal drug violations and a majority of federal prisoners – 103,194 of 191,757 – were housed in federal facilities because of drug convictions. 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, despite the drug being arguably less dangerous than alcohol and having been decriminalized in almost a third of U.S. states, and legalized in two states. Reducing all drug sentencing guidelines by at least two levels would bring sentencing policy in line with 28 U.S.C. § 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 Commission 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 U.S.C. § 3553(a)(2), 28 U.S.C. § 994(c) and (d), and 28 U.S.C. § 994(g) by reducing all federal drug guidelines by at least two levels.

Sincerely,

/s/
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Senior Staff Attorney

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2 Global Commission on Drug Policy. War on Drugs (June 2011).
8 Ibid.
9 Ibid.
10 18 U.S.C Section 994(g).
17 H.R. Rep. No. 99-845
21 Ibid. at 10.
25 Ibid. at 4.
34 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
38 Ibid. at 359, 361.
39 Ibid. at 361
40 Ibid. at 363
42 Jeremy Travis, “Prisoner Reentry Seen Through a Community Lens,” Luncheon Address at the Neighborhood Reinvestment Corporation Training Institute 2 (Aug. 23, 2001)
49 Christopher J. Mumola, Incarcerated Parents and Their Children, Bureau of Justice Statistics (August 2000)
57 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.
60 Ibid. at 329-357, 351.
63 Ibid. at 61-62.
64 Ibid. at 61-62.
66 For a more thorough report documenting the benefits of Portuguese decriminalization, see Caitlin Hughes and Alex Stevens, “What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?” The British Journal of Criminology vol. 50, no. 6 (2010): 999-1022; Also Glen Greenwald, “Drug Decriminalization in Portugal: Lessons


71 See 28 USC § 994(g)


74 Ibid. at 165.

75 Ibid. at 218.