



July 15, 2013

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

Re: Request for Public Comment, Notice of Proposed Priorities

Dear Judge Saris:

FAMM welcomes this opportunity to comment on the proposed priorities announced by the Sentencing Commission for the 2014 amendment cycle. We are especially heartened by the Commission's request that public comment address the long-neglected mandate in 28 U.S.C. § 994(g). While we appreciate the scope of proposed priorities, we note that § 994(g) requires the Commission to draft *all* of its guidelines cognizant of prison capacity. That requirement, coupled with the extreme overcrowding now plaguing the Bureau of Prisons (BOP), frankly demands more of this Commission than piecemeal approaches. Over-incarceration is a direct result of sentencing policies that have produced sentences altogether too long in many cases, combined with the determinate sentencing regime ushered in by the Sentencing Reform Act (SRA). The Commission is not solely responsible for this state of affairs. Congress and the Department of Justice have much to answer for as well. And while all three institutions have recognized a problem exists, none has taken the big steps necessary to get mass incarceration under control. The Commission, which shares responsibility for this state of affairs, should shoulder the task of doing what it can to end it. Doing so will require a genuine commitment to reforming an unduly complex guideline system largely ungrounded in empirical evidence and producing recommended sentences too often too long.

Taking 28 U.S.C. § 994(g) Into Account

Today's criminal justice system has become addicted to solving social and public safety problems with incarceration. That appetite, combined with a long-simmering distrust of the judiciary, led to the creation of mandatory minimums that dominate the sentencing field directly and indirectly, through their sentencing guideline proxies.

Entities responsible for sentencing policy and law enforcement confront a severe challenge. The Department of Justice devotes an ever-increasing portion of its, at best, flat-lined budget¹ on housing the expanding federal prison population. The situation has

¹ See Letter from Jonathan Wroblewski to The Honorable Patti B. Saris, 7 (July 11, 2013) (Wroblewski Letter).

become so dire that budgets for other components, including those directly responsible for public safety, such as the FBI and those that provide grants to state and local law enforcement, are threatened. While a number of states, including red states, for which the problem of over-incarceration surfaced with greater urgency over the last 7 years, have been taking measures to stabilize their prison populations, the federal government has not acted.

The problems posed by our approach to sentencing have for years absorbed the attention of reform advocates such as FMM, which decry the injustice of unduly long sentences that do not fit the crime. For different reasons, the Department of Justice, long a proponent of mandatory sentencing and ever harsher guidelines, shifted its approach in the last several years. In speeches and submissions to Congress and the Commission, Main Justice and its representatives have highlighted the increasing share of the Department's budget dedicated to funding federal prisons.²

The problem: where to keep all those people and how to pay for them.

The Federal Bureau of Prisons (BOP) is operating at 138 percent of rated capacity.³ The Inspector General of the Department of Justice ("IG") bluntly rates its outlook as "bleak: the BOP projects system-wide crowding to exceed 45 percent over rated capacity through 2018."⁴ He charges that the problems can be traced in part to the increased numbers of prisoners entering the system:

[T]he Department faces the challenge of addressing the growing cost of housing a continually growing and aging population of federal inmates and detainees. The federal prison system is consuming an ever-larger portion of the Department's budget, making safe and secure incarceration increasingly difficult to provide, and threatening to force significant budgetary and programmatic cuts to other DOJ components in the near future. In FY 2006,

² See, e.g., Assistant Attorney General Lanny A. Breuer Speaks at the National District Attorney's Association Summer Conference Justice News, United States Department of Justice (July 23, 2012) (noting flat budgets and prison overcrowding: and stating "we must also recognize that a criminal justice system that spends disproportionately on prisons – at the expense of policing, prosecutions and recidivism-reducing programs – is unlikely to be maximizing public safety."), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-120723.html>.

³ *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 4 (April 17, 2013) (Samuels Statement), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf> (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

⁴ *Oversight of the Department of Justice: Hearing Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies*, Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice 9 (March 14, 2013) (Horowitz March Statement), available at: <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

there were 192,584 inmates in BOP custody. As of October 2012, the BOP reported 218,730 inmates in BOP custody, an increase of more than 13 percent. Not surprisingly, these trends mirror the increased number of federal defendants sentenced each year, which rose from approximately 60,000 in FY 2001 to more than 86,000 in FY 2011, according to the U.S. Sentencing Commission.⁵

The IG anticipates that absent a course change, the BOP's 25 percent share of the FY 2013 Department of Justice budget will grow to 30 percent by 2018.⁶

Notwithstanding these funding increases, overcrowding in the BOP is unabated, threatening prisoner and staff safety.⁷ Faced with the prospect of across-the-board automatic spending cuts made necessary by sequestration, and fearing for the BOP's ability to maintain staffing and protect the safety of personnel and prisoners, the Attorney General sought and received permission from Congress to reprogram funds from other components to avert layoffs and/or furloughs.⁸ The Department reprogrammed \$150 million to the BOP,⁹ including approximately \$90 million from the FBI.¹⁰

Reprogramming on that scale is untenable. The IG warned Congress in early June that "continuing to spend more money each year to operate more federal prisons will require the Department to make cuts to other important areas of its operations."¹¹ The Sentencing Commission's *ex officio* from the DOJ warns in his most recent comment on the Commission's priorities that:

⁵ Horowitz March Statement at 8.

⁶ Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, Before the Senate Committee on Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, 8 (June 6, 2013), (Horowitz June Statement), available at <http://www.justice.gov/oig/testimony/t1306a.pdf>.

⁷ Samuels Statement, at 4-5 ("[I]ncreases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults. An increase of one in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates.").

⁹ Statement of Eric H. Holder, Jr., Attorney General of the United States, Before the United States Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, 1 (June 6, 2013), available at <http://www.appropriations.senate.gov/ht-commerce.cfm?method=hearings.download&id=5c7116e8-9d3b-4e21-9b2d-86b157adb140>.

¹⁰ *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Transcript of Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 6 (April 17, 2013) (on file with author).

¹¹ Horowitz June Statement at 10.

If the current spending trajectory continues and we do not reduce the prison population and prison spending, there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs, and cuts along a range of other criminal justice priorities.¹²

Mandatory minimums, the subject of one of the Commission's proposed priorities, and the federal Sentencing Guidelines contribute to this problem directly and indirectly. According to the Congressional Research Service (CRS):

Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. ... Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the [U.S. Sentencing Commission or] USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more.¹³

Over the years, people serving mandatory minimums have accumulated in the federal system. On September 30, 2010, 75,579 (39 %) of the 191,757 offenders in BOP custody were serving a mandatory minimum sentences.¹⁴ And, the sentences they were serving were longer as well. In 2010, the average mandatory minimum sentence imposed was 139 months, in contrast to 48 months for all offenses.¹⁵

The remaining 61 percent of the prisoners incarcerated in 2010 were serving guideline sentences. The majority of the guidelines for offenses covered by mandatory minimums are anchored by mandatory minimums. And while the guidelines themselves are no longer mandatory, judges are obliged to first calculate the applicable sentencing guideline before moving to the inquiry under 18 U.S.C. § 3553(a).¹⁶ In 2012, 84.5 percent of sentences fell within or above the guidelines or below them due to a government motion or a guidelines-sanctioned judicial departure.¹⁷

¹² Wroblewski Letter at 7 (July 11, 2013).

¹³ Congressional Research Service, *The Federal Prison Population Buildup, Overview, Policy Changes, Issues and Options* 1 (Jan. 22, 2013) (CRS Report), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

¹⁴ U.S. Sent'g Comm'n, *Report to Congress: Mandatory Minimums in the Federal Criminal Justice System* 148 (Oct. 2011) (2011 Mandatory Minimum Report).

¹⁵ 2011 Mandatory Minimum Report at 136.

¹⁶ See *Gall v. United States*, 552 U.S. 38, 49 (2007).

¹⁷ U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. N (2013) (2012 Sourcebook).

Finally, sentencing guidelines for offenses not anchored by mandatory minimums have increased over the years, based on a kind of faux proportionality. CRS observed that the “USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.”¹⁸

This “proportionality” has operated in only one direction, prompting the Judicial Conference’s Criminal Law Committee to chide the Commission for addressing proportionality concerns by increasing penalties. “The Committee believes that the goal of proportionality should not become a one-way ratchet for increasing sentences.”¹⁹

For years, lengthy sentences were touted as a way to promote public safety. Today, we see the beginnings of a paradigm shift, led by states and fueled by necessity. Unless we reduce the number of people in prison, far from keeping us safer, our addiction to incarceration could endanger public safety. Happily, “reducing mass incarceration is conceptually simple: We need to send fewer people to prison and for shorter lengths of time.”²⁰

Some of the Commission’s proposed priorities hold the promise of turning this simple concept into reality. And we support most of the proposals for that reason. But, we urge the Commission to do more by laying the groundwork for a truly fundamental reassessment of the severity and complexity of the current guidelines. Champions of judicial discretion and sentencing fairness will stand ready to support the Commission. And, the Commission is likely to find other allies for shorter sentences and/or increased judicial discretion in unexpected places, including within the Department of Justice, Congress²¹ and among the formerly tough-on-crime. The latter make up a vibrant conservative movement for criminal justice reform. From the Heritage Foundation to the American Legislative Exchange Council, leaders of conservative thought and action are taking up criminal justice reform. Conservative activist Eli Lehrer calls it “the most important social reform movement on the right since the rise of the pro-life movement of the 1970s.”²² Legislation to include a safety valve for all mandatory minimums, the Justice Safety Valve Act, enjoys bi-partisan sponsorship in the House (Reps. Bobby Scott (D-Va) and Rep. Thomas Massie (R-Ky) introduced HR 1695, while Sen. Rand Paul (R-Ky) joined with Sen. Patrick Leahy (D-Vt) on the Senate side.

¹⁸ CRS Report, at 8.

¹⁹ Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law, to Members of the United States Sentencing Commission 3-4 (Mar. 8, 2004) (on file with the author).

²⁰ Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. OF RACE AND L. 295, 297 (Spring 2013).

²¹ See, e.g., S. 619, the Justice Safety Valve Act of 2013, available at <http://thomas.loc.gov/cgi-bin/thomas>.

²² Neil King, Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL STREET J., June 21, 2013, at A1 (WSJ).

Specific Proposed Priorities

Booker Fix (proposed priority 3)

Before we discuss our support for many of the Commission's proposed priorities, we reiterate our longstanding opposition²³ to the Commission's proposals to make the guidelines more mandatory. We note, above all, that the Commission is alone in its call for more curbs on judges. Congress has introduced no legislation, despite the Commission's invitation in October and December 2012, nor has the DOJ stepped up in support of this or any other proposal of its ilk.

Moreover, we cannot help but note a shift in the Department's characterization of disparity, contained in the DOJ's priorities letter to the Commission. While bemoaning what it characterizes as "increasing unwarranted disparities in sentencing," it also

agree[s] with many commentators who find fault with the Commission's approach to measuring consistency in sentencing and the extent of such disparities. We recognize, as we must, that consistency and fairness are driven not only by judicial decision[-]making, but also by litigation dynamics, including charging decisions and plea bargain negotiations. We further recognize that the structure of the federal sentencing guidelines itself contributes to inconsistent application of the federal sentencing guidelines and inconsistent sentencing outcomes.²⁴

We think this means the Department is more interested in reforming the guidelines than in curbing judicial discretion. We are certain it means that it shares our views that the Commission has not made a case for more mandatory guidelines and has not accounted for other factors, including the aforementioned charging and plea practices as well as the guidelines' structural problems in assessing whether disparity exists or is unwarranted.

Meanwhile, many sentencing reform advocates, the judiciary, the Federal Public Defenders and the private bar are firmly arrayed against these proposals, which they consider unnecessary, unwarranted and certainly likely to do more harm than good. Moving forward in this fashion is bound to trigger an unnecessary and counterproductive confrontation with all of these groups on the Hill.

At a minimum, the Commission should do nothing to tie judges' hands using the advisory guidelines before it reforms problematic guidelines and assesses the impact on variance rates following those reforms. As we have said many times before, seeking a change to discretion without first fixing guidelines suggests that the guidelines are

²³ See, e.g., Letter from Julie Stewart and Mary Price to Patti B. Saris 8-9 (Aug. 26, 2011); see also Statement of Mary Price Before the U.S. Sent'g Commission Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012)

²⁴ Wroblewski Letter at 8.

infallible and judges are wrong to disagree with them. Were that true, then indeed variance from the guidelines should be better controlled. But, the guidelines are not perfect, and not because they are now advisory. They are in many cases deeply flawed.

In short, fix bad guidelines and get a better grip on the underlying causes of disparity.

Mandatory Minimum Sentences and Safety Valve (proposed priority 1)

On the other hand, we support proposed priority 1 and many of the Commission's legislative proposals contained in the Mandatory Minimum Report, and stand ready to support your efforts on the Hill with our own.

For example, we applaud the Commission's recommendation to Congress to consider a safety valve that embraces mandatory minimum-bearing offenses other than the drug offenses currently covered. Our support for such a change is longstanding and based in sound arguments presented by the Commission itself about the failures of mandatory minimum sentencing.

Expanding the safety valve would also have an impact on prison overcrowding and attendant costs. Directing judges to the advisory guidelines saves money and prison beds for the more serious offenders that mandatory minimums were intended to punish.

In 2010 alone, 5,539 of the 15,257 people convicted of a drug offense carrying a mandatory minimum sentence benefitted from the safety valve.²⁵ That year, defendants who remained subject to the mandatory minimum were sentenced to an average 132 months.²⁶ Defendants who received safety valve relief, in contrast, received average sentences of 49 months,²⁷ an 83-month difference. What we don't know, of course, is what sentences those 5,539 safety valve defendants would have received had they received the mandatory minimum, but it would have been shorter than the 132 month average. This is because defendants eligible for the safety valve are less culpable than others and would likely not have been enhanced for weapon possession, significant criminal history, or being a leader or organizer.²⁸

That said, assuming those 5,539 defendants saved on average only 12 months, the overall savings would be 5,539 prison years. Not only does this affect bed spaces, it of course saves a lot of money. At an average annual cost of \$28,893.40 to incarcerate a federal prisoner,²⁹ the safety valve savings generated in 2010 alone (5,539 times

²⁵ U.S. Sent'g Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 44, p. 113 (2010) ("2010 SOURCEBOOK").

²⁶ 2011 Mandatory Minimum Report at 161.

²⁷ *Id.* at 161.

²⁸ *Id.* at 137.

²⁹ 78 Fed. Reg. 16711 (Mar. 18, 2013).

\$28,893.40) would be at least \$160,040,542.60. Expanding the current safety valve to additional offenses could have a beneficial impact on prison capacity, saving beds and money.

We are compelled to point out that the bi-partisan Justice Safety Valve Act, describes a safety valve that is broader than all of the changes to the current drug safety valve contemplated by the Commission. It would restore judicial discretion in cases where any statutory mandatory minimum would result in an unjust, excessive sentence.

Besides supporting the Commission's suggested reforms in this area, and urging the Commission to seek as broad and unencumbered a safety valve as it can, we also reiterate our advice that the Commission encourage Congress to change the existing safety valve, at a minimum expanding its reach to defendants with more criminal history by making defendants in Criminal History Categories I and II eligible for the relief.

The fact that the safety valve is only available to individuals who do not have more than one criminal history point leads to some unwelcome results. The Mandatory Minimum Report devotes a section to discussing the "disproportionate and excessively severe cumulative sentencing impact on certain drug offenders" of criminal history scoring.³⁰ One of those, of course, is ineligibility for the safety valve.³¹

The Commission suggests permitting defendants with 2 or 3 criminal history points be safety valve eligible. More defendants could benefit.³² There are also equitable reasons to further limit the impact of criminal history scoring on access to the safety valve. Criminal history calculations are frequently overblown as vividly illustrated by the fact that criminal history issues were cited as the reason in 43.8 percent of downward departures/variances in 2010. This far outstripped any other ground for departure.³³ In 2011 and 2012, criminal history again led the field, making up around 50 percent of all departures/variances.³⁴

The criminal history points versus criminal history categories distinction is an important one. A court may depart to CH I but may not use the Safety Valve in such cases.³⁵ There is no principled reason to deny courts the ability to give effect to their reasoned determination that the criminal history score overstates a defendant's criminal history and then, based on that, be able to apply the statutory safety valve to defendants who meet the other criteria. Changing the eligibility from points to categories and expanding eligibility to

³⁰ 2011 Mandatory Minimum Report at 352.

³¹ *Id.* at 353 and 355-56.

³² *Id.* at 355.

³³ 2010 Sourcebook at 67 (2011).

³⁴ 2011 Sourcebook at tbls. 25, 25A & 26, and 2012 Sourcebook at tbls. 25, 25A & 26.

³⁵ See e.g., *U.S. v. Resto*, 74 F.3d 22 (2d Cir. 1996) (defendant ineligible for safety valve despite departure from CH III to CH I); *U.S. v. Boddie*, 318 F.3d 491 (3d Cir. 2003) (criminal history departure does not make defendant safety valve eligible); *U.S. v. Barrera*, 562 F.3d 899 (8th Cir. 2009) (criminal history calculation not advisory for safety valve purposes post *Booker*).

Criminal History Category II will allow the courts to credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

“All Drugs Minus Two”(proposed priority 2)

FAMM is very pleased to see drug sentencing reform return after its absence from the 2012 proposed priority list. We heartily endorse proposed priority number 2 to amend the Drug Quantity Table across drug types.

Drug trafficking convictions have comprised the largest percentage of the federal criminal docket for a number of years. The Commission, in drafting the drug guideline, chose to link it to the five- and ten-year mandatory minimum sentences set by the Anti-Drug Abuse Act of 1986.³⁶ According to the Commission, “no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . , had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”³⁷

These choices were not only unprecedented, they were uncalled for. The Commission acknowledged that in crafting guidelines it has choices when indexing them to mandatory minimums. It explained in 2009 that, when faced with drafting guidelines for an offense that includes a mandatory minimum, it has four choices:

1. It can set the base offense level (which determines the sentencing range) for the offense so it exceeds the mandatory minimum.
2. It is able to set the base offense level so that the mandatory minimum is contained within the corresponding guideline range. This is how crack cocaine was handled for a brief period.
3. It can set the corresponding base offense level below the mandatory minimum and rely on specific enhancements if necessary to achieve a mandatory minimum length sentence.
4. It can set the base offense level without regard to the mandatory minimum.³⁸

The Commission has on occasion crafted or amended guidelines with corresponding mandatory minimums using all four methods,³⁹ but the drug guidelines, with a couple of notable

³⁶ U. S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing* 49 (Nov. 2004) (Fifteen Year Report).

³⁷ Fifteen Year Report at 49.

³⁸ U. S. Sent’g Comm’n, *The History of the Child Pornography Guidelines* 44-45 (Oct. 2009) (Child Pornography History).

³⁹ See, e.g., U.S.S.G. § 2G2.2(a) (setting base offense levels for trafficking in child pornography below the mandatory minimum and including enhancements that can increase the sentence to or above it; see also Child Pornography History at 46-49; U.S.S.G. § 2D1.1(b)(1), assessing a two-level enhancement when a gun is possessed

exceptions, include base offense levels higher than the otherwise applicable mandatory minimum. Practitioners and experts have urged the Commission to end the practice.⁴⁰

Anchoring the guidelines in this fashion has had profound consequences. Today, nearly half of all federal prisoners are incarcerated for drug offenses (half of whom are first time offenders) and they are serving sentences that average 78 months.⁴¹ The Urban Institute's recent study of the drivers of the BOP population found that "the growth in the BOP population from 1998 to 2010 confirmed that time served in prison, particularly for drug offenses, was the largest determinant of the growth in the population."⁴² Time served for those offenders is inextricably linked to the mandatory minimum sentences on which the guidelines are based.

While we would prefer that the guidelines be entirely delinked from the mandatory minimum (and believe the Commission has the authority to delink the guidelines from the corresponding mandatory minimums), we welcome the proposed priority. In light of the § 994(g) impact, reducing drug sentencing guidelines by two levels has the potential to reduce the pressure on the BOP. In 2007, prior to the Commission's adoption of the so-called "crack minus two" adjustment, average sentences for the 5,477 defendants sentenced for crack cocaine was 129 months. In 2008, the average sentence had dropped to 114.5 months, a 14.5 month average decrease per prisoner sentenced that year. In 2008, the 4,897 prisoners were saved a collective 5,917.2 years in prison. Retroactivity of course enhanced the immediate impact of the change.

Economic Crimes (proposed priority 4)

We also endorse the Commission's proposed renewed commitment to work on the guidelines governing economic crimes, including an examination of the loss table and the definition of loss, described in proposed priority number 4. We note however that, as we and others have pointed out before, the guideline needs a major overhaul. We urge the Commission to look into two principle problems: first, that monetary loss has become the

by a defendant in connection with a drug trafficking offense, notwithstanding the 5-year mandatory minimum sentence under 18 U.S.C. § 924 (c) for a conviction of possessing a firearm in connection with a drug trafficking offense; *see also* U.S.S.G. §. 2D1.1(E), assigning a weight for marijuana plants of 100 grams rather than the statutory assessment of 1000 grams per plant in 21 U.S.C. §. 841(b)(1)(A)(vii); *see also*, U.S.S.G. §. 2D1.1(G) (subtracting the weight of the carrier medium from the weight of LSD calculated under the guidelines and assigning each dose of LSD a uniform weight, in contrast to 21 U.S.C. §. 841(b)(1)(A)(v) which weighs the entire dose, including the carrier medium).

⁴⁰ Recent examples include: Letter from Julie Stewart and Mary Price (FAMM) to Hon. Patti B. Saris, 15-16 (July 23, 2012) (urging across the board two-level reduction of drug base offense levels); Jasmine Tyler, Drug Policy Alliance, Public Comments Submitted to the United States Sentencing Commission 4-5 (July 31, 2012); Letter from Marjorie E. Meyers to Honorable Patti B. Saris, 3-5 (Aug. 26, 2011); Letter from Marc Mauer to Patti B. Saris, 1-2 (Aug. 22, 2011).

⁴¹ Nancy La Vigne and Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions 4* (Urban Institute, Dec. 2012) (Urban Institute), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&ved=0CEYQFjAE&url=http%3A%2F%2Fwww.urban.org%2FUploadedPDF%2F412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf&ei=kjG6Ue_I0Y640QHV5oD4BA&usg=AFQjCNFw4PltCCLtgZJmTMWd19hgVtWqXQ&bvm=bv.47883778.d.dmQ.

⁴² Urban Institute at 5.

single most important factor driving sentence length, and second, that redundant sentencing enhancements and SOCs for ubiquitous conduct, such as for using “sophisticated means,” quickly inflate sentences.

Short of a complete overhaul of the guideline, we offer four suggested principles to guide the reforms. First, reduce the current excessive emphasis on actual or intended monetary loss. Second, better account for whether and to what extent the defendant benefitted from the crime. Third, ensure that more weight is placed on personal culpability, intent and other features that should bear on punishment. Finally, eliminate double counting aspects by striking redundant enhancements.

We are pleased to be part of the American Bar Association-sponsored task force of practitioners, scholars and judges looking into making concrete recommendations in light of these and other concerns. We are confident this collaboration will move the conversation forward as the Commission takes up this important inquiry.

Child Pornography Offenses

FAMM endorses the Commission’s call to Congress to address the disturbing outcomes of the sentencing guidelines for child pornography receipt and possession. We urge that the Commission adopt no more enhancements or SOCs, including those recommended by the DOJ, until the guideline for these offenses has had the airing the Commission believes it deserves. As the DOJ points out in its most recent letter, the guidelines do not reliably account for culpability or offense severity.⁴³ The DOJ’s solution includes apparently increasing sentences using SOCs and enhancements under U.S.S.G. sec. 2G2.2. Adding the DOJ’s proposed enhancements, departures, and SOCs to these guidelines is uncalled for, absent a retooling of these punishments, and is puzzling in light of the Department’s recognition that the guideline is badly flawed. The bulk of the Department’s recommendations would increase sentences under 2G2.2, though to its credit it also calls for revisions to better distinguish between occasional and habitual collectors, among other things.

Among the disturbing findings in the Commission’s December 2012 report is the fact that enhancements, originally slated to proportion sentences based on targeted aggravated conduct, routinely aggravate sentences for the vast majority of offenders.⁴⁴ These increases have in turn been prompted by changes made either directly by Congress or directed or encouraged by Congress.⁴⁵

The Commission rightly identifies the non-production guideline as one in need of substantial revision and asks Congress to revisit the current penalty structure in federal

⁴³ Wroblewski letter at 11.

⁴⁴ Child Pornography Report at 316.

⁴⁵ *Id.*

distribution offenses to better account for new technology and its impact on the ease of image and file sharing.

Compassionate Release.

Many observers, FAMM among them, worked with the Commission on the adoption of the policy statement U.S.S.G. § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). We did so because the BOP had improperly limited reduction in sentence motions under 18 U.S.C. § 3582(c)(1)(A)(i) to people within months of death or those severely debilitated by illness or injury. Absent guidance to the courts from the Commission, we reasoned, the BOP was hesitant to expand the situations under which it would consider reduction in sentence motions. As far back as 2001, then-Commissioner John Steer was among those who speculated that guidance from the Commission would be useful to the BOP considering what kinds of circumstances would be considered extraordinary and compelling.” “Without the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has understandably chosen to file very few motions under this section.”⁴⁶

The Commission adopted in 2007 a robust policy statement, over the objection of the DOJ, which had sought to tighten, not expand, the criteria.⁴⁷ The policy statement explicitly carved out both medically and non-medically based examples of extraordinary and compelling circumstances and also provided a catch-all provision, recognizing that extraordinary and compelling circumstances, other than those examples, might make early release feasible.

But, the BOP never directed its staff to use the USSC guideline when considering prisoner requests for compassionate release nor has it ever advised prisoners that grounds other than imminent death or near complete incapacitation exist. The BOP does not consider itself bound by the policy statement, which, while true, certainly misses the point.⁴⁸

Furthermore, the BOP has continued its practice of bringing only a handful of cases to the courts’ attention every year.⁴⁹ In researching “The Answer is No,” FAMM, in collaboration with Human Rights Watch, found that the BOP not only limits the motions to end-of-life and dire medical cases, but also refuses to bring motions unless it is satisfied that even prisoners who qualify under those limited criteria *deserve* to be released. Even though the decision about whether to release a prisoner who meets the extraordinary and compelling criteria is committed

⁴⁶ John Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the President’s Power to Commute Sentences*, 13 FED. SENT’G REP. 154-158, 155 (2001).

⁴⁷ For a thorough discussion of the DOJ’s stance on early release, see Human Rights Watch & FAMM, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* 23-27 (Nov. 2012) (The Answer is No), available at:

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.hrw.org%2Fsites%2Fdefault%2Ffiles%2Freports%2Fus1112ForUploadSm.pdf&ei=ll7kUb21OZeI4APTslDADw&usq=AFQjCNEYZw6pKBIM1HDFpNs_AxwbXfMBIw&bvm=bv.48705608.d.dmg.

⁴⁸ *Id.* at 27.

⁴⁹ *Id.* at 34, see also U.S. Dep’t of Justice, Office of Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program*, 1-2 (2013) (OIG Report).

to the courts and not the BOP, the BOP will not bring a motion to the courts if it feels the prisoner shouldn't receive a reduction in sentence. We found prison officials refused prisoners for a variety of reasons, including that their crimes were so heinous that they should not be released; that no matter how incapacitated they were they might reoffend; that they had not served enough of their sentence; that their release might result in bad publicity; and that the crime victims might object.⁵⁰

In response to criticism leveled at the BOP, including by the DOJ's Inspector General, the BOP has removed one level of review in the compassionate release process and expanded slightly the medical criteria governing end of life and debilitating conditions.⁵¹ While we welcome this expansion and expressions by the BOP of its interest in bringing more compassionate release motions, we also welcome anything the Commission can do to contribute to a compassionate release program that complies with congressional intent and permits deserving prisoners the hearing their cases deserve in the courts.

To that end, we would encourage the Commission to provide more examples of what constitute extraordinary and compelling circumstances, while ensuring that the list the policy statement provides is not exhaustive. In other words, keep the catch-all provision in Application Note (1)(A)(4).

Examples could include

- Situations where a prisoner was subjected to extreme physical, emotional or sexual abuse by or with the acquiescence of prison staff. FAMM and Human Rights Watch documented a case of a woman sexually abused over a 3 and half year period by prison staff. The abuse was so severe that she won a multi-million dollar lawsuit against her abusers but was told by the BOP that she was not eligible for compassionate release because the "circumstance, although unfortunate, does not merit a compassionate release." The regional director, reviewing her appeal agreed, stating: "staff did not consider your situation an extraordinary and compelling circumstance to warrant an early release." The Central Office concurred.⁵²
- Situations where a prisoner's medical condition that was likely to lead to death or extreme impairment was known at the time of sentencing but, because the prisoner was sentenced pursuant to then-mandatory guidelines or a mandatory minimum, the court could not, had it wanted to, adjust the sentence to reflect the circumstances. The BOP has denied compassionate release to such cases routinely, operating under a fiction that somehow the court can accommodate such situations, where of course they were unable to.

⁵⁰ *Id.* at 56-62

⁵¹ See Memorandum from the BOP General Counsel to Chief Executive Officers, "Guidance for Use of the Bureau of Prisons' Reduction in Sentence Authority for Medical Cases" (Apr. 29, 2013).

⁵² The Answer is No at 50-51.

- Relatedly, the Commission should clarify that in medical cases where conditions that existed at the time of sentencing subsequently developed into qualifying circumstances are appropriately considered extraordinary and compelling. It appears that the General Counsel's memorandum of April 29 recognizes this.
- Instances of acts of heroism, by which prisoners assist fellow inmates and prison staff at risk of their own lives.

Currently of course, courts are barred from granting a reduction in sentence unless the BOP brings the motion. In light of the BOP's intransigence and mismanagement of the program⁵³ we further urge the Commission to recommend to Congress that changes be made to the statute governing compassionate release. In particular, Congress should amend 18 U.S.C. § 3582(c)(1)(A)(i) to clarify that:

- The BOP is required to make motions to the sentencing courts for a reduction in sentence in all cases that fall within U.S.S.G. § 1B1.13; and
- Given that Congress has directed the courts in § 3582 to consider public safety or criminal justice grounds in assessing motions for early release, the BOP is not authorized to assess the grounds and may not use them to refuse to bring a compassionate release motion to the courts.

Additionally, the Commission can recommend to Congress that it permit prisoners to bring reduction in sentence motions directly after they have exhausted their administrative remedies and can present a prima facie case that they meet the threshold criteria.

Finally, in light of the § 994(g) requirement, it is useful to note that the OIG report "found that a properly managed compassionate release program inevitably provides cost savings to the BOP and provides assistance to the BOP in addressing its ever-increasing and significant capacity problems."⁵⁴ Any changes the Commission can help support to the program are likely to advance the Commission's § 994(g) objectives.

Conclusion

Thank you as always for considering our views. We look forward to working with the Commission this year on these priorities.

⁵³ OIG Report at i.

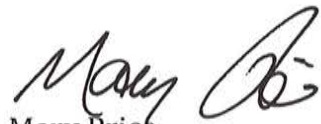
⁵⁴ OIG Report at iii.

Honorable Patti B. Saris
July 15, 2013
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Sincerely,

A handwritten signature in cursive script that reads "Julie Stewart" followed by a stylized flourish.

Julie Stewart
President

A handwritten signature in cursive script that reads "Mary Price" followed by a stylized flourish.

Mary Price
Vice President and General Counsel