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on Civil and Human Rights

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July 15, 2013

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs

Dear Judge Saris:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to provide comments on the Sentencing Commission's proposed priority policy issues for the amendment cycle ending May 1, 2014.

These comments focus on the specific areas where The Leadership Conference believes the Commission can improve the fairness and proportionality of the Guidelines; promote individualized review of specific offense conduct; and mitigate excessively punitive provisions that have not only promoted racial disparities in sentencing, but also have sustained a costly explosion in the number of individuals in the federal penal system.

In summary, we strongly support the following proposed Commission priorities:

- **Continuation of its work with regard to mandatory minimums, including consideration of the expansion of the "safety valve," and the elimination of the mandatory stacking of penalties.**

- **Review, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.**
- **Continuation of its comprehensive, multi-year study of recidivism.**

- **Possible consideration of amending the policy statement pertaining to "compassionate release," §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).**

The Leadership Conference does not, however, support the following proposed Commission priority:

-Implementing the recommendations set forth in the Commission's 2012 Report on <u>The Continuing Impact of *United States v. Booker* on Federal Sentencing.</u>

Our detailed comments are set forth below.

The Leadership Conference

Continuation of its work with regard to mandatory minimums, including consideration of the expansion of the "safety valve", and the elimination of the mandatory stacking of penalties.

a. Review of Mandatory Minimum Penalties

As documented by a recent report by the Congressional Research Service (CRS), one of the single most important elements in explaining the record incarceration numbers at the federal level could be "mandatory minimum" sentencing requirements, under which certain prison sentences for certain crimes, particularly for drug offenses, [1] are automatically required by federal and state law. Over the past 30 years, according the Congressional Research Service (CRS), the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent.[2] Currently, our federal prison system is operating almost 40 percent over capacity to house a large population of non-violent drug offenders, at a significant cost to taxpayers.

Mandatory minimum sentencing schemes eliminate judicial discretion and prevent courts from considering all relevant factors, such as culpability and role in the offense, and tailoring the punishment to the crime and offender. Further, studies have shown that mandatory minimum sentences not only exacerbate racial disparities in the criminal justice system, but are also ineffective as public safety mechanisms, as they increase the likelihood of recidivism.[3] One of the few ways to address this unsustainable growth in the Bureau of Prisons (BOP) prison population and disparities in sentencing is to address the length of time offenders are serving sentences in the federal system and increase a sentencing judge's ability to engage in individualized sentencing.[4]

While we categorically oppose mandatory minimum sentencing schemes, we agree with the Commission that "if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently."[5] The Leadership Conference supports the Commission's following specific recommendations regarding mandatory minimums:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines.[6] (See additional discussion of this recommendation below).
- Mitigating the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960, including more finely tailoring the current definition of "felony drug offenses" that triggers the heightened mandatory minimum penalties.[7]
- Amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) for firearm offenses, particularly the penalties for "second or subsequent" violations of the statute, to lesser terms.[8]
- Amending 18 U.S.C. § 924(c) so that the increased mandatory minimum penalties for a "second or subsequent" offense apply only to *prior* convictions to reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c).[9]
- Amending 18 U.S.C. § 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently to provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender

The Leadership Conference

will receive an excessively severe punishment.[10]

- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act's mandatory minimum penalty.[11]

b. Expansion of the Safety Valve

The Leadership Conference was especially pleased by the Commission's 2011 recommendation that "Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines."[12] We urge the Commission to reiterate its recommendation to Congress and to support an expansion of safety valve eligibility for non-violent offenders with even more than three criminal history points. Although not as effective as comprehensive reform to mandatory minimums, this eligibility expansion would permit judges to sentence more defendants with studied and thoughtful care given to the 18 U.S.C. § 3553(a) factors and to avoid unjust sentences caused by Congress's mistaken conflation of drug quantity with culpability in the Anti-Drug Abuse Act of 1986.

As the Commission reported to Congress in fiscal year 2010, "[m]ore than 75 percent . . . of Black drug offenders convicted of a drug offense carrying a mandatory minimum penalty have a criminal history score of more than one point under the sentencing Guidelines, which disqualifies them from application of the safety valve."[13] By contrast, 53.6 percent of Hispanic offenders, 60.5 percent of White offenders, and 51.6 percent of Other offenders had more than one criminal history point disqualifying them from safety valve relief. Thus, in addition to subjecting non-serious traffickers to harsh mandatory minimums, the safety valve's criminal history eligibility requirement magnifies racially disproportionate enforcement dynamics that occur at both the state and federal levels. No reasonable justification exists for maintaining a safety valve that applies too narrowly. The Commission should support significantly expanding the safety valve eligibility for nonviolent offenders with more than one criminal history point. Such an expansion would permit judges – in appropriate situations – to avoid imposing lengthy sentences on offenders who do not need and whose conduct does not justify serving long sentences in federal prison.

Review, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.

The Leadership Conference strongly urges the Commission to do what it can to ameliorate the harshness of drug sentencing. A substantial, across-the-board reduction would mitigate some of the worst harms of the mandatory minimums and their emphasis on quantity rather than actual criminal conduct as a one-size-fits-all proxy for culpability. Currently, the quantity-driven minimums and drug conspiracy liability under the guidelines can lead to defendants with minor to moderate roles in a drug operation receiving decades of prison time based on quantities of drugs they never handled, saw, or even knew about. As the Commission learned in 2007 with the implementation of reductions to Base Offense Level's, a two-level reduction in Guideline sentencing could be completed with administrative ease and would still be able to incorporate mandatory minimum sentences, while lowering existing penalties and reducing costs and the population in the BOP. The Commission's paramount responsibility is to ensure that sentences are no great than necessary. Accordingly, we encourage the Commission to review and amend the Drug Quantity Table in 2D1.1.

The Leadership Conference

In *U.S. v. Diaz*, Judge Gleeson wrote that "the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. Instead, they are driven by drug type and quantity, which are poor proxies for culpability."[14] The court noted that from the beginning, "the original Commission erred in deciding to base the Guidelines primarily upon typical, or average, actual past practice by analyzing 10,500 actual past cases in detail . . . along with almost 100,000 other less detailed case histories."[15] He goes on to state that while the "empirical data on drug trafficking offenses were gathered, [] they had *no* role in the formulation of the Guidelines ranges for drug trafficking offenses."[16] It is clear that the passage of the Anti-Drug Abuse Act of 1986 ("ADAA") compounded this problem by creating a two-tiered scheme of mandatory minimum and enhanced maximum sentences that have now become central features of the federal drug sentencing landscape. Under the ADAA, Congress established a five-year mandatory minimum, enlarged the maximum from 20 to 40 years, which was intended for the managers of drug enterprises, and provided a ten-year mandatory minimum, with a maximum of life, which was intended for the organizers and leaders.[17]

This legislation made drug type and quantity, rather than "role in the offense," trigger these harsh mandatory minimums, thereby "creating a problem for the commission, as those sentences were far more severe than the average sentences previously meted out to drug trafficking offenders. . . . and it might not look right for a defendant to have a Guidelines range significantly lower than the minimum sentences mandated by Congress in the ADAA."[18] As a result, the Commission completely "jettisoned its data making the quantity-based sentences in the ADAA proportionately applicable to *every* drug trafficking offense."[19] These Guidelines are therefore based neither on empirical data nor national experience and "the linkage of the guideline ranges to the ADAA's weight driven [mandatory minimum] scheme has resulted in far more punitive sentences that Congress intended."[20] We urge the Commission to act judiciously in developing amendments to the drug quantity table across drug types to correct a mistake that has had significant human and economic costs.

Continuation of its comprehensive, multi-year study of recidivism.

The Leadership Conference supports the Commission's continuation of its comprehensive multi-year study of recidivism. Over-incarceration has not only led to the burgeoning of our prison populations and spending, but has also led to an explosion in the number of people returning to the community each year. Although this phenomenon has resulted in an increased focus on barriers to reentry, to date, efforts to reduce reoffending have not been as robust as necessary.

Within three years of being released, 67 percent of ex-prisoners re-offend, and 52 percent are re-incarcerated. Americans are paying dearly for this trend. According to the Pew Center on the States, state and federal spending on corrections has grown 400 percent over the past 20 years, from about $12 billion to about $60 billion. To stem the tide of increasing budgets, much has been done over the last decade to study interventions that prevent further crime and result in substantial cost savings for local governments. For example, the Urban Institute evaluated a family therapy intervention for juveniles incarcerated in DC jails, concluding that on average, the program reduces arrests by 22.6 percent for program participants within one year.[21] The analysis found that each prevented arrest saves local agencies $26,100 and federal agencies $6,100 and that, on average, each averted arrest prevents $51,600 in associated victim harms, which accounts for more than 60 percent of all savings from averted crimes.[22] This is but one example of programming that has been proven to have a significant impact on both spending and reoffending.

Recent studies such as these have sparked a movement toward reform, primarily at the state level. State leaders have recognized the benefits of sentencing reforms and begun to transform sentencing and

The Leadership Conference

correction policies across much of the country through justice reinvestment initiatives. Early reports in those states that have implemented reforms suggest that these initiatives have been largely successful in reducing prison spending and improving public safety, by redirecting resources to less expensive community-based efforts and making adjustments to sentencing for low level non-violent drug offenders.

Justice reinvestment is typically been accomplished in three phases: (1) an analysis of criminal justice data to identify drivers of corrections spending and the development of policy options to reform such spending to more efficiently and effectively improve public safety; (2) the adoption of new policies to implement reinvestment strategies, usually by redirecting a portion of corrections savings to community-based interventions; and (3) performance measurement. Using this model, 21 states have implemented initiatives – including Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont – and six others are pursuing legislation. For those states that have implemented initiatives, great improvements have been made, resulting in almost immediate reductions in costs and prison populations. For example, the 2007 reinvestment initiative in Texas stabilized and ultimately reduced its prison pollution between 2007 and 2010.[23] The initiative also produced a 25 percent decrease in parole revocations between September 2006 and August 2008.[24]

Taking its cue from state leaders, it is imperative for the federal government to do all it can to reform sentencing policy in order to reduce reoffending, improve supervision programming, and increase overall public safety. The continuation of the Commission's multi-year study is a right step in this direction and the availability of current data will assist in analyzing how best to implement reforms.

Possible consideration of amending the policy statement pertaining to "compassionate release," §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons)

The Sentencing Reform Act of 1984 authorized the federal BOP to request that a federal judge reduce an inmate's sentence for "extraordinary and compelling" circumstances. This practice is also known as compassionate release. The request can be based on either medical or non-medical conditions that could not reasonably have been foreseen by the judge at the time of sentencing. While consistency and finality of sentences is an important goal of the criminal justice system, judicial discretion and review is equally as important to ensure the fairness of punishment and that the system continues to serve the purpose of justice. Congress recognized the importance of ensuring that justice be balanced with mercy when it created compassionate release.[25] It is the Commission's responsibility to determine the definition of "extraordinary and compelling" circumstances.

Under 18 U.S.C. § 3582(c) (1) (A) (i), the BOP has authority to petition for compassionate release. Yet BOP has been reluctant to use this authority in a manner consistent with the Commission's current policy statement. Even though the Commission promulgated a more expansive interpretation of "extraordinary and compelling," BOP issued regulations reiterating a very narrow "terminal illness/total disability" standard for seeking reduction of a prison term under this statute, inconsistent with this Commission's definition. This Commission's definition does not require "total" disability and also allows for consideration of a family member's death or inability to care for children. BOP has administered its far narrower test in fewer than 30 cases each year.[26]

The Leadership Conference

According to the Department of Justice's recent letter to the Commission, the department is in the process of reviewing and modifying aspects of the "Reduction in Sentence" program, has issued new medical criteria for evaluating requests, and is considering non-medical criteria.[27] Although the Department's comment signals steps in the right direction, we urge the Commission to not only evaluate amending its policy statement, but also to continue to work with BOP to bring its compassionate release policy in line with that of the Commission, as well as to improve the application process to include basic procedures to ensure fair and reasoned decision making. Ultimately, BOP should align its policy with that of the Commission, which would provide more opportunities for resentencing under these circumstances and provide resource saving sentence reductions.

Implementing the recommendations set forth in the Commission's 2012 Report on *The Continuing Impact of United States v. Booker* on Federal Sentencing.

The Leadership Conference does not support the implementation of the recommendations set forth in the Commission's 2012 *Booker* report and therefore does not support making this a priority during the upcoming amendment cycle. Most of the recommendations focused on addressing perceived sentencing disparities, nationally, locally, and by type of offense. The Leadership Conference believes that the "problem" of disparity is overstated due to factors such as government-sponsored sentencing reductions and "fast track" programs that previously were available in limited number of districts. In our view, the Commission should focus on the more significant problems of over-reliance on incarceration and the imposition of substantial periods of incarceration for non-violent offenders.

In sum, in determining which priorities to set for the 2013-2014 review cycle, the Commission should honor the intent of Congress to create greater equity within, and restore confidence to, the criminal justice system and focus its resources on priorities that will further those goals. The Leadership Conference urges the Commission to consider its own history and leadership in encouraging reform of sentencing laws, the overall aims of the criminal justice system and the Sentencing Reform Act, and the problems of mass incarceration, disparities in sentencing, and overspending.

Thank you for your attention to our concerns. If you have any questions, please contact Sakira Cook, Senior Policy Associate, at cook@civilrights.org or (202) 263-2894.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

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

[2] Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 2010 (2011), available at http://www.bis.gov/content/pub/pdf7cpus1Q.pdf.

The Leadership
Conference

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[3] Barbara S. Vincent and Paul J. Hofer, "The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings," (Federal Judicial Center, 1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf
[4] *See generally* Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.
[5] U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, at 345.
[6] *Id.* at 355-56.
[7] *Id.* at 356.
[8] *Id.* at 364.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 365.
[12] Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011 at xxxi.
[13] *Mandatory Minimum Penalties,* October 2011 at 159-160.
[14] *U.S. v. Diaz,* 2013 WL 322243 at *1 (E.D. N.Y. January 28, 2013).
[15] *Diaz,* 2013 WL 322243 at *4 (internal quotation marks and footnotes omitted).
[16] *Id.*
[17] *Id.*
[18] *Id.* at *5.
[19] *Id.* at *6.
[20] *Id.*
[21] Samuel Taxy, *et al.*, *The Costs and Benefits of Functional Family Therapy for Washington, D.C.*, at 3, District of Columbia Crime Policy Institute (September 2012) available at http://www.urban.org/UploadedPDF/412685-The-Costs-and-Benefits-of-Functional-Family-Therapy-for-Washington-DC.pdf.
[22] *Id.*
[23] See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Govt's Justice Ctr.,
The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending (2011); National Alliance for Model State Drug Laws, Justice Reinvestment Initiatives (2012).
[24] Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 11 (2010).
[25] FAMM and Human Rights Watch, *THE ANSWER IS NO: Too Little Compassionate Release in US Federal Prisons* (December 2012)
[26] *Id* at 2
[27] U.S. Department of Justice Annual, Criminal Division, Annual Report to U.S. Sentencing Commission Commenting on its proposed priorities for the guideline amendment year ending May 1, 2014. http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf