



March 18, 2014

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: Proposed Amendments to the Sentencing Guidelines 2014

Dear Judge Saris,

On behalf of the board, staff and members of Families Against Mandatory Minimums (FAMM) we are pleased to offer these comments on several proposed amendments to the Sentencing Guidelines.

(A) Whether Any Changes Should be Made to the Drug Quantity Table Across Drug Types, and Other Possible Changes.

FAMM supports the Commission's proposal to lower the base offense levels in the Drug Quantity Table by two levels to incorporate the corresponding mandatory minimum penalties so that the quantities trigger base offense levels 24 and 30 instead of the current levels of 26 and 32. We also encourage the commission to avoid adding any enhancements designed to offset the lower base offense levels.

(1) Authority to Delink the Guidelines from the Corresponding Mandatory Minimums.

We want to elaborate on our response to a question that came up at the March 13 public hearing about whether the Commission has the authority to "delink" the guidelines from the mandatory minimum penalties. As Julie pointed out, the Commission does have that authority and has exercised that option in the past.

The Commission has previously acknowledged that in crafting guidelines it has choices when indexing them to mandatory minimums.¹ When faced with drafting guidelines for an offense that includes a mandatory minimum, it has four choices. The Commission has on occasion crafted or amended guidelines with corresponding mandatory minimums using all four methods.

¹ U.S. Sentencing Comm'n, *The History of the Child Pornography Guidelines*, 44-45 (Oct. 2009) ("Child Pornography History").

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1. It can set the base offense level (which determines the sentencing range) for the offense so it exceeds the mandatory minimum. This of course is the approach taken in establishing the base offense levels for drugs.
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 under “crack minus two” and how the Commission proposes to amend the drug guidelines in 2014.
3. It can set the indicated base offense level below the mandatory minimum and rely on specific enhancements if necessary to achieve a mandatory minimum length sentence. For example, the Commission set the base offense levels for trafficking in child pornography *below* the mandatory minimum and including enhancements that can increase the sentence to or above it.²
4. It can set the base offense level without regard to the mandatory minimum. For example the Guidelines
 - assess a two-level enhancement when a gun is possessed 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;³
 - assign 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);⁴ and
 - subtract the weight of the carrier medium from the weight of LSD calculated under the guidelines, 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.

FAMM has urged the Commission in the past to embrace a less modest approach and set the guideline with respect to the many considerations – other than the mandatory minimum penalty assigned by Congress – that go into determining an appropriate base offense level.⁵ That said, we heartily welcome the proposed change.⁶

² USSG § 2G2.2(a); *see also* Child Pornography History at 46-49.

³ USSG § 2D1.1(b)(1).

⁴ USSG § 2D1.1(E).

⁵ *See, e.g.*, Letter from Julie Stewart & Mary Price to Honorable William K. Sessions, III, 7 (Aug. 16, 2010) (stating: “the Commission need not limit itself to reducing drug sentences by two levels to readjust the relationship to the mandatory minimum. In fact, the Commission should take a close look at the overall harshness of the drug guidelines and delink the guidelines from the mandatory minimums altogether so that sentences are more rational, relevant and meaningful.”) *available at*:

http://www.uscc.gov/Meetings_and_Rulemaking/Public_Comment/20100825/FAMM%20comment%20on%20prop%20priorities.pdf; *see also*, Letter from Julie Stewart & Mary Price to Honorable Patti B. Saris, 10 (Aug. 26, 2011) (same).

⁶ We fully support the proposal put forward by the Federal Public Defenders in testimony and written comments that urged the Commission to include *all* defendants, including those with the largest and smallest drug amounts, by

(2) Reducing Base Offense Levels Across Drug Types Will Help the Commission Comply with the Congressional Mandate in 28 U.S.C. § 994(g).

Guideline sentences for drug offenses, anchored as they are to hover above their mandatory minimum cohorts, have helped fuel the crisis the federal prison system, and by extension, the Department of Justice faces today.⁷ The Guidelines continue to exert a strong influence over the length of the sentence imposed. A little more than 60% of prisoners incarcerated in 2010 were serving Guideline sentences.⁸ In 2012, judges sentenced within the applicable guidelines in over 82% of cases, indicating the guidelines' continuing influence over sentencing.⁹ Drug sentences were not an exception; judges follow the guidelines or sentence below them pursuant to a government-sponsored motion in nearly 80% of cases.¹⁰

Drug sentences averaged 68 months in 2012.¹¹ The Urban Institute's recent study of the factors that have increased 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."¹² Time served for those offenders is inextricably linked to the mandatory minimum sentences on which the guidelines are based.

resetting the upper limit and lowering to level 10 the guideline floor. To do otherwise, as the Defenders point out, would exclude fully 30 percent of individuals convicted of a drug offense. See Testimony of Molly Roth on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Commission, 2, 22-27 (Mar. 13, 2014).

⁷ For a discussion of the pressures facing the federal Bureau of Prisons and the Department of Justice, see, e.g. *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before the Subcomm. On Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 4 (April 17, 2013) (statement of Charles E. Samuels, Jr., Dir. of the Fed. Bureau of Prisons), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf>; see also Michael E. Horowitz, Inspector General, U.S. Dep't. of Justice, *Top Management and Performance Challenges Facing the Department of Justice – 2013* (Dec. 11, 2013, reissued Dec. 23, 2013) (citing the opinion of the Deputy Attorney General that the increasing cost of the prison system is "unsustainable."), available at <http://www.justice.gov/oig/challenges/2013.htm#1>; see also Letter from Jonathan J. Wroblewski to Honorable Patti B. Saris, 7-10 (Jul. 11, 2013), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf.

⁸ U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Criminal Justice System* 140 (2011) ("Mandatory Minimum Report").

⁹ *Id.*

¹⁰ U.S. Sentencing Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, Tbl. 45.

¹¹ *Id.* at fig. E, table 14.

¹² See Julie Samuels, et al., *Urban Inst. Justice Policy Ctr., Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, 2 (Nov. 2013), available at <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>.

The role played by the Guidelines in prison population growth has also long been acknowledged by the Commission which wrote as far back as 2004 that “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.”¹³

Anchoring the guidelines in this fashion has indeed had profound consequences. Today, half of all federal prisoners are incarcerated for drug offenses¹⁴ (half of whom are first time offenders) and they are serving sentences that average 78 months.¹⁵

In light of the § 994(g) directive, 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.

Reducing sentence length appears to have been coupled with reducing the numbers of people prosecuted for crack cocaine. While one cannot draw a simple conclusion from a trend that may have multiple causes, it is indisputable that starting in 2008, the number of people prosecuted for crack cocaine offenses have fallen, while prosecutions for all other drug offenses have risen.¹⁶ The changes wrought by the Commission’s decision to lower crack cocaine penalties by two levels in 2008 and those made possible by the Fair Sentencing Act of 2010

¹³ U.S. Sentencing Comm’n, *Fifteen Year of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 49 (Nov. 2004); see also Nathan James, Cong. Research Serv., *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* 8-9 (2013), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf> (identifying, as one of four factors leading to overcrowded federal prisons the growth in mandatory minimums that has in turn led to increased sentencing ranges and lengths under the federal Sentencing Guidelines.)

¹⁴ U.S. Sentencing Comm’n, *Webcast: Analysis of Drug Trafficking Offenders and Guidelines*, accompanying PDF *Analysis of Drug Trafficking Offenders*, Tbl. 1 (2014) (“Webcast”), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20140109/Data-Presentation.pdf.

¹⁵ Nancy La Vigne & Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, 4 (Urban Institute, Dec. 2012), 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.

¹⁶ Webcast at Fig. 2.

appear to have had a calming effect on the number of crack cocaine prosecutions. A similar change across drug types might very well have the same influence.

It is expected that reducing all drug guidelines by two levels will result in a drop in the federal prison population of 6,550 five years from the change,¹⁷ and perhaps some more in light of the Attorney General's very recent instruction to prosecutors that they not object to defense efforts to seek the benefit of the change prospectively.¹⁸

(3) Reducing Drug Penalties by Two Levels Will Modestly Address the Harshness of Drug Sentencing Tied to Mandatory Minimums.

While budgets were expanding and money for prisons was not an issue, so called "tough on crime" lawmakers found it expedient to pass criminal statutes with mandatory minimums. While some of these politicians genuinely believed that rigid sentences would deter criminals and keep our communities safer, it became too easy to score political points by seizing on the crime *du jour* to support adopting a new mandatory minimum. Mandatory minimums were "frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'"¹⁹ Other lawmakers describe a more principled, but equally evidence-bereft, process. For example, former Representative Dan Lungren, a Republican from California, reflected on the dramatic escalation of the crack cocaine mandatory minimum by the House of Representatives in 1986: "We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did, thinking we were doing the right thing at the time."²⁰

Tying the Sentencing Guidelines for drug offenses to the mandatory minimums and then arraying the guideline ranges below, between and (mostly) above them -- using weight as the trigger -- meant that guideline sentences for simple drug offenses could be, and frequently are, very long.

The change proposed by the Commission is indeed, modest. It would reduce the average drug sentence by a mere 11 months. It will also depress somewhat the influence of unduly harsh and ill-considered mandatory minimum sentences on guideline sentences. And, while it will do

¹⁷ *Id.* at Tbl. 5.

¹⁸ U.S. Department of Justice, Office of Public Affairs, Press Release, "Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers" (March 13, 2014), available at <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

¹⁹ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 28-29 (2010), 24 (quoting William H. Rehnquist, Luncheon Address (June 18, 1993), in *U.S. SENTENCING COMM'N, DRUGS AND VIOLENCE IN AMERICA* 287 (1993)).

²⁰ Congressional Record, 111th Cong. H 6202 (July 28, 2010) available at <http://thomas.loc.gov/cgi-bin/query/F?r111:7:./temp/~r111M9LunZ:e60208>.

little to correct the untoward influence of drug quantity on drug sentences it will be a first step to softening the impact of the decision to use such a crude tool to assess culpability.

(4) The reduction should not be offset by enhancements.

It is beyond dispute that the five- and ten-year mandatory minimums and the guidelines based on them, while set to capture the most serious drug offenders,²¹ are in fact used for an array of less culpable offenders, including low-level street dealers, couriers and others with minimal control over drug operations. The Commission's 2011 report on mandatory minimums found that in 2009, "courier" captured the most common function, representing 23.0% of all offenders, followed by wholesaler (21.2%), and street-level dealer (17.2%). High-level Supplier and/or importer made up a mere 10.0%.²² Moreover, the report concluded that "the quantity of drugs involved in an offense was not closely related to the offender's function in the offense."²³

That insight notwithstanding, the median base offense levels for four of the five primary drugs covered by the guidelines match or exceed level 26, the range considered appropriate for "serious drug traffickers."²⁴ But only 6.2% of drug offenders receive an aggravating role adjustment, for, among other things, being a supervisor or leader of a drug operation.²⁵

In other words, the guidelines, absent any aggravating adjustment, call for sentences that are already too long in light of the role of the defendant. This is because they are, and even if the amendment is enacted, will continue to be anchored to the ill-conceived mandatory minimums. That insight, coupled with the fact that the guidelines already provide for many enhancements, including 14 in U.S.S.G. § 2D1.1, three in U.S.S.G. § 3B1.1 and a variety of upward departure option, counsel against further additions at this time. No more are needed at the present time.

We urge as well that the Commission avoid as well any enhancements for harms associated with drug production operations. Federal law and the guidelines currently include a variety of options for courts to use when needed to address environmental damage or other harms caused by drug manufacturing and production, including marijuana cultivation and processing. These include an enhancement specific to environmental harm. Presently, U.S.S.G. § 2D1.1(13)(A) increases the offense level by two for unlawfully causing a hazardous or toxic substance to be discharged, emitted or released into the environment. An upward departure exists in case two levels are insufficient to punish the harm.²⁶ Additional enhancements would be

²¹ Mandatory Minimum Report at 24.

²² Mandatory Minimum Report at xxxii.

²³ *Id.* at xxxiii.

²⁴ Webcast at Tbl. 2.

²⁵ Webcast at Tbl. 3.

²⁶ See U.S.S.G. §2D1.1, comment (n. 8).

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redundant and we urge the Commission to refrain from including them absent any evidence that they will deter conduct or are necessary.

(B) Circuit Conflict Involving the Interpretation of § 1B1.10.

FAMM strongly supports Option 1 as the better approach when resentencing a defendant under § 1B1.10 who was originally sentenced for an offense involving a mandatory minimum sentence but who received a reduction below the mandatory minimum as a result of a government motion to recognize the defendant's substantial assistance. The government's motion already rendered § 5G1.1(b) superfluous, by directing the court to consider the calculated guideline range. Had the new guideline range been available at the time of sentencing, it, rather than the mandatory minimum, it would have provided the properly calculated guideline range. The goal of making a reduction retroactively available is to give effect to the recognition that the original guideline range recommended sentences that were too long, and to correct the guideline to bring them better in line. That correction should not be denied defendants who had the misfortune of being sentenced (and cooperating) before the guideline was made retroactive. It strikes us as formalistic and unfair to withhold from such defendants the benefit of retroactivity for the sake of a mandatory minimum *that has already been ignored to reward a cooperating defendant*. We can see no principled reason to reinstate the mandatory minimum for the sole purpose of denying the sentenced defendant the chance to secure a proportionate reduction.

(C) Conclusion

We appreciate this opportunity to provide our views on the Commission's work to amend the Sentencing Guidelines and look forward to working with you in this amendment cycle.

Sincerely,

Julie Stewart



President

Mary Price


General Counsel