

Testimony Before The United States Sentencing Commission

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Written Testimony Regarding Drug Guidelines

I am pleased to have the chance to testify on behalf of the Sentencing Commission's Practitioners Advisory Group regarding the proposals and issue for comments that deal with the drug guidelines. As one of the Commission's three standing advisory groups, the PAG strives to provide the perspective of those in the private sector who represent individuals investigated and charged under the federal criminal laws. We appreciate the Commission's willingness to listen to and consider our thoughts on various possible approaches to issues that arise under the guidelines.

I. The PAG Strongly Supports The Proposal To Change The Drug Quantity Table Across Drug Types

The Commission has requested comment on whether any changes should be made to the Drug Quantity Table and has offered a proposed amendment to reduce by 2 levels each base offense level in the drug quantity table that triggers mandatory minimum penalties. For the reasons stated below, the PAG supports the proposed 2-level reduction.

A. The Proposed Amendment Is An Appropriate Step In Reducing and Eventually Eliminating the Impact of Mandatory Minimum Penalties on Defendants to Whom a Mandatory Minimum Does Not Apply

The PAG strongly supports the Commission's increased efforts to address the unduly harsh sentences that result from the penalty structure of federal drug laws. These efforts include, most recently, the Commission's recommendations to Congress to reduce mandatory minimums in drug offenses, to make the Fair Sentencing Act retroactive and to expand the safety valve. We welcome the proposed 2-level reduction across the drug quantity table because it is a step in the direction of eventually eliminating the influence that the mandatory minimum penalties have on defendants who have not engaged in the conduct those harsh and inflexible statutory penalties are intended to punish. It is the PAG's position that the Drug Quantity Table should be completely delinked from the mandatory minimums. Indeed, such a link is contrary to Congress' original intent of applying mandatory minimums to the most serious offenders, i.e., the kingpins, managers and leaders of drug operations, because that linkage means that the mandatory minimums increase the penalties for drug defendants who are not the most serious offenders.

The Commission's 2011 report to Congress regarding mandatory minimums recognized that the intent of the Anti-Drug Abuse Act of 1986 ("ADAA") was to create a two-tiered penalty structure for specific types of drug traffickers. Specifically, the Commission's 2011 report quoted the following statement made on the floor of the Senate by then Senate Minority Leader Robert Byrd:

For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is ten years. . . . Our proposal would also provide mandatory

minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail – a minimum of 5 years for the first offense.

U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011).

It is clear that Congress’s intent in enacting the ADAA was to assign mandatory minimums to serious drug traffickers, i.e., the kingpins and middle-level dealers. But linking the Drug Quantity Table to the mandatory minimums has allowed a single factor—the quantity of drugs involved in the *offense*—to subject lower level offenders to guidelines ranges at or near the ranges for the most serious violators. Thus, the current guidelines ranges allow drug quantity to subject *all* drug offenders to the harsh penalty hierarchy created by mandatory minimums regardless of their role in the offense. That is flatly inconsistent with the reality that “[t]he overwhelming majority of drug trafficking offenders are neither managers or leaders – in Fiscal Year 2011, roughly 93% of trafficking offenders did not fall into either of those leadership categories.” *U.S. v. Diaz*, No. 11-CR-00821, 2013 WL 322243, at *6 (E.D.N.Y. Jan. 28, 2013). In fact, the Department of Justice has long recognized that drug quantity does not serve as a good proxy for identifying the type of drug trafficker:

Regardless of the functional role a defendant played in the drug scheme, the drug amounts involved in the offense are similar across the roles. After applying Guideline adjustments and downward departures, there is a great deal of overlap in the distribution of sentences among high-level dealers, street level dealers, couriers, and those with a peripheral role.

U.S. Dept. of Justice, Nat’l Inst. Of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994, February).

Because drug quantity overstates an offender’s culpability in a drug trafficking crime, the PAG believes that the Drug Quantity Table should be completely delinked from the ADAA’s mandatory minimums. As such, the PAG welcomes the proposed 2-level reduction as a step in that direction. Furthermore, the PAG believes that the proposed 2-level reduction should be applied to all drugs.¹

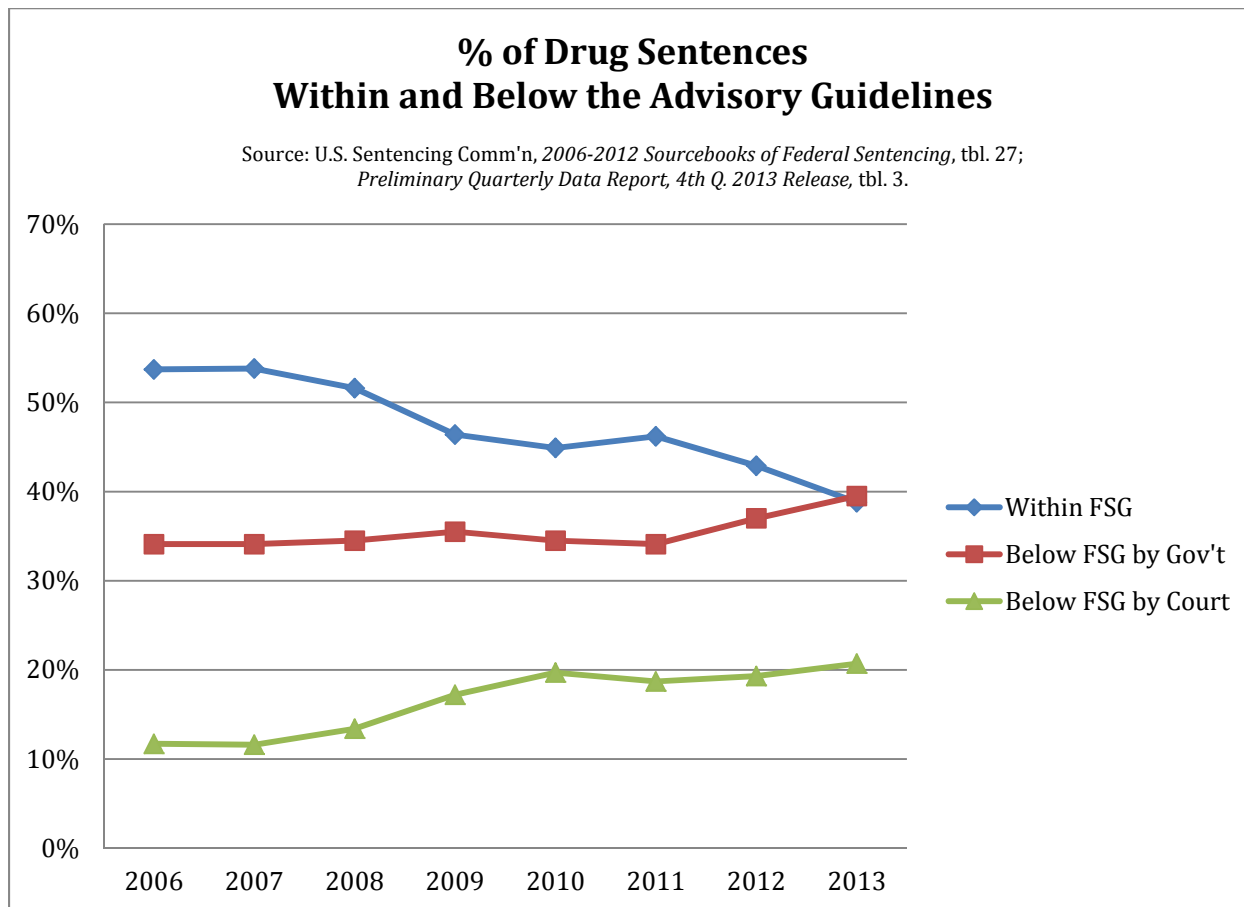
B. Empirical Sentencing Data Support the Proposed 2-Level Reduction

Empirical sentencing data suggest that the current guidelines ranges for drug trafficking offenses overstate the appropriate punishment for the offender. Based on the Commission’s

¹ The Commission also should consider the recent trend among States to decriminalize marijuana when assessing whether a further reduction for marijuana offenses is warranted in the future. For example, Washington and Colorado have decided to fully legalize marijuana and many other states have at least partially legalized marijuana in some form, such as for medical uses.

published reports, Figure 1 below illustrates that within guideline sentences for drug trafficking offenses (sentenced primarily under USSG §2D1.1) have consistently decreased since *Booker*. At the same time, the rate of below-guideline sentences has increased significantly, with judge-imposed downward variances increasing from 11.7% in 2006 to 20.7% in the 4th Quarter of FY 2013.

Figure 1



These within-guidelines and variance rates for drug offenses are in sharp contrast to the overall rates for all federal offenses, as depicted in Figure 2 below. In contrast to a 51.2% overall within-guidelines rate, a mere 38.8% of drug sentences now are imposed within the guidelines.

Figure 2

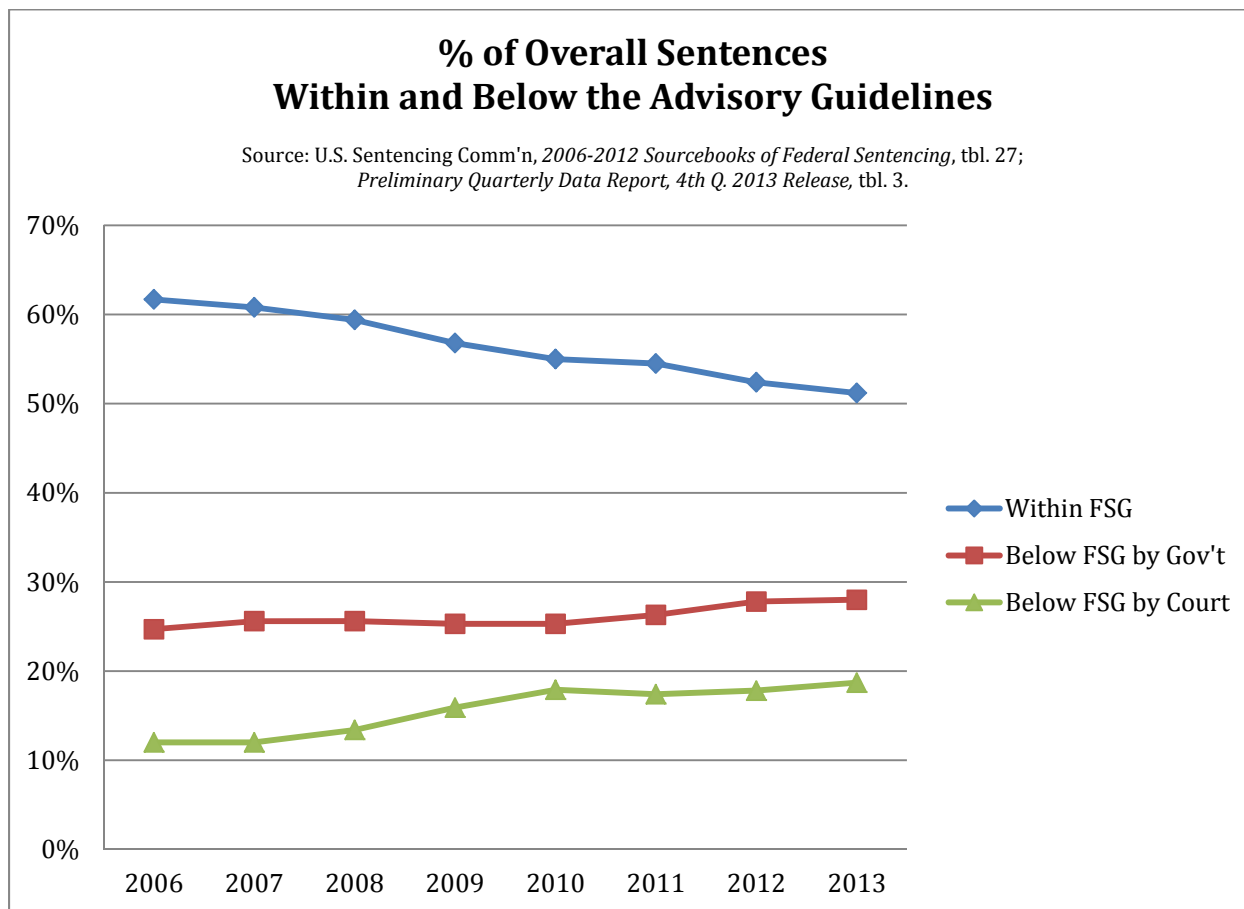
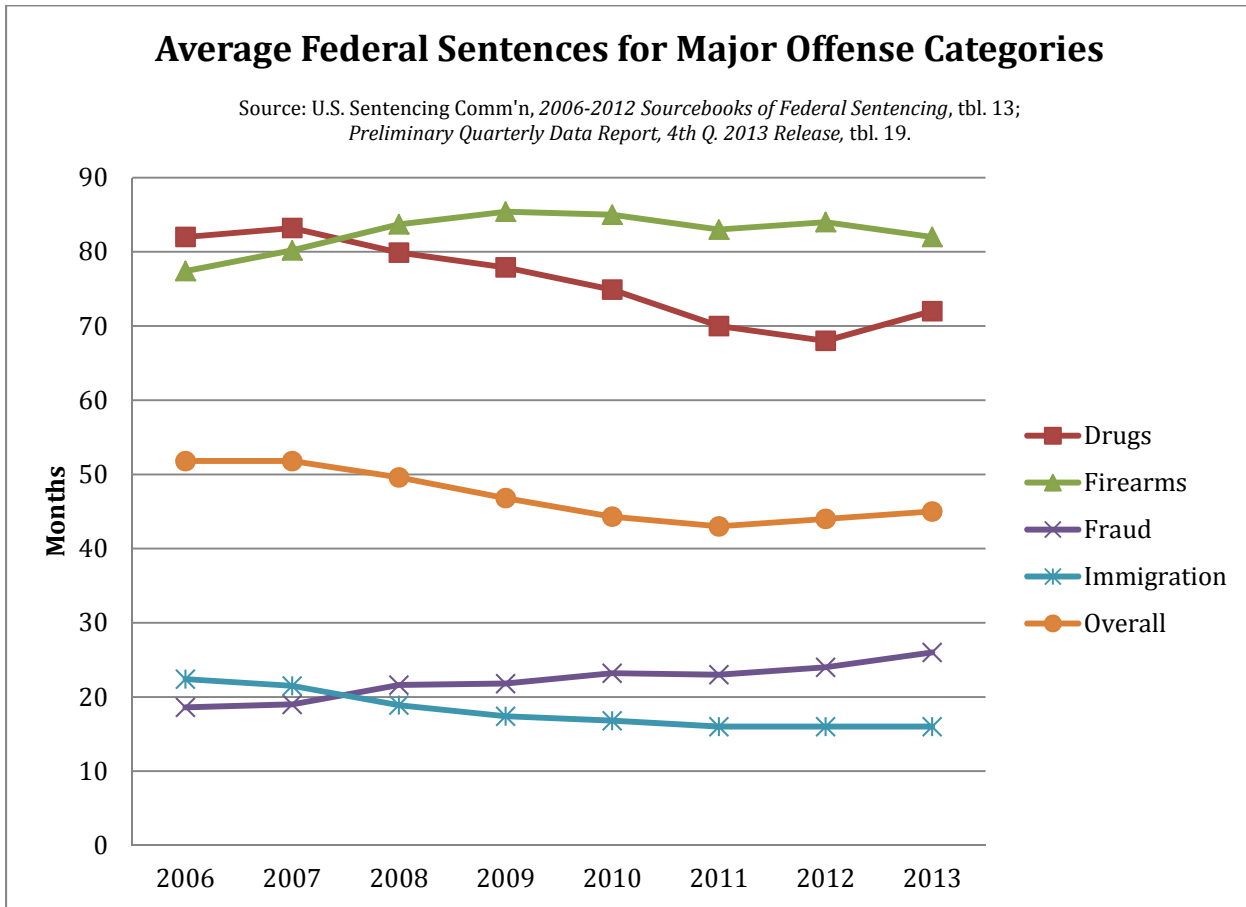


Figure 3 illustrates the average sentence-length imposed among major offense categories since 2006. Not surprisingly, in light of the rates just discussed for drug sentences, the average sentences imposed under USSG §2D1.1 generally have decreased from 82 months in 2006 to 72 months in the 4th Quarter of FY 2013. Given these statistics, the proposed 2-level reduction is necessary to better reflect an appropriate sentence for those who commit drug trafficking offenses.

Figure 3



Finally, it should be noted that the PAG is unaware of any empirical studies indicating that slightly lower sentences for drug trafficking offenses would cause increased rates of recidivism. Indeed, longer prison sentences may actually contribute to recidivism while shorter terms of imprisonment or use of alternatives can and often do contribute to lowering rates of recidivism. As Judge Weinstein observed in *United States v. Bannister*, 786 F. Supp. 2d 617, 658 (E.D.N.Y. 2011), “[e]xcept for the incapacitation effect of incarceration, there is little apparent correlation between recidivism and the length of imprisonment. Those who serve five years or less in prison have rearrest rates of 63 to 68 percent, with no discernible pattern relating to sentence length.” (citing Patrick A. Langan & David J. Levin, Bureau of Justice Stat., *Dep’t of Justice, Recidivism of Prisoners Released in 1994* 17 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (reporting results for prisoners released since 1994)); see also Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) (noting that sanctions can inhibit reintegration and rehabilitation and can increase recidivism); Elena Saxonhouse, Note, *Unequal Protection:*

Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination, 56 STAN. L. REV. 1597, 1611 (2004).

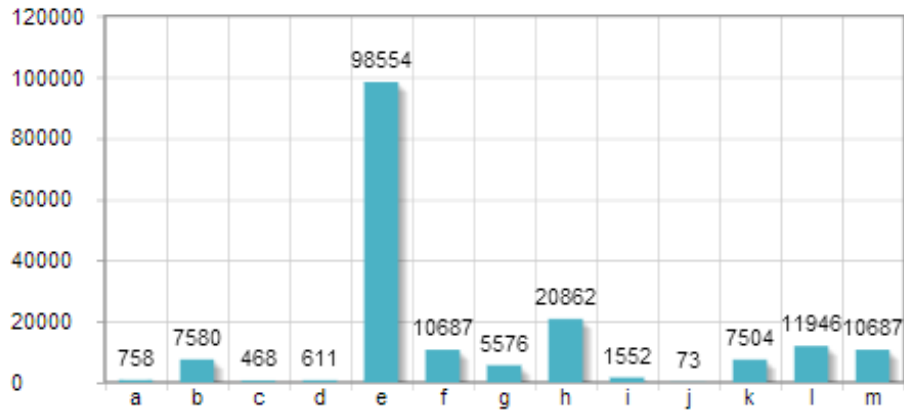
As the Commission is well aware, lengthy terms of imprisonment also exacerbate the population problem that has confronted the Bureau of Prisons for a generation. Figure 4 is a snapshot from the Bureau of Prison's website illustrating that drug offenders comprise just over half of its total population—a population now at 138% of rated capacity. There can be no doubt that by easing prison overpopulation, the proposed amendment would address the Commission's intent to "consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." 78 FR 51820 (August 21, 2013).

Figure 4

Offenses

Updated Monthly -- Last Updated: Saturday, 25 January 2014

Please Note: Data is limited due to the availability of offense-specific information.



| Chart Label | Offense | # of Inmates | % of Inmates |
|-------------|---|--------------|--------------|
| a | Banking and Insurance, Counterfeit, Embezzlement | 758 | 0.4% |
| b | Burglary, Larceny, Property Offenses | 7,580 | 3.9% |
| c | Continuing Criminal Enterprise | 468 | 0.2% |
| d | Courts or Corrections | 611 | 0.3% |
| e | Drug Offenses | 98,554 | 50.1% |
| f | Extortion, Fraud, Bribery | 10,687 | 5.4% |
| g | Homicide, Aggravated Assault, and Kidnapping Offenses | 5,576 | 2.8% |
| h | Immigration | 20,862 | 10.6% |
| i | Miscellaneous | 1,552 | 0.8% |
| j | National Security | 73 | 0.0% |
| k | Robbery | 7,504 | 3.8% |
| l | Sex Offenses | 11,946 | 6.1% |
| m | Weapons, Explosives, Arson | 10,687 | 5.4% |

C. Any Reduction in the Drug Quantity Table Should be Accompanied by a Mitigating Role Tiered Reduction

Given an amendment to the Drug Quantity Table, the Commission also asks if there are any circumstances that should be wholly or partially excluded from such an amendment and what conforming changes should be made to other provisions of the Guidelines Manual. As an initial matter, the PAG does not believe that there are any circumstances that should be wholly or partially excluded from an amendment to the Drug Quantity Table. However, in applying an amendment to other portions of the Guidelines Manual, the PAG believes that the 2-level reduction should also apply to the mitigating role tiered reduction outlined in §2D1.1(a)(5). This provision currently provides that if the defendant receives an adjustment under §3B1.2 for mitigating role and the base offense level is 32, reduce by 2 levels; if the base offense level is 34 or 36, reduce by 3 levels; and if the base offense level is 38, reduce by 4 levels. With the proposed 2-level across-the-table decrease, the reduction in §2D1.1(a)(5) should apply to defendants with a base offense level starting at level 30, rather than 32 (with similar adjustments for the higher base offense levels). Such a reduction is consistent with the intent, under the proposed amendment, to reduce the impact of drug quantity across the board, and it would address concomitant concerns over the increasing costs of incarceration and prison overcrowding. As there are very few reductions available to address mitigating circumstances in drug cases, the PAG believes that including §2D1.1(a)(5) in the proposed amendment would be a positive step toward fully accounting for the differences in culpability across drug offenders.

II. No Changes Should Be Made Regarding Drug Productions Operations

The Commission also requested comment on whether the guidelines for offenses involving drug production operations provide penalties that adequately account for the environmental and other harm caused by the offenses. The PAG believes that the guidelines adequately address all environmental and other harms caused by drug production operations. In keeping with the Commission's stated intention to consider the costs of incarceration and the overcapacity of prisons, the PAG believes that no changes should be made to increase the punishment for drug production operations, especially in the absence of evidence suggesting change is warranted.

Conclusion

On behalf of the PAG, thank you again for the opportunity to provide our perspective on these very important issues.