

**Public Comments submitted to the
United States Sentencing Commission regarding
whether the Commission should lower by two levels
the base offense levels in the Drug Quantity Table
across drug types in guideline §2D1.1**



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Submitted by
Bill Piper, Director of National Affairs, Drug Policy Alliance

The Drug Policy Alliance (DPA), the nation's leading organization advancing drug policies that are grounded in health, science, compassion, and human rights, appreciates this opportunity to submit our comments to the United States Sentencing Commission on whether the Commission should reduce drug sentencing guidelines by two levels.

As the war on drugs enters its fifth decade, there is a growing acknowledgement that federal drug sentencing policies have led to unsustainable levels of incarceration. The U.S. is the world's largest jailer, and roughly one out of every 100 American adults is behind bars.¹ The cost to incarcerate so many people is an issue of growing concern: the Bureau of Prisons constitutes nearly a third of the annual budget for the U.S. Department of Justice, representing almost seven billion dollars per year in spending.² In response, Attorney General Eric Holder and the Obama Administration are pursuing numerous reforms to drug sentencing policy, including stopping the use of mandatory minimum sentences in some federal drug cases. These steps are consistent with the approach that we have advocated for many years based on evidence that mandatory minimum sentencing policies have fueled mass incarceration and racially disparate sentencing outcomes.³ We supported the USSC's recommendations to begin to reform policies driving over-incarceration at the federal level in the recent *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, to expand the access to the safety valve, mitigate the cumulative impact of criminal history, diminish the incidence of stacking mandatory minimum sentences, undertake a comprehensive study of recidivism, and generally reduce the use of mandatory minimums.⁴ We now advocate that the USSC use its discretion to reduce all drug sentencing guidelines by two levels in order to conform federal drug sentences to 18 USC § 3553(a)(2), 28 USC § 994(c) and (d), and 28 USC § 994(g).

Recommendations

Reducing all drug sentencing guidelines by two levels would be an effective method to better conform drug sentences to 18 USC § 3553, 28 USC § 994(c) and (d), and 28 USC § 994(g), while having little to no negative impact on public safety. Under this approach, statutory mandatory minimums would fall within, rather than below, the guideline's recommended sentence range for first-time, nonviolent drug offenses. If there are aggravating factors present in the commission of the offense, these offenders could be dealt with through the available enhancements under the guidelines.

The USSC reported in 1995 that it sets the base offense level for drug offenses slightly higher than the mandatory minimum in order to pressure defendants to plead guilty or otherwise cooperate with the government.⁵ This reasoning proved to be unfounded when the USSC reduced crack cocaine sentences by two levels in 2007 and the rate of guilty pleas and cooperation were unaffected.⁶ Additionally, low quantity thresholds result in the apprehension of many small-time sellers who, even if they want to cooperate, do not have valuable information to provide prosecutors with to receive substantial assistance.⁷

Regardless, placing the base offense levels for drug offenses above the prescribed mandatory minimums is an inappropriate mechanism by which to encourage cooperation. In fact, this policy has the unfortunate consequence of punishing *noncooperation*, which raises a host of due process concerns and arguably infringes on a defendant's 6th amendment right to trial. Also, defendants who provide substantial assistance to the prosecution are eligible for substantial reductions in sentences that fall below the mandatory minimums under 18 USC § 3553(e), making the purpose of higher guideline ranges as a means to encourage cooperation superfluous.

In addition, the current guidelines do not accomplish their stated goals to provide just punishment, deterrence, incapacitation, and rehabilitation.⁸ While the federal government spends an enormous amount of money in the apprehension, prosecution, and incarceration of low- to mid-level drug offenders, it does not have a positive impact on public safety and has led to significant overcrowding in the Federal Bureau of Prisons.⁹ There is no evidence to support the claim that longer sentences lead to safer communities and studies, including a major study conducted by the Department of Justice, have concluded there is little – if any – connection between fluctuations in criminal activity and incarceration rates,¹⁰ especially in reference to drug crimes.¹¹ Furthermore, evidence is beginning to show that imprisonment leads to greater rates of recidivism among drug offenders, when compared to probation and other alternatives,¹² and prison has long been abandoned as an ideal space for rehabilitative intervention.¹³

Lengthy terms of imprisonment do not result in lower rates of drug use or drug-related crime. A 1997 report by the RAND Corporation found that mandatory minimums and long terms of incarcerations are less cost-effective at reducing cocaine consumption and drug-related crime than putting heavy users through treatment programs.¹⁴ Research has also found that while imposing longer sentences only on high-level dealers has the potential to be cost-effective in reducing consumption, determining offense seriousness based solely on drug quantity is an ineffective means by which to accomplish this feat.¹⁵ Additionally, high-level dealers are less likely to possess large amounts of drugs, as they are able to pay others to assume this risk.¹⁶

These studies show that our draconian quantity-based drug sentencing approach has little to no effect on criminal activity and recidivism, or increasing rehabilitation and public safety, thus highlighting the need for reductions in drug sentencing levels in order to fulfill mandates laid out by Congress in 18 USC § 3553(a)(2)(B), (C), and (D). The U.S. must respond to calls from world leaders¹⁷ and move away from a criminal justice approach to drug policy in favor of a public health model that expands and emphasizes access to treatment and rehabilitation, such as the decriminalization regime that has proved extremely successful in Portugal since being enacted more than a decade ago.¹⁸

The current federal guidelines result in the imprisonment of a vast number of non-violent, low- to mid-level drug offenders and trigger a downward spiral of disadvantage and collateral consequences that negatively affects those incarcerated, their families, and their communities. The excessive incarceration in drug sentencing makes thousands of people permanent economic, labor market, and civic outsiders.¹⁹ It increases and entrenches poverty in our most vulnerable communities.²⁰ Individuals suffer when their lives are disrupted by unnecessary imprisonment and the lifetime of legal discrimination that follows. Families suffer when a financial contributor is imprisoned and communities suffer from a cumulative loss of earning power when high concentrations of residents are incarcerated and returning ex-offenders are unable to procure employment.²¹ Tragically, incarceration promotes a cycle of involvement with the criminal justice system for the children of offenders, hindering intergenerational economic mobility, familial stability, and public safety.²² The literature shows that current drug sentencing guidelines do not adequately take into accounts the considerations outlined in 28 USC § 994(c) and (d). Reducing all drug sentencing guidelines by two levels would work towards conforming to these standards by more properly addressing both the factors that lead many drug offenders to commit drug related crimes and the consequences of lengthy imprisonment as a response.

Current drug sentencing levels are also in questionable compliance with 28 USC § 994(g), which dictates that “guidelines prescribed [by the USSC] shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.”²³ Since the creation of the USSC, the level of overcrowding in federal prisons has been dramatically increasing and is now approaching 40%.²⁴ In 2010, 23,964 people were convicted of federal drug violations²⁵ and a majority of federal prisoners – 103,194 of 191,757 – were housed in federal facilities because of drug convictions.²⁶ 87,323 of these prisoners were convicted of an offense carrying a mandatory minimum sentence of at least 5 years. Marijuana offenses accounted for 6,161– or more than 25% – of the 23,964 drug-related convictions in 2010 and 12,473 federal inmates,²⁷ despite the drug being arguably less dangerous than alcohol and having been decriminalized in almost a third of U.S. states.²⁸ Reducing all drug sentencing guidelines by two levels would bring sentencing policy in line with 28 USC § 994(g) by significantly reducing overcrowding in federal prisons.

Conclusion

As they are currently written, federal sentencing guidelines perpetuate a system that is not cost-effective in reducing drug consumption or prohibition-related crime and violence, does not improve public safety, fuels overcrowding in federal prisons, and destabilizes the lives of countless non-violent individuals, their families, and their communities. The Drug Policy Alliance urges the USSC to take a step towards conforming federal drug sentences to Congressional mandates laid out in 18 USC § 3553(a)(2), 28 USC § 994(c) and (d), and 28 USC § 994(g) by reducing all federal drug guidelines by two levels.

The Drug Policy Alliance thanks the Commission for the opportunity to comment.

¹ American Civil Liberties Union, “Mass Incarceration Problems,” accessed March 6, 2014, https://www.aclu.org/files/assets/massincarceration_problems.pdf.

² Nancy La Vinge and Julie Samuels, *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions* (Washington, D.C.: The Urban Institute, 2012).

³ Marc Mauer, “The Impact of Mandatory Minimum Penalties in Federal Sentencing,” *Judicature*, 944, no. 1 (2010): 6-8, 40.

⁴ U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 348-360.

⁵ U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* at 148 (1995).

⁶ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 55.

⁷ Eric Sevigny and Jonathon Caulkins, “Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons,” *Criminology & Public Policy* vol. 3, no. 3 (2004): 401-34.

⁸ U.S. Sentencing Commission, *An Overview of the United States Sentencing Commission* (Washington, DC), 1.

⁹ Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, before the House of Representatives Committee on Appropriations, Sub-Committee on Commerce, Science, Justice and Related Agencies, March 6, 2012.

¹⁰ James Austin and John Irwin, *It's About Time. America's Imprisonment Binge*, 3rd ed. (Palo Alto, CA: Wadsworth 2000), cited in James Austin and Tony Fabelo, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, The JFA Institute (Washington, D.C.: July 2004); U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (Washington, D.C.: June 2002).

Cassia Spohn and David Holleran, “The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders.” *Criminology* vol. 40, no. 2 (2002): 331.

¹² *Ibid.* at 329-357, 351.

¹³ Charles Tittle, "Prisons and Rehabilitation: The Inevitability of Disfavor," *Social Problems* vol. 21, no. 3 (1974): 385.

¹⁴ Jonathon Caulkins, et al., *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* RAND: Drug Policy Research Center (1997): 62.

¹⁵ *Ibid.* at 61-62.

¹⁶ *Ibid.* at 61-62.

¹⁷ Ari Rosmarin and Niamh Eastwood, "A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe," Release Campaign: Drugs – It's Time for Better Laws (2012).

¹⁸ For a more thorough report documenting the benefits of Portuguese decriminalization, see Caitlin Hughes and Alex Stevens, "What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?" *The British Journal of Criminology* vol. 50, no. 6 (2010): 999-1022; Also Glen Greenwald, "Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies," *CATO Institute*, Washington, D.C. (2009).

¹⁹ Alex Stevens, *Drugs, Crime and Public Health: The Political Economy of Drug Policy*, Abingdon: Routledge (2010): p.116.

²⁰ Dina Rose and Todd Clear, "Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory," *Criminology* vol. 36, no. 3 (August 1998).

²¹ Dina Rose, Todd Clear, and Judith Ryder, *Drugs, Incarceration and Neighborhood Life: The Impact of Reintegrating Offenders into the Community*, National Criminal Justice Reference Service (Rockville MD: 2002): 14.

²² Joseph Murray, Carl-Gunnar Janson, and David P. Farrington, "Crime in Adult Offspring of Prisoners: A Cross-National Comparison of Two Longitudinal Studies," *Criminal Justice and Behavior* vol. 34, no. 1 (January 2007): 133-49.

²³ See 28 USC § 994(g)

²⁴ Statement of Charles Samuel, Director of the Bureau of Prisons, Before the U.S. Sentencing USSC. February 16, 2012.

²⁵ ²⁵ U.S. Sentencing Commission. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011): 162.

²⁶ *Ibid.* at 165.

²⁷ *Ibid.* at 218.

²⁸ Robert Gable, "The Toxicity of Recreational Drugs," *American Scientist*, vol. 94 (2006).; Also Tristan Kirby and Adam Barry, "Alcohol as a Gateway Drug: A Study of US 12th Graders," *Journal of School Health*, vol. 82, no. 8 (2012).