WASHINGTON
LEGISLATIVE OFFICE

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. 2002-8002

Re: ACLU Comments in response to Notice for Proposed U. S. Sentencing Commission (USSC) Amendments to the Sentencing Guidelines, policy statements and commentary for the Cycle Ending in May 2014 (cite 79 Fed. Reg. 3279).

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Dear Judge Saris:

With this letter the American Civil Liberties Union ("ACLU") provides public comments to the U.S. Sentencing Commission on its notice of proposed amendments to the sentencing Guidelines, policy statements and commentary for the amendment cycle ending May 1, 2014. The ACLU is a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty, equality, and justice embodied in our Constitution and our civil rights laws.

These comments address several of the issues outlined by the Commission where the ACLU believes the Commission can take substantial steps toward improving the fairness and proportionality of the Guidelines, promoting individualized consideration of specific offense conduct, and mitigating excessively punitive provisions that have promoted not only racial disparities in sentencing but also a sustained and costly increase in the number of individuals in the federal Bureau of Prisons system. Our comments are focused on two areas of specific interest to our organization: the proposed amendment to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) to respond to two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C § 3582(c)(2) and a proposed amendment to the Guidelines applicable to the Drug Quantity Table in 2D1.1.

I. Proposed Amendment regarding the effect of a mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C. § 3582(c)(2).

This proposed amendment responds to two circuit conflicts involving the effect of a mandatory minimum sentence on the guideline range in resentencing proceedings under 18 U.S.C. § 3582(c)(2) and the Commission's policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). The Commission has proposed two options that reflect differing approaches taken by circuit courts. Option 1 would add a new subsection (c) to § 1B1.10 to state that when a district court was authorized to impose a sentence below a mandatory minimum based on substantial assistance, "for purposes of this policy statement, the amended guideline range shall be determined without regard to the operation of § 5G1.1 [Sentencing on a Single Count of Conviction] and § 5G1.2 [Sentencing on Multiple Counts of Conviction]."[1] Conversely, Option 2 would set forth that in such cases the "amended guideline range shall be determined after operation of § 5G1.1 [] and § 5G1.2 []."[2]

The ACLU urges the Commission to adopt Option 1, the proposed amendment that would permit the court, in all cases involving a statutorily required minimum sentence where the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, to determine such a sentence without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

Under § 1B1.10, a defendant is eligible for a sentence reduction if "the guideline range applicable to the defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual" that the Commission has determined should apply retroactively. U.S.S.G. § 1B1.10(a) (1).[3] Normally when a mandatory minimum sentence calls for a sentence longer than the guideline range, the statute prevails and becomes the guideline sentence such that the defendant cannot receive the benefit of an amendment lowering that range. But where courts have granted the government's substantial assistance motion under 18 U.S.C. § 3553(e), the statutory minimum is "waived" and the court is permitted to impose a lower sentence based on the appellant's applicable guideline range.

As such, without the mandatory minimum bar, there is nothing preventing a court from lowering a defendant's applicable amended guideline range. This discretion is not withdrawn when the guideline range has been lowered. As the Seventh Circuit explained, "when a district court is authorized (by the prosecutor's substantial-assistance motion or a safety-valve reduction) to give

[1] 79 Fed. Reg. 3280, 3282 (Jan. 17, 2010).
[2] *Id.*
[3] *In re Sealed Case*, 722 F.3d 361, 367 (D.C. Cir. 2013).

a sentence below the presumptive statutory floor, that authority is equally applicable to a sentence-reduction motion after a change in the Guideline range."[4] This approach makes sense because the amended guideline range is determined before any mandatory minimum is accounted for at Part G of Chapter Five.[5] Thus all such defendants should be eligible for a reduced sentence comparably below the bottom of the amended guideline range corresponding to the offense level and criminal history category as set forth in the Sentencing Table.

Indeed, the Seventh Circuit questioned why the Sentencing Commission would have "disabled persons who provided substantial assistance from receiving the benefit of the lower penalty for crack cocaine. Nothing in the revised Guidelines, or the explanations for them in Amendments 750 and 759, hints at a goal of giving uncooperative defendants greater sentence reductions than those available for cooperative defendants. Reading § 1B1.10 the way we have done allows both types of defendants to gain and preserves the reward for cooperation, a reward that the prosecutor's reading would diminish or even abolish."[6] Whereas Option 1 would allow comparable below-guideline sentences in cases in which the original sentence was below the mandatory minimum, Option 2 would render unavailable comparable below-guideline sentences in many cases when the "amended guideline range"[7] is determined after operation of § 5G1.1, resulting in many defendants being deemed ineligible for a reduction whose sentences reflect lower original and amended guideline ranges as a result of less serious offenses or fewer criminal history points.

Therefore, the ACLU urges the Sentencing Commission to adopt Option 1 and amend § 1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of § 1B1.10 the amended guideline range shall be determined without regard to the operation of § 5G1.1 and § 5G1.2.

I. Proposed Amendment To The Guidelines Applicable To Drug Quantity Table in § 2D1.1.

The Commission's proposals to make a two-level downward adjustment in the Guidelines for defendants in drug trafficking cases represent an important step in improving the fairness of the Guidelines. The Commission's successful implementation of a 24/30 base offense level (BOL) reduction for crack cocaine in 2007 demonstrates the administrative ease of implementing reductions to the sentencing Guidelines. A significant, across-the-board reduction would mitigate some of the worst harms of the mandatory minimums and their emphasis on quantity rather than

[4] *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013).
[5] *Id. See also* §§ 1B1.1(a)(8), 5G1.1(b)-(c).
[6] *United States v. Wren*, 706 F.3d 861, 863 (7th Cir. 2013).
[7] *Id.*

actual criminal conduct as a one-size-fits-all proxy for culpability. Under the current Guidelines, quantity-driven minimums and conspiracy liability can lead to saddling defendants with minor to moderate roles in a drug operation with decades of prison time based on quantities of drugs they never handled, saw, or even knew about.[8] A two-level reduction in guideline sentencing would still be able to incorporate mandatory minimum sentences, while lowering existing penalties and reducing cost and population in the BOP.

Furthermore, the ACLU encourages the Commission to review and amend the Drug Quantity Table in 2D1.1 because "the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability."[9]

Judge John Gleeson of the U.S. District Court in the Eastern District of New York detailed the "deep[] and structural[] flaw[s]" [10] of the drug trafficking guidelines for heroin, cocaine, and crack offenses in his decision in *U.S. v. Diaz.*[11] The Guidelines' ranges for drug trafficking offenses are flawed at their root because they are not based on empirical data and national experience. When Congress established the Commission in the Sentencing Reform Act ("SRA") of 1984, it instructed the new body "to establish Guidelines that would reconcile the multiple purposes of punishment while promoting the goals of uniformity and proportionality."[12] The Commission's first job and starting point was "to ascertain the average sentences imposed in pre-Guidelines cases for particular categories of offenses."[13] Although the SRA did not require the Commission to base the Guidelines on average sentences from the previous regime,[14] the original Commission decided 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]

However, 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] Before the first Commission could finish the first version of the Guidelines, Congress enacted the Anti-Drug Abuse Act of 1986 ("ADAA"), which "established a two-tiered scheme of mandatory minimum and enhanced maximum sentences that have now become central features of the federal drug

[8] *See, e.g.*, Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminal. 155, 171 (2009) (noting that drug quantity "is not significantly correlated with role in the offense" and suggesting that this "lack of association" shows "unwarranted or excessive uniformity in federal drug sentencing").
[9] *U.S. v. Diaz*, 2013 WL 322243 at *1 (E.D. N.Y. January 28, 2013).
[10] *Id.*
[11] *Id.*
[12] *Id.* at *3 (footnotes omitted).
[13] *Id.* (internal quotation marks and footnotes omitted).
[14] 28 U.S.C. § 994(m).
[15] *Diaz*, 2013 WL 322243 at *4 (internal quotation marks and footnotes omitted).
[16] *Id.*

sentencing landscape. The ADAA's five-year mandatory minimum, with a maximum sentence increased from 20 to 40 years, was specifically intended for the managers of drug enterprises, while the ten-year mandatory minimum, with a maximum sentence of life, was intended for the organizers and leaders."[17]

Congress made the infamous mistake of having drug type and quantity, rather than role, trigger these harsh mandatory minimums. The quantity-driven mandatory minimums "created a problem for the original Commission. Those sentences were far more severe than the average sentences previously meted out to drug trafficking offenders. . . . The problem for the Commission was that 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] In response, the Commission "jettisoned its data entirely and made 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.

The Commission's mistake compounded Congress's mistake: "the Commission's linkage of the Guidelines ranges for drug trafficking offenses to the ADAA's weight-driven [mandatory minimum] regime has resulted in a significantly more punitive sentencing grid than Congress intended."[20] Since the Supreme Court decided *United States v. Booker*,[21], "[t]he degree to which sentencing judges vary downward [from the drug trafficking ranges] provides a clue" to "[h]ow far out of line" these Guidelines are.[22] "In the period from December 11, 2007 to September 30, 2010, the average reduction from the bottom end of the applicable sentencing range in non-government sponsored below-range sentences was 39 months for crack offenses (32.7% reduction) and 27 months for cocaine and heroin offenses (respectively, 33.7% and 37.2% reductions).[23] As a result, the average sentence for *all* crack cases has consistently been about 30 months below the applicable Guidelines range minimum, and the average sentences in cocaine and heroin cases have just as consistently been about 20 months below the bottom end of the applicable range.[24],[25] In short, "[t]he drug trafficking offense guideline was *born* broken"

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[17] *Id.*
[18] *Id.* at *5.
[19] *Id.* at *6.
[20] *Id.*
[21] 543 U.S. 220 (2005)
[22] *Diaz*, 2013 WL 322243 at *9 .
[23] Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Prepared Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Oct. 12, 2011), at 33, 36, 43, *available at* http:// www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_ and_ Reports/Testimony/20111012_Saris_Testimony.pdf.
[24] *Id.* at app. A; *see also* U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: 3RD QUARTER RELEASE, PRELIMINARY FISCAL YEAR 2012 DATA, THROUGH JUNE 30, 2012 37, fig. H (2012) (depicting the average sentence in all drug trafficking cases from Fiscal Years 2007 to 2011 to be about 20 months below the bottom end of the average Guidelines range minimum).
[25] *Diaz*, 2013 WL 322243 at *9.

and "[m]any judges will not respect it because as long as the sentences it produces are linked to the ADAA's mandatory minimums, they will be too severe."[26]

"Perhaps the best indication that the Guidelines ranges for drug trafficking offenses are excessively severe is the dramatic impact they have had on the federal prison population *despite* the fact that judges so frequently sentence well below them. In 1984, when the Sentencing Reform Act was passed, the federal prison population was 34,263.[27] By 1994, it was 95,034;[28] by 2004, it was 180,328. [29]"[30] As of March 13, 2014, there are 215,777 prisoners in the custody of the federal government.[31] Thus, these Guidelines' excessive severity has contributed to the crisis of mass incarceration in the United States, which exacts alarming human and economic tolls on our society.

The ACLU endorses Judge Gleeson's recommendations that: (1) The Commission should "use its resources, knowledge, and expertise to fashion fair sentencing ranges for drug trafficking offenses"[32] by "de-link[ing] the drug trafficking sentencing grid from the ADAA's weight driven mandatory minimum sentences and reduce the Guidelines ranges for these offenses;"[33] and (2) "In the meantime, because real people, families, and communities are harmed by the current ranges, [the Commission] should immediately lower them by a third."[34] Indeed, Judge Gleeson's recommendations have also been endorsed by Judge Bennett in the Northern District of Iowa. In *U.S. v. Hayes*,[35] Judge Bennett concluded that Judge Gleeson's "comprehensive policy disagreement with the Guidelines for heroin, cocaine, and crack offenses [] also applies to methamphetamine offenses."[36] Accordingly, Judge Bennett "follow[ed] Judge Gleeson's recommendation of reducing the penalty by one third for methamphetamine offenses in response to the fundamental problems with the methamphetamine Guidelines range."[37]

On August 12, 2013, Attorney General Eric Holder's gave a speech to the American Bar Association announcing critical reforms to the way the Department of Justice prosecutes and

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[26] *Id.*
[27] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984 12 tbl. 1 (1987).
[28] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 66 tbl. 5.1 (1996).
[29] *Diaz*, 2013 WL 322243 at *10.
[30] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 3 tbl. 3 (2005).
[31] Federal Bureau of Prison, Population Statistics, (March 14, 2014) http://www.bop.gov/about/statistics/population_statistics.jsp
[32] *Diaz*, 2013 WL 322243 at *9.
[33] *Id.* at *11.
[34] *Id.* at *9.
[35] *U.S. v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa June 7, 2013); *see also U.S. v. Woody*, 2010 WL 2884918, *10 (D. Neb. July 20, 2010) (affording less deference to methamphetamine Guidelines range since it was "promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission's unique area of expertise" and varying downward where quantity does not accurately reflect culpability).
[36] *Id.* at *9.
[37] *Id.* at *21.

addresses drug crimes.[38] This speech was historic and long overdue. The federal government cannot maintain a federal prison system that since 1980 has grown at an astonishing rate of almost 800 percent. In 2012, on the federal, state and local levels it cost $80 billion dollars to incarcerate 2.3 million people in this country.

Attorney General Holder's willingness to "rethink[] the notion of mandatory minimum sentences for drug-related crimes," comes as a welcome alternative to the status quo which was for the Department to ask for longer and harsher sentences [39] Attorney General Holder's modification of the Justice Department's charging policies "so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences" is a critical step toward creating a fairer and more justice federal criminal justice system.[40]

In testimony delivered to the Commission on March 13th, the Attorney General endorsed the Commission's proposed change to the Sentencing Guidelines Drug Quantity Table. During last week's testimony Holder said that "[t]his straightforward adjustment to sentencing ranges – while measured in scope – would nonetheless send a strong message about the fairness of our criminal justice system,"[41] Holder also testified "it would help to rein in federal prison spending while focusing limited resources on the most serious threats to public safety."

Currently, fifty percent (50%) of the federal prison population is comprised of drug offenders. Accordingly, the Commission's proposal to amend the Guidelines for drug offenses will be an important, but incremental step to address the length of sentences for non-violent crimes and ease the overcrowding in federal prisons. The time is right for the Commission to amend the drug quantity table across drug types to correct the devastating mistake of linking the Guidelines ranges for drug trafficking offenses to the ADAA's weight-driven mandatory minimum regime. We encourage the Commission to amend the drug quantity table in § 2D1.1 of the Sentencing Guidelines across drug types which will reduce the human and economic harms caused by these excessive Guidelines.

[38] *See* Attorney General Eric Holder American Bar Association Speech, August 12, 2013, San Francisco, California
[39] *Id.* at 5
[40] Id.
[41] Attorney General Eric Holder American Bar Association Speech, March 13, 2014, Testimony Before August 12, 2013,

Conclusion

We appreciate the opportunity to comment on the Commission's proposed amendments for 2014. If there are any comments or questions, please feel free to contact to Senior Legislative Counsel Jesselyn McCurdy at (202) 675-2307 or jmccurdy@dcaclu.org.

Respectfully submitted,

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