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November 26, 2013

Senator Patrick Leahy, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Chuck Grassley, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Grassley,

The United States Sentencing Commission is pleased that the Senate Judiciary Committee plans to take up legislation next month on important sentencing issues, including federal mandatory minimum penalties. We want to draw your attention to the written statement submitted for the Committee's September 18 hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." That statement (attached) made several recommendations relevant to the legislation before the Committee and drew heavily upon the research and conclusions from the Commission's 2011 report on Mandatory Minimum Penalties in the Federal Criminal Justice System.

As set out in that statement, the Commission is concerned about rising federal prison costs and about federal prison populations far exceeding prison capacity. We believe that modifying certain severe mandatory minimum penalties is an important step toward addressing that problem and improving the fairness of federal sentences.

Specifically, the Commission unanimously recommends that Congress consider the following statutory changes:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.
- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.

- Congress should consider expanding the so-called “safety valve,” allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.
- The safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, should be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

The Commission is also pleased that the Judiciary Committee is considering clarifying the calculation of good time credit for federal inmates to specify that inmates are eligible for 54 days of good time credit per year of sentence imposed. We support Congress addressing this longstanding issue.

As set out in more detail in the attached statement, the Commission reached these conclusions based on its analysis which indicates that mandatory minimum penalties in general have contributed to the overall federal prison population, that certain severe mandatory minimum sentences can lead to disparate charging decisions by prosecutors, and that, in the drug context, statutory mandatory minimum penalties often apply more broadly than to just the high-level drug offenders that it appears Congress intended to target. The Commission’s recommendations are also informed by recidivism data showing that crack cocaine offenders released early after modest sentence reductions did not demonstrate an increased propensity to reoffend after a two-year study period.

The Commission stands ready to assist the Judiciary Committee as it prepares to consider these vitally important federal sentencing issues. We are happy to provide any data, analysis, or other assistance that would be useful to the Committee. Please don’t hesitate to reach out to me or my staff if we can be helpful in any way.

Sincerely,



Patti B. Saris
Chair

cc: Senate Judiciary Committee Members

Statement of Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Hearing on
“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”
Before the Committee on the Judiciary
United States Senate

September 18, 2013

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for providing me with the opportunity to submit this statement on behalf of the United States Sentencing Commission about mandatory minimum sentences in the federal criminal justice system.

We are particularly pleased that the Judiciary Committee is addressing this vital issue that has been a key focus for the Commission for several years. The bipartisan seven-member Commission¹ unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget. We unanimously agree that statutory changes to address these problems are appropriate.

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,² the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. We set out a series of recommendations for modifying the laws governing mandatory minimum penalties that would make sentencing laws more uniform and fair and help them operate as Congress intended. It is gratifying that members of this Committee, including Senators Leahy, Durbin, and Lee, and other Republican and Democratic members of the Senate and House have proposed legislation corresponding to many of these key recommendations.

Since 2011, circumstances have made the need to address the problems caused by the current mandatory minimum penalties still more urgent. Even as state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has continued to grow, increasing by almost four percent in the last two years alone and by about a third in the past decade.³ The size of the Federal Bureau of Prisons (BOP) population exceeds the BOP's capacity by 38 to 53 percent on average.⁴ Meanwhile, the nation's budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as

¹ By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

² U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

³ E. Ann Carson & Daniela Golinelli, U.S. Dept of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts 2* (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

⁴ U.S. Dept of Justice, *Federal Prison System FY 2013 Congressional Budget 1* (2013) <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>.

more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety. Federal prisons and detention now cost more than \$8 billion a year and account for close to one third of the overall Department of Justice budget.⁵ For these reasons, the Commission feels even more strongly now than in 2011 that congressional action is necessary and has also identified reducing costs of incarceration as a Commission priority for this year.⁶

I will set out the Commission's findings as to why changes in the law are necessary and our recommendations for the changes the Commission believes Congress should consider. The Commission found that certain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission unanimously recommends that Congress consider a number of statutory changes. The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We recommend that the provisions of the Fair Sentencing Act of 2010,⁷ which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. We further recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted. Finally, the Commission recommends that the safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

Republican and Democratic members of this Committee and others in Congress have proposed legislation to reform certain mandatory minimum penalty provisions. The Commission strongly supports these efforts to reform this important area of the law. While there is a spectrum of views among the members of the Commission regarding whether Congress should exercise its power to direct sentencing power by enacting mandatory minimum penalties in general, the Commission unanimously believes that a strong and effective system of sentencing

⁵ U.S. Dept of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dept of Justice FY 2014 Budget Request), www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs; see also Letter from Jonathan Wroblewski, U.S. Dept of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) (http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

⁶ See U.S. Sentencing Comm'n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820, 51,821 (Aug. 21, 2013) (Notice of Final Priorities).

⁷ Pub. L. No. 1116220, 124 Stat. 2373 (2010).

guidelines best serves the purposes that motivated Congress in passing the Sentencing Reform Act of 1984.

I. The Commission's Findings on Mandatory Minimum Sentences

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the SRA.⁸ Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.⁹

In section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a provision that originated with members of this Committee, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.¹⁰ In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. The Commission published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published. That comprehensive process has led the Commission to several important conclusions about the effect of current mandatory minimum penalty statutes.

A. Severe Mandatory Minimum Penalties Are Applied Inconsistently

The Commission determined that some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them. These mandatory minimum penalties are triggered by a limited number of aggravating factors, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower penalty.¹¹ This broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them. As a result, certain mandatory minimum penalties are applied inconsistently from district to district and even within districts, as shown by the Commission's data analyses and our interviews of prosecutors and defense attorneys. Mandatory minimum penalties, and the existing provisions granting relief from them in certain cases, also impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.

Interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered

⁸ See 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

⁹ 28 U.S.C. § 991.

¹⁰ Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111684, 123 Stat. 2190, 2843 (2009).

¹¹ Mandatory Minimum Report, *supra* note 2, at 345-46.

significant mandatory minimum penalties. These differences were particularly acute with respect to practices regarding filing notice under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, the filing was routine. In others, it was more selectively filed, and in one district, it was almost never filed at all.¹² Our analysis of the data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.¹³

Similarly, the Commission's interviews revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. The Commission found that districts had different policies as to whether and when they would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.¹⁴ The data bears out these geographic variations in how these mandatory minimum penalties are applied. In fiscal year 2012, just 13 districts accounted for 45.8 percent of all cases involving a conviction under section 924(c) even though those districts reported only 27.5 percent of all federal criminal cases that year. In contrast, 35 districts reported 10 or fewer cases with a conviction under that statute.

When similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA. Yet the Commission has found severe, broadly applicable mandatory minimum penalties to have that effect.

The current mandatory minimum sentencing scheme also affects different demographic groups in different ways. Hispanic offenders constituted 41.1 percent of offenders convicted of an offense carrying a mandatory minimum penalty in 2012; Black offenders constituted 28.4 percent, and White offenders were 28.1 percent.¹⁵ The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.6 percent of cases in which a mandatory minimum penalty applied, compared to White offenders in 29.0 percent of cases, and Hispanic offenders in 42.9 percent.¹⁶ Because of this, although Black offenders in 2012 made up 26.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 35.2 percent of the drug offenders still subject to that mandatory minimum at sentencing.

¹² *Id.* at 111-13.

¹³ *Id.* at 255.

¹⁴ *Id.* at 113-14.

¹⁵ *Id.* at xxviii.

¹⁶ Offenders were most often disqualified from safety valve relief because of their criminal history or because of involvement of a dangerous weapon in connection with the offense. *See* Mandatory Minimum Report, *supra* note 2, at xxviii.

B. Mandatory Minimum Drug Penalties Apply to Many Lower-Level Offenders

In establishing mandatory minimum penalties for drug trafficking, it appears that Congress intended to target "major and serious" drug traffickers.¹⁷ Yet the Commission's research has found that those penalties sweep more broadly than Congress may have intended. Mandatory minimum penalties are tied only to the quantity of drugs involved, but the Commission's research has found that the quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization.

Mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs into the United States.¹⁸ For instance, in the cases the Commission reviewed, 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing — that is, those who did not obtain any relief from those penalties — were street level dealers, who were many steps down from high-level suppliers and leaders of drug organizations.¹⁹ While Congress appears to have intended to impose these mandatory penalties on "major or serious" drug traffickers, in practice the penalties have swept more broadly.

C. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.²⁰ By December 31, 2012, that number had more than tripled to 217,815 inmates.²¹

¹⁷ See U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm; see also 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) ("For the kingpins — the minimum term is 10 years. — [F]or the middle-level dealers — a minimum term of 5 years."); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

¹⁸ To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission's analysis, please see Mandatory Minimum Report, *supra* note 2, at 165-66.

¹⁹ *Id.* at 166-70.

²⁰ Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

²¹ Carson & Golinelli, *supra* note 3, at 2.

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.²² The number of offenders in custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.²³ Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing ó who had not received relief from that mandatory sentence ó increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.²⁴

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased more than six fold from \$1.36 billion for fiscal year 1991²⁵ to \$8.23 billion this year,²⁶ but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.²⁷ Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

D. Recent Reductions in the Sentences of Some Drug Offenders Have Not Increased Offenders' Propensity to Reoffend

The Commission recognizes that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety.²⁸ The Commission believes based on its research that some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.

In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007 amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.²⁹ In order to determine whether drug offenders serving reduced sentences

²² An increase in the number of prosecutions brought and individuals convicted overall, including for offenses without mandatory minimum penalties, has also contributed to the increasing federal prison population. *See* Mandatory Minimum Report, *supra* note 2, at 81-82.

²³ *Id.* at 81.

²⁴ *Id.*

²⁵ Pub. L. No. 1016515, 104 Stat. 2101, 2114 (1990).

²⁶ U.S. Dept of Justice FY 2014 Budget Request, *supra* note 5.

²⁷ Mandatory Minimum Report, *supra* note 2, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Commøn (Mar. 17, 2011)); *Brown v. Plata*, 563 U.S. ___, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

²⁸ 18 U.S.C. § 3553(a)(2)(B) and (C).

²⁹ U.S. Sentencing Commøn, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 1116220, 124 Stat. 2373 (2010).

posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.³⁰ The analysis showed no statistically significant difference between the two groups.³¹

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.³²

The Commission's study examined offenders released pursuant to retroactive application of a change in the sentencing guidelines, not a change in mandatory minimum penalties. Still, the Commission's 2011 study found that federal drug offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences. That result suggests that modest reductions in mandatory minimum penalties likely would not have a significant impact on public safety.

II. The Commission's Recommendations for Statutory Changes

Based on the Commission's research and analysis in preparing our 2011 report and in the years since, we support several statutory changes that will help to reduce disparities, help federal sentencing work more effectively as intended, and control the expanding federal prison population and budget.

A. Reduce Mandatory Minimum Penalties for Drug Offenses

In the Mandatory Minimum Report, the Commission recommended that, should Congress use mandatory minimum penalties, those penalties not be excessively severe. The Commission focused in detail on the severity and scope of mandatory minimum drug trafficking penalties. The Commission now recommends that Congress consider reducing the mandatory minimum penalties governing drug trafficking offenses.

Reducing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission's

³⁰ U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

³¹ *Id.* at 2.

³² *Id.* at 4-7.

report. It would also reduce the likelihood that low-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.

Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially. For example, under one scenario, a reduction in drug trafficking mandatory minimum penalties from ten and five years to five and two years, respectively, would lead to savings for those offenders sentenced in the first fiscal year after the change of 45,312 bed years over time.³³ That bed savings would translate to very significant cost savings,³⁴ with corresponding savings over time for each subsequent year of reduced sentences, unless offense conduct or charging practices change over time.

A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking. These changes would lead to reduced minimum penalties for all offenders currently subject to mandatory minimum penalties for drug trafficking. As noted above, currently available forms of relief from mandatory minimum penalties affected different demographic groups differently, particularly in the case of Black offenders, who qualify for the "safety valve" much less frequently than other offenders.

³³ The following broad assumptions, some or all of which might not in fact apply should the law change, were made in performing this analysis:

(a) The sentences for all offenders subject to an offense carrying a 10-year mandatory minimum penalty at the time of sentencing would be lowered by half (as a reduction from a 10-year mandatory minimum to a 5-year minimum is a 50% reduction). For those offenders who were convicted of an offense carrying a 10-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission's rough estimate was that their sentence would be reduced by 25% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(b) The sentences for all offenders convicted of an offense carrying a 5-year mandatory minimum penalty would be lowered by 60 percent (as a reduction from a 5-year mandatory minimum to a 2-year minimum is a 60% reduction). For offenders who were convicted of an offense carrying a 5-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission's rough estimate was that their sentence would be reduced by 30% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(c) The analysis did not include any estimate of a change in sentence for offenders for whom a mandatory minimum penalty did not apply (e.g., drug trafficking offenders with drug quantities below the mandatory minimum thresholds);

(d) For offenders who were also convicted of additional (i.e., non-drug) mandatory minimum penalties, those penalties were left in place.

See id. at 3-7.

³⁴ The Bureau of Prisons estimated the average annual cost per inmate to be \$26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), http://www.bop.gov/foia/fy12_per_capita_costs.pdf. This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

B. Make the Fair Sentencing Act Statutorily Retroactive

The Fair Sentencing Act of 2010 (FSA),³⁵ in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.³⁶ The law did not make those statutory changes retroactive. The Commission recommends that Congress make the reductions in mandatory minimum penalties in the FSA fully retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,³⁷ the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere" and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."³⁸ The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.⁴⁰ To date, 11,937 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,317 of those cases.⁴¹ The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.⁴²

The same rationales that prompted the Commission to make the guideline changes implementing the FSA retroactive justify making the FSA's statutory changes retroactive. Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions

³⁵ Fair Sentencing Act, Pub. L. No. 1116220, 124 Stat. 2373 (2010) (FSA).

³⁶ FSA § 2.

³⁷ The Commission, in deciding whether to make amendments retroactive, considers factors including "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." USSG §1B1.10, comment. (background).

³⁸ U.S. Sentencing Commission, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332, 41,333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

³⁹ See generally FSA.

⁴⁰ Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

⁴¹ U.S. Sentencing Commission, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (July 2013), http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf.

⁴² *Id.* at Table 8.

already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and to significant cost savings. The Commission estimates that 87.7 percent of the inmates eligible for a sentence reduction would be Black.

C. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider “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.”⁴³ The “safety valve” statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

The Commission found that the broad sweep and severe nature of certain current mandatory minimum penalties led to results perceived to be overly severe for some offenders and therefore to widely disparate application in different districts and even within districts.⁴⁴ The Commission also found that in the drug context, existing mandatory minimum penalties often applied to lower level offenders than may have been intended. It would be preferable to allow more cases to be controlled by the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied. Accordingly, Congress should consider allowing a broader group of offenders who still have a modest criminal history, but who otherwise meet the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines.

In 2012, 9,445 offenders received relief under the safety valve provision in the sentencing guidelines. If the safety valve had been expanded to offenders with two criminal history points, 820 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 2,180 additional offenders would have qualified.⁴⁵ While this

⁴³ Mandatory Minimum Report, *supra* note 2, at xxxi.

⁴⁴ *Id.* at 346.

⁴⁵ These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. *See* 18 U.S.C. § 3553(f).

change would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.⁴⁶ For reduced sentences to reach a broader demographic population, Congress would have to reduce the length of mandatory minimum drug penalties.

D. Apply Safety Valve and Other Relief to a Broader Set of Offenses

The Mandatory Minimum Report recommended that a statutory “safety valve” mechanism similar to the one available for drug offenders could be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.⁴⁷ Such safety valve provisions should be constructed similarly to the existing safety valve for drug cases with specific factors to ensure consistent application regardless of the location of the offense, the identity of the offender, or the judge. The Commission stands ready to work with Congress on safety valve criteria that could apply in a consistent manner. The Commission has also recommended that Congress consider reducing the length of some mandatory minimum penalties outside of the drug context.⁴⁸

The concerns set out above about disparities resulting from severe mandatory minimum sentences apply in contexts beyond drug offenses, as do the concerns about the effect on the prison population and costs. While drug offenders make up a significant proportion of those subject to mandatory minimum penalties, the number of offenders subject to other mandatory minimum penalties is also substantial. In 2012, 20,037 offenders were convicted of an offense carrying a mandatory minimum penalty. Of those, 4,460 were convicted of non-drug-related offenses subject to a mandatory minimum penalty, and 3,691 of these were still subject to that penalty at the time of sentencing. Statutory provisions allowing for relief when appropriate for this pool of offenders would address the same concerns the Commission has highlighted.

In the Mandatory Minimum Report, the Commission recommended several other legislative provisions to address specific problems documented with existing mandatory minimum penalties, particularly in connection with section 924(c) of title 18 of the United States Code for the use of a firearm during a crime of violence or drug trafficking felony. The Commission recommended that Congress consider amending section 924(c) so that enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, not for multiple violations charged together. The Commission further recommended that Congress consider reducing the length of some of the penalties in that firearms statute and giving courts discretion to impose mandatory sentences concurrently for multiple violations of section 924(c), following the structure currently in place for aggravated identity theft offenses, rather than mandating that the sentences be imposed consecutively.⁴⁹ The

⁴⁶ Mandatory Minimum Report, *supra* note 2, at 356.

⁴⁷ *See id.* at xxx.

⁴⁸ *See, e.g., id.* at xxxi.

⁴⁹ *See id.* at 364.

Commission also recommended that Congress reassess the scope and severity of the recidivist provisions for drug offenses in sections 841 and 960 of title 21 of the United States Code, which can lead to what some perceive as over-counting for criminal history.⁵⁰

III. The Role of the Sentencing Commission and the Guidelines

These recommendations, all of which impact statutory mandatory minimum penalties and require statutory change, can only be effectuated by Congress. However, the Commission is dedicated to working within its authority and responsibilities to address the issues of unwarranted sentencing disparities and over-incarceration within the federal criminal justice system. First, the Commission is committed to working with Congress to implement the recommendations of the Mandatory Minimum Report. We have identified doing so as the first item in our list of priorities for the coming year.⁵¹ This will entail supporting legislative initiatives and working with Congress to help members craft and pass appropriate legislative provisions that are consistent with our recommendations. We are gratified that Senators on and off this Committee have introduced legislation to reform certain mandatory minimum penalty provisions, and the Commission strongly supports these efforts to reform this important area of the law. We have also called on Congress to request prison impact analyses from the Commission as early as possible when it considers enacting or amending mandatory minimum penalties. This analysis may be very helpful for congressional consideration particularly at this time of strained federal resources.⁵²

The Commission is also considering whether changes to the sentencing guidelines are appropriate to address similar concerns about prison populations and costs, noting an intention overall to “consider the issue of reducing costs of incarceration and overcapacity of prisons” pursuant to 28 U.S.C. § 994(g).⁵³ Specifically, the Commission has listed as its second priority for the coming year review and possible amendment of guidelines applicable to all drug offenses, possibly including amendment of the Drug Quantity Table across all drug types.⁵⁴ Should the Commission determine that such action is appropriate, such an amendment would have a significant impact on federal prison sentences for a large number of offenders, though as was the case with the Commission’s 2007 crack cocaine amendment, the impact would be limited by current mandatory minimum penalties.

Finally, and most fundamentally, the Commission believes that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties in some of the ways under discussion today, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing. The Commission will continue to work to ensure that the guidelines are amended as necessary to most appropriately

⁵⁰ See *id.* at 356.

⁵¹ See Notice of Final Priorities, *supra* note 6.

⁵² See Mandatory Minimum Report, *supra* note 2, at xxx.

⁵³ See Notice of Final Priorities, *supra* note 6.

⁵⁴ *Id.*

effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.

IV. Conclusion

The Commission is pleased to see the Judiciary Committee and others in Congress undertaking a serious examination of current mandatory minimum penalties and considering options to make the federal criminal justice system fairer, more effective, and less costly. The bipartisan Commission strongly supports legislative provisions currently being considered that are consistent with the recommendations outlined above and stands ready to work with you and others in Congress to enact these statutory changes. We will also work closely with you as we seek to address similar concerns through modifications of the sentencing guidelines. The Commission thanks you for holding this very important hearing and looks forward working with you in the months ahead.