



Human Rights Watch comments on US Sentencing Commission proposed amendments to the Drug Quantity Table in the US federal sentencing guidelines

Human Rights Watch submits the following comments to the United States Sentencing Commission in response to the Commission's January 17, 2014 notice of proposed amendments, specifically amendment #3 relating to possible changes to the Drug Quantity Table in the US federal sentencing guidelines.

Human Rights Watch commends the Commission for undertaking the reasonable, though limited, step of amending the Drug Quantity Table. We support, with some caveats, the proposal to drop base offense levels in the sentencing guidelines by two levels across drug types. We also urge the Commission to continue to explore further reforms to the federal sentencing guidelines for drug crimes. The Commission should explore de-linking the guidelines from statutorily imposed mandatory minimums. The Commission should also consider developing guidelines that are not keyed primarily to drug weight.

The human rights argument for proportionate drug sentences

Our support for the proposed guideline amendment reflects our conviction that the current guidelines lead to sentences for drug offenders that are frequently disproportionately severe relative to their conduct and culpability. As such, they violate fundamental tenets of justice.

Punishment for crime holds offenders accountable – a core responsibility of government to its people, including crime victims. But human rights and fundamental criminal justice principles dictate that punishment should be proportionate to the offense and the individual's blameworthiness and no greater than necessary to further the purposes of punishment. As the Commission knows, countless judicial opinions and academic analyses have criticized the current drug sentencing guidelines for failing this test. Thus, for example, Judge John Gleeson has stated, "Over twenty-five years of application experience have demonstrated that the drug trafficking offense guideline is unnecessarily severe and produces unjust outcomes."¹

Imprisonment is the most drastic punishment, short of the death penalty, that a government can lawfully impose on an individual. It is also the most frequently imposed sanction for federal crimes.² Before the guidelines, many federal offenders received terms of probation. Such sentences are now few and far between.

¹ *United States v. Diaz*, 2013 U.S. Dist. LEXIS 11386, 81 (E.D.N.Y. 2013)

² For example, 85 percent of persons convicted in US District Courts in FY 2008 (the most recent year for which data are publicly available) were sentenced to terms of incarceration. See "Sourcebook of Criminal Justice

Prisoners lose their liberty and autonomy. They are cut off from their families, friends, and communities. Children lose their parents to prison, and parents lose their children. In prison, a person's ability to work, express themselves, and engage in activities that promote what human rights law calls the “free and full development of the personality”³ is severely restricted. The health and safety of prisoners, as well as their dignity and privacy, are threatened by overcrowding – which is a major problem in federal prisons, as well as harsh measures such as prolonged solitary confinement. Rehabilitative programs, including substance abuse treatment and education, are limited relative to the demand. Many prisoners emerge from federal prisons with few of the tools needed to reintegrate successfully into society.

We recognize that the Commission does not bear responsibility for the many problems with federal prisons. But it does bear responsibility for failing to adequately weigh the burdens of incarceration against the crime committed and for failing to ensure that its guideline ranges did not yield sentences greater than needed to advance the purposes of punishment enunciated by Congress.⁴

The average federal drug sentence has increased 250 percent since 1987 when the Sentencing Commission first published its guidelines. In 2012, the average sentence length for all defendants sentenced for federal drug trafficking offenses was 68 months.⁵ The Urban Institute has calculated that the increase in sentence length for federal drug offenders “was the single greatest contributor to growth in the federal prison population between 1998 and 2010.”⁶

Statistics Online,” University at Albany, <http://www.albany.edu/sourcebook/pdf/t5252008.pdf> (accessed February 14, 2014), Table 5.25.2008.

³ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), Art. 26 (2).

⁴ 18 U.S.C. 3553(a).

⁵ United States Sentencing Commission (“USSC”), 2012 Sourcebook, “Table 13: Sentence Length in Each Primary Offense Category, Fiscal Year,”

http://www.usc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table13.pdf (accessed October 1, 2013). The average sentence length has decreased from 82 months in 2008, primarily as a consequence of the Fair Sentencing Act which reduced sentences for crack offenses. USSC, 2012 Sourcebook, “Figure E: Length of Imprisonment in Each General Crime Category, Fiscal Years 2008-2012,”

http://www.usc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureE.pdf (accessed October 1, 2013). The length of prison sentences varied by type of drugs: from an average of 97 months for crack offenders to 36 months for marijuana. USSC, 2012 Sourcebook, “Figure J: Length of Imprisonment in Each Drug Type, Fiscal Year 2012,”

http://www.usc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureJ.pdf (accessed October 1, 2013).

⁶ Kamala Mallik-Kane, Barbara Parthasarathy, and William Adams, Urban Institute, “Examining Growth in the Federal Prison Population, 1998 to 2010,” September 2012, <http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf> (accessed September 30, 2013).

As federal drug sentences have increased, so have the number of people imprisoned for drug offenses. Between 1980 and 2013, the number of incarcerated federal drug defendants soared from 4,749 to 100,026—an astonishing 2,006 percent. As of September 28, 2013, half—50.1 percent—of all federal prisoners were in prison for drug offenses.⁷ In fiscal year 2012 alone, 26,560 men and women were convicted of federal drug crimes.⁸

Yet the growth in number of people imprisoned for federal drug offenses, and growth in length of drug sentences is not reflected in the severity of the drug crimes themselves. The most common functions of convicted federal drug defendants were courier (23 percent), followed by wholesaler (21.2 percent) and street-level dealer (17.2 percent), according to an analysis of drug offender function by the Sentencing Commission.⁹ The Sentencing Commission has also calculated that 93.4 percent of federal drug defendants were in the lower or middle tiers of the drug business.¹⁰ In 2012, 85 percent of drug defendants had no weapon involved in their offense, a crude proxy for determining whether the defendant's conduct was violent.¹¹ Fifty-three percent had either an insignificant or no state or federal criminal history.¹²

⁷ See Bureau of Prisons, “Quick Facts about the Bureau of Prisons,” <http://www.bop.gov/news/quick.jsp#2> (accessed October 28, 2013). This is an increase from 2011 when 48 percent of federal prisoners were serving time for drug offenses. E. Ann Carson and William J. Sabol, Bureau of Justice Statistics, US Department of Justice, “Prisoners in 2011,” December 2012, <http://www.bjs.gov/content/pub/pdf/p11.pdf> (accessed September 30, 2013), Table 11.

⁸ USSC, 2012 Sourcebook, “Table 3: Change in Guideline Offenders in Each Primary Offense Category, Fiscal Year 2011 – 2012,”

http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table03.pdf (accessed September 30, 2013).

⁹ The analysis was undertaken in 2010 based on a sample of drug offenders from 2009. According to the Sentencing Commission's definitions, couriers transport or carry drugs using a vehicle or other equipment; street-level dealers distribute retail quantities (less than one ounce) directly to users; and wholesalers buy or sell at least one ounce or possess at least two ounces. USSC, “Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/2011031_RtC_Mandatory_Minimum.cfm (accessed March 17, 2014), p. 166-169.

¹⁰ Percentage calculated on basis of whether the defendants received an aggravating role adjustment under the guidelines 2012 Sourcebook. USSC, 2012 Sourcebook, “Table 37: Criminal History Category of Drug Offenders in Each Drug Type, Fiscal Year 2012,”

http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table37.pdf (accessed October 1, 2013). See USSC, “2012 Guidelines Manual,” November 1, 2012,

http://www.uscc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf (accessed October 1, 2013), section 3B1.1 for an explanation of aggravated role sentence adjustment.

¹¹ USSC, 2012 Sourcebook, “Table 39: Weapon Involvement of Drug Offenders in Each Drug Type, Fiscal Year 2012,” http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table39.pdf (accessed October 1, 2013); *United States v. Leitch*, 2013 U.S. Dist. LEXIS 27796, 53 (E.D.N.Y. 2013).

¹² USSC, 2012 Sourcebook, “Table 37,”

http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table37.pdf (accessed March 17, 2014). Fifty-three percent of federal drug defendants in 2012 were in criminal history

Human Rights Watch urges the Commission to consider further changes to the Drug Quantity Table across drug types.

Human Rights Watch urges the Commission to revisit the structure of its guidelines and the Drug Quantity Table across all drug types. We join many analysts of the Guidelines and practitioners in observing that the Commission’s decision to link the guidelines to the drug quantity framework set up by Congress to govern mandatory minimum sentences is responsible for unnecessarily severe sentencing ranges. Passed with little deliberation or preparation,¹³ the harsh new regime reflected the ascendancy of “tough on crime” policies and the belief that severe sentences were needed to restore law and order.¹⁴ It established sentences keyed to the quantity of drug involved in the offenses that were far more severe than those which had been historically imposed for drug offenses. Even worse, Congress thought the weight of the drugs involved would be a reasonable proxy for the drug trafficking role.¹⁵ Unfortunately, it got the numbers wrong: even low-level offenders distribute the quantities that garner the five- and ten-year minimum sentences Congress

category I, which means they had no more than one criminal history point. Criminal history points are based on state or federal sentences. See USSC, “2012 Guidelines Manual,” http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf, Chapter Four, Part A.

¹³ The Anti-Drug Abuse Act (ADAA) of 1986 was expedited through Congress, passing without the usual subcommittee hearings, markups of bills, and amendments passed at the committee level. Some individual members of Congress delivered floor statements, but there was no committee report analyzing the act’s key provisions. Drug quantities triggering the mandatory minimum sentences were based on anecdotal evidence, and did not reflect research, statistical data, or input from expert agencies. See Testimony of Eric E. Sterling, president, Criminal Justice Policy Foundation, before United States Sentencing Commission on Proposed Guideline Amendments for Public Comment, March 22, 1993; USSC, “Special Report to Congress: Cocaine and Federal Sentencing Policy,” 1995, p. 117.

¹⁴ Prior to the ADAA, federal drug offenders were subject to maximum sentences and no statutory mandatory minimum sentences. See, e.g., 21 U.S.C. §841(b)(1)(A) (1982). Politics and public concern have, for example, driven the extremely high sentences for methamphetamine offenses. While it takes one kilogram of heroin to trigger a ten-year mandatory sentence, it only takes 50 grams of pure methamphetamine to trigger the same sentence.

¹⁵ “For the kingpins— the masterminds who are really running these operations— and they can be identified by the amounts of drugs with which they are involved— we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years.... Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well.... [They] would have to go to jail—a minimum of 5 years for the first offense.” USSC, “Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,”

http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm, p. 24 (quoting Senator Robert Byrd, 132 Cong. Rec. 27, 193-194 (September 30, 1986)) (internal footnotes omitted). Congress also thought the mandatory minimums would “give greater direction to the DEA and the US Attorneys on how to focus scarce law enforcement resources.” Ibid. Michael S. Nachmanoff and Amy Baron-Evans, “Booker Five Years Out: Mandatory Minimum Sentences and Department of Justice Charging Policies Continue to Distort the Federal Sentencing Process,” *Federal Sentencing Reporter*, vol. 22 (December 2009), p. 96.

intended for more serious traffickers.¹⁶ According to the Sentencing Commission in 2011, “the quantity of drugs involved in an offense was not closely related to the offender’s function in the offense.”¹⁷ Although Congress did not mandate the Commission to tailor its guidelines according to the statutory mandatory minimum framework, the Commission nonetheless chose to follow Congress, and set sentencing ranges for drug offenses keyed to drug quantities and also made the additional – and never explained – decision to increase those ranges by specified amounts according to the defendant’s prior criminal history.

Given that the drug guidelines were keyed to the statutory mandatory minimum sentences, now widely recognized as excessively severe, it is no surprise that the guidelines also yield egregiously long sentences. For example, street-level dealers who sell to retail customers can easily distribute 300 grams of crack or 500 grams of methamphetamine in a month, with a retail value of \$20,000 to \$50,000.¹⁸ Yet the guidelines sentencing range for a nonviolent, first-time offender distributing this quantity of those drugs to an adult is 10 to 12 years—greater than for forcible rape of an adult, killing a person in voluntary manslaughter, disclosing top secret national defense information, or violent extortion of more than \$5 million involving serious bodily injury.¹⁹

On February 28, 2012, a federal judge imposed a 12-year guidelines sentence on Dwayne Ingram for selling less than 1 gram of crack (about the equivalent of a sweetener packet) within 1,000 feet of public housing property, following two earlier convictions for selling small crack quantities. As federal appellate Judge Guido Calabresi said in a concurring opinion upholding the sentence, “[T]here is nothing ‘reasonable’ about sending a man to prison for twelve years to punish him for a nonviolent, \$80 drug sale.”²⁰

¹⁶ The government can influence the amount of drugs for which a defendant is charged. Law enforcement agents or confidential informants working for the government may make multiple buys from a drug seller until he has sold a total quantity that triggers a higher mandatory minimum. They may also aggressively solicit offenders to influence the amount they sell. Human Rights Watch interview with A.J. Kramer, federal public defender in the District of Columbia, Washington, D.C., February 12, 2013.

¹⁷ USSC, “Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” http://www.usc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

¹⁸ Executive Office of the President, Office of National Drug Control Policy, “The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003,” November 2004, https://www.ncjrs.gov/ondcppubs/publications/pdf/price_purity.pdf (accessed November 1, 2013).

¹⁹ Mark Osler, “Amoral Numbers and Narcotics Sentencing,” University of St. Thomas (Minnesota) Legal Studies Research Paper No. 13-21 (2013), accessed March 18, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271380. See USSC, “2012 Guidelines Manual,” http://www.usc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf, §§2A3.1, 2A1.3, 2B3.2, 2M3.3.

²⁰ *United States v. Ingram*, 721 F.3d 35, 43 (2nd Cir. 2013) (emphasis in original).

We urge the Commission to reform its reliance on drug weight as the starting point for its guidelines. Drug weight is a poor proxy for the severity of the crime or the culpability of the offender. For example, because mandatory minimums are triggered by the quantity of drug involved, a street-level dealer can face the same minimum sentence as the head of a large drug trafficking organization. The adjustments included in the Guidelines to reflect minor participation in a drug trafficking enterprise are not sufficient to mitigate the high sentences based on drug quantity. A typical federal drug offender is someone like Jamel Dossie, a 20-year-old, small-time street-level drug dealer's assistant who received a five year mandatory minimum sentence for working as a go-between in four hand-to-hand sales totaling 88.1 grams or 3.1 ounces of crack (the weight of an average bar of soap).²¹

Human Rights Watch supports the Commission's proposed amendment to reduce a majority of the base offense levels by two for all drug weights.

The proposed amendment will help to reduce the sentence of about 70% of drug trafficking offenders by an average of 11 months.²² According to the Commission, the amendment could help reduce the Bureau of Prisons population by 6,500 inmates at the end of five years. This is a small but important step by the Commission in what we hope will be an ongoing effort to swing the sentencing pendulum back from its recent extremes.

The amendment should be improved, however. The amendment unnecessarily proposes creating a new higher level of drug quantity weights that would trigger a base offense level of 38, instead of lowering all base offense levels by two (thereby eliminating drug weights that trigger a base offense level of 38). So, for example, under the current Drug Quantity Table, 8.4 kilos of crack cocaine or any weight higher triggers level 38 (235-293 months, about 20 to 24 years for a first time offender). Under the amendment, those 8.4 kilos would now trigger level 36 (188-235 months, about 18 to 20 years for a first time offender), but anything above 25.2 kilos of crack cocaine would still trigger level 38. Creating a new tier of drug weights appears disconnected to the aims of the proposed amendment, which

²¹ At sentencing, a prosecutor assured the judge that there were factors beside the drug selling justifying the five-year sentence for Dossie, including information linking him to a gang. The government did not have to prove such links, offer them to judicial scrutiny or afford Dossie the opportunity to contest them. "There is no fairness in a system that allows that to happen," Judge Gleeson concluded. *United States v. Dossie*, 851 F. Supp. 2d 478, 485 (E.D.N.Y. 2012).

²² "U.S. Sentencing Commission Seeks Comment on Potential Reduction to Drug Trafficking Sentences," USSC press release, January 9, 2014, http://www.uscc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20140109_Press_Release.pdf (accessed March 17, 2014).

according to Judge Saris reflects the Commission’s priorities of “reducing costs of incarceration and overcapacity of prisons, without endangering public safety.”²³

The proposed amendment also stops reducing the base offense levels for heroin, crack cocaine, powder cocaine, meth, and other common drugs at level 12 (10-16 months for a first time offender). The proposed amendment punishes offenders with the lowest amount of drugs by combining drug weights at the bottom level of the drug weight table. The Commission does not explain the need to take this step and how it relates to its priorities. The logic for a “minus two” reduction, which applies in the proposed amendment at all base level offense levels above 12, does not end at base offense level 12. This arbitrary floor should be removed from the final regulation.

On the bottom end of the base offense level, to keep the lowest level at 6, the amendment merges the weights for level 8 and level 6 to create one category of drug quantity weights that trigger level 6. Again, this change seems to be disconnected from the primary aims of the amendment to reduce costs of incarceration and overcrowding. The proposal, in effect, withholds relief from those offenders involved with the lowest weight quantities in the Table. We would recommend simply lowering the lowest base offense level to 4 and making the necessary adjustments to the simple possession guidelines and any other guidelines impacted by this change.

Conclusion

Federal drug sentencing – like all criminal sentencing – should be proportionate to the offense and the individual’s blameworthiness and no greater than necessary to further the purposes of punishment. The amendment proposed by the Commission moves a step closer to this goal. We therefore urge the Commission to both adopt the proposed amendment before it and to commit to further review of its drug guidelines as currently constructed. We thank the Commission for the opportunity to provide comments on this proposal.

²³ Ibid.