



July 29, 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 (79 FR 31409)
From the U. S. Sentencing Commission (USSC) Amendments to the
Sentencing Guidelines for the Cycle Ending in May 2015.**

Dear Judge Saris:

With this letter, the American Civil Liberties Union (“ACLU”) provides commentary on the Notice of Proposed Priorities and Request for Public Comment for the amendment cycle ending May 1, 2015. For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, or national origin.

These comments address several of the issues outlined by the Commission on which 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.

I. Severity and Scope of Mandatory Minimum Penalties

The continuing impact of mandatory minimum sentencing is a major contributor to growing the Federal Bureau of Prison (BOP) prison population. Federal courts are overwhelmed with staggering immigration and criminal caseloads. BOP is operating at about 35% over capacity and currently makes

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up about 30 percent of the Department of Justice's (DOJ) budget.¹

Research by the Urban Institute found that increases in federal law enforcement activity contributed to about 13% of the growth in the federal prison population between 1998 and 2010, though the effects were not consistent across offense types and time. For example, heightened immigration enforcement and increased investigation of weapons offenses contributed to approximately one-tenth of the population growth.² This Urban Institute report concluded that increases in expected time served, specifically for drug offenses, contributed to half of the prison population growth between 1998 and 2010.³ A 2013 report by the Congressional Research Service (CRS) found that the increase in the amount of time inmates were expected to serve was probably partially the result of inmates receiving longer sentences and partially the result of inmates being required to serve approximately 85% of their sentences after Congress eliminated parole for federal prisoners.⁴ The increased time served by drug offenders accounted for almost one-third of the total federal prison population growth between 1998 and 2010.⁵ Drug offenders currently make up almost 50% of the BOP population despite increases in the number of immigration and weapon offenders during the same time period.⁶

The CRS report concluded that mandatory minimums, the federal government prosecuting more criminal cases and elimination of federal parole are major contributors to BOP overcrowding.⁷ In addition to the adoption of the reduction in the drug quantity table and its retroactive application which the commission approved in 2014, another policy change that could have an important effect on the unsustainable growth in the BOP prison population would be an expansion of safety valve relief. Expanding safety valve relief to individuals in Criminal History Category II or even III would in fact be a rational way to reduce the length of sentences without jeopardizing public safety.

Criminal sentences should be based on the nature of the offense and on relevant personal characteristics and circumstances of the defendant. Thus, the ACLU opposes mandatory sentences or any other sentencing scheme that unduly restricts a judge's ability to engage in individualized sentencing.⁸ We agree generally, however, with the Commission, that "if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently."⁹ In line with our express opposition to all mandatory minimum penalties and our endorsement of the Commission's three basic principles regarding such penalties as fostering incremental improvement over the current system, we support the Commission's following

¹ Nancy LaVigne, Julie Samuels, Urban Institute *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions* pgs.1 and 2 (2012) (hereinafter LaVigne Urban Institute Report).

² Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* pg. 9 (January 22, 2013) (hereinafter CRS report)

³ LaVigne Urban Institute Report at 5

⁴ CRS Report at 8.

⁵ Kamala Mallik-Kane, Barbara Parthasarathy, William Adams, *Examining Growth in the Federal Prison Population, 1998 to 2010* pg. 3 (2012)

⁶ *Id.*

⁷ CRS report at 51

⁸ See generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.

⁹ U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, at 345.

specific recommendations regarding mandatory minimums:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines.¹⁰ (*See additional discussion of this recommendation below*)
- Mitigating the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960, including more finely tailoring the current definition of “felony drug offenses” that triggers the heightened mandatory minimum penalties.¹¹
- Amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) for firearm offenses, particularly the penalties for “second or subsequent” violations of the statute, to lesser terms.¹²
- Amending 18 U.S.C. § 924(c) so that the increased mandatory minimum penalties for a “second or subsequent” offense apply only to *prior* convictions to reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c).¹³
- Amending 18 U.S.C. § 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently to provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment.¹⁴
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.¹⁵

Moreover, in the absence of the abolition of mandatory minimum penalties, the ACLU encourages the Commission to recommend to Congress that it enact a new statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) for offenders convicted of other offenses carrying mandatory minimum penalties. We commend the Commission for its longstanding advocacy against unjust mandatory minimum penalties and encourage the Commission to pursue Congressional action.

¹⁰ *Id.* at 355-56.

¹¹ *Id.* at 356.

¹² *Id.* at 364.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 365.

II. Expansion of Current Safety Valve Eligibility

The ACLU agrees with the Commission's 2011 recommendation that "Congress should 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."¹⁶ We urge the Commission to reiterate this recommendation to Congress and to support an expansion of safety valve eligibility for non-violent offenders with even more than three criminal history points. In the absence of sweeping reform to mandatory minimum sentences, this eligibility expansion would permit judges to sentence more defendants with studied and thoughtful care given to the 18 U.S.C. § 3553(a) factors and to avoid unjust sentences caused by Congress's mistaken conflation of drug quantity with culpability in the Anti-Drug Abuse Act of 1986.

The sentencing of Jamel Dossie demonstrates the need for expanding safety valve eligibility. As summarized by Judge Gleeson in *U.S. v. Dossie*:¹⁷

Jamel Dossie is a young, small-time, street-level drug dealer's assistant. No one could reasonably characterize him as a leader or manager of anything, let alone of a drug business. Like many young men in our community, he was in the drug business because he is a drug user. Dossie was born in the Brownsville section of Brooklyn. His father's illegal drug use caused a split with his mother before Dossie was even born; Dossie saw his father only three times per year before his father died in 2009. Dossie's mother was (and still is) a bus driver and she raised Dossie and his two siblings by herself. Dossie criminal history included a 2008 simple marijuana possession conviction, and a 2010 misdemeanor conviction for possessing heroin and crack. His sentences for those misdemeanors were only seven days in custody and probation, respectively, but each conviction nevertheless earned Dossie a criminal history point, terminating any chance he had for safety-valve relief

Dossie on four occasions was a go-between in hand-to-hand crack sales. . . . In sum, Dossie sold a total of 88.1 grams, or 3.1 ounces, of crack. His sole function was to ferry money to the supplier and crack to the informant on four occasions for a total gain to himself of \$140.¹⁸

The government charged Mr. Dossie with a violation of 21 U.S.C. § 841(b)(1)(B), triggering a five year mandatory minimum sentence that Congress intended for "'serious' traffickers."¹⁹ Even though Mr. Dossie's criminal history was entirely non-violent, because of existing criminal history limitations he was ineligible for the safety valve and the district court judge was forced to sentence him to five years.

Because of stories like Mr. Dossie's, the ACLU agrees with Judge Gleeson that the Commission's 2011 recommendation to expand safety valve eligibility to include non-violent

¹⁶ Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011 at xxxi.

¹⁷ *U.S. v. Dossie*, 851 F.Supp.2d 478 (E.D. N.Y. 2012).

¹⁸ *Id.* at 481-82 (internal footnotes omitted).

¹⁹ Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011 at 24.

offenders with “two, or perhaps three, criminal history points”²⁰ is insufficient. As Judge Gleeson explained, “[t]his recommendation is too tepid, given how easy it is for non-violent offenders to rack up criminal history points.”²¹

In 2012, of the 1,552,432 people arrested for drug abuse violations, 42.4% (634,000) were arrested for marijuana possession.²² The ease with which non-violent offenders get saddled with criminal history points is particularly true among African Americans, who police often disproportionately target for low-level non-violent drug offenses, and who – as a result – are disproportionately ineligible for safety valve relief.²³ As the Commission has reported to Congress, in fiscal year 2010, “[m]ore than 75 percent . . . of Black drug offenders convicted of a drug offense carrying a mandatory minimum penalty have a criminal history score of more than one point under the sentencing Guidelines, which disqualifies them from application of the safety valve.”²⁴ By contrast, 53.6% of Hispanic offenders, 60.5% of white offenders, and 51.6% of other offenders had more than one criminal history point, thereby disqualifying them from safety valve relief. Thus, in addition to subjecting non-serious traffickers to harsh mandatory minimums, the safety valve’s criminal history eligibility requirement magnifies racially disproportionate enforcement dynamics that occur at both the state and federal levels. No reasonable justification exists for maintaining an overly narrow safety valve. Under the current eligibility for the safety valve, someone like Mr. Dossie, with a criminal history that includes only misdemeanor offenses, is ineligible for safety valve relief, thus causing an excessive and unjust sentence.

In sum, we urge the Commission to support a significant expansion of safety valve eligibility for non-violent offenders with more than one criminal history point. Such an expansion would permit judges – in appropriate situations – to avoid imposing lengthy sentences on offenders who do not need and whose conduct does not justify serving long sentences in federal prison. The current criminal history eligibility requirement results in “too many non-violent, low-level, substance-abusing defendants like Jamel Dossie los[ing] their claim to a future”²⁵

III. Fair Sentencing Act Report and the Impact of the Changes in Federal Sentencing

Section 10 of the Fair Sentencing Act (FSA) of 2010 (P.L. 111-220),²⁶ requires the Commission to conduct a study on the impact that the FSA has had on sentencing policy and the

²⁰ *Mandatory Minimum Penalties*, October 2011 at xxxi.

²¹ *Dossie*, 851 F.Supp.2d at 482 n.5.

²² *The War on Marijuana in Black and White*, p. 14, available at <http://www.aclu.org/files/assets/061413-mj-report-rfs-rel4.pdf>

²³ See generally, *The War on Marijuana in Black and White*, p. 4 (documenting that “on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates. Such racial disparities in marijuana possession arrests exist in all regions of the country, in counties large and small, urban and rural, wealthy and poor, and with large and small Black populations.”).

²⁴ *Mandatory Minimum Penalties*, October 2011 at 159-160.

²⁵ *Dossie*, 851 F.Supp.2d at 478 (internal quotation marks omitted).

²⁶ “Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.” P.L. 111-220 (2010)

law. In the four years since the enactment of the FSA, it is important for the Commission in its report to Congress to demonstrate the direct and indirect impact that the law has had on the federal criminal justice system. The Commission's own statistics tell an important story about the direct impact that the FSA has had on federal sentencing in just four years. In 2010, 4,897 individuals were sentenced under the Guidelines for crack cocaine offenses which equaled 19.5% of the federal drug cases that year, compared to only the 2,975 individuals in 2013, which comprised only 11.3% of federal drug cases.²⁷ Furthermore, individuals were serving an average of 110 months in prison for crack cocaine offenses in 2010, but that decreased to an average of 100 months in 2013.²⁸

Also, as a result of the Commission's application of the FSA Guidelines retroactively, 7,706 individuals had their motions for resentencing under the FSA Guidelines granted.²⁹ This is significant to highlight in the context of the report to Congress as Congress continues to consider legislation such as S.1410 and H.R. 3382 the Smarter Sentencing Act (SSA). By focusing on the major impact that FSA Guideline retroactivity has had on federal sentencing, the Commission could play an important role in assisting Congress to understand the potential effect SSA crack cocaine statutory retroactivity will have on the federal criminal justice system.

Moreover, it is essential for the Commission to emphasize that recidivism rates did not increase as a result of the retroactive application of the FSA Guidelines. In the Commission's Report updated in May, titled *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, in which the rates of recidivism among prisoners who received a reduced sentence pursuant to the 2007 amendment to the drug quantity table for crack cocaine offenses was compared to similarly situated people who did not receive a reduced sentence, the Commission concluded that "there is no evidence that offenders whose sentence lengths were reduced ... had higher recidivism rates than a comparison group ... released before the effective date of the 2007 Crack Cocaine Amendment"³⁰ Indeed, recidivism rates were higher for the comparison group,³¹ both for men and women,³² and across all criminal history categories.³³ Simply put, the Commission's successful reduction of the Guidelines for crack cocaine in 2007, and of their retroactive application in 2007 and 2011 demonstrates that implementing reductions to the Sentencing Guidelines does result in any greater jeopardy to public safety.

This is important for Congress to understand both in the context of its consideration of the SSA and the Commission's statutory responsibility under 28 U.S.C. § 994(u) when it revises Guidelines to "specify in what circumstances and by what amount the sentences of prisoners

²⁷ U. S. Sentencing Commission's 2013 Sourcebook of Federal Sentencing Statistics, Figure A and Table 33; <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013-0> and U. S. Sentencing Commission 2010 Sourcebook of Federal Sentencing Statistics, Figure A and Table 33; <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2010/sourcebook-2010>

²⁸ *Id.* at Figure J

²⁹ U.S. Sentencing Commission Preliminary Crack Retroactivity Data Report Fair Sentencing Act, Table 1 (July 2014)

³⁰ U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, *supra* note 20, at 1-2.

³¹ *Id.* at 3.

³² *Id.* at 5.

³³ *Id.* at 6.

serving terms of imprisonment for the offense may be reduced.”³⁴ Some in Members of Congress have criticized the Commission for its decisions to apply Guideline changes retroactively. While the Commission is not required to apply Guideline changes retroactively, it is required by the statute to consider whether the revisions should apply to people currently serving sentences for the crimes. Congress should respect the Commission’s statutory responsibility under 28 U.S.C. § 994(u).

IV. Recommendations from the Commission’s December 2012 Report, *The Continuing Impact of U.S. v. Booker on Federal Sentencing*

A. Appellate Review

The ACLU opposes the Commission’s proposal to “[d]evelop more robust substantive appellate review by requiring a presumption of reasonableness on appellate review of within range sentences, greater justification for sentences further outside the guideline range, and heightened review of sentences based on policy disagreements with the guidelines.”³⁵ The Commission’s proposal “would make review of guideline sentences less ‘robust’ and review of non-guideline sentences more ‘robust,’ contrary to the Supreme Court’s holding that that all sentences must be reviewed only for abuse of discretion, ‘whether inside, just outside, or significantly outside the Guidelines range,’³⁶ and whether based on individualized circumstances or on a conclusion that the guideline itself fails to achieve § 3553(a) objectives.”³⁷³⁸

In its decision in *Gall v. U.S.* two years after *Booker*, the Court stated that “while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of- discretion standard.”³⁹ The Court went on to provide more precise guidance, pointing out that, in any given case, the appellate courts have the authority – indeed, the legal obligation – to consider both procedural and substantive issues:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound; the appellate court should

³⁴ 28 U.S.C. 994(u).

³⁵ U.S.S.C. December 2012 Report to Congress *The Continuing Impact of U.S. v. Booker on Federal Sentencing*, Part A, at 9.

³⁶ *Gall v. U.S.*, 552 U.S. 38, 41 (2007); see also *Kimbrough v. U.S.*, 552 U.S. 85, 110 (2007); *Rita*, 551 U.S. at 351; *U.S. v. Booker*, 543 U.S. 220, 261 (2005).

³⁷ *Kimbrough*, 552 U.S. at 110; *Gall*, 552 U.S. at 51-53, 59-60.

³⁸ Amy Baron-Evans & Jennifer Niles Coffin, *The Commission’s Proposals to Restore Mandatory Guidelines Through Appellate Review*, at 1.

³⁹ 52 U.S. 38, 41 (2007).

consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness.⁴⁰

The Court based its decision regarding the appropriateness of the abuse-of-discretion standard, quite logically, on “related statutory language, the structure of the statute, and the ‘sound administration of justice,’” as well as “the past two decades of appellate practice in cases involving departures.”⁴¹ While critics have complained that the review standard announced by the Court in *Booker* and *Gall* has “severely degrad[ed] [courts of appeals’] ability to correct even gross outlier sentences,”⁴² a careful review of the Court’s rationale in reaching its decision, as well as the historical context in which the decision was made, reveals the appropriateness and ultimate workability of the abuse-of-discretion standard.

To begin with, despite some commentators’ lamentations that *Booker* “stripped the courts of appeals of the power of *de novo* sentencing review,”⁴³ the fact is that the *de novo* standard was not inserted into § 3742(e) until 2003, just two years before *Booker* was decided. In the two decades prior to that, under the mandatory regime, appellate courts were directed to determine whether a sentence was “unreasonable” in light of the factors articulated in § 3553(a) – an inquiry entirely consistent with the abuse-of-discretion standard the Court found implicit in the SRA, even after the removal of § 3553(b)(1).

Two basic principles underlie the application of the abuse-of-discretion standard.⁴⁴ First, where a court’s ruling is based, in large part, on the judge’s unique perspective as the finder of fact, due deference should be given to the court’s decision on appeal.⁴⁵ Hence, the Supreme Court has recognized that “deference was owed to the ‘judicial actor . . . better positioned than another to decide the issue in question.’”⁴⁶ In the sentencing context, the abuse-of-discretion standard and the attendant level of deference to the district court are particularly appropriate. In addition to being more intimately familiar with the facts of the case simply by virtue of presiding over the proceedings, the sentencing judge has the opportunity to assess the credibility of witnesses, both at trial and during the sentencing phase, and to observe and interact directly with the defendant. As such, it makes perfect sense for appellate courts to extend significant deference to the district court’s decision.

That said it is worth noting that, in some important ways, the current review standard provides appellate courts with even more opportunities to alter or correct sentencing decisions than did the original scheme. Under the SRA, appellate courts gave significant deference to sentences within the applicable Guideline range, reviewing only for procedural error. With

⁴⁰ *Gall*, 552 U.S. at 597.

⁴¹ *Booker*, 543 U.S. at 260-261.

⁴² Otis, William. “The Slow, Sad Swoon of the Sentencing Suggestions.” Engage: Vol. 12, Issue 1, p. 30.

⁴³ *Id.*

⁴⁴ *U.S. v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009).

⁴⁵ *See Id.* (noting that “deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter.”) (internal citation omitted).

⁴⁶ *Koon v. U.S.*, 518 U.S. 81, 98, 99 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988)).

regard to sentences outside the Guideline range, the SRA imposed a reasonableness standard, using the § 3553(a) factors as the central point of reference, and required due deference to the district court's decision for the traditional reasons articulated above. But as *Gall* makes clear, the reasonableness inquiry now applies to all sentences – whether inside or outside the guideline range – and includes both procedural and substantive aspects.

The second justification for the use of the abuse-of-discretion standard is “the sheer impracticability of formulating a rule of decision for the matter in issue.”⁴⁷ That is, because of the fact-specific nature of any given case, the district court is better positioned to come to reasoned decision, including in the sentencing context, than is the appellate court.⁴⁸

It is no surprise then that the Supreme Court has found, even prior to *Booker*, that “[a] district court’s decision to depart from the [mandatory] Guidelines. . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.”⁴⁹ The Court in *Koon* went on to add that deference to the district court stems from that court’s “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”⁵⁰ Moreover, a *de novo* standard of review in this context would not provide sentencing courts with any consistent guidance going forward. “[A] district court’s departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization, and as a consequence, *de novo* review is unlikely to establish clear guidelines for lower courts.”⁵¹ For these same reasons, the Court, in light of *Booker*, has determined that the abuse-of-discretion standard continues to be the most appropriate in the sentencing realm, notwithstanding the fact that the Guidelines are no longer mandatory. The Court has made clear that “[t]he sentencing judge is in a superior position to find facts and judge their import under §3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.”⁵² In addition, “district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.”⁵³

The reasonableness standard is a familiar concept for federal appeals courts charged with reviewing sentencing decisions. The courts relied on a reasonableness inquiry prior to *Booker*, with the exception of the short timeframe between passage of the Feeney Amendment in 2003 (establishing a *de novo* review standard) and the Court’s decision in 2005. As expected, given the mandatory nature of the Guidelines at that time, a greater percentage of sentences reviewed by appellate courts pre-*Booker* were within the applicable Guideline range, notwithstanding sentencing courts’ ability to depart from the Guidelines under certain circumstances.⁵⁴ To the extent that there has been an increase in sentences outside the Guidelines range after *Booker*, appellate courts have embraced their increased opportunities to assess the reasonableness of

⁴⁷ *Pierce*, 487 U.S. at 561-562.

⁴⁸ See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise.”) (quoting *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

⁴⁹ *Koon*, 518 U.S. at 98.

⁵⁰ *Id.*

⁵¹ *Id.* at 99 (internal citations omitted).

⁵² *Gall*, 552 U.S. at 51.

⁵³ *Id.* at 52. See also *Rita v. U.S.*, 551 U.S. 338, 357-358 (2007).

⁵⁴ *Otis*, at 28.

sentencing court decisions, and indeed to strike down sentences outside the applicable range on the ground either that they were procedurally deficient or substantively unreasonable – a trend that has not been to the benefit of defendant-appellants. From a results-oriented perspective, the majority of sentences today end up within the Guideline range, just as they did pre-*Booker*.

Indeed, despite the suggestion that criminal offenders are receiving a windfall as a result of the changes to the appellate procedure, the abuse-of-discretion standard applies with equal force whether the court sentences a defendant above, below, or within the guideline range. Hence, to the extent that this standard of review renders the court’s sentencing decision more difficult to overturn on appeal, all parties are on equal ground. The Commission reports that, of the 60 sentences the government appealed in fiscal year 2012,⁵⁵ it boasted a 66.6% success rate.⁵⁶ Defendants challenging their sentences have been much less successful. Of the 5,928 sentences appealed by defendants in fiscal year 2012, the defendant prevailed in just 14.4% of the cases.⁵⁷ Moreover, the majority of sentences in 2012 – 54.4% – fell within or above the now-advisory Guideline range,⁵⁸ which flies in the face of the notion that *Booker* and *Gall* have applied undue pressure on judges to give undeserving defendants the benefit of downward departures. And while 45.6% of total sentences fell below the Guideline range in 2012, approximately 61% of below Guidelines sentences were government sponsored.⁵⁹ These numbers suggest that, rather than giving defendants the upper hand, the current appellate review standard is working to the great advantage of the federal government.

The Court acknowledges that the “reasonableness” standard will not necessarily lead to the kind of uniformity in sentencing that Congress sought in enacting the SRA. However, “Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create.”⁶⁰ As such, and given that the Guidelines have been deemed advisory, the question becomes “which alternative adheres more closely to Congress’s original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions?”⁶¹ Although the former will not guarantee absolute uniformity in sentencing, appellate courts’ reasonableness determination, based on an abuse-of- discretion standard, “would tend to iron out sentencing differences,” while the latter would leave parties with no opportunity to appeal at all. Additionally, appellate review under the current standard works in tandem with the continued efforts of the Sentencing Commission to collect sentencing information from around the country, research salient legal issues, and revise the Guidelines as necessary, thus encouraging uniformity in sentencing while also allowing district courts to consider the specific circumstances and characteristics surrounding individual defendants.⁶²

⁵⁵ United States Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics, tbl. 56A. The 2012 Sourcebook notes that, of the 9,755 appeals cases, 3,788 were excluded due to one of the following reasons: type of appeal was “conviction only” (2,031), “Anders Brief” (1,636), or “unknown” (121). Of the 5,967 remaining cases, 5,907 were excluded as the appeal was by the defendant only.

⁵⁶ 2012 Sourcebook of Federal Sentencing Statistics, tbl. 56A.

⁵⁷ *Id.*, tbl. 56.

⁵⁸ *Id.*, tbl. N.

⁵⁹ *Id.*

⁶⁰ *Booker*, 543 U.S. at 263.

⁶¹ *Id.*

⁶² See *Kimbrough v. U.S.*, 552 U.S. 85, 107 (2007) (citing *Booker* and noting that “advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”).

The majority of defendants who wish to challenge their above- or within- Guidelines sentence continue to face very long odds on appeal given the current standard of review. Nevertheless, in light of the fact that the abuse-of-discretion standard gives significant weight to the sentencing courts' decisions, encourages adherence to the Guidelines by permitting appellate courts to maintain the presumption of reasonableness with regard to within-Guideline sentences, and thereby discourages frivolous appeals, it is difficult to quarrel with the Court's conclusion that the current standard is the most appropriate in this context.

While it is understandable (though ironic) that prosecutors and others may now, post-*Booker*, find the abuse-of-discretion standard to be a frustrating impediment to successful appeals – a frustration long endured by criminal defendants – the suggestion that the standard is therefore unworkable or unfair is not supported by the statistics. Indeed, the better question seems to be how a *de novo* standard of review, as proposed by some critics, could be squared with the Court's consistent and well-reasoned conclusion, as highlighted above, that sentencing courts maintain a unique and significant advantage over appellate courts in determining the appropriate sentence for criminal defendants. At best, such a standard would encourage duplicative efforts by district and appellate courts. At worst, it would allow appellate judges, far removed from the original proceedings and relying solely on a paper record, to substitute their judgment for that of the sentencing judge who had first-hand access to the proceedings, a phenomenon long frowned upon in our system of justice. For these reasons, we urge the Commission to reconsider its appellate review proposal.

B. Statutory Changes that Would Curtail Judicial Discretion at Sentencing

The Commission seeks comment on three proposals it made to Congress in its December 2012 *Booker* Report: (1) that Congress should enact into law the three-step guideline the Commission promulgated in 2010, which states that the sentencing court *shall* consider in every case all of the policy statements and commentary prohibiting or discouraging sentences outside the Guideline range, and only then consider the §3553(a) factors taken as a whole;⁶³ (2) that courts should be required to give the Guidelines “substantial weight;”⁶⁴ and (3) that Congress should reconcile 28 U.S.C. § 994(d) and (e), which it interprets as requiring the Commission to restrict the manner in which certain offender characteristics can be considered in the guidelines with 18 U.S.C. § 3553(a), which the Supreme Court interprets as requiring courts to consider broadly offender characteristics.⁶⁵

The ACLU joins the Federal Defenders⁶⁶ in opposing all three of these proposals. The Commission's “proposals would eviscerate judges' authority to consider the history and characteristics of the defendant and mitigating circumstances of the offense, and would suppress disagreement with the guidelines and policy statements, all contrary to Supreme Court law.”⁶⁷ Working together, these three proposals would constrain judges far more than the Constitution permits: the Commission's proposals would create the equivalent of “the sentencing framework

⁶³ U.S.S.C. December 2012 Report to Congress *The Continuing Impact of U.S. v. Booker on Federal Sentencing*, Part A at 114.

⁶⁴ *Id.*

⁶⁵ *Id.* at 113.

⁶⁶ Amy Baron-Evans & Thomas W. Hillier, *The Commission's Legislative Agenda To Restore Mandatory Guidelines*, April 16, 2013.

⁶⁷ *Id.* at 1.

that the Supreme Court struck down.”⁶⁸ Indeed, Judges, probation officers, and practitioners overwhelmingly endorse the current advisory Guidelines system, which is characterized by far greater flexibility than the system that the Commission’s proposals would create.

As the Federal Defenders documented, “[a]t the Commission’s hearing in February 2012 on ‘Federal Sentencing Options after *Booker*,’ where its current proposals were previewed, nearly every witness, including witnesses for the Judicial Conference, and even some Commissioners, noted that the proposals posed significant constitutional problems and would engender disruptive and costly litigation. No one was able to identify a benefit that would outweigh those problems.”⁶⁹ Witnesses who commented on the Commission’s proposals to prevent individualized sentencing said that such legislation would be unfair (particularly to racial minorities), bad public policy (in ignoring differences among defendants that are relevant to the need for incapacitation), and/or unconstitutional (on Sixth Amendment, separation of powers, and/or equal protection grounds).⁷⁰”⁷¹

Thus, in opposing these three proposals, the ACLU joins a sizable chorus of dissenters who represent a diverse range of perspectives. In light of this overwhelming opposition, the Commission should abandon these proposed statutory changes. Instead, the Commission should urge federal district courts to harmonize *Kimbrough* and *Gall* and embrace the approach applied by a handful of courts around the country in which courts first determine whether they have any policy-based disagreements with the sentencing Guidelines as authorized by *Kimbrough* and, if so, determine a new sentencing range, and only then take into account individual offender characteristics under 18 U.S.C. § 3553(a). Such a process would serve a number of important purposes. It would (1) promote consistency within sentencing procedure and harmony within sentencing law; (2) ensure that the parties secure the benefits of the sentencing court’s discretion along each of the dimensions the Supreme Court has identified as appropriate for judicial consideration in the new advisory-Guideline regime; and (3) encourage judicial clarity about the bases for variance, thus helping to identify areas of the Guidelines that judges believe need reform and facilitating the dialogue between courts and the Commission that Congress expected

⁶⁸ *Id.* at 11.

⁶⁹ See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 94-95 (Commissioner Friedrich); *id.* at 166-67 (Judge Howell); *id.* at 62 (Feb 16, 2012) (Judge Barbadoro); *id.* at 88-89, 95 (Associate Deputy Attorney General Matthew Axelrod); *id.* at 107-09, 167-69 (Professor Klein); *id.* at 169-71 (Judge Lynch); *id.* at 171 (Judge Davis); *id.* at 116-20, 171-73 (Federal Defender Henry Bemporad); *id.* at 363-72 (David Debold, Chair, Practitioners’ Advisory Group); *id.* at 380-93 (James Felman, American Bar Association); Statement of Chief United States Circuit Judge Theodore McKee on Behalf of the Judicial Conference Before the U.S. Sent’g Comm’n, Washington, D.C., at 6-19 (Feb. 16, 2012). But see *id.* at 174 (Matthew Miner acknowledging constitutional concerns but urging the Commission to “take some risks.”).

⁷⁰ See Federal Sentencing Options Hearing Tr. at 154-56 (“I’d be surprised if a rational Congress would seriously do that.”) (remarks of Judge Lynch); *id.* at 108, 141, 152-53 (explaining that it would raise a separation of powers problem if Congress told judges they could not consider matters important to judging) (remarks of Professor Klein); *id.* at 156 (opining that a pure “just deserts system” would lead the Court to change its selective prosecution doctrine) (remarks of Judge Davis); *id.* at 157-58 (such a system would leave “only the guidelines standing” and thus “raise Sixth Amendment issues”) (remarks of Henry Bemporad). See also Henry J. Bemporad, Fed. Pub. Defender for the W. Dist. of Tex., Statement Before the U.S. Sentencing Commission 4-10 (Feb. 16, 2012); Raymond Moore, Fed. Pub. Defender for the Dists. of Colo. and Wyo., Statement Before the U.S. Sentencing Commission 20-25 (Feb. 16, 2012); Susan R. Klein, Professor, Univ. of Tex., Statement Before the U.S. Sentencing Commission 9-11 (Feb. 16, 2012); David Debold, Chair, Practitioners Advisory Grp., Statement Before the U.S. Sentencing Commission 8-9 (Feb. 16, 2012); Lisa Wayne, President, Nat’l Ass’n of Criminal Def. Lawyers, Statement Before the U.S. Sentencing Commission 6-7 (Feb. 16, 2012); Michael Tonry, Professor of Law and Public Policy, U. of Minn., Statement Before the U.S. Sentencing Commission 1 (Feb. 16, 2012).

⁷¹ *The Commission’s Legislative Agenda To Restore Mandatory Guidelines* at 2.

when it enacted the SRA, and that the Supreme Court has repeatedly emphasized as a worthy by-product of the advisory-Guideline system.⁷²

V. Statutory and Guideline Definitions

The ACLU encourages the Commission to recommend that Congress make statutory changes to the definitions for “crime of violence,”⁷³ “violent felony,”⁷⁴ and “aggravated felony.”⁷⁵ The existing definitions sweep far too broadly, capturing conduct that is not actually violent.⁷⁶ As a first step, Congress should narrow its definition of “violence” to exclude mere risk of force. Indeed, “[b]y defining ‘violence’ by reference to the risk of physical force against the property of another and the serious potential risk of physical injury to another, sections 16 and 924(e) of Title 18 represent an unprecedented expansion in the concept of violence.”⁷⁷ Rather than focus on actual violence, or even threats of violence, the analysis turns on the risk of violence. The net result has been an explosion in the crimes that qualify as ‘violent,’⁷⁸ which in turn fuels the growth in the prison population.⁷⁹ The statutory definitions at issue should be limited to felonies that actually involve the use or attempted use of force against another person—the hypothetical risk of force against people or property should be excluded. These overbroad definitions result in excessively severe sentences that fail to reflect many defendants’ actual conduct and culpability. Therefore, the Commission should recommend that Congress significantly narrow the definitions of these terms.

⁷² See Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements With the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1089 (2012).

⁷³ 18 U.S.C. § 16 defines “crime of violence” as: “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

⁷⁴ 18 U.S.C. § 924(e)(2)(B) defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that-- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . .”

⁷⁵ 8 U.S.C. § 1101(a)(43)(F), defining “aggravated felony” incorporates crimes of violence as defined in 18 U.S.C. § 16 (but not including a purely political offense) for which the term of imprisonment is at least one year.

⁷⁶ Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2013, at 11.

⁷⁷ See Alice Ristorph, *Criminal Law in the Shadow of Violence*, 62 ALLR 571 (2011).

⁷⁸ The focus on “risk” rather than actual force or threats of force in the violent crimes analysis has resulted in numerous state crimes being used to enhance federal sentences that would not be considered “violent” under any common sense use of the term. See, e.g., *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008) (homicide by negligent operation of motor vehicle); *United States v. Alderman*, 601 F.3d 949 (9th Cir. 2010) (Washington first degree theft a.k.a. “pick-pocketing”); *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994) (pickpocketing under District of Columbia statute); *Sykes v. United States*, 131 S. Ct. 2267 (2011) (fleeing a police officer by vehicle); *United States v. Alfaro-Gramajo*, 283 Fed. Appx. 677 (11th Cir. 2008) (burglary of a vehicle); *United States v. Lopez-DeLeon*, 513 F.3d 472 (5th Cir. 2008) (statutory rape).

⁷⁹ Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2013, at 15 (internal footnote omitted).

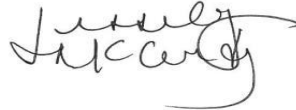
VI. Conclusion

We appreciate the opportunity to comment on the Commission's proposed priorities for 2015. If there are any comments or questions, please feel free to contact to Senior Legislative Counsel Jesselyn McCurdy at (202) 675-2307 or jmccurdy@aclu.org.

Respectfully submitted,



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