

**NEW YORK  
CITY BAR**

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June 9, 2014

The Honorable Patrick J. Leahy  
Chairman  
United States Senate  
Committee on the Judiciary  
437 Russell Senate Building  
Washington, DC 20510

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate  
Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, DC 20510

The Honorable Bob Goodlatte  
Chairman  
U.S. House of Representatives  
Committee on the Judiciary  
2309 Rayburn HOB  
Washington, D.C. 20515

The Honorable John Conyers  
Ranking Member  
U.S. House of Representatives  
Committee on the Judiciary  
2426 Rayburn H.O.B.  
Washington, DC 20515

**Re: The "Smarter Sentencing Act"**

Dear Senators Leahy and Grassley, and Representatives Goodlatte and Conyers:

We respectfully write on behalf of the Federal Courts Committee of the Association of the Bar of the City of New York ("the Association"), in support of the "Smarter Sentencing Act." The Senate bill (S. 1410), which was initially sponsored by Senators Richard Durbin (D-IL) and Mike Lee (R-UT), was recently placed on the Senate's Legislative Calendar. The House bill (H.R. 3382), introduced by Representative Raul Labrador (R-ID), is in Committee.

**A. Introduction**

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its

membership many lawyers in every area of law practice, including many present or former federal prosecutors as well as many lawyers who represent defendants in criminal cases. The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

The Association is generally opposed to mandatory minimum sentences in criminal cases. Federal statutes requiring the imposition of a mandatory minimum sentence take away from federal district judges the discretion to impose an appropriate sentence, consistent with the federal sentencing policies set out in 18 U.S.C. § 3553(a), taking into account the unique facts of each case and defendant. Statutes imposing mandatory minimum sentences instead substitute a "one-size-fits-all" approach that can often result in unduly harsh and unjust sentences and contribute to sentencing disparities among similarly situated defendants. The problem created by mandatory minimum sentences is particularly acute with respect to the current mandatory minimums imposed for drug offenses, which often result in excessively severe penalties relative to the gravity of the offense, are in large part responsible for the enormous growth of the federal prison population, and have greatly exacerbated racial disparities in the treatment of federal offenders. Moreover, even when mandatory minimums do not apply to a particular case, they have exerted an adverse impact on the sentencing of drug offenders generally, because the Sentencing Commission has taken the mandatory minimum penalties into account in setting the sentencing ranges for drug offenders in the Federal Sentencing Guidelines (the "Guidelines").

The Association supports the Smarter Sentencing Act because it would provide urgently needed reform of current mandatory minimum sentences. The most significant aspects of the Smarter Sentencing Act are that it would: (1) reduce mandatory minimum sentences for many drug offenses by 50-60%; (2) expand the applicability of the "safety valve" provided by 18 U.S.C. § 3553(f), by broadening the conditions under which drug offenders may qualify for a sentence below the mandatory minimum; (3) permit current federal prisoners to seek relief retroactively under the Fair Sentencing Act of 2010; and (4) require the Sentencing Commission to amend the Guidelines to reflect the new provisions, which will result in fairer sentencing overall.

The Smarter Sentencing Act also would have a salutary effect on the overcrowding of federal prisons, in turn saving taxpayers billions of dollars. As the Sentencing Commission, among others, has observed, mandatory sentencing laws have caused the federal prison population to soar. Approximately 2.4 million people – fully 1% of the U.S. adult population – are now behind bars. The bill would reduce prison overcrowding and prison costs, making funds available for programs that aid victims and other purposes; such programs are likely to be more effective than lengthy prison terms in reducing recidivism. The Act also would reduce, at least to some extent, the disgraceful racial disparities in sentencing that continue to plague our criminal justice system.

## **B. Background on Mandatory Minimum Laws for Drug Offenses**

The framework of mandatory minimum sentences for federal drug offenses was established by the Anti-Drug Abuse Act of 1986. The minimums were based on drug quantity, which was viewed as a proxy for identifying major drug traffickers, without allowing for

consideration of an offender's actual role in the drug distribution organization. The quantities triggering a mandatory minimum sentence differed by drug or form of drug. In particular, the 1986 Act treated quantities of crack cocaine vastly differently from quantities of powder cocaine, using a "100-to-1" ratio and thereby causing, as has been well documented, significant racial disparities in sentencing. The mandatory minimum sentencing provisions of the 1986 Act were expanded in 1988, including by imposing a 5-year mandatory minimum for possession of more than 5 grams of crack cocaine and extending the scope of mandatory minimums for drug trafficking offenses to defendants convicted of conspiring to commit substantive drug offenses. These laws made non-violent, low-level street dealers and private users susceptible to disproportionately lengthy prison terms relative to their conduct.

In 2010, Congress passed the Fair Sentencing Act, effectively reducing the ratio between crack and powder cocaine to 18-to-1 and eliminating the mandatory minimum sentence for possession of crack cocaine. The 2010 Act was not made retroactive at the time, and therefore provided no relief to federal prisoners serving lengthy prison sentences under the earlier mandatory minimum laws.<sup>1</sup>

### **C. The Smarter Sentencing Act<sup>2</sup>**

#### **1. REDUCTION OF MANDATORY MINIMUM SENTENCES FOR CERTAIN DRUG OFFENSES**

Section 4 of the Smarter Sentencing Act would amend the Controlled Substances Act, 21 U.S.C. § 841(b)(1), and the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b)(1), to reduce substantially mandatory minimum sentences for trafficking (importing, exporting, or possessing with intent to distribute) in heroin, cocaine, and other drugs. The mandatory minimum for offenses involving larger quantities of these drugs would be reduced from 10 years to 5 years and the mandatory minimum for offenses involving smaller quantities would be reduced from 5 years to 2 years. The Smarter Sentencing Act also would reduce from 20 years to 10 years the mandatory minimum for a person convicted of committing a qualifying drug trafficking conviction after a prior felony drug conviction. The Act would *not*, however, change other mandatory minimum sentences for drug crimes, including the mandatory minimum sentences for drug crimes that result in death or serious injury.

The Association believes that a substantial reduction of the mandatory minimums for non-violent drug offenses is necessary and restores proportionality in sentencing for these offenses. We believe that Congress's focus on reducing mandatory minimums for drug offenses is appropriate, given that current mandatory minimums for drug offenses represent a significant

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<sup>1</sup> The Supreme Court has held that the more lenient penalties of the Fair Sentencing Act apply to offenders who committed crimes before the 2010 Act, but were sentenced after its passage. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

<sup>2</sup> References are to the Senate bill (S. 1410), as amended in and reported by the Senate Judiciary Committee. The House bill is identical to the original text of the Senate bill.

majority of all convictions carrying a mandatory minimum.<sup>3</sup> The Act properly recognizes that mandatory minimums should be a “floor” and should not be set by reference to the sentence appropriate to the most culpable violators, but rather to a sentence appropriate to the least culpable violator who can be convicted under the statute. It is important to bear in mind that a sentencing judge can always sentence a more culpable violator to a sentence above the mandatory minimum.<sup>4</sup>

## 2. SAFETY VALVE EXPANSION

Existing law contains a “safety valve” exception for federal drug offenses, 18 U.S.C. 3553(f), which permits some defendants convicted of a drug trafficking offense to avoid a mandatory minimum sentence even if the drug quantity relevant to their offense would otherwise require imposition of the mandatory minimum. The “safety valve” currently allows drug offenders who have one criminal history point under the Guidelines to qualify for a sentence below the mandatory minimum if they meet certain other criteria. Section 2 of the Smarter Sentencing Act would expand the safety valve so that offenders who have two criminal history points may also qualify. The bill disqualifies, however, any offender who has a prior conviction for an offense that has as an element the use, attempted use, or threatened use of physical force against another person, or who has been convicted of a firearm offense or certain other enumerated offenses.

The Association supports the expansion of the safety valve provision. Under current law, an offender with prior convictions for one or more minor offenses in the distant past might be ineligible for safety valve consideration. The Smarter Sentencing Act would enable such offenders to qualify for a sentence below the mandatory minimum if they otherwise qualify for the safety valve.

However, the Association believes that the Smarter Sentencing Act in its current form is insufficiently flexible, and urges that the bill be amended to allow non-violent drug offenders who have more than two criminal history points, but otherwise meet the statutory criteria, to qualify for the safety valve if a sentencing judge determines that the criminal history points of the particular offender overstate the seriousness of that offender’s criminal history.<sup>5</sup> Such an amendment would be consistent with Guidelines Section 4A1.3(b).

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<sup>3</sup> See U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 122 & Table D-2 (Oct. 2011) [hereinafter “Sentencing Commission Report”] (showing over 77% in 2010).

<sup>4</sup> The bill would not alter the maximum terms of imprisonment applicable to these offenses, which generally range from 20 years to life.

<sup>5</sup> The Sentencing Commission has advocated for expanding the safety valve to a broader group of drug offenders “who still have a modest criminal history” and meet the statutory criteria, including possibly to offenders who have three criminal history points. It estimates that 2,180 additional defendants would have qualified for the safety valve in 2012 had it been expanded to those with three criminal history points. Letter from Patti B. Saris, Chair, U.S. Sentencing Commission, to Senators Leahy and Grassley (attaching Sept. 18, 2013 statement) (Nov. 26, 2013), at p. 10 of statement.

### **3. RETROACTIVE RELIEF UNDER THE FAIR SENTENCING ACT OF 2010**

As noted above, the Fair Sentencing Act of 2010 amended the trigger amounts for mandatory minimum sentences applicable to drug offenses by reducing the ratio between crack and powder cocaine quantities from 100:1 to 18:1. The main purpose of that change was to reduce the gross racial disparity in sentencing for cocaine-base, or “crack,” offenses.

Section 3 of the Smarter Sentencing Act provides retroactive relief to offenders whose offenses predated August 3, 2010, the date of enactment of the 2010 Act, and who have not previously sought relief under the 2010 Act. While it would not automatically reduce existing sentences, the Smarter Sentencing Act would allow a defendant (or the government) to make a motion for a reduced sentence, and would confer discretion on a sentencing judge to impose a reduced sentence as if the provisions of the 2010 Act had been in effect at the time the offense was committed.

The Association supports this provision because it would provide potential relief, based on the individualized facts of each case, to approximately 9,000 federal prisoners who were sentenced to lengthy prison terms under laws that Congress has acknowledged were gravely flawed and had a racially disparate and unjust impact. It will also have the salutary impact of reducing the prison population and saving taxpayers money.

### **4. SENTENCING GUIDELINES DIRECTIVE**

Section 5 of the Smarter Sentencing Act would require the Sentencing Commission to review and revise the Guidelines within 120 days of the Act’s passage, to ensure that the Guidelines are consistent with the reduction of the mandatory minimum sentences for certain drug offenses and the expansion of the safety valve provisions.<sup>6</sup>

The Association supports this provision. Although the Sentencing Commission was created as an independent agency charged with establishing sentencing policies and practices, the Commission has generally incorporated mandatory minimum penalties into the Guidelines, setting base offense levels for applicable offenses in excess of the mandatory minimums.<sup>7</sup> Accordingly, even offenders who are not directly subject to mandatory minimums are sentenced under Guidelines that largely parallel the mandatory minimums. Notably, the Commission supports the Smarter Sentencing Act and has urged reducing mandatory minimums for drug offenses and expanding the safety valve provision. On April 10, 2014, the Commission voted unanimously to impose what it described as a “modest” reduction in penalties for certain drug offenders. While the Commission has clearly acknowledged that the current Guidelines for non-violent drug offenses are overly severe and unjust, it remains either unwilling or unable to amend its Guidelines to reflect the Commission’s views absent action from Congress. By passing the Smarter Sentencing Act, Congress can take the lead on this issue and remedy the injustice stemming from disproportionately severe sentences in non-violent drug cases.

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<sup>6</sup> Sections 6 and 7 also direct the Attorney General to submit a report on the cost-savings impact of the Smarter Sentencing Act, as well as other reports on criminal statutory and regulatory offenses.

<sup>7</sup> See Sentencing Commission Report, at 53.

## 5. NEW MANDATORY MINIMUMS FOR CERTAIN OFFENSES

While the Smarter Sentencing Act substantially reduces mandatory minimums for many non-violent drug offenders, it also establishes in Sections 8 through 10 new mandatory minimums for other offenses, namely certain sexual assault, domestic violence and terrorism-related offenses.<sup>8</sup> It establishes a 5-year mandatory minimum sentence for various federal crimes of sexual abuse, as well as for murder committed during the course of such offenses or offenses of trafficking or exploitation of children. It also creates a 10-year mandatory minimum sentence for interstate domestic violence offenses that result in the victim's death.<sup>9</sup> Finally, the bill amends the International Emergency Economic Powers Act, the Trading With the Enemy Act, the Arms Export Control Act and the general federal smuggling statute to create 5-year mandatory minimum sentences for providing arms to terrorists, exporting "goods or services to any person in connection with a program of a foreign country or foreign person to develop weapons of mass destruction," or attempting, aiding or abetting, or conspiring to do so.

The Association generally does not support imposing new mandatory minimums and recommends further study as to whether these mandatory minimums are necessary and appropriate in all cases. Nevertheless, on balance, we believe that the Smarter Sentencing Act is a fair compromise and that the benefits of the provisions the Association supports substantially outweigh the concerns we have with adding new mandatory minimums. We also note that, unlike the non-violent drug offenses for which the Smarter Sentencing Act would reduce mandatory minimums, many of the new mandatory minimums are for serious crimes against victims that are likely to include violence, crimes as to which sentencing judges would likely impose sentences substantially exceeding the mandatory minimums established by the Act.

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<sup>8</sup> These provisions were added to the Senate bill by amendment, and are not contained in the House bill as it currently stands.

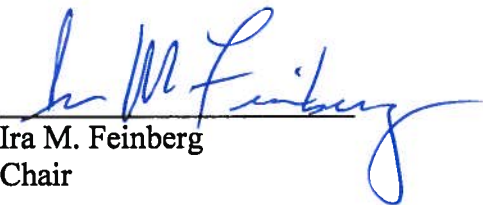
<sup>9</sup> Section 9 would also increase *maximum* penalties for certain domestic violence offenses.

**D. Conclusion**

The Association supports the Smarter Sentencing Act because there is an urgent need for the reforms it contains. We join the growing bi-partisan chorus of members of Congress and concerned organizations that have expressed their support for the bill.<sup>10</sup> While the Association submits that additional reductions of mandatory minimums and/or expansion of the safety valve provisions beyond the measures provided in the Act are warranted, the Smarter Sentencing Act is an important step in the right direction. We urge you to pass this important bill.

Sincerely,

Federal Courts Committee  
Association of the Bar of the City of  
New York

By:   
Ira M. Feinberg  
Chair

cc: U.S. Attorney General Eric H. Holder  
Senator Charles E. Schumer  
Senator Kirsten E. Gillibrand  
Representative Timothy Bishop  
Representative Yvette D. Clarke  
Representative Chris Collins  
Representative Joseph Crowley  
Representative Elliot Engel  
Representative Chris Gibson  
Representative Michael Grimm  
Representative Richard Hanna  
Representative Brian D. Higgins  
Representative Peter King  
Representative Steve Israel

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<sup>10</sup> To date, the Senate bill has 23-co-sponsors and the House bill has 33 co-sponsors. There is also broad support for the bill among disparate constituencies and organizations. Numerous law enforcement organizations support the Act, including the International Union of Police Associations, Association of Prosecuting Attorneys, Major Cities Chiefs Association, the American Correctional Association, the American Probation and Parole Association, and the International Community Corrections Association. The American Civil Liberties Union and the Brennan Center for Justice at New York University School of Law have also written in support of the Act, and a letter from the Leadership Conference on Civil and Human Rights in support of the bill was signed by numerous organizations, ranging from the Service Employees International Union to the United Methodist Church.

Representative Hakeem Jeffries  
Representative Nita Lowey  
Representative Daniel D. Maffei  
Representative Carolyn Maloney  
Representative Sean Patrick Maloney  
Representative Gregory Meeks  
Representative Carolyn McCarthy  
Representative Grace Meng  
Representative Jerrold Nadler  
Representative Bill Owen  
Representative Charles Rangel  
Representative Tom Reed  
Representative Jose Serrano  
Representative Louise Slaughter  
Representative Paul D. Tonko  
Representative Nydia Velazquez