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June 4, 2015

The Honorable Charles E. Grassley
Chairman
United States Senate
Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
United States Senate
Committee on the Judiciary
437 Russell Senate Building
Washington, D.C. 20510

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

Re: The "Smarter Sentencing Act"

Dear Senators Grassley and Leahy 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. 502) and the House bill (H.R. 920), which are identical, were introduced by Senator Mike Lee (R-UT) and Representative Raul Labrador (R-ID), respectively, and referred to the Committees on the Judiciary on February 12, 2015. They follow bills of the same name that were introduced last year, which the Association also supported.

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.¹

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

¹ In contrast to the 2014 Senate Committee version of the bill (*see* S. 1410, §§ 8-10), the bills introduced this year do not seek to impose new mandatory minimum sentences for other offenses, a change that the Association supports.

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.²

C. The Smarter Sentencing Act

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), to reduce substantially mandatory minimum sentences for manufacturing, distributing or dispensing (or possessing with intent to distribute) heroin, cocaine, and other drugs. It would also amend the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b)(1), to similarly reduce mandatory minimum sentences for offenses involving the importation or export of narcotics that are committed by a “courier” – i.e., by “a defendant whose role in the offense was limited to transporting or storing drugs or money.”

The mandatory minimum sentence 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 Act also would reduce the mandatory minimum for a person convicted of committing a qualifying drug offense after a prior felony drug conviction from 20 years to 10 years or from 10 years to 5 years. It would also reduce the mandatory minimum for a person convicted of a qualifying drug offense after two or more prior felony drug convictions from life imprisonment to 25 years. The Act would *not*, however, change 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 majority of all convictions carrying a mandatory minimum.³ 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.⁴ It is for these reasons that the Association would urge that Congress extend the reduction of mandatory minimum sentences to other non-violent offenders (in addition to couriers, as

² 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).

³ 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).

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

defined in the bill) convicted under the Controlled Substances Import and Export Act, on the same terms applicable to other drug offenses, as the version of the bill introduced last year would have done.

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 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 no more than 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 no more than two criminal history points may also qualify.

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.⁵ Such an amendment would be consistent with Guidelines Section 4A1.3(b).

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.

⁵ 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.

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.⁶

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.⁷ 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.

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.⁸ 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.

The Association would also appreciate an opportunity to participate in any public hearings that may be held on the bill.

Respectfully,



Ira M. Feinberg
Chair, Federal Courts Committee
Association of the Bar of the City of New York

⁶ 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.

⁷ See Sentencing Commission Report, at 53.

⁸ To date, the Senate bill has 12 co-sponsors and the House bill has 43 co-sponsors. There is also broad support for the bill among disparate constituencies and organizations, including law enforcement organizations, taxpayer advocacy organizations, civil rights organizations, and religious organizations. All told, over 100 organizations have signed letters in support of the Act.

cc: U.S. Attorney General Loretta E. Lynch
Senator Charles E. Schumer
Senator Kirsten E. Gillibrand
Representative Yvette D. Clarke
Representative Chris Collins
Representative Joseph Crowley
Representative Daniel M. Donovan
Representative Eliot Engel
Representative Chris Gibson
Representative Richard Hanna
Representative Brian D. Higgins
Representative John Katko
Representative Peter King
Representative Steve Israel
Representative Hakeem Jeffries
Representative Nita Lowey
Representative Carolyn Maloney
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