

# REEVALUATING THE EFFECTIVENESS OF FEDERAL MANDATORY MINIMUM SENTENCES

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## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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SEPTEMBER 18, 2013

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## **REEVALUATING THE EFFECTIVENESS OF FEDERAL MANDATORY MINIMUM SENTENCES**

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**WEDNESDAY, SEPTEMBER 18, 2013**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:05 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Klobuchar, Franken, Blumenthal, Hirono, Grassley, Cornyn, and Lee.

### **OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Good morning. Thank you for being here.

Today we are meeting to confront the unsustainable growth of our federal prison population. Let me emphasize that: the unsustainable growth. After years of debate, I am encouraged that we have bipartisan agreement that we must act, that we must reevaluate how many people we send to prison and for how long. Fiscal responsibility demands it. Justice demands it.

One piece of the problem is the extensive use of mandatory minimum sentences. It is a problem that Congress created, but it is also a problem Congress can fix.

I want to be clear that some offenders deserve long sentences. I certainly learned that as a prosecutor. And no one is saying that we should not send dangerous criminals to prison. As any prosecutor knows, behind our most serious crimes, of course, are victims, and victims deserve peace of mind knowing that the criminal who robbed them or raped them or defrauded them of their life savings is off the streets and is being punished. We know that in some cases, especially white-collar crimes, long sentences can serve as a deterrent to others. I also want to emphasize that our efforts should in no way be seen as a criticism of the tireless efforts of law enforcement officials who dedicate their lives to keeping us safe. They deserve our appreciation and support. We saw an example of their efforts just this week here in Washington, D.C.

But we also have to acknowledge that our federal prison population is expanding at a rate that is simply unsustainable. In the past 30 years, it has soared by more than 700 percent. We now spend—and this is just on federal prisons, not State prisons. We spend approximately \$6.4 billion a year on federal prisons; that is about a quarter of the Department of Justice's budget. This spending means fewer federal prosecutors and FBI agents, less funding

for investigations, less support for State and local law enforcement, and fewer resources for crime prevention programs or victim services or reentry programs.

Now, the skyrocketing costs might be acceptable if mass incarceration improved public safety. But we know it does not. While Congress has continued to pass legislation mandating ever longer sentences, the States have focused on successful alternatives. New York, South Carolina, Georgia, Ohio, Rhode Island, and Michigan have undertaken reforms like reducing sentences, repealing mandatory minimums, investing in recidivism reduction, and they have saved taxpayer dollars—all while crime rates have decreased. So I think we should look to the States and see what lessons they have learned.

The number of mandatory minimum penalties in the Federal Code nearly doubled from 1991 to 2011. Many of those mandatory minimums originated right here in this Committee room. When I look at the evidence we have now, I realize we were wrong. Our reliance on a one-size-fits-all approach to sentencing has been a great mistake. Mandatory minimums are costly, unfair, and they do not make our country safer.

I will give you an example. Weldon Angelos, a 23-year-old with no criminal history, received a 55-year mandatory minimum sentence for selling \$350 worth of marijuana on three occasions while in possession of a firearm. Now, there is no question Mr. Angelos committed a crime and he should be punished. But 55 years? He will be in prison until he is nearly 80 years old. His children, only 5 and 6 at the time of his sentencing, will be 60 years old. And for selling that \$350 worth of marijuana, we the taxpayers will have spent more than \$1.5 million to lock him up.

The federal judge who sentenced Mr. Angelos—and incidentally, the federal judge was a conservative Republican—called this sentence “unjust, cruel, and irrational” and noted the sentence, which involved no violence, was much more than the minimum for hijacking or kidnapping or rape. So we have to ask ourselves: What good does this do society?

Mr. Angelos’ sister is here today, as are many family members with similar stories of loved ones sent to prison for decades, and I thank them for being here.

Attorney General Holder’s decision last month not to pursue mandatory minimum sentences for certain drug cases is an encouraging step, but it will not reach cases like Mr. Angelos’. And the Department of Justice cannot solve this problem on its own. Congress has to act.

In March, Senator Rand Paul and I introduced the Justice Safety Valve Act of 2013, which would restore the sentencing discretion judges used to have if they determine that a mandatory minimum punishment is unnecessary and counterproductive. And I believe I speak for both Senator Paul and myself—and he is going to be testifying—that judges, not legislators, are in the best position to evaluate individual cases and determine appropriate sentences. Our bipartisan legislation is neither liberal nor conservative. It has received support across the political spectrum.

I am also a cosponsor of the Smarter Sentencing Act, which was introduced by Senator Durbin and Senator Lee and makes nec-

essary reforms to federal drug sentences. I know that Senator Cornyn, Senator Whitehouse, and others are working on legislation to reduce the size of our prison population. I hope we can combine the best ideas from all of these pieces of legislation, because we cannot afford to stay on our current path.

Reducing mandatory minimum sentences, which have proven unnecessary to public safety, is an important step that we desperately need. This is not a political issue. It is a practical one, and it is long overdue.

Senator Grassley.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.  
SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you for holding this hearing. There is quite a bit of misunderstanding concerning this topic. Prior to 1984, federal judges had almost unlimited discretion in sentencing. Sentences imposed depended much more on which judge was giving the sentence than the nature of the offense or of the criminal's history. Parole and excessive judicial discretion led to unwarranted disparity. Congress thus adopted Sentencing Guidelines. They considered the nature of the criminal offense and the history of the offender. Those guidelines were normally binding on any federal judge. So no longer would sentences turn on which judge a criminal appeared before. The guidelines eliminated disparities. Judges could not consider factors that often led to wealthier defendants receiving shorter sentences for similar crimes than the less wealthy.

Racial bias, conscious or unconscious, also was addressed through the guidelines. Lengthier sentences protected victims' interests and reduced the changes that other innocent people would become victims. All this had wide bipartisan majorities.

Congress also increased the number of mandatory minimum sentences, although they have existed since 1790. Since then, due in part to tougher federal criminal penalties, elimination of parole, increased number of inmates, better police practices, and other factors, crime rates have dropped significantly.

The Supreme Court undermined the excellent sentencing legislation.

First, the Court created from whole cloth a novel interpretation of the Sixth Amendment.

Second, the Court in *Booker* unnecessarily extended that line of cases to mandatory sentencing guidelines and help them to be unconstitutional.

Third, rather than strike down the guidelines, the courts rewrote them.

In a particularly egregious example of judicial activism, they overrode congressional intent and made the guidelines advisory. It was only because the guidelines were clearly intended to be mandatory that Congress ever passed them in the first place.

Following *Booker*, Congress has only one tool to make sure that sentences are not too lenient and do not reflect unwarranted disparity. That, of course, is mandatory minimums.

Under the current state of the law, if Congress, reflecting the will of the American people, is to have any effect on sentences imposed, protecting victims, deterring crimes, punishing appro-

priately, mandatory minimums are our only option. Otherwise, judges will be able to exercise effectively unbridled discretion that existed before 1984.

Some people think that the cost is a reason to do away with mandatory minimums, so we have this oddity. For the first time in 5 years, this administration finally found one area of federal spending that it wants to cut, and that is, prison expense. Perhaps in an era of voluntary guidelines, the first place to think about cutting spending on sentencing would be abolishing the Sentencing Commission. Private parties can analyze this data and issue reports just as well, and taxpayers will not have to fund an entity that favors retroactive leniency at various opportunities.

The sentencing disparities that exist today are not due to mandatory minimum sentences, which existed both before *Booker* and after. In fact, Congress has reduced mandatory minimum sentences since *Booker*. Rather, the disparities are due primarily to the Supreme Court's *Booker* decision that made the Sentencing Guidelines advisory. Minimum sentences imposed now turn on which judge the offender appears before. The quality of the lawyer, and other factors that produced disparities before the Sentencing Reform Act are now creeping back into sentencing.

The Sentencing Commission in December issued a report that compared sentences of African Americans and white males at the time the guidelines were still mandatory until now when they are advisory only. For cases overall, when the guidelines were mandatory, African American males served 11.5 percent longer sentences than white males. Now that the guidelines are advisory, African American men serve 19.5 percent longer sentences than white males.

In firearms cases, African American men received sentences that were 6 percent longer than white men when guidelines were mandatory. Today African American men receive sentences 10 percent longer than whites for these crimes.

For drug trafficking, African American men received sentences that were 9 percent longer than white men in 2005, but since the guidelines were made advisory, they now receive sentences that are 13 percent longer.

As the Sentencing Commission concluded, "Although sentence length for both black male and female offenders and white male and female offenders have decreased over time, white offenders' sentence length has decreased more than black offenders' sentence length."

We should certainly continue to examine federal sentencing policies. We may decide that the length of some mandatory minimum sentences should be adjusted up or down. But there are two areas in which we ought to consider adding new mandatory minimum sentences because federal judges are departing downward from guidelines excessively. These are financial crimes and child pornography possession. We should consider imposing mandatory minimum sentences for these offenses.

Mandatory minimum sentences are not as inflexible as they are often characterized. According to the Sentencing Commission, almost half of the offenders convicted of an offense carrying a mandatory minimum sentence are not given such sentences. We hear over

and over again that mandatory minimum sentences are not one size fits all or that they are unfair. We hear that low-level and first offenders always receive harsh sentences, and that is not so. It effectively—the safety valve provision requires judges not to impose mandatory minimum sentences for first-time low-level nonviolent drug offenders who have cooperated with authorities. The combination of mandatory minimum sentences and the reduction for substantial assistance provides investigative leads against bigger fish. It is a benefit of mandatory minimum sentences that is not always appreciated.

I will put the rest of my statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you.

I mentioned that Senator Durbin, who chairs one of the major Subcommittees here, has legislation. He wanted to say a couple words, and then we will go to Senator Paul, if that is all right. Senator Durbin.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S.  
SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Mr. Chairman, thank you for this hearing. Senator Paul, thank you for being part of a bipartisan effort. Senator Lee has also been working with me on companion legislation, parallel legislation. I commend it to you. I hope that you will look at it. It is very, very similar to what you have, but it takes a slightly different approach.

I just want to tell a story. It is a story of a young black woman named Eugenia Jennings. Eugenia Jennings from Alton, Illinois, was a single mom with three children. She became addicted to crack. There was a time when she was desperate, without money, and she sold a small quantity of crack to a man in exchange for clothing, and she ended up being arrested.

At the age of 23, she was arrested, convicted, and sentenced to 22 years in prison for the sale of a handful of crack cocaine. Twenty-two years in prison. She left behind three small children. Her brother, Cedric Parker, a true hero, stepped in to raise those kids while his sister went off to prison for 22 years. He did a great job, and he came and testified and told us her story.

I decided to look at it more closely and get to know Eugenia Jennings. I met her in a federal prison in Greenville, Illinois, and found out that she had been a model prisoner for 10 years. She had done everything right. There was nothing to say negatively about her, and I met with her in a room, and she looked up at me, and she said, "Senator, if you can get me back with my kids, I promise you I will never, ever commit another crime in my life."

I told that story to a former Senator from Illinois named Barack Obama. He commuted her sentence. She has been home now for a year and a half. She is struggling with cancer, but she is back with her children. They are reunited. They are a family again.

Was America safer if she spent another 10 years in prison at \$29,000 or \$30,000 a year? Was her family better if she was separated from them for another 10 years? Is 22 years a just sentence

for what I just described to you, even if it was one of multiple offenses? And I will be very honest with you—it was.

In fact, the President saw it differently, and he did what I think was the right thing.

What we are talking about here is doing everything that we can do sensibly to reduce the level of incarceration. In our bill, it focuses on drug cases, and those represent about 50 percent of the increase in prison incarceration.

I have talked to judges, prosecutors, all across the board. They have begged for the opportunity to be able to reduce these mandatory minimums in cases just like Eugenia's. Before the President commuted her sentence, he went back to the sentencing judge, went back to the U.S. Attorney's Office, and all of them said, "Turn her loose." They knew that there was a miscarriage of justice in her case.

Let us be smart about reducing crime in America. Let us not be punitive in the belief that somehow that makes us a safer nation.

Mr. Chairman, this is the right time for this hearing, and this is the right time for the Judiciary Committee and Congress to address this issue.

Chairman LEAHY. Well, thank you very much.

Senator Paul and I have had a lot of discussions on this. I know of his sincerity and his feelings about this. Senator, please go ahead.

#### **STATEMENT OF HON. RAND PAUL, A U.S. SENATOR FROM THE STATE OF KENTUCKY**

Senator PAUL. Good morning. Thank you for allowing me to testify today about mandatory minimums.

If I told you that one out of three African American males is forbidden by law from voting, you might think I was talking about Jim Crow 50 years ago. Yet today a third of African American males are still prevented from voting because of the War on Drugs.

The War on Drugs has disproportionately affected young black males. The ACLU reports that blacks are four to five times more likely to be convicted for drug possession although surveys indicate that blacks and whites use drugs at about the same or similar rate. The majority of illegal drug users and dealers nationwide are white, but three-fourths of the people in prison for drug offenses are African American or Latino. Why are the arrest rates so lopsided? Because it is, frankly, easier to go into urban areas and make arrests than it is to go into suburban areas.

Arrest statistics matter when applying for federal grants. It does not take much imagination to understand that it is easier to round up, arrest, and convict poor kids than it is to convict rich kids.

The San Jose Mercury News reviewed 700,000 criminal cases that were matched by crime and criminal history of the defendant. The analysis revealed that similarly situated whites were far more successful than African Americans and Latinos in the plea bargaining process; in fact, "at virtually every stage of pretrial negotiation, whites are more successful than non-whites."

I know a guy about my age in Kentucky, who grew marijuana plants in his apartment closet in college. Thirty years later, he still cannot vote, cannot own a gun, and when he looks for work he

must check the box, the box that basically says: "I am a convicted felon and I guess I will always be one." He has not been arrested or convicted for 30 years, but he cannot vote, he does not have his Second Amendment rights, and getting a job is nearly impossible for him.

Today I am here to ask you to create a safety valve for all federal mandatory minimums. Mandatory sentencing automatically imposes a minimum number of years in prison for specific crimes—usually related to drugs. By design, mandatory sentencing laws take discretion away from judges so as to impose often harsh sentences, regardless of circumstances.

Since mandatory sentencing began, America's prison population has exploded, quadrupled, 2.4 million people in jail. America now jails a higher percentage of its citizens than any other country in the world, at a staggering cost of \$80 billion a year.

Recently Chairman Leahy and I introduced the Justice Safety Valve Act. This legislation is short and simple. It amends current law to provide "authority to impose a sentence below a statutory mandatory minimum." In other words, we are not repealing mandatory minimums, although I probably would. What we are doing is merely allowing a judge to sentence below a mandatory minimum if certain requirements are met.

There is an existing safety valve, some will argue, yet it is very limited. It has a strict five-part test, and only about 23 percent of all drug offenders are qualified for the safety valve.

The injustice of mandatory minimum sentences is impossible to ignore when you hear the stories of the victims:

John Horner was a 46-year-old father of three when he sold some of his prescription painkillers to a friend. His friend turned out to be a police informant, and he was charged with dealing drugs. Horner pleaded guilty and was sentenced to the mandatory minimum of 25 years in jail. He will be nearly 80, like the other people we have heard from earlier.

Edward Clay, 18 years old, was a first-time offender when he was caught with less than 2 ounces of cocaine. He received 10 years in jail from a mandatory minimum sentence.

Weldon Angelos, who the Chairman mentioned, was 24 years old and was given 55 years in prison for selling marijuana. There is no justice here. It is wrong, and it needs to change.

Federal Judge Timothy Lewis recalls a case where he had to send a 19-year-old to prison for conspiracy. What was the "conspiracy"? The young man was in a car where drugs were found. I do not know about you—this is Judge Lewis—but I am pretty sure one of us might have been in a car in our youth at one point in time where there might have been drugs in the car. Imagine this—and I am glad the President has such great compassion, because he has admitted, like a lot of other individuals who are now elected to office, that one time he made mistakes as a youth. And I think what a tragedy it would have been had he gone to prison. What a tragedy it would have been if America would not have gotten to see Barack Obama as a leader. I just do not know why we cannot come together and do something about this.

Each case I think should be judged on its own merits. Mandatory minimums prevent this from happening. Mandatory minimum sen-

tencing I think has done little to address the real problem of drug abuse while also doing a great deal of damage by destroying so many lives.

I am here today to ask you to let judges start doing their jobs. I am here to ask that we begin today the end of mandatory minimum sentencing.

Thank you, Mr. Chairman.

[The prepared statement of Senator Paul appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Senator Paul. As I said, you have talked many, many times about this, and I do not question your sincerity. I know the Sentencing Commission found that African American and Hispanic offenders constitute the large majority of offenders subject to mandatory minimums. And as a result, African American offenders make up 26 percent of drug offenders convicted of crimes carrying mandatory minimums. But they account for 35 percent of those at sentencing. And, you know, the statistics are very clear on this. They are also very clear that this has not really done anything to protect us or make us safer.

Senator PAUL. Could I make one final point? It is not just the unfairness of the sentencing. This is a lifelong problem with employment. People talk about it. You have got to check the box that you are a convicted felon. It makes it very difficult, and I think for a nonviolent felony, we need to get away from a lifelong punishment where you really have difficulty getting employment after this.

Chairman LEAHY. You know, it is interesting. On the voting, in my State, if you are convicted of a felony, you do not lose your right to vote. In fact, when I first ran for the Senate, I was very interested in what the votes were coming out of our State prison insofar as about a third of the people in there had been prosecuted by me.

[Laughter.]

Chairman LEAHY. But I have always supported allowing people to vote.

Senator Paul, you have asked if you can stay, and you are most welcome to stay for any part of this hearing you want.

Unless there are questions of Senator Paul, we will go to our next witness. Thank you very much.

Senator PAUL. Thank you.

Chairman LEAHY. Senator Grassley, go ahead.

Senator GRASSLEY. I ask unanimous consent to include in the hearing record a statement from Wayne Ford, Des Moines, Iowa, a former member of the Iowa Legislature, on this subject.

Chairman LEAHY. And, without objection, of course, it will be.

[The statement appears as a submission for the record.]

Chairman LEAHY. Our first witness is Marc Levin. He is the director of the Center for Effective Justice at the Texas Public Policy Foundation and policy director of its Right on Crime Initiative. Since he started Right on Crime with colleagues in 2010, the initiative has become a national leader in conservative criminal justice reform. His work played a key role in Texas criminal justice reforms that I understand saved \$2 billion in avoided incarceration costs while still maintaining low crime rates.

Mr. Levin, please go ahead. And what we are going to do, we are going to hear from each of the witnesses, and then we will have questions. And I would ask you to keep within 5 minutes. Your whole statement will be placed in the record. Go ahead, sir.

**STATEMENT OF MARC LEVIN, POLICY DIRECTOR, RIGHT ON CRIME INITIATIVE AT THE TEXAS PUBLIC POLICY FOUNDATION, AUSTIN, TEXAS**

Mr. LEVIN. Thank you, Chairman, and it is a real privilege to be here with our very distinguished, outstanding U.S. Senator, John Cornyn, who has done a great deal to advance public safety over the years as well.

We launched Right on Crime back in 2010 following our successful work since 2005 to strengthen the criminal justice system in Texas, and I am pleased to tell you we have now our lowest crime rate since 1968, even as our incarceration rate has fallen by more than 10 percent.

Back in 1999, Ed Meese, who was one of the signatories to our Right on Crime Statement of Principle, said, "I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." Now more than 2 decades later since Ed Meese said that, we now have a chance to review these mandatory minimums, and I thank the Committee and the Chairman for that.

I am really pleased that Senators of both parties have come together to see how we can improve the federal criminal justice system and, frankly, learn from our laboratories of innovation, the States around this country, including Texas. And as a great believer in the Tenth Amendment, I think it is a great opportunity for the federal prison system to see some of the evidence-based practices in community supervision, strengthening reentry, and other solutions that have proven to be successful in many States.

We want to emphasize that public safety, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970s, Americans, and particularly conservatives, were correct to react against the attitudes and policies that stemmed from the 1960s, which included an "if it feels good, do it" mentality, as well as a tendency to emphasize societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing decades, we have seen a six-fold increase in incarceration, and we want to emphasize some of that, particularly as it relates to ensure violent and dangerous offenders were kept off the streets for a long time, was necessary.

But the pendulum went a bit too far. We swept too many low-risk nonviolent offenders into our prison systems. Thankfully, we have seen a great deal of advances both in techniques and research since that time, whether it is risk and needs assessments, electronic monitoring, Drug Courts, the Hawaii HOPE Court, which has reduced recidivism and substance abuse by two-thirds. We are seeing many States around the country achieve great success with strengthening alternatives to incarceration for nonviolent offenders.

And in Texas, as the Chairman observed, we were able to do that back in 2007 with a justice reinvestment package; since that time

we have seen double-digit drops both in our crime rate and our incarceration rate, including saving more than \$2 billion on building prisons that we did not have to do.

Now, building on the success in Texas, we launched our Right on Crime Initiative in 2010, with our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field of criminology and policing such as John DiIulio and George Kelling. And so our focus here in this Statement of Principles is on personal responsibility for offenders, accountability for the system, restitution for crime victims, and ensuring we combat overcriminalization by reducing the growth of non-traditional criminal laws and ensuring there is an appropriate mens rea or intent requirement in criminal justice.

Now, I want to talk about some of the States where we have seen tremendous success in the last several years in addition to Texas. Georgia, for example, South Carolina, Ohio, Pennsylvania—in each of these States, we have seen conservative Governors taking the lead in enacting far-reaching reform packages that have included expanding Drug Courts, in some cases increasing penalties on certain violent crimes such as in South Carolina, while lowering penalties on low-level drug possession, implementing earned time policies for offenders, risk and needs assessments. In Georgia, we also saw the enactment of a mandatory minimum safety valve for drug cases that is very similar to the legislation by Chairman Leahy and Senator Paul.

Now, while in the last 2 years the incarceration rate at the State level has declined, the federal incarceration rate continues to increase. Let me conclude by just touching on some of the issues with mandatory minimums.

We believe that they do result in excessive prison terms in many instances. For example under 21 U.S.C. 851, if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions, the mandatory minimum is 20 years with a maximum of life in prison. And one of the issues that we have seen is that judges and juries have much more information as to the specific facts of the case, yet are prevented from looking, for example, at the risk level of the defendant.

The other thing that I want to emphasize is that mandatory minimums do not take into account the wishes of the victim in the case. They also have not succeeded in, frankly, creating uniformity.

For example, a defendant in the Northern District of Iowa, “who is eligible for a Section 851 enhancement is 2,532 percent more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska.” And, again, it is just really random in some instances whether this enhancement ends up being administered.

So it is important to remember that if we did not apply mandatory minimums to certain drug cases as proposed, these offenders would still be going to federal prison. And recent experience shows they would still be going for a long time.

Since the crack-powder disparity was narrowed in 2010, those convicted subsequently in crack cases have received an average federal prison term of 97 months.

So to wrap up, we really applaud the work that this group is doing here. We would refer you to the copy of our paper, "The Verdict on Federal Prison Reform," that you have been given, and we stand ready to work with each of you to improve the federal criminal justice system and learn from the successful models in States across the country.

Thank you.

[The prepared statement of Mr. Levin appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Levin.

Brett Tolman is a shareholder at Ray Quinney & Nebeker, co-chair of the firm's white-collar criminal defense, corporate compliance practice group. He was the U.S. Attorney for the District of Utah from 2006 to 2009. He worked in the same office as Assistant U.S. Attorney from 2000 to 2004. He served as chief counsel for Crime and Terrorism to Chairman Specter, and prior to that as counsel to Chairman Hatch on this Committee, which is where we first met.

Welcome back to the Committee. You are as familiar with this room as anybody in it. Go ahead.

**STATEMENT OF HON. BRETT TOLMAN, SHAREHOLDER, RAY  
QUINNEY & NEBEKER, SALT LAKE CITY, UTAH**

Mr. TOLMAN. Thank you, Chairman Leahy, Ranking Member Grassley, and the many Senators, especially the good Senator from Utah and long-time friend, Senator Lee.

Prior to my service in the U.S. Senate, I was an Assistant United States Attorney in Utah. As a line prosecutor in the federal system, I personally prosecuted hundreds of felonies. While I prosecuted mostly violent crime felonies, I also participated in the prosecution of white-collar criminals, drug traffickers, child predators, violent illegal immigrants, and others. Indeed, in my nearly a decade with the Department of Justice, I was responsible for the prosecution of individuals who are currently serving long prison sentences—some longer than 30 years in prison.

I am here today because my experience, while at times rewarding, revealed the need for federal criminal justice reforms that are not only meaningful, but the result of thoughtful analysis of the deficiencies in the administration of justice in the federal system. I am not alone in this position. Several of my former colleagues, many of which were appointed by Republican Presidents, have joined me in signing a "Policy Statement of Former Federal Prosecutors and Other Government Officials," which I have brought with me and ask that it be made part of the record.

The signers of this statement are a diverse group of former federal prosecutors, judges, Department of Justice and other officials who deeply believe in notions of fairness in the administration of justice.

Rather than focusing valuable resources on the highest levels of criminal conduct, the reality is that today's federal system is all too often mired in the pursuit of low-level offenders who are too often overpunished by the Federal Government and who, a growing number believe, should otherwise be prosecuted by the States. More and more individuals, on both sides of the political aisle, are recog-

nizing that many of these low-level offenders are being given extremely long sentences in federal prisons—sentences that too often do not match the gravity of the crimes committed.

The result, ironically, is a burgeoning prison population that, with its rising costs, is becoming a real and immediate threat to public safety. Department heads and congressional leaders have become painfully aware that the growing prison budget is consuming an ever-increasing percentage of the Department of Justice's budget.

It is with these concerns in mind that I appear before this Committee. It is my hope and intention to highlight areas of concern and to engage at all levels necessary to assist in achieving meaningful and thoughtful reforms. Specifically, the Committee should focus its attention on several unfortunate consequences of our current front-end policies and practices, including the use and abuse of certain mandatory minimums.

Under current laws, federal prosecutors exercise virtually complete control over the entire criminal justice process. Federal prosecutors decide who to charge, what to charge, how many counts to charge, the terms of any plea agreement, and all too often what the range of sentence will be.

Unfortunately, the substantial majority of federal drug prosecutions are utilizing mandatory minimum statutes based solely upon quantity rather than the position of the individual in the trafficking organization. Adding to the problem is the use of sections like Section 851, which is effectively a way in which a drug mandatory minimum can be doubled simply by the existence of a prior felony for—even if they had not served any time in jail. Section 851 continues to be a problem that prosecutors have highlighted for years, but have fallen on deaf ears.

It is of particular concern that mandatory minimum sentences have become the sought-after result by which many in the criminal justice system measure success. The practical implications are such that the federal criminal justice system has become overly reliant on the use of mandatory minimum statutes in making its charging decisions. All too often, prosecutors and investigators associate the success of their investigations and prosecutions with the amount of time a particular defendant receives in sentencing. And, in fact, agents and prosecutors will attempt to utilize the facts in a way that add to the sentence, even above and beyond the existing or underlying mandatory minimum that was charged.

I had a conversation with a federal judge last night who informed me of a case that I was unaware of. Patrick Washington, convicted in Kansas of distribution of crack cocaine, under his conviction was to be sentenced to around a decade of prison time based on the charging decisions of the prosecutor. However, because Patrick was so forthright in his interview after conviction, the probation officer learned that he had distributed crack cocaine on previous occasions, and as a result applied four 30-year mandatory minimums to achieve a sentence of over 120 years. In the end, Mr. Washington served over 20 years, was saved through a habeas corpus petition in which the prosecutor testified on Mr. Washington's behalf. That extreme effort by a prosecutor in order to save—or to enable the fairness in the administration of justice is something we

should not always be dependent on or hope for when these sentences are distributed.

I look forward to the opportunity to work with this Committee. I applaud the dedication and determination to do front-end and back-end changes. I have been honored to work with Senator Cornyn, Senator Hatch, and Senator Lee on fashioning a bill, but look forward to working with Senator Leahy and those on the Democratic side, and the Republican side, who have joined hands in addressing the mandatory minimums.

Thank you.

[The prepared statement of Mr. Tolman appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Tolman, and, again, welcome back to the Committee room.

Mr. TOLMAN. Thank you.

Chairman LEAHY. Our next witness is Scott Burns, who is the executive director of the National District Attorneys Association, one of the largest professional organizations representing district attorneys, State's attorneys, Attorneys General, and county and city prosecutors. Before I gave up that position for the anonymity of the U.S. Senate, I was once a vice president of the NDAA and had to make the difficult choice of being elected president of the NDAA or taking the Senate seat, and I took the Senate seat.

Previously Mr. Burns served as the Deputy Director at the White House Office of National Drug Control Policy, and as an elected county attorney and chief prosecutor in Iron County, Utah.

Mr. Burns, always good to have you here, sir. Go ahead.

**STATEMENT OF HON. SCOTT BURNS, EXECUTIVE DIRECTOR,  
NATIONAL DISTRICT ATTORNEYS ASSOCIATION, ALEXAN-  
DRIA, VIRGINIA**

Mr. BURNS. Thank you, Senator, and thank you, Ranking Member Grassley and members of the Committee, for inviting me to testify today on behalf of the National District Attorneys Association, which has been around for some 60 years and is the voice of America's 40,000 prosecutors.

To begin with, I would like to acknowledge and thank you, Senator Grassley, for your statement on the Senate floor this week regarding the importance of federal mandatory minimum sentences. And like you, Senator Grassley, prosecutors across the country listened closely to the policy announcements made by General Holder. And like you, some of the items and priorities that he outlined we agree with. Coordinating with State, local, and tribal enforcement and prosecutors in order to maximize federal resources in criminal prosecutions is a good thing.

In addition, General Holder talked about something that NDAA has made a priority for years, and that is, providing support for survivors of sexual assault and domestic violence.

But what America's 40,000 prosecutors—and I think I can speak for law enforcement—did not agree with are General Holder's repeated statements that the criminal justice system is broken—or the current popular phrase that is repeated over and over, it is "in crisis." The truth is that crime is down significantly in the United States, and many at record low levels. I met with Willie Meggs yes-

terday. He came up to testify in the Stand Your Ground hearing that was canceled and spent the day with him. Willie Meggs is the long elected DA in Tallahassee, Florida, and he told me that in Florida crime is at the lowest rate it has been in 42 years, and many other prosecutors across the country echo that sentiment in their respective States. Homicides are down 50 percent in the United States. Think about that: 50 percent in the past 30 years. And every other category of crime—rape, robbery, assault, burglary—they are all down 30 to 40 percent. This is a success story. If we recall the 1980s, those of us that were around then, when crime was rampant in the urban cities, and citizens demanded not only of federal, State, and local legislators but their prosecutors and law enforcement, “Do something about it.” And with laws passed in this Congress and State and local legislatures, we did something about it, and prosecutors and law enforcement got the message as well. Crime is down significantly, and I think you are to be applauded for many of the steps that you have taken right here.

I submit to you that prosecutors across the country collectively shook their heads when General Holder directed United States Attorneys to no longer prosecute or send to prison “first-time offenders,” no longer send to prison low-level drug offenders. U.S. Attorneys have never, to my knowledge, prosecuted low-level cases. They have never in my opinion, unless there is a gun—it is the same on the State level, it is a serious offense—sent first-time offenders to prison. Prosecutors across this country would tell you in the real world—and, by the way, we do 95 percent of the prosecutions in this country, and I appreciate my colleague and friend Brett Tolman’s statement that State and local prosecutors should do more. But they prosecute more cases in 6 months in the city of Philadelphia than all U.S. Attorneys handle, all federal judges handle in all the federal courtrooms across the country, over 10 million non-misdemeanor cases. So we are willing to step up and do more, but we already do 95 percent of the criminal cases in this country.

The fact that the system is broken or “in crisis” is a myth, and it is a myth that must be dispelled if we are going to work together to make a great criminal justice system even better.

The prosecutors I know—and we have prosecutors here in the Committee and throughout the Senate and the House—we look at treatment programs, diversions, plea in abeyance, Drug Courts—which have been highly successful—supervised probation, and we work with judges and defense counsel to look at every single alternative. And if you were a prosecutor, you know what I am saying is true. The last thing a prosecutor wants, a defense attorney wants, a judge wants, if there is any possible means of doing something different, is to take a valuable prison cell and lock up somebody that does not deserve to be there. I promise you we go to great lengths to look at every alternative we can.

The reality is, together with that attitude and those policies, mandatory minimums have become an important tool for State and local prosecutors. Again, it is kind of the game inside the game, but people are out there listening that understand the criminal justice system. State and local prosecutors all the time, to go up the chain in a sophisticated drug cartel case or to get somebody to roll on a

homicide where a 3-year-old has been shot in the head and you have a recalcitrant witness who happens to be charged with a State crime, possession of cocaine or methamphetamine, think about this: "What if I call the U.S. Attorney and now you are looking at a much more serious crime. It would be helpful now if you tell me what you know about this 3-year-old getting shot in the head." It has been highly successful and used to leverage cases on the State and local level.

I guess the final question prosecutors would ask is, Why now? With crime at record lows, why are we looking at sweeping changes? Why now? We are getting even smarter on crime. With programs like Drug Courts and 24/7 and Project Hope as carrots, why would we take away one of our most effective sticks?

Again, I appreciate the opportunity to testify and look forward to answering any questions you may have.

[The prepared statement of Mr. Burns appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much.

I will lead off with a question for Mr. Tolman. Some of the critics of sentencing reform have said that low-level drug offenders normally do not face prison time. The Sentencing Commission looked at the data and came to a different conclusion.

In your experience as a federal prosecutor, did offenders at the lowest levels of drug organizations, such as mules or street-level dealers, face mandatory minimum sentences? Or were these reserved just for the kingpins?

Mr. TOLMAN. The reality is too many people confuse a large amount of drugs found in an investigation as a high-level drug prosecution. The drug cartels, those running those trafficking operations, understand our criminal laws as well as we do, if not better. They send their low-level people with their large quantities knowing that the large quantities, once found, are going to result in extremely large sentences.

I recently asked the former head of the Drug Division in my former office, who has over 25 years of prosecuting federal drug cases, "How many times did you get a kingpin?" He said, "Almost got one once." Almost once.

The reality is the individuals with the large quantity of drugs do not have the knowledge or the insight into the operation to actually go up the chain in the usual case, and that is getting worse, because they know it is much easier to send someone with a lack of knowledge with a high quantity amount of drugs than it is to put someone that knows the inner workings of their operation.

Chairman LEAHY. While it has been years since I was involved in prosecutions, what you say is very similar to what I recall. But let me ask you this: You prosecuted many serious crimes, first as a line prosecutor and then as U.S. Attorney. Were mandatory minimums necessary to do your job effectively, or to ensure public safety?

Mr. TOLMAN. They are not necessary. I will say there may be the occasional mandatory minimum that can be applied. In the child predator arena, there appears to have been different data than in the drug or the violent crime area. However, the mandatory minimum—and I think the Senator is right on the money when asking

the question, "Is it necessary?" Because Section 3553 tells us that we should be sentencing individuals only the minimum amount necessary to achieve punishment and deterrence. What we are seeing, however, is all too often—and you highlighted the Weldon Angelos case. What is not talked about in the Weldon Angelos case is the fact that the agents could have arrested him after the first undercover buy. But why did they wait for three? That is because 924(c) allows you to stack 25-year mandatory minimums on each subsequent offense. So they waited and then stacked them, and then pulled the trigger on arresting.

Chairman LEAHY. Thank you.

Mr. Levin, I look at Texas, and we have two Texas Senators on this Committee, so I also get the anecdotal aspect, but I think it is a fact that they dramatically reduced the prison population in Texas but have not increased crime rates. At least that is what I am told.

You noted in your testimony that Texas had few mandatory minimums to begin with, so the reforms were based on alternatives to incarceration on the front end of sentencing and shorter sentences on the back end. Would back-end sentencing reforms like earned time credits have been as successful in reducing the prison population in Texas if a large number of them had been on mandatory minimums where you could not have used that?

Mr. LEVIN. That is a great question, Chairman. Definitely there is a big difference between Texas and the federal system in this area in that in Texas we have very few mandatory minimums. The only one that we really have is in our habitual offender statute, which deals with murders and rapists, the most heinous crimes.

So as you said, in Texas, the success of our reforms has really been based on prosecutors and judges responsibly exercising their discretion. And what we did is we greatly expanded the availability of Drug Courts and mental health treatment, of alternative sanctions, and our judges and prosecutors have taken advantage of those for appropriate nonviolent offenders, and that has enabled us, as you said, to see our crime drop to its lowest level since 1968.

Now, with the federal system, with the mandatory minimums covering the drug offenses and other nonviolent offenses, that really eliminates the discretion or severely reduces that of the judges. And so you are not able to get the benefits of these alternatives in the same way we have in Texas. And so I think it is very important at the federal level to not only implement, as you said, earned time, risk and needs assessments, evidence-based practices, strengthening reentry, but also at the same time we must address these mandatory minimums through some of the legislation that has been discussed today.

Chairman LEAHY. Thank you. My time is up. I do have further questions, but go ahead, Senator Grassley.

Senator GRASSLEY. Mr. Burns, one of the bills before the Committee would cut in half the mandatory minimum sentences that are now in place for drug offenses, such as manufacture, distribution, importation of a variety of serious drugs, some of which would be cocaine, PCP, LSD, and methamphetamine.

When the sponsor of this bill introduced it, he said that mandatory minimum sentences for nonviolent drug offenses are “a threat to public safety” and “have been proven not to work.”

Mr. Burns, do you think that mandatory minimum sentences are these offenses—or do you think that mandatory minimum sentences for these offenses are a threat to public safety and have been proven not to work?

Mr. BURNS. Clearly, the drug trade and the insidious nature of all of addiction is a threat to public safety, and I think, Senator, minimum mandatories are appropriate in the right cases under the discretion of the prosecutor. And I do not think we even say anymore, anybody that has looked at the drug issue, that it is a non-violent offense. I do not have to go into a 5-minute soliloquy about people that are murdered and children that are killed, you know, “lead or silver” in Mexico.

I got a call yesterday from Jan Scully, our former president. In Sacramento, 82 percent of all the people that are checked into her jail, 82 percent are under the influence of one or another illegal substance, and many of those are violent offenses.

So I think we all understand that now, that possession, selling, slinging meth and heroin and cocaine, is not a nonviolent offense.

Senator GRASSLEY. Mr. Levin, based upon your opposition to mandatory minimums for low-level possession, one of the bills the Committee is discussing today would allow federal judges to disregard mandatory minimum sentences that now apply to serious drug offenses such as manufacture, distribution, importation, and export of drugs such as heroin, LSD, PCP, and methamphetamine. More so, this bill would eliminate the mandatory minimum sentences when the drug offense results in death. Were the bills to pass, judges could impose no jail time at all for these crimes. The second bill would cut in half current mandatory minimum sentences for these crimes.

Does your opposition to mandatory minimum sentences for low-level, nonviolent drug offenses extend to changes in sentencing for the other crimes that these bills would create?

Mr. LEVIN. Well, thank you, Ranking Member Grassley, for that question. We actually do not endorse or oppose specific legislation, so I would not be able to address that. But I certainly can tell you, as I said at the outset, we think long prison sentences are appropriate for violent and dangerous criminals as well as international drug kingpins, those who are really at the center of leading large criminal enterprises.

I think that when you look at it, as far as the current safety valve was concerned, only 24 percent of drug offenders benefit from that, and, furthermore, that only 7 percent of those sentenced under mandatory minimums for drug offenses are supervisors, ring leaders, kingpins, et cetera.

So I do think it is important to make the distinctions that have been referenced by you and others and to make sure that we narrowly tailor sentences to fit the particular offense as well as the risk level that the offender presents.

Senator GRASSLEY. Mr. Tolman, in your statement you referenced your work with the Public Safety Enhancement Act. That bill would give prisoners rewards for “successfully participating” in

various programs designed to reduce the likelihood that they would commit future crimes after release. I am concerned that the bill would release prisoners simply for showing up at a program.

For instance, drug treatment is unlikely to work if the individual being treated is not interested in breaking his habit.

Question: Why should we release prisoners early just for participating in a program? Setting aside whether cutting sentences is a good idea, shouldn't we at least make sure that the prisoner completes the program and has obtained some measurable benefits that might prevent his returning to a life of crime after release?

Mr. TOLMAN. The short answer is we should not. However, I am encouraged by the work of Senator Cornyn and Senator Lee and Senator Hatch—I apologize. The short answer is that we should not simply release for mere participation.

The encouraging thing is that this is a factor that Senator Cornyn, Senator Hatch, and Senator Lee have been very focused on. So the bill that is being proposed actually takes the leading and cutting edge reassessment tools and requires an initial assessment and a reassessment throughout their incarceration before they receive rewards.

And if I might correct one mis-notion about this, it is not a release in the traditional sense that we think an individual is released. We still have the Truth in Sentencing Act which requires that they serve 85 percent of their time.

In law currently, you are allowed, a judge is allowed, prosecutors are allowed, defendants are able to take advantage of pre-release custody. This bill would expand and incentivize those willing to take advantage of those programs and jobs, be assessed and reassessed throughout their time, and allow them to enter into pre-release custody, which is still custody, but it is home confinement, monitoring, ankle monitoring, and supervision, which will have a great impact on the budgetary problems, but at the same time do what Texas did, which is to identify—and might I add, the States are our pilot programs. The federal system is very juvenile in its administration of criminal justice and should be learning from the States. And States like Texas, South Carolina, Ohio, and many others have learned that assessing recidivism and the risk of recidivism in your prison population and then training, educating, employing those individuals and reassessing that recidivism and rewarding them has lowered their crime statistics at a greater rate than we have seen nationally.

Chairman LEAHY. Thank you.

Senator GRASSLEY. Thank you. I have further questions, but I am going to have to submit them in writing because I have to go to a Finance Committee hearing.

Chairman LEAHY. Thank you.

I would note that I have been told that Judge Benson, a federal district judge for the District of Utah, is here, well known both to Senator Lee and to Mr. Tolman, who both clerked for him. Judge, happy to have you here, sir.

I have to take one phone call. I am going to turn the gavel over to Senator Durbin, who is next anyway, and I will be back in a couple of minutes. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. And, without objection, I will enter into the record a letter which we received supporting the bill which I worked on with Senator Lee. The support is from the bipartisan U.S. Sentencing Commission and more than 50 former federal judges and prosecutors. If there is no objection, I would like to enter it into the record at this moment.

Chairman LEAHY. Without objection.

Senator DURBIN. Thank you.

[The letter appears as a submission for the record.]

Senator DURBIN [presiding]. Mr. Burns, we have worked together on a few issues.

Mr. BURNS. Yes, Senator.

Senator DURBIN. The John R. Justice Act, which provides student loan forgiveness for prosecutors and defense attorneys, and allows more to become professionals who might otherwise make a different career decision.

We have also worked on the Fair Sentencing Act dealing with the issue of crack cocaine and powder cocaine sentencing.

Mr. BURNS. That is right.

Senator DURBIN. Which had a huge disparity at one point in time not that long ago of 100 to 1. We brought it down to 18 to 1. Senator Sessions and I cosponsored the bill, it went through this Committee, and was signed into law. I thank you for that cooperation.

Mr. BURNS. Thank you, Senator.

Senator DURBIN. Mr. Burns, you are an important part of this conversation because the prosecutors play the critical gatekeeper role in determining who goes into the federal system of criminal justice. And despite what the Attorney General may have said or not said, I do not believe our system is in crisis, but I do believe we face a pretty serious challenge.

The rate of incarceration, the cost of incarceration, is forcing us to make some hard choices. If we are going to continue to push money into the correctional field, it is at the expense of money that would otherwise be spent for law enforcement or perhaps for some of the things Mr. Levin has noted: the Drug Courts, for example, the mental health diversion, in my State veterans courts, which have really turned out to be fairly successful.

An interesting note. When we worked together on reducing the crack cocaine sentencing disparity from 100 to 1 over 18 to 1 over powder, there was a reduction in the sentencing of some who were already in prison, and we received a report. We asked what happened when we let these people out, and it is interesting. They were let out earlier than they might have been because of the action that we took, and we found the following: Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the sentencing amendment, 30.4 percent recidivated within 2 years. Of the 484 offenders studied who were released the year before the new amendment took effect, 32.6 recidivated. So there was a slight decrease in recidivism for those who were released early, which seems counterintuitive. But I think it is what we are driving at here.

Senator Lee and I are not trying to eliminate mandatory minimums but, rather, in some cases to be able to lower those mini-

mums so that there are not these gross disparities which Mr. Tolman and others have described.

Do you think we can still meet the goal, a worthy goal, of reducing drug crime in America and do it without wasting resources on incarceration and make certain that judges and prosecutors have the right tools to do the job?

Mr. BURNS. Well, first of all, Senator, on behalf of 40,000 prosecutors and probably that many defense attorneys, thank you for all of your work on the John R. Justice Act and providing student loan assistance to thousands that otherwise would have gone into the public sector, good, bright young men and women who are in courtrooms today doing public service, and that is because of you. And it is much appreciated.

We did work with you on the Fair Sentencing Act, and I think people forget that Ronald Reagan proposed a 50 to 1 crack-powder disparity. It was a Congressman named Charles Rangel and the Black Caucus that insisted that it be 100 to 1, and a lot of us shook our heads and said, wow, that is some disparity. But it worked. The consequences were great. A lot of young people, young African American males primarily, went to prison, and they went to prison for a long time. But people could then walk the streets of Washington, D.C., and Philadelphia and New York.

So we did what the Congress asked, and in States across the country where they have minimum mandatories, we follow what the legislature says, and crime has been reduced.

We are always willing to work with you, Senator Durbin. You have always been reasonable and you are great and you have a great staff, and we are here.

Senator DURBIN. Good. Mr. Levin, you make a point of what is happening in Texas. It is happening in Illinois, too, where we have some special courts. And just to put it in the vernacular, we are finding ways to take potential criminal defendants and better ways to rescue them from addictions, mental illness, lives of crime, and costly incarceration. Our communities are safer. Rather than putting a mentally ill person in a prison where they are not likely to receive the kind of professional care they need, they are redirected to a different place.

Has that been the part of the experience in Texas which has brought down the crime rate?

Mr. LEVIN. Absolutely, and I would also add the kind of law enforcement strategies, when we talk about walking the streets of New York, a lot of that is data-driven policing, ComStat, things that occurred under Mayor Giuliani, and similar efforts with William Bratton and now in other jurisdictions. So I think we ought to really emphasize it is also the percentage of people we catch, it is the swiftness of the sanction, when we look at the Hawaii HOPE Court, the swiftness and sureness of a sanction, not the length of time.

And with regard to mental illness, it is an enormous problem, but we are seeing things like mental health courts, veterans courts have tremendous impact in reducing recidivism. We are also seeing programs like in Harris County, which is in Houston, Texas, where you have got a mentally ill person, who are called "frequent flyers." They go in and out of jail dozens of times a year for things like

criminal trespassing. They are now driving by those people's homes a few times a week with a probation officer and a mental health worker, making sure that person is taking their prescription medications and complying with treatment. And the visits are going way down, and you are taking someone you might have been spending half a million dollars on a year with these frequent jail visits and keeping the public safe and making sure that person is staying healthy.

So I think there is a tremendous amount we can do when it comes to mental illness and criminal justice.

Senator DURBIN. The only problem I have with this hearing is that all the time we are speaking of Texas, and so now I want to recognize Senator John Cornyn of Texas.

[Laughter.]

Senator DURBIN. Maybe you could say something about Illinois.

Senator CORNYN. I was going to say it is music to my ears, Mr. Chairman, Senator Durbin. Thank you.

I just want to acknowledge at the beginning, in large part thanks to the pioneering work of the Texas Public Policy Foundation and Mr. Levin, Texas is no longer known—well, we are still known for swift and sure justice and for punishing people who need punishment. But I think we are also becoming known for something else, which is more enlightened treatment of people who commit offenses, and certainly I just want to acknowledge the great work that is being done by Mr. Levin and the Public Policy Foundation. But we have had the pleasure of working with all three of these witnesses—Mr. Burns and Mr. Tolman—on legislation, and thank you for your contribution today and always.

I just want to also say that Senator Paul, I think, and Senator Leahy have touched on something very important we need to address when it comes to arbitrariness in the sentencing of people who commit offenses, and really if I think about that slogan or that motto above the Supreme Court of the United States just across the street here, it says, "Equal Justice Under Law," and that, of course, is the aspiration of our entire justice system.

But just as minimum mandatory sentences can result sometimes in arbitrariness, I think we also have to recognize that it was actually supposed to be the antidote to what was viewed as arbitrariness, where people committing similar offenses were treated dissimilarly, depending on the court and the circumstances under which they were prosecuted. So it reminds me of one of the quotes from H.L. Mencken, which says, "To every complex problem, there is a simple, neat answer that is wrong."

And so this is more complicated, I think, as you all appreciate and as we all need to continue to keep in mind as we fight arbitrariness in our justice system no matter where it appears. And I think it is also important to make the point that we have to be careful not to legislate by anecdote, because we all have heard horror stories—and Senator Durbin certainly has recounted one today—where the criminal justice system has gone completely awry, and that ought to be something we continue to try to root out. But we need to be careful, at least in my view, to legislate by anecdote because, just for example, if you look at the number of people in federal prison, at the end of 2010, we had 96,000 people

in federal prison for drug trafficking, 156 for drug possession. And I think, Mr. Burns, your point is well taken. People get involved with drugs. Even though they might be classified as nonviolent, it does not mean there is no harm, either to society or to those persons or the people they love and live with.

So I am actually very encouraged by where we have come due to pioneering efforts at the State level. I wish we would do this more and look at the States as laboratories of democracy. The tendency is for Washington to think we know better than anybody else and impose the one size fits all, which does not work. I think experience would show us that.

But particularly what I hope as a result of this series of pieces of legislation that are going to be introduced here now and in the near future—I was just looking at a study from the RAND Corporation. That is not the Rand Paul Corporation. That is the RAND Corporation.

[Laughter.]

Senator CORNYN. But they point out that after examining the higher-quality research studies that, “We found on average inmates who participated in correctional education programs had 43 percent lower odds of recidivating than inmates who did not.”

So I was struck, Mr. Tolman, when you talked about the goals of our criminal justice system to punish and deter. There is a third leg to that stool that I learned in law school and as a former judge, and that is to rehabilitate.

Mr. TOLMAN. Yes.

Senator CORNYN. But we have almost forgotten that part of it.

Mr. TOLMAN. True.

Senator CORNYN. And to me I think we just need to remind ourselves that that is one of the goals of our criminal justice system.

So I wonder, Mr. Levin and Mr. Tolman and Mr. Burns, if you just might comment on the role of rehabilitation and how do we restore it to its rightful place as part of the goals of our criminal justice system.

Mr. LEVIN. Well, I will start, I guess. Thank you. Those are terrific points, Senator Cornyn. I think that what we really need to realize is we need to create the right incentives both for offenders and the system. And as was referenced earlier, Texas did adopt earned time policies both for inmates in State jails, which are basically less than a gram of drugs, prostitution offenders, et cetera, our lowest-level felonies, as well as earned time for probationers, so that you could actually earn a bit of time off your sentence by successfully completing programs—not just showing up, as was referenced, but actually successfully completing programs as well as paying all your restitution, meeting all your obligations, basically exemplary performance.

And so that provides an incentive for offenders, but we also need to look at incentives for the system. A number of States, including Texas, Ohio, for example, have adopted, particularly in the juvenile system, incentives for counties that have made those local juvenile probation departments reduce their commitments to the State lock-ups and they reduced recidivism, and that is very important. They can get some additional funding from the States, some of the sav-

ings that the State achieves by those reductions. And so that is very important.

And we need to have rigorous performance measures to know whether programs are working, and we need to utilize nonprofits and faith-based programs. We should not think government has all the answers. In particular as we are looking at the federal system, rather than reinvent the wheel, one thing we suggested in our paper is that the Federal Government could contract with States, local, and nonprofit agencies that run reentry programs, for example, and that way we do not have to build a new federal building to do it. We can utilize what is already effective.

Chairman LEAHY [presiding]. Thank you. And as you said earlier, Mr. Tolman, too, it would not hurt for the Federal Government to learn from the States. They are usually much closer to this.

Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

We have seen throughout the country the impact of mandatory minimums, and I think it is very appropriate for this Committee to assess the impact of these kinds of mandatory sentencing laws. So I am glad—and thank you all for being here, and I note that two of you have mentioned the HOPE program, which began in Hawaii, and it was created by former U.S. Attorney and now Judge Steve Alm, and I am glad that this program is being recognized more and more as one of the ways and one of the tools in fighting crime. And, yes, we have the three-pronged goals of our criminal justice system, which is to punish, to deter, and to rehabilitate. And sometimes we spend a lot more resources on one aspect of these goals, particularly punishment.

I do have a concern about the disparate impact that mandatory minimums have on minority communities, and this was certainly pointed out by Senator Paul in his testimony, including the impact on women. And there have been articles written about mandatory minimums and their unfair impact on women, especially black women. These women of circumstances are often minimally involved in the crime of drug trafficking, and their crime truly being that of a relationship of some kind with a male drug trafficker.

Are women still being unfairly impacted by mandatory minimums? And if so, how can we prevent this from occurring? And I would ask any of the members of the panel to give brief responses.

Mr. TOLMAN. I will go ahead and address that, Senator. I appreciate the question. I would indicate that one of the misnomers is that when we cite a very large number for drug-trafficking offenses is to not fully understand or appreciate in the federal system how easy it is to get a trafficking offense. Oftentimes it can be simply based on the quantity, what they refer to as a “distributable amount.” And there may be no other indicia of trafficking but for the fact that it is a distributable amount.

I remember many cases which would have an impact, a disparate impact, in some of our inner cities among our minorities, even women, and that is oftentimes individual users will purchase larger quantities because they come into some money or it is an opportunity for them. And they may be purchasing for themselves and perhaps someone else in their family. We all agree that punishment is appropriate, but rehabilitation is a concern.

However, a prosecutor can get a trafficking offense, which can bring in mandatory minimums, at very low levels. We often refer to it as the “Snickers bar case” because if you have a Snickers bar size of methamphetamine, for example, you are invoking a mandatory minimum.

And so I do not think there is an appreciation for some of the unintended consequences of being very reliant on quantity.

Mr. LEVIN. Could I add to that? Thank you for that question.

One of the things that—for some of the mandatory minimums, the only way out is a substantial assistance, for lowering the amount for the prosecutor to say that person provided substantial assistance. The problem is in some of these examples of cases I have in front of me, typically you have a girlfriend and she has a lot less information than her boyfriend, who in some cases was actually the primary person. And so because she has less information, she is less able to qualify for the substantial assistance.

There was one case, Stephanie George, in Florida, a young mother of three, had a minor role in a boyfriend’s crack dealing. She ended up sentenced to mandatory life in prison. And, of course, the boyfriend actually got off much lighter because he had more information, and the judge said, “Your role as a girlfriend and bag holder and money holder does not warrant a life sentence,” but the judge had no choice.

And so that illustrates, I think, what you are talking about, that we may think we are promoting uniformity with these mandatory minimums, but on things like substantial assistance, it actually is not at all uniform who may qualify for that and who may be in, frankly, a position, it is the person that was more culpable is in a position to provide the information.

Senator HIRONO. I am interested in how these laws actually result in disparate treatment, whether they be of African Americans or women.

Mr. Burns, you mentioned the HOPE Program. I am wondering if, in your opinion, the HOPE Program is a workable solution for federal offenders, and if so, how?

Mr. BURNS. Yes, I applaud Judge Alm, and I met with him several times as you were launching that in the great State of Hawaii. But what works, I think, depends upon the personalities and the State that you are in. 24/7 works great in South Dakota and some rural States, Red Hook in New York, and Drug Courts, I think we would all agree, mental health courts, DUI courts, veterans courts have been a godsend to this country and to prosecutors.

But I am also interested in your question about women, and our job as prosecutors, as you know, is to not prosecute the innocent and hold the guilty accountable. And we take our victims as we get them. And, unfortunately, a large number of victims are women, and I have heard stories around the courtroom, around the chambers—I try not to, as Senator Cornyn stated, talk anecdotally, but we can talk about a man who was sentenced to 30 days in jail for rape of a prepubescent teen in Montana last week. That is horrific. That deals with women across the country.

We can talk about my friend Don Klein in Omaha who just this last week had an offender who was serving a 21-year sentence released after 10½ because he supposedly met the guidelines even

though he had violated every rule they had, tried to escape twice, and assaulted prison guards, and he murdered four people within 2 weeks of being released from prison—women. So our job, when we talk about women primarily, we talk about as victims.

Senator HIRONO. Thank you.

Thank you, Mr. Chair.

Chairman LEAHY. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. And thanks to our distinguished panel for being here today. It is a real pleasure to have you here, all three of you. It is a pleasure to have two Utahns on the panel. I was pleased a minute ago when Mr. Cornyn was referring to what Texas has become known for. I was hoping he was going to say Texas' recent loss to BYU, but, alas, that was not what he had in mind.

[Laughter.]

Chairman LEAHY. We are having a special hearing on that.

Senator LEE. Exactly. I look forward to that, sir. But having Mr. Burns and Mr. Tolman here from Utah is a pleasure. I have known Mr. Tolman ever since law school. I am not sure he was shaving back then, but apparently he got into the habit of not shaving, and I might say, sir, that is a beautiful beard.

[Laughter.]

Senator LEE. We worked together on two subsequent occasions. We clerked together while clerking for U.S. District Court Judge Dee Benson, one of the great minds ever to serve in the federal judiciary, who we are honored to have here in the audience with us today.

The Federal Government is, in my opinion, enacting and enforcing far too much substantive criminal law, and, consequently, our federal criminal system is far too large and it is far too expensive.

To put this in perspective, we need to remember that in 1980, the size of the federal prison population was about 25,000. Today it stands at about 200,000. To my knowledge, the U.S. population has not increased eight-fold since 1980, nor to my knowledge have the number of crimes engaged in by Americans increased eight-fold since 1980. I, therefore, reach the conclusion that what has changed, at least the biggest single factor that has changed, is the fact that we have, in my opinion, over-federalized the criminal justice system.

In recent years one of the things that has been pushing that, one of the factors that has strongly influenced this very significant increase in the federal prison population has been the increased use of minimum mandatory penalties within that system. Almost half of all federal inmates are serving sentences for drug-related offenses. Even if long mandatory minimums for drug offenses that do not directly involve violence as an element of the offense, even if those were a good idea, it is not clear that our country can afford to continue waging this war on drugs through a system that so directly and so inevitably involves these kinds of minimum mandatory sentences.

As evidenced by our witnesses today and the two distinguished panels that we have had today, there is, I think, an increasing consensus developing, a consensus that is developing on the right and

on the left, that significant reforms to minimum mandatory penalties are in order, that this is where we need to go.

I really appreciated the opportunity to work with Senator Durbin on this issue, and with the help of Chairman Leahy as well, to introduce some modest and incremental measures that, if enacted, will result in significant savings and enhance public safety by better focusing scarce federal resources on serious crimes.

Our bill, importantly, does not eliminate any mandatory minimums but, rather, reduces some of the more egregious mandatory minimums for drug offenses that do not directly involve violence as an element of the offense. And this bill also would return discretion to judges in a narrow set of circumstances here.

So, Mr. Tolman, in the time I have got left, I would like to get your perspective as a former Assistant U.S. Attorney and then as a former U.S. Attorney. I would like to just ask you about something that I do not think we have covered yet today, which is what mandatory minimum penalties do to the discretion of a prosecutor and specifically what they do to a prosecutor's ability to manage that prosecutor's caseload. How does that affect your interaction with defendants and defense counsel?

Mr. TOLMAN. It is a great question we have not focused on. The mandatory minimum sentences have become larger and larger in the eyes of the prosecutor, sometimes based on the pressure they receive within the Department of Justice, in particular the agencies that know that in some ways they receive pats on the back for the lengths of sentences. It is not something anyone really is proud of, I would think, but it is a culture, it is the underlying culture that you measure yourself with the length of sentences that you receive. So I am very concerned about the driving force that motivates a prosecutor.

When it comes to what does that do to the discretion, mandatory minimums have started to replace the discretion of the prosecutor. It has become a foundation which they are trying to build on rather than address case by case and individually what are the merits.

I am reminded of—I had a personal meeting with Ed Meese not long ago in which he reminded me that he would on occasion call Assistant U.S. Attorneys and U.S. Attorneys when he would learn that they would defer a prosecution or they would decline a prosecution, and he would congratulate them on exercising their discretion. That culture is not really there. I think the States have done a better job of recognizing rehabilitation is part of their mandate. The Federal Government has not done that, and I think the mandatory minimums are a large part of that.

Your wanting to review both the front end and the back end of the criminal justice system really is identifying both sides of a very similar problem, which is discretion is being set aside, and often what is replacing it is the very draconian sentences. And I would articulate that while I agree we are all encouraged by the decrease in the crime rate, as Mr. Burns points out, you know, that is something we do not want to lose. But we can focus on rehabilitation and we can move away from some of these anecdotal problems and still maintain the reduction in that crime rate.

Chairman LEAHY. You know, it is interesting. If you listen to this, like many others on this Committee, I have fought for grants

to local prosecutors and various law enforcement agencies and the Department of Justice, for everything from specialized enforcement for a particular problem in the area or rehabilitation programs or other programs that work. We now find there is less and less and less money available for these programs because the Department must spend more and more and more of their budget on the Bureau of Prisons.

I am not suggesting it is all dollars or cents, but I would note that local prosecutors and those who work on diversionary programs and everything else are finding a lot less money as it goes into the Bureau of Prisons. It is just an interesting thought to have.

Senator Lee, were you finished? I did not mean to interrupt.

Senator LEE. I just wanted to ask one more followup on that point.

With regard to getting to a plea agreement, does this influence your ability as a prosecutor, or did it when you were a prosecutor, to get to a plea agreement? Are cases that involve significant mandatory minimum penalties less amenable to being resolved through a plea? And if they are, explain to us how that might be detrimental to a prosecutor's office.

Mr. TOLMAN. It is absolutely true. If you look at some of the high mandatory minimums, 20-, 30-, 40-year mandatory minimums that are in the code, a prosecutor is now faced with the problem that anytime you charge that particular crime, you are going to go to trial. And as one prosecutor indicated to me, when several—and I was here in the Senate when some of these mandatory minimums were elevated. The problem—and she was asking, was anyone a prosecutor back there that was looking at this when Congress passed these elevated mandatory minimums? Because she now was—previous to these mandatory minimums, she could prosecute dozens and dozens of cases. She was in the child predator area. Now every one wants to go to trial because the risk is so great, she is now doing six, seven, eight cases a year because she has to go to trial. There is no longer an ability to—and they should be punished and they should have severe punishments. But when those mandatory minimums are so high, you have now eliminated any ability to enter into appropriate plea negotiations.

Mr. BURNS. Could I just say, Senator, if that is happening in the federal system, that is a shame. I have not heard that, that there is a culture that you get a pat on the back if you rack up a long prison sentence, because I can tell you—and I think Senator Leahy would agree—the days of putting a notch in your belt for how many convictions you get are long gone. And with respect to the plea negotiation, Mr. Tolman stated earlier, right now the prosecutor has all the power. You get to assess the case, you get to decide who is charged, and you can decide what the penalty is. And from General Holder's announcement, I think U.S. Attorneys will be getting calls every week congratulating them for not charging crimes that supposedly he does not want them to charge.

We never do that. We are just as proud when we acquit the innocent, when we do not charge, or when we go to trial and hold the guilty accountable for victims.

Senator LEE. All the more reason why I am very comfortable with the bulk of the criminal law enforcement being done at the State level.

Mr. TOLMAN. Correct. And if I could just add, the problem is—and Mr. Burns has pointed it out—the States are using—they are using the federal system to say if you do not reach a certain agreement, we are going to send you over to the Feds. Why do they say that? And why do they want to?

Mr. LEVIN. We really like it.

Mr. TOLMAN. They do. They can still do it under the Sentencing Guidelines, but the reason they are doing it, you cannot simultaneously indicate that federal prosecutions are only 5 percent of the Nation's criminal justice prosecutions and laud the mandatory minimums and argue that our decreasing crime is a result of those types of policies, when it is only based on 5 percent of the population.

Chairman LEAHY. Let me conclude on this. I think we applaud, and should, the discretion, as Mr. Burns has noted, that prosecutors have to decline a case. I always felt as a prosecutor that was probably the most important job I had, to determine when to decline. But we also know prosecutors who love to, especially at election time, tout the number of convictions they had. It is just like I remember when I was a young lawyer watching J. Edgar Hoover testify, I believe before the Judiciary Committee—he had contrasted the amount of budget that he had, but he said, “We have recovered for the American people two times that—or three times that.” Well, when I became a prosecutor, I found out how that worked. The local sheriff would recover the stolen car, which might have been \$10,000 new, it was probably worth \$500 now, and within 2 minutes the local FBI agent was there and said, “We will take it and rack it up—we have recovered \$10,000.” I mean, statistics can be statistics, and we do not want to get ourselves into a case in which we just deal with statistics when we are dealing with human beings.

To end on that, there are a large number of family members here today with photos of their loved ones who are serving mandatory minimums. As this Committee knows, during the time of testimony, whether people agree or disagree with me, I do not allow people to stand and show things, but we are finished the testimony now. You have traveled from as far as Montana, Texas, Utah, Illinois, Connecticut, Maryland, Virginia, and D.C. I wonder if the family members would mind standing up so we can see them.

I think all of you should know that we all come from different backgrounds. I have always felt that much of what I do in public office was shaped by my experience as a prosecutor. And I did appreciate the fact that the NDAA picked me 1 year as one of the three Outstanding Prosecutors in the country. I took that very seriously. And I come to this seriously. That is one of the reasons why I stayed as Chairman of this Committee instead of taking a different Committee when I had the opportunity. Let us work together. There are Senators, Republicans and Democrats, conservatives and liberals, who want to find out the best way, and your testimonies helped.

Mr. Tolman, it is nice to have you back here in the Committee. I do not know why we ever let you leave.

[Laughter.]

Chairman LEAHY. Thank you all very, very much. We stand in recess.

[Whereupon, at 11:40 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]



# **A P P E N D I X**

## **ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD**

### **UPDATED Witness List**

Hearing before the  
Senate Committee on the Judiciary

“Reevaluating the Effectiveness of Federal Mandatory Minimum  
Sentences”

Wednesday, September 18, 2013  
Dirksen Senate Office Building, Room 226  
10:00 a.m.

#### **Panel I**

The Honorable Rand Paul  
United States Senator  
State of Kentucky

#### **Panel II**

Marc Levin  
Policy Director  
Right on Crime Initiative at the Texas Public Policy Foundation  
Austin, TX

The Honorable Brett Tolman  
Shareholder  
Ray Quinney & Nebeker  
Salt Lake City, UT

The Honorable Scott Burns  
Executive Director  
National District Attorneys Association  
Alexandria, VA

## PREPARED STATEMENT OF HON. PATRICK LEAHY

**Statement of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"  
September 18, 2013**

Today we meet to confront the unsustainable growth of our federal prison population. After years of debate, I am encouraged that we have bipartisan agreement that we must act; that we must reevaluate how many people we send to prison and for how long. Fiscal responsibility demands it. Justice demands it.

One piece of the problem is the extensive use of mandatory minimum sentences. It is a problem that Congress created and that Congress must fix.

I want to be clear that some offenders deserve long sentences and no one is saying that we should not send dangerous criminals to prison. As a former prosecutor, I know that behind our most serious crimes are victims. Victims deserve peace of mind of knowing that the criminal who robbed them, or raped them, or defrauded them of their life savings is off the streets and being punished. We know that in some cases, especially white collar offenses, long sentences can serve as a deterrent to others. I also want to emphasize that our efforts should in no way be seen as a criticism of the tireless efforts of law enforcement officials who dedicate their lives to keeping us safe. They deserve our appreciation and support.

We must acknowledge, however, that our federal prison population is expanding at a rate that is simply unsustainable. In the last 30 years, it has soared by more than 700 percent. We now spend approximately \$6.4 billion a year on federal prisons; that is around one-quarter of the Department of Justice budget. This spending means fewer federal prosecutors and FBI agents; less funding for investigations; less support for state and local law enforcement; and fewer resources for crime prevention programs, reentry programs, and victim services.

Perhaps these skyrocketing costs would be acceptable if such mass incarceration improved public safety. But we know that it does not. While Congress has continued to pass legislation mandating ever longer sentences, the states have focused on successful alternatives. New York, South Carolina, Georgia, Ohio, Rhode Island, and Michigan have undertaken reforms like reducing sentences, repealing mandatory minimums, investing in recidivism reduction and they have saved tax payer dollars - all while their crime rates have decreased. It is time we look to the states and draw on the lessons they have learned.

The number of mandatory minimum penalties in the federal code nearly doubled from 1991 to 2011. Many of those mandatory minimums originated right here in this Committee room. When I look at the evidence we have now, I realize we were wrong. Our reliance on a one-size-fits-all approach to sentencing has been a great mistake. Mandatory minimums are costly, unfair, and do not make our country safer.

Take for example Weldon Angelos, a 23-year-old with no criminal history who received a 55-year mandatory minimum sentence for selling \$350 worth of marijuana on 3 occasions while in possession of a firearm. There is no question that Mr. Angelos committed a crime and deserved

to be punished. But 55 years? Mr. Angelos will be in prison until he is nearly 80 years old. His children, only 5 and 6 at the time of his sentencing, will be in their 60s. American taxpayers will have spent more than \$1.5 million locking him up.

The federal judge who sentenced Mr. Angelos, a Republican appointee, called this sentence “unjust, cruel, and irrational” and noted the sentence, which involved no violence, was much more than the minimum for hijacking, kidnapping, or rape. We must stop and ask ourselves what good does that sentence do society? Mr. Angelos’s sister is here today, as are many family members with similar stories of loved ones sent to prison for decades longer than reason and public safety demand. I want to thank them for being here.

Attorney General Eric Holder’s decision last month not to pursue mandatory minimum sentences for certain drug cases is an encouraging step, but it won’t reach cases like Mr. Angelos’. And the Department of Justice cannot solve this problem on its own. Congress must act.

In March, Senator Paul and I introduced the Justice Safety Valve Act of 2013, which would restore the sentencing discretion judges used to have if they determine that a mandatory minimum punishment is unnecessary and counterproductive. Senator Paul and I believe that judges, not legislators, are in the best position to evaluate individual cases and determine appropriate sentences. Our bipartisan legislation has received support from across the political spectrum.

I am also a co-sponsor of the Smarter Sentencing Act, which was introduced by Senators Durbin and Lee and makes necessary reforms to federal drug sentences. I understand that Senator Cornyn, Senator Whitehouse and others are also working on legislation to reduce the size of our prison population. I look forward to working with them to find a comprehensive solution to this problem.

We cannot afford to stay on our current path. Reducing mandatory minimum sentences, which have proven unnecessary to public safety, is an important reform that our federal system desperately needs. This is not a political solution – it is a practical one, and it is long overdue.

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## PREPARED STATEMENT OF HON. CHUCK GRASSLEY

STATEMENT OF SENATOR CHARLES E. GRASSLEY  
 "REEVALUATING THE EFFECTIVENESS OF MANDATORY MINIMUM SENTENCES"  
 SENATE JUDICIARY COMMITTEE  
 SEPTEMBER 18, 2013

Mr. Chairman, thank you for holding this hearing on the important topic of mandatory minimum sentences. I believe there is quite a bit of misunderstanding concerning this topic. Prior to 1984, federal judges had almost limitless discretion in sentencing within a broad range. Sentences imposed depended much more on which judge was giving the sentence than the nature of the offense or the criminal history of the offender. Parole and excessive judicial discretion led to unwarranted disparities in sentencing. And so in 1984, Congress adopted truth in sentencing and abolished parole.

Sentencing guidelines were established. They considered the nature of the criminal offense and the criminal history of the offender. Those guidelines were normally binding on any federal judge in the country. So no longer would sentences turn on which judge a criminal appeared before. The guidelines eliminated other disparities as well. Judges could not consider factors that often led to wealthier defendants receiving shorter sentences for similar crimes than less wealthy defendants. Racial bias in sentencing, conscious or unconscious, also was addressed through mandatory guidelines. Lengthier sentences protected victim interests and reduced the chances that other innocent people would become victims. The legislation was passed by wide bipartisan majorities. Congress, separate from the sentencing guidelines, also increased the number of mandatory minimum sentences, although they have existed since 1790.

Since then, due in part to tougher federal criminal penalties, elimination of parole, increased numbers of inmates, better police practices, and other factors, crime rates have dropped significantly. However, the Supreme Court undermined the excellent sentencing legislation that Congress passed. First, the Court created from whole cloth a novel interpretation of the Sixth Amendment. Second, the Court in a 2005 case called Booker unnecessarily extended that line of cases to mandatory sentencing guidelines and held them unconstitutional. Third, rather than then strike down the guidelines, the Court rewrote them. In a particularly egregious example of judicial activism, they overrode congressional intent and made the guidelines advisory. It was only because the guidelines were clearly intended to be mandatory that Congress ever passed them in the first place.

Following Booker, Congress now has only one available tool to make sure that sentences are not too lenient and do not reflect unwarranted disparity. That is mandatory minimum sentences. Under the current state of the law, if Congress, reflecting the will of the American people, is to have any effect on sentences imposed -- protecting victims, deterring crime, punishing appropriately -- mandatory minimum sentences are our only option. Otherwise, judges will be able to exercise effectively unbridled discretion, with all the disparities and excessive leniency that existed before 1984.

Some people think that cost is a reason to do away with mandatory minimums. I see that for the first time in five years, the Obama Administration has finally found one area of federal spending that it wants to cut: prisons. Perhaps in an era of voluntary guidelines, the first place to

think about cutting spending on sentencing would be to abolish the Sentencing Commission. Private parties can analyze its data and issue reports just as well. And taxpayers won't have to fund an entity that favors retroactive leniency at every opportunity.

The sentencing disparities that exist today are not due to mandatory minimum sentences, which existed both before Booker and after. In fact, Congress has reduced mandatory minimum sentences since Booker. Rather, the disparities are due primarily to the Supreme Court's Booker decision that made the sentencing guidelines advisory. Sentences imposed now turn on which judge the offender appears before. The quality of the lawyer and the other factors that produced disparity before the Sentencing Reform Act are now creeping back into sentencing.

The Sentencing Commission in December issued a report that compared sentences of African-American and White males at the time the guidelines were still mandatory to today, when they are advisory only. For cases overall, when the guidelines were mandatory, African-American males served 11.5% longer sentences than white males. Now that the guidelines are advisory, African-American men serve 19.5% longer sentences than white males. In firearms case, African-American men received sentences that were 6% longer than white men when the guidelines were mandatory. Today, African-American men receive sentences 10% longer than whites for these crimes. For drug trafficking, African-American men received sentences that were 9% longer than white men in 2005, but since the guidelines were made advisory, they now receive sentences that are 13% longer.

As the Sentencing Commission concluded, "although sentence length for both Black male and female offenders and White male and female offenders have decreased over time, White offenders' sentence length has decreased more than Black offenders' sentence length." We should certainly continue to examine federal sentencing policy. We may decide that the length of some mandatory minimum sentences should be adjusted up or down.

But there are two areas in which we ought to consider adding new mandatory minimum sentences because federal judges are departing downward from the guidelines excessively. These are financial crimes and child pornography possession. We should consider imposing mandatory minimum sentences for these offenses, both to reduce racial disparities and to give prosecutors additional tools to combat these serious crimes.

Mandatory minimum sentences are not as inflexible as they are often characterized. According to the Sentencing Commission, almost half of all offenders convicted of an offense carrying a mandatory minimum sentence are not given such a sentence. We hear over and over that mandatory minimum sentences are one size fits all or that they are unfair. We hear that low level and first time offenders always receive harsh sentences. That's just not so. The safety valve provision requires judges not to impose mandatory minimum sentences for first time, low-level, nonviolent drug offenders, who have provided all information to the authorities. Mandatory minimum sentences are not imposed on many other offenders because they provide substantial assistance to the government in prosecuting more serious criminals.

The combination of mandatory minimum sentences and a reduction for substantial assistance provides investigative leads against bigger fish. It is a benefit of mandatory minimum sentences that is not always appreciated. Were we to meaningfully cut back on mandatory minimums, we would lose the ability to bring prosecutions against a large number of major criminals.

I have serious concerns with legislation that would eliminate mandatory minimum sentences, either wholesale or for a class of drug offenses. Two of the bills before the Committee would eliminate or cut in half mandatory minimum sentences for manufacture, distribution, importation, or exportation of such drugs as heroin, cocaine, PCP, LSD, and methamphetamine. I see the toll that meth is taking in Iowa. I do not want to see more harm done because Congress decides to weaken penalties for serious offenses involving this drug. I do not want to see more quantities of these drugs manufactured or distributed because the penalties for particular quantities are lowered.

Finally, I believe that the issue of mandatory minimum sentences is erroneously connected to the issue of federalism. Issues of the clarity of the drafting of federal criminal statutes, what conduct should be subject to federal criminal penalties, and whether the offense sets forth the intent associated with the crime are all important issues bearing on federal power and the number of criminal defendants and prisoners. However, there is no connection between those issues and mandatory minimum sentences. I look forward to today's hearing.

## PREPARED STATEMENT OF HON. RAND PAUL

**SEN. RAND PAUL  
TESTIMONY BEFORE SENATE JUDICIARY COMMITTEE  
SEPTEMBER 16, 2013**

If I told you that one out of three African American males is forbidden by law from voting, you might think I was talking about Jim Crow 50 years ago.

One-out-of-three African-American males are forbidden from voting because of the War on Drugs.

The War on Drugs has disproportionately affected young black males. The ACLU reports that blacks are 4-5 times more likely to be convicted for drug possession although surveys indicate that blacks and whites use drugs at similar rates. The majority of illegal drug users and dealers nationwide are white, three-fourths of all people in prison for drug offenses have been African American or Latino.<sup>1</sup>

Why are the arrest rates so lopsided? Because it is easier to go into urban areas and make arrests than suburban areas.

Because we literally subsidize the arrest and incarceration of people. Federal grant money is based on convictions. It doesn't take much imagination to understand that it's easier to round up, arrest and convict poor kids than it is to convict rich kids. If law enforcement is expected, or pressured, to meet some quota due to the federal dollars their department might receive, they are more likely to go looking in urban areas than the suburbs.

The *San Jose Mercury News* reviewed 700,000 criminal cases that were matched by crime and criminal history of the defendant. The analysis revealed that similarly situated whites were far more successful than African Americans and Latinos in the plea bargaining process; in fact, "at virtually every stage of pretrial negotiation, whites are more successful than non-whites."<sup>2</sup>

I know a guy about my age in Kentucky, who grew marijuana plants in his apartment closet in college. 30 years later, he still can't vote, can't own a gun, and when he looks for work he must check the box, the box that basically says: "I'm a convicted felon and I guess I'll always be one."

He hasn't been arrested or convicted for 30 years—but still can't vote or have his 2<sup>nd</sup> Amendment rights. Getting a job is very difficult for him.

Today, I'm here to ask you to create a comprehensive sentencing safety valve for all federal mandatory minimums, which have been a major culprit in our unbalanced and often unjust drug laws.

Mandatory sentencing is the automatic imposition of a minimum number of years in prison for specific crimes — usually related to drugs. By design, mandatory sentencing laws take discretion away from prosecutors and judges so as to impose harsh sentences, regardless of circumstances.

<sup>1</sup> Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HRW Reports, vol.12, no. 2 (May 2000)

<sup>2</sup> Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *San Jose Mercury News*, Dec. 8, 1991

Since mandatory sentencing began, America's prison population has quadrupled, to 2.4 million. America now jails a higher percentage of its citizens than any other country, at the staggering cost of \$80 billion a year.

Chairman Leahy and I introduced the Justice Safety Valve Act of 2013. We have been joined by Senators Levin, King, and Gillibrand.

The legislation is short and simple. It amends current law to provide "authority to impose a sentence below a statutory mandatory minimum." In other words, we are not repealing mandatory minimums on the books – we are merely allowing a judge to sentence below a mandatory minimum if certain requirements are met.

There is an existing safety valve in current law, yet it is very limited. It has a strict 5 part test and only about 23% of all drug offenders qualified for the safety valve.

The injustice of mandatory minimum sentences is impossible to ignore when you hear the stories of the victims:

John Horner was a 46-year-old father of three when he sold some of his prescription painkillers to a friend. He had been prescribed painkillers for years after losing his eye in an accident, and agreed to sell his friend four unused bottles.

After the pills exchanged hands, Horner discovered that his friend was in fact a police informant, and he was charged with dealing drugs. Horner pleaded guilty, and was later sentenced to the mandatory minimum of **25 years in jail**.

The informant, who turned out to have a long history of drug offenses, was more fortunate— he received a reduced sentence of just 18 months after informing on Horner, and is now free.

Edward Clay was an 18 year old and first time offender when he was caught with less than 2 ounces of cocaine. He received 10 years in jail from a mandatory minimum sentence.

Weldon Angelos was a 24 year old who was sentenced to life in prison for 3 marijuana sales.

Federal Judge Timothy Lewis recalls a case where he had to send a 19-year-old to prison for 10 years for conspiracy. What was the "conspiracy?" This young man had been in a car where drugs were found. I don't know where many of you in this chamber went to high school, but I'm pretty sure one of us might have been in a car in our youth where someone might've had drugs.

As this young man was sentenced to a decade behind bars, he turned and screamed for his mother as he was escorted away. Before the arrest, this young man was going to be the first in his family to go to college.

Each case should be judged on its own merits. Mandatory minimums prevent this from happening. Mandatory minimum sentencing has done little to address the very real problem of drug abuse while also doing great damage by destroying so many lives.

I'm here today to ask you to let judges start doing their jobs. I'm here to ask that we repeal mandatory minimum sentencing.

## PREPARED STATEMENT OF MARC LEVIN



**Testimony of Marc Levin, Esq.**  
**Policy Director, Right on Crime Initiative**  
**at the Texas Public Policy Foundation**  
**Before the Senate Judiciary Committee, September 18, 2013**

### Introduction

- In 1999, Ed Meese told the *New York Times*, "I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." More than two decades later and three years after Ed Meese became one of the signatories to our Right on Crime Statement of Principle, today we have that opportunity.
- More broadly, I am very pleased this Committee and distinguished Senators of both parties have come together to identify ways we can improve the federal criminal justice system and offer some very worthwhile proposals dealing with not only reining in mandatory minimums, but also implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry. As an organization committed to the Tenth Amendment and the founders' vision of states serving as laboratories of innovation, I am pleased to share with you today that many states, particularly those led by conservative Governors, have taken these steps and found great success in reducing costs to taxpayers, and much more importantly their crime rate.
- Keeping Americans safe, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970's, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960's, which included an "if it feels good, do it" mentality and a tendency to emphasize purported societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing couple of decades, a six-fold increase in incarceration occurred, some of which was necessary to ensure violent and dangerous offenders were kept off the streets.
- However, the pendulum shift while necessary went a bit too far, sweeping too many nonviolent, low-risk offenders into prison for long terms while at the same time recent years have yielded new research and techniques on everything from drug courts to actuarial risk assessments to electronic monitoring to pharmacological interventions to treat heroin addiction. One of the most recent and promising models is the Hawaii HOPE Court launched by former federal prosecutor Steve Alm that utilizes swift, sure, and commensurate sanctions, which has reduced substance abuse and re-offending by two-thirds.<sup>1</sup> With all of these advancements, just as we recognize that locking up violent offenders and international drug kingpins continues to make us safer, we must also follow the examples of many states that demonstrate utilizing more alternatives for low-level, low-risk offenders can lead to better public safety outcomes at a lower cost to taxpayers.

### About the Texas Public Policy Foundation & Right on Crime

- Since 1989, the Texas Public Policy Foundation has served as the state's free-market think tank and in 2005 I launched our Center for Effective Justice. Our work in Texas which included research, data analysis, and legislative testimony helped shape Texas' historic shift in criminal justice policy in 2007 away from building more prisons to instead strengthening alternatives for holding nonviolent offenders accountable in the community, such as drug courts. Since making this shift, Texas has achieved a drop in its incarceration rate by more than 9 percent and, most importantly, a drop in its crime rate by more than 12 percent, reaching its lowest level since 1968.<sup>2</sup> Taxpayers have avoided spending more than \$2 billion on new prisons.
- Building on the Texas success, we launched Right on Crime in 2010. Our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field such as John DiLulio and George Kelling, explains how conservative principles such as personal responsibility, limited government, and accountability should apply to criminal justice policy. Our focus areas include: 1) maximizing the public safety return on the dollars spent on criminal justice, 2) giving victims a greater role in the system through restorative justice approaches and improving the collection of restitution, and 3) combating overcriminalization by limiting the growth of non-traditional criminal laws. There are more than 4,500 federal statutory crimes with perhaps hundreds of thousands of regulatory offenses created by agencies themselves, which is exacerbated by the erosion of *mens rea* requirements.<sup>3</sup>
- Over the past few years, we have worked with our counterpart free-market think tanks and conservative Governors and legislators across the country to advance tough and smart criminal justice reforms, which in most cases have passed unanimously or with just a few votes against. Examples include Georgia, South Carolina, Ohio, and Pennsylvania. These legislative packages have shared many similarities, such as strengthening and expanding alternatives such as drug and other problem-solving courts, reducing penalties for low-level drug possession while still holding these offenders accountable and requiring treatment, reinvesting a share of prison savings into proven community corrections and law enforcement strategies, imposing swift, certain, and commensurate sanctions for non-compliance with community supervision terms, implementing earned time policies that incentivize offenders to succeed, and instituting rigorous, outcome-oriented performance measurements to hold the system accountable for lowering recidivism.
- While in the last two years, state incarceration rates have been declining, the federal prison system continues to grow. Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.<sup>4</sup> Some 46.8 percent of federal inmates are drug offenders.<sup>5</sup>

### Mandatory Minimums

- As former Attorney General Meese indicated, it has long been time to reexamine many mandatory minimums. We have the following concerns with mandatory minimums, particularly as they apply to nonviolent offenses:
  - Judges and juries have much more information as to the specific facts of the case, yet mandatory minimums prevent the judge and jury from considering the defendant's background and especially his risk level. Research shows that actuarial risk assessments can accurately determine that two offenders who committed the same offense pose very different levels of risk to the community.
  - Some mandatory minimums result in excessive prison terms, particularly following the abolishment of parole in the federal system. For example under 21 U.S.C. § 851(a), if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for a "felony drug offense," the mandatory minimum is 20 years with a maximum of life in prison. If there were two prior "felony drug offenses" that the prosecutor files notice of, life in federal prison is mandatory. Notably, a prior "felony drug offense" can be satisfied by a state misdemeanor in states where a misdemeanor is punishable by one or more years behind bars and even a diversionary disposition in state court. Furthermore, there is no limit on how old the prior offense can be and in some cases it has been decades old.
  - Illustrating the injustice that mandatory minimums can lead to, there are many cases where federal judges have lamented in the record that the sentence they are forced to give by the applicable mandatory minimums is unjust and far beyond what is needed to sufficiently punish and ensure public safety. Among those are the case of college student Michael Wahl just this year in Florida who received ten years for growing marijuana in his apartment due to a § 851 enhancement for drug possession case two decades earlier. An Iowa 40 year-old man named Robert Riley was sentenced to mandatory life in federal prison for selling 10 grams of drugs, including the weight of the blotter paper they were attached to, due to the prosecutor filing § 851 enhancements based on prior drug convictions involving small amounts. The judge said the sentence he was forced into was "unfair" and wrote a letter supporting presidential clemency which has proven futile so far. In addition to the drug cases, there are also many problematic cases involving firearms owned by the federal laws applicable to - previously convicted of any crime punishable by more than a year behind bars, as some have received mandatory terms of 10 to 40 years even when the prior offense was nonviolent and decades ago and the gun they currently possessed was otherwise legal and not being used for any illicit purpose. In one such case where the gun was a sixty year-old hunting rifle used to hunt turkey in rural Tennessee, the judge described the 15 year mandatory term he was forced to impose as "too harsh."

- A Rand Institute study found mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective.<sup>6</sup>
- They do not allow for input from the victim. Research has shown that in some cases victims do not want the maximum prison term and that restitution is much more likely to be obtained if an alternative sentence is imposed.<sup>7</sup>
- They have not met the goal of achieving uniformity in sentencing. For example, a defendant in the Northern District of Iowa “who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska,” a defendant in the Eastern District of Tennessee is “3,994% more likely to receive” the enhancement than in the Western District. *United States v. Young*, \_\_ F. Supp. 2d \_\_, 2013 WL 4399232 (N.D. Iowa 2013).
- We do recognize the value of appropriate sentencing ranges to guide the discretion exercised by judges and juries as well as judges being aware of the sentencing patterns of their colleagues. If mandatory minimums were rolled back for certain offenses, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues.
- We appreciate the outstanding work that prosecutors typically do at all levels of government. We have heard the concern that prosecutors in some jurisdictions have excessive caseloads and mandatory minimums provide the leverage needed to quickly extract plea bargains that are satisfactory to them, but the better way to address this concern is to ensure there are sufficient prosecutors to properly examine the facts of each case and, when necessary, fully prosecute those cases that merit a trial.

#### Other Federal Corrections Reforms

- In the recent groundswell of state policy innovations in this area, reforms in some states like Texas and Georgia have not dealt with mandatory minimums because they had few if any mandatory minimums to begin with and instead have long provided meaningful sentence ranges for most offenses. However, at the federal level, since mandatory minimums affect many cases, including many nonviolent cases, comprehensive reform approaches should address both mandatory minimums and other changes that do not involve sentencing laws such as earned time and strengthening reentry.
- You have been given a copy of our paper “The Verdict on Federal Prison Reform” that focuses mostly on such other changes that would complement reform of mandatory minimums and that are backed by empirical research and proven success in the states.<sup>8</sup> These include: utilizing validated risk and needs assessments, earned time policies, strengthening alternatives to incarceration such as problem-solving courts and electronic monitoring, reducing collateral consequences of convictions that make it harder for

rehabilitated ex-offenders to find employment, and strengthening reentry. With regard to both alternatives to incarceration and reentry, we suggest considering subcontracting in some instances with state, local, and non-profit agencies, as this can be more efficient than the federal government reinventing the wheel, particularly in areas where there are not that many federal offenders on probation or on supervised release.

- Congress must also act to rein in overcriminalization by reducing the number of unnecessary criminal laws, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, and reining in the authority of agencies to create regulatory offenses.

## Conclusion

- The success in many states in reducing both crime and costs through reforms anchored in research and conservative principles provides a blueprint for reform at the federal level. It has been a privilege to be with you today. We are encouraged by the remarkable vision and leadership of the distinguished members of this Committee and look forward to being of assistance in any way we can.

<sup>1</sup> "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program, <http://www.hopeprobation.org/about/program-evaluation-results>.

<sup>2</sup> Marc Levin, "The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs," Texas Public Policy Foundation, Sept. 2011, <http://www.texaspolicy.com/sites/default/files/documents/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>.

<sup>3</sup> Paul Larkin, "The Need for a Mistake of Law Defense as a Response to Overcriminalization," Heritage Foundation, April 2013, <http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization>.

<sup>4</sup> The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted. See also "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.

<sup>5</sup> Federal Bureau of Prisons Quick Facts, <http://www.bop.gov/news/quick.jsp>.

<sup>6</sup> Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa, "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?," Rand Institute, MR-827-DPRC, 1997, 217 pp., ISBN: 0-8330-2453-1

<sup>7</sup> "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa, April 1998, [http://www.csbs.uni.edu/dept/csbr/pdf/CRI\\_Crime\\_Victimization\\_Survey-1998.pdf](http://www.csbs.uni.edu/dept/csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf). "Empowering and Restoring Crime Victims," Texas Public Policy Foundation, <http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf>.

<sup>8</sup> Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation, July 2013, <http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf>



**RIGHT  
ON CRIME**

## STATEMENT OF PRINCIPLES

[www.rightoncrime.com](http://www.rightoncrime.com)

**Job Bush**  
*Former Governor of Florida*

**Newt Gingrich**  
*American Solutions for Winning the Future*

**Grover Norquist**  
*American for Tax Reform*

**Edwin Meese III**  
*Former U.S. Attorney General*

**William J. Bennett**  
*Former Secretary of Education and Federal "Drug Czar"*

**Asa Hutchinson**  
*Former U.S. Attorney and Administrator of the U.S. Drug Enforcement Administration*

**J.C. Watts**  
*Former Member of the U.S. House of Representatives for Oklahoma and Congressional District*

**Pat Nolan**  
*Prison Fellowship Ministries*

**David Keene**  
*Former Chairman of the American Conservative Union*

**Richard Viguerie**  
*ConservativeMatters*

**Chuck Calson (1931-2012)**  
*Prison Fellowship Ministries*

**Erick Erickson**  
*Founder of Real State*

**Brooke Rollins**  
*Real Public Policy Foundation*

**Ralph Reed**  
*Founder of the Faith and Freedom Coalition*

**Eli Lehrer**  
*Heritage Institute (Washington, DC)*

**Larry Thompson**  
*Former U.S. Deputy Attorney General*

**Tony Perkins**  
*Family Research Council*

**Rabbi Daniel Lapin**  
*American Alliance of Jews and Christians*

**Penny Nance**  
*Conservative Women for America*

**John J. DiIulio, Jr.**  
*University of Pennsylvania*

**Ward Connerly**  
*American Civil Rights Institute and former Regent of University of California*

**Jerry Madden**  
*Former Trade House Contractors' Chairman*

**George Kelling**  
*Marshallian Institute (NY)*

**Gary Bauer**  
*American Values*

**Viet Dinh**  
*Georgetown University Law Center and former U.S. Assistant Attorney General*

*List of signatories continues on back*


As members of the nation's conservative movement, we strongly support constitutionally limited government, transparency, individual liberty, personal responsibility, and free enterprise. We believe public safety is a core responsibility of government because the establishment of a well-functioning criminal justice system enforces order and respect for every person's right to property and life, and ensures that liberty does not lead to license.

Conservatives correctly insist that government services be evaluated on whether they produce the best possible results at the lowest possible cost, but too often this lens of accountability has not focused as much on public safety policies as other areas of government. As such, corrections spending has expanded to become the second fastest growing area of state budgets—trailing only Medicaid.

Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches that enhance public safety. A clear example is our reliance on prisons, which serve a critical role by incapacitating dangerous offenders and career criminals but are not the solution for every type of offender. And in some instances, they have the unintended consequence of hardening nonviolent, low-risk offenders—making them a greater risk to the public than when they entered.

Applying the following conservative principles to criminal justice policy is vital to achieving a cost-effective system that protects citizens, restores victims, and reforms wrongdoers.

1. As with any government program, the criminal justice system must be transparent and include performance measures that hold it accountable for its results in protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution and conserving taxpayers' money.
2. Crime victims, along with the public and taxpayers, are among the key "consumers" of the criminal justice system; the victim's conception of justice, public safety, and the offender's risk for future criminal conduct should be prioritized when determining an appropriate punishment.



**RIGHT  
ON CRIME**

[www.rightoncrime.com](http://www.rightoncrime.com)

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**Dan Greenberg**  
*President of Alliance for Nevada Institute*

**Hal Stratton**  
*Former New Mexico Attorney General*

3. The corrections system should emphasize public safety, personal responsibility, work, restitution, community service, and treatment—both in probation and parole, which supervise most offenders, and in prisons.
4. An ideal criminal justice system works to reform amenable offenders who will return to society through harnessing the power of families, charities, faith-based groups, and communities.
5. Because incentives affect human behavior, policies for both offenders and the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results.
6. Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.

These principles are grounded in time-tested conservative truths—constitutionally limited government, transparency, individual liberty, personal responsibility, free enterprise, and the centrality of the family and community. All of these are critical to addressing today's criminal justice challenges. It is time to apply these principles to the task of delivering a better return on taxpayers' investments in public safety. Our security, prosperity, and freedom depend on it.

**About Us**

Right on Crime is a national initiative led by the Texas Public Policy Foundation, one of the nation's leading state-based conservative think tanks. The initiative aims to raise awareness of the truly conservative position on criminal justice policy by demonstrating the growing support for effective criminal justice reforms within the conservative movement. This initiative will share research and policy ideas, mobilize conservative leaders, and work to raise public awareness.

Right on Crime couldn't be timelier. With new majorities in 19 state legislatures and hundreds of new lawmakers who pledged to cut spending now taking office, Right on Crime provides conservative principled solutions that are proven to reduce crime, lower costs, and restore victims.

For more information, please visit [www.rightoncrime.com](http://www.rightoncrime.com).



# **Selected Recent Major Corrections Reforms Under Conservative Governors**

Rev. 7/17/13

State	Year	Governor	Description	Impact
Georgia	2012	Deal	The Georgia General Assembly unanimously passed legislation that was the result of a data-driven analysis by the bipartisan, inter-branch Special Council on Criminal Justice Reform, which found that the state's prison population had more than doubled in the last two decades and would grow by an additional 8 percent over the next five years if current policies remained in place. The new law protects public safety and controls prison growth by focusing prison space on serious offenders, strengthening probation and accountability courts, relieving local jail overcrowding, and instituting outcome-based performance measures.	The legislative package is projected to avert all of the previously anticipated growth in the prison population and also reduce the daily population by approximately 1,000 offenders during the next five years. As a result, taxpayers will save at least \$264 million. The state budget also prioritizes spending to enhance community corrections such as drug courts that reduce recidivism. Combined, these efforts are expected to improve public safety and cut costs.
Georgia (juvenile)	2013	Deal	Following a criminal justice overhaul in 2012, Georgia took further steps in 2013, which included wide-ranging reforms to its juvenile justice system based on recommendations from the Special Council on Criminal Justice Reform for Georgians. The legislation focuses state facilities on higher-level offenders, reduces recidivism by prioritizing evidence-based programs and practices, and improves government performance with better collection and performance-based contracting. The reforms were passed with unanimous support and signed by Governor Deal. Some of the savings were reallocated for county-level voluntary incentive grants.	The 2013 initiatives are expected to save Georgia nearly \$85 million through 2018 and avoid the need to open two additional juvenile lockups. The initiatives also redirected a portion of the savings to expand community-based programs and practices proven to improve public safety by reducing recidivism. Additionally, the overhaul streamlines and revises the state code relating to juvenile justice and child welfare.
Louisiana	2012	Jindal	Eight provisions recommended by the bipartisan, inter-branch Louisiana Sentencing Commission became law. The measures simplify "good time" and earned time statutes, expand parole eligibility for second-time offenders, and allow for the waiver of mandatory minimum sentences for non-violent offenders if the prosecutor, defense counsel and judge agrees. They also clarify provisions for administrative sanctions for supervision violations, repeal under-utilized risk-review panels, expand Louisiana's reentry courts, and consolidate the pardon and parole boards into a single board. Other measures allow earned time for non-violent habitual offenders and provide parole eligibility for non-violent offenders serving life sentences.	These measures are projected to save Louisiana more than \$200 million over 10 years while enabling the state with the nation's highest incarceration rate to prioritize prison space for violent and dangerous offenders.
Pennsylvania	2012	Corbett	After Governor Corbett challenged lawmakers to pass criminal justice reform, the Legislature obliged by unanimously passing a series of reforms which the governor signed. The new law requires that low-level, nonviolent misdemeanor offenders be sentenced to a sanction other than prison, and it reduces costly inefficiencies in the parole process. It also increases the accountability of community-based residential programs, targeting their use as intermediate sanctions for technical parole violators and for offenders who have been granted parole but lack a housing plan. This package, based on recommendations from a bipartisan, interbranch Justice Reinvestment working group, also authorizes the creation of swift and certain sanctions for probation violators based on the Hawaii HOPE program.	These provisions are expected to improve public safety and save the state approximately \$253 million over the next five years by slowing the growth of Pennsylvania's prison population. Provisions to prioritize a portion of the savings in strategies to help local law enforcement deter crime, to support crime victims, and to bolster probation resources are included in a separate measure, which also was passed by the Legislature and signed by Governor Corbett in 2012.

South Carolina	2010	Sanford	A comprehensive package enacted in 2010 reduces the application of substantial prison terms to low-level drug possession offenses while increasing penalties for certain violent crimes. The reforms also require supervision for offenders leaving prison, focus corrections resources on high-risk offenders, and provide greater accountability for non-violent, lower-level offenders. They require greater accountability through performance measures and provide data-driven oversight of sentencing and corrections reform.	This package is projected to save the state up to \$175 million in prison construction costs and avoid more than \$66 million in operating costs during the next five years. Crime substantially declined in 2011, the most recent year for which statistics are available following the enactment of this legislation.
South Dakota	2013	Daugaard	South Dakota's reform package expands the tools available to courts and parole agencies to change offender behavior and reduce recidivism. The measure creates more drug and DUI courts and two pilot HOPE courts. The measure also creates more targeted punishments for certain nonviolent crimes, including increased penalties for the most serious grand theft and drug manufacturing, distributing, and dispensing, creating a default sentence of probation for the least serious nonviolent offenses, and more finely delineating certain property offenses. Further, the reform package enables offenders to earn time off their community supervision term through exemplary performance, requires the use of evidence-based practices including graduated sanctions to improve probation and parole and reduce recidivism, and requires courts and the corrections system to focus treatment and intervention programs for probation and parole populations on recidivism reduction, and to report on outcomes.	This package is projected to reduce anticipated prison growth in South Dakota by 716 beds, avert the construction of two prisons, and save state taxpayers \$207 million in construction and operating costs through 2022. It also redirects \$8 million from the current budget to programs and policies proven to improve public safety by reducing recidivism and improving offender accountability.
Texas	2007	Perry	Policymakers responded to an official projection that the state would need to build more than 17,000 prison beds by 2012 by instead crafting a \$241 million justice reinvestment package. It involved expanding drug courts, intermediate sanctions and short-term treatment beds, halfway house beds, and non-residential treatment slots. The package also reduced probation caseloads so more probation violations could be expeditiously addressed in a way that deters future violations and thereby prevents revocations.	This package avoided \$2 billion in prison construction and operation costs. Since this 2007 reinvestment package, Texas has seen both its crime rate and incarceration rate drop by more than 10 percent. Texas now has its lowest crime rate since 1968 and its lowest prison population in five years. Parole and probation failure rates have dropped substantially since 2007.
Texas (juvenile)	2007	Perry	Lawmakers addressed an abuse scandal at the state's youth lockups by enacting a comprehensive legislative approach, which not only instituted video cameras, an ombudsman, and inspector general to enhance accountability at these facilities, but also reduced the overutilization of state lockups. One key provision precluded the placement of youth misdemeanants in state lockups, such as youths in possession of marijuana and alcohol and graffiti offenders, instead opting to redirect some of the savings towards local solutions which have shown to be more effective. The legislation also established panels to ensure youths are promptly reviewed after successfully completing their rehabilitation program to determine if they are safe to be transferred to parole.	The population of Texas state youth lockups has fallen from approximately 5,000 in 2006 to about 1,500 today, resulting in a savings of several hundred million in the state's juvenile justice budget. Most importantly, Texas' juvenile crime rate has plummeted since 2007, with the juvenile violent crime arrest rate per 100,000 youths falling from 190.0 in 2006 to 145.5 in 2010. The juvenile arrest rate for all crimes has also declined substantially.

## The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime & Costs

by Marc A. Levin &  
Vikrant P. Reddy<sup>1</sup>

### Key Findings

- The federal government should better utilize probation, accountability courts, and other community-based sanctions that the states have used to control criminal justice costs and improve public safety.
- The federal prison system should expand good time credits.
- The federal government should implement better strategies to improve ex-offender reentry and limit the "collateral consequences" of incarceration.
- Congress should reverse decades of overcriminalization and limit the use of criminal law to regulate behavior that is not traditionally considered criminal in nature.

"There is an urgent need to address the astronomical growth in the prison population, with its huge cost in dollars and lost human potential....The criminal justice system is broken, and conservatives must lead the way in fixing it." ~Newt Gingrich and Pat Nolan<sup>2</sup>

### Challenges Facing the Federal Criminal Justice System

The federal prison population, which currently exceeds 218,000 prisoners, has increased at an alarming rate for about three decades.<sup>3</sup> Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.<sup>4</sup>

It is generally true that both state and federal prison populations rapidly outpaced population growth throughout the 1980s and 1990s, but in recent years, many state prison populations have declined, while the federal prison population keeps growing.<sup>5</sup> In 2012, the Bureau of Justice Statistics reported that the total population of incarcerated persons in the United States had decreased for four consecutive years from 2008 to 2011, but the decline came entirely at the state level.<sup>6</sup> The federal system continued to gain prisoners.

When the first federal prison, in Fort Leavenworth, Kansas, was partially opened in 1903, it contained a total of 418 federal prisoners.<sup>7</sup> In 1930, President Herbert Hoover signed legislation formally establishing the Federal Bureau of Prisons (BOP) to "provide more ... humane care for federal inmates, to professionalize the prison service, and to ensure consistent and centralized administration."<sup>8</sup> The BOP, in 1931, managed 13,035 prisoners in 14 facilities. In 1940, the number of prisoners increased to

24,797. From 1940 until 1980, the federal prison population hovered just above or just below 20,000.<sup>9</sup>

The population exploded, however, after the passage of the Comprehensive Crime Control Act of 1984, a major criminal justice overhaul which largely eliminated federal parole, reduced good time credits, and transferred many sentencing decisions from the judiciary to Congress.<sup>10</sup>

Table 1: Federal Prison Population Growth 1940-2012<sup>11</sup>

Year	Federal Prison Population
1940	24,797
1949	19,921
1959	17,652
1969	23,299
1979	20,000
1989	24,252
1999	54,072
2009	141,419
2010	139,113
2012	218,295

The federal prison budget grew as the federal prison population grew. The BOP budget increased by an average of \$197 million per year from Fiscal Year (FY) 1980 to FY 2010, a total increase of approximately 1,700 percent.<sup>12</sup> The current BOP budget is 25 percent of the entire Department of Justice (DOJ) budget, and a 2012 Urban Institute study concluded that "if present trends continue, the share of the DOJ budget consumed by BOP will [approach] 30 percent in 2020."<sup>13</sup> The FY 2013 budget request for BOP, \$6.9 billion, was 4.2 percent higher than the budget enacted in FY 2012.<sup>14</sup> The in-

*continued on next page*

**As of September 2012, the prison system operated at 39 percent above capacity. High-security and medium security facilities for male inmates are especially overburdened, operating at 47 percent and 51 percent over capacity in 2012, respectively.**

creasing cost of prisons is not only a fiscal concern. It has public safety consequences because the swelling BOP budget crowds out other important DOJ functions, such as crime prevention and investigation.<sup>15</sup>

Furthermore, federal prisons are overcrowded, which may lead to increases in prisoner misconduct.<sup>16</sup> As of September 2012, the prison system operated at 39 percent above capacity.<sup>17</sup> High-security and medium security facilities for male inmates are especially overburdened, operating at 47 percent and 51 percent over capacity in 2012, respectively.<sup>18</sup> Temporary solutions, such as double and triple-bunking and housing prisoners in non-residential areas, are commonplace, but these practices create public safety concerns by undermining the ability of the corrections system to provide effective recidivism-reduction programming.<sup>19</sup>

Expansions of the federal prison system have been proposed to deal with these problems.<sup>20</sup> Such proposals, however, do not solve the fundamental spending problem. They merely ignore perpetual prison population growth.

#### **Drivers of Growing Federal Prison Population: Overfederalization, Inflexible Sentencing Designs, & Ineffective Community Supervision**

The expansion of federal prosecution into areas traditionally governed by the police function of the states—the “overfederalization” of crime—has played a significant role in the increase of the federal prison population.<sup>21</sup> For example, in 1980, 4,749 drug offenders accounted for 25 percent of the federal prison population, but in 2009, a total of 95,205 drug offenders accounted for 51 percent of the federal prison population.<sup>22</sup> For some in this category, such as drug king-

pins or white collar criminals like Bernie Madoff, justice may require lengthy sentences. These criminals, however, represent only a portion of the prison population. Many in federal prisons are drug offenders who traditionally would have been dealt with in state criminal justice systems.<sup>23</sup> Moreover, these offenders, many of whom are low-level and low-risk, often serve lengthy federal sentences with limited avenues for earning early release.<sup>24</sup> Justice Antonin Scalia, in testimony before the Senate Judiciary Committee, has observed that “it was a great mistake to put routine drug offenses into the federal courts.”<sup>25</sup>

Another driver of the growing federal prison population is the manner in which sentence lengths dramatically increase due to a variety of sentencing enhancements that are stacked upon an underlying charge. Many states have moved to more flexible sentencing approaches in the last several years that recognize judges and juries—not legislatures—are best able to tailor an appropriate sentence to the unique facts of a case. Texas, for example, generally follows an effective and well-regarded model of indeterminate sentencing. The federal prison system, however, eschews the Texas model, and adheres ever-more closely to California’s counterproductive model of determinate sentencing.<sup>26</sup> From 1991 to 2011, the number of mandatory federal penalties almost doubled, and it has been argued that because these penalties are listed in the U.S. Sentencing Guidelines, they have a collateral effect on other penalties which must increase “in order to keep a sense of proportionality.”<sup>27</sup>

Indeed, these inflexible penalties are arguably superfluous in light of the federal sentencing guidelines.<sup>28</sup> Moreover, they may lead to unjust outcomes and effectively substitute prosecutorial discretion for judicial discretion because the prosecutor, by selecting the charge, is also selecting the sentence.<sup>29</sup> Former Chief Justice of the United States William Rehnquist criticized these sentencing schemes by saying that they have “led to an inordinate increase in the ... prison population and will require huge expenditures to build new prison space.”<sup>30</sup> Supreme Court Justice Anthony Kennedy has been equally critical.<sup>31</sup>

Still another driver of the increasing federal prison population is ineffective community supervision. In FY 2010, about one in seven BOP admissions were supervision violators.<sup>32</sup> In 2012, a report on recidivism among offenders on federal community supervision that was prepared for the

Bureau of Justice Statistics and the Office of Probation and Pretrial Services concluded that substance abuse, mental health issues, and difficulty in obtaining employment are all risk factors for recidivism.<sup>33</sup> DOJ resources could be directed towards addressing these risk factors, but as mentioned above, spending on incarceration crowds out spending for these operations.

In short, after years of well-intentioned but imprudent policy decisions, the federal prison system is riddled with costly problems. Punishment is often disproportionate, judicial discretion has been curtailed, expensive incarceration is sometimes used on offenders regardless of whether public safety benefits from it, good behavior and recidivism reduction are not effectively incentivized, and the scope of the federal criminal law has exceeded its appropriate reach. Federal prosecution and incarceration should be reserved for appropriate criminals, notably those guilty of crimes which fall outside of the scope of the states' police powers or high-level offenders which the federal system is particularly well-suited to prosecute and punish.

#### **Taking Cues from the States— Especially Texas**

The challenges described above are not historically unique to the federal system. Several states faced comparable overcrowding crises in recent years, but they responded by cutting prison populations and costs without reducing public safety. Between 2000 and 2010, 17 states managed to reduce both their crime rates and their incarceration rates.<sup>34</sup> This suggests that increases in incarceration are not necessarily responsible for decreases in crime.<sup>35</sup>

This is not as counter-intuitive as it might seem at first blush. According to social scientists Bert Useem and Anne Morrisson Piehl, incarceration reduces crime but yields diminishing returns. In fact, Useem and Piehl go yet one step further when describing the results of their research:

[T]hese results go beyond the more typical claim of declining marginal returns. Rather, they document accelerating declining marginal returns, that is, a percent reduction in crime that gets smaller with ever-larger prison populations. The findings imply several conclusions about the usual constant-elasticity, statistical analyses of incarceration's effect on crime: (1) at low levels

of incarceration, these analyses underestimate the negative relationship between incarceration and crime; (2) at higher levels of incarceration, the analyses overstate the negative effect; and (3) analyses from one time period cannot be extrapolated to other points in time with vastly different incarceration experience.<sup>36</sup>

Commenting in part on Piehl and Useem's research, criminologist John DiIulio observed that "[t]he justice system is becoming less capable of distributing sanctions and supervision rationally, especially where drug offenders are concerned."<sup>37</sup> The upshot is that, at a certain point, incarceration is not the optimal method for ensuring public safety. Public safety may also improve, at least in part, through stronger community corrections and improved reentry.

Texas, for example, offers an excellent model that federal reform could reasonably emulate. In 2007, in lieu of constructing approximately 17,000 more prison beds and a spending increase of approximately \$2.63 billion through 2012,<sup>38</sup> the Texas Legislature opted to implement proven supervision and treatment programs for \$241 million, with recidivism reduction as the primary goal.<sup>39</sup> Since 2007, Texas legislators have focused on expanding community-based options like accountability courts and halfway houses,<sup>40</sup> and the years in which these changes were implemented have coincided with declining crime rates in Texas that have reached their lowest level since 1973.<sup>41</sup> In the process, Texas avoided spending nearly \$2 billion dollars which would have otherwise been spent on prison beds. It is notable that the decline in crime is occurring as the state relies less, not more, on incarceration. In 2011, for the first time in modern history, Texas actually closed a prison, the Central Unit in the city of Sugarland.<sup>42</sup> (By contrast, in April of 2013, U.S. Rep. Hal Rogers indicated that Congress may soon allocate funds for a new federal prison in Letcher County, Kentucky.<sup>43</sup>)

Texas policymakers accomplished this by focusing on recidivism reduction and incentivizing good conduct. For appropriate offenders, alternatives to incarceration such as evidence-based intervention and treatment programs, problem-solving (accountability) courts, and community supervision with electronic monitoring have been used. These alternatives have been shown for many offenders to produce a greater reduction in crime with each dollar spent.<sup>44</sup>

### Genuine Reform of the Federal Criminal Justice System Should Be Guided by Six Principles<sup>45</sup>

The national Right On Crime campaign presents six principles to guide state-level criminal justice reform. All six of the principles are equally applicable to federal criminal justice reform:

1. As with any government program, the criminal justice system must be transparent and include performance measures that hold it accountable for its results in protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution, and conserving taxpayers' money.
2. Crime victims, along with the public and taxpayers, are among the key "consumers" of the criminal justice system; the victim's conception of justice, public safety, and the offender's risk for future criminal conduct should be prioritized when determining an appropriate punishment.
3. The corrections system should emphasize public safety, personal responsibility, work, restitution, community service, and treatment—both in probation and parole, which supervise most offenders, and in prisons.
4. An ideal criminal justice system works to reform amenable offenders who will return to society through harnessing the power of families, charities, faith-based groups, and communities.
5. Because incentives affect human behavior, policies for both offenders and the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results.
6. Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.

### Four Broad Policy Recommendations

To maximize the public safety return on taxpayer investment, the federal prison system needs to be reformed. Al-

ternatives to incarceration, such as treatment and community-based corrections, are generally less costly and more effective, and they should be better utilized. Costly incarceration should be reserved for those who truly warrant it, due to public safety, deterrence, or retribution considerations. Good behavior and recidivism reduction should be incentivized by tying time served to earned time credits. The federal government should implement better strategies to improve ex-offender reentry and limit the "collateral consequences" of incarceration. Above all, federal crimes should be limited to those outside the scope of state police powers and which federal agencies are uniquely suited to prosecute.

### A Greater Focus on Community Corrections

Fundamentally, the federal prison system needs a greater focus on community corrections. For example, after serving a portion of his sentence in prison, a suitable federal inmate could be stepped down to a community-based option (with appropriately graduated sanctions) such as work release, a day reporting center, or a halfway house. By contracting with state or non-profit operators, substantial cost-savings could be realized, as time spent at community corrections facilities is generally less costly (\$70.79/day) than incarceration in federal prisons (\$77.49/day).<sup>46</sup> The annual cost of community supervision is approximately \$3,433 per offender; by contrast, the average cost of incarcerating a minimum security inmate is \$21,006 annually.<sup>47</sup> This would facilitate reentry in close proximity to the community from which the offender came, where positive supports such as families, churches, and social service organizations can be better leveraged to promote successful reintegration.

Congress might also consider policy changes that allow courts, using appropriate risk assessment instruments, to place more federal inmates on probation, an idea considered in a 2013 Congressional Research Service report.<sup>48</sup> The report noted that a federal judge's ability to sentence an offender to probation is somewhat limited under the federal sentencing guidelines.<sup>49</sup> Nevertheless, the report also concluded that because the U.S. Supreme Court has determined the guidelines to be advisory, judges are not entirely without flexibility.<sup>50</sup>

Of course, genuine reform means not just more community supervision, but better supervision—what some state-level reformers refer to as "supervision with teeth."

At the state level, electronic monitoring has been especially instrumental in improving the supervision of offenders. The tool enables a supervising agency to determine whether an offender is at work, attending treatment, in a prohibited zone, or violating a curfew. One study found offenders being electronically monitored were 89-95 percent less likely to be revoked for a new offense, perhaps because they better appreciate the likelihood of being caught if they abscond.<sup>51</sup> Although electronic monitoring is not a panacea (it will not replace the human relationship necessary in community corrections), federal policymakers should consider whether home confinement with electronic monitoring could be expanded among inmates in low-security and medium-security facilities.

#### *Expansion of Good Time Credits*

In the federal system, good time credits are given to inmates who have “displayed exemplary compliance with institutional disciplinary regulations.” These credits, which are the primary means of sentence reduction, are effectively capped at 47 days per year sentenced.<sup>52</sup> Thus, the vast majority of federal inmates serve more than 87 percent of their sentences, and the average time served is a relatively long 9.5 years.<sup>53</sup>

No offender is entitled to time off his or her prison term, but states like Texas with a strong tradition of law and order have enacted earned time policies that apply to prisoners who are not among the most serious offenders, recognizing the basic truth that incentives affect behavior and, therefore, earned time can enhance compliance and the motivation to complete vocational, educational, and rehabilitative programs. In 2011, Texas took the additional step of expanding the good time credits for some offenders in state jails in addition to those in prison.<sup>54</sup>

The states that have adopted more robust earned time programs than the federal system, such as Texas, Kansas, and Colorado, have appropriately limited the programs to low-level offenders.<sup>55</sup> Federal legislation should do the same. Furthermore, the BOP should consider granting earned time to inmates who complete rehabilitative programs that are not related to substance abuse, such as those programs related to anger management and other mental health problems.<sup>56</sup>

In many states, including Georgia, Ohio, and Pennsylvania, expansions of good time credits and a broad philosophical

**Kentucky’s Public Safety and Offender Accountability Act of 2011 also focused, in part, on improving the incentives for ex-offenders to find and keep jobs, and it is expected to reduce the state prison population by 3,000 and save \$422 million.**

shift away from determinate sentencing policies have been coupled with improvements to community supervision for drug offenders. A RAND Institute study argues in favor of this approach, having determined that with the important exception of drug dealing by major kingpins, determinate sentences for drug offenders are not cost-effective.<sup>57</sup> Furthermore, there appears to be no correlation between such sentences and recidivism rates.<sup>58</sup>

#### *Facilitating Reentry and Limiting Collateral Consequences*

Many states have begun to target recidivism-reduction as the key to reducing incarceration costs. In 2008, Arizona passed the Safe Communities Act, legislation which—among other things—established stronger incentives for probationers to get jobs. Kentucky’s Public Safety and Offender Accountability Act of 2011 also focused, in part, on improving the incentives for ex-offenders to find and keep jobs, and it is expected to reduce the state prison population by 3,000 and save \$422 million.<sup>59</sup>

Often, the key to helping ex-offenders find and keep jobs is removing the “collateral consequences” of a conviction. As Dr. Mitch Pearlstein has explained:

Collateral sanctions [or consequences] include any legal penalty, disability, or disadvantage imposed automatically upon conviction: for example, ineligibility for various jobs, such as school-bus driver or property manager for an apartment building. Collateral consequences encompass the full range of bad things and debilitating restrictions—official or unofficial, codified or not—that regularly confront people after they’ve served their sentences.<sup>60</sup>

**Abner Schoenwetter, a lobster fisherman, served over six years in a federal prison for fishing-related violations, such as the importation of lobster tails in plastic bags rather than cardboard boxes.**

Some state governments have addressed this issue through legislation seeking to remove arrests from criminal records if an arrest did not result in the filing of charges. Another option is to allow a judge to limit the access or visibility of parts of a criminal record after a sufficient amount of time has passed. The most sweeping solution, expungement of a crime, is appropriate only in limited circumstances—primarily exonerations. Nondisclosure, however, would still allow the offense to be visible to judges, prosecutors, and law enforcement and to be reasonably used for sentencing enhancement purposes. Measures like this—which fall short of expungement—are appropriate in a wider array of cases based on such factors as the nature of the underlying offense and the length of time an ex-offender has been law-abiding in the community and in compliance with all terms of supervision.

The American Legislative Exchange Council has even passed model legislation that extends greater tort liability protections for employers who hire ex-offenders. (The ALEC legislation includes some obvious and appropriate safeguards—such as not extending liability protection to employers who hire sex offenders to work in child care.)

Congress has already considered some similar policies. One proposal, for example, would enhance an ex-offender's ability to limit the disclosure of nonviolent offenses on his or her record. The federal government could do more, however. For instance, the Federal Bureau of Investigation (FBI) conducts many criminal background checks for prospective federal employees, and according to a report issued by the Department of Justice in 2006, around half of these records are incomplete or inaccurate because of arrest updates that have not been submitted to the FBI.<sup>63</sup> New legislation from Congress could require the FBI to track down

any incomplete information before releasing a rap sheet on an offender.

***Reversing Overcriminalization***

Finally, the federal prison system would benefit by paying more attention to a trend that state lawmakers increasingly try to avoid: overcriminalization, the tendency of governments to use the criminal law to regulate behavior that is not traditionally considered criminal.

Lobster fisherman Abner Schoenwetter, for example, served over six years in a federal prison for fishing-related violations, such as the importation of lobster tails in plastic bags rather than cardboard boxes.<sup>62</sup> Federal prosecutors concluded that his actions violated Honduran law, which, under the Lacey Act, they are empowered to interpret and enforce.<sup>63</sup> There was a dispute within the Honduran government over whether Schoenwetter's actions in fact violated the law of Honduras, but this did not prevent federal prosecutors from pressing charges and earning a conviction.<sup>64</sup> For over six years, taxpayer dollars that could have been applied to far more important DOJ investigative and crime prevention functions were instead used to incarcerate Schoenwetter. As Justice Scalia noted in a different case:

It should be no surprise that as the volume [of criminal laws] increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nittygritty. In the field of criminal law, at least, it is time to call a halt.<sup>65</sup>

Overcriminalization is increasingly a part of discussions about state corrections reform. The American Legislative Exchange Council's Public Safety Performance Project (PSP), for example, promotes model legislation for states that is aimed at reducing overcriminalization in state codes. Among other things, the PSP insists that criminal statutes contain strong mens rea protections so that limited carceral resources are not spent on people who did not have the requisite state of mind to render their actions criminal. According to one analysis, "over 57 percent of the offenses

considered by the 109th Congress contained inadequate mens rea requirements.”<sup>66</sup>

Another problem that occurs at the state level, but which is also noticeable at the federal level, is the delegation of authority for criminal law creation and enforcement to federal agencies. As Professor Erik Luna has commented:

The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.<sup>67</sup>

Former Attorney General Dick Thornburgh has called for the creation of a commission to study overcriminalization, and he has recommended that the commission be linked to a larger federal criminal justice reform effort.<sup>68</sup> In May 2013, the U.S. House of Representatives announced the creation of a bipartisan, 10-member task force to investigate the problem.<sup>69</sup> The U.S. Senate should consider taking a similar step.

### Conclusion

It is sometimes said—citing a famous opinion by Justice Louis Brandeis—that the 50 states serve as ‘laboratories of democracy,’ and that states should learn from one another’s successful policy experiments.<sup>70</sup> But the federal system can also learn from their experiments. In a sensible political environment, the national government’s public policy decisions would emulate state policy successes. In current criminal justice policy, states like Texas are leading the way, and the federal government would be wise to follow. ★

## Endnotes

- <sup>1</sup> The authors would like to thank Cody Smith and April Phillely for valuable research assistance.
- <sup>2</sup> Newt Gingrich & Pat Nolan, "Prison Reform: A Smart Way for States to Save Money and Lives," *Washington Post* (7 Jan. 2011).
- <sup>3</sup> United States Department of Justice, "Quick Facts about the Bureau of Prisons," (Bureau of Prisons, June 28, 2012). As of July 18, 2013, the Bureau of Prisons was supervising a total of 219,218 individuals in all public facilities, private facilities, and community correctional management field offices. Federal Bureau of Prisons Weekly Population Report (accessed 18 July 2013).
- <sup>4</sup> The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted. See also "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.
- <sup>5</sup> Paul Guerino, Paige Harrison, & William J. Sabol, *Prisoners in 2010*, U.S. Department of Justice, Bureau of Justice Statistics (Dec. 2011) Table 1. From 2008 to 2010, the federal prison population increased by 4.2%, while state prison populations decreased by 0.4%.
- <sup>6</sup> Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011*, U.S. Department of Justice, Bureau of Justice Statistics (Nov. 2012) 1.
- <sup>7</sup> Dean J. Champion, *Sentencing: A Reference Handbook* 22 (2007). Federal incarceration is relatively recent innovation, but even state and local incarceration was once a rare punishment. In colonial America, "[f]logging, public humiliation, and banishment were common penalties, and execution was imposed for a wide range of offenses." Suzanne M. Kirchhoff, *Economic Impacts of Prison Growth*, Congressional Research Service (Apr. 2010) 6.
- <sup>8</sup> United States Department of Justice, "About the Federal Bureau of Prisons," (Federal Bureau of Prisons, Jan. 2011).
- <sup>9</sup> Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850-1984*, United States Department of Justice, Bureau of Justice Statistics (Dec. 1986); United States Department of Justice, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* (Spring 1989).
- <sup>10</sup> See 18 U.S.C. §§ 3551-3586 (1985).
- <sup>11</sup> Population figures are taken from sources provided by the Bureau of Justice Statistics. Figures for 1940-1960 are taken from Cahalan at 146. The figure for 1970 is taken from Cahalan at 32. Figures for 1980-2000 are taken from Nathan James, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, Congressional Research Service (Jan. 2013) 53-54. Because some available records reflect prison population figures as calculated at the beginning of the year, some reflect them as calculated at the end of the year, and some are averages, the methodology for the counting the totals is not entirely consistent. The general trend, however, holds firm. Populations hovered around 20,000 from 1940-1980, and then began to increase sharply.
- <sup>12</sup> *The Federal Prison Population Buildup*, 11; William T. Robinson & Janet Levine, "Time is right for criminal justice reform," *The Hill*, (25 Oct. 2011).
- <sup>13</sup> Nancy La Vigne & Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, Urban Institute Justice Policy Center (Nov. 2012) 2.
- <sup>14</sup> *The Federal Prison Population Buildup*, 12. It is worth noting that not only is a larger prison population leading to higher incarceration costs, but the per capita cost of incarceration itself has been rising. *The Federal Prison Population Buildup*, 15-16. "Annual costs per inmate are \$21,006 for minimum security, \$25,378 for low security, \$26,247 for medium security, and \$33,930 for high security." Lavigne & Samuels, *Growth and Increasing Cost*, 2. The average cost per federal prisoner is \$28,284 per year (\$77.49/day). "Annual Determination of Average Cost of Incarceration," Bureau of Prisons, 76 Fed. Reg. 57081 (15 Sept. 2011).
- <sup>15</sup> "Annual Letter to the United States Sentencing Commission," Office of the Assistant Attorney General (23 July 2012) 4.
- <sup>16</sup> *The Federal Prison Population Buildup*, 24. The Congressional Research Service report explains that although different reports have reached different conclusions about whether overcrowding causes prisoner misconduct, the BOP's own study (conducted across 73 all-male facilities between July 1996 and December 2004) determined that "there is a significant positive relationship between overcrowding and misconduct." *Ibid.*
- <sup>17</sup> United States Government Accountability Office, "Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure" (Sept. 2012) 2.
- <sup>18</sup> *The Federal Prison Population Buildup*, 22.
- <sup>19</sup> See *ibid.*, 25 (noting temporary housing solutions, including spaces normally reserved for programming); "Annual Letter to the United States Sentencing Commission," Office of the Assistant Attorney General (23 July 2012) 6.
- <sup>20</sup> United States Department of Justice, "FY 2013 Budget and Performance Summary" (2012) 8. The President's FY 2013 budget request of \$8.6 billion for federal prisons and detention is a 4.5 percent increase over the enacted budget of FY 2012, despite a 2.2 percent decrease in the DOJ discretionary budget. This includes plans to open two new prisons, and contract for an additional 1000 beds. *Ibid.*
- <sup>21</sup> Alexander Hamilton, "The Federalist No. 17" (5 Dec. 1787) ("There is one transcendent advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice."); see also Vikrant P. Reddy, "10th Amendment applies to criminal justice, too," *The National Law Journal* (15 Feb. 2012).
- <sup>22</sup> *The Expanding Federal Prison Population* 2 (internal citations omitted).
- <sup>23</sup> "Report to Congress: Cocaine and Federal Sentencing Policy," United States Sentencing Commission (May 2007) 85. "Among federal powder

cocaine offenders the largest proportion are couriers and mules, consistent with the need for a large number of low-level, unskilled laborers required to transport the drug into the United States. Among federal crack cocaine offenders, the largest proportion of offenders also are classified in a low-level function—that of street-level dealer...; Testimony of Bret Tolman, Hearing on Rising Prison Costs: Restricting Budgets and Crime Prevention Options Before the Senate Judiciary Committee (1 Aug. 2012) 3-4. "In the drug arena, DOJ is expected to use the hammer of heavy mandatory minimum sentences to dismantle drug trafficking—but the reality is that most prosecutions, while resulting in significant prison sentences, are only netting insignificant 'mules' or small-time traffickers rather than those of any importance in a given drug organization."

<sup>24</sup> See generally "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," United States Sentencing Commission (Oct. 2011).

<sup>25</sup> Testimony of Antonin Scalia, Hearing on Considering the Role of Judges Under the Constitution of the United States Before the Senate Judiciary Committee, 111th Cong. 8 (5 Oct. 2011).

<sup>26</sup> Ashley Stebbins, "A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position," 62 BAYLOR L. REV. 873, 880 (2010). "California can draw important lessons from Texas sentencing. Texas has preserved an indeterminate system with unique features that have allowed it to remain flexible in its own recent reforms and to address prison overcrowding."

<sup>27</sup> *Federal Prison Population Buildup*, 8, citing Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, United States Sentencing Commission (Oct. 2011) 63.

<sup>28</sup> See Cassell, Paul G., "Too Severe? A Defense of the Federal Sentencing Guidelines" (and a Critique of the Federal Mandatory Minimums), 56 STAN. L. REV. 1017, 1044-48 (2004).

<sup>29</sup> "[I]n the absence of any judicial check on this legislative trend, the result is a wholesale transfer of power from elected legislative officials to prosecutors who, in many instances, are unelected and not responsible to the public. Where once the law had strict limits on the capacity of the government to criminalize conduct... those limits have now evaporated." Paul Roserzweig, *The Overcriminalization of Social and Economic Conduct*, Heritage Foundation Legal Memorandum (17 Apr. 2003). Indeed, in a forthcoming law review article, John F. Pfaff argues that "at least since 1994, [state and federal] prison growth has been driven primarily by prosecutors increasing the rate at which they file charges against arrestees." See John F. Pfaff, "The Micro and Macro Causes of Prison Growth," 28 GA. ST. U. L. REV. \_\_\_\_ (2013).

<sup>30</sup> William H. Rehnquist, Luncheon Address, in U.S. SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA 286 (1993).

<sup>31</sup> Anthony Kennedy, Speech by Justice Kennedy at the American Bar Association Annual Meeting (9 Aug. 2003) ("I can accept neither the wisdom nor the necessity of federal mandatory minimum sentences").

<sup>32</sup> La Vinge & Samuels, *Growth and Increasing Cost*, 5.

<sup>33</sup> William Rhodes, Christina Dyou, Ryan Kling, Dana Hunt, and Jeremy Luallen, *Recidivism of Offenders on Federal Community Supervision*, Abt Associates (Jan. 2013).

<sup>34</sup> Calculated by the Pew Public Safety Performance Project based on data from The Bureau of Justice Statistics (Paul Guerino, Paige Harrison, & William J. Sabol, Prisoners in 2010, U.S. Department of Justice, Bureau of Justice Statistics (Dec. 2011)) and The Federal Bureau of Investigation (Crime in the United States 2010).

<sup>35</sup> Criminologists generally believe that recent increases in incarceration in the United States were responsible only for 25-33% of the national crime decrease that contemporaneously occurred. William Spelman, "The Limited Importance of Prison Expansion," in *The Crime Drop in America*, eds. Alfred Blumstein and Joel Wallman (Cambridge University Press, 2000) 97-129 and Steven D. Levitt, "Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not," J. ECON. PERSPECT. 18, no 1 (Winter 2004): 163-190.

<sup>36</sup> Anne Morrison Piehl & Bert Useem, "Prisons," in *Crime and Public Policy* (eds. James Q. Wilson and Joan Petersilia) (Oxford University Press 2011), at 542.

<sup>37</sup> John J. DiIulio, Jr., "Two million prisoners are enough," *The Wall Street Journal* (12 Mar. 1999).

<sup>38</sup> Legislative Budget Board, "Adult and Juvenile Correctional Population Projections Fiscal Years 2007-2012" (Jan. 2007) table 3 (projected population exceeding state operating capacity of 17,332). See also Pew Charitable Trust Public Safety Performance Project, "Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011" (20 Jun. 2007) 22 (estimated per bed construction cost of \$65,000); Legislative Budget Board, "Criminal Justice Uniform Cost Report Fiscal Years 2006-2008" (29 Jan. 2009).

<sup>39</sup> Council of State Governments Justice Center, "Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative" (Apr. 2009).

<sup>40</sup> Texas Department of Criminal Justice, Report to the Governor and Legislative Budget Board on the Monitoring of Community Supervision Diversion Funds (1 Dec. 2007) 10-11.

<sup>41</sup> "Uniform Crime Reporting Statistics," Federal Bureau of Investigation, accessed 14 June 2013.

<sup>42</sup> Zen T.C. Zheng, "Lawmakers agree to shut 102-year-old Sugar Land prison," *Houston Chronicle* (18 May 2011).

<sup>43</sup> Katie Roach, "Plans still underway to bring federal prison to Letcher Co.," WYMT TV (16 Apr. 2013).

<sup>44</sup> Steve Aos, Polly Phipps, Robert Barnoski and Roxanne Lieb, "The Comparative Costs and Benefits of Programs to Reduce Crime, Version 4.0," Washington State Institute for Public Policy (May 2001). Marc A. Levin, "Five Technological Solutions for Texas' Correctional and Law Enforcement Challenges," Texas Public Policy Foundation (Jun. 2008) 1-4.

<sup>45</sup> Right On Crime Statement of Principles.

<sup>46</sup> "Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison," United States Government Accountability Office Report to Congressional Requestors (Feb. 2012) 18.

<sup>47</sup> See *supra* note 14.

<sup>48</sup> *Federal Prison Population Buildup*, 38-41.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* (citing *United States v. Booker*, 543 U.S. 220, 245 (2005)).

<sup>51</sup> Kathy G. Padgett, William D. Bales & Thomas G. Blomberg, "Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring," *Criminology and Public Policy*, 5.1 (2006) 61-69.

<sup>52</sup> *Barber v. Thomas*, 130 S.Ct. 2499, 2503 (2010). The relevant sentencing statute provides that "a prisoner who is serving a term of imprisonment of more than one year ... may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days..." See 18 U.S.C. § 3624(b)(1). In *Barber*, however, the Supreme Court explains how the BOP's calculation procures effectively limit this to only 47 days. See *Barber*, 130 S.Ct. at 2503; see also "Frequently Asked Questions about Federal Good Time Credit," Families Against Mandatory Minimums (7 June 2010).

<sup>53</sup> "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (6 Mar. 2012) statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. In comparison, the average time served by state prisoners nationwide is 2.9 years. "Time Served: The High Cost, Low Return of Longer Prison Terms," The Pew Center on the States (Jun. 2012) table 1.

<sup>54</sup> TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15(h) (Vernon 2012).

<sup>55</sup> Alison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislatures, (July 2009), 4.

<sup>56</sup> "Compassionate release," like good time, is another early release policy that, if properly reformed, may reduce the federal prison population and alleviate the burden of growing costs. A full evaluation of compassionate release policies is beyond the scope of this paper, but interested readers may access a Department of Justice report concluding that the program is badly mismanaged at The Federal Bureau of Prisons' Compassionate Release Program, U.S. Department of Justice Office of the Inspector General (Apr. 2013). Unlike good time, compassionate release is granted for medical or humanitarian reasons. Among other recommendations, the Department of Justice report suggested that the standards for granting and denying compassionate release should be clarified.

<sup>57</sup> Rand Corporation, *Are Mandatory Minimum Drug Sentences Cost-Effective?*, 1997.

<sup>58</sup> Cynthia A. Kempinen, "A Multi-Method Study of Mandatory Minimum Sentences in Pennsylvania" (Pennsylvania Commission on Sentencing Research Bulletin: April 2010) 8.

<sup>59</sup> See Robinson and Levine.

<sup>60</sup> Mitch Pearlstein, "Crime, Punishment, and Rehabilitation," *National Review* (3 Oct. 2011).

<sup>61</sup> "The Federal Bureau of Investigation (FBI) maintains a criminal history record repository, known as the Interstate Identification Index (III or 'Triple I') system, that contains records from all states and territories, as well as from federal and international criminal justice agencies. The state records in the III are submitted to the FBI by central criminal record repositories that aggregate criminal records submitted by most or all of the local criminal justice agencies in their jurisdictions. The records in the III are all based on 10 rolled fingerprints, which provide a positive, biometric match between the individual and his or her record. Although it is quite comprehensive in its coverage of nationwide arrest records for serious offenses, the III is still missing final disposition information for approximately 50 percent of its records." U.S. Dept. of Justice Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) 3.

<sup>62</sup> Testimony of Abbie Schoenwetter, Hearing on Reining In Overcriminalization: Assessing the Problem, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 23 (4 Sept. 2010).

<sup>63</sup> See 16 U.S.C. §§ 3371-78.

<sup>64</sup> *U.S. v. McNab*, 324 F.3d 1266, 1266-67 (2003) ("Our task is complicated by conflicting representations from Honduran officials regarding the validity of the Honduran laws").

<sup>65</sup> *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

<sup>66</sup> Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, May 2010) 3-4.

<sup>67</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 AM U. L. REV. 703, 708 (2005) (citations omitted).

<sup>68</sup> Testimony of Dick Thornburgh, Hearing on Overcriminalization and the Need for Legislative Reform before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 8 (22 July 2009) ("A Commission should be constituted, perhaps in connection with Senator Webb's National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated mens rea requirements, and consider overcriminalization issues").

<sup>69</sup> Resolution Establishing the House Committee on the Judiciary Over-criminalization Task Force, 113th Cong., (2013).

<sup>70</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

### About the Authors

**Marc A. Levin** is director of the Center for Effective Justice. Levin is an attorney and an accomplished author on legal and public policy issues.

Levin has served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit and Staff Attorney at the Texas Supreme Court.

Levin's articles on law and public policy have been featured in publications such as *The Wall Street Journal*, *USA Today*, *Texas Review of Law & Politics*, *National Law Journal*, *New York Daily News*, *Jerusalem Post*, *Toronto Star*, *Atlanta Journal-Constitution*, *Philadelphia Inquirer*, *San Francisco Chronicle*, *Washington Times*, *Los Angeles Daily Journal*, *Charlotte Observer*, *Dallas Morning News*, *Houston Chronicle*, *Austin American-Statesman*, *San Antonio Express-News* and *Reason Magazine*.

**Vikrant P. Reddy** is a policy analyst in the Center for Effective Justice at the Texas Public Policy Foundation, where he coordinates the Right On Crime campaign. He has authored several reports on criminal justice policy and is a frequent speaker and media commentator on the topic.

Reddy has worked as a research assistant at The Cato Institute, as a law clerk to the Honorable Gina M. Benavides of the Thirteenth Court of Appeals of Texas, and as an attorney in private practice, focusing on trial and appellate litigation. He is a member of the State Bar of Texas and of the State Bar's Appellate Section and Criminal Justice Section.

### Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

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TEXAS PUBLIC POLICY FOUNDATION

## JusticeBrief

SEPTEMBER 2013  
Center for Effective Justice

## Adult Corrections Reform: Lower Crime, Lower Costs

by Marc Levin, Director, Center for Effective Justice

In the last several years, Texas has become emblematic of the growing movement to be both tough and smart on crime, as it has achieved significant declines in both its crime and incarceration rates. Policies initiated since 2005 have expanded capacity in alternatives to incarceration that hold nonviolent offenders accountable and provide effective supervision. Since that time, Texas has seen a double-digit reduction in crime, reaching its lowest crime rate since 1973.<sup>1</sup> In this same period, the state's adult incarceration rate has fallen 9 percent. Texas, which in 2004 had the nation's second highest incarceration rate, now has the fourth highest.<sup>2</sup>

### Texas Crime and Incarceration Rates Tumble<sup>3</sup>

Year	FBI Index, Crime Rate	Incarceration Rate Per 100,000
2005	4,115.1	681
2010	4,236.4	620
% Change	-12.8%	-9.0%

Two key budgetary strategies enabled Texas to cut crime and avoid building more than 17,000 new prison beds.

The first strategy involved appropriating \$55 million in 2005 for probation departments that agreed to target 10 percent fewer prison revocations and to implement graduated sanctions. Graduated sanctions ensure swift, sure, and commensurate sanctions (e.g., increased reporting, extended term, electronic monitoring, weekend in jail, etc.) for rules violations, such as missing meetings, rather than letting them pile up and then revoking that probationer to prison. Most of the funding went towards reducing caseloads from nearly 150 (in major urban areas) to 110 probationers per officer, and expanding specialized, much smaller caseloads for subgroups such as mentally ill probationers. This facilitated closer supervision, and the consistent application of such sanctions, which led to a decline in revocations in these departments, saving taxpayers \$119 million.<sup>4</sup>

The second strategy, in 2007, was the appropriation of \$241 million for a package of prison alternatives that included more intermediate sanctions and substance abuse treatment beds, drug courts, and mental illness treatment slots. This package was in lieu of spending \$2 billion on 17,332 new prison beds that the Legislative Budget Board (LBB) had otherwise projected would be needed by 2012.<sup>5</sup> The search for alternatives came in response to statements from judges, prosecutors, and corrections officials, bolstered by data, indicating that increasing numbers of low-level, nonviolent offenders were being directly sentenced, or revoked from probation, to prison. Why? Because of long waiting lists for many alternatives.

Furthermore, parolees often remained in prison because of waiting lists for halfway houses and programs they had to complete before release, a backlog addressed by the 2007 package.<sup>6</sup> All told, the 2008-09 budget added 4,000 new probation and parole treatment beds, 500 in-prison treatment beds, 1,200 halfway house beds, 1,500 mental health pre-trial diversion beds, and 3,000 outpatient drug treatment slots.

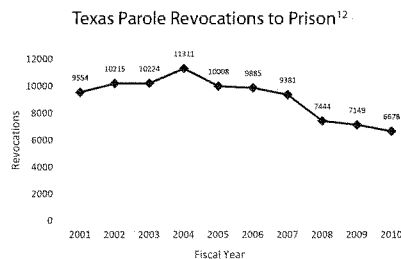
Perhaps reflecting increased confidence by judges, juries, and prosecutors in probation, sentences to prison actually declined 6 percent in 2009 while more nonviolent offenders went on probation.<sup>7</sup> This reversed the historical increase of 6 percent per year in prison commitments.<sup>8</sup>

Furthermore, probation and parole revocations together account for approximately half of the annual prison intakes, and both have declined recently as supervision has been strengthened.<sup>9</sup> From 2005 to 2010, Texas' probation revocation rate fell from 16.4 to 14.7 percent.<sup>10</sup>

Similarly, during the last several years, parole offices have improved supervision by expanding the use of graduated sanctions, implementing instant drug testing, and restoring the parole chaplaincy program. Thus, despite there being more parolees, the number of new crimes committed by parolees declined 8.5 percent from 2007 to 2010, contributing to a sharp reduction in parole revocations.<sup>11</sup>

*continued on back*

Capitalizing on Texas' recent success, the Legislature in 2011 followed the recommendation of both the Texas Public Policy Foundation and Governor Rick Perry in ordering the closure of the Sugar Land Central Unit, the first such prison closure in Texas history. This will save taxpayers approximately \$20 million over the biennium in operating costs, in addition to the one-time proceeds from the sale of the property.



In 2011, Texas policymakers also took many additional steps to continue the new Texas trend of lower crime and incarceration rates. First, lawmakers grappling with a challenging budget environment found operational savings such as closing one adult and three juvenile lockups and reducing subsidized housing for high-level corrections officials, rather than cutting back on cost-effective alternatives to prison and in-prison

treatment programs that have paid dividends since being expanded in 2007.

In the time since the reforms were implemented, the State's correctional population dropped precipitously. Inmates served the remainder of their time and were discharged at a faster rate than they were replaced. Not only did this relieve the strain on the needed capacity of the prison system, it lowered the marginal cost of the correctional system. In 2011, the State of Texas decided to close Central Unit, a men's correctional facility in Sugar Land. In June of 2013, Texas again capitalized on this reduced need for prison space by closing two additional correctional facilities: a state jail in Dallas and a pre-parole center in Mineral Wells. The reductions in system-wide capacity occurred in tandem during a persistent decrease in violent and property crime rates, leading to no decrease in public safety.

Further, the closure of the three facilities saved an estimated \$107 million from the biennial state budget. These savings were able to be applied in part to the community correctional supervisions, safely handling many more low-risk offenders at a fraction of the cost of incarceration.

While Texas, like all states, has more work to do to strengthen its criminal justice system, Texas' success over the last several years is a shining example of how states can adopt strategies that deliver less crime and a lower bill to taxpayers. ★

<sup>1</sup> Texas Crime Rates, FBI Reports.

<sup>2</sup> Marc Levin, "Texas Criminal Justice Reform: Lower Crime, Lower Cost" Texas Public Policy Foundation (Jan. 2010).

<sup>3</sup> Texas Crime Rates 1960-2010.

<sup>4</sup> "Adult Probation" 2011-12 Texas Legislators' Guide to the Issues, Texas Public Policy Foundation.

<sup>5</sup> "Adult & Juvenile Correctional Population Projections Fiscal Years 2007-2012" Legislative Budget Board (Jan. 2007).

<sup>6</sup> "Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative" Council of State Governments Justice Center (Apr. 2009).

<sup>7</sup> Garron Guszak, Legislative Budget Board, email (16 Dec. 2009).

<sup>8</sup> "Current Correctional Population Indicators" Legislative Budget Board (Apr. 2011).

<sup>9</sup> "Adult & Juvenile Correctional Population Projections Fiscal Years 2011-2016" Legislative Budget Board (Jan. 2011).

<sup>10</sup> "Statewide Criminal Justice Recidivism and Revocation Rates" Legislative Budget Board (Jan. 2011).

<sup>11</sup> "2007 Annual Report" Texas Board of Pardons and Paroles; and "2010 Annual Report" Texas Board of Pardons and Paroles.

<sup>12</sup> Tony Fabelo, "Texas Justice Reinvestment: Outcomes, Challenges and Policy Options to Consider" Council of State Governments Justice Center (Mar. 2011); and Texas Department of Criminal Justice Parole Statistics.



PREPARED STATEMENT OF HON. BRETT TOLMAN

**Testimony**

**“Reevaluating the Effectiveness  
of Federal Mandatory Minimum Sentences”**

**Testimony before the Senate Judiciary Committee**

**September 18, 2013**

**Brett Tolman  
Shareholder  
Ray Quinney & Nebeker**

Chairman Leahy, Ranking Member Grassley, and members of the committee:

Thank you for the opportunity to testify today.

My name is Brett Tolman, and I am currently a shareholder at the law firm of Ray Quinney & Nebeker, PC based in Salt Lake City, Utah. I am the former United States Attorney for the District of Utah – a position I held for nearly 4 years from 2006 to 2009. As U.S. Attorney I made it a priority to protect children, to aggressively prosecute mortgage fraud, to preserve American Indian heritage, and to stem the abuse of illicit and prescription drugs. Prior to serving as US Attorney, I was Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch.

Prior to my service in the United States Senate, I was an Assistant United States Attorney for the District of Utah. As a line prosecutor in the federal system I personally prosecuted hundreds of felonies. While I prosecuted mostly violent crime felonies, I also participated in the prosecution of white-collar criminals, drug traffickers, child predators, violent illegal immigrants, and others. Indeed, in my nearly a decade with the Department of Justice I was responsible for the prosecution of individuals who are currently serving long prison sentences – some longer than 30 years in federal prison.

I am here today because my experience, while at times rewarding, revealed the need for federal criminal justice reforms that are not only meaningful, but the result of thoughtful analysis of deficiencies in the administration of justice in the federal system. I am not alone in this position. Several of my former colleagues have joined me in signing a “Policy Statement of Former Federal Prosecutors and

Other Government Officials,” which I have brought with me and ask that it be submitted into the record of this hearing.

The signers of this statement are a diverse group of former federal prosecutors, judges, Department of Justice and other government officials who deeply believe in notions of fairness in the administration of justice. Many of us are noted conservatives who were some of the most aggressive appointees when it came to pursuing crime. While our experiences vary, we can agree that a shift in investigative and prosecutorial direction has occurred in the federal criminal justice system over the past few decades.

Rather than focusing valuable resources on the highest levels of criminal conduct, the reality is that today’s federal system is all too often mired in the pursuit of low-level offenders who are too often over-punished by the federal government and who, a growing number believe, should otherwise be prosecuted by the states. More and more individuals, on both sides of the political aisle, are recognizing that many of these low-level offenders are being given extremely long sentences in federal prisons – sentences that too often do not match the gravity of the crimes committed.

The result, ironically, is a burgeoning prison population that, with its rising costs, is becoming a real and immediate threat to public safety. Department heads and congressional leaders have become painfully aware that the growing prison budget is consuming an ever-increasing percentage of the Department of Justice’s budget. Over the last 15 years, the enacted BOP budget has increased from 15% to more than 25% of the Department of Justice budget, and I have seen projections it will exceed 30% by the end of this decade.

During my tenure as U.S. Attorney, which included roughly a year as a member of the Attorney General’s Advisory Committee, I became aware of growing budgetary issues as many US Attorneys’ offices were informed that they could no longer hire additional prosecutors – in many instances unable to fill existing vacancies, let alone secure much needed additional FTEs. And as I informed this committee last year, I observed the budget become the absolute center of focus of the Department of Justice and its U.S. Attorneys. More significantly, in individual U.S. Attorney’s offices across the country, lack of funding is increasingly the reason behind failed or abandoned law enforcement obligations and partnerships. U.S. Attorneys are increasingly turning to volunteer Special Assistant U.S. Attorneys, investigative agency attorneys, and state and local prosecutors to help fill the widening gaps.

It is with these concerns in mind that I appear before this Committee. It is my hope and intention to highlight areas of concern and to engage at all levels necessary to assist in achieving meaningful and thoughtful reforms. Specifically, this Committee should focus its attention on several unfortunate consequences of our current front-end policies and practices, including the use and abuse of certain mandatory minimum statutes.

Under current laws, federal prosecutors exercise virtually complete control over the entire criminal justice process. Federal prosecutors decide who to charge, what to charge, how many counts to charge, the terms of any plea agreement, and all too often what the range of sentence will be.

Unfortunately, the federal system has neither been thoughtful nor conscientious in its punishment of those it convicts. In the drug arena, DOJ is expected to use the hammer of mandatory minimum sentences to dismantle drug trafficking – but the reality is that most prosecutions, despite resulting in significant prison sentences, are only netting insignificant “mules” or small-time traffickers. The threat of long mandatory minimum sentences has *not* resulted in the identification of high-level leaders of drug organizations by low-level targets, primarily because “kingpins” are smarter than that – they insulate themselves so the “mules” and street-corner dealers either do not know who they are or do not have enough information to lead to their discovery let alone prosecution. As a result, the long federal sentences routinely go to the lower-level targets while the “kingpins” and their drug trafficking operations continue to thrive.

Accordingly, it has long been my view that punishment in the federal system should not be based upon the quantity of drugs but on other factors such as the role or position in the trafficking or distribution operation. Unfortunately, the substantial majority of federal drug prosecutions are utilizing mandatory minimum statutes based solely upon quantity of drugs found. Adding to the problem is the use of section 851, which is effectively a way in which drug sentences are doubled if the target has a prior drug felony. Consequently, the already long mandatory minimum sentences in drug prosecutions are doubled if a prior exists – a fact which is all too common among low level drug couriers and users.

Over-punishment is certainly not confined to the drug arena. As I have previously informed this committee, in the white collar world for example, long sentences are too easily the product of manipulating the “dollar-loss figure” – resulting in baffling and unfortunate prosecutions such as Sholom Rubashkin, a 52-year old

Jewish rabbi with no criminal history who is serving 27 years for financial fraud despite there being no actual victim of fraud.

It is of particular concern that mandatory minimum sentences have become the sought-after result by which many in the criminal justice system measure success. The practical implications are such that the federal criminal justice system has become overly-reliant on the use of mandatory minimum statutes in making its charging decisions. All too often, prosecutors and investigators associate the success of their investigations and prosecutions with the amount of time a particular defendant receives in sentencing. Felonies are more significant than misdemeanors, multiple felonies mean longer prison sentences, and mandatory minimum cases are viewed as more important cases with undoubtedly more significant offenders. However, prosecuting the “more significant offenders” is not the reality in the application of many mandatory minimum prosecutions in the federal system. The institutional pressures to prosecute with an eye toward identifying and using mandatory minimum statutes to achieve the longest potential sentence in a given case are severe. This fact became all too vivid for me in one of my earliest prosecutions as a young federal prosecutor.

My first assignment as a new federal prosecutor was to prosecute violent crime. One of my first cases was the prosecution of Marco Rivas. Mr. Rivas was a young man with very little criminal history who made unfortunate decisions over a two-day period of time that resulted in his potential incarceration for over 57 years, or effectively the remainder of his life. Based upon this range of sentence, it would be natural to assume that Mr. Rivas killed someone or otherwise committed such a capital offense as to effectively demand the equivalent of a mandatory minimum life sentence. To the contrary, Mr. Rivas, while trying to evade a pursuing police officer stole three vehicles from three different individuals. I was asked to take the case and to determine whether a federal prosecution for carjacking could be brought for each vehicle theft, and, because Mr. Rivas had a gun on him, whether the mandatory minimum gun enhancements could apply. After concluding that I could bring multiple carjackings and multiple mandatory minimum enhancements, I was shocked to learn that the minimum sentence Mr. Rivas was looking at was over 55 years in prison. I did not believe this was a fair result and had to expend significant time and energy to secure DOJ permission to offer Mr. Rivas a plea deal for only two of the offenses charged. Mr. Rivas was faced with having to plead guilty to a near 30-year sentence simply to avoid the effective lifelong incarceration. Significantly, Mr. Rivas’ sentence was still roughly 10 times the amount of prison time he would have otherwise received had he been prosecuted in the state system – where this type of crime is traditionally prosecuted.

Furthermore, my experience has been that federal agents are all too often incentivized to allow the commission of multiple offenses in order to enable federal prosecutors to stack gun charges and get the longest possible mandatory minimum sentences under section 924(c) of Title 18 of the U.S. Code. Rather than making arrests as soon as they have evidence of an offense, it is not uncommon for agents to watch these offenders commit one or more further crimes, which unnecessarily increases the potential for further crime victims, but invokes additional mandatory minimums and thus facilitates longer sentences.

As a particularly egregious example of this problem, look at the case of Weldon Angelos, who was convicted of selling marijuana to a police informant several times while having a firearm strapped to his body. Mr. Angelos had very little if any criminal history, and he never used or even brandished the firearm during the undercover buys. The law enforcement officials in the case allowed Mr. Angelos to commit multiple offenses, knowing that the 924(c) mandatory minimum sentences could be stacked on top of each other by the prosecutor. As a result, Mr. Angelos received a mandatory minimum sentence of 55 years in prison – a sentence that far outweighs the minimum sentence for hijacking, kidnapping, or rape. The federal judge who was forced to impose this sentence, Paul Cassell – now a former federal judge who has joined me in signing the attached Policy Statement – described it as “unjust, disproportionate to his offense, demeaning to victims of actual criminal violence... [and] one of those rare cases where the system has malfunctioned.”

These examples highlight why many, regardless of political affiliation, have argued as of late that the federal criminal justice system needs to be reformed in two meaningful ways: first, on the front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies, and second, on the back end, through a thoughtful implementing of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system. It is not enough to focus on sentencing reforms – we must also address the issues associated with risk and recidivism reduction in order to offset the out-of-control incarceration costs plaguing the federal system. So I hope you will consider another hearing to look into the federal prison system, as well.

Along with my fellow signers of the Policy Statement, I am here to serve as a resource in this process, so we can all – current and former servants of the law – do our part to ensure that justice shall be done.

In this direction, I have already been working with members of the House Judiciary Committee to help them shape H.R. 2656, the Public Safety Enhancement Act of 2013. And I look forward to working with members of this committee to finalize a Senate version of this bipartisan legislation, which will implement evidence-based federal prison reform strategies that are finding success in states like Texas, Ohio, Vermont, Rhode Island, South Carolina and many others.

Further, my fellow signers and I hope to work with the Committee to identify the front-end policies and practices that have created imbalance, and then develop thoughtful reforms that will allow us to achieve a more appropriate balance in the federal criminal justice system.

Without meaningful front-end and back-end reforms, the oft quoted ideal articulated by Justice George Sutherland in *Berger v. United States*, 295 U.S. 88 (1935), will remain a thing of the past, incapable of being achieved. He wrote:

*The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.*

*As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so.*

*But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

As you move forward to finalize and debate specific reforms, I respectfully urge the Committee to take a thoughtful approach that avoids the political divide, and focuses instead on our common duty and interest to strike hard blows but refrain from striking foul blows.

Thank you, Chairman Leahy, Ranking Member Grassley, and members of the Committee.

PREPARED STATEMENT OF HON. SCOTT BURNS



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**Written Testimony of**

**Mr. Scott Burns, Esq.**

**Executive Director, National District Attorneys Association**

**Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"**

**Senate Committee on the Judiciary**

**United States Senate**

**September 18, 2013**

Chairman Leahy, Ranking Member Grassley, members of the Committee, thank you for inviting me to testify today on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing over 39,000 district attorneys, State's attorneys, Commonwealth attorneys, and county and city prosecutors with the responsibility for prosecuting 95% of criminal violations in all 50 states in America.

To begin I would like to acknowledge and thank Ranking Member Grassley for your statement on the Senate floor this week regarding the importance of federal mandatory minimum sentences. Like you, Senator Grassley, NDAA listened carefully to recent policy announcements made by Attorney General Eric Holder and NDAA is likewise supportive of some of the priorities he set for the Department of Justice, including coordinating directly with state, local and tribal enforcement and prosecutors in order to maximize federal resources in criminal

*To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People*

prosecutions. In addition, General Holder talked about something that NDAA has made a priority for years and that is providing support for survivors of sexual assault and domestic violence. It is the goal of every prosecutor to keep our communities safe, help and heal victims of crime and ensure that those charged with a crime receive the full benefit of each constitutional right and a vigorous defense (we do have an adversarial system in the United States) and they go to work each day with the singular purpose of doing justice in each case – not charging those who are innocent – and charging and prosecuting those who engage in acts that have been deemed a crime by state legislatures.

What America's 40,000 prosecutors do not agree with is General Holder's repeated statements that the criminal justice system is broken (or "in crisis" is the current popular phrase). The truth is crime is down significantly in the United States, in many states at record lows. I spoke with Willie Meggs yesterday, the long elected State's Attorney in Tallahassee, Florida, who told me that crime in Florida is the lowest it has been in 42 years, and many prosecutors echo the same statistics in their respective states. Across the country, homicides are down 50% over the past 30 years – isn't this a statistic we can all be proud of? In addition, the crimes of rape, robbery, assault, burglary - nearly every category of crime - is likewise down 30% to 40%.

Prosecutors have many tools to choose from in doing their part to drive down crime and keep communities safe and one of those important tools has been mandatory minimum sentences. While Federal mandatory minimum sentences sometimes result in outcomes that seem harsh, the vast majority of those cases are the result of a defendant that rejected plea negotiations, went to trial, and then received the sentence he or she said would be mandatory if convicted by a jury or

judge. In addition, mandatory sentences have been extremely helpful to state and local prosecutors as leverage to secure cooperation from defendants and witnesses and solve other crimes or, in a drug distribution case, “move up the chain” and prosecute those at higher levels of sophisticated trafficking organizations; it is a tool that has been used sparingly but effectively by state and local prosecutors.

I submit that prosecutors across the country collectively shook their heads when General Holder directed his United States Attorneys to no longer prosecute or send to prison those who are first time offenders or those who have committed low level drug offenses. US Attorneys have never, to my knowledge, prosecuted low level offenses and, unless it is a serious case and often must involve a firearm, first time offenders do not go to prison. The prosecutors I know in America look at every available alternative before recommending that a person be sentenced to prison and, as such, are incensed by General Holder’s repetitive statements that America’s prisons are full of low-level drug offenders and non-violent offenders and first time offenders. That is a myth that must be dispelled if we are going to work together to try and make a great criminal justice system even better. Unless it is a murder or rape or violent offense, it is difficult to be sentenced to prison in state courts across America. The prosecutors I know look at probation, treatment programs, diversion, plea in abeyance, Drug Courts, supervised probation and work with Judges and defense counsel to look at every alternative *but* prison. It is only in those instances where someone has committed a terribly serious crime or, after repeated attempts to stop the person from reoffending - sometimes literally six and seven violations of probation - that an offender is sentenced to prison. And the reality is, together with other tools like mandatory

minimum sentences, it has worked. So for anyone to say that our prisons are full of low-level, first time, minor drug offenders simply could not be further from the truth.

Prosecutors will tell you that it is a very small percentage of offenders that commit the vast majority of crimes, people who insist no matter what we do to change their behavior, commit crime after crime. Is it not appropriate, after all attempts have failed, or in the event the person commits a very serious offense, to sentence them to longer prison terms which has inarguably resulted in lower crime rates and safer communities?

A prosecutor told me the other day, after reading General Holder's statements, "to me, I see this as we are three touchdowns ahead and many are now saying we should take out some of our best players – and mandatory minimum sentences are one of our best players". Why now, with crime at record lows are sweeping changes being suggested? Why now, as we are getting even smarter on crime with programs like Drug Courts, 24/7 and Project Hope as carrots would we take away one of the most effective sticks?

NDAA continues to be willing to work with Congress and the Department of Justice, as we did when we worked together to address the crack/powder sentencing disparity with the Fair Sentencing Act, and on several other Congressional initiatives that have been proposed over the years; but if this is solely about money, that the number of people we incarcerated in America is too expensive, then I know I speak for Police Chiefs, Sheriffs, law enforcement officers at every level and prosecutors in saying that crime will go back up and we may very well be back to the

“catch and release” days of old, which many would tell you didn’t really save money at all when the costs of investigations and prosecutions of those that reoffend are analyzed.

Chairman Leahy, Ranking Member Grassley, members of the Committee, I appreciate the opportunity to testify before you on this important matter and will answer any questions you might have.

QUESTIONS SUBMITTED BY SENATOR FRANKEN FOR MARC LEVIN

**Senate Judiciary Committee Hearing**  
**“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”**  
**Questions for the Record Submitted by Senator Al Franken for Marc Levin**

**Question 1:** Minnesota’s Second Chance Coalition sent me a letter, which I am submitting for the record. The letter reads, in part, as follows:

Thirty years of using federal mandatory minimum sentencing laws has created serious problems for our criminal justice system, taxpayers, and communities. Our current mandatory minimum laws have locked up hundreds of thousands of nonviolent, low-level, and drug-addicted offenders over the last three decades. These laws treat small-fry and nonviolent offenders as if they were major kingpins or killers. Defendants, and the American public, expect that judges will get to consider all the facts and circumstances of these cases and craft a punishment that fits the crime. They, and we, are shocked to learn that the sentence has already been chosen, and the judge has no say in the matter. The injustice and arbitrariness of mandatory minimum sentences breeds cynicism and erodes public trust in the criminal justice system.

Can you comment on that passage and on the effect that mandatory minimum sentences have on the credibility of our criminal justice system?

**Question 2:** During the hearing, you spoke highly about the use of drug courts, mental health courts, and veterans treatment courts. Can you please elaborate on this and explain the importance of federal investments in these diversion programs?

QUESTIONS SUBMITTED BY SENATOR FRANKEN FOR BRETT TOLMAN

**Senate Judiciary Committee Hearing  
 “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”  
 Questions for the Record Submitted by Senator Al Franken for Bret Tolman**

**Question 1:** I think that mandatory minimum sentences raise serious constitutional issues. The Eighth Amendment prohibits cruel and unusual punishments. In *Solem v. Helm*, the Supreme Court said that this is a ban not only on barbaric punishments, but also on “sentences that are disproportionate to the crime committed.”

And the Fifth and Fourteenth Amendments guarantee due process before one may be deprived of liberty. I am troubled by the notion that a person receives due process in a criminal case when the judge is forbidden from taking into account the unique circumstances of his case.

I take it from your written testimony that there also might be a separation-of-powers issue here. Could you elaborate on that?

**Question 2:** Many federal judges have spoken out against mandatory minimum sentences. For example, in a 2001 opinion, Judge Paul Magnuson, a Reagan appointee to the federal bench in Minnesota, raised serious questions about the application of a mandatory minimum sentence in the case before him. The defendant in the case – a mother who was addicted to drugs – pled guilty to manufacturing methamphetamine. Judge Magnuson thought that a sentence of 70 months – almost six years – was appropriate. But a mandatory minimum sentencing statute required a ten-year sentence, in part because the defendant previously had written two bad checks – one for \$45 and the other for \$38 – which disqualified her from safety valve relief.

Judge Magnuson was so outraged by sentencing law that he recused himself from the case. He wrote this:

I continue to believe that a sentence of 10 years’ imprisonment under the circumstances of this case is unconscionable and patently unjust. Upon re-sentencing, [the defendant] will be sacrificed on the altar of Congress’ obsession with punishing crimes involving narcotics. This obsession is, in part, understandable, for narcotics pose a serious threat to the welfare of this country and its citizens. However, at the same time, mandatory minimum sentences-almost by definition-prevent the Court from passing judgment in a manner properly tailored to a defendant’s particular circumstances. This is one case in which a mandatory minimum sentence clearly does not further the ends of justice.

It seems to me that federal judges are most familiar with the way these laws operate in the criminal justice system. Of what significance is it that so many federal judges have been outspoken in their opposition to mandatory minimum sentences?

## RESPONSES OF MARC LEVIN TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

**Senate Judiciary Committee Hearing**  
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Can you comment on that passage and on the effect that mandatory minimum sentences have on the credibility of our criminal justice system?

On behalf of the Texas Public Policy Foundation’s Right on Crime Initiative, I can tell you that we share these very same concerns about the excessive scope and severity of many federal mandatory minimums. We were pleased to host an event with the Minnesota Second Chance Coalition in St. Paul, MN in January 2013, which was attended by many Minnesota policymakers and which featured remarks by Right on Crime signatory and former American Conservative Union Chairman David Keene.

Undoubtedly, public trust and confidence in the fairness of the justice system is vital to public safety. This is true for many reasons. For example, research has shown that many crimes are not reported, particularly in some high-crime areas where confidence in the justice system is low. While there will always be different opinions about the merits of sentences in certain cases, it is important that the public overall view the justice system as dispensing sentences that are proportionate to the seriousness of the crime and the level of risk the offender poses.

Unfortunately, mandatory minimums, particularly as applied to nonviolent offenders, often undermine this goal. For example, rigid minimum prison terms can preclude the judge from taking into account that the offender before them may be low-risk as demonstrated by a validated, actuarial risk-needs assessment that has been proven to accurately predict the probability of future offending. Additionally, some cases involve circumstances that tend to show more or less culpability on the part of the offender. A former felon with a gun could be a person who is currently a drug kingpin with a machine gun or it could be a person whose last offense was decades ago who was shooting deer with a hunting rifle. One of the great insights of

free market economists such as Hayek is command and control systems do not work in part because knowledge is diffuse and it is impossible to centrally plan for every contingency. Mandatory minimums suffer mightily from this defect and thus inevitably lead to disproportionate sentences that erode public confidence in the fair administration of justice.

**Question 2:** During the hearing, you spoke highly about the use of drug courts, mental health courts, and veterans treatment courts. Can you please elaborate on this and explain the importance of federal investments in these diversion programs?

Yes, our research has found that these specialty or problem-solving courts have tended to produce excellent results in terms of reducing recidivism, while costing a fraction of incarceration. There are several reasons why, in our view, these courts continue to succeed. First, they involve a “carrot and stick” approach that balances treatment with responsibility and include the prospect of graduation and not having a permanent criminal record in many cases, as well as consequences for failure to comply. Second, they break from the traditional assembly line model of criminal justice where a judge hands an offender off to probation or prison and never seems him or her again, unless perhaps there is a motion to revoke probation. The constant engagement of the judge and the ongoing offender accountability to that court provide a level of structure in between basic probation and incarceration.

One of the keys is to ensure drug courts are focused on offenders who are not the lowest-risk offenders who could succeed on basic probation. By concentrating on those who with greater needs for supervision and who would likely otherwise be in prison, drug courts can best fill their niche in the broader system. Also, it is important to ensure that judges, prosecutors, and defense lawyers involved in problem-solving courts have appropriate training and that fidelity is maintained to the model. The National Association of Drug Court Professionals has published a useful document that sets for the core elements of a successful drug court.

While drug courts primarily focus on those with chemical dependency, there is another type of specialty court that is targeted more at those who may not necessarily need extensive treatment. The Hawaii HOPE Court that uses swift, sure, and commensurate sanctions, including a few days of jail time, to promote compliance. In the HOPE Court, the judge apprises the drug-related offenders entering his court that each day they must call in to find out if they must report for a random drug test and, if they test positive or don’t show up, an immediate arrest warrant will result in brief jail time, often on the weekend so they can keep their job. The Court has achieved more a more than 50 percent reduction in probation revocations and reoffending, an 80 percent reduction in missed probation appointments, and an 86 percent reduction in positive drug tests.<sup>i</sup> Judge Steve Alm, a former federal prosecutor who launched the Hawaii HOPE Court, recommends that the small minority of offenders who do not desist from drugs through the program be triaged into a drug court with intensive treatment. This is a highly cost-effective approach given that the HOPE Court has a few thousand participants and thus costs about a third of a drug court.

Mental health courts can successfully divert mentally ill offenders from traditional sentencing, redirecting them into appropriate mental health treatment. A clinical case manager screens offenders for participation in the court using an instrument designed to identify individuals with serious mental disorders. Defendants with conditions that are on Axis I of the *Diagnostic and Statistical Manual of Mental Disorders*, such as major depression and schizophrenia, are typically eligible.

Rather than simply issuing a sentence and going to the next case, the judge coordinates mental health services for the offender and monitors compliance. Smaller probation caseloads are typically used, allowing case managers to effectively monitor participants' compliance with the treatment plan.

A RAND Institute study of mental health courts found that “the leveling off of mental health treatment costs and the dramatic drop in jail costs yielded a large cost savings at the end of [its] period of observation.”<sup>ii</sup> For example, in the Washoe County Mental Health Court in Reno, Nevada, the 2007 class of 106 graduates went from 5,011 jail days one year prior to mental health court to 230 jail days one year after, a 95 percent reduction.<sup>iii</sup> Strikingly, the cost to the system was reduced from \$566,243 one year prior to mental health court to \$25,290 one year after.<sup>iv</sup>

Evidence suggests that mental health courts also reduce re-offending. The *American Journal of Psychiatry* reported that mental health courts were “associated with longer time without any new criminal charges or new charges for violent crimes.”<sup>v</sup> Similar results have been achieved in the Delaware Mental Health Court. Of the 64 offenders who participated in the first three years of the program, 57 completed the program, of which 53 did not recidivate within six months of completion.

The rationale for veterans' courts is based on the combat-related stress, financial instability and other difficulties adjusting to life that confront many soldiers returning home. A 2008 RAND Corporation study found that about one-fifth of all Iraq and Afghanistan veterans — or about 300,000 of the more than 1.6 million U.S. troops in the two wars — reported symptoms of PTSD or major depression.<sup>vi</sup> While most of these veterans are law-abiding, these problems contribute to criminal behavior among a substantial number of veterans.

The Bureau of Justice Statistics found in a 2000 survey — the most recent information available — that 12 percent of prison and jail inmates reported military service.<sup>vii</sup> All told, more than 200,000 veterans are behind bars. Veterans were more likely to be first-time offenders, employed, and have a history of mental illness and/or alcohol dependence.<sup>viii</sup>

The nation's first veterans' court was founded in 2008 in Buffalo, New York and at least ten communities across the nation have also set up such courts. In the Buffalo court, which has virtually eliminated re-arrests, offenders must complete “rigorous and individually tailored treatment programs.”<sup>ix</sup> The Buffalo judge, Robert Russell, points out that veteran's courts are

distinguished from other specialty courts in that they also include mentoring sessions with other veterans, which leverage the camaraderie that the military builds. Struck by the impressive results of the Buffalo court, Congressman Steve Buyer (R-Indiana) told Judge Russell at a hearing examining the success of that court: “You win my ‘wow’ award.”<sup>x</sup>

Following the success of the Buffalo model, Illinois, Nevada, and Texas are among the states that have enacted legislation authorizing the creation of veteran’s courts. The Texas legislation may be particularly useful as a model for other states, because it authorizes counties to create such courts, provides guidelines that are flexible enough to allow for local innovation, and had no fiscal note.<sup>xi</sup>

Veterans’ courts share many attributes with drug and mental health courts. Though they recognize that veterans deserve our gratitude for their service, these courts don’t let them off the hook because of that, but rather appropriately hold them accountable through a strict schedule of court appearances and treatment appointments, and, if necessary, sanctions imposed by the judge that can include jail time. Some courts also utilize probation officers to ensure the offender is properly monitored. Serious violent and sex offenders are generally not eligible for a veteran’s court. Some veterans’ courts require that participants have a service-related disability such as primary diagnosis of post-traumatic stress disorder (PTSD), traumatic brain injury, or severe depression.<sup>xii</sup> Veterans’ courts typically have the authority to require participants to attend rehabilitation, educational, vocational, medical, psychiatric or substance-abuse programs.

Like other problem-solving courts, rather than issue a sentence and move to the next case, a judge in a veterans’ court holds regular hearings to monitor the offender’s progress through treatment and compliance with the terms of probation. The El Paso, Texas court is actually a docket of an existing court so there is no expense of creating a new court and the county expects to save money on jail costs. Just as with drug and mental health courts, successful completion of the court may result in a dismissal or reduction of the charges, a feature which helps participants obtain or retain employment.

In sum, all of these problem-solving courts are proving themselves around the country. As we look to more effectively allocate limited taxpayer funds to maximize public safety, it is clear that, given the small percentage of total offenders who pass through them, there is plenty of opportunity for additional gains in this area. Policymakers should take into account that, while these courts can result in lower total costs in the criminal justice system, they do require funds to operate, including support for the treatment components so the court is more than just a specialized docket. One of the ideas we are working with state policymakers on involves a grant program whereby local jurisdictions would be prioritized for additional such courts to the extent they enter into an agreement with the state to send fewer of the type of low-level offenders to the state who would go into these courts. With this incentive funding model, states that may not have additional funds available would be able to directly link the expansion of these courts with a reduction in spending on unnecessary incarceration.

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<sup>i</sup> “Program Evaluation Results,” Hawai’i State Judiciary’s HOPE Probation Program

<sup>ii</sup> Christine DeMartini *et al.*, *Justice, Treatment, and Cost: An Evaluation of the Fiscal Impact of Allegheny County Mental Health Court*, (Santa Monica, CA: RAND Corporation, 2007), p. xi.

<sup>iii</sup> Personal Interview, Julie Clements, Pretrial Services Officer, Washoe County Mental Health Court, January 13, 2009.

<sup>iv</sup> *Ibid.*

<sup>v</sup> <http://ajp.psychiatryonline.org/cgi/content/abstract/164/9/1395>.

<sup>vi</sup> <http://www.rand.org/pubs/monographs/MG720/>.

<sup>vii</sup> <http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf>.

<sup>viii</sup> *Ibid.*

<sup>ix</sup> <http://www.statebillnews.com/?p=550>.

<sup>x</sup> <http://www.buffalonews.com/cityregion/story/798194.html>.

<sup>xi</sup> <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01940F.htm>

<sup>xii</sup> <http://www.allbusiness.com/government/government-bodies-offices-regional/12793391-1.html>.

RESPONSES OF BRETT TOLMAN TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

**Senate Judiciary Committee Hearing**  
**“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”**  
**Answers to Questions for the Record Submitted by Senator Al Franken for Brett Tolman**

**Question 1:** I think that mandatory minimum sentences raise serious constitutional issues. The Eighth Amendment prohibits cruel and unusual punishments. In *Solem v. Helm*, the Supreme Court said that this is a ban not only on barbaric punishments, but also on “sentences that are disproportionate to the crime committed.”

And the Fifth and Fourteenth Amendments guarantee due process before one may be deprived of liberty. I am troubled by the notion that a person receives due process in a criminal case when the judge is forbidden from taking into account the unique circumstances of his case.

I take it from your written testimony that there also might be a separation-of-powers issue here. Could you elaborate on that?

**Answer 1:** I agree that there are constitutional concerns surrounding some mandatory minimum sentences. Regarding separation-of-powers, mandatory minimum sentences have placed enormous power in the hands of federal prosecutors, such that they exercise virtually complete control over the entire criminal justice process. Federal prosecutors decide who to charge, what to charge, how many counts to charge, the terms of any plea agreement, and all too often what the range of sentence will be. Many have argued that with the sentencing guidelines now being discretionary, some balance has been returned. In my view, this is neither accurate nor the reality in federal prosecutions. The executive branch still exercises too much power given the ease with which the sentence or sentencing range can be manipulated based solely upon charging decisions. Prosecutors can elevate the sentence through the use of strategic decisions at the time of charging – either through the use of mandatory minimums, the manipulation of dollar/loss figures, or the manipulation of drug quantity factors.

For most of America’s history as a constitutional republic, the vast majority of sentencing decisions were left in the hands of judges. This system has two major advantages: first, appointed judges are independent from the winds of political pressures to impose disproportionate sentences in criminal cases. Second, and most importantly, judges become intimately familiar with the facts of the case and the circumstances of the particular defendant, enabling them to make decisions based on the full spectrum of relevant factors.

In the past two or three decades, we have seen dramatic changes in the way these sentencing decisions are made. While it is within Congress’s constitutional powers to narrow or limit the discretion of federal judges in many circumstances, both the number of current mandatory minimum sentences and the severity of many of these sentences raise serious concerns that the power of federal judges is being unduly restrained.

In short, Congress has effectively removed discretion historically belonging to the judiciary – an institution prized for its independence and impartiality – and placed it in the hands of federal prosecutors. The prosecutors I worked with as a U.S. Attorney impressed me with their professionalism and commitment to justice, but our constitutional system was designed to

prevent *any* one person from wielding as much power as these men and women have been given by Congress. And as is made clear by our “Policy Statement of Former Federal Prosecutors and Other Government Officials,” many of these prosecutors – including some of the most conservative in the country – believe that the level of discretion they were given has resulted in an imbalance in the scales of justice.

I therefore believe that as both a constitutional matter and a policy matter, Congress should engage in a thoughtful debate about the best way to edit and redraft current federal criminal laws and sentencing policies, which should inform us how to most effectively scale back the number and severity of mandatory minimum sentences.

**Question 2:** Many federal judges have spoken out against mandatory minimum sentences. For example, in a 2001 opinion, Judge Paul Magnuson, a Reagan appointee to the federal bench in Minnesota, raised serious questions about the application of a mandatory minimum sentence in the case before him. The defendant in the case – a mother who was addicted to drugs – pled guilty to manufacturing methamphetamine. Judge Magnuson thought that a sentence of 70 months – almost six years – was appropriate. But a mandatory minimum sentencing statute required a ten-year sentence, in part because the defendant previously had written two bad checks – one for \$45 and the other for \$38 – which disqualified her from safety valve relief.

Judge Magnuson was so outraged by sentencing law that he recused himself from the case. He wrote this:

I continue to believe that a sentence of 10 years’ imprisonment under the circumstances of this case is unconscionable and patently unjust. Upon re-sentencing, [the defendant] will be sacrificed on the altar of Congress’ obsession with punishing crimes involving narcotics. This obsession is, in part, understandable, for narcotics pose a serious threat to the welfare of this country and its citizens. However, at the same time, mandatory minimum sentences-almost by definition-prevent the Court from passing judgment in a manner properly tailored to a defendant’s particular circumstances. This is one case in which a mandatory minimum sentence clearly does not further the ends of justice.

It seems to me that federal judges are most familiar with the way these laws operate in the criminal justice system. Of what significance is it that so many federal judges have been outspoken in their opposition to mandatory minimum sentences?

**Answer 2:** It is absolutely correct that more and more federal judges are speaking out against the overuse of mandatory minimum sentences. As I discussed in my written testimony, Judge Paul Cassell spoke out on this issue in the case of Weldon Angelos, who was convicted of selling marijuana to a police informant several times while having a firearm and was sentenced to a term of 55 years in prison. Judge Cassell described this sentence as “unjust, disproportionate to his offense, demeaning to victims of actual criminal violence... [and] one of those rare cases where

the system has malfunctioned.” Judge Cassell also signed onto our “Policy Statement of Former Federal Prosecutors and Other Government Officials.”

This policy statement underlines the point: those officials with the most intimate experiences with the criminal justice system are now acknowledging, in greater and greater numbers, that mandatory minimum sentences are failing our system in many instances.

It is important for Congress to listen to these informed voices. Prior to my experience as a U.S. Attorney, I worked in Congress as Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch. This experience gave me important insights into how Congress enacted many of these mandatory minimum sentences in the first place. Too often, the process was not as thoughtful as it should have been. Instead, Congress set policies that did not properly take into account the practical experiences of prosecutors, judges, and other officials in the criminal justice system.

Congress now has the opportunity to correct these mistakes by involving these officials, listening closely to their viewpoints, and shaping thoughtful and meaningful policy reforms that strike a more appropriate balance between the relevant competing interests at stake.

Again, my former colleagues and I stand ready to serve as resources in this process.

## MISCELLANEOUS SUBMISSIONS FOR THE RECORD

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

**September 18, 2013**

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

We are particularly pleased that the Judiciary Committee is addressing this vital issue that has been a key focus for the Commission for several years. The bipartisan seven-member Commission<sup>1</sup> unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget. We unanimously agree that statutory changes to address these problems are appropriate.

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

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

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

<sup>2</sup> U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).

<sup>3</sup> E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts* 2 (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

<sup>4</sup> U.S. Dep't of Justice, *Federal Prison System FY 2013 Congressional Budget* 1 (2013) <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>.

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

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

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

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

<sup>5</sup> U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dep't of Justice FY 2014 Budget Request), [www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs](http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs); see also Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) ([http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20130801/Public\\_Comment\\_DOJ\\_Proposed\\_Priorities.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf)).

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

<sup>7</sup> Pub. L. No. 111-220, 124 Stat. 2373 (2010).

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

### **I. The Commission's Findings on Mandatory Minimum Sentences**

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

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

#### **A. Severe Mandatory Minimum Penalties Are Applied Inconsistently**

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

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

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

<sup>9</sup> 28 U.S.C. § 991.

<sup>10</sup> Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2843 (2009).

<sup>11</sup> Mandatory Minimum Report, *supra* note 2, at 345-46.

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

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

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

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

<sup>12</sup> *Id.* at 111-13.

<sup>13</sup> *Id.* at 255.

<sup>14</sup> *Id.* at 113-14.

<sup>15</sup> *Id.* at xxviii.

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

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

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

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

### **C. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations**

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.<sup>20</sup> By December 31, 2012, that number had more than tripled to 217,815 inmates.<sup>21</sup>

<sup>17</sup> See U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm); see also 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) (“For the kingpins ... the minimum term is 10 years. ... [F]or the middle-level dealers ... a minimum term of 5 years.”); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

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

<sup>19</sup> *Id.* at 166-70.

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

<sup>21</sup> Carson & Golinelli, *supra* note 3, at 2.

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

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased more than six fold from \$1.36 billion for fiscal year 1991<sup>25</sup> to \$8.23 billion this year,<sup>26</sup> but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.<sup>27</sup> Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

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

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

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

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

<sup>23</sup> *Id.* at 81.

<sup>24</sup> *Id.*

<sup>25</sup> Pub. L. No. 101-515, 104 Stat. 2101, 2114 (1990).

<sup>26</sup> U.S. Dep't of Justice FY 2014 Budget Request, *supra* note 5.

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

<sup>28</sup> 18 U.S.C. § 3553(a)(2)(B) and (C).

<sup>29</sup> U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. See Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010).

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

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

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

## **II. The Commission's Recommendations for Statutory Changes**

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

### **A. Reduce Mandatory Minimum Penalties for Drug Offenses**

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

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

<sup>30</sup> U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Miscellaneous/20110527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 4-7.

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

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

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

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

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

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

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

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

See *id.* at 3-7.

<sup>34</sup> The Bureau of Prisons estimated the average annual cost per inmate to be \$26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), [http://www.bop.gov/foia/fy12\\_per\\_capita\\_costs.pdf](http://www.bop.gov/foia/fy12_per_capita_costs.pdf). This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

### B. Make the Fair Sentencing Act Statutorily Retroactive

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

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,<sup>37</sup> the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"<sup>38</sup> and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."<sup>39</sup> The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.<sup>40</sup> To date, 11,937 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,317 of those cases.<sup>41</sup> The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.<sup>42</sup>

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

<sup>35</sup> Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010) (FSA).

<sup>36</sup> FSA § 2.

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

<sup>38</sup> U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332, 41,333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

<sup>39</sup> See generally FSA.

<sup>40</sup> Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

<sup>41</sup> U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (July 2013), [http://www.ussc.gov/Research\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/FSA\\_Amendment/2013-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

<sup>42</sup> *Id.* at Table 8.

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

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

### C. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider “expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”<sup>43</sup> The “safety valve” statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

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

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

<sup>43</sup> Mandatory Minimum Report, *supra* note 2, at xxxi.

<sup>44</sup> *Id.* at 346.

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

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

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

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

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

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

<sup>46</sup> Mandatory Minimum Report, *supra* note 2, at 356.

<sup>47</sup> See *id.* at xxx.

<sup>48</sup> See, e.g., *id.* at xxxi.

<sup>49</sup> See *id.* at 364.

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

### **III. The Role of the Sentencing Commission and the Guidelines**

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

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

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

<sup>50</sup> See *id.* at 356.

<sup>51</sup> See Notice of Final Priorities, *supra* note 6.

<sup>52</sup> See Mandatory Minimum Report, *supra* note 2, at xxx.

<sup>53</sup> See Notice of Final Priorities, *supra* note 6.

<sup>54</sup> *Id.*

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

#### **IV. Conclusion**

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



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**Honorable Robert Holmes Bell, Chair**

September 17, 2013

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

Dear Mr. Chairman:

As Chair of the Criminal Law Committee of the Judicial Conference of the United States, I am pleased that the Senate Judiciary Committee plans to convene a hearing on September 18, 2013, entitled "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.<sup>1</sup> In anticipation of this upcoming hearing, I am writing to reiterate the Conference's long-standing opposition to mandatory minimum sentences and to express our strong support for legislation such as the "Justice Safety Valve Act of 2013" that would help avoid the fiscal and social costs associated with mandatory minimum sentences.

<sup>1</sup> JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17.

Honorable Patrick J. Leahy  
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The Conference has had considerable company in its opposition to mandatory minimum sentences. As Judge William W. Wilkins testified, “It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion . . . . [T]he spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system.”<sup>2</sup>

Judges routinely perform tasks in which the individual judge has no or very little discretion. “In fact, much of a judge’s daily activity is consumed with executing ‘mandatory’ tasks, using a decision-making process that is ‘mandated’ by some other entity. Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge’s possible disagreement with some of these instructions. Myriad other examples abound.”<sup>3</sup> But the Judicial Conference does not advocate for the repeal of these legislatively mandated tasks.

This belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Rather, the Conference’s opposition to mandatory minimums derives from a recognition, gained through years of experience, that they are wasteful of taxpayer dollars, produce unjust results, are incompatible with the concept of guideline sentencing, and could undermine confidence in the judicial system.

Part I of this letter describes some of the well-known objections to mandatory minimums. In part II, we discuss the Conference’s support of interim legislative measures to reduce the effects of statutory minimums. There is a range of ways to address their unjust and unintended effects, from outright repeal to taking incremental steps. The Judicial Conference is supportive of Congress’s efforts to make a thoughtful and thorough assessment of this continuing problem.

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<sup>2</sup> See, e.g., *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66 (July 28, 1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission).

<sup>3</sup> *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 39 (July 14, 2009) [hereinafter *2009 Hearing*] (statement of Chief Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States).

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## I. The Failure of Mandatory Minimum Sentences

Though mandatory minimums have been criticized on numerous grounds,<sup>4</sup> there are three objections that we wish to highlight. First, statutory minimums cost taxpayers excessively in the form of unnecessary prison and supervised release costs. Second, they are inherently rigid and often lead to inconsistent and disproportionately severe sentences. Finally, they impair the efforts of the Sentencing Commission to fashion Guidelines in accordance with the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to severity of the offense and the research-based development of a rational and coherent set of punishments.

### A. Mandatory Minimum Sentences Unnecessarily Increase the Cost of Prison and Community Supervision

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, a proliferation of mandatory minimum penalties has occurred over the past 20 years. Between 1991 and 2011, the number of mandatory minimum penalties doubled, from 98 to 195.<sup>5</sup> There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the federal prison population.<sup>6</sup> This growth “is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates.”<sup>7</sup>

Longer prison sentences also mean longer terms of supervised release. Legislation ameliorating the effects of mandatory minimums can save taxpayer dollars, not only through a reduction in the prison population, but by lowering supervised release caseloads. It has been suggested that “persons who serve the longer terms of imprisonment that have resulted from mandatory minimum sentences and the sentencing guidelines may present greater problems in

<sup>4</sup> See, e.g., U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), at 90-103, available at: [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Chapter\\_05.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_05.pdf). (reviewing policy views against mandatory minimum penalties, including that: they are applied inconsistently; they transfer discretion from judges to prosecutors; they are ineffective as a deterrent or as a law enforcement tool to induce pleas and cooperation; they are indicative of the “overfederalization” of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government; and they unfairly impact racial minorities and the economically disadvantaged).

<sup>5</sup> U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 71.

<sup>6</sup> Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (January 2013), at 51, available at: <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>7</sup> *Id.* See also U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 63 (“Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system . . . that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. [T]he changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.”).

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supervision simply by virtue of the longer periods of incarceration.”<sup>8</sup> In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender subject to a mandatory minimum was 52 months, which compared to 35 months for an offender who was not subject to a mandatory minimum—a difference of 17 months.<sup>9</sup> Based on fiscal year 2012 cost data, the cost of supervising an offender for one month is approximately \$279.<sup>10</sup> Should the prison population be reduced due to legislation reducing the impact of mandatory minimums, the federal probation and pretrial services system could also play a role in reducing system-wide costs through the effective and efficient supervision of offenders in the community.<sup>11</sup>

#### **B. Mandatory Minimum Sentences Cause Disproportionality in Sentencing**

Mandatory minimum statutes are structurally flawed and often result in disproportionately severe sentences. As past chairs of the Judicial Conference’s Criminal Law Committee have testified, there is an inherent difficulty in crafting a statutory minimum that can truly apply to every case. Unlike the Sentencing Guidelines, applied by judges on a case-by-case basis, allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender, mandatory minimum statutes typically identify one aggravating factor, and then pin the prescribed enhanced sentence to it. Such an approach means that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account, will necessarily be given a sentence that is excessive. This reduces proportionality and creates unwarranted uniformity in treatment of disparate offenders. In short, as two former Criminal Law Committee chairs have put it, mandatory minimum penalties “mean one-size-fits-all injustice”<sup>12</sup> and are “blunt and inflexible tool[s].”<sup>13</sup>

<sup>8</sup> See David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FEDERAL SENTENCING REPORTER 190, 191 (1994).

<sup>9</sup> U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010), at 51-52, available at: [http://www.ussc.gov/Research/Research\\_Publications/Supervised\\_Release/20100722\\_Supervised\\_Release.pdf](http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf).

<sup>10</sup> Memorandum from Matthew G. Rowland, Assistant Director, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts (hereinafter “AO”), “Costs of Incarceration and Supervision,” (May 17, 2013) (on file with the AO).

<sup>11</sup> 1993 Hearing, *supra* note 2, at 110 (statement of Judge Vincent L. Broderick) (“There are a variety of alternative sanctions that can be safely managed in the community, ranging from low security residential correctional alternatives and home detention with electronic monitoring, to community supervision of offenders who are required to provide restitution, to submit urine tests for the detection of drug use, to perform compensatory service, and to pay fines. I have had the great privilege, these past three years, of exercising judicial supervision over the Federal Pretrial Services Officers and Probation Officers. They constitute an extremely talented and dedicated body of men and women who can effectively control convicted criminals outside of penal facilities.”).

<sup>12</sup> *Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (June 26, 2007) [hereinafter 2007 Hearing] (statement of Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States) (“Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases.”).

<sup>13</sup> 2009 Hearing, *supra* note 3, at 42 (statement of Chief Judge Julie E. Carnes). See also 1993 Hearing, *supra* note 2, at 67 (statement of Judge William W. Wilkins, Jr.) (“[Mandatory minimums] treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important

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Mandatory minimum sentences typically are adopted to express opprobrium for a certain crime or in reaction to a particular case where the sentence seemed too lenient. And in some cases, of course, the mandatory penalty will seem appropriate and reasonable. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair. Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the particular crime the judge has just examined and terribly cruel to the human being standing before the judge for sentencing.

This is frequently the case with drug distribution cases, where the only considerations are the type and amount of drugs.<sup>14</sup> Former Criminal Law Committee Chair Judge Vincent Broderick testified two decades ago that mandatory minimums for drug distribution offenses are often unfair and result in sentences disproportionate to the level of culpability because they are based on the amount of drugs involved.<sup>15</sup> they are based on the weight of drugs regardless of purity,<sup>16</sup> they apply conspiracy principles to drug sentences,<sup>17</sup> and the most culpable offenders are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy than lower-level offenders.<sup>18</sup>

offense or offender-related facts.”); U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 346 (“For . . . a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must always warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties.”) (emphasis in original).

<sup>14</sup> In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses. U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 146.

<sup>15</sup> 1993 *Hearing*, *supra* note 2, at 106 (statement of Judge Vincent L. Broderick) (“Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels – those that transport, sell, or possess the drugs – that are caught with large quantities. These individuals make up the endless supply of low paid mules, runners, and street traders, many of them aliens.”).

<sup>16</sup> *Id.* (“The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account.”).

<sup>17</sup> *Id.* (“Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes . . . [A]ccomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the conspiracy. A low-level conspirator is subject to the same penalty as the kingpin . . . despite the fact that [he or she] ha[s] little knowledge of the nature [or amount of the drugs involved].”).

<sup>18</sup> *Id.* 107 (“Who is in a position to give such ‘substantial assistance’? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . There are few federal judges engaged in criminal sentencing who have not had the disheartening experience

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In her congressional testimony four years ago, Chief Judge Julie Carnes (my predecessor as Chair of the Criminal Law Committee) provided a specific example of how disproportionately severe sentences may result from the mandatory minimum structure governing drug-related offenses.<sup>19</sup> Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment—e.g., 5 kilograms of cocaine—the defendant’s 10-year mandatory sentence shall be doubled to a 20-year sentence if he has been previously convicted of a drug distribution-type offense. Now, if the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may be just. The amount of drugs may be a valid indicator of market share, and thus culpability, for leaders of drug manufacturing, importing, or distributing organizations. But, kingpins are, by definition, few in number, and they are not the drug defendant that judges see most frequently in federal court.

Instead of a drug kingpin, assume that the defendant is a low-level participant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. This is so even though in cases of employees of these organizations or others on the periphery of the crime, the amount of drugs with which they are involved is often merely fortuitous. A courier, unloader, or watchman may receive a fixed fee for his work, and not be fully aware of the type or amount of drugs involved. A low-level member of a conspiracy may have little awareness and no control over the actions of other members. Further, assume that the low-level defendant has one prior conviction for distributing a small quantity of marijuana, for which he served no time in prison. Finally, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. This defendant will now be subject to a 20-year mandatory minimum sentence. It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.<sup>20</sup>

### **C. Mandatory Minimum Sentences are Incompatible with the Sentencing Reform Act**

Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act. In 1984, Congress passed the Sentencing Reform Act after years of consideration and debate. The Act created the Sentencing Commission and charged it with the responsibility to create a comprehensive system of guideline sentencing.

of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.”).

<sup>19</sup> 2009 Hearing, *supra* note 3, at 43 (statement of Chief Judge Julie E. Carnes).

<sup>20</sup> See, e.g., *United States v. Letich*, No. 11-CR-00609(JG), 2013 WL 753445, at \*2 (E.D.N.Y. Feb. 28, 2013) (“[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimum sentences that Congress explicitly created only for the leaders and managers of drug operations.”).

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But mandatory minimum sentences have severely hampered the Commission in its task of establishing fair, certain, rational, and proportional Guidelines. They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy. Since the Commission has embodied within its Guidelines the mandatory minimum sentences,<sup>21</sup> the Guidelines have been skewed out of shape and upward by the inclusion of sentence ranges which have not been empirically constructed.<sup>22</sup> Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.

As the Commission explained in its 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated . . . smooth continuum" of the Guidelines, and prevents the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.<sup>23</sup> The Commission concluded that the two systems are "structurally and functionally at odds."<sup>24</sup> Similarly, in 1993, Chief Justice William Rehnquist stated that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."<sup>25</sup> Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.<sup>26</sup>

<sup>21</sup> The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate. The Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. The Criminal Law Committee has expressed its concerns to the Commission about the subversion of the Sentencing Guideline scheme caused by mandatory minimum sentences. The Committee believes that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing. See, e.g., Letter from Judge Sim Lake, Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of the U.S. Sentencing Commission (Mar. 8, 2004) (on file with the AO); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007) (on file with the AO); see also *U.S. v. Leitch*, *supra* note 20, at \*2 ("[T]he Commission can fix this problem by delinking the Guidelines ranges from the mandatory minimum sentences and crafting lower ranges based on empirical data, expertise, and more than 25 years of application experience demonstrating that the current ranges are not the 'heartlands' the Commission hoped they would become.").

<sup>22</sup> 1993 *Hearing*, *supra* note 2, at 108 (statement of Judge Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward . . . As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

<sup>23</sup> U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991), available at: [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/199108\\_RtC\\_Mandatory\\_Minimum.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm)

<sup>24</sup> *Id.*

<sup>25</sup> Chief Justice William H. Rehnquist, *Luncheon Address* (June 18, 1993), in U.S. Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

<sup>26</sup> Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993).

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## II. Solutions to Ameliorate the Effects of Mandatory Minimum Statutes

Today, the Conference endorsed seeking legislation “such as the ‘Justice Safety Valve Act of 2013,’ . . . that is designed to restore judges’ sentencing discretion and avoid the costs associated with mandatory minimum sentences.”<sup>27</sup> Though it favors the repeal of all mandatory minimum penalties, the Conference also supports steps that reduce the negative effects of these statutory provisions.

The Judicial Conference historically has supported legislative measures short of outright repeal of mandatory minimum statutes. In 1991, for instance, it approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.<sup>28</sup> The Conference noted that “[w]hile the judiciary’s overriding goal is to persuade Congress to repeal mandatory minimum sentences, for the short term, a safety valve of some sort is needed to ameliorate some of the harshest results of mandatory minimums.”<sup>29</sup> In 1993, the Conference considered the Controlled Substances Minimum Penalty–Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the Sentencing Commission that attempted to reconcile mandatory minimum sentences with the Sentencing Guidelines.<sup>30</sup> The Criminal Law Committee believed that, although the proposed legislation would not have solved all of the problems associated with mandatory minimum sentences, it addressed the essential incompatibility of mandatory minimums and Sentencing Guidelines and represented a promising approach.<sup>31</sup> On recommendation of the Committee, the Conference endorsed the concept.<sup>32</sup>

## Conclusion

The Conference supports Congress’s efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. The good intentions of their proponents notwithstanding,<sup>33</sup> mandatory minimum sentencing statutes have created what the late Chief Justice Rehnquist aptly identified as “unintended consequences.”<sup>34</sup> Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous

<sup>27</sup> JCUS-SEP 13, p. \_\_\_\_.

<sup>28</sup> JCUS-SEP 91, p. 56. The proposed legislation for drug offenses would have required the Commission to use mandatory minimum penalties only in establishing base offense levels, and would otherwise permit the guidelines through downward adjustments or departures to provide for sentences below the mandatory minimum penalties. See *1993 Hearing*, *supra* note 2, at 70 (statement of Judge William W. Wilkins, Jr.).

<sup>29</sup> JCUS-SEP 91, p. 56.

<sup>30</sup> JCUS-SEP 93, p. 46.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *2009 Hearing*, *supra* note 3, at 37 (statement of Chief Judge Julie E. Carnes) (“I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimums sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws.”).

<sup>34</sup> Chief Justice William H. Rehnquist, *Luncheon Address*, *supra* note 25 (suggesting that federal mandatory minimum sentencing statutes are “perhaps a good example of the law of unintended consequences”).

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injustice in the sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



Robert Holmes Bell

Identical letter sent to: Honorable Charles E. Grassley

**Statement of Julie Stewart, President**  
**Families Against Mandatory Minimums**  
 Submitted to the Senate Judiciary Committee  
 for a hearing on  
 “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”

September 18, 2013  
 Washington, DC

**Introduction**

I appreciate the opportunity to submit this written statement on behalf of Families Against Mandatory Minimums (FAMM). FAMM is a nonpartisan, nonprofit organization advocating for fair, proportionate, and individualized sentences that fit the crime and the offender and protect the public. FAMM supports punishment for those who violate our nation’s laws and believes incarceration is necessary to protect public safety from dangerous and violent offenders. We know, however, that mandatory minimum sentences are not essential to reducing crime and that Congress can improve public safety and save taxpayer dollars by enacting common sense sentencing reforms.

FAMM has enjoyed working with many members of this committee to make our federal sentencing laws more just and rational. In particular, we would like to thank Chairman Leahy for his strong and steadfast leadership on this issue. We want to thank Senators Durbin and Lee for their commitment to reforming federal mandatory minimum laws, as evidenced by their introduction of S. 1410, the Smarter Sentencing Act. We also thank Senator Sessions for his leadership on reforming crack cocaine laws. Finally, though he is not a member of the committee, we want to thank Senator Paul for bringing a unique perspective to this issue and for sponsoring S. 619, the Justice Safety Valve Act, with Chairman Leahy.

We hope the members of this committee will embrace the type of mandatory minimum sentencing reform that has helped states all across the country reduce their crime rates *and* prison budgets. Public policy leaders and criminal justice experts and advocates from across the political spectrum have already announced their support for federal mandatory minimum reform, including former Bush administration attorney general Michael Mukasey, the American Correctional Association, over 50 former federal prosecutors and judges, former National Rifle Association president David Keene, Americans for Tax Reform president Grover Norquist, the ACLU, conservative columnist George Will, the National Association of Evangelicals, Justice Fellowship/Prison Fellowship Ministries, the NAACP, and the Leadership Conference on Civil and Human Rights, just to name a few. As members of this committee are well aware, Attorney General Eric Holder recently announced that the Justice Department wants to work with Congress to enact mandatory minimum sentencing reform.

**Summary**

FAMM has spent the past 22 years pointing out the many flaws of mandatory minimum sentencing laws. We have tried to show how these inflexible laws violate the fundamental

American ideal that people should be treated as individuals. We have put a human face on mandatory sentencing laws to prove that one size really does not fit all. And we have sought to highlight the unsustainable economic and public safety costs of imposing lengthy mandatory sentences on tens of thousands of offenders.

In brief, FAMM believes that:

- **Mandatory minimum sentencing laws do not reduce unwarranted sentencing disparity, but instead create it.** Their reliance on single factors, such as the weight of a drug or the presence of a gun, can result in wildly different sentences for equally culpable offenders. Moreover, they can cause a first-time, low-level offender to receive a much longer sentence than a violent and dangerous criminal;
- **Conversely, mandatory sentencing laws produce unwarranted uniformity – that is, they treat very different offenders alike.** We see this problem most clearly in drug cases in which low-level offenders and addicts receive the same lengthy sentences that kingpins and major suppliers receive;
- **Mandatory minimums are not needed to protect public safety.** The federal and state governments' real-world experiences over the past 20 years make clear that crime rates can be reduced without mandatory minimum sentencing laws. In fact, the more pressing concern today is whether crime rates can remain low with mandatory sentencing laws in place. Because these laws force the government to spend so much money to detain nonviolent offenders for lengthy sentences, they divert resources from proven crime-fighting programs and personnel, such as police, investigators, and prosecutors; and
- **Enacting modest reforms would make a major difference.** Two bipartisan bills, the Justice Safety Valve Act, S. 619, and the Smarter Sentencing Act, S. 1410, would improve public safety while saving the government hundreds of millions of dollars. Specifically, FAMM believes Congress should adopt a broad "safety valve" for all nonviolent offenders facing mandatory minimum sentences. Further, we believe Congress should make the Fair Sentencing Act of 2010 retroactive.

#### **The Crack Disparity Model**

Before I begin, I want to recall this committee's leadership in passing the Fair Sentencing Act of 2010, legislation that dramatically reduced the crack-powder cocaine sentencing disparity. In 2009, this committee took the lead in reducing the infamous and indefensible disparity between the two drugs. Many members of the committee and others in Congress stated that they simply no longer believed the arguments that had supported the 100:1 disparity when Congress created it in 1986. Members said that the case for disproportionately lengthy crack sentences was based on premises that had not stood the test of time or the burden of real-world experience. The Justice Department, former federal prosecutors like Asa Hutchinson, who later served in Congress and as George W. Bush's head of the Drug Enforcement Administration (DEA), and ideologically diverse interest groups all urged Congress to support reform. The Fair Sentencing Act (FSA) ultimately reduced the crack-powder disparity to 18:1 by raising the amounts of crack that would trigger the five- and ten-year mandatory minimums. The bill also eliminated the

mandatory minimum sentence for crack possession.<sup>1</sup> It passed with unanimous, bipartisan support.

We have only a few years of data available since the FSA was adopted to judge the law's effect. While many criminologists would likely caution against drawing too many conclusions from such a limited sample, we think it is obvious that, had violent crime or crack use skyrocketed in the wake of the FSA's passage, mandatory minimum supporters would use those facts to argue against any additional changes to our federal sentencing laws. They aren't, because that hasn't happened.

Instead, federal judges have continued to give out stiff sentences for crack offenses. In 2012, the 3,388 defendants sentenced for crack cocaine received average sentences of 97 months, just 14 months shorter than the pre-FSA crack sentences.<sup>2</sup> Also, the number of people entering federal prison for relatively minor crack offenses has fallen. In FY 2010, 4,897 were sentenced for crack cocaine offenses. That number fell 31 percent, to 3,388 in FY 2012.<sup>3</sup> The combination of fewer prosecutions and slightly shorter sentences saved federal taxpayers nearly \$156 million in FY 2012 alone.

**Most important, this enormous benefit came at zero cost to public health and safety. Both the national violent crime rate and crack use have fallen since the FSA's passage.<sup>4</sup>** In short, after this committee reformed and eliminated crack mandatory minimum sentences the country enjoyed less crime, less drug abuse, and less prison spending. These results are similar to what we experienced after Congress adopted the original drug safety valve in 1994. It's a record that proponents of mandatory minimums cannot explain and one for which members of this committee should take great satisfaction.

### **The High Cost of Mandatory Minimums**

Mandatory minimum sentences carry unsustainably high costs for American families, taxpayers, and communities. These laws have not eliminated or reduced unwarranted disparity in sentencing. Further, they do not deter crime or increase public safety. As the states experienced first, and the U.S. Department of Justice (DOJ) and Bureau of Prisons (BOP) have come to learn, these failures are not cheap. Billions of taxpayer dollars are being wasted on sentencing policies

<sup>1</sup> Pub. L. 111-220, 111th Cong. (2010).

<sup>2</sup> U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure J (2012) [hereinafter 2012 SOURCEBOOK], available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm).

<sup>3</sup> Cf. U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure J (2011), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/sbtoc10.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm), with 2012 SOURCEBOOK at Figure J.

<sup>4</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES, RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS ("The number of past year initiates of crack cocaine ranged from 209,000 to 353,000 in 2002 to 2008 and declined to 95,000 in 2009. The number of initiates of crack cocaine has been similar each year since 2009 (e.g., 84,000 in 2012)."), available at <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm#ch5>. For violent crime statistics, see FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS for 2010, 2011, and 2012, at <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Crime>.

that do not make the public safer. No government program or policy with such an awful track record deserves to survive, no matter how righteous its purpose.

### *The Injustice of Mandatory Minimum Sentences*

Congress created the federal sentencing guidelines and the U.S. Sentencing Commission (USSC) in 1984 with the goal of fostering national uniformity in sentencing, on the grounds that judges were misusing their sentencing discretion in ways that led to unwarranted disparities. Guideline supporters claimed that a defendant's sentence depended on a game of "judge roulette": a judge in Boston might sentence a drug dealer to probation, while a judge in Sioux Falls might give another dealer 10 years in prison for essentially the same crime. Guidelines would ensure uniformity between these similarly situated offenders.

Concern about unbridled judicial discretion and unwarranted sentencing disparities has also been one of the policy justifications for Congress's creation of mandatory minimum sentences over the last 30 years. In the 1980s, Congress, with nearly unanimous bipartisan support, created mandatory minimum sentences for drug offenses in response to public concern about drug abuse. The goal was to deter and incapacitate "serious" and "major" drug dealers.<sup>5</sup> As Congress has adopted more and more mandatory minimums, proponents have increasingly claimed that these laws are necessary to rein in judicial discretion and ensure that offenders receive at least a "rock bottom" minimum prison term.

In theory, mandatory minimum sentences ensure that similar offenders receive at least the same minimum punishment for similar crimes nationwide. In reality, mandatory minimum sentences create more unwarranted disparity than they prevent. In fact, mandatory minimums create both unwarranted disparity and unwarranted uniformity in sentencing. Mandatory minimums treat nonviolent offenders as if they had committed the most violent and heinous of crimes. Mandatory sentences treat low-level, street-corner drug sellers as if they were kingpins. They treat people who merely possess even legally-owned and properly-registered guns and ammunition as if they had used those weapons and bullets to injure or kill others. They also treat similarly culpable codefendants differently based on how each person is charged and which person has the best information to offer to prosecutors as "substantial assistance" in exchange for a shorter sentence.

American citizens expect to be treated like individuals when they enter our courts of law. They expect punishments that fit their crimes and their culpability. They are shocked and dismayed and lose respect for the justice system when they discover that they must be treated like a far worse offender who committed a more serious crime, or must be punished more harshly than others like them who committed the same crime. Mandatory minimums proliferate both unwarranted disparity and unwarranted uniformity in punishment, two flaws that any system committed to equal justice should not tolerate.

<sup>5</sup> U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23-24 (2011) [hereinafter MM REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/201111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/201111031_RtC_Mandatory_Minimum.cfm).

Over the past 22 years, FAMM has identified thousands of cases where mandatory minimum sentencing laws have *created* shocking injustices and an appalling waste of human lives, taxpayer dollars, and public safety resources. Here are a few examples:

**Weldon Angelos.** In 2002, the 24 year-old, up-and-coming music producer was sentenced to 55 years in prison for selling marijuana to a police informant on three occasions. During one transaction, Angelos carried a pistol in an ankle holster. During another, he left his handgun in his car. When police searched his home, they found a gun in a safe. Although Mr. Angelos did not use or even threaten anyone with a weapon when selling the marijuana, the primary federal gun law imposes a severe mandatory minimum for “possessing” a gun “in furtherance” of a drug deal. Each gun conviction must run consecutively; five years for the first, 25 years for the second, and 25 years for the third. U.S. District Judge Paul Cassell of Utah, a conservative appointed by President George W. Bush, railed against the absurdity of the 55-year sentence he was forced to impose. **He pointed out that Mr. Angelos would have received a shorter sentence had he been convicted of hijacking an airplane (25 years), a terrorist bombing intended to kill a bystander (20 years), or kidnapping (13 years).** The judge noted that just two hours earlier, he had imposed a sentence of 22 years in a case in which a man beat a senior citizen to death with a log. “Is there a rational basis,” Cassell asked, “for giving Mr. Angelos more time than the hijacker, the murderer, the rapist?” Cassell called the 55-year sentence “unjust, cruel, and even irrational” but said that the law left him “no choice.”

**Mandy Martinson.** In 2007, Ms. Martinson, a first-time offender, received a 15-year mandatory minimum sentence for nonviolent drug and gun possession offenses. Mandy was leading a full, productive life before her drug problems escalated, taking everything from her in a matter of months. After becoming addicted to methamphetamine, she began dating and living with a man who sold the drug and gave some to her. She occasionally drove with him when he went to pick up or drop off drugs, and she helped him count his earnings. After the two were arrested and charged, Judge James Gritzner, another George W. Bush appointee, was forced to sentence Ms. Martinson to the mandatory minimum term: 10 years in prison for the drugs, plus an additional five years for possessing a gun in the course of the drug crime. Ms. Martinson never used, fired, or threatened others with a gun. At her sentencing, Judge Gritzner said that Mandy’s “possession of the firearm was at the direction of [her ex-boyfriend] and was facilitated by [her ex-boyfriend],” but these important facts could not be used to give her a fair and proportionate sentence. The judge despaired that “[u]nder any possible sentence that the law would allow for Ms. Martinson, the sentence will exceed that of [her ex-boyfriend].” **Her sentence (180 months) was longer than the average sentence imposed in federal court in 2007 for kidnapping (169 months), nearly four times as long as the average sentence for manslaughter (48.7), and roughly twice as long as the average sentences for sexual abuse (94.3) and robbery (85.1).**<sup>6</sup> Ms. Martinson’s case, often referred to as a “girlfriend case,” is not unique.

<sup>6</sup> See U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 13 (2007), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2007/sbtoc07.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2007/sbtoc07.htm).

**Stephanie George.** Ms. George worked hard to support her three young children, but her salary alone wasn't enough. She dated several men who were involved in selling drugs and, in exchange for some financial support, she would occasionally deliver and sell drugs and take messages for them. Ms. George was arrested twice – once while sitting on the front porch next to a bag containing cocaine residue and another time for selling small amounts of crack to a confidential informant. She pled guilty and served nine months in a county jail with work release for these offenses. Nearly three years later, Ms. George was arrested a third time and charged, along with her drug-dealer boyfriend, for her involvement in his crack cocaine conspiracy. **Despite her limited role – the judge described her as “a girlfriend and bag holder and money holder” – Ms. George received a mandatory sentence of life without parole due to her two prior drug convictions.** At sentencing, Judge Roger Vinson, a Ronald Reagan appointee, said, “[T]here’s no question that Ms. George deserves to be punished. The only question I have is whether it should be a mandatory life sentence ... I wish I had another alternative.” Short of death, life without parole is the harshest punishment available in the United States, and it is usually reserved for those convicted of premeditated murder.

None of these people were innocent, and each deserved to be punished. But the sentences these defendants received greatly exceeded the sentences regularly imposed on far more dangerous offenders. This is an inevitable consequence of mandatory minimums, which hinge on certain factors that are often poor reflectors of actual dangerousness and blameworthiness, e.g., the weight of the drug sold and the presence of a firearm (whether used or not). As soon as one of these triggering facts is found, the judge must impose the mandatory minimum sentence regardless of any other factors, such as whether the defendant is nonviolent, a low-level or first-time offender, or simply less blameworthy than any coconspirators.

Mandatory minimum sentences also impose very different penalties on offenders who commit similar offenses and have similar culpability. The case of Christopher Williams illustrates this point.

**Christopher Williams.** Mr. Williams operated a medical marijuana dispensary in Montana, as permitted by state law. In 2012, Mr. Williams and his partners were charged with violating federal drug laws. Mr. Williams chose to exercise his right to trial, and prosecutors responded by charging him with four counts of possessing a gun in the commission of a drug crime. Williams kept legally registered pistols and shotguns at his marijuana operation. He didn't use or even wield them, but that does not matter under federal law. Simply having guns – even legally compliant ones – condemned him to the notorious gun “stacking” mandatory minimum terms found in 18 U.S.C. § 924(c): a five-year mandatory prison sentence for the first gun charge and 25 years in prison for each subsequent offense. The law requires that the sentences must be served consecutively. Thus, **after a jury found Williams guilty, he faced a mandatory minimum of 80 years in prison. On the other hand, two of Mr. Williams’ partners, who also carried legal guns, received probation.**

The idea that three business partners can commit the same crimes and yet one receives 80

years in prison while the other two get probation makes a mockery of any sense of fairness. Fortunately for Mr. Williams, the backlash against the unwarranted disparity was so great that the federal prosecutor offered him a plea deal *after the jury convicted him!* Three of the gun charges were dismissed in return for Mr. Williams forfeiting his right to appeal. When federal prosecutors can all-but-singlehandedly knock 75 years off a “mandatory” sentence after a jury has already returned a conviction, the contention that mandatory minimums apply equally and promote parity in sentencing becomes laughable.

Mr. Williams’ case was a high-profile media event because of the national debate over medical marijuana. Most disparity-creating cases are usually hidden from the public, as was the case with Michael Mahoney.

**Michael Mahoney.** In 1979, when Mr. Mahoney was 24 years old, he was using methamphetamine and selling the drug to support his habit. He made three sales to an undercover officer within a one-month period and was arrested. He pled guilty to all three counts and served almost two years in jail in Texas. After his release in 1981, Michael successfully completed his probation in 1990. Mr. Mahoney moved to Tennessee in 1991 and turned his life around, opening a successful local restaurant and pool hall business. In 1993, he bought two revolvers from a pawnshop for personal protection, because he carried a large amount of cash at closing time. Federal agents reviewing the pawnshop’s record arrested Michael for being a felon in possession of a firearm. Although Mr. Mahoney had no idea his decade-old convictions made it illegal for him to buy a gun, he was charged as a felon in possession of a firearm, a penalty that carries a 15-year mandatory minimum sentence under the Armed Career Criminal Act. U.S. District Judge James Todd deliberately postponed Mr. Mahoney’s sentencing in an effort to find a way around the mandatory minimum, but ultimately realized the law gave him no choice. **Judge Todd, a Ronald Reagan appointee, stated at sentencing: “So it doesn’t matter how compelling your circumstances may be, it doesn’t matter how long ago those convictions were, and it doesn’t matter how good your record has been since those prior convictions. [The law] requires in your case that you receive a sentence of fifteen years...[I]t seems to me this sentence is just completely out of proportion to the defendant’s conduct in this case...[I]t just seems to me this is not what Congress had in mind.”**

The unintended consequences of mandatory minimums are both common and well-documented.<sup>7</sup>

<sup>7</sup> The misapplication of federal mandatory minimum laws to situations Congress clearly did not intend is so common that there are no outlier cases. Common examples abound in the area of gun and ammunition possession offenses. For example, Dane Yirkovsky served a 15-year sentence for possession of a single .22-caliber bullet. In December 1998, he found the bullet while doing remodeling work for a friend who was giving him a place to stay in exchange for the work. Yirkovsky put the bullet in a box in his bedroom. Later that month, the police found the bullet while searching Yirkovsky’s room after receiving a call from his former girlfriend, who claimed he had some of her possessions. Because of Yirkovsky’s prior convictions for burglary, federal prosecutors charged him under the Armed Career Criminal Act, although he had not threatened anyone and did not have a gun. In a similar case, Edward Young received a 15-year mandatory sentence for finding shotgun shells in a piece of furniture he was helping a neighbor sell. See Nicholas D. Kristof, *Help Thy Neighbor and Go Straight to Prison*, N.Y. TIMES, Aug.

Clearly, mandatory minimum sentences do not guarantee that similar offenders will be treated similarly, or that different offenders will be treated differently. Mandatory minimums create both unsupportable sentencing disparity and sentencing uniformity. These disparities not only burden families and taxpayers, but also undermine both public trust in the justice system and public safety.

### **The Illusion of Greater Public Safety**

Probably the most popular false premise cited in support of mandatory minimum sentences is that these laws are largely responsible for reducing crime. In the past, the Justice Department and other law enforcement officials have argued that mandatory minimum penalties deter crime by imposing predictable and generally severe punishment.<sup>8</sup> Some prosecutors and police argue that stiff mandatory minimums help law enforcement extract guilty pleas and cooperation and secure convictions without the time and monetary cost of winning trials. In sum, the safety argument can be boiled down to the following: Crime rates will drop whenever mandatory minimums are enacted and rise when mandatory sentences are repealed or reduced.

The problem with this argument is that it's simply not true. **Despite 30 years of experience with mandatory sentences at the federal and state level, there is no evidence that lengthy, one-size-fits-all punishments reduce crime.** In fact, given the wasteful spending these laws necessitate, there is a strong argument that they actually jeopardize public safety.

### ***The Federal Experience***

Recall that Congress passed strict five- and 10-year mandatory sentences for buying and selling cocaine, marijuana, heroin, and other drugs in 1986. Beginning the following year, **when the new mandatory sentencing law took effect, the violent crime rate actually rose over the next four years by a startling 24 percent and did not return to its 1987 level until a decade later.**<sup>9</sup>

Before it reached that point, however, Congress acknowledged that the new mandatory minimum prison sentences were excessive in some cases. In 1994, at the urging of many members of this committee, and spearheaded by then-Congressman Schumer, Congress passed the current drug safety valve, 18 U.S.C. § 3553(f). This provision exempts certain first-time, nonviolent, and low-level drug offenders from mandatory minimums. If an offender met the safety valve's criteria, federal courts were authorized to impose individualized sentences based on the defendant's actual guilt and role in the crime.

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10, 2013, available at [http://www.nytimes.com/2013/08/11/opinion/sunday/kristof-help-thy-neighbor-and-go-straight-to-prison.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/11/opinion/sunday/kristof-help-thy-neighbor-and-go-straight-to-prison.html?pagewanted=all&_r=0).

<sup>8</sup> MM REPORT at 87.

<sup>9</sup> See UNITED STATES CRIME RATES 1960-2011, at <http://www.disastercenter.com/crime/uscrime.htm>; FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT 2011 Table 1 (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1> (showing a violent crime rate (per 100k population) in 1987 of 609.7. Four years later, in 1991, it was 758.1. In 1997, it was 611.0.).

If the claims made by mandatory minimums' proponents were correct, crime should have increased when this significant carve-out was created. In reality, *since the safety valve was implemented, roughly 86,000 drug offenders have received shorter sentences*<sup>10</sup> - *and the crime rate has dropped a whopping 44 percent.*<sup>11</sup> Needless to say, a theory that says that mandatory sentences reduce crime cannot explain how the crime rate dropped so far and so fast when tens of thousands of drug offenders were spared the full weight of such sentences.

### *The State Experience*

The experience of the states is even more devastating to the theory that mandatory minimums reduce crime. Like the federal government, many states adopted lengthy mandatory sentences in the 1980s and 1990s. And, as with federal crime rates, state crime rates fell over the next 20 years. But when budget pressures caused by the economic downturn forced states to look for ways to reduce their prison spending, governors and lawmakers began implementing reforms to reduce their prison populations. Many states, both red and blue, enacted comprehensive sentencing and prison reform. Some, like New York, Rhode Island, South Carolina, and Delaware, repealed mandatory minimum sentences. Others, like California and Minnesota, reformed their mandatory sentencing laws by reducing penalties or limiting the number of cases to which they would apply. What happened? State crime rates kept on falling, sometimes at faster rates than before the reforms. **Indeed, all 17 states that reduced their prison populations over the past decade, including by reforming mandatory minimums, have also experienced a reduction in crime.**<sup>12</sup>

We expect to see more sentencing reform successes in the states very soon. Earlier this year, Georgia's Republican Governor Nathan Deal sought and won passage of a drug safety valve that is similar to the existing federal safety valve.<sup>13</sup> Also, the American Legislative Exchange Council (ALEC), an organization of conservative state lawmakers from around the country, recently adopted model safety valve legislation to enable judges to depart from mandatory minimum sentences in cases in which defendants did not use or threaten violence.<sup>14</sup>

What we have learned from the federal and state experiences over the past few decades is that while punishment is important, forcing courts to impose lengthy mandatory prison sentences on everyone does not make us safer. University of Chicago economist and *Freakonomics* author Steven D. Levitt was perhaps the most influential supporter of pro-prison policies in the 1990s. He said that sending more people to prison was responsible for as much as 25 percent of the

<sup>10</sup> See U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FY 1995-2012, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/Archives.cfm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/Archives.cfm).

<sup>11</sup> See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT 2011 Table 1 (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1> (showing that the violent crime rate (per 100k population) in 1995 was 684.5. In 2011, it was 386.3.).

<sup>12</sup> PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 7 (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Time\\_Served\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf) (the 17 states are Alaska, California, Connecticut, Delaware, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah, and Wisconsin).

<sup>13</sup> HB 349, 152nd Gen. Assem., Reg. Sess. (Ga. 2013).

<sup>14</sup> American Legislative Exchange Council, Justice Safety Valve Act, at <http://www.alec.org/model-legislation/justice-safety-valve-act/>.

decade's crime drop. Proponents of mandatory sentences cited Levitt at every turn. That was then. Members of the committee are not likely to hear about Professor Levitt today, however, because he recently concluded that, as the crime rate continued to drop and the prison population continued to grow, the increase in public safety diminished. He told the *New York Times* earlier this year, "In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration." But now, Levitt says, "I think we should be shrinking the prison population by at least one-third."<sup>15</sup> Eliminating mandatory minimum sentences (or enacting a broad safety valve to prevent their application in cases where they are not warranted) is a far more modest change, but it would maintain public safety while reducing the prison population.

### ***How Mandatory Minimums Harm Public Safety***

For years, Congress has passed mandatory minimum sentencing laws without doing sufficient cost-benefit analysis. This habit has now put the Justice Department in a bind that could result in dangerous cuts in anti-crime spending.

The federal Bureau of Prisons (BOP) is consuming a greater and greater proportion of the DOJ's budget. Today, the BOP takes up 25 percent of the DOJ budget; by 2018, if unchecked, it will reach 30 percent.<sup>16</sup> These spending increases are tied to the growing federal prison population, which has risen by over 800 percent since 1980, while the U.S. population has grown just 36 percent during that period.<sup>17</sup> BOP facilities are operating at 37 percent above capacity and will be at 45 percent over capacity if current trends continue.<sup>18</sup> The Congressional Research Service has stated that the increasing use of mandatory minimum sentences has been a major contributor to the rise in prison costs.<sup>19</sup> While most Americans would gladly pay whatever it takes to keep us safe from terrorists and violent offenders, we are actually paying for a federal prison system that is stuffed with nonviolent offenders: half of all federal prisoners are incarcerated for drug offenses.<sup>20</sup>

These costs are forcing tough choices. In a July 2013 letter to the USSC, Jonathan Wroblewski, DOJ's director of the Office of Policy and Legislation, delivered a dire warning:

<sup>15</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, NEW YORK TIMES (Dec. 11, 2012), available at <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all>.

<sup>16</sup> Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, before the U.S. House of Representatives Committee on Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies concerning Oversight of the Department of Justice 8 (Mar. 14, 2013) [hereinafter Horowitz Statement], available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

<sup>17</sup> CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGE, ISSUES, AND OPTIONS I (Jan. 22, 2013) (emphasis added) [hereinafter CRS REPORT], available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>. ("The number of inmates under the BOP's jurisdiction has increased from approximately 25,000 in FY1980 to nearly 219,000 in FY2012"); cf. U.S. CENSUS BUREAU, 1980 FAST FACTS, at [http://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1980\\_new.html](http://www.census.gov/history/www/through_the_decades/fast_facts/1980_new.html) (showing U.S. population of 226.5 million in 1980) with U.S. CENSUS BUREAU, USA QUICK FACTS, at <http://quickfacts.census.gov/qfd/states/00000.html> (showing U.S. population of 308.7 million in 2010, a 36 percent increase).

<sup>18</sup> Horowitz Statement at 8.

<sup>19</sup> CRS REPORT at 8.

<sup>20</sup> BUREAU OF PRISONS, QUICK FACTS, at <http://www.bop.gov/news/quick.jsp> (last updated Aug. 24, 2013).

**If the current spending trajectory continues and we do not reduce the prison population and prison spending, there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention, and intervention programs, and cuts along a range of other criminal justice priorities.<sup>21</sup>**

In short, we have reached the point where mandatory minimum sentencing laws, which are applied predominantly to nonviolent offenders, are on the verge of forcing cuts to anti-crime programs and personnel, including those that target serious and violent criminals.

Diverting money from police, investigators, and prosecutors to pay for lengthy prison sentences for offenders who do not need them takes the lessons learned over the past 30 years and stands them on their head. Indeed, leading criminologists like the late James Q. Wilson and UCLA professor Mark A.R. Kleiman have said, in almost identical words, that crime is deterred when punishment is swift and certain, not severe.<sup>22</sup> If we want to discourage people from committing crime, we need to make detection and punishment more certain by capturing and prosecuting more offenders. The DOJ cannot pursue this strategy if it must cut its number of investigators and prosecutors so that it can pay to incarcerate nonviolent offenders serving excessive mandatory prison terms.

#### **Legislative Proposals for Reform**

FAMM supports the elimination of all federal mandatory minimum sentencing laws, but we think there are some common sense reforms Congress can adopt if political support for full repeal does not yet exist.

#### ***The Justice Safety Valve Act of 2013, S. 619***

S. 619, the Justice Safety Valve Act of 2013, sponsored by Senator Paul and Chairman Leahy, seeks to build on the success of the existing drug safety valve by authorizing judges to depart below the statutory minimum in more cases where the minimum is not warranted. The bill does not repeal any mandatory minimum sentencing laws, but it represents the boldest reform introduced to date.

<sup>21</sup> U.S. Dep't of Justice, Comments to U.S. Sentencing Comm'n on Proposed Priorities for FY2014, at 7 (July 11, 2013) (emphasis added), available at [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20130801/Public\\_Comment\\_DOJ\\_Proposed\\_Priorities.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

<sup>22</sup> Mark A.R. Kleiman, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 3 (2009) ("We know that punishment deters crime, but we also know that it is probably the swiftness and certainty of being imprisoned more than the severity of the penalty that has the largest effect."); James Q. Wilson, CRIME AND PUBLIC POLICY 624 (2011) ("The right answer, as far as the operations of the criminal justice system are concerned, will use the minimum amount of punishment necessary to achieve any given level of crime control. That in turn requires that most punishments be swift and certain, rather than severe. Theory and evidence agree that: swift and certain punishments, even if not severe, will control the bulk of offending behavior.").

The drug safety valve has been a tremendous success. It has enabled federal courts to impose better-fitting, individualized sentences on roughly 86,000 offenders and has saved taxpayers the costs of thousands of years of unnecessary incarceration of nonviolent offenders. And, as noted above, the national violent crime rate has dropped steadily since the safety valve was adopted. Building on the success of the 1994 safety valve, a broader safety valve targeted at nonviolent offenders is needed to improve sentencing outcomes, use federal crime-fighting money wisely, and reduce the federal prison population.

### **The Need for a Broader Safety Valve**

As written and interpreted by the courts, it has become clear that the existing safety valve is too narrow. Mandatory minimum sentences continue to be imposed in drug cases even when they do not fit the crime or the offender. In 2012, for example, only 24 percent of drug offenders benefitted from the safety valve, despite the fact that (1) more than half of all federal drug offenders had little or no criminal history; (2) almost 85 percent did not have or use any weapons; and (3) only 7 percent were considered leaders, managers, or supervisors of others.<sup>23</sup>

The main reasons people fail to qualify for the safety valve are:

- (1) **Criminal history:** All prior felony convictions (e.g., drug possession, possession of drug paraphernalia) are counted when determining a person's criminal history points, and even some misdemeanor and petty offenses (e.g., careless driving, insufficient funds check) are counted if they resulted in sentences of more than a year of probation or at least 30 days imprisonment. Even very minor prior convictions can exclude a person from the safety valve's coverage; and
- (2) **The presence of a gun:** Mere possession of even a lawfully obtained and registered gun is enough to disqualify an otherwise nonviolent, low-level offender from the safety valve. This is true even if the defendant did not use or intend to use the weapon.

### **Protecting Public Safety**

**The Justice Safety Valve Act is not a get-out-of-jail-free card. It would authorize – but not require – judges to issue shorter sentences in some cases, but not to let an offender avoid prison completely.** Current law already prevents judges from issuing probation sentences in drug cases involving mandatory minimums,<sup>24</sup> and the bill does nothing to change that. Everyone convicted of a federal drug trafficking offense that triggers a mandatory minimum sentence would still go to prison.

Some might claim that expanding the safety valve to more offenders will jeopardize public safety. In truth, though, we are already comfortable with significant and frequently-applied breaks from mandatory minimum sentences, offered by prosecutors. Prosecutors realize that mandatory minimums are not necessary in every case, including in those where the existing

<sup>23</sup> 2012 SOURCEBOOK at Tbls. 37, 39, 40, 44.

<sup>24</sup> 21 U.S.C. § 841 (2012) (“Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under [21 U.S.C. §§ 841(a), (b)]”).

drug safety valve does not apply. In FY 2010, for example, nearly 20 percent of drug offenders who did not qualify for the safety valve received shorter sentences because prosecutors argued that they had provided the government “substantial assistance.”<sup>25</sup> For example, in FY 2010, federal prosecutors recommended shorter-than-statutory-minimum sentences for 25 percent of all “high-level suppliers and importers,” those at the top of the drug trafficking chain, as well as for 44 percent of all “managers and supervisors.”<sup>26</sup>

It is also worth noting that the breaks in drug sentences promoted by prosecutors are much greater than those given by judges under the drug safety valve. Specifically, in FY 2010, the average extent of substantial assistance reductions in drug offenses was 48.8 percent, or 67 months, below the minimum of the governing guideline range. The average extent of drug safety valve reductions granted by judges in drug offenses that carried a mandatory minimum penalty was 29.8 percent, or 34 months, from the governing guideline range.<sup>27</sup> Prosecutors would not approve of large sentence reductions if the offender were a real threat to the public. The Justice Safety Valve Act would permit judges to make similar judgments.

Prosecutorial leniency is not limited to federal drug offenders. It is also frequently used in cases involving gun mandatory minimum sentences. While many gun offenses can be serious, few actually involve violence, threats, or injuries. In fact, in FY 2010, most offenders receiving mandatory minimum sentences under 18 U.S.C. § 924(c) (the main enhancement for possessing or using a firearm in the commission of a crime of violence or drug crime) did so for merely possessing a gun rather than brandishing or discharging it. In FY 2010, nearly 65 percent of all § 924(c) convictions involved the five-year mandatory sentence for possession of a gun; only 22.7 percent involved the seven-year mandatory sentence for brandishing a gun; and a mere 8.8 percent involved the 10-year mandatory sentence for discharging a gun or possessing a short-barreled rifle, shotgun, or semiautomatic assault weapon.<sup>28</sup> *Under the existing drug safety valve, the mere presence of a weapon during a drug offense is enough to disqualify an otherwise worthy offender from its coverage – regardless of whether the person is charged with a § 924(c) offense. As evidenced by the cases of Weldon Angelos, Mandy Martinson, and Chris Williams, there is currently no relief from the mandatory minimum, other than substantial assistance, for those convicted of § 924(c) charges – no matter how nonviolent the crime.*

While current mandatory minimum laws have no safety valve to permit courts to impose shorter sentences in gun cases, prosecutors nonetheless secure sentence reductions for nearly a quarter of all offenders convicted of violating § 924(c). Offenders convicted of multiple counts under § 924(c) received sentencing relief from prosecutors even more often – nearly 36.7 percent of the time.<sup>29</sup> This may reflect prosecutors’ acknowledgement that multiple, lengthy mandatory sentences for § 924(c) convictions often produce absurd or unjust results. Such use of discretion is laudable; judges should have similar opportunities to prevent such outcomes, too.

We appreciate that Congress long ago authorized prosecutors to move to reduce the

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<sup>25</sup> MM REPORT at 158.

<sup>26</sup> *Id.* at 171, Fig. 8-11.

<sup>27</sup> *Id.* at 163-64.

<sup>28</sup> *Id.* at 273.

<sup>29</sup> *Id.* at 280.

sentences of those offenders who they determine have provided substantial assistance, usually by providing evidence against others. But we do not believe that prosecutors would jeopardize public safety by helping individuals who they believed were dangerous criminals to get back on the street sooner. Rather, we believe that prosecutors are demonstrating through their actions, i.e., in seeking reduced sentences for some “high-level” drug suppliers and gun law offenders, that mandatory minimum terms are not always appropriate for some offenders who do not qualify for the existing safety valve. The Justice Safety Valve Act simply acknowledges that federal judges, approved by Congress, should also have flexibility to distinguish between the truly violent and dangerous and those who are not when applying mandatory sentences.

### **Maintaining Efficiency Through Guilty Pleas**

By retaining all federal mandatory minimum laws, the Justice Safety Valve Act also preserves what prosecutors have routinely cited as an important tool in disposing of cases efficiently: the threat of a lengthy mandatory sentence, which may convince some defendants to plead guilty and cooperate.<sup>30</sup> If the Justice Safety Valve Act is passed, many defendants are still likely to choose to plead guilty to avoid the mandatory minimum, rather than roll the dice by pursuing an expensive trial and hoping a jury will acquit them, or that a judge will find them worthy of a lower sentence. Data from the USSC raise some doubts about whether mandatory minimums actually procure more guilty pleas, and they raise the intriguing suggestion that the drug safety valve may actually incentivize pleas.<sup>31</sup> Mandatory minimum sentences are no guarantee of a guilty plea; nonetheless, S. 619, the Justice Safety Valve Act, does not seek to repeal them.

### **Saving Money Through Modest Reform**

The Justice Safety Valve Act would vastly improve current sentencing law and save taxpayers millions of dollars. When viewed in proper context, however, the bill would affect only a modest number of offenders. Consider that over 73,000 individuals were sentenced in federal court in 2010. Of that total, 10,600 were sentenced to a mandatory minimum term.<sup>32</sup> Though it is impossible to say for certain how often judges will depart below the mandatory minimum if the Justice Safety Valve Act were law, one reasonable guide is the rate at which judges currently vary from the federal sentencing guidelines. In 2012, that rate was 17.8 percent.<sup>33</sup> **This guide suggests that 1,886 individuals would have been eligible for shorter prison terms in 2012, a number that represents just two percent of the total population**

<sup>30</sup> FAMM has serious concerns about the way some prosecutors use this leverage. We fear that heavy-handed attempts to coerce pleas and testimony against others have led some defendants to forfeit their constitutional right to trial and some witnesses to offer false testimony. Abuses like these have been written about extensively.

<sup>31</sup> MM REPORT at 127 (showing that safety valve-eligible drug offenders pled guilty at a higher rate (99.4%) than those offenders who were not eligible for safety valve relief (94.6%)); *id.* at 125 (showing that, in FY 2010, 94.1 percent of those convicted of an offense carrying a mandatory minimum pled guilty while 97.5 percent of the offenders not facing a mandatory minimum pled guilty); *id.* at 126 (finding that “the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty.”); 2012 SOURCEBOOK at Figure C (showing a historically high guilty plea rate of 97 percent of all offenders in FY 2012); *id.* at Table 11 (showing that crimes like robbery, burglary, larceny, embezzlement, and forgery/counterfeiting, for which there are few mandatory minimum penalties, also carried high guilty plea rates of between 96 and 99 percent).

<sup>32</sup> MM REPORT at Table 7-1.

<sup>33</sup> 2012 SOURCEBOOK at Table N.

**sentenced in federal court that year.** Whereas Professor Levitt suggested that the nation's prison population could be reduced by at least one-third, **the Justice Safety Valve Act would simply give federal courts the authority to reduce the prison terms of one quarter of one percent of offenders nationwide.**<sup>34</sup> This is modest reform, indeed.

The limited impact of the Justice Safety Valve Act shows that its implementation will not jeopardize public safety or produce large increases in crime. But the bill's passage would ensure that low-level, nonviolent offenders who do not fall within the drug safety valve's current scope nonetheless get just punishments. The bill would also produce modest cost savings and, over time, prison bed space savings. If just one in 10 of the 10,600 offenders who received mandatory minimum sentences in 2010 received a sentence reduction of just one year under the Justice Safety Valve Act, the savings would be over \$30 million per year in incarceration costs.<sup>35</sup> With \$30 million, DOJ could hire 492 entry-level Assistant U.S. Attorneys (annual salary: GS-11, step 1, \$62,467, Washington, DC area), 631 entry-level U.S. Marshals (annual salary: GL-0082-07, \$48,708), 439 entry-level FBI special agents (annual salary: \$69,900), or provide 61,480 bulletproof vests for law enforcement officers (using a price of \$500/vest). These are real savings with meaningful public safety ramifications.

At a time when every dollar literally counts, the modest but tangible cost-saving and public safety-enhancing nature of the Justice Safety Valve Act is nothing to sniff at. Every dollar we spend on locking up a nonviolent offender for longer than necessary to keep the public safe is a dollar that can't be spent on protecting society from terrorism and the truly violent and dangerous.

#### *The Smarter Sentencing Act, S. 1410*

The Smarter Sentencing Act, S. 1410, also is worthy of support, especially because it includes a provision to apply the Fair Sentencing Act of 2010 (FSA) retroactively. FAMM strongly supports making the FSA retroactive. As I said at the outset of my testimony, Congress was right to admit that the original justification for enacting the 100:1 crack-powder sentencing disparity was no longer tenable. And Congress deserves credit for correcting its mistake. But it is unfair to continue to deny relief to those serving excessive sentences under the old regime simply because they made their mistakes before Congress fixed its own.

No doubt some will raise fears about the public safety impact of releasing crack law offenders early. There is strong reason to believe, however, that there will be absolutely no impact. Again, we can learn from experience. After Congress voted to repudiate the 100:1 crack-powder cocaine sentencing disparity, the USSC wisely decided to change its guidelines to reflect Congress's correction *and* to apply the new sentence recommendations to those who were already in prison. FAMM strongly supported the USSC's decision, but some in Congress

<sup>34</sup> See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 11 (2012) (showing that 668,800 individuals were admitted to federal and state prisons across the country in 2011), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

<sup>35</sup> This calculation uses an annual per-person cost of incarceration of \$29,000. If 10 percent of the 10,600 offenders receiving mandatory minimums in FY 2010 received one-year reductions based on the Justice Safety Valve Act, the savings would be: \$29,000 \* 1,060 offenders \* 1 year = \$30.4 million.

attacked it. They said it would be a major threat to public safety and would squander federal resources on resentencing hearings for eligible prisoners.

Based on everything we have learned to date, including the USSC's July 2013 report on crack retroactivity implementation, it is clear that those dire predictions were wrong. We now know that the federal courts, U.S. Attorneys, and defense bar have worked well to implement the new guidelines. As a result of their efforts, more than 7,300 defendants have received, on average, a 29-month reduction in their sentences. This average reduction lowered the average crack sentence from 12.5 years to just over 10 years. Thus, even with the changes, no one escaped serious prison time. And, yet, the modest sentence reductions have generated roughly half a billion dollars in savings.<sup>36</sup>

While the crack sentence reductions were being implemented over these past few years, the nation's violent crime rate has continued to fall. Previous data collected by the USSC confirms that those who were released early due to the retroactive guideline changes have been no more likely to reoffend than those who served their full sentences.<sup>37</sup> **In short, while crack offenders were given fairer sentences, taxpayers received the same level of crime control for a half-billion dollars cheaper. We strongly encourage Congress to build upon this incredible success by making the FSA retroactive.**

The Smarter Sentencing Act also significantly reduces all drug mandatory minimum prison terms. While FAMM would prefer to eliminate these mandatory minimums outright or to authorize judges to craft individualized sentences based on the particular facts and circumstances of the crime and offender, we believe reducing penalties as the bill recommends would be a positive step. The current drug penalties were established without the benefit of any hearings or debate in Congress. Decades of experience has taught us that the current penalties are appropriate for many cases but simply do not fit many others. Reducing penalties as the bill proposes would ensure fairer sentences for thousands of nonviolent drug offenders. In addition, it would likely lead to fewer low-level drug crimes clogging the federal courts.

The major drawback of the Smarter Sentencing Act, as well as the new charging policies announced by Attorney General Holder last month,<sup>38</sup> is that it is unnecessarily narrow. It applies only to drug offenses, despite the fact that some of the worst mandatory minimum sentencing cases FAMM has highlighted over the past two decades (and in this statement) were not drug cases (or, at least, not solely drug cases). To wit, even if the Smarter Sentencing Act had been law at the time, it would not have enabled judges to authorize more appropriate sentences for

<sup>36</sup> See U.S. SENTENCING COMMISSION, PRELIMINARY CRACK RETROACTIVITY DATA REPORT, FAIR SENTENCING ACT (July 2013), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/FSA\\_Amendment/2013-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf). The cost-savings figure is based on 7,300 offenders receiving 29-month average sentence reductions, and an annual incarceration cost of \$29,000 per offender.

<sup>37</sup> U.S. Sentencing Commission, Memorandum on Recidivism of Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment, May 31, 2011, at 11 (on file with the author).

<sup>38</sup> See U.S. Dep't of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates, San Francisco, Aug. 12, 2013, at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

Weldon Angelos, Mandy Martinson, Michael Mahoney, Stephanie George, and many other nonviolent, low-level offenders. The Smarter Sentencing Act would do nothing to ameliorate the unjust and absurd results that so often follow when 18 U.S.C. § 924(c) is applied to nonviolent drug offenders.

Like the attorney general's new charging policy, the Smarter Sentencing Act draws a line between drug and non-drug cases. We respectfully suggest that a better place to draw such a line is between violent and nonviolent offenses. In other words, even if the committee is reluctant to extend the safety valve to all federal offenders, as proposed in the Justice Safety Valve Act, we strongly urge the committee to extend judicial discretion to all nonviolent offenders. As mentioned above, ALEC recently adopted safety valve model legislation for the states to consider. That proposal authorizes judges to depart from a mandatory minimum in cases that did not include "the use, attempted use or threatened use of serious physical force by the defendant against another person or result in the serious physical injury of another person by the defendant."<sup>39</sup> This kind of distinction would better serve the stated goals of the Justice Department and congressional reformers: to improve public safety while reducing unnecessary prison spending.

### **Conclusion**

Before concluding, I want to make the committee aware that FAMM members will likely attend this morning's hearing. At least one member will fly across the country to be here. Others will drive several hours. They will come to listen to the testimony of the witnesses, and just by being here, offer their own silent testimony to the unfairness and destructiveness of federal mandatory minimum sentencing laws. I hope committee members will take the opportunity either before or after the hearing to seek some of these family members out and listen to their stories. What you will hear might surprise you. What you will not hear might surprise you more. These family members will not claim their loved one was innocent, and they will not say their son or brother or father did not deserve punishment. They are not here out of self-interest, seeking leniency or any type of favor from the government. The truth is that nothing in the Justice Safety Valve Act can help their loved ones because the bill does not apply retroactively. The reason these family members will travel from across the country to be here is to try to prevent other families from experiencing the same hardships they endured. I hope the members of the committee will recognize that it is not easy or comfortable to share the often private, sometimes embarrassing details of what is the toughest, most painful experience of their families' lives. For two decades, they have been sharing their stories with FAMM so that our advocacy is better informed, and we are grateful. We believe their perspective deserves to be heard, and we hope you will listen.

Mr. Chairman and members of the committee, mandatory minimum sentencing laws, which once enjoyed bipartisan support, have now attracted bipartisan opposition. Federal judges,

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<sup>39</sup> The ALEC safety valve model also excludes offenses that involve any sexual contact by a defendant against a minor or cases in which the defendant has a prior conviction for the same offense within the past ten years. See American Legislative Exchange Council, Justice Safety Valve Act, at <http://www.alec.org/model-legislation/justice-safety-valve-act/>.

sentencing law experts, members of the defense bar, and civil rights advocates have long raised concerns about the unfairness produced by these laws. In recent years, we have seen a growing number of taxpayer advocates, small government champions, and, yes, law enforcement and prison officials speak in opposition to mandatory minimums. With respected law enforcement leaders like former FBI director Louis Freeh, former Bush attorney general Michael Mukasey, the world's largest association of corrections officers, and dozens of former federal prosecutors promoting mandatory minimum reform, it is clear that the old paradigm of "tough on crime" versus "soft on crime" is being replaced by a new one: Do we want to be "smart on crime" or "stupid on crime"? If we want to be smart and heed the lessons learned over the past 30 years, we will embrace the kind of mandatory minimum sentencing reforms that have helped states across the country reduce crime by focusing more resources on violent offenders, reduce wasteful government spending by letting courts impose punishments that fit the crime, and promote equal justice by eliminating unwarranted disparity in sentencing.

We urge Congress to be smart on crime and to act boldly and quickly to reform our federal mandatory sentencing laws.

**Statement of Lisa Angelos**  
Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”  
U.S. Senate Committee on the Judiciary

September 18, 2013  
Washington, DC

Chairman Leahy, Ranking Member Grassley, and members of the committee, my name is Lisa Angelos. I live in Sandy, Utah. I am grateful for this opportunity to share my thoughts on federal mandatory minimum sentencing laws.

In 2004, my brother, Weldon Angelos, was sentenced to a mandatory minimum of 55 years in federal prison, without parole, despite never committing or even threatening an act of violence. Just a few years before, he was on his way to becoming a superstar in the music industry. He had established his own record label and wrote and recorded songs with famous artists like Snoop Dogg. Unfortunately, he also used and sold marijuana.

In 2002, Salt Lake City police used a confidential informant to buy marijuana from my brother on two occasions. The informant said that my brother had a gun on both occasions; he said it was visible in Weldon’s car the first time and was in an ankle holster the second time. When police searched my brother’s house, they found additional drug paraphernalia, as well as guns stored in a locked safe.

My family and I knew Weldon was in trouble and would most likely face jail time. But we also knew that he had never been in trouble with the law before, except for a nonviolent misdemeanor offense as a kid. Weldon had a young family and a promising career, and we hoped he would get a second chance before too long.

I know my brother would have taken advantage of it. Growing up, we were very close. Our father suffered from physical disabilities that made him unable to work. Our parents separated, and Weldon and I found comfort and encouragement in the bond we had. Weldon was the primary support and backbone of our family unit. He was a good father to his children and a good son to our ailing father. He was also a very talented, creative musician and was respected by the artists he worked with. Though he was breaking the law and doing wrong, he also had a bright future in the music industry and the ambition and determination to make that future a reality. Prior to his arrest, he had just signed a record deal with Bayside Distribution, a branch of Tower Records, and was preparing to release his own album.

Unfortunately, mandatory minimum sentencing laws denied Weldon a second chance. What many people do not realize is that federal gun mandatory minimum sentences can send people away for decades, even if the gun owner has a right to own the gun and never uses it to threaten or harm anyone. In my brother’s case, having a gun in his car and ankle holster — and another gun in a safe in his apartment, which the police found during their search — were considered three separate crimes. He was deemed to have possessed those guns “in furtherance” of his marijuana sales.

Under federal law, one count of possessing a gun “in furtherance” of a drug crime adds a mandatory minimum term of five years to the underlying sentence. Every count after the first

adds another 25 years. After being convicted of possessing a gun in those three instances, my brother received a sentence of 55 years (5+25+25) without parole in federal prison.

One of the most frustrating things we learned during Weldon's ordeal is that the judge had no discretion to avoid such an excessive sentence. Judge Paul Cassell, who was appointed by President George W. Bush, was frustrated, too. He wanted to give my brother a stiff sentence — 8 to 10 years, based on the sentencing guidelines — but thought 55 years was absurd. At sentencing, Judge Cassell called Weldon's punishment "unjust, cruel, and even irrational." He said that repeat child rapists and airplane hijackers get much shorter sentences.

Weldon has been serving his sentence in Southern California, far from his family. His relationship with his children's mother has not survived his incarceration. His boys, who were 5 and 6 when he was sentenced, are growing up without their father. He talks with them every day, and I do everything I can to let them know that their father still loves and supports them, but no one in my family can fill Weldon's shoes or give them what only a father can give them. Weldon knows that it is his fault that he got into trouble, and he has to live with that pain and guilt. But 55 years for a drug offense in which no one was hurt or even threatened is an inappropriate punishment.

Weldon has been an exceptional person while incarcerated, completing enough college credits to earn a degree and completing vocational training in dental laboratory management and graphic design, as well as other classes. Weldon recently earned a Certificate of Achievement in General Business from Coastline Community College. He is also currently a tutor for the FCC Lompoc Education Department.

My family prays that President Obama will commute Weldon's sentence — as Judge Cassell had requested when he sentenced Weldon — so that my nephews will get a chance to know their father before they become fathers themselves. But we also pray that no other family has to go through what we have.

As you know, U.S. Attorney General Eric Holder last month announced that the Justice Department was going to change how it prosecuted nonviolent individuals who buy or sell illegal drugs. Mr. Holder said, "By reserving the most severe penalties for serious, high-level, or violent drug traffickers, we can better promote public safety, deterrence, and rehabilitation — while making our expenditures smarter and more productive." Unfortunately, his proposed changes would not have helped Weldon, even though he did not commit a violent crime.

I am glad that Utah's two senators — Senator Hatch and Senator Lee — understand that existing mandatory minimum laws need to be reconsidered. I understand that Senator Lee has co-sponsored a bill, S. 1410, the Smarter Sentencing Act, which would reduce the mandatory minimum sentences in drug cases. My concern is that, like the attorney general's proposal, this Act would not prevent others from getting the same excessive sentence Weldon received.

I hope the members of this committee understand that I do not seek leniency for violent criminals. I have a child of my own, and I want him to live in a safe neighborhood. But not everyone who owns or carries a gun is a violent criminal or drug kingpin. In cases where a defendant does not even use or threaten to use a gun, I think federal courts should have some

discretion to avoid the mandatory minimum sentences that Congress intended for violent criminals.

The laws you consider today will not help Weldon. Only clemency can bring him home to us sooner. But I'm here today and supporting S. 619, the Justice Safety Valve Act, because I do not want any other family to suffer what we have suffered. Everyone sentenced in an American court deserves to be treated like an individual, and no court should be forced to treat nonviolent offenders as if they committed the most heinous and violent of crimes.

Thank you again for the chance to share my views with the committee.

## **The Justice Safety Valve Act of 2013**

### **S. 619**

#### **Written Statement of Shon Hopwood<sup>1</sup>**

Gates Public Service Law Scholar  
University of Washington School of Law

Senators Leahy and Paul, and the entire Senate Judiciary Committee, thank you for the kind invitation to present my views about the Justice Safety Valve Act of 2013.

I am writing to express support for the Bill, which I believe is a necessary step towards strengthening our communities, ingraining a sense of fairness into federal sentencing, and returning sentencing discretion back to where it rightfully belongs: the federal judiciary.

My perspective on the issue of mandatory minimum sentencing is unique. Unlike most witnesses who come before you, I am a product of the federal criminal justice system. I received a sentence of over 12 years for my role in five bank robberies that I committed at the age of 22 when I was a reckless and immature young man. That sentence included a mandatory minimum five years of imprisonment for carrying a firearm during one of the robberies. I am now a committed husband, father, community volunteer, and a law-school student in my third year at the University of Washington School of Law.

My sentence was just. But I saw many that weren't. In fact, it is fair to say that what I saw in federal prison would shock and shame most Americans. What I saw was a colossal waste of humanity and resources wrapped into a system of mass incarceration. And at the heart of that waste is our mandatory minimum sentencing regime.

### **The Randomness of Mandatory Minimum Sentencing**

Before I explain why this Bill is needed, I'd like to explain why mandatory minimum sentences result mostly from sheer random bad luck when they are actually imposed on criminal defendants. This random bad luck is largely determined not by the defendant's criminal conduct or lack of remorse but by the prosecutor assigned to the defendant's case.

Adam Clausen's case was not much different from my own. While in his early twenties, Adam committed nine robberies in Philadelphia, crimes for which he undoubtedly deserved some imprisonment.<sup>2</sup>

The federal prosecutor assigned to Adam's case made several plea bargains with Adam's co-defendants, but the same prosecutor was unwilling to offer Adam a reasonable deal. So, Adam went to trial and a jury convicted him of robbery and firearms charges.

Although our crimes were similar, a federal judge sentenced Adam to 213 years of imprisonment and his release date is December 1, 2185.

Adam now spends his days teaching and mentoring other prisoners. Unless there is a miraculous presidential commutation of his sentence, Adam Clausen will die in prison. Assuming that he lives until the age of 75, taxpayers can expect to hemorrhage a sum of over 1.2 million dollars to incarcerate him.

How did Adam receive 213 years when I received 12 years for comparable crimes? In the 1980s and 1990s, Congress passed several get-tough-on-crime mandatory minimum sentencing laws. One of those laws requires a judge to impose an additional 25-year sentence for anyone convicted of a second or subsequent firearm charge, even if that subsequent offense is part of a single and continuous crime spree with no intervening arrest.<sup>3</sup> Because of these laws, Adam faced 205 years of mandatory minimums just for the firearm offenses.

Without these laws, Adam may have received the same 12-year sentence I did. Instead, mandatory minimums sentencing provisions allowed the prosecutor to transform a crime that averages a 10-year sentence into lifelong imprisonment.

Congress passed mandatory minimum sentencing laws, in part, because it believed that similar crimes deserved similar punishments. But what it did not consider is the role federal prosecutors play in charging the accused. Possessing an arsenal of over 4,500 federal criminal statutes, a federal prosecutor can manipulate prison sentences by picking and choosing which crimes to charge. These charging decisions ultimately dictate the prison sentence a judge must impose under federal law.

In my case, a federal prosecutor brought charges that allowed me a second chance in life despite the prosecutor's unchecked discretion. Adam was not so lucky.

When the law leads to such arbitrary results, we normally take it as a sign that the law needs to be rethought. On a fundamental level, a criminal defendant's sentence should result from even application of sentencing laws and by a judge carefully weighing the aggravating and mitigating factors, not by the subjective charging decisions made by prosecutors at the outset of a case. Giving federal prosecutors the discretion to trigger harsh mandatory minimum sentences has created much greater randomness in federal sentencing, not less.

#### **Give the Discretion Back to the Federal Judiciary**

The Justice Safety Valve Act raises a fundamental question as to which body should possess discretionary sentencing authority to impose mandatory minimum sentences. I would vote for Article III judges.

Why are federal judges better equipped than federal prosecutors to decide which criminal defendants should receive mandatory minimum sentences? To begin with, federal sentencing judges enjoy the constitutional protection of life tenure and

salary protection, which shelter them from the popular hysteria that often accompanies crime and punishment in this country. This allows federal judges to make sentencing decisions with “clear heads ... and honest hearts deemed essential to good judges.”<sup>4</sup>

Judges are also the best-equipped group to make the weighty decision of whether a mandatory minimum sentence should be imposed on a particular defendant. Most judges, unlike many prosecutors, are not seeking career advancement. Indeed, most are life-long public servants. And just like when Congress rightly thinks it can do a better job at legislating than, say, an administrative agency, most judges believe the judiciary is the best-positioned group to weigh the competing goals of sentencing and then determine what sentence should be imposed. They are, after all, judges.

The Judiciary has more information at its disposal than prosecutors when deciding whether to impose a mandatory minimum sentence. Through the adversarial process, judges receive both the prosecution and defense views on what the proper sentence should be. Additionally, judges can tap into the wisdom of federal probation officers. These officers ordinarily interview defendants and family members, and obtain school, employment, medical, and mental health records, before drafting a presentence investigation report explaining the aggravating and mitigating factors relevant to an individual defendant's sentence. And criminal defendants sometimes send their sentencing judge a letter before sentencing, placing their actions into context or explaining their remorse for those actions—all factors essential to determining a fair and just sentence. Sentencing judges thus possess a broader array of information than prosecutors to use in fashioning an appropriate sentence.

Federal judges often spend a great deal of time thinking about federal sentencing, contemplating whether a particular sentence is correct both as a matter of policy and as a matter of individual justice. I saw this in action last summer while working for Senior Judge John C. Coughenour of the United States District

Court for the Western District of Washington. What few people outside his chambers will ever understand is just how much time and thought Judge Coughenour expends on federal sentencing. When difficult cases arose, he would convene a group together in the early morning hours before the courthouse doors opened. Clerks and interns role played as prosecutors and defense attorneys, peppering Judge Coughenour with hypothetical arguments the real lawyers might present in the upcoming sentencing hearing that day.<sup>5</sup> While I have never witnessed a federal prosecutor prepare a case, I doubt that a busy prosecutor, faced with an overwhelming caseload, is thinking about sentencing with the same depth and effort of a Judge Coughenour.<sup>6</sup> And it almost goes without saying that when it comes to imposing a mandatory minimum sentence of a decade or two in prison on another human being, thoughtfulness and thoroughness count for a great deal.

As the Supreme Court recently noted, we have a “tradition of judicial sentencing,” and sentencing should “not be left to employees of the same Department of Justice that conducts the prosecution.”<sup>7</sup> This Bill correctly places the discretion to impose a statutory minimum sentence with the judiciary where it belongs.

#### **Legislation Is Necessary: A Change in DOJ Policy Will Not Work**

Attorney General Eric Holder released a memo on August 12, 2013, directing prosecutors to decline to charge the quantity of drugs necessary to trigger mandatory minimum sentences, if the defendant meets several criteria. There are a number of reasons why this Bill is superior to the new policy change directed by the Attorney General.

First, any policy change created by the Executive is a temporary fix. The Attorney General’s new policy is susceptible to change with the next administration. The changes made by this Bill are of such monumental importance to the effort of criminal justice reform that they should be enshrined into law and made impervious to Executive modification.

Second, the Attorney General's memo does not go far enough with respect to drug cases. The memo applies to defendants only if: 1) the defendant's "relevant conduct," which includes the conduct of others and not just the defendant herself, does not involve possession of firearms or violence; 2) the defendant is not a leader, organizer, or manager of a drug conspiracy; 3) the defendant does not have ties to a large drug operation or gang; and 4) the defendant does not have a significant criminal history, defined as at least three criminal history points. From my experience, almost all federal drug offenses can be said to be tied to a large drug operation or gang, if only remotely, and, unless the offender is particularly young, most federal drug offenders have three or more criminal history points—usually associated with small sales of drugs, simple possession, or even traffic violations. Based on the criteria set forth by the Attorney General's memo, I question how many of the 25,000 federal defendants sentenced each year for involvement with drugs will be affected by the changes, and I understand that the Federal Public Defenders have analyzed the data and found that fewer than 1,000 defendants per year would be affected.

Third, the Attorney General's memo does not apply to mandatory minimums applicable to firearms, which have created some of the most absurd and abhorrent results. Consider again the example of Adam Clausen who committed nine robberies in one crime spree before his arrest. Because of the provision for a second or subsequent use of a firearm,<sup>8</sup> he received consecutive mandatory minimum sentences of 5, 25, 25, 25, 25, 25, 25, 25, and 25 years, for nine charges. Or, to put it somewhat differently, Adam received a higher sentence than terrorists,<sup>9</sup> persons convicted of child rape,<sup>10</sup> and some murderers.<sup>11</sup>

Adam is not the only one. During my time in federal prison, I met several prisoners who had received mandatory minimum sentences of 15 years under the Armed Career Criminal Act.<sup>12</sup> One received a sentence because he had committed a prior felony and police found a few bullets in his car. Another felon received 15 years because he possessed a rifle on his farm that he used to scare away the deer

in his wife's garden. Both of these defendants had wives and children, and the cost of incarcerating them totaled over \$700,000. While these two were wrong to possess firearms after previously having been convicted of a felony, stiff sentences like these would be better reserved for far more serious crimes. The Attorney General's memo fails to address these cases.

### **The Human Toll**

Adam Clausen is not the same 22-year-old that committed some robberies. In prison he has become a life coach to others, takes college classes for self-improvement, and teaches physical-fitness classes for other prisoners. He has a wife and family, and they simply don't understand why Adam received the sentence he did. To be sure, Adam made a serious mistake, but it was not the kind of mistake that required a sentence of 213 years.

Adam's story easily could have been my story. Had a different prosecutor been assigned to my case, I could have received four additional firearm charges. Had I received those additional firearm charges, the judge would have sentenced me to 85 years in mandatory minimums and the taxpayers would be footing the bill to incarcerate me over a lifetime for a crime that rarely carries a sentence of more than 20 years of imprisonment.

I truly believe that my story of rehabilitation is one that could be easily repeated, if some prisoners are given the chance. Many of the mandatory minimum sentencing provisions remove that second chance from the sentencing equation. And sentences such as Adam's serve little purpose other than to perpetuate the human suffering and waste of taxpayer dollars, when judges are forced to impose harsh mandatory sentences, even where the facts and circumstances suggest that a mandatory minimum sentence is not appropriate.

## Conclusion

The Justice Safety Valve Act of 2013 is an important step forward in meaningfully addressing some of the harshest and most unfair aspects of the federal system of criminal justice. Federal mandatory minimums are often imposed simply because of the prosecutor assigned to the case, and this Bill will prevent injustices from occurring by handing over the discretion of mandatory minimum sentencing to the actor best equipped to decide whether to impose such sentences: federal sentencing judges. This Bill is also needed because the Attorney General's memo is a temporary and inadequate fix and fails to address some of the most pressing injustices in current mandatory minimum sentencing. Most importantly, this Bill will alleviate the human toll that mandatory minimum sentencing provisions have inflicted on those like Adam Clausen, whose criminal culpability did not match the punishment imposed.

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<sup>1</sup> I am a Gates Public Service Law Scholar at the University of Washington School of Law and the  
<sup>2</sup> See *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003).

<sup>3</sup> 18 U.S.C. § 924(c)(1)(C)(i).

<sup>4</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (citing 1 Works of James Wilson 363 (J. Andrews ed. 1896)).

<sup>5</sup> I asked Judge Coughenour if I could share this story and he graciously agreed. However, he expresses no opinion on the substance of my testimony.

<sup>6</sup> In fact, it's not a prosecutor's role to do so. They are one side in the adversary system, not a judge.

<sup>7</sup> *Setser v. United States*, 132 S. Ct. 1463, 1471-72 (2012).

<sup>8</sup> 18 U.S.C. § 924(c)(1)(C)(i); see also 18 U.S.C. §§ 922(g) & (h).

<sup>9</sup> [http://www.justice.gov/opa/pr/2006/June/06\\_crm\\_389.html](http://www.justice.gov/opa/pr/2006/June/06_crm_389.html)

<sup>10</sup> [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Sex\\_Of\\_fense\\_Topics/199503\\_Federal\\_Rape\\_Cases.PDF](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Of_fense_Topics/199503_Federal_Rape_Cases.PDF)

<sup>11</sup> [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_PDF/Chapter\\_2\\_A-C.pdf](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_2_A-C.pdf)

<sup>12</sup> 18 U.S.C. § 924(e).

**POLICY STATEMENT OF**  
**FORMER FEDERAL PROSECUTORS**  
**AND OTHER GOVERNMENT OFFICIALS**

*July 15, 2013*

**The Need for Meaningful Federal Criminal Justice Reform**

We are a diverse group of former federal prosecutors, judges, Department of Justice and other government officials who deeply believe in notions of fairness in the administration of justice. Our backgrounds, experiences, ethnicities and political preferences vary greatly. However, we all have one thing in common: at one time or another we served as United States Attorneys, Assistant United States Attorneys, Department of Justice attorneys, or other government officials including judges and members of Congress. Many of us pursued successful prosecutions and argued for appropriate and substantial punishments in federal courts.

Now, as former federal prosecutors, judges and other government officials, we are united with a common concern: our experiences with the criminal justice system have too often revealed the need for meaningful, thoughtful criminal justice reforms. While employed by the federal government, we were team players – rarely called upon to weigh-in on congressional inquiries regarding criminal statutes or sentencing issues. Appropriately, the Department of Justice, as an institution, advised Congress on its positions. Now, however, we lend our collective voices based upon our individual experiences to the meaningful debates and efforts to accomplish appropriate criminal justice reforms.

While our experiences vary, we can agree that a shift in investigative and prosecutorial direction has occurred in the federal criminal justice system over the past 10-15 years. Rather than focusing valuable resources on the highest levels of criminal conduct, the reality is that today's federal system is often consumed with the pursuit of low level offenders who many recognize can and should be prosecuted by the states. Further, many of these low level offenders are being given extremely long sentences in federal prisons – sentences that too often do not match the gravity of the crimes committed.

The result, ironically, is a burgeoning prison population that, with its rising costs, is becoming a real and immediate threat to public safety. Department heads and congressional leaders have become painfully aware that the growing prison budget is consuming an ever-increasing percentage of the Department of Justice's budget. According to the Statement of the Department's Inspector General before Congress on March 14, 2013, concerning oversight of the Department of Justice:

*...it is clear that something must be done... the Department cannot solve this challenge by spending more money to operate more federal prisons unless it is prepared to make drastic cuts to other important areas of the Department's operations.<sup>1</sup>*

Further, according to the Department's official viewpoint as of July 11, 2013:

*Now with the sequester, the challenges for federal criminal justice have increased dramatically and the choices we all face – Congress, the Judiciary, the Executive Branch – are that much clearer and more stark: control federal prison spending or see significant reductions in the resources available for all non-prison criminal justice areas. If the current spending trajectory continues and we do not reduce the prison population and prison spending, there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs, and cuts along a range of other criminal justice priorities.*

*...taken together, reductions in public safety spending that have already occurred and that are likely to continue in the coming years mean that the remarkable public safety achievements of the last 20 years are threatened unless reforms are instituted to make our public safety expenditures smarter and more productive.<sup>2</sup>*

We have no doubt current federal prosecutors and law enforcement officers are doing their best to make a difference and protect the public, just as many of us did when we served. But the system is at risk of becoming enslaved to policies and practices which create imbalance in the scales of justice.

We do not say this lightly. We say this as former prosecutors and government officials who very much valued our service within the federal government and count our years there among some of the best of our careers. It is our devotion to the law and the pursuit of justice that causes us to speak out and acknowledge the fact that a growing number of federal prisoners have been and continue to be negatively impacted by an ill-prepared justice system.

One can hardly expect current prosecutors to correct the problem from within. We know the position they are in as many of us have been there ourselves. Every day, these hard-working men and women zealously prosecute the cases that come across their desks. They are hardly in a place to observe the system objectively, let alone thoughtfully consider and voice opinions on how it should be changed. Current laws give federal prosecutors virtually complete control over the entire process. Federal prosecutors decide what to charge, who to charge, how many counts to charge, the terms of the plea agreement and all too often what the range of sentence will be.

It is our intention to highlight areas of concern and to engage at all levels necessary to assist in achieving meaningful criminal justice reform.

<sup>1</sup> <http://www.justice.gov/oig/testimony/t1303.pdf>. "Drastic cuts" in DOJ budgets may directly impact the investigative and prosecutorial resources in areas such as counterterrorism, cybercrimes, financial fraud, crimes against children, drug trafficking and other vital areas of current DOJ focus.

<sup>2</sup> <http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>

The federal criminal justice system needs to be reformed in two meaningful ways: first, on the front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies; second, on the back end, through a thoughtful implementing of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism.

Because of immediate budget concerns, Congress should start by taking quick and decisive action to address the growing cost of the federal prison system and ensure that the Department of Justice can continue to run our prisons safely and securely without compromising the scope or quality of the Department's many other critical law enforcement missions.

In this direction, Congress should move swiftly to debate, markup and pass H.R. 2656, The Public Safety Enhancement Act, into law. This legislation will implement evidence-based prison reform strategies that are finding success in states like Texas, Ohio, Arkansas, Kentucky, Pennsylvania and North and South Carolina. Such strategies include the establishment of dynamic offender risk and needs assessment as the cornerstone of a more effective and efficient system; expansion of proven recidivism reduction programs in the prisons; incentivizing prisoners to participate in the programs they need; and rewarding those who actually complete these programs and reduce their individual risk of recidivism by providing them with the ability to earn time credits toward transfers into alternative, less-costly custody arrangements – such as halfway houses or home confinement – during the latter portion of their prison terms. We urge the Department of Justice to work with Congress to ensure this legislation will have the intended effect and begin to control the cost of the federal prison system.

At the same time, for the longer term, we also urge Congress, the Judiciary, and the Executive Branch to work together to perform fact-finding, identify and study the effects of the front-end policies that have created imbalance, and then develop thoughtful reforms that will allow us to achieve a more appropriate balance in the federal criminal justice system.

We hope to serve as resources in this process, so we can all – current and former servants of the law – do our part to ensure that justice shall be done.

Respectfully,

Brett L. Tolman  
Former United States Attorney, District of Utah

Paul Cassell  
Presidential Professor of Criminal Law, S.J. Quinney College of Law  
Former United States District Court Judge, District of Utah

Matthew Orwig  
Former United States Attorney, Eastern District Texas

Greg Lockhart  
Former United States Attorney, Southern District Ohio

Thomas Heffelfinger  
Former United States Attorney, District of Minnesota

John Ratcliffe  
Former United States Attorney, Eastern District of Texas

Rodger Heaton  
Former United States Attorney, Central District of Illinois

Richard Roper  
Former United States Attorney, Northern District of Texas

Alice Martin  
Former United States Attorney, Northern District of Alabama

Paul Perez  
Former United States Attorney, Middle District of Florida

Donald J. DeGabrielle  
Former United States Attorney, Southern District of Texas

Frank Keating  
Former United States Attorney, Northern District of Oklahoma  
Former United States Associate Attorney General  
Former Governor of Oklahoma

Joe D. Whitley  
Former United States Attorney, Middle & Northern Districts of Georgia  
Former United States Associate Attorney General  
First General Counsel of the United States Department of Homeland Security

George W. Proctor  
Former United States Attorney, Eastern District of Arkansas  
Former Federal Immigration Judge

A. Bates Butler III  
Former United States Attorney, District of Arizona

James Reynolds  
Former United States Attorney, Northern District of Iowa

James A. Rolfe  
Former United States Attorney, Northern District of Texas

W. Thomas Dillard  
Former United States Attorney, Northern District of Florida  
Former Assistant U.S. Attorney, Eastern District of Tennessee

Tim Johnson  
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Kenneth J. Mighell  
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Kevin V. Ryan  
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William B. Cummings  
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Thomas E. Moss  
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Lawrence D. Finder  
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H.S. Garcia  
Former United States Attorney, District of Puerto Rico

Charles B. Renfrew  
Former United States Deputy Attorney General  
Former United States District Court Judge, Northern District of California

David H. Coar  
Former United States District Court Judge, Northern District of Illinois

Bruce Einhorn  
Former Chief of Litigation, U.S. Department of Justice's Office of Special Investigations (OSI)  
Former Federal Immigration Judge

Hon. William G. Bassler  
Former United States District Court Judge, District of New Jersey

Sam Alba  
Former U.S. Magistrate Judge District of Utah, First Assistant and Chief Criminal Division U.S. Attorney's Office District of Utah

Johnnie M. Walters  
Former Assistant Attorney General  
Former Commissioner of IRS

Eric Benson  
Former Assistant United States Attorney, District of Utah

Brett Parkinson  
Former Assistant United States Attorney, District of Utah

Nathan Crane  
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Matthew Lewis  
Senior Counsel to the Assistant Attorney General, Criminal Division, Department of Justice

Robert Steinbuch  
Law Professor at University of Arkansas Law School  
Former IRS Attorney

**SUMMARY OF SAMPLE CASES**

**Troy Augusta: Mandatory 10 years.** Mr. Augusta sold 1 pound of marijuana to a confidential informant at the informant's request, but was not arrested. The informant then asked for 2 ounces of methamphetamine, the amount necessary for a 10-year mandatory minimum. Mr. Augusta did not sell methamphetamine, but introduced the informant to someone who did, for which he received no money or other compensation. Mr. Augusta was not eligible for safety valve because he had 4 criminal history points: 2 for misdemeanor battery, to which he pled no contest and received a 90-day sentence, and 2 because he committed the instant offense less than 2 years after release from jail on the misdemeanor. At age 22, he left behind his nine-month-old child and pregnant fiancé. The co-defendant, who sold the drugs, had no criminal record, so got the safety valve and a sentence of about four years.

**Wanda Barton: Mandatory 10 years.** Ms. Barton was a 30-year-old mother of four, with an Associate of Arts degree, and fairly steady employment until the year before her arrest for conspiracy to possess with intent to distribute 50 or more grams of crack. Ms. Barton was not eligible for safety valve because she had 2 criminal history points based on two shoplifting offenses committed at age 26: for the first, she pled no contest to petit theft, was not adjudicated guilty, and was sentenced to pay a fine; for the second, she pled no contest to grand theft, was adjudicated guilty, and was sentenced to 12 months' probation.

**Ronald Blount, Jr.: Mandatory Life.** Mr. Blount was a low-level non-violent drug runner, severely addicted to crack cocaine and diagnosed with paranoid schizophrenia. At age 36, his mandatory minimum was increased from 10 years to mandatory life because the prosecutor filed § 851 enhancements for two exceedingly minor prior drug convictions, in order to pressure him to cooperate. He did not cooperate because he feared for his life and, as a low-level addict, had no useful information to give.

**Derrick Cain: Mandatory 10 Years.** Mr. Cain was a husband, father, stellar employee, and first offender when he was sentenced to a mandatory minimum of 10 years for selling cocaine and possessing a pistol legally registered and licensed in his name. The friend who introduced him to selling drugs received probation for cooperating against him. The judge stated, "There's nothing anyone here can do or say to get you below ten years."

**Sherman Chester: Mandatory Life.** Mr. Chester, a 27-year-old former athlete, had his mandatory minimum enhanced from 10 years to mandatory life because he chose to go to trial, and the prosecutor filed two § 851 enhancements for minor convictions punished with probation and house arrest. Except for the leader of the 9-person conspiracy, all of Mr. Chester's co-defendants, including those more culpable than he, received lower sentences and have been released. The sentencing judge stated: "This man doesn't deserve a life sentence, [but I cannot] legally keep from giving it to him."

**Larhonda Devine: Mandatory 5 years.** Ms. Devine was a 36-year-old mother of three, who suffered from untreated panic disorder, agoraphobia, and depression, and was dependent on marijuana (smoking daily for over 15 years), but excelled in and successfully completed inpatient treatment after her arrest in this case for conspiracy to distribute 28 grams or more of crack. Ms. Devine was not eligible for safety valve because she had 4 criminal history points for two misdemeanor traffic violations, for which she received 3 years' probation: 2 for the misdemeanors, and 2 because she was on probation for one of the misdemeanors during the instant offense.

**Charlton Esekhighbe: Mandatory 20 Years.** Mr. Esekhighbe came from a stable family, had attended community college, studied to be an aviation mechanic, and went to barber school, but was addicted to multiple drugs when he sold crack to an informant at the informant's request and had a gun with him for protection. The prosecutor doubled the mandatory minimum from 10 to 20 years by filing a § 851 enhancement for a prior

conviction for simple possession of 5.81 grams of MDMA. In sentencing Mr. Esekhighbe to 20 years, the judge stated, "It's a tragic case," "his previous criminal history is shoplifting and possession," "I don't know who is well served by your spending 20 years in jail, not your society, not your family, not the taxpayers who are going to have to pay for it."

**Pedro Fuenmayor-Arevalo: Mandatory 10 Years.** Mr. Fuenmayor-Arevalo was a mentally retarded 60-year-old man with vascular dementia and no record when he was sentenced to a mandatory minimum of 10 years. The prosecutor successfully argued that safety valve did not apply under a novel legal theory. The judge stated, "I rather imagine if we had Congress solemnly convened here they would vote pretty much in favor of a 36-48 month sentence."

**Stephanie George: Mandatory Life.** Ms. George was a young mother of three who played a minor nonviolent role in her boyfriend's crack dealing. She would have received a 10-year mandatory minimum based on drugs her former boyfriend testified belonged to him, drugs he testified he sold, and the uncorroborated testimony of others adding to the quantity. At age 26, after she was convicted based on the testimony of her former boyfriend and other more culpable participants in exchange for leniency, she was sentenced to mandatory life because the prosecutor filed § 851 enhancements for two prior convictions for possessing residue and a few crack rocks, for which she was sentenced respectively to probation and nine months in jail with work release. The judge stated, "[Y]our role . . . as a girlfriend and bag holder and money holder . . . doesn't warrant a life sentence. . . . I wish I had another alternative."

**Eddie Joe Grissom: Mandatory 15 Years.** Mr. Grissom, a 51-year-old man, was prosecuted for being a felon-in-possession of a firearm and sentenced to a mandatory minimum of 15 years for sitting in a turkey blind on his family's property in a remote rural area at 5:00 a.m. with a 60-year-old hunting rifle owned by his uncle. The ACCA required 15 years based on prior convictions that were 30 years old (robbery) and 10 and 13 years old (two alcohol-related assaults). Mr. Grissom had a previous drinking problem but had been sober for four years. In sentencing Mr. Grissom to the 15-year mandatory minimum for "armed career criminals," the judge noted that he "was not involved in a violent crime" and "no one was threatened by the possession of the weapon."

**Keith Harrison: Mandatory 10 Years.** The government was investigating the purchase and sale of untaxed contraband cigarettes by Middle Eastern targets, believing the proceeds were being funneled back to the Middle East. Mr. Harrison and others worked at a warehouse run by the targets. First, the government sold cigarettes for money, then, at the suggestion of the undercover agent, the government traded cigarettes for crack cocaine, subjecting the non-target workers to a mandatory minimum of ten years. All of the other non-target co-defendants were safety valve eligible. Mr. Harrison was not eligible for safety valve because, at age 53, he had 4 criminal history points: 1 for driving with "no operator's license," 2 for committing the instant offense while on unsupervised probation for the driving offense, and 1 for possession of marijuana, for which he served 1 day in jail.

**Kenneth Harvey: Mandatory Life.** Mr. Harvey was a courier who was paid \$300 to bring 501 grams of crack from Los Angeles to Kansas City. He had no gun and no record of violence. The prosecutor offered a sentence of 15 years in exchange for a guilty plea, but when Harvey chose to go to trial, filed § 851 enhancements based on one prior conviction that barely qualified as a felony or a conviction, and one for selling 2.23 grams of crack. In sentencing Mr. Harvey to federal prison "for the remainder of his life," the judge recommended executive clemency after 15 years because the priors "were not deemed serious enough to merit imprisonment and appear to be only technically within the statutory punishment plan," and because of Mr. Harvey's "immaturity of judgment" at the time. The judge "[did] not think [the statutory life minimum] was fully understood or intended by Congress in cases of this nature, but there [was] no authority that [he] knew of that would permit a different sentence by [him]."

**Mary Beth Looney: Mandatory 40 Years.** Ms. Looney was a 53-year-old woman with serious health problems and no prior convictions or arrests. She was sentenced to 45 years, 40 of which were mandatory, for selling drugs with her husband and having guns in the house. The prosecutor offered 15 years for a guilty plea, but “stacked” the gun charges, adding 25 mandatory years, when she opted for trial. The Fifth Circuit said: “Although . . . there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house,” “the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence.” Ms. Looney’s co-defendant prosecuted in an adjoining district received a 37-month guideline sentence.

**Va Thi Nguyen: Mandatory 10 Years.** Ms. Nguyen, a 50-year-old woman, a refugee from Vietnam where she was imprisoned for her Catholic faith, with a 5th grade education, an 11-year-old son, and no record was sentenced to a mandatory minimum of 10 years for being hired by her cousin to water marijuana plants that he said were for medical purposes. The prosecutor blocked the safety valve by charging that the marijuana was grown within 1000 feet of a school, a violation not listed in the safety valve statute.<sup>1</sup> The judge stated, “I wish I had discretion . . . to give a sentence that I felt was more just in light of the congressionally mandated factors in Title 18, 3553(a), but I’m not able to do that.”

**Olivar Martinez-Blanco: Mandatory Life.** Martinez-Blanco argued that the “government filed the two § 851 notices” -- for convictions that occurred when he was 22 and 24 years old, addicted to drugs, and involved small amounts of drugs -- “to coerce him into entering a plea,” that “his codefendants received lesser sentences but were more culpable,” and that “the mandatory life sentence was cruel and unusual.” The sentencing judge agreed that “the mandatory life imprisonment was ‘savage, cruel and unusual,’” but that “its hands were tied” and “it regretted its lack of discretion in determining the sentence.”<sup>2</sup>

**Natacha Pizarro-Campos: Mandatory 10 Years.** Ms. Pizarro-Campos was a 24-year-old mother of two with a history of mental illness, suicide attempts, psychiatric hospitalizations, and severe drug addiction, who sold drugs under pressure by her boyfriend and in exchange for drugs to feed her habit, when she was sentenced to a mandatory minimum of 10 years. The safety valve did not apply because of a prior no contest plea to an offense for which she received probation and no state court conviction. She pled guilty to the instant drug conspiracy in the belief government would reward her for providing “substantial assistance,” but the government refused to file the motion. After continuing the sentencing hearing twice in an attempt to encourage the government to file the motion, the judge sentenced Ms. Pizarro-Campos to ten years, stating that “the sentence exceeds what is necessary to address the conduct in this case, but [that] is irrelevant because the Court has no option but to impose [it].”

**Robert Riley: Mandatory Life.** Mr. Riley was a 40-year-old “flower child” when he was sentenced to mandatory life for selling a minuscule amount of LSD on blotter paper weighing just over 10 grams and the prosecutor’s filing of § 851 enhancements based on prior convictions involving small amounts of drugs. The judge stated, “It’s an unfair sentence,” and later wrote, “There was no evidence presented in Mr. Riley’s case to indicate that he was a violent offender or would be in the future,” and “It gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life.”

**Melissa Ross: Mandatory 20 Years.** Ms. Ross was a young woman who played a minor, non-violent role in her boyfriend’s crack dealing. The prosecutor offered her a three-year sentence if she would plead guilty to

<sup>1</sup> In a handful of districts, prosecutors routinely charge offenses under drug statutes that are not listed, such as 21 U.S.C. § 860 (protected locations), in order to avoid the safety valve.

<sup>2</sup> *United States v. Martinez-Blanco*, 351 Fed. Appx. 339, 340 (11th Cir. 2009).

misprision of a felony, but when she chose to go to trial, filed an § 851 enhancement based on a no contest plea six years earlier to simple possession of crack, with deferred adjudication which did not result in a conviction in state court. The judge stated that the prosecutor had “vindictively filed the § 851 enhancement because Petitioner asserted her constitutional right to trial by jury,” and that it was “a gross miscarriage of justice.”

**Alexandra Valles-Aguirre: Mandatory 5 years.** Ms. Valles-Aguirre pled guilty to importing of .56 kg. methamphetamine, on foot, strapped to her body. She was arrested 5 days before she turned 22, and was a single mother with a toddler at the time. She was diagnosed with depression at age 12, attempted suicide twice, and stopped taking her medication two months prior to her arrest. She had a history of alcohol and illegal substance abuse. This was her first attempt to smuggle drugs. She was pregnant at the time of her arrest, gave birth while in custody, and has not been able to hold her son since he was born. Couriers similar to Ms. Valles-Aguirre in this district (Southern District of California) routinely receive sentences of 3 years or less, and commonly 24 months or less. Ms. Valles-Aguirre was not eligible for safety valve because she had 3 criminal history points: 1 point for possession of paraphernalia, a misdemeanor for which she received an 18-month term of diversion, and 2 points for being on warrant status at the time of her arrest for failing to comply with the diversion.

**Michael Patrick Wahl: Mandatory 10 Years.** Mr. Wahl was a 42-year-old college student when he was sentenced to a mandatory minimum of 10 years for growing marijuana in his apartment. The prosecutor doubled the mandatory minimum from 5 to 10 years by filing a § 851 enhancement based on a prior conviction for selling 6.3 grams of LSD twenty years earlier when Mr. Wahl was 23 years old. His roommate, who pled guilty with a cooperation agreement, was sentenced to 28 months for identical conduct. The judge stated that the prosecutor “has more authority than I do because he’s the one that charges these offenses and that drives these mandatory minimums and I’m just a figurehead up here. I’m just a rubber stamp. I’m not sure why they pay me as much as they do to engage in this fiasco because I can’t imagine if you got 20 educated people in a room and looked at this situation that one out of 20 would give this young man 10 years in prison. . . . I don’t think it’s just or fair or appropriate. So I wish somebody would talk about changing the law. . . . The vast majority of these people are not violent. They’re not engaged in high level drug trafficking. . . . [T]hat we’re spending fortunes now warehousing people like Mr. Wahl for growing marijuana plants is patently ridiculous in my view.”

**Further details of these cases are set forth in the Appendix.**

APPENDIX**TROY AUGUSTA**

Sentence: mandatory minimum 120 months

Offense: conspiracy to distribute 55 grams methamphetamine

District: C.D. California

Year sentenced: 2010

Age at sentencing: 22

Mr. Augusta sold 1 pound of marijuana to a confidential informant at the informant's request. He was not arrested. The informant then asked for 2 ounces of methamphetamine, the amount necessary for a 10-year mandatory minimum. Mr. Augusta did not sell methamphetamine, but introduced the informant to someone who did, for which he received no money or other compensation.

Mr. Augusta was not eligible for safety valve relief because he had 4 criminal history points: 2 points for misdemeanor battery, to which he pled no contest and received a 90-day sentence, and 2 points because he committed the instant offense less than 2 years after release from jail on the misdemeanor. Although he was ineligible for safety valve, he met with the prosecutor and four law enforcement agents and gave truthful information regarding his offense. When Mr. Augusta was sentenced to 10 years, he left behind his nine-month-old child and pregnant fiancé. The co-defendant, who sold the drugs, had no criminal record, so got the safety valve and a sentence of about four years.

**WANDA BARTON**

Sentence: mandatory minimum 120 months

Offense: conspiracy to possess with intent to distribute 50 grams or more of crack cocaine

District: M.D. Florida

Year sentenced: 2005

Age at sentencing: 30

Ms. Barton was a mother of four. She had an Associate of Arts degree, and a fairly steady employment until the year before her arrest. She was not eligible for safety valve because she had 2 criminal history points based on two shoplifting offenses committed at age 26: for the first, she pled no contest to petit theft, was not adjudicated guilty, and was sentenced to pay a fine; for the second, she pled no contest to grand theft, was adjudicated guilty, and was sentenced to 12 months' probation.

**RONALD BLOUNT, JR.**

Sentence: Mandatory Life

Offense: Courier in a conspiracy to distribute crack, use of a telephone to facilitate a drug transaction

District: WD Louisiana

Year sentenced: 1999

Age at sentencing: 36

Projected release date: N one

Mr. Blount was a severely addicted crack cocaine user with a 9th grade education and diagnosed with paranoid schizophrenia. He slept on the porch of his parents' house because they would not allow him inside. He was sentenced to mandatory life for acting as a courier in exchange for crack to feed his habit.

Mr. Blount was convicted on two counts of an eight-count indictment: conspiracy to distribute crack cocaine and using a telephone to facilitate a drug transaction. The 9-person conspiracy was a loose collection of street level dealers. Mr. Blount was the lowest level participant – a courier between the dealers (one of whom was his brother) and the buyer, for which he was paid in crack to feed his habit. None of the participants was charged with using or carrying a gun or of any violence. Mr. Blount had no violent criminal history.

In order to pressure Mr. Blount to cooperate against the others, the prosecutor filed an information under 21 U.S.C. § 851 based on two prior convictions of a "felony drug offense," increasing his mandatory minimum sentence from 10 years to life. Section 851 gives the prosecutor sole discretion to increase a mandatory minimum in this manner, or not.

The first prior conviction was possession with intent to distribute marijuana to which he pled guilty in exchange for release on a suspended sentence, at age 26. He would wash drug dealers' cars in exchange for money or drugs, in this instance money to fix his own car. While driving the car from the car wash, he was stopped pursuant to a raid on the drug dealers' house and cars, and marijuana was in the trunk.

The second prior conviction was delivery of a controlled substance, at age 29. Mr. Blount was sitting on the porch when an undercover agent came by and asked him where to score drugs. He told the agent to try a nearby house and was charged with facilitating the drug transaction.

Mr. Blount did not cooperate because he feared for his life, and because, as just a junkie, he had no useful information about the operations of the dealers or their suppliers. The sentence of this mentally ill non-violent addict who acted as a courier in exchange for crack was thus enhanced from a mandatory minimum of 10 years to mandatory life.

**DERRICK CAIN<sup>3</sup>**

Sentence: Mandatory minimum 10 years

Offense: Possession with intent to distribute cocaine; possession of a legally registered firearm in furtherance of a drug trafficking crime

Priors: None

District: Eastern District of Pennsylvania

Year sentenced: 2009

Age at sentencing: 32

Projected release date: Dec. 9, 2017

Derrick Cain was sentenced to a 10-year mandatory prison term for selling cocaine. When his wife went back to school to become a pediatric nurse, his salary alone wasn't enough, so he worked during the day and sold cocaine at night. This landed him in prison for ten years after the friend who introduced him to selling cocaine became a confidential informant, in return for which the friend got one year probation. In imposing sentence, Judge Davis said, *"There's nothing anyone here can do or say to get you below 10 years. This is a mandatory [sentence]. It means that if I gave you one second less than ten years in jail, I would be violating the law."*

After graduating from high school in Philadelphia, Derrick married his girlfriend, and they had two children. In 1997, he was hired by a pipefitting company, Anvil International, where he worked until his arrest. He received stellar work reviews and his supervisor praised him as "a valuable asset who can be depended upon to do an excellent job." In 2001, Derrick's wife enrolled in college to become a pediatric nurse. Derrick worked overtime but eventually was unable to afford her education and support the family.

At a friend's suggestion, Derrick agreed to sell cocaine to increase his income. From 2001 to 2005, he worked during the day and sold cocaine at night. On April 11, 2005, the friend was arrested for drug trafficking, and immediately became a confidential informant in exchange for leniency. On his tip, police raided Derrick's house. They found 3.4 pounds of cocaine and a pistol, and 28-year-old Derrick was arrested. After spending five weeks in county jail, federal prosecutors took the case. Derrick was released on bail during the three years the case was pending, and was gainfully employed and law-abiding throughout that time.

Derrick pled guilty to possession with intent to distribute cocaine and possession of a firearm in furtherance of a drug trafficking crime. Judge Davis was forced to impose a five-year mandatory minimum for the cocaine. Although Derrick's gun was legally registered, licensed in his name, and he was not convicted of using it but of possessing it, he also received a consecutive mandatory five-year sentence.

Since his incarceration, Derrick has taken several educational courses. One of his instructors has praised Derrick for his work ethic, positive attitude and willingness to help others, saying Derrick "continues to strive to better himself through learning." Derrick's former employer, Anvil International, is keeping a position open for him upon his release. See Derrick's story in the Philadelphia Daily News, Read the Philadelphia Daily News article featuring Derrick's story from May, 2011: [http://articles.philly.com/2011-05-27/news/29590246\\_1\\_mandatory-minimum-sentencing-laws-mandatory-minimum-sentences-drug-offenders](http://articles.philly.com/2011-05-27/news/29590246_1_mandatory-minimum-sentencing-laws-mandatory-minimum-sentences-drug-offenders).



<sup>3</sup> This account is based on a summary prepared by FAMM from primary source documents.

**SHERMAN CHESTER<sup>4</sup>**

Sentence: Mandatory Life

Offense: Conspiracy to possess with intent to distribute, possession with intent to distribute and distribution of cocaine; conspiracy to possess and distribute, and distribution of heroin

Priors: Possession of cocaine (1989); possession of cocaine, marijuana and paraphernalia (1991)

District: Middle District of Florida

Year sentenced: 1994

Age at sentencing: 27

Projected release date: None

In imposing the mandatory life sentence for this non-violent drug crime, the judge stated: *"This case is an illustration of the difficulties and problems that result from the application of mandatory minimum sentences. This man doesn't deserve a life sentence, and there is no way that I can legally keep from giving it to him."* Taxpayers will spend over \$1.3 million to incarcerate Mr. Chester for his natural life.

Sherman excelled on his high school football team in St. Petersburg. He then enrolled in a community college in Tallahassee. After being encouraged by a Minnesota football coach, Sherman decided to get in shape and pursue football again. He moved to Minnesota in 1987, enrolled in a community college and started playing football. Back home in Florida, Sherman's mother was diagnosed with cancer and having financial difficulties. She worked two jobs, but was facing foreclosure. Distracted by his mother's problems, Sherman dropped out of college and returned home.

Sherman used cocaine for the first time in high school, and used it with friends recreationally as a young adult. After returning home, he was encouraged by a friend to start selling the drug. In need of money, Sherman started selling small amounts of cocaine. In 1989, Sherman was pulled over for a traffic violation and arrested when officers found a baggie with cocaine residue in it, and he received two years' probation. In 1991, he was caught with ¼ gram of cocaine, a user quantity of marijuana, and paraphernalia, for which he received two years of house arrest and one year of probation.

In 1989, Sherman had become involved in a drug conspiracy led by a family friend, someone he describes as an uncle figure. He was a street level dealer in the conspiracy, selling cocaine and heroin and, on occasion, picking up money for the leader. Over the course of eight months, Sherman sold varying amounts of cocaine and heroin to an undercover detective several times – as little as one gram of cocaine the first time, and 40 grams of cocaine another time.

In April 1992, Sherman was indicted in federal court with nine codefendants. He was convicted at trial and held accountable at sentencing for nearly the entire amount involved in the conspiracy, not just the drugs he personally handled. Even so, he would have been subject to a ten-year mandatory minimum, and would be home now. But the prosecutor filed notices under 21 U.S.C. § 851 based on his 1989 and 1991 convictions for a "felony drug offense," enhancing the sentence to mandatory life. Except for the leader of the conspiracy, all of Sherman's codefendants received shorter sentences and have been released.



Sherman has now served 20 years of his life sentence. His mother passed away after battling cancer, heart disease, lupus and diabetes. He maintains relationships with other family members, participates in educational and vocational programming, and has maintained a near-spotless disciplinary record.

<sup>4</sup> This account is based on a summary prepared by FAMM from primary source documents.

**LARHONDA DEVINE**

Sentence: mandatory minimum 60 months

Offense: conspiracy to distribute 28 or more grams of crack cocaine

District: C.D. California

Year sentenced: 2012

Age at sentencing: 36

Ms. Devine was a mother of three. She suffered from untreated panic disorder, agoraphobia, and depression, for which she was dependent on marijuana, which she smoked daily for over 15 years. After her arrest, however, she excelled in and successfully completed inpatient treatment.

Ms. Devine was not eligible for safety valve because she had 4 criminal history points for two misdemeanor traffic violations, for which she received 3 years' probation: 2 points for the misdemeanors, and 2 points because she was on probation for one of the misdemeanors during the instant offense. That misdemeanor occurred in 2001 but was not disposed of until 2006; if not for this delay, she would have had 2 points.

**CHARLTON ESEKHIGBE**

Sentence: Mandatory minimum 20 years

Offense: possession with intent to distribute crack cocaine; felon in possession of a firearm

District: SD Texas

Year sentenced: 2006

Age at sentencing: 24

Projected release date: 12/29/2022

In imposing the 20-year mandatory minimum on this drug-addicted young man with a minor record, Judge Ellison said, *"It's a tragic case," "his previous criminal history is shoplifting and possession," "I am really troubled about this sentence being too heavy,"* but *"I just don't know what my way out is."* *"I don't know who is well served by your spending 20 years in jail, not your society, not your family, not the taxpayers who are going to have to pay for it. . . . I take no pleasure at all in imposing this sentence. I really do grieve for all parties."*

Mr. Esekhighbe was one of four children in a stable family. He had been in special education classes, and was mentally slow. During high school and as a young adult, he worked at a variety of low skill jobs. He graduated from high school in 2000, attended summer classes at community college, studied to be an aviation mechanic, then went to barber school. He had a two-year-old son at the time of sentencing.

Mr. Esekhighbe started smoking marijuana in middle school and was using it daily at the time of his arrest, sometimes soaking it in embalming fluid. He used powder cocaine occasionally, MDMA daily, crack occasionally, codeine with cough syrup weekly, often with Xanax.

Mr. Esekhighbe had prior convictions for possession of 5.81 grams of MDMA (a felony), shoplifting from a Wal-Mart (a felony), and simple possession of marijuana.

In 2005, an undercover DEA agent phoned Mr. Esekhighbe and asked him to sell him 18 ounces of crack. Mr. Esekhighbe arrived at the place designated by the agent with only 4.5 ounces (128.8 grams) of crack. A gun, which he had for protection, was found in his car. He immediately admitted guilt for the drugs and the gun.

Mr. Esekhighbe was charged with possession with intent to distribute 50 grams or more of a mixture or substance containing crack cocaine, and for being a felon in possession of a firearm. The guideline range at that time was 151-188 months, and the mandatory minimum was 10 years. One month after indictment, the prosecutor filed an information under 21 U.S.C. § 851 based on the prior conviction for possession of 5.81 grams of MDMA, raising the mandatory minimum to 20 years.

Mr. Esekhighbe pled guilty to both charges, including the § 851 enhancement, under an agreement that required him to waive his right to appeal, and his right to challenge his sentence in post-conviction proceedings for any reason. Attempting to explain the government's harsh treatment to the judge, the prosecutor said the government "didn't put every single count it could have on this defendant." He claimed it could have charged a 5-year mandatory minimum under 18 U.S.C. § 924(c) but "doubted that the facts really did support it."

Under the Fair Sentencing Act, Mr. Esekhighbe would be subject to a ten-year mandatory minimum with the § 851 enhancement and a five-year mandatory minimum without it, but the Fifth Circuit has ruled that the FSA is not retroactive. Mr. Esekhighbe's guideline range would be 100-125 months under the retroactive FSA guideline amendments, but because of the 240-month mandatory sentence imposed in the prosecutor's sole discretion, his sentence cannot be reduced.

The taxpayers will spend approximately \$500,000 to incarcerate Mr. Esekhighbe.

**PEDRO FUENMAYOR-AREVALO**

Sentence: Mandatory minimum 10 years

Offense: Conspiracy to possess with intent to distribute 5 kg. or more of a mixture or substance containing a detectable amount of cocaine aboard a vessel, 46 U.S.C. §§ 70503, 70506, 21 U.S.C. § 960

District: Middle District of Florida

Priors: None

Year sentenced: 2011

Age at sentencing: 60

Projected release date: 3/2/2019

In sentencing this 60-year-old, mentally retarded man with the reasoning capacity of a six-year-old, no education whatsoever, suffering from vascular dementia resulting in a 39% chance of surviving for 5 years, and with no prior criminal record, Judge Merryday said that if not for the 10-year mandatory minimum, he would sentence the defendant to three or four years, and *"I rather imagine if we had Congress solemnly convened here that they would vote pretty much in favor of a 36-48 month sentence or somewhere like that for this fella."*

Mr. Foenmayor had worked since he was a small child in a poor village in Colombia, never attending school, and as a fisherman since age 20. He had four children, two of whom had died, and had lived with their mother, his common law wife, for 39 years. He had ten grandchildren and a great grandchild. According to the neuropsychologist who evaluated Mr. Foenmayor, if he survives his sentence, it is unlikely he will recognize his family due to his progressive vascular dementia.

When asked if he ever had his own boat, he said, "No, I have never had anything." When asked if he ever thought of saying no when the captain told him they were going to bring cocaine to the United States, he said, "I said, well, if you said so." When asked if he always did what the captain said, he said, "Yes, of course, because he's the one in charge of the vessel." When asked when he first knew he had done something wrong, he said, "When the police arrived there at the boat and jailed us."

Mr. Foenmayor's guideline range was 108-135 months, and a 10-year mandatory minimum applied. He had no information to assist the government, nor would he have been a competent witness. But for the government's novel interpretation of the safety valve statute, he would have been entitled to relief from the mandatory minimum, and the judge would have granted counsel's request for a substantial downward departure for diminished capacity.<sup>5</sup>

Instead, the American taxpayers will spend \$29,000 a year (at the current rate) to incarcerate Mr. Foenmayor for ten years or as long as he lives.

<sup>5</sup> Counsel moved for safety valve relief under 18 U.S.C. § 3553(f), which allows a court to impose sentence "without regard to any statutory minimum sentence" if the defendant was convicted of an offense "under" certain statutes, including 21 U.S.C. § 960 (which he was) and meets five criteria (all of which he met). The safety valve statute had been applied to all defendants penalized under 21 U.S.C. § 960 for over fifteen years. However, the U.S. Attorney in this district recently took the position that it did not apply to such defendants arrested on the high seas as opposed to coastal waters. Unfortunately, the district court accepted this position, relying on an Eleventh Circuit decision holding that the safety valve did not apply to defendants convicted under an entirely different statute.

**STEPHANIE GEORGE<sup>6</sup>**

Sentence: Mandatory Life

Offense: Conspiracy to possess with intent to distribute crack

Priors: Possession of cocaine with intent to distribute; resisting arrest without violence; principle to sale of cocaine; three counts sale and delivery of cocaine and possession of cocaine (1993)

District: Northern District of Florida

Year sentenced: 1997

Age at sentencing: 26

Projected release date: None

Taxpayers will spend nearly \$1.4 million to incarcerate Stephanie George for life for being “a girlfriend and bag holder and money holder.” Despite the judge’s wish that he had another alternative, she received a mandatory life sentence – the longest sentence of any of her codefendants.

After graduating from high school, Stephanie worked as a sales clerk, receptionist, housekeeper, nursing home assistant, and beautician, but her salary could not support her three young children. Stephanie dated several men involved in selling drugs. They would sometimes help support her family, in return for which she occasionally delivered and sold drugs and took messages for them. This resulted in two felony convictions in 1993. First, police found her sitting on the front porch of a house next to a bag containing cocaine residue. She confessed she had crack in her possession, and surrendered it to the officers. She received probation. Second, a confidential informant purchased two crack rocks from Stephanie for \$120, and \$40 worth of crack from her and several codefendants. Police then searched her residence and found four pieces of crack cocaine. She was sentenced to nine months in jail with work release.

Nearly three years later, police raided Stephanie’s residence after a CI reported that he had seen crack in the house. Officers found 500 grams of powder cocaine and \$13,710 in an attic safe belonging to Stephanie’s former boyfriend, Michael, and utensils that tested positive for drug residue. Michael had the key to the safe, along with \$797 in cash in his pants pocket. He confessed to police that the money, the cocaine and the paraphernalia belonged to him and that the \$797 was from 500 grams of crack he had already sold.

Later, Michael testified that he paid Stephanie to let him reside and store crack at her house. At the time of her arrest, she had no cash, no bank account and owned no property besides her car, worth \$2,500. She depended on food stamps and welfare to provide for her children.

Stephanie went to trial, and was convicted. She was held accountable for the 500 grams of powder cocaine found in the attic safe as well as 500 grams of crack that Michael said he sold. Several codefendants who dealt drugs with Michael testified against her. Because of their uncorroborated testimony, Stephanie was held accountable for an additional 290 grams of crack, for a total of 1,290 grams (about 2.84 pounds).

She would have been subject to a 10-year mandatory minimum, but the prosecutor filed notices under 21 U.S.C. § 851 based on her 1993 drug offenses, resulting in a mandatory life sentence. Judge Vinson was forced to sentence 26-year-old Stephanie to life in prison without parole: *“There’s no question that Ms. George deserved to be punished. The only question is whether it should be a mandatory life sentence ... I wish I had another alternative.”* He told Stephanie, *“Even though you have been involved in drugs and drug dealing for a number of years ... your role has basically been as a girlfriend and bag holder and money holder. So certainly, in my judgment, it doesn’t warrant a life sentence.”*

Over 15 years ago, the young mother of three was led out of the courtroom quietly crying. Her children have grown up without her and her older relatives have aged and passed away. Stephanie has participated in vocational and educational training, worked hard at her prison job, completed drug treatment and is sober.

<sup>6</sup> This account is based on a summary prepared by FAMM from primary source documents.

**EDDIE JOE GRISSOM**

Sentence: Mandatory minimum 180 months

Offense: Possession of a hunting rifle by a convicted felon

District: ED Tennessee

Year sentenced: 2005

Age at sentencing: 51

Projected release date: October 2017

Wildlife agents found Mr. Grissom sitting in a turkey blind on his family's property in a remote, rural county at 5:00 a.m. with a sixty-year-old hunting rifle owned by his elderly uncle. He was helping a friend hunt his first turkey. For this, he was charged with possessing a firearm, having previously been convicted of a crime punishable by imprisonment exceeding one year.

Mr. Grissom was raised by violent alcoholic parents, left home at age 14, and began drinking at age 16. While serving a sentence for a robbery he committed at age 20, he completed a GED, then worked as a roofer for 30 years, and lived with his long-term girlfriend. By the time of sentencing, he had been sober for four years.

The Armed Career Criminal Act (ACCA) required a mandatory minimum of 15 years because Mr. Grissom had a felony conviction for the robbery he committed in 1974 at age 20 over thirty years earlier, and two convictions for alcohol-related assaults, committed more than a decade earlier, in 1992 and 1995. Mr. Grissom's guideline range was even higher; the Sentencing Commission decided to set the guideline range at 235-293 months for a defendant like Mr. Grissom subject to the ACCA. If not for the ACCA, Mr. Grissom's guideline range would have been 70-87 months.

The judge sentenced Mr. Grissom to 15 years, as he was bound to do. The judge found the ACCA-enhanced "guideline sentence is too harsh," as Mr. Grissom "was not involved in a violent crime," but rather was arrested "while turkey hunting on family property" with a "60-year-old shotgun owned by [his] uncle," and "no one was threatened by the possession of the weapon."

**KEITH HARRISON**

Sentence: mandatory minimum 120 months

Offense: Possessing with intent to distribute 280 or more grams of crack; aiding and abetting the possession or receipt of contraband cigarettes

District: E.D. Virginia

Year sentenced: 2012

Age at sentencing: 53

The government was investigating the purchase and sale of untaxed contraband cigarettes by Middle Eastern targets, believing the proceeds were being funneled back to the Middle East. Mr. Harrison and others worked at a warehouse run by the targets. First, the government sold cigarettes for money, then, at the suggestion of the undercover agent, the government traded cigarettes for crack cocaine, subjecting the non-target workers to a mandatory minimum of ten years. All of the other non-target co-defendants were safety valve eligible.

Mr. Harrison was not eligible for safety valve because he had 4 criminal history points: 1 point for driving with "no operator's license," 2 additional points for committing the instant offense while on unsupervised probation for the driving offense, and 1 point for possession of marijuana, for which he served 1 day in jail.

**KENNETH HARVEY**

Sentence: Mandatory Life

Offense: Possession with intent to distribute 50 grams or more of crack

District: Western District of Missouri

Date and age at time of offense: 1989, age 24

Date and age at time sentenced: 1991, age 25

Projected release date: None

In 1989, Kenneth Harvey, age 24, was arrested at the Kansas City Airport in possession of 501 grams of crack cocaine. He was acting as a courier to carry the drugs from Los Angeles to Kansas City, for which he was to be paid \$300. He had no gun, and no record of violence. The judge who was required to sentence Mr. Harvey to prison for life took the unusual step of recommending clemency after 15 years, a recommendation with which the court of appeals agreed, but to no avail.

Mr. Harvey was charged in one count with possession with intent to distribute 50 grams or more of crack cocaine, subject to a 10-year mandatory minimum.

The government initially offered to recommend a 15-year sentence if Mr. Harvey pled guilty, but he elected to proceed to trial. The government then filed notice under 21 U.S.C. § 851 based on two prior convictions, thus increasing the sentence to mandatory life if he was convicted. Mr. Harvey was convicted by the judge after a bench trial.<sup>7</sup> The government then offered to withdraw one of the § 851 notices and recommend the mandatory minimum of 20 years if Mr. Harvey would waive his right to appeal, but he refused that offer too.

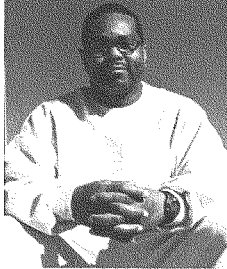
The § 851 notice was based on two minor offenses that barely qualified as felonies. The first occurred in 1984, when a woman sold a rock of crack to an undercover agent from her apartment, and was talking with Mr. Harvey when she was later arrested. Mr. Harvey, then 19 years old, was not seen selling any drugs and denied doing so. But he agreed to participate in a diversion program to avoid being prosecuted. When he failed to complete the diversion program, he pled guilty to a charge that could be either a misdemeanor or a felony under state law, and was placed on probation, making it a misdemeanor. When he failed to pay a fine as a condition of probation, his probation was revoked and he was sentenced to state prison, thus converting the charge to a felony, and served 10 months.

The second prior offense occurred in 1987, when Mr. Harvey, then 21 years old, was caught with 2.23 grams of crack and his companion with \$20. He pled guilty to sale of a controlled substance, for which he received probation. This offense was technically a felony because the maximum sentence exceeded one year.

In sentencing Mr. Harvey to federal prison “for the remainder of his life,” Judge Sachs recommended executive clemency after 15 years (1) because the priors “were not deemed serious enough to merit imprisonment and appear to be only technically within the statutory punishment plan,” and (2) because of Mr. Harvey’s “immaturity of judgment” at the time. Judge Sachs was “troubled by the statutory minimum,” found it “disproportionate,” and “[did] not think it was fully understood or intended by Congress in cases of this nature, but there [was] no authority that [he] knew of that would permit a different sentence by [him].”

The Eighth Circuit Court of Appeals rejected Harvey’s argument that the sentence constituted cruel and unusual punishment in violation of the Eighth Amendment, but agreed with Judge Sachs’ recommendation that “Harvey be given executive clemency after fifteen years,” noting that clemency was “one reason for the Supreme Court’s holding that the type of sentence imposed in this case does not violate the Eighth Amendment.”

<sup>7</sup> He waived his right to a jury trial.



Mr. Harvey has now served almost 24 years in prison, and has been denied clemency twice. He is well-regarded by prison officials who work with him on a daily basis. He has gained specific work skills, and become a reliable and conscientious employee. One prison official observed that he has been an excellent role model for younger inmates in carrying himself with dignity and always “trying to do the right thing.” He has had a good prison disciplinary record, and has become a member of a faith community. He has a stable family and a job waiting for him if he is ever released.

His case has been written up several times, including by John Tierney in *Life Without Parole: Four Inmates' Stories*, New York Times, Dec. 12, 2012, [http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html?\\_r=0](http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html?_r=0).

**MARY BETH LOONEY**

Sentence: 45 Years

Offense: Conspiracy to possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine; possession with intent to distribute methamphetamine; 2 counts of aiding and abetting possession of a firearm in furtherance of a drug crime

Priors: None

District: Northern District of Texas

Year sentenced: 2006

Age at sentencing: 53

Projected release date: 2046

Mary Beth Looney was a 53-year-old woman with serious health problems and no prior arrests or convictions when she received a 45-year sentence, 10 years of which was for drug trafficking, and 30 years of which was for aiding and abetting the possession of guns in furtherance of drug trafficking. Although there was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house,” she “was given effectively a life sentence,” and “it is the prosecutor’s charging decision that is largely responsible.” *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

In 2004, Ms. Looney’s husband Donald began traveling to Arizona to purchase methamphetamine and distribute it in Wichita Falls, Texas. LaDonna Harris, a friend of the Looneys, bought methamphetamine from Donald and sold it just across the border in Oklahoma. Harris sold methamphetamine on four occasions to undercover agents in Oklahoma. On the final purchase, the agents asked for a larger quantity (an ounce), and were to pick it up at a parking lot in Wichita Falls. Harris’ ex-husband picked up an ounce of methamphetamine at the Looneys’ home and brought it to the parking lot. Harris and her ex-husband were arrested, and a search of the Looneys’ residence turned up 136 grams of methamphetamine and four guns.

Harris was transported to the Western District of Oklahoma and charged with conspiracy to distribute and distribution of methamphetamine. No mandatory minimum counts were charged and the statutory maximum for each count was 20 years. Harris pled guilty and was sentenced to 37 months on each count to run concurrently. She did not cooperate.

Ms. Looney, however, was prosecuted in the Northern District of Texas. She was initially charged with possession with intent to distribute 50 grams or more of methamphetamine, subject to a 10-year mandatory minimum, and aiding and abetting possession of three firearms in furtherance of that drug trafficking crime, subject to one consecutive five-year mandatory minimum. The prosecutor’s only offer was to plead guilty to both counts, necessitating two mandatory minimum sentences totaling 15 years. Ms. Looney was then 52 years old, with serious health problems, including hypoglycemia and severe swelling and circulatory problems in her legs from a car accident that severed her right ankle. She feared she would die in prison, so decided to go to trial.

The prosecutor then superseded the indictment, adding a count for conspiracy to possess with intent to distribute and a count for aiding and abetting possession of a firearm in furtherance of the conspiracy count, which added a 25-year consecutive mandatory minimum. Ms. Looney was convicted and sentenced to 45 years imprisonment.

The Fifth Circuit voiced its “serious concerns regarding the harshness of Ms. Looney’s sentence,” caused by the prosecutor’s charging decision, but was powerless to do anything about it:

[S]he was given *effectively a life sentence* . . . [b]ecause of the way the indictment was stacked by the prosecutor . . . Although thirty years of her sentence can be attributed to possessing guns in furtherance

of her methamphetamine dealing, *there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house. . . .*

*Although Congress established the mandatory minimum terms of imprisonment, and further provided that the firearms counts must be served consecutively, it is the prosecutor's charging decision that is largely responsible for Ms. Looney's ultimate sentence.* Instead of charging Ms. Looney with two separate § 924(c) offenses, the prosecutor might well have charged her with only one, which would have avoided triggering the twenty-five-year mandatory, consecutive sentence for the second firearm count. The prosecutors also could have chosen to charge Ms. Looney with the drug offenses and requested a two-level enhancement under the Sentencing Guidelines based on the involvement of firearms with the offenses. *Instead, the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence for Ms. Looney. . . .*

*[W]e must observe that the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence. . . . [T]he possibility of abuse is present whenever prosecutors have virtually unlimited charging discretion and Congress has authorized mandatory, consecutive sentences.”*

**OLIVAR MARTINEZ-BLANCO**

Sentence: Mandatory Life

Offense: Conspiracy and attempt to possess with intent to distribute at least five kilograms of cocaine

District: ND Georgia

Year sentenced: 2008

Projected release date: None

Martinez-Blanco argued that the “government filed the two § 851 notices” -- for convictions that occurred when he was 22 and 24 years old, addicted to drugs, and involved small amounts of drugs -- “to coerce him into entering a plea,” that “his codefendants received lesser sentences but were more culpable,” and that “the mandatory life sentence was cruel and unusual.” The sentencing judge agreed that “the mandatory life imprisonment was ‘savage, cruel and unusual,’” but that “its hands were tied” and “it regretted its lack of discretion in determining the sentence.”<sup>8</sup>

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<sup>8</sup> *United States v. Martinez-Blanco*, 351 Fed. Appx. 339, 340 (11th Cir. 2009).

**VA THI NGUYEN**

Sentence: Mandatory minimum 10 years

Offense: Conspiracy to Manufacture and Possess with Intent to Distribute 1000 or more Marijuana Plants, 21 U.S.C. § 841, within 1000 feet of a school, 21 U.S.C. § 860(a)

District: ND Iowa

Year sentenced: 2008

Age at sentencing: 50

Projected release date: 6/3/2016

In imposing the 10-year mandatory minimum in this case, Judge Bennett stated, "I wish I had discretion . . . to give a sentence that I felt was more just in light of the congressionally mandated factors in Title 18, 3553(a), but I'm not able to do that."

Ms. Nguyen was a very simple woman who was a refugee from Vietnam where she had been imprisoned for her Catholic faith. She had a green card and worked legally as a waitress. Ms. Nguyen had a fifth grade education, an 11-year-old son, no criminal history, and no encounters with law enforcement whatsoever. She was hired by a relative to water approximately 400 marijuana plants in his grow operation, and worked for him for approximately five months. He paid her \$2,500 per month, \$1,400 more than the \$1,100 per month she had been earning as a waitress. Her cousin told her the marijuana was for medical purposes and was sold to the hospital.

She was charged in one count of a 21-count indictment against the two owners of the grow operation and eight others with conspiracy to manufacture and possess with intent to distribute 1000 or more marijuana plants, and with doing so within 1,000 feet of a protected location, a school, under 21 U.S.C. § 860. Ms. Nguyen exercised her right to trial, and the jury found her guilty.

The guideline range was 57-71 months, and a ten-year mandatory minimum applied.

The safety valve statute does not list 21 U.S.C. § 860. The Northern District of Iowa is one of a handful of districts in which prosecutors routinely charge a violation under 21 U.S.C. § 860 in order to prevent application of the safety valve for minor non-violent offenders with little or no criminal history like Ms. Nguyen. Otherwise, the safety valve would have applied. The court would have been able to disregard the 10-year mandatory minimum, and the advisory guideline range would have been 46-57 months.

In sentencing Ms. Nguyen to the 10-year mandatory minimum, Judge Bennett said:

*This is one of those unfortunate cases where Congress has selected a mandatory minimum which leaves me with no discretion to apply the Title 18, 3553(a) factors and to try and arrive at a sentence utilizing those factors that is sufficient but not greater than necessary to achieve all of the sentencing purposes. In this case I am forced to . . . give Va Nguyen a ten-year mandatory minimum sentence without reference to the Title 18, 3553(a) factors. . . . I wish I had discretion . . . to give a sentence that I felt was more just in light of the congressionally mandated factors in Title 18, 3553(a), but I'm not able to do that. . . . In my view this sentence is greater than necessary to comply with all of the sentencing purposes and is not sufficient but is unduly harsh and conflicts with the so-called parsimony provision of Title 18, 3553(a) that requires me to give a reasonable sentence that is sufficient but not greater than necessary to comply with all sentencing purposes.*

**NATACHA PIZARRO-CAMPOS**

Sentence: Mandatory minimum 10 years

Offense: Conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine

District: Middle District of Florida

Year sentenced: 2012

Age at sentencing: 24

Projected release date: 5/24/19 (includes credit for over two years served before sentencing)

Ms. Campos was a young mother of two, with a history of mental illness, suicide attempts, psychiatric hospitalizations, and severe drug addiction. A year before she was charged in this case, her 4-month-old daughter had died, after which she again attempted suicide, drank herself to intoxication daily, and used methamphetamine, cocaine and heroin. For a period of months at age 22, Ms. Campos was the girlfriend of a drug dealer, Rafael Hernandez. She began selling methamphetamine for him because he insisted that she work to repay him for paying for her baby's funeral, gave her an unlimited supply of drugs, and physically threatened her.

In sentencing Ms. Campos to a mandatory 10 years in prison, Judge Scriven stated, "*the sentence exceeds what is necessary to address the conduct in this case, but [that] is irrelevant because the Court has no option but to impose [it].*" She sold 406 grams of methamphetamine to a confidential informant on five occasions, an amount requiring a 5-year mandatory minimum and with a guideline range of 70-87 months. But she was charged along with Hernandez and others with conspiracy to distribute 500 grams or more of methamphetamine, subject to a 10-year mandatory minimum.

Ms. Campos would have been eligible for safety valve relief because her offense involved no violence, she played no leadership role, and she provided the government truthful information about her own conduct and much more. But as a result of her grief and substance abuse in the wake of her baby's death, she had 3 criminal history points. She had an altercation with a woman, for which she was charged with battery. She pled no contest, was placed on probation, and adjudication was withheld. Because no contest pleas are counted as convictions under the guidelines even when there is no actual conviction in state court, she received 1 point, and 2 additional points because she attempted but failed to sell methamphetamine for Hernandez on one occasion after she was placed on probation for the battery charge.

The only possibility of relief was to accept the government's deal of pleading to the 10-year mandatory minimum in the hope that he would file a motion for a departure based on substantial assistance in the investigation or prosecution of another. Ms. Campos and her lawyer had good reason to believe the government would file the motion: After she was indicted and should have been taken before a magistrate to have counsel appointed, four government agents interrogated her, without counsel, and she told them everything she knew. When later represented by counsel, she gave a proffer and testified before a grand jury. Believing the government would file the motion, she pled guilty to the conspiracy charge, waiving her defenses and any right to challenge the government's decision whether to file the motion. The government refused, acknowledging that her information was accurate but citing her mental health issues, though it had previously extracted a *Miranda* waiver from her when it interrogated her without counsel.<sup>9</sup> Judge Scriven continued the sentencing hearing twice in an attempt to convince the government to file the motion. The government continued to refuse but suggested that it might file a motion under Rule 35 within a year of sentencing. Ms. Campos received the

<sup>9</sup> Five months after sentencing, the Florida Bar issued an ethics opinion stating that it is unethical for a prosecutor to offer a plea in which the client is required to waive prosecutorial misconduct. Professional Ethics of the Florida Bar Opinion 12-1 (June 22, 2012).

same 120-month sentence as Hernandez, the leader of the conspiracy. The time has now run on the Rule 35 and no motion was filed.

Judge Scriven noted that Ms. Campos “poses less risk” to the public “than any defendant” she had seen who had benefited from a substantial assistance motion, and that she had “seen the government work less hard on a hardened criminal to get a ten-year mandatory minimum than you’re working to get a ten-year mandatory minimum here.” The judge wished to consider Ms. Campos’ mental state, the coercion applied by Hernandez, and the effect of the sentence on Ms. Campos’ children and mother, but could not. In imposing the 120-month mandatory minimum, the judge said that she had had “a long sleepless night,” and “understood the strong arguments in favor of” relief from the mandatory minimum, “but the law just does not provide for it.”

The court made a “stronger-than-normal recommendation that the Bureau of Prisons do all that is practicable” to place her near her seven-year-old son, who lived with her mother in Miami. Although there are two women’s prisons in Florida, Ms. Campos is serving her sentence in West Virginia.

**ROBERT RILEY<sup>10</sup>**

Sentence: Mandatory Life  
 Offense: Conspiracy to distribute LSD  
 District: Southern District of Iowa  
 Year sentenced: 1993  
 Age at sentencing: 40  
 Projected release date: None

Robert Riley followed the Grateful Dead in the 1970s and '80s and sometimes sold drugs to fellow Deadheads. Convicted several times for possession of small amounts of marijuana and amphetamines, he spent short periods in county jails in California and Wisconsin. In 1993, he was convicted in a federal court in Iowa of conspiring to distribute hits of LSD dissolved on pieces of blotter paper.

The weight of the LSD was minuscule, but prosecutors also counted the blotter paper's weight, putting it over a 10-gram threshold that — with two previous convictions for which the prosecutor filed a notice under 21 U.S.C. § 851 — required a mandatory life sentence.

At the sentencing hearing, his lawyer complained that Mr. Riley was being punished more severely than most violent criminals, even murderers. "It's an unfair sentence," Judge Longstaff said as he imposed it. Nine years later, in 2002, he wrote a letter supporting a petition for presidential clemency.

"There was no evidence presented in Mr. Riley's case to indicate that he was a violent offender or would be in the future," the judge wrote. "It gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life."

The petition was not granted. Mr. Riley, now 60, has been behind bars for 19 years.

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<sup>10</sup> This summary is largely excerpted from John Tierney, *Life Without Parole: Four Inmates' Stories*, New York Times, Dec. 12, 2012, [http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html?\\_r=0](http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html?_r=0).

**MELISSA ROSS**

Sentence: Mandatory minimum 20 years  
 Offense: Conspiracy to distribute crack cocaine, no guns or violence  
 District: MD Florida  
 Year sentenced: 2002  
 Age at sentencing: 30  
 Projected release date: 5/19/2019

Judge Conway found the 20-year mandatory minimum for this non-violent minor participant to have been “a gross miscarriage of justice,” a sentence “vindictively” chosen by the prosecutor “because [Ms. Ross] exercised her constitutional right to trial.”

Ms. Ross graduated from a medical assistant program in 1998, then graduated from a practical nursing program in 1999, but failed the state nursing exam twice. She worked as a hair stylist at home, and worked outside the home in a variety of jobs from 1992 to 2001, when she was arrested in this case.

Ms. Ross was the girlfriend of the head of a conspiracy to distribute powder and crack cocaine. Because her role in her boyfriend’s conspiracy was minor, the prosecutor initially offered her a sentence of three years if she would plead guilty to misprision of a felony. Misprision of a felony is a Class E felony, the next step up from a misdemeanor, with a maximum sentence of three years. It is defined as “having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.” 18 U.S.C. § 4.

Ms. Ross did not accept the offer. A few days before trial, the prosecutor filed a notice under 21 U.S.C. § 851 based on Ms. Ross’s 1996 plea of no contest with deferred adjudication in state court to possession of 20 grams of crack, an offense *not* classified as a drug trafficking offense or as a conviction under Florida law, but nonetheless a conviction of a “felony drug offense” under Eleventh Circuit law. On the morning of the first day of trial, the prosecutor offered to withdraw the § 851 if she would plead guilty and cooperate.

Ms. Ross went to trial and was convicted of the conspiracy charge. Judge Conway sentenced her to 292 months under the then-mandatory guidelines.

In January 2009, Judge Conway reduced the sentence to 240 months under the retroactive two-point reduction in the crack guidelines adopted by the Commission in 2008. Because of the 240-month mandatory minimum dictated by the prosecutor’s § 851 filing, the judge could not reduce the sentence to 235 months as would otherwise have been possible, or reduce it to 188 months under the later retroactive reduction under the Fair Sentencing Act.

Ms. Ross then filed a motion to vacate her sentence, contending that her lawyer had failed to accurately advise her regarding whether she should plead guilty to misprision of a felony and the potential sentences she faced if she went to trial.

On July 11, 2013, Judge Conway found that the lawyer’s actions did not amount to deficient performance and denied the motion, but stated as follows:

[I]t is *fundamentally unfair* that Petitioner received a 292-month sentence, later reduced to a 240-month term, when the Government was initially willing to offer Petitioner a three-year sentence in exchange for a guilty plea to a lesser charge, recognizing that Petitioner was a *minor participant* in this conspiracy. The original prosecutor who handled this case from indictment through sentencing, *vindictively filed the*

*§ 851 enhancement because Petitioner asserted her constitutional right to trial by jury. . . . The § 851 enhancement should be used to protect the public from those defendants with a serious history of felony drug offenses, not as a cudgel to force minor participants like Petitioner to accept a plea.*

Nevertheless, the Court . . . was required to impose a minimum mandatory sentence even though Petitioner had just one minor drug conviction wherein she entered a nolo contendere plea to possession of a controlled substance, adjudication was withheld, and Petitioner received a sentence of probation. It is a *gross miscarriage of justice to require such an extreme sentence for a criminal defendant who wished to exercise her right to stand trial.*

Ms. Ross will nonetheless serve this “fundamentally unfair,” “vindictive” sentence to punish her for exercising her constitutional right to trial, at a cost to the taxpayers of approximately \$500,000.

**ALEXANDRA VALLES-AGUIRRE**

Sentence: mandatory minimum 60 months

Offense: importation of .56 kg. of a mixture or substance containing methamphetamine

District: S.D. California

Year sentenced: 2013

Age at sentencing: 23

Ms. Valles-Aguirre pled guilty to importing of .56 kg. methamphetamine, on foot, strapped to her body. She was arrested 5 days before she turned 22, and was a single mother with a toddler at the time. She was diagnosed with depression at age 12, attempted suicide twice, and had stopped taking her medication two months prior to her arrest. She had a history of alcohol and illegal substance abuse. This was her first attempt to smuggle drugs. She was pregnant at the time of her arrest, gave birth while in custody, and has not been able to hold her son since he was born. Couriers similar to Ms. Valles-Aguirre in this district routinely receive sentences of 3 years or less, and commonly 24 months or less.

Ms. Valles-Aguirre was not eligible for safety valve because she had 3 criminal history points: 1 point for possession of paraphernalia, a misdemeanor for which she was granted an 18-month term of diversion, and 2 points for being on warrant status at the time of her arrest for failing to comply with the diversion.

**MICHAEL PATRICK WAHL**

Sentence: Mandatory Minimum 10 years

Offense: Conspiracy to Possess with Intent to Distribute and Manufacture Marijuana

District: MD Florida

Year sentenced: 2013

Age at sentencing: 42

Projected release date: 3/8/2021

Mr. Wahl worked as a dental technician much of his adult life. He was a student at Daytona State College and unemployed at the time of his arrest. He began using marijuana at age 19 and was smoking it daily at the time of his arrest.

Police allegedly received a complaint about marijuana being grown in the apartment shared by Mr. Wahl and his roommate. A confidential source then bought ¼ ounce of marijuana for \$10 from Mr. Wahl. The apartment was searched, turning up 122 plants and 6 ounces of marijuana.

Mr. Wahl pled guilty without a plea agreement. A 60-month mandatory minimum applied, double the guideline range of 30-37 months. The prosecutor doubled it yet again to 120 months by filing an information under 21 U.S.C. § 851 for a prior conviction for a felony drug offense -- sale of 6.3 grams of LSD to a confidential informant 20 years previously when Mr. Wahl was 23 years old, a conviction too old to receive criminal history points under the guidelines. Mr. Wahl's roommate, who pled guilty with a cooperation agreement, received a sentence of 28 months for identical conduct.

Before imposing the 120-month sentence chosen by the prosecutor, Judge Presnell stated:

[U]nlike Mr. Chiu [the prosecutor] -- I have no discretion here. Whether that's good policy or bad is . . . something that I wish Congress would address.

When it comes to these charging decisions, in many cases a line prosecutor like Mr. Chiu has more authority than I do because he's the one that charges these offenses and that drives these mandatory minimums and I'm just a figurehead up here. I'm just a rubber stamp.

I'm not sure why they pay me as much as they do to engage in this fiasco because I can't imagine if you got 20 educated people in a room and looked at this situation that one out of 20 would give this young man 10 years in prison. But that's the policy we have got as dictated by Congress. That's the one that I have to impose, and so that's what I'm going to have to do. I don't like doing it. I don't think it's just or fair or appropriate.

So I wish somebody would talk about changing the law. [O]ver 55 percent of all federal inmates now are there on drug related charges. The vast majority of these people are not violent. They're not engaged in high level drug trafficking. They're people who have addiction problems or engaged in an illegal business, and we have chosen to criminalize that to the extent that we're spending fortunes now warehousing people like Mr. Wahl for growing marijuana plants is patently ridiculous in my view, but I'm not Congress.

**The Senate Committee on the Judiciary**  
**Full Committee Hearing**  
**“Reevaluating the Effectiveness of Federal Mandatory  
Minimum Sentences”**

September 18, 2013  
10:00 am  
Dirksen Senate Office Bldg  
Room 226

Written Testimony of Sherrie A. Armstrong and Thomas C. Means  
Attorneys, Crowell & Moring LLP  
*Pro Bono* Counsel for Stephanie Yvette George  
Washington, D.C.

\* \* \* \*

Our Founding Fathers believed that “[i]t is impossible for any general law to foresee and provide for all cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”<sup>1</sup> Mandatory minimum sentences frequently cause such very great injustice by preventing judges from exercising their discretion under the circumstances of each case to impose sentences that are tailored to fit the crime. As the late Chief Justice William Rehnquist once commented, by taking away that flexibility, mandatory minimum sentences are “a good example of the law of unintended consequences.”<sup>2</sup>

Stephanie Yvette George is just one example of the frequently harsh and unjustifiable application of mandatory minimum sentences to low-level, non-violent drug offenders. Stephanie is one of the more than 219,000 federal inmates that Attorney General Holder recently acknowledged are behind bars and is one of the half of that number that is serving time for a drug-related crime. Stephanie’s case is a particularly poignant illustration of the unjust

consequences that can result from a mandatory minimum sentencing regime. Stephanie is serving a life sentence for her minor involvement in a drug conspiracy, a sentence with which her sentencing judge disagreed but which he had no choice to impose under the mandatory provisions of the Controlled Substances Act.<sup>3</sup>

#### **Stephanie George's Case**

Stephanie George received a life sentence almost 16 years ago based on her two prior state drug convictions involving a total of approximately \$160 of crack cocaine and her low-level, non-violent involvement in her former boyfriend's drug activities, for which the large amount of drugs and money possessed by him were attributed to Stephanie.

Although Stephanie once faced a promising future, even managing to graduate from high school and obtain certification as a hairdresser as a teenage single mother, Stephanie soon entered into the first of a series of relationships with men who sold crack cocaine. She had two more children, both of whom were fathered by men who sold drugs and who were not present in their children's lives.

Stephanie did not make enough money as a hairdresser to support her children. As she has acknowledged, "I was a 26 yr. old mother struggling to make ends meet who made the most ill fated decision of my life to involve myself with individuals that sold drugs & [with] a lifestyle unhealthy for everyone . . . involved."<sup>4</sup> She took messages for her boyfriends and handled their money and drugs. They also used her home to store drugs, believing that police were less likely to target a mother with children.

Stephanie George did not, however, go unnoticed or unpunished. During a two month period at the end of 1993, Stephanie was charged with state felony drug offenses for possessing a

bag with cocaine residue and for selling a small amount of powder and crack cocaine to a confidential informant totaling approximately \$160. She was charged with multiple felonies and pleaded guilty to those offenses. Stephanie was sentenced to a total of only nine months in state custody for those crimes, to run concurrent with a year's probation, which she served in county jail with work release.

Unfortunately, after her release, Stephanie – through her relationship with a former boyfriend, the father of her middle child, Michael Dickey – became entangled in the drug conspiracy for which she is serving her life sentence. Dickey was an admitted drug dealer who conspired to control the Florida Panhandle drug trade. He stored money and drugs at Stephanie's house, where officers discovered Stephanie doing someone's hair in the kitchen. Dickey was in the living room with marijuana, a large amount of cash on his person, and keys to a safe. In the safe in the attic, officers found approximately one-half of a kilogram of cocaine and \$13,710 in cash.

Afraid of a lifetime away from her children, and initially reluctant to take responsibility for her crime, Stephanie elected to go to trial. She was found guilty based on the testimony of cooperating witnesses, most of whom had been charged with the same drug conspiracy. Their testimony established that Stephanie was (in the words of her sentencing judge), "a girlfriend and bag holder and money holder."<sup>5</sup> Notably, Stephanie George is not alone in choosing to go to trial rather than plead guilty when faced with a mandatory minimum sentence. The Sentencing Commission reported that, in 2010, the longer the mandatory minimum penalty an offender faced, the less likely that that offender was to plead guilty.<sup>6</sup>

### Stephanie's Life Sentence

Stephanie George exemplifies what some have called the “girlfriend problem,” wherein women become entangled in their significant others’ drug activities for which, ironically, they receive harsher sentences because of their lack of knowledge and information about the drug conspiracy with which they could otherwise have bargained for a reduced sentence.<sup>7</sup> Stephanie received the longest sentence by far of any of her co-defendants: life in prison.

As Stephanie George discovered, mandatory minimum provisions are triggered by a number of aggravating factors “without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower sentence.”<sup>8</sup> For those sentences to be fair or reasonable in every case, “the factors triggering the mandatory minimum penalty must always warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender.”<sup>9</sup> Stephanie’s circumstances decidedly did not warrant a life sentence. In fact, Stephanie’s sentencing judge, the Honorable Roger Vinson of the U.S. District Court for the Northern District of Florida, repeatedly opined that she did not deserve a life sentence, but the mandatory minimum regime gave him no other option. Although he believed that “[t]here’s no question Ms. George deserves to be punished,” he stated that “the thing that troubles me about this case and Ms. George, is that I don’t think she warrants a life sentence.”<sup>10</sup> As Judge Vinson explained,

Well, I have examined the case law as carefully as I can, Ms. George, and it appears that you are facing a mandatory life sentence and I don’t really have any choice in the matter, as has been explained to you. If there was some way I could find to give you something less than life I sure would do it, but I can’t. Unfortunately, my hands are tied.

\* \* \*

... **I wish I had another alternative.**<sup>11</sup>

On May 5, 1997, Judge Vinson sentenced Stephanie George to life in prison under a mandatory minimum provision that imposed a life sentence based on the amount of drugs attributed to the conspiracy and her prior state felony drug convictions.<sup>12</sup> Stephanie's case is striking because she received a life sentence for her relatively minor involvement in the crime and after serving only nine months in county jail, with work release. And as Judge Vinson made it clear: "but for the statutory enhancement I would not impose a life sentence . . . in my judgment [your crime] does not warrant a life sentence. Nevertheless, I am required by law to impose such a sentence . . . ."<sup>13</sup>

As Chairman Patrick Leahy has described Stephanie, "she was simply caught up in the dragnet because her boyfriend dealt drugs, and yet, she has been sentenced to life in prison."<sup>14</sup> Shockingly, although Stephanie received a life sentence, Dickey, the drug kingpin and the owner of the money and the drugs found in Stephanie's home, was released from prison **6 years ago**, in 2007. Similarly, of the admitted drug dealers who testified against Stephanie, all but one have been released and the remaining incarcerated co-conspirator is due to be released soon.

#### **Stephanie's Clemency Petition**

Stephanie has already served almost 16 years of her life sentence. The hapless 26 year-old single mother of three is now a 43 year-old grandmother. The structure of the mandatory minimum laws in this country is such that Stephanie has **no hope** of release from prison during her lifetime but through the possible exercise of the President's pardon power under Article II, Section 2 of the United States Constitution.

In March 2012, Stephanie petitioned President Obama for clemency, seeking commutation of her sentence to time served. Stephanie George deserves clemency. She has accepted responsibility for her crime and has been rehabilitated during her time in prison through faith, counseling, education, and hard work.

In addition to Stephanie's personal growth and transformation, the disproportionate and unduly severe nature of her life sentence warrants clemency. Congress considers a sentence of ten years or more to be appropriate for drug kingpins, "the masterminds who are really running these operations."<sup>15</sup> But Stephanie George was not a kingpin; she was a non-violent, low-level offender who was mixed up with the wrong kind of man, the very circumstances under which many women like Stephanie have become peripherally involved in the drug trafficking activities of those with whom they have personal relationships.<sup>16</sup>

Stephanie's petition for commutation of her sentence was supported by her family and members of her community who are willing to provide her with employment and other support. Even Judge Vinson has since expressed his support for clemency for Stephanie. But Stephanie still sits in federal prison, hoping, praying, and waiting for a favorable decision on her clemency petition, from a President who has many, many more urgent matters commanding his attention.

#### **Contemplated Reforms**

At the August 12, 2013, Annual Meeting of the American Bar Association's House of Delegates, Attorney General Holder announced a significant change in the Department of Justice's charging policy: low-level, non-violent drug offenders will no longer be charged with offenses like Stephanie's for which draconian mandatory minimum sentences attach.<sup>17</sup> As the Attorney General also recognized, there is a growing groundswell of support for similar (and more permanent) reforms in Congress, with proposed legislation to reform this country's

mandatory sentences sponsored by Senators Durbin, Leahy, Lee, and Paul. We commend those Senators for their efforts, as such legislative reform offers enormous promise for the Stephanie Georges of the future who may become ensnared in their romantic partners' drug activities. If those reforms are enacted, those women would be spared having to pay for their foolish youthful mistakes by spending the rest of their lives behind bars. As Stephanie has explained, as a "struggling young mother," she made terrible mistakes for which she has had to pay with "the loss of everything."<sup>18</sup>

But those laudable changes, while necessary to fix our broken sentencing system, will come too late to help Stephanie George herself. Stephanie, a vibrant and intelligent woman, remains in a Florida prison, working hard at her prison job, taking business courses, and trying to keep busy with knitting and exercise. She receives occasional visits from her family, but because trips to prison are expensive for them, primarily keeps up with her mother, sister, children, and grandchildren through frequent calls home.

She waits, and she hopes, perhaps in vain.

Stephanie will die in prison if her petition for clemency is not granted. Stephanie George is just one of many in this country who have suffered from an unjust mandatory minimum sentencing regime and who will continue to suffer needlessly unless reforms are enacted. We urge the Congress to exercise its legislative power to prevent such future harms, as we continue to urge the President to exercise his unique Executive Pardon Power to commute the life sentence of Stephanie George to time served, so she can be returned to her children and her new grandchildren, a free woman again after 16 years of imprisonment.

Thank you for the opportunity to present this testimony. We stand ready to provide any assistance to the Committee as may be requested of us.

<sup>1</sup> Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 The Founder's Constitution 17 (R. Kurland & R. Lerner ed. 1987).

<sup>2</sup> William H. Rehnquist, Luncheon Address (June 18, 1993), *reprinted in* Barbara S. Vincent & Paul J. Hofer, "The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings," Fed. Jud. Ctr. (1994).

<sup>3</sup> See 21 U.S.C. § 841(b)(1)(A)(iii).

<sup>4</sup> Stephanie George's Supplemental Statement in Support of her Petition for Clemency.

<sup>5</sup> Case No. 3:96-cr-78, George Sentencing Tr. at 13 (N.D. Fla. May 5, 1997).

<sup>6</sup> U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at 155-56 (Oct. 2011).

<sup>7</sup> See generally Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 Univ. of St. Thomas L.J. 462 (2006).

<sup>8</sup> U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, *supra*, at 346.

<sup>9</sup> *Id.*

<sup>10</sup> George Sentencing Tr. at 13.

<sup>11</sup> *Id.* at 11-12 (emphasis added).

<sup>12</sup> 21 U.S.C. § 841(b)(1)(A)(iii).

<sup>13</sup> George Sentencing Tr. at 13.

<sup>14</sup> See Senate Judiciary Committee Hearing Documents and Transcripts: 112th Congress, Questions for the Record-Jeffrey Sedgwick, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/080112QFRs-Sedgwick.pdf> (Question 2 posed by Sen. Leahy to Jeffrey Sedgwick).

<sup>15</sup> U.S. Sentencing Commission, Report to Congress, Cocaine and Federal Sentencing Policy, at 6-7 (May 2002) (internal quotation marks omitted) (quoting 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1986 (Remarks by Sen. Byrd)). Congress envisioned a ten-year sentence for drug kingpins who were first time offenders and a five-year sentence for first-time "middle level dealers." *Id.*

<sup>16</sup> See Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 Santa Clara L. Rev. 285, 311 & n.139 (2007); Lenora Lapidus et al., *Caught in the Net: The Impact of Drug Policies on Women and Families*, Am. Civil Liberties Union, Break the Chains, & the Brennan Ctr. for Justice, at 1, 16-18 (Mar. 15, 2005); Joe Rigert, *Drug Sentences Often Stacked Against Women*, Star Tribune, Dec. 14, 1997 at 01A.

<sup>17</sup> See Attorney General's Remarks, available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> (last visited Sept. 15, 2013).

<sup>18</sup> Stephanie George's Supplemental Statement in Support of her Petition for Clemency.



**Statement of the Immigrant Justice Network**  
**Submitted to the**  
**Committee on the Judiciary of the United States Senate**  
**Hearing on September 18, 2013**  
**“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”**

The Immigrant Justice Network (IJN), submits this statement to the Senate Committee on the Judiciary. IJN is a collaboration between the Immigrant Defense Project in New York, the Immigrant Legal Resource Center in San Francisco, and the National Immigration Project in Boston that works towards the elimination of unjust penalties for immigrants entangled in the criminal justice system and to end the criminalization of immigrant communities. Our organizations have been working on the intersection between the immigration and criminal justice systems for over twenty years.

IJN applauds the Committee for holding this hearing on the matter of federal mandatory minimum sentences. We strongly agree with Attorney General Eric Holder’s remarks to the American Bar Association on August 12, 2013, in which he recognized that high rates of incarceration and harsh mandatory minimum policies not only create unsustainable rates of incarceration in this country, but are also wasteful, ineffective, unfair, exacerbate poverty, and insecurity for families and weaken communities. Like the general U.S. prison population, immigration detention has ballooned to unsustainable and unmanageable proportions due to harsh mandatory minimum deportation laws in our immigration system. These laws have similarly resulted in the separation of families and communities, unfair consequences for immigrants, and exorbitant fiscal costs. For this reason, we ask the Committee to consider mandatory detention and deportation laws in its review of federal minimum sentencing laws.

**Disproportionate consequences of deportation as a “mandatory minimum”**

Attorney General Holder has stated that judges should have more discretion not to apply draconian and excessive mandatory minimum sentences to drug offenders, arguing that “it is important to ensure a sentence length commensurate with the crime committed.”<sup>1</sup> In the

<sup>1</sup>U.S. Department of Justice. *Smart on Crime: Reforming the Criminal Justice System for the 21<sup>st</sup> Century*, (Aug. 2013).

immigration system, deportation is a “mandatory minimum” life sentence of permanent exile for thousands of lawful permanent residents, asylees, and undocumented people who have been convicted of certain crimes. Drug convictions alone have resulted in mandatory deportation of many immigrants who have long resided in the United States. According to Immigration Customs Enforcement (ICE), at thirty percent, drug-related charges were the most common grounds for criminal deportation in 2009.<sup>2</sup>

Many of the laws that impose mandatory detention and deportation stem from harsh and punitive provisions that Congress added to our immigration laws in 1996. The most serious of these is imposed on individuals who have committed offenses classified as “aggravated felonies.” An aggravated felony is a term that was first created by the 1988 Anti-Drug Abuse Act to include murder, rape, drug trafficking, and trafficking in firearms or destructive devices. Congress expanded this term numerous times over the years, and most extensively in 1996. The aggravated felony category now includes more than fifty classes of offenses, some of which are neither “aggravated” nor a “felony” (for example, the sale of \$10 worth of marijuana).

Over the years, attempts to toughen our immigration laws took away, in many cases, the ability of immigration law enforcement and judges to consider the individual circumstances of a person's case. Few other legal systems, criminal or civil, are as rigid or mechanical as our current immigration laws. An offense that triggers deportation lasts forever, even if it was a mistake that occurred years ago. A conviction for an offense classified as an “aggravated felony” carries the most severe penalties under our immigration laws, including mandatory detention and deportation of lawful permanent residents. These rigid and harsh criminal deportation policies result in thousands of fathers and mothers separated from their citizen children. In these cases, as well as many others involving controlled substances, judges have no power to stop many deportations even if an individual clearly poses no risk to society and may be a U.S. veteran, a small business owner, a role model in the community or came to the U.S. as a very young child or as a refugee.

**Lundy Khoy** is an example of the disproportionate immigration consequences that drug convictions can impose on immigrants. She was born in a refugee camp in Thailand after her parents fled genocide in Cambodia. When Lundy was one year old, she and her family came to the U.S. as refugees and were granted legal permanent residence. In 2000, when Lundy was nineteen and a freshman in college, a police officer stopped her and asked if she had any drugs. Lundy truthfully told the officer that she had tabs of ecstasy, and he arrested her for possession with intent to distribute. Following the advice of her lawyer, Lundy pled guilty. She served three months of her sentence and was released by a judge for good behavior. Lundy completed four years of supervised probation without missing an appointment or failing a drug test. During

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<sup>2</sup> Department of Homeland Security, Office of Immigration Statistics Policy Directorate. *Annual Report of Immigration Enforcement Actions: 2009*. (Aug. 2010)

that time, Lundy worked hard to get her life back on track and make up for lost time. She moved back with her parents, got a job, and enrolled in a community college.

Unfortunately, because Lundy's drug conviction is one of dozens of offenses classified as an "aggravated felony," she is automatically subject to mandatory detention and deportation. In 2004, Lundy arrived at a regularly scheduled probation appointment to show off her college report card. Excited to finish her probation period, Lundy was shocked when she was immediately detained by immigration Customs Enforcement (ICE). She was taken to Hampton prison in Southern Virginia without a warning and imprisoned for almost nine months. After being released, Lundy continued to work to complete her Bachelor's Degree in Communications. She now works full-time as an enrollment advisor at the University of Phoenix, and is involved in her community by volunteering in local charities, such as Habitat for Humanity and March of Dimes. Despite Lundy's individual circumstances and exemplary behavior, in April 2012, Lundy was told that she would be placed in the Intensive Supervision Appearance Program (ISAP) and recommended for immediate deportation. Meanwhile, Lundy's family are devastated about her imminent deportation to Cambodia, a country she has never seen. She has no family members in Cambodia; everyone live in the United States.

#### **Effects of deportation on families and communities**

The DOJ recognizes that high rates of incarceration and disproportionate punishment exacerbate a cycle of poverty and criminalization by breaking apart families, destabilizing communities, and decreasing economic opportunity and earnings. According to federal data released to the Applied Research Center through a FOIA request, in the first six months of 2011 alone, more than 46,000 parents of citizen children were deported, leaving many in foster care or Child Protective Services. Thousands of other children must say goodbye to one parent forever, leaving another to raise them alone. Deportation has had a devastating impact on families. Take for example the story of Howard.

**Howard Bailey** came to the United States in 1989 at the age of seventeen as a lawful permanent resident, with his mother who is a U.S. citizen. He joined the Navy after graduating high school and was soon deployed to the Persian Gulf to serve in Desert Storm. In 1995, soon after he returned home after service, some acquaintances sent Howard a package containing marijuana. Federal agents had been tracking the package and arrested Howard. Howard had never before had any interaction with the criminal justice system. His lawyer recommended that he take the plea and serve fifteen months.

Upon his release, Howard was determined to rebuild his life. He saved up money to start a business. He first owned and ran a small restaurant with two employees and later started a trucking business, employing up to five drivers. Through hard work, Howard was able to buy

two homes. His wife and children were always the center of his life. He also became a mentor for other returning veterans.

In 2005, Howard applied for citizenship. As part of the application process, he honestly reported his conviction from ten years earlier and supplied all the records related to the case. After five years of delays, Howard's application was denied. Immigration officers handcuffed him in front of his wife and children and he was placed in deportation proceedings. Howard spent nearly two years in immigration jails far from his home. He tried to fight his case and ask a judge to consider his individual circumstances: an armed service veteran who defended the United States, a lawful permanent resident who owned a business and employed several people, a husband with a wife and two children who were dependent on him. But because, under current law, a judge has no ability to consider these circumstances, the judge had to mandate his detention and deportation based on Howard's old criminal conviction from more than fifteen years before.

Howard was deported in May 2012 and is now in Jamaica, a country he hasn't seen in twenty-four years. He can no longer support his family and lives in constant fear for his own life, as deportees are stigmatized in Jamaica and targets of violence. At the same time, his family in the United States is deteriorating. His sixteen year-old daughter has gone from being an honor roll student to barely passing and has attempted suicide. His eighteen year-old son is struggling and starting to get into trouble. His home is in foreclosure, and his business has shut down.

Howard's case is not an anomaly. Noncitizens, including Lawful Permanent Residents who are U.S. veterans and refugees, serve their time in the criminal justice system and start their lives over only to find that they will be automatically deported years later. Despite evidence of rehabilitation, positive contributions to the community, or the potential impact of a deportation on parents, spouses, and dependents, current policies make deportation mandatory in many cases.

### **High Cost of Detention and Deportation**

Attorney General Holder recognizes that mass incarceration is "ineffective and unsustainable," costing around \$80 billion dollars per year, and that it is "disruptive to families" who may lose the income of one or both parents for months or years. Last year, the U.S. government detained about 400,000 people in immigration custody, a vast network of federal, county, and city jails and prisons, many of which are privately owned and operated, at the cost of about \$164 per person / per day. The Department of Homeland Security should continue to expand community-based alternative approaches to detention, which are far less costly and less disruptive to families. Deportation is also extremely costly to U.S. taxpayers and the U.S. economy. According to the National Immigration Forum, the current administration has deported over one million people at a cost of about \$23,000 per person, and the Migration Policy Institute has found that the total cost of immigration policing, apprehension, detention, and deportation is larger than

all other federal criminal law enforcement programs combined. The extremely high economic and social costs of permanently separating thousands of families every year is harder to measure.

**Conclusion**

We urge the Committee that in undertaking the important task of reevaluating mandatory minimum laws, it seriously considers reforming mandatory detention and deportation laws, and consider whether these laws truly help serve the interest of American taxpayers, help to build strong and safe American communities, and reflect American principles of justice and fairness.

September 17, 2013

VIA ELECTRONIC MAIL

The Honorable Richard J. "Dick" Durbin  
United States Senate  
711 Hart Senate Office Building  
Washington, DC 20510-1304

The Honorable Michael S. "Mike" Lee  
United States Senate  
316 Hart Senate Office Building  
Washington, DC 20510-4404

RE: The Smarter Sentencing Act

Dear Senators Durbin and Lee:

As former judges, prosecutors and law enforcement officials, we write to express our support for the reforms to federal sentencing contained in the Smarter Sentencing Act (S.1410). Your bill represents an important step in promoting public safety and addressing the consequences of federal mandatory minimum sentences on the explosive growth in incarceration costs and the fairness of sentences for nonviolent drug offenders.

Law enforcement has made great progress in curbing violent crime. At the federal level, we need to address the parts of our sentencing policies that are not working. Over the past three decades, what we spend on federal incarceration has increased by more than 1100 percent. Despite this massive investment, federal prisons are nearly 40 percent over capacity, with the ratio of prisoners to prison guards rising. As a nation, we are expending enormous amounts of money and still failing to keep pace with the growing prison population, with drug offenders comprising nearly half of this population.

In addition to being fiscally imprudent, maintaining the status quo in federal sentencing policy threatens public safety. Overcrowding threatens the safety of prison guards and inmates in federal prisons. Perhaps most important, spending on incarceration in this economy has started to jeopardize funding for some of our most important priorities, like crime prevention, law enforcement, and reducing recidivism. This includes possible reductions in the number of federal investigators and prosecutors. The Bureau of Prisons currently accounts for about 25 percent of the Department of Justice's budget and this is projected to increase. With more resources going to incarcerate nonviolent offenders, and fewer resources spent to investigate and prosecute violent crimes and support state and local law enforcement efforts, public safety will be at risk. Law enforcement will continue to maximize its resources to keep our communities safe. But Congress created our sentencing scheme and needs to act to help solve these problems.

The Smarter Sentencing Act reflects these concerns and embodies measured, bipartisan reforms. Its modest expansion of the current "safety valve," coupled with the reduction of some mandatory minimums for non-violent drug offenses—while maintaining statutory maximums—allows courts to make individualized assessments in nonviolent drug cases. This maintains consistency in sentencing for drug-related offenses, but allows for discretion to give less lengthy sentences, where appropriate. This approach is a step toward controlling the growth of incarceration costs, while maintaining public safety

and helping to ensure that prison sentences are appropriate for each offender. The bill does not repeal any mandatory minimums or affect the sentences for any violent offenses, but helps focus limited resources on the most serious offenders.

The bill also promotes fairness and consistency by acknowledging the numerous federal prisoners who are serving sentences imposed prior to the Fair Sentencing Act of 2010's reduction of the crack/powder cocaine sentencing disparity. The Smarter Sentencing Act would allow certain inmates sentenced under the old regime to petition courts and prosecutors for a review of their sentences and possible sentence reductions under current law. This not only addresses what is now widely recognized as an unjust disparity in sentences, but estimates also show that it could save more than \$1 billion in incarceration costs.

We appreciate your leadership in seeking bipartisan solutions to address the widely acknowledged problems with over-incarceration, to which mandatory minimum sentences have contributed. We are pleased to extend our help as you work with your colleagues in both the Senate and House to pursue reform in federal sentencing.

*Signatories as of September 17, 2013:*

**Lee Altschuler**

Former Chief Assistant United States Attorney, Silicon Valley Division, Northern District of California; former Assistant United States Attorney, Northern District of California.

**The Honorable David H. Coar (Ret.)**

Former Judge, United States District Court, Northern District of Illinois.

**Vincent J. Connelly**

Former Assistant United States Attorney, Northern District of Illinois.

**Richard S. Berne**

Former Assistant United States Attorney, Eastern District of New York; former Assistant United States Attorney, Northern District of California.

**Jim Brosnahan**

Former Assistant United States Attorney, District of Arizona; former Assistant United States Attorney, District of Northern California.

**A. Bates Butler III**

Former United States Attorney, District of Arizona; former First Assistant United States Attorney, District of Arizona.

**Arthur L. Burnett, Sr.**

Former Magistrate Judge, United States District Court, District of Columbia; former Assistant United States Attorney, District of Columbia; former Trial Attorney, United States Department of Justice, Criminal Division.

**Robert J. Del Tufo**

Former United States Attorney, District of New Jersey; former New Jersey State Attorney General.

**Richard A. Devine**

Former State's Attorney, Cook County, IL.

**James P. Fieweger**

Former Assistant United States Attorney, Northern District of Illinois.

**Mark A. Flessner**

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**Stephen G. Frye**

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**John N. Gallo**

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**Matthias A. Lydon**

Former Assistant United States Attorney, Northern District of Illinois.

**John Martin**

Former United States District Judge, Southern District of New York; former United States Attorney, Southern District of New York.

**A. Melvin McDonald**

Former United States Attorney, District of Arizona.

**James D. Montgomery, Sr.**

Former Assistant United States Attorney, Northern District of Illinois.

**Nan R. Nolan**

Former United States Magistrate Judge, Northern District of Illinois.

**Kirk Bowden Obear,**

Former Special Assistant United States Attorney, Southern District of Illinois; former Chief, Military Justice, United States Air Force.

**Kate Pflaumer**

Former United States Attorney, West District of Washington.

**Mark Osler**

Former Assistant United States Attorney, Eastern District of Michigan.

**A. John Pappalardo**

Former United States Attorney, District of Massachusetts; former Assistant United States Attorney, District of Massachusetts.

**Elliot R. Peters**

Former Assistant United States Attorney, Southern District of New York.

**Ernest D. Preate , Jr.**

Former Attorney General of Pennsylvania; former District Attorney, Lackawanna County, PA.

**Dom J. Rizzi**

Former Judge, Appellate Court of Illinois, First District; former Judge, Circuit Court of Cook County.

**Mark L. Rotert**

Former Assistant United State Attorney, Northern District of Illinois.

**Stephen H. Sachs**

Former United States Attorney, District of Maryland; former Assistant United States Attorney, District of Maryland.

**Ronald S. Safer**

Former Assistant United States Attorney, Northern District of Illinois.

**Stephen Saltzburg**

Former Ex-Officio Member, United States Sentencing Commission; former Deputy Assistant Attorney General, Criminal Division, United States Department of Justice; former Associate Counsel, Office of Independent Counsel for Iran/Contra.

**Donald E. Santarelli**

Former Administrator, Law Enforcement Assistance Administration, United States Department of Justice; former Associate Deputy Attorney General, United States Department of Justice.

**John Schmidt**

Former Associate Attorney, United States Department of Justice

**William S. Sessions**

Former Director, Federal Bureau of Investigation; former Judge, United States District Court, Western District of Texas, Chief Judge (1980-1987); former United States Attorney, Western District of Texas.

**Alan Silber**

Former Assistant Prosecutor, Essex County, NJ; Chief Economic Crimes Unit (1970-73).

**Charles B. Sklarsky**

Former Assistant United States Attorney, Northern District of Illinois; former Assistant State's Attorney, Cook County, Illinois.

**Juliet S. Sorensen**

Former Assistant United States Attorney, Northern District of Illinois.

**Neal R. Sonnett**

Former Assistant United States Attorney, Chief of Criminal Division, Southern District of Florida.

**David J. Stetler**

Former Assistant United States Attorney, Northern District of Illinois.

**Stanley A. Twardy, Jr.**

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**Keith Uhl**

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**M. David Weisman**

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**Warren D. Wolfson**

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**Sheldon T. Zenner**

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**David M. Zlotnick**

Former Assistant United States Attorney, District of Columbia.

**Sheldon T. Zenner**

Former Assistant United States Attorney, Northern District of Illinois.



## AMERICAN CORRECTIONAL ASSOCIATION

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### PUBLIC CORRECTIONAL POLICY ON SENTENCING

1994-1

#### Introduction:

Changes in U.S. sentencing policies have been a major cause of an unprecedented increase in the prison population. The sentencing process should attempt to control crime as much as possible, at the lowest cost to taxpayers and in the least restrictive environment consistent with public safety. There should be a balanced consideration of all sentencing objectives.

Sentencing policy today takes many forms. In some venues, legislatures have taken authority over that policy, leaving little discretion in the sentencing of individual offenders to the judiciary. Under these circumstances "sentencing" discretion is shifted to the prosecutors and takes the form of plea bargaining and charge selection. In others, judges and parole boards retain wide discretion on a case-by-case basis. In still others, sentencing commissions have been given responsibility for defining how offenders are punished. Regardless of the form, sentencing policy directly affects what the correctional practitioner does on a daily basis, and to the extent that this policy fails in fairness and rationality, then correctional practice is adversely affected.

As implementors of sentencing policies, corrections professionals have a unique vantage point from which to provide input on their effectiveness and consequences. If corrections does not voice its collective experience on this matter, then sentencing practices nationwide will fail to be as soundly based as they should be in this important public policy area.

#### Policy Statement:

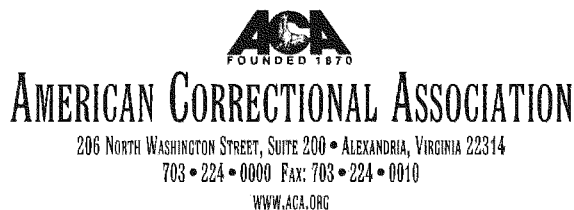
The American Correctional Association actively promotes the development of sentencing policies that should:

- A. Be based on the principle of proportionality. The sentence imposed should be commensurate with the seriousness of the crime and the harm done;
- B. Be impartial with regard to race, ethnicity and economic status as to the discretion exercised in sentencing;

- C. Include a broad range of options for custody, supervision and rehabilitation of offenders;
- D. Be purpose-driven. Policies must be based on clearly articulated purposes. They should be grounded in knowledge of the relative effectiveness of the various sanctions imposed in attempts to achieve these purposes;
- E. Encourage the evaluation of sentencing policy on an ongoing basis. The various sanctions should be monitored to determine their relative effectiveness based on the purpose(s) they are intended to have. Likewise, monitoring should take place to ensure that the sanctions are not applied based on race, ethnicity or economic status;
- F. Recognize that the criminal sentence must be based on multiple criteria, including the harm done to the victim, past criminal history, the need to protect the public and the opportunity to provide programs for offenders as a means of reducing the risk for future crime;
- G. Provide the framework to guide and control discretion according to established criteria and within appropriate limits and allow for recognition of individual needs;
- H. Have as a major purpose restorative justice — righting the harm done to the victim and the community. The restorative focus should be both process and substantively oriented. The victim or his or her representative should be included in the “justice” process. The sentencing procedure should address the needs of the victim, including his or her need to be heard and, as much as possible, to be and feel restored to whole again;
- I. Promote the use of community-based programs whenever consistent with public safety; and
- J. Be linked to the resources needed to implement the policy. The consequential cost of various sanctions should be assessed. Sentencing policy should not be enacted without the benefit of a fiscal-impact analysis. Resource allocations should be linked to sentencing policy so as to ensure adequate funding of all sanctions, including total confinement and the broad range of intermediate sanction and community-based programs needed to implement those policies.

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This Public Correctional Policy was unanimously ratified by the American Correctional Association Delegate Assembly at the Congress of Correction in St. Louis, Aug. 10, 1994. It was reviewed and amended Jan. 20, 1999, at the Winter Conference in Nashville, Tenn. It was reviewed and amended at the Winter Conference in New Orleans, Jan. 14, 2004. It was reviewed and amended at the Winter Conference in Kissimmee, Fla., Jan. 14, 2009.



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**SUPPORTING THE ELIMINATION OF MANDATORY MINIMUM SENTENCES  
AND THE ENACTMENT OF "SAFETY VALVE" LEGISLATION**

**WHEREAS**, mandatory minimum sentences are a major contributor to prison and jail crowding and corrections budget growth; and

**WHEREAS**, a "safety valve" is a statutory provision, enacted by a legislature, that permits judges to sentence offenders below an applicable mandatory minimum sentence if certain conditions are met or certain facts and circumstances warrant such a sentence; and

**WHEREAS**, the Justice Safety Valve Act would create a "safety valve" provision that would apply to all federal mandatory minimum sentences and permit judges to sentence below the mandatory minimum term if doing so would not endanger the public and other facts and circumstances justified it; and

**WHEREAS**, model legislative language for state legislatures has been proposed to create a "safety valve" provision at the state level that would apply to many mandatory minimum sentences and permit judges to sentence below the mandatory minimum term if doing so would not endanger the public and certain other qualifications were met; and

**WHEREAS**, the use of statutory "safety valves" helps to reduce both prison and jail crowding and corrections costs, in turn making prisons safer and more rehabilitative, preserving limited resources for the most violent and dangerous offenders, and ensuring continued funding of other important law enforcement and crime reduction programs; and now

**THEREFORE BE IT RESOLVED**, the American Correctional Association supports the elimination of mandatory minimum sentencing policies; and now

**THEREFORE BE IT FURTHER RESOLVED** that the American Correctional Association supports enactment by state legislatures and the U.S. Congress of "safety valve" provisions.



## Minnesota Second Chance Coalition

The Honorable Al Franken  
 United States Senate  
 309 Hart Senate Office Building  
 Washington, D.C. 20510-2304

Senator Franken,

We ask that you support S. 619, the Justice Safety Valve Act, introduced by Senator Rand Paul, and S. 1410, the Smarter Sentencing Act, introduced by Senators Durbin and Lee.

In Minnesota we have a long tradition of limiting the use of incarceration. We know that reserving incarceration for the most serious and violent offenders is cost-effective, produces fairer punishments, and keeps the public safe. We have the second lowest incarceration rate in the country,<sup>1</sup> and also one of the lowest rates of violent crime.<sup>2</sup>

But even in Minnesota our rates of incarceration and conviction have greatly increased over recent decades, we feel the impact of the federal system, and we've made it increasingly difficult for people to be successful once they have been in the criminal justice system. This is why a large and diverse group of Minnesota organizations, over 50, have come together to form the Minnesota Second Chance Coalition to support positive reforms in Minnesota's criminal justice system; this legislation makes similar reforms at the federal level.

Thirty years of using federal mandatory minimum sentencing laws has created serious problems for our criminal justice system, taxpayers, and communities. Our current mandatory minimum laws have locked up hundreds of thousands of nonviolent, low-level, and drug-addicted offenders over the last three decades. These laws treat small-fry and nonviolent offenders as if they were major kingpins or killers. Defendants, and the American public, expect that judges will get to consider all the facts and circumstances of these cases and craft a punishment that fits the crime. They, and we, are shocked to learn that the sentence has already been chosen, and the judge has no say in the matter. The injustice and arbitrariness of mandatory minimum sentences breeds cynicism and erodes public trust in the criminal justice system. The solution is to stop requiring courts to give out so many one-size-fits-all mandatory minimum sentences to so many nonviolent offenders.

Mandy Martinson, the niece and goddaughter of several of your constituents, is but one of many examples of why we need mandatory minimum sentencing reform. Ms. Martinson is serving a 15-year mandatory minimum sentence at the federal prison in Waseca, Minnesota for her first and only criminal conviction. Ms. Martinson became addicted to methamphetamine in the midst of coping with her exit from an abusive dating relationship. Unwisely, she then began dating a different man who was kind to her and provided her with some of the drugs he also sold to others. She counted money for him and let him keep drugs and two handguns at her home. When police arrested this boyfriend, Ms. Martinson was also tried and convicted of drug trafficking and possessing a gun in the course of that offense. She received a mandatory minimum of 10 years for the drug trafficking charge and an additional mandatory sentence of five years for the handguns found in her home, even though she never carried, used, or threatened anyone with the guns herself. Federal judge James Gritzner, a George W. Bush appointee, felt that 10 years instead of 15 would be sufficient for Ms. Martinson. He had no choice but to give her the longer sentence. By the day of her sentencing, Ms. Martinson had completed drug treatment, obtained a steady job, and was leading a sober, productive life once again. Judge Gritzner nonetheless had to send her to prison for 15 years, even though he stated on the record that he felt she was not a threat to the public and was

<sup>1</sup> Bureau of Justice Statistics, Prisoners in 2012 - Advance Counts, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4737>.

<sup>2</sup> FBI Uniform Crime Reports 2011, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-4>.

unlikely to reoffend. Ms. Martinson has served seven years of her sentence so far.<sup>3</sup>

The Justice Safety Valve Act, S. 619, would have let Judge Gritzner give Ms. Martinson a sentence befitting a first-time, nonviolent, drug-addicted offender. The Justice Safety Valve Act would fix the shortcomings of our current safety valve, which only applies to some drug offenders. The Justice Safety Valve Act would permit courts to render sentences below the mandatory minimum term whenever doing so would keep the public safe, lead to better rehabilitation, or prevent an unwarranted disparity (such as treating a person who merely possessed a gun as if she had injured someone with it).

Minnesota law has a similar safety valve that permits our state's courts to sentence a person below the state's mandatory minimum sentences for commission of crimes involving a firearm.<sup>4</sup> Courts must have "substantial and compelling reasons" to depart below the mandatory minimum. Application of this safety valve is carefully tracked by our diligent Minnesota Sentencing Guidelines Commission.<sup>5</sup> Between 2001 and 2010, Minnesota's safety valve saved the state the use of 11,743 prison beds, saving taxpayers millions each year.<sup>6</sup> Over that same period, the state's overall crime rate dropped by 24 percent, and the state's violent crime rate dropped by 18 percent.<sup>7</sup>

On a final note, passing the Smarter Sentencing Act, S. 1410, would finish what began when Congress unanimously passed the Fair Sentencing Act in 2010. That law corrected one of the worst sources of racial disparity in the federal sentencing system by replacing the 100:1 crack-powder cocaine disparity with a fairer ratio of 18:1.<sup>8</sup> That reform, nonetheless, has never been applied to the thousands of federal crack offenders still in prison serving those now-repudiated sentences. This is unfair, it is wrong, and we must fix it in this Congress. Receiving a just and rational punishment should not hinge on the date you went to court. Dr. Martin Luther King, Jr., said that "justice delayed is justice denied." We have delayed long enough; let us deny justice no longer.

Please extend our appreciation to Senators from both parties for their strong leadership and inspiring vision for a better sentencing system in our federal courts. Thank you.

Sincerely,




Mark Haase, Co-Chair, MN Second Chance Coalition  
Vice President, Council on Crime and Justice

Sarah Walker, Co-Chair, MN Second Chance Coalition

<sup>3</sup> See Erin Fuchs, *The Gut-Wrenching Story of an Addict Who Got Clean, Got a Job, and Then Got 15 Years in Prison*, BUSINESS INSIDER, Sept. 13, 2013, at <http://www.businessinsider.com/mandy-martinsons-mandatory-minimum-sentence-2013-9>.

<sup>4</sup> Minn. Stat. § 609.11, subd. 8 (2012).

<sup>5</sup> See, e.g., MINN. SENTENCING GDLNS. COMM'N, SENTENCING PRACTICES: WEAPONS OFFENSES SENTENCED IN 2011 (2012) (describing use of safety valve for offenses involving gun possession), available at <http://mn.gov/sentencing-guidelines/images/2011%20Weapons%2520Report.pdf>.

<sup>6</sup> MINN. SENTENCING COMM'N, OFFENDERS SENTENCED FOR OFFENSES WITH A MANDATORY MINIMUM UNDER MINN. STAT. § 609.11: 2001-2010 (showing 11,743 prison beds saved as a result of application of the Minn. Stat. § 609.11, subd. 8 safety valve between 2000 and 2010) (on file with author).

<sup>7</sup> Cf. MINN. DEP'T OF PUB. SAFETY, MINNESOTA CRIME INFORMATION 2000 11 (2000), available at (showing an overall crime rate of 3,633 incidents per 100,000 residents, and a violent crime rate of 292 incidents per 100,000 residents), with MINNESOTA DEP'T OF PUB. SAFETY, MINNESOTA CRIME INFORMATION 2010 10 (2010), available at (showing an overall crime rate of 2,797 incidents per 100,000 residents, a 24 percent decrease, and a violent crime rate of 240 incidents per 100,000 residents, an 18 percent drop).

<sup>8</sup> Pub. L. 111-220, 111th Cong. (2010).

**Minnesota Second Chance Coalition**

American Indian OIC

Amicus, Inc.

Antioch Christian Center

Barbara Schneider Foundation

Council on Crime and Justice

Central MN Re-Entry Project

CivicMedia/Minnesota

Children's Defense Fund Minnesota

Criminal Justice Working Group

Construction Career Training Program

Correctional Transition Services, Inc.

180 Degrees, Inc.

Elim Transitional Housing, Inc.

Emerge Community Development

La Familia Guidance Center

Friends for a Nonviolent World

Goodwill/Easter Seals Minnesota

Greater Mpls. Council of Churches

Hired

Jacob Wetterling Resource Center

Jason Sole Consulting

Joint Religious Legislative Coalition

L.I.F.E in Recovery

MAD DADS Minneapolis

Minneapolis Urban League

Minnesota Adult and Teen Challenge

MN Juvenile Justice Advisory Committee

Minnesota State Public Defender

National Alliance on Mental Illness of MN

Network for Better Futures

NOLA Criminal Defense Investigation

Northside Policy Action Coalition

Pathways Counseling

Peace Foundation

Prison Policy Initiative

Project for Pride in Living

R3 Collaborative

RS Eden

Rebuild Resources

St. Paul Federation of Teachers

The Reentry Clinic at William Mitchell

Take Action Minnesota

Twin Cities Rise

Twin Ports Action Coalition

Wilder Foundation JobsFirst Program

Wilderness Inquiry

YWCA of St. Paul

MN Association of Criminal Defense Lawyers

MN Community Corrections Association

Minnesota Fathers & Families Network

Minnesota Catholic Conference

Minnesota Coalition for the Homeless

Minnesota Community Action Partnership

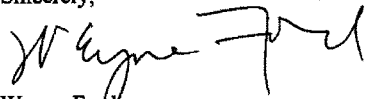
Before the United States Senate Judiciary Committee  
"Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"  
September 18, 2013

Statement of Former Iowa State Representative Wayne W. Ford, Des Moines, Iowa

My name is Wayne Ford. As an Iowa State Representative, I was responsible for Iowa being the first state to enact what is known as Minority Impact legislation. This law requires that every criminal justice bill going through the Iowa legislature be evaluated with respect to whether or not it will have a disproportionate effect on specified minority groups – blacks, Hispanics, Pacific Islanders, Native Americans, women, and the disabled. Similar legislation has since been enacted in Connecticut and Oregon and is being considered by other states, including Washington, Arkansas, New York, Pennsylvania, and Wisconsin.

More severe criminal penalties for possession of crack cocaine than for possession of an equal amount of cocaine in its powder form were shown to have a disproportionate effect on minorities because minorities were more likely to use it in its crack form. I believe this situation was exacerbated by the application of mandatory minimum sentences in conjunction with the more severe penalties prescribed by the applicable criminal statutes. Accordingly, I urge the Committee to consider the matter of whether mandatory minimum sentences may, per se, have a disproportionate impact on an identifiable segment of society and the adoption of legislation at the federal level comparable to what we have in Iowa, to yield a level playing field for everyone.

Sincerely,

A handwritten signature in black ink, appearing to read "Wayne Ford", with a stylized flourish at the end.

Wayne Ford  
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Testimony of Jessica M. Eaglin  
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For a Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”  
Submitted to Senate Judiciary Committee

September 18, 2013

The Brennan Center for Justice at NYU School of Law<sup>1</sup> thanks the Senate Judiciary Committee for holding this hearing on mandatory minimum penalties in the federal sentencing system. As the federal prison population continues to grow exponentially in the face of budget constraints, prison overcapacity problems, and the shifting political tides around mass incarceration in the United States, the Brennan Center urges the Committee to focus on curtailing the deleterious effects of mandatory minimum penalties in the federal system as a means to ensure a rational, just, and effective criminal justice system.

The Brennan Center for Justice is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. The Brennan Center’s Justice Program seeks to ensure a rational, effective, and fair criminal justice system. As part of that mission, we advocate for reforms that will reduce the size and severity of the criminal justice system. Such reforms are part and parcel of a larger effort to reduce mass incarceration, including the harmful collateral consequences of incarceration disproportionately borne by communities of color in the United States.

Individualized sentences that fit the characteristics of the offender and the seriousness of the crime are the hallmark of a fair sentencing system. Mandatory minimum penalties disrupt judges’ ability to make rational and just sentencing determinations in the federal system because they disregard key details about both the offender and the offense. While the majority of states

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<sup>1</sup> This letter does not represent the opinions of NYU School of Law.

are now reconsidering their sentencing regimes under the increasing pressures of mass incarceration, the federal government should continue the momentum by implementing reforms that reduce incarceration at the front end of the system. Reforming mandatory minimums provides a pivotal avenue to improve the criminal justice system by increasing fairness at sentencing while maintaining public safety.

The Brennan Center supports reforms designed to reduce the undue harshness and restrictive nature of mandatory minimums. Because there has been extensive attention drawn to the distorting effects of mandatory minimum penalties in the federal system, and because we anticipate that committee will hear substantial testimony on how mandatory minimums have a particularly unjust effect on racial minorities in the criminal justice system, this testimony focuses on contextualizing mandatory minimum reform as part of a national and bipartisan movement to reconsider the problematic policies driving mass incarceration in the United States. We submit this testimony to emphasize that in the federal system smarter criminal justice reform policy requires, at the start, reforming mandatory minimum penalties at sentencing for the broadest scope of offenders possible.

#### **I. BIPARTISAN STATE LEGISLATIVE REFORMS ARE DRIVING NATIONAL RECONSIDERATION OF POLICIES SUSTAINING MASS INCARCERATION IN THE UNITED STATES**

Due largely to budgetary constraints during the economic downturn, several states are implementing bipartisan reforms designed to manage the size of their prison populations. For example, Republicans and Democrats in Texas and Kansas joined together to pass legislation which increased diversionary treatment programs for low level drug offenders as a means to reduce the pressures of exponentially increasing prison populations. In South Carolina, New Jersey and Michigan, political opposites came together to adopt legislation reducing or repealing mandatory minimum penalties. Even in California, the majority of the public – regardless of political leanings – supported a referendum reducing the severity of harsh sentencing enhancements for certain lower level offenses.<sup>2</sup>

Such bipartisan legislative reforms have contributed to notable stabilization or decreases in state prison populations across the country. But not all states are moving in the direction of reducing

<sup>2</sup> Sixty-eight percent of voters supported reducing the harsh three-strikes law in California, which previously required habitual offenders to serve life sentences for nonviolent third offenses. Julia Zebley, *California Modifies Three-Strikes Law, Keeps Death Penalty in Referendum*, JURIST, Nov. 7, 2012, available at <http://jurist.org/paperchase/2012/11/california-modifies-three-strikes-law-keeps-death-penalty-in-referendum.php>. According to Andrew Gelb, Director of the Pew Center on the States' Public Safety Performance Project, passage of this referendum "sends a powerful message to policymakers in California and across the country that taxpayers are ready for a new direction in criminal justice." Tracey Kaplan, *Proposition 36: Voters Overwhelmingly Ease Three Strikes Law*, MERCURY NEWS, Nov. 7, 2012, available at [http://www.mercurynews.com/elections/ci\\_21943951/prop-36-huge-lead-early-returns](http://www.mercurynews.com/elections/ci_21943951/prop-36-huge-lead-early-returns).

their incarceration rates. Indeed, the prison population in several states, like in the federal system, has continually increased over the past decade.<sup>3</sup> The combination of drastic reforms in some states and steady prison population increases in others resulted in an overall decrease in the total U.S. prison population three years in a row.<sup>4</sup> In 2012, the total prison population decreased by 1.7%, though just three states – California, Texas, and North Carolina – accounted for 84% of that decline.<sup>5</sup> The decreasing incarceration rates are a positive development amongst the states, but whether this occurrence signals a larger, long-term trend remains to be seen.

Nevertheless, it is undeniable that criminal justice reform has become a bipartisan issue,<sup>6</sup> and that the most successful legislation has been implemented with support from both the left and the right.<sup>7</sup> Numerous states have seen massive reforms that address the increasing prison population crisis in new and innovative ways. For example, North Carolina and California have reallocated responsibility for certain offenders from the state to county level. Colorado overhauled its state sentencing scheme around drug offenses, increasing the amount of drugs necessary to qualify as a felony offense. Other states continue to consider meaningful reforms, the majority of which are bipartisan efforts designed to address the specific factors driving the individual state's prison population.

## II. THE FEDERAL SYSTEM NEEDS BIPARTISAN REFORMS TO MANDATORY MINIMUM PENALTIES IN ORDER TO ADDRESS ITS INCREASING PRISON POPULATION

Despite these strategic steps at the state level, the federal system has been slow to adopt meaningful reforms that would address the rising economic and human costs of

<sup>3</sup> JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, *DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 1* (2010), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf) (between 2000 and 2008 the incarceration rate of six states increased by more than 40%: West Virginia, Minnesota, Arizona, Kentucky, Florida, and Indiana). Between 2010 and 2011, the landscape changed slightly, as Iowa (7.3%), Illinois (7.2%), Oklahoma (5.8%) and West Virginia (4.9%) led the states with the largest increases to their prison population. E. Ann Carson & William J. Sabol, Bureau of Justice Statistics, *Prisoners in 2011 tbl. 2* (2012). This demonstrates that there is much fluctuation in incarceration rates among the states, and an overall trend is not yet defined.

<sup>4</sup> See E. Ann Carson & Daniela Golinelli, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts 1* (2013).

<sup>5</sup> Inimai Chettiar, Letter to the Editor, *The Decline of the Prison Population*, N.Y. TIMES, Aug. 2, 2013, at A18.

<sup>6</sup> See *Liberals, Tea Party Republicans Team Up to Fight Mandatory Prison Terms for Some Drug Crimes*, WASH. POST, Sept. 17, 2013, available at [http://www.washingtonpost.com/politics/courts\\_law/liberals-tea-party-republicans-team-up-to-fight-mandatory-prison-terms-for-some-drug-crimes/2013/09/17/322ce9dc-1f68-11e3-9ad0-96244100e647\\_story\\_1.html](http://www.washingtonpost.com/politics/courts_law/liberals-tea-party-republicans-team-up-to-fight-mandatory-prison-terms-for-some-drug-crimes/2013/09/17/322ce9dc-1f68-11e3-9ad0-96244100e647_story_1.html) (quoting Rep. Jason Chaffetz as saying, “There’s a new era of bipartisanship on this issue”).

<sup>7</sup> Compare ACLU, *SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES* (2011), available at [http://www.aclu.org/files/assets/smartreformispossible\\_web.pdf](http://www.aclu.org/files/assets/smartreformispossible_web.pdf) (describing successful bipartisan reforms implemented in Texas, Kansas, Mississippi, South Carolina, Kentucky and Ohio) with Andrew Cohen, *In California Prison Fight, At Last a Bright Idea*, BRENNAN CENTER FOR JUSTICE, Sept. 4, 2013, available at <http://www.brennancenter.org/analysis/california-prison-fight-last-bright-idea> (criticizing Governor Jerry Brown’s initial plan to increase use of private prisons as a means to resolve federal court order to reduce prison population before December 31, 2013).

overincarceration in the United States. Since 1980, the federal prison population alone has increased by almost 790 percent.<sup>8</sup> Today, there are more than 217,000 prisoners incarcerated in federal prisons, and the majority of inmates are incarcerated for nonviolent crimes.<sup>9</sup>

Experts and policymakers agree that two key forces driving overincarceration are the increased number of individuals entering prison every year, along with the increased length of time each prisoner spends on average behind bars.<sup>10</sup> While numerous issues plague the federal justice system, the increased length of prison stays amongst *all* prisoners is a key driver in sustaining the large prison population.<sup>11</sup> Increased dependence upon mandatory minimum penalties implemented by Congress contributes to this increase in sentence length.

In 2011, the U.S. Sentencing Commission reported that mandatory minimum sentences are used for more crimes, and have increased in length in recent decades.<sup>12</sup> The Commission reported that, beginning in the 1950s, Congress changed its use of mandatory minimum penalties in three significant ways. First, Congress created *more* mandatory minimum penalties. In 1991, 98 mandatory minimum penalties existed; by 2011 that number increased to 195.<sup>13</sup> Second, Congress expanded the types of offenses to which mandatory minimum penalties applied. Prior to 1951, mandatory minimum penalties were attached to crimes considered most serious in society, including treason, murder, piracy, rape and slave trafficking.<sup>14</sup> Since 1951, mandatory minimum penalties have been enacted to punish a broader scope of crimes, including drug offenses, firearm offenses and identity theft.<sup>15</sup>

Most importantly for this Committee to note, the *length* of mandatory minimum penalties has increased as well. In 1991, the majority of offenders serving sentences carrying a mandatory minimum penalty were convicted of violating a statute that required a penalty of five years.<sup>16</sup> By

<sup>8</sup> NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 51 (Jan. 2013) [Hereinafter CRS REPORT].

<sup>9</sup> See Carson & Sabol, *supra* note 3, at 10, tbl. 11 (indicating that less than 10% of federal prisoners sentenced in 2011 committed violent crimes).

<sup>10</sup> PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 1-2 (2012) (“The analysis in this study shows that longer prison terms have been a key driver of prison populations the past 20 years . . .”); Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L. J. 1587, 1631 (2012) (“[T]he scholarly consensus suggests that prison commitments must be reduced and prison release increased and return to prison after parole failure decreased” in order to reduce mass incarceration in the United States”).

<sup>11</sup> CRS REPORT, *supra* note 7, at 7 (“[W]hile more offenders are being arrested by federal law enforcement, tried in federal courts, and sentenced to incarceration in federal prisons for increasingly longer periods of time, the abolition of parole ensures that most inmates will serve all or nearly all of their sentences.”).

<sup>12</sup> UNITED STATES SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71-74 (2011) [hereinafter MANDATORY MINIMUMS REPORT].

<sup>13</sup> *Id.* at 71.

<sup>14</sup> *Id.* at 22.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 75.

2010, the majority of offenders convicted under statutes carrying mandatory minimum penalties were serving sentences under statutes requiring ten or more years of imprisonment.<sup>17</sup> As the Congressional Research Service recently noted, “the expanded use of mandatory minimum penalties [in the federal system] has resulted in offenders being sentenced to longer terms of imprisonment than they were 20 years ago.”<sup>18</sup> These penalties apply regardless of the individualized characteristics of the offender, and take little account of the manner in which the offense was undertaken. Though these laws were enacted to respond to the genuine concerns of Congress that certain offenses are more serious, the price the federal system bears for such decisions in the long run are now being brought to bear.

Mandatory minimum sentences create problematic results in the justice system. This result is most readily seen in the unfair and unbalanced outcomes of the drug trafficking mandatory minimums: lower-level, frequently nonviolent and disproportionately offenders of color receive longer terms of incarceration than the relatively few high-level drug traffickers incarcerated in federal prisons.<sup>19</sup> This result undermines Congress’s intention to target offenders for their particular role in the offense when creating these statutory limitations.<sup>20</sup> However, these results are amplified in other contexts as well – mandatory minimums prevent the criminal justice system from properly considering the characteristics of the offender and the offense. Moreover, they systematically ensure longer sentences for a broader scope of criminal offenders, many of whom would not otherwise be considered the most heinous offenders in society.

Congress has taken some steps to address certain of the more glaring issues in the federal system. In 2011, this Committee spearheaded enactment of the Fair Sentencing Act, which reduced the disparities in sentencing between crack and powder cocaine from the 100:1 ratio, to its current 18:1 ratio.<sup>21</sup> It also eliminated mandatory minimum sentences for crack possession. This legislation modestly reduced increasing pressures on the federal prison population, and without an increase in crime.<sup>22</sup> However, the legislation did not clearly indicate retroactive application,

<sup>17</sup> *Id.* (indicating that 52.6% of offenders serving sentences with mandatory minimum penalties had mandatory sentences of ten or more years).

<sup>18</sup> CRS REPORT, *supra* note 7, at 8.

<sup>19</sup> For example, while 74% of crack defendants faced mandatory minimum penalties in 2011, only 5.4% of them occupied an aggravating role of leader or manager of a drug business. U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 40, 44 (2011). See also *U.S. v. Dossie*, 851 F. Supp. 2d 478, 480 (E.D.N.Y. 2012). On average, only 10% of drug cases concern offenders with supervisory roles. *Dossie*, 851 F. Supp. 2d at 480.

<sup>20</sup> MANDATORY MINIMUMS REPORT, *supra* note 19, at 24 (“Congress intended to link the five-year mandatory minimum penalties to what some called ‘serious’ traffickers and the ten-year mandatory minimum penalties to ‘major’ traffickers.”).

<sup>21</sup> The Fair Sentencing Act, Pub. L. 111-220, 111th Cong. (2010).

<sup>22</sup> The FSA was implemented in August 2011. Meanwhile, the violent crime rate in the United States has continued to drop since the 1990s. This trend did not change between 2011 and today, and indeed the use of crack cocaine has dropped during this period as well. See *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences*:

and now almost 17,000 federal prisoners continue to serve sentences under a penalties scheme that Congress, through unanimous support, declared no longer just.<sup>23</sup>

The Obama Administration, too, has recently taken steps to address the harshness of the federal system. In August 2013, Attorney General Eric Holder announced new charging policies which require district attorneys to avoid imposing “draconian” mandatory minimum sentences on certain low level, nonviolent drug offenders.<sup>24</sup> Moreover, the Justice Department now requires local U.S. Attorneys to clarify which offenses to focus federal prosecution as a means to both reduce the breadth of the federal system and allow states to continue developing innovative alternatives to incarceration where the federal government has lagged behind.<sup>25</sup> Additionally, the Justice Department recently clarified its enforcement policy where states have legalized marijuana.<sup>26</sup>

However, despite these key steps, the federal system continues to struggle with severe and systemic problems caused by overincarceration. Currently, the federal Bureau of Prisons (“BOP”) operates at thirty-seven percent overcapacity.<sup>27</sup> In 2013, the BOP commanded twenty-five percent of the Justice Department’s budget, a 4.2 increase from fiscal year 2012.<sup>28</sup> This percentage will increase to nearly thirty percent by 2020 absent any change in course.<sup>29</sup>

The federal government has a unique platform to create a national movement adopting rational and effective criminal justice reform. Attorney General Holder signaled the way with his new Smart on Crime approach to prosecutorial practices. But the Attorney General cannot do this alone, nor should Congress allow the executive branch to take the lead on this issue with simply short-term reform efforts.

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*Hearing Before the S. Judiciary Committee*, Statement of Julie Stewart, President of Families Against Mandatory Minimums 3 (2013).

<sup>23</sup> *But see* United States v. Blewett, 719 F.3d 482 (6th Cir. 2013), *vacated for reh’g en banc* (considering whether the FSA should be applied retroactively based upon equal protection analysis).

<sup>24</sup> Eric Holder, Att’y Gen., Remarks at Annual Meeting of the American Bar Association (Aug. 12, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

<sup>25</sup> DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013), *available at* <http://www.justice.gov/ag/smart-on-crime.pdf>.

<sup>26</sup> Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws, If Distribution Is Regulated*, WASH. POST, Aug. 29, 2013, *available at* [http://articles.washingtonpost.com/2013-08-29/national/41566270\\_1\\_marijuana-legalization-attorney-general-bob-ferguson-obama-administration](http://articles.washingtonpost.com/2013-08-29/national/41566270_1_marijuana-legalization-attorney-general-bob-ferguson-obama-administration).

<sup>27</sup> *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 2 (April 17, 2013), *available at* <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf> (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

<sup>28</sup> *Id.* (estimating a net increase of 6,000 inmates annually through 2015).

<sup>29</sup> CRS REPORT, *supra* note 7, at 7.

<sup>29</sup> NANCY LAVIGNE & JULIE SAMUELS, URBAN INSTITUTE, THE GROWTH AND INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012).

### III. RECENTLY INTRODUCED LEGISLATION WOULD PROVIDE MEANINGFUL REFORMS ADDRESSING MASS INCARCERATION

The Brennan Center, along with our coalition partners in the criminal justice advocacy community, urges the Commission to seriously consider endorsing legislation that reduces the undue harshness and restrictive nature of mandatory minimum penalties in the federal system. Currently, two pieces of legislation have been introduced before the Senate, both of which would rationalize federal sentencing, reduce overdependence on mandatory minimums penalties, and generally signal a shift away from overreliance on incarceration. In concluding our testimony to the Committee, we wish to emphasize the unique benefits each bill provides towards improving the federal justice system.

- 1) *The Smarter Sentencing Act*. The Brennan Center recently issued a letter in support of S. 1410, the Smarter Sentencing Act, introduced by Senators Durbin and Lee.<sup>30</sup> The SSA proposes to reduce mandatory minimum penalties for drug sentences, expands the drug safety valve, orders the U.S. Sentencing Commission to incorporate the new, lower levels of mandatory minimum penalties into the sentencing guidelines, and permits retroactive application of the Fair Sentencing Act to certain offenders who do not currently benefit from the amendment. These reforms would alleviate the unduly harsh nature of mandatory minimum penalties in the federal system and would signal that punishment levels for drug sentencing across the country should be recalibrated to a more reasonable level. While the bill is limited in its scope because it applies only to drug sentencing, this legislation would prove an important step towards implementing long-term reforms that reduce mass incarceration in the United States.
- 2) *The Justice Safety Valve Act*. The Brennan Center supports S. 619, the Justice Safety Valve Act, introduced by Chairman Leahy and Senator Paul. This legislation would return discretion to judges, who are uniquely positioned to assess both the characteristics of the offender and the offense at sentencing, to determine which offenders are the types envisioned by Congress to fall under the umbrella of mandatory minimum penalties. The bill does not eradicate mandatory minimum penalties, but it would expand the current narrowly tailored safety valve used in drug cases to all offenses carrying a mandatory minimum. This legislation would ensure that Congress's intent would be applied more faithfully, and avoid the over-inclusive nature of mandatory minimum penalties resulting in unduly harsh sentences for a broader swath of criminal offenders.
- 3) *Signaling the "Beginning of the End" of Mass Incarceration*. Passage of either bill would signal pivotal steps away from mass incarceration. As Senator Paul emphasized in his

<sup>30</sup> Letter from Lauren-Brooke Eisen, et al, Brennan Center for Justice, to Patrick Leahy and Charles Grassley, U.S. Senators (July 31, 2013), available at <http://www.brennancenter.org/analysis/brennan-center-supports-smarter-sentencing-act-2013>.

testimony before the Committee on September 18, reducing the severity of mandatory minimums in the federal system would be a meaningful, yet modest step towards dismantling the complicated web of policies and practices that sustain mass incarceration – from the perverse financial incentives driving high arrest rates, the overrepresentation of populations of color at every point in the system, to the systemic unemployment, lack of access to housing, and disenfranchisement of individuals who have paid their debt to society. Reducing unduly harsh sentencing laws does not solve all the problems, but it would provide momentum to continue the national dialogue while affecting meaningful and long-term changes to the system. We encourage this Committee to recognize that significance as it weighs the benefits of both proposed pieces of legislation.

#### IV. CONCLUSION

The Brennan Center thanks the Senate Judiciary Committee for holding a hearing to draw attention to this critical criminal justice and social justice matter. We appreciate the opportunity to provide additional information for the Committee regarding this issue. We urge the Committee to look to other state reforms as it considers shaping federal sentencing policy, but also to be cognizant of the unique dynamics at the federal level, which make mandatory minimum sentences an important place to begin reform efforts.

Finally, we emphasize to the Committee that now is the time to move beyond political reluctance towards criminal justice reform. The “status quo” of overincarceration in the federal system is a relic of the past. Reluctance to address mandatory minimum penalties only contributes to an antiquated approach to criminal justice reform that is neither smart on crime nor smart on limited federal funds. Refusal to implement reforms addressing mandatory minimum penalties contributes to the BOP’s reality of severe overcapacity and an exponentially increasing prison population in the face of sequestration’s newly imposed stringent funding. This Committee has the opportunity to promote legislation that will address these concerns. We urge you to do so in the coming months.



**Written Statement of the American Civil Liberties Union  
Before the United States Senate Judiciary Committee**

*Hearing on*

**“Reevaluating the Effectiveness of Federal Mandatory Minimum  
Sentences”**

*Wednesday, September 18, 2013  
at 10:00 am*

Submitted by the  
ACLU Washington Legislative Office,

For further information contact Jesselyn McCurdy, Senior Legislative Counsel at  
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The American Civil Liberties Union (ACLU) commends the Senate Judiciary Committee for holding this hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences.” The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. For years, we have been at the forefront of the fight against over-incarceration due to its devastating impact on those who become ensnared in the criminal justice system, its failure to produce a proportional increase in public safety, and its disproportionate effect on poor communities of color. We are pleased to have this opportunity to submit testimony on the subject of mandatory minimum sentences which have contributed to the over-incarceration crisis in this country by creating unnecessarily harsh and lengthy punishments, taking away judges’ discretion to consider individual cases, creating racial disparities in sentencing and empowering prosecutors to force defendants to bargain away their constitutional rights.

#### **Recent History of Mandatory Minimum Sentences**

Mandatory minimum penalties refer to criminal penalties requiring, upon conviction of a crime, the imposition of a specified minimum term of imprisonment.<sup>1</sup> In 1951, Congress began to enact more mandatory minimum penalties for more federal crimes.<sup>2</sup> The Boggs Act, which provided mandatory minimum sentences for drug offenses, was passed in 1951.<sup>3</sup> In 1956, Congress passed the Narcotics Control Act, which increased these mandatory minimum sentences to five years for a first offense and ten years for each subsequent drug offense.<sup>4</sup>

Since then, mandatory minimum sentences have proliferated in every state and federal criminal code. In 1969, President Nixon called for drastic changes to federal drug control laws. In 1970, Congress responded with the Comprehensive Drug Abuse Prevention and Control Act of 1970, supported by both Republicans and Democrats, which eliminated all mandatory minimum drug sentences except for offenders who participated in large-scale ongoing drug operations. President Nixon signed the Act on October 27, 1970.<sup>5</sup>

Mandatory minimum sentences for drug offenses emerged again, after the death of Len Bias. In 1986, University of Maryland basketball star Len Bias died of a drug overdose just hours after the Boston Celtics picked him in the NBA draft.<sup>6</sup> His death sparked a national media frenzy largely focused on the drug that was suspected, mistakenly, of killing him – crack cocaine. A few weeks after Bias’ death, Congress passed the Anti-Drug Abuse Act of 1986, establishing for the first time mandatory minimum sentences triggered by specific quantities of cocaine.<sup>7</sup> Two years later, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988 which created mandatory minimums for simple possession of crack cocaine.<sup>8</sup>

### **Mandatory Minimum Sentences are Flawed**

After the reemergence of mandatory sentences in federal law in the 1980's, many observers began to see the same problems that lead to the repeal of drug mandatory minimums in 1970. Mandatory sentences don't allow judges to reduce a defendant's sentence based on any number of mitigating factors, including circumstances of the case or a person's role, motivation, or likelihood of repeating the crime. This approach to sentencing is unfair; treating similar defendants differently and different defendants the same. It is ineffective at reducing criminal behavior, because it is not consistently applied (many factors affect whether prosecutors will charge the minimum).

Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of these lengthy punishments to frustrate defendants asserting their constitutional rights. Contrary to popular belief, mandatory minimum sentencing laws are neither mandatory nor do they impose minimum sentences. Under a truly mandatory sentencing law, everyone arrested for the same offense would end up receiving the same sentence if convicted. But that's not how mandatory sentencing laws work. They simply transfer the discretion that a judge should have to impose an individualized sentence (based on relevant factors, such as a defendant's role in the crime, criminal history, and likelihood of reoffending) and give that discretion to prosecutors.

Under mandatory sentencing laws, prosecutors have control over sentencing because they have unreviewable authority to decide what charges to pursue. In prosecutors' hands, the minimum transforms from a 'certain and severe sanction' to a tool for prosecutors to incentivize behavior and make judgment calls. Prosecutors use their charging power to cut deals, secure testimony against other defendants, and force guilty pleas where the evidence is weak. They also have the authority to under-charge defendants where they think that the mandatory would be too severe a sentence.

A prosecutor need never disclose his or her reasons for bringing or dropping a charge. Judges, on the other hand, must disclose their reasons for sentencing in the written public court record and aggravating factors can be contested by the defendant.<sup>9</sup> A defendant faced with a plea deal of 1.5 years or a risk of 20 years imprisonment if he goes to trial is likely to choose the former, no matter how weak the evidence. Defendants who choose to exercise their constitutional rights and go to trial are ultimately sentenced not only for their misconduct, but for declining to plead guilty on the prosecutor's terms.<sup>10</sup> The threat of mandatory minimum penalties may cause defendants to give false information,<sup>11</sup> to plead guilty to charges of which they may actually be innocent,<sup>12</sup> or to forfeit a strong defense.<sup>13</sup>

Federal mandatory minimum laws and some state laws afford defendants relief from the mandatory minimum in exchange for information helpful to prosecutors. Low-level defendants charged under mandatory minimums – drug couriers, addicts or those on the periphery of the drug trade, like spouses – often have no information to give to prosecutors for a sentence reduction.

Finally, it is extremely expensive to incarcerate people under mandatory sentences. By putting all discretion in the hands of prosecutors who have a professional interest in securing as many convictions as possible, mandatory minimums ensure that public policy concerns about cost, racial disparities and whether a particular punishment results in public safety are not a priority.<sup>14</sup> The decision regarding what level of incarceration will serve public safety is best left in the hands of judges, who have more of an incentive to balance public safety needs against the facts in an individual case.

#### **Recent Research Reveals Impact of Mandatory Minimum Sentences**

The continuing impact of mandatory minimum sentencing is a major contributor to the growing federal Bureau of Prison (BOP) prison population. Federal courts are overwhelmed with staggering immigration and criminal caseloads. BOP is operating at almost 40% over capacity and accounts for over 25 percent of the Department of Justice's (DOJ) budget.<sup>15</sup> Currently, over 219,000 people are in federal prison and almost half of them are serving time for drug-related crimes - and in a majority of cases they are non-violent.

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.<sup>16</sup> This Urban Institute report concluded that increases in expected time served, specifically for drug offense, contributed to half of the prison population growth between 1998 and 2010.<sup>17</sup>

A recent report by the Congressional Research Service (CRS) found that the increase in amount of time inmates were expected to serve likely resulted from inmates receiving longer sentences and inmates being required to serve approximately 85% of their sentences after Congress eliminated parole for federal prisoners.<sup>18</sup> The increased time served by drug offenders accounted for almost one-third of the total federal prison population growth between 1998 and 2010.<sup>19</sup> Drug offenders continued to make up almost 47% of the BOP population despite increases in the number of immigration and weapon offenders during the same time period.<sup>20</sup>

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.<sup>21</sup> One of the few ways to address this unsustainable growth in the BOP prison population is to address the length of time people are serving sentences in the federal system. Legislation proposing expansion of safety valve relief and reducing drug sentences would in fact be viable ways to reduce the length of sentences without jeopardizing public safety.

In 1991, the U.S. Sentencing Commission (USSC) issued a report to Congress denouncing mandatory minimums and calling for their abolition.<sup>22</sup> The report gathered widespread support from policymakers, judges and practitioners in the field of federal sentencing. In October 2011, the USSC released its most recent report on mandatory minimum sentences. In a press release announcing the release of the report, the Chair of the Sentencing Commission, Judge Patti Saris acknowledges that mandatory minimum sentencing has contributed to federal prison overcrowding.<sup>23</sup> In this report, the Commission concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984, but recommends reform to mandatory sentencing.<sup>24</sup> Although the Commission did not come to a consensus about mandatory minimum penalties as a whole, it unanimously agreed that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently in the federal system.<sup>25</sup>

The Commission's report recommend Congress revisit certain statutory recidivist provisions in drug sentencing laws and consider reform that would allow for flexibility in sentencing low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties. In addition, the report recommends that Congress reconsider so-called "stacking" (i.e. sentencing a person to consecutive mandatory sentences) of mandatory minimum penalties for some federal firearms crimes, because these penalties can be excessively severe and unjust.

Specifically, the ACLU endorses the following Sentencing Commission recommendations to Congress outlined in its 2011 Mandatory Minimum Report:

- 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.<sup>26</sup>
- 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.<sup>27</sup>
- 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.<sup>28</sup>

- 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).<sup>29</sup>
- 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.<sup>30</sup>
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.<sup>31</sup>

#### **ACLU Supports Attorney General Eric Holder’s Effort to “Rethink” the Department’s Approach to the Mandatory Minimums and the “War on Drugs”**

On August 12, 2013, Attorney General Eric Holder's gave a speech to the American Bar Association announcing critical reforms to the way the Department of Justice prosecutes and addresses drug crimes.<sup>32</sup> This speech was historic and long overdue. The federal government cannot maintain a federal prison system that since 1980 has grown at an astonishing rate of almost 800 percent. In 2012, on the federal, state and local levels it cost \$80 billion dollars to incarcerate 2.3 million people in this country.

Attorney General Holder’s willingness to “rethink[ing] the notion of mandatory minimum sentences for drug-related crimes,” comes as a welcome alternative to the status quo which was for the Department to ask for longer and harsher sentences.<sup>33</sup> Attorney General Holder’s modification of the Justice Department’s charging policies “so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences” is a critical step toward creating a fairer and more justice federal criminal justice system.<sup>34</sup> Addressing the length of sentences for non-violent crimes will ease overcrowding in federal prisons and help ensure that taxpayer dollars are spent in ways that improve public safety - such as reentry programs helping formerly incarcerated people seek employment and housing.

#### **States Have Successfully Repealed Mandatory Minimums Laws**

Although the Department of Justice’s new approach to addressing drug crimes is an important step forward for smart criminal justice policy, it is not a new approach to reform. In states around the country, lawmakers have in recent years been taking a hard look at broken

criminal justice systems that fail to effectively respond to public safety needs or fix problems like addiction. Several states over the last 10 years have recognized the need to address the rising cost of incarceration and changed their laws to focus on people who truly need to be locked up.

- In 2003, **Michigan** repealed almost all mandatory minimums for drug offenses. From 2006-2010, its prison population fell 15 percent, spending on prisons declined by \$148 million, and both violent and property crime rates declined.
- Since 2003, New York has reduced its prison population by almost 17 percent. These reductions can be attributed to a sharp decline in felony drug arrests, increased diversion to treatment programs, legislation that allowed for more earned time credits for people in prison, and reforms to the Rockefeller Drug Laws including lower mandatory minimums. All these successful reforms took place while the state's crime rate decline by 13 percent.
- In 2009, **Rhode Island** repealed all mandatory minimum sentencing laws for drug offenses. Since then, its prison population has declined by 12 percent and the crime rate has declined by several percentage points.
- In 2010, **South Carolina** eliminated mandatory minimum sentences for first convictions of simple drug possession.
- In 2001, **Louisiana** repealed mandatory minimum sentences for simple drug possession and many other non-violent offenses and cut minimum sentences for drug trafficking in half.

#### **Bipartisan Opposition to Mandatory Minimum Sentences**

Recent surveys have found that a majority of adults favor elimination of mandatory sentencing laws and support allowing judges to choose the appropriate sentence. In a 2012 Pew national survey, 70 percent agreed that “there are more effective, less expensive alternatives to prison” for those convicted of non-violent offenses and “expanding those alternatives is the best way to reduce the crime rate.” A 2008 StrategyOne national survey found that 60 percent of Americans oppose mandatory prison sentences for some nonviolent crimes. A 2005 Crime and Justice Institute survey of Massachusetts residents found that 88 percent opposed mandatory minimum sentences.

In addition to public opposition of mandatory penalties, many judges and conservative commentators have expressed opposition to mandatory minimums.

- **Anthony Kennedy**, Associate Justice, United State Supreme Court has indicated “I’m against mandatory sentences. They take away judicial discretion to serve the four goals of sentencing. American sentences are eight times longer than their equivalents in Europe.”<sup>35</sup>
- **Stephen Breyer**, Associate Justice, United States Supreme Court stated that “[i]n 1994 Congress enacted a ‘safety-valve’ permitting relief from mandatory minimums for certain non-violent, first-time drug offenders. This, in my view, is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.”<sup>36</sup>
- **William Rehnquist**, former Chief Justice of the United States Supreme Court said “[t]hese mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders...mandatory minimums have also led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space...they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.”<sup>37</sup>
- **Pat Robertson**, Chancellor of Regent University and Chairman of the Christian Broadcasting Network said “[t]hese mandatory sentences needlessly cost our government millions of dollars when there are better approaches available.”<sup>38</sup>
- Former National Rifle Association president and former chair of the Conservative Union **David Keene** once said that “[m]y opposition to mandatory minimums . . . is rooted in conservative principles; namely, reverence for the Constitution and contempt for government action that ignores the differences among individuals. . . . [M]andatory minimums undermine [the separation of powers] by allowing the legislature to steal jurisdiction over sentencing, which has historically been a judicial function.”<sup>39</sup>
- Founder and president of Americans for Tax Reform **Grover Norquist** was quoted as saying “[t]he benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself. Viewed through the skeptical eye I train on

all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America's taxpayers."<sup>40</sup>

### **Congress Must Take the Next Step**

While the attorney general has taken some preliminary steps to address the mass incarceration crisis in this country, he cannot do this alone. We call on Congress to finish the work that the Administration has now started and where states have been leaders. And that work has already begun with today's hearing, but Congress must take the next step and pass two bipartisan bills that have been introduced that specifically focus on the problems in the federal criminal justice system.

The first, S. 1410, the Smarter Sentencing Act of 2013, which was introduced by Sens. Richard Durbin (D-IL), Mike Lee (R-UT) and Patrick Leahy (D-VT) is comprehensive legislation that would reduce the length of some drug mandatory minimum sentences, allow judges to use more discretion to determine sentences for low level drug offenses, and apply the Fair Sentencing Act (the law that reduced the crack-powder cocaine sentencing disparity) to those currently serving sentences for these offenses.

Similarly, S. 619 and H.R. 1695, the Justice Safety Valve Act of 2013, is bipartisan legislation introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Sen. Rand Paul (R-Ky.) and in the House by Representative Robert C. "Bobby" Scott. This bill would give federal judges more discretion to sentence below a mandatory minimum sentence when appropriate. Today, we call on Congress to take the next important steps toward a just and fair criminal justice system by passing these two important pieces of legislation.

### **Conclusion**

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.<sup>41</sup> It is critical that both Congress and the Administration make sentencing reform a priority. Unless the number of people who are subjected to long and unfair mandatory minimum sentences is addressed, any effort to reform the federal criminal justice system will have little to no effect on the current crisis in the BOP.

Thus, we agree with the U.S. Sentencing Commission recommendations in its 2011 Mandatory Minimum Report, 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.”<sup>42</sup>

In the absence of the abolition of mandatory minimum penalties, the ACLU encourages Congress to enact S. 1410, the Smarter Sentencing Act of 2013 and S. 619 and H.R. 1695, the Justice Safety Valve Act of 2013 which would reduce mandatory minimum sentences for drug offenses, apply the Fair Sentencing Act retroactively and enact a new statutory “safety valve” mechanism similar to that available for certain drug offenders at 18 U.S.C. § 3553(f) for people convicted of other offenses and with more serious criminal histories.

<sup>1</sup> U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, DC, October 2011, p. 4, [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm), hereinafter “*Mandatory Minimum Penalties in the Federal Criminal Justice System*.”

<sup>2</sup> *Id.* at 63.

<sup>3</sup> See Pub. L. No. 82–255, § 1, 65 Stat. 767, 767 (1951).

<sup>4</sup> See Narcotics Control Act of 1956, §§ 103, 105, 107, 108, Pub. L. No. 84–728, 70 Stat. 567, 568, 570–71.

<sup>5</sup> Pub. L. No. 91–513, 84 Stat. 1236 (1970).

<sup>6</sup> Marc Mauer, The Disparity on Crack-Cocaine Sentencing, THE BOSTON GLOBE, July 5, 2006, [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2006/07/05/the\\_disparity\\_on\\_crack\\_cocaine\\_sen\\_tencing/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sen_tencing/)

<sup>7</sup> Pub. L. No. 99–570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).

<sup>8</sup> Pub. L. No. 100–690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

<sup>9</sup> See e.g., Justice Anthony Kennedy: “the trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.” Justice Anthony M. Kennedy, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_08-09-03.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_08-09-03.html).

<sup>10</sup> Prepared Statements of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, at 12 (May 27, 2010); Jay Rorty, American Civil Liberties Union, to the Commission at 2 (May 27, 2010) (“Then prosecutors used that threat [of mandatory minimum penalties] to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury – all as the price for not being exposed to the higher minimum.”); and Erik Luna, at 2 (suggesting such practices impose a “trial tax” on defendants who exercise their constitutional right to a jury trial).

<sup>11</sup> See Nachmanoff, *supra* at 13 (“The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.”); Ellen Yaroshesky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 *FORDHAM L. REV.* 917, 931 (1999) (“[F]ormer [Assistant United States Attorneys] . . . readily admit that, in some instances, they simply could not determine if the cooperator had told the truth.”); Prepared Statement of Thomas W. Hillier, II, Constitution Project, to the Commission, at 6–7 (May 27, 2010) (explaining that mandatory minimum

penalties “create a powerful incentive for informants and cooperators to provide exaggerated or false information [to prosecutors] . . . [that] is not subjected to the crucible of trial”).

<sup>12</sup> Nachmanoff, *supra* note 8, at 13.

<sup>13</sup> Prepared Statement of Cynthia Hugar Orr, National Association of Criminal Defense Lawyers, to the Commission, at 8 (May 27, 2010) (“The risk of being sentenced under mandatory minimums effectively precludes defendants from exercising their Sixth Amendment right to a trial. . . . [E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten years or more, a defendant will almost always forego his right to a trial.”).

<sup>14</sup> See, e.g., Richard T. Boylan & Cheryl X. Long, Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors, 48 J.L. & ECON. 627 (2005); Richard T. Boylan, What do Prosecutors Maximize? Evidence From the Careers of U.S. Attorneys, 7 AM. LAW & ECON. REV. 379 (2005); Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 CAL. L. REV. 1585, 1599-1600 (2005) [hereinafter Brown, Decline of Defense Counsel]; Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2470-76 (2004); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 WIS. L. REV. 837, 902-03; Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 134-35 (2004); Todd Lochner, Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants, 23 JUST. SYS. J. 271 (2002); Edward L. Glaeser et al., What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes, 2 AM. L. & ECON. REV. 259 (2000); David T. Johnson, The Organization of Prosecution and the Possibility of Order, 32 LAW & SOC’Y REV. 247 (1998); DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE (1996); Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851 (1995); Stanley Z. Fisher, In Search of the Virtuous Prosecutor, 15 AM. J. CRIM. L. 197 (1988). Moreover, many young attorneys stay in a prosecutor’s office only for a few years, seeking to build their resumes and credentials as a means to achieve a high-paying job in the private sector. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207 (2004) [hereinafter TONRY, THINKING ABOUT CRIME].

<sup>15</sup> 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).

<sup>16</sup> Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* pg. 9 (January 22, 2013) (hereinafter CRS report)

<sup>17</sup> LaVigne Urban Institute Report at 5

<sup>18</sup> CRS Report at 8.

<sup>19</sup> Kamala Mallik-Kane, Barbara Parthasarathy, William Adams, Examining Growth in the Federal Prison Population, 1998 to 2010 pg. 3 (2012)

<sup>20</sup> Federal Bureau of Prisons, Quick Facts about the Bureau of Prisons, <http://www.bop.gov/news/quick.jsp>

<sup>21</sup> CRS report at 51

<sup>22</sup> U.S. Sentencing Commission, Special Report To The Congress: Mandatory Minimum Penalties In The Criminal Justice System 9 (1991) [Hereinafter USSC 1991 Mandatory Minimum Report].

<sup>23</sup> New Release, *Sentencing Commission Issues Comprehensive Report On Statutory Mandatory Minimum Penalties, Sends Recommendations for Statutory Changes to Congress*, October 31, 2011.

<sup>24</sup> U.S. Sentencing Commission Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, [Hereinafter USSC 2011 Mandatory Minimum Report]

<sup>25</sup> *Id.* at xxx-xxxi.

<sup>26</sup> *Id.* at 355-56.

<sup>27</sup> *Id.* at 356.

<sup>28</sup> *Id.* at 364.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 365.

<sup>32</sup> See Attorney General Eric Holder American Bar Association Speech, August 12, 2013, San Francisco, California

<sup>33</sup> *Id.* at 5

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- <sup>34</sup> *Id.*
- <sup>35</sup> Kennedy, William French Smith Memorial Lecture, Pepperdine University, February 3, 2010.
- <sup>36</sup> Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rep. 180 (1999).
- <sup>37</sup> Rehnquist, "Luncheon Address," in U.S. Sentencing Commission, Drugs and Violence, 2005.
- <sup>38</sup> <http://www.famm.org/aboutsentencing/WhattheExpertsSay.aspx>
- <sup>39</sup> See FAIMM *supra* at note 3.
- <sup>40</sup> <https://docs.google.com/viewer?url=http://www.texaspolicy.com/sites/default/files/documents/2010-01-PP02-conservativesaresaying-ml.pdf&chrome=true>
- <sup>41</sup> See generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.
- <sup>42</sup> USSC 2011 Mandatory Minimum Report at 345.

**"Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"**  
**U.S. Senate Judiciary Committee Hearing**

**September 2013**

**Testimony of Jasmine L. Tyler, M.A.**  
**Deputy Director, National Affairs, Drug Policy Alliance**

The Drug Policy Alliance (DPA) is the nation's leading organization working to promote alternatives to punitive drug laws. DPA advocates for new drug policies that are grounded in science, compassion, health and human rights, and we applaud Chairman Leahy for arranging this hearing to address the important issue of mandatory minimum sentencing.

**Introduction**

More than thirty years ago, this country began a radical social experiment in mass incarceration. Over this time period, the U.S. prison population has grown at an unprecedented rate. The engine driving this growth has been the overuse of incarceration for nonviolent drug offenses and mandatory minimum sentencing. Mandatory minimums are a costly and counterproductive, one-size-fits-all approach that restricts a judge's ability to apply a meaningful sentence that will address all aspects of the offense and provide for public safety. The U.S. now has the largest prison population in the world – both numerically and per capita. And while the U.S. accounts for only 5 percent of the world's population, it holds 25 percent of the world's prisoners. According to the Pew Foundation's research, more than 2.3 million people are incarcerated in the United States; this means that one in one hundred adults is now behind bars.

In 2011, over 1.5 million people were arrested in the United States for drug law violations – and more than four out of five of these arrests were for possession, not manufacture or sale.<sup>1</sup> Fueled by the passage of federal legislation like the Anti-Drug Abuse Acts of 1986 and 1988, the rate of arrests for drug crimes has tripled over the last 30 years,<sup>2</sup> contributing to spiraling criminal justice costs and overcrowding in federal and state corrections facilities. Because of this far-reaching impact, a comprehensive survey of the U.S. criminal justice system must thoroughly examine the efficacy of our current drug policies.

The Congressional Research Service recently found that the number of people confined in the Federal Bureau of Prisons rose from over 24,000 in 1980 to almost 219,000 last year.<sup>3</sup> Today, drug offenders make up about half of the Federal Bureau of Prisons' population. The Urban Institute has said "the length of sentences – particularly for drug offenders – is an important determinant of the stock population and driver of population growth."<sup>4</sup> Their research found that the Federal Bureau of Prisons' population growth from 1998 to 2010 was due to the increasing length of time served in prison for drug offenses. The U.S. Sentencing Commission concluded that mandatory minimums are "unevenly applied, leading to unintended consequences" in their recent report to Congress on the issue.<sup>5</sup> The Sentencing Commission's report found that low-level drug offenders often receive mandatory minimum sentences, not traffickers or kingpins.<sup>6</sup> In fact, it was street-level drug sellers who bear the brunt of federal mandatory minimum sentencing.<sup>7</sup>

**Impact of Mandatory Minimum Sentencing**

*Mass Incarceration*

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Harsh sentencing policies – such as mandatory minimums, sentencing enhancements, and habitual offender laws – have driven the increase in incarceration rates in federal and state corrections facilities over the last 30 years. In 1980, there were 41,000 people imprisoned for drug law violations; by 2010, that number had risen to more than half a million.<sup>8</sup> The Federal Bureau of Prisons currently operates between 138 to 153 percent capacity, and nearly 50 percent of its prisoners are incarcerated for drug law violations.<sup>9</sup> This overcrowding poses a serious risk to the safety of both prisoners and staff.<sup>10</sup>

At the state level, New York's Rockefeller Drug Laws – enacted in 1973 – instituted long mandatory minimum prison sentences. Even those convicted of first time, nonviolent drug offenses faced the prospect of life in prison, driving an unprecedented explosion of the prison population.<sup>11</sup> The Rockefeller Drug Laws became a national model, with other states enacting their own mandatory minimum sentencing statutes.<sup>12</sup> The 1980s brought a further proliferation of harsh sentencing laws for drug law violations enacted by legislatures around the country. The federal system followed suit with the passage of the Anti-Drug Abuse Acts of 1986 and 1988. These laws created numerous severe mandatory minimum sentences for drug law violations, including the 100-to-1 sentencing disparity between crack and powder cocaine. As a result, sentencing judges lost their discretion to consider the range of factors pertaining to the individual and the offense that would normally be a vital aspect of the sentencing process.<sup>13</sup>

The overarching effect of these egregious sentencing policies is that people convicted of drug law violations are facing longer and longer sentences: from 1992 to 2002, the average time served in federal prison for a drug offense increased by 31 percent, from 32.7 months to 42.9 months.<sup>14</sup> Meanwhile, the length of time served in prison at the state level has increased across the nation, with people convicted of drug crimes serving sentences as much as 194 percent longer than those meted out in 1990.<sup>15</sup> The lengthy sentences carried out by people convicted of drug law violations calls into question the notion of proportionality in the American criminal justice system. While it has been historically accepted that a sentence should be proportionate to the underlying criminal offense, in recent years the U.S. has shifted away from this model of justice.<sup>16</sup> The Bureau of Justice Statistics finds that at the state level, people convicted of drug trafficking serve an average sentence of 37 months, whereas those convicted of aggravated assault serve 41 months. At the federal level, individuals convicted of simple drug possession serve nearly twice as much time as those convicted of felony aggravated assault.<sup>17</sup>

#### *Prosecutorial Power*

While judges have lost discretionary power in sentencing drug crimes, prosecutorial power has increased exponentially. As a result of decades of laws to toughen sentences for people convicted of drug law violations, prosecutors have gained incredible leverage to extract guilty pleas – often by threatening more serious charges requiring mandatory minimum sentences. Meanwhile, as prosecutors seek to reduce the number of cases that go to trial, a so-called “trial penalty” has become apparent in many jurisdictions, as those who go to trial now face harsher penalties than those who agree to a plea. This gap is so apparent in many jurisdictions that legal experts have expressed concern that it has become a coercive instrument used to punish defendants who choose to exercise their right to trial. For instance, in Florida, felony defendants who opt for trial routinely face the prospect of sentences as much as 20 times as long as if they had pleaded guilty.<sup>18</sup>

Despite lawmakers' intentions, mandatory minimums have not aided law enforcement or prosecutors in the apprehension of kingpins or major traffickers. Imprisoning drug offenders is complicated by the fact that drug dealing is subject to a "replacement effect," in that street-level sellers who are arrested and incarcerated are quickly and easily replaced by other sellers.<sup>19</sup> Therefore, while incarceration imposes a substantial financial burden on the government and taxpayers, it does little to reduce the underlying behavior that drives illicit drug markets, such as addiction. It also does little to combat the prohibition-related violence that surrounds the illicit drug market. These core problems highlight the ways that mandatory minimum sentences fail to adequately protect public safety and health.

The impact of mandatory minimums goes beyond the drug kingpins these sentences were designed to target. For instance, only 11 percent of federal drug defendants are classified as high-level dealers, and 75 percent of drug offenders in state prisons have been convicted of possession or some other non-violent drug offense.<sup>20</sup> Even in cases where mandatory minimums are not employed, the possibility of a lengthier sentence likely escalates the amount of punishment imposed by pressuring defendants, many of whom are people who use drugs on the periphery of the drug trade, into plea arrangements that forfeit their due process rights and judicial discretion.

#### *Racial Disparities*

There is a significant racial bias evident in the length of sentences served by people convicted of drug law violations. African Americans serve almost as much time in federal prison for a drug law violation (58.7 months) as whites do for a violent offense (61.7 months), largely due to racially disparate sentencing laws such as the crack-powder cocaine disparity.<sup>21</sup> This disparate impact is present despite consistent data showing that African Americans and whites use drugs at similar rates, have similar rates of chemical dependence, and are involved in drug sales in similar numbers.<sup>22</sup>

During the last 30 years, many states implemented sentencing enhancement laws, such as instituting mandatory minimum sentences for drug crimes taking place within 1,000 feet of a school or park (known as "drug-free school zones"). However, the effect of these laws was to create a two-tier system of justice: a harsher one for dense urban areas with numerous schools and overlapping zones, and a milder one for rural and suburban areas, where schools are more spread out. Evidence has shown that laws biased against urban areas fall most harshly on black and Latino populations. For instance, research has illustrated that the drug free school zone law in Massachusetts failed to move drug activity away from young people while subjecting black and Latino defendants to longer sentences,<sup>23</sup> while New Jersey's school zone law resulted in blacks and Latinos being convicted of 96 percent of school zone violations.<sup>24</sup>

Habitual offender laws have also contributed to the mandatory lengthy sentences served by people convicted of drug law violations. California's Three Strikes Law, which sentences individuals convicted of three or more serious criminal offenses to life in prison, has been shown to have a disproportionate effect on people convicted of nonviolent drug offenses. In 2003, more third strikers were serving 25-years-to-life for drug possession than third strikers in prison for second degree murder, assault with a deadly weapon, and rape combined. This law is also racially disparate in its application: the black incarceration rate for third strikes is 12 times higher than that of whites, while the Latino rate is 45 percent higher than that of whites.<sup>25</sup> In November of 2012, Californians overwhelmingly voted to

reform the Three Strikes Law, closing the loophole that allowed life sentences to be imposed when the new felony conviction is not “serious or violent.”<sup>26</sup>

#### *Fiscal Impact*

Lamentably, the U.S. spends enormous amounts of money enforcing the current sentencing regime that punishes the taxpayer as well as the offender while doing little to enhance public safety in return. The Federal Bureau of Prisons FY 2013 budget accounts for almost a third of the Department of Justice’s budget,<sup>27</sup> totaling almost \$7 billion.<sup>28</sup> Meanwhile, there is no evidence that longer terms of incarceration result in safer communities. Numerous studies – including one conducted by the Department of Justice – have concluded that there is little, if any, connection between fluctuations in criminal activity and incarceration rates.<sup>29</sup> In fact, Bureau of Justice statistics reveal that between 1998 and 2007, states that increased their incarceration rates the most did not see a corresponding drop in crime, while states that decreased incarceration did experience lower levels of criminal activity.<sup>30</sup>

#### *Human Costs*

The overrepresentation of people of color in the expanding federal prison system imposes a host of negative consequences on minority communities. Families suffer when a financial contributor is imprisoned, while larger communities suffer from a cumulative loss of earning power when high concentrations of returning ex-offenders are unable to secure employment.<sup>31</sup> And tragically, incarceration promotes a cycle of involvement with the criminal justice system for the children of offenders.<sup>32</sup>

These policies also present a steep cost to the families and communities of people incarcerated for drug crimes. When a parent or caregiver is incarcerated, it causes disruptions to daily life that have a profound social and psychological impact on children. Having a parent in prison is linked to numerous harms including depression, poor academic performance, and poverty.<sup>33</sup> Moreover, research estimates that having an incarcerated parent makes a child six times more likely than their counterparts to become criminally involved or to be imprisoned at some time in their life.<sup>34</sup>

In addition to the traumatic social and enormous economic cost of mandatory minimums, there is a physical cost as well. Nonviolent possessors and sellers frequently have addiction problems and need substance abuse treatment, not longer sentences. Prisons rarely promote rehabilitation and sometimes even have the opposite effect. Incarceration places a person who is struggling with addiction into a stressful, violent and humiliating environment, where drugs are often available (and clean syringes almost never), where sexual violence is common (and condoms rare), where HIV, hepatitis C, tuberculosis and other communicable diseases are prevalent, where medical care is often substandard, and where drug treatment is largely nonexistent.

A long period of incarceration typically prevents access to drug treatment due to budgetary constraints, and reinforces the notion that the person is deviant. The pain, deprivation and atypical, dehumanizing routines that people experience while incarcerated can create long-term negative consequences.<sup>35</sup> In light of a growing body of medical evidence that supports the idea that addiction is a disease, we should not continue to support a sentencing scheme that is unable to take into account the role of a person’s illness in the commission of an offense while ignoring the fact that treatment is effective in reducing recidivism.

People who struggle with substance abuse and addiction should be subject to health interventions, not criminal justice involvement.

Indiscriminately incarcerating low-level, nonviolent individuals can promote a tragic cycle of recidivism, as the stigmatization of serving a prison sentence, or even an arrest, denies people access to legitimate economic markets upon release and forces them back into the illicit drug trade.

Repealing mandatory minimum sentences for nonviolent drug offenders does not mean that these individuals are going to “get off easy.” The prohibition-related violence and harms that stem from the illicit drug trade as a whole are issues that merit close attention and concerted attempts to eliminate. However, recognizing that mandatory minimums have failed to achieve their stated objective moves toward combating the drug problem through a different, more effective lens, and does not abandon the issue or deny its importance.

#### **National and state-wide trends support the repeal of mandatory minimum sentences**

By the mid-1990s, frustration with the overreliance on incarceration led some jurisdictions to pursue alternatives to incarceration for nonviolent drug offenders – such treatment programs for people who struggle with drug misuse or addiction, or diversion to community-based programs for others. In California, the Substance Abuse Crime Prevention Act of 2000 (otherwise known as Proposition 36) offered treatment instead of incarceration for first and second time drug offenders. Evaluations found that the program produced substantial reduction in incarceration costs, saving as much as \$4 for every \$1 allocated.<sup>36</sup> Texas also made significant reforms, passing legislation that allows judges to sentence individuals to community corrections treatment facilities, expanding sentencing options for certain low-level drug offenses. The law also provides the prosecuting attorney the discretion to charge a state felony as a misdemeanor, thereby avoiding a sentence of incarceration.<sup>37</sup>

While treatment and community diversion options expanded in some jurisdictions, the punitive sentencing provisions of the 1980s remain in effect across the U.S., resulting in near-record levels of arrests, convictions and sentences to prison for drug law violations.<sup>38</sup> Meanwhile, incarceration rates and criminal justice costs continue to rise as a result of harsh sentencing policies.<sup>39</sup>

#### *New York's Rockefeller Law Reforms*

In 2009, New York accomplished its own reform when it modified the Rockefeller Drug Laws, which was the first statute to impose notoriously harsh and ineffective mandatory minimum sentences for drug offenders. In effecting these changes, the government explicitly recognized that mandating nonviolent drug offenders to prison is counterproductive and results in unconscionable racial disparities. The legislation eliminated mandatory minimum sentences and significantly restored judges' ability to order treatment and rehabilitation instead of incarceration.

States from coast to coast, including Texas, Michigan, Delaware, and Connecticut, have recently repealed or scaled back their draconian sentencing schemes amidst a growing consensus that mandatory minimums are ineffective and impose enormous social and economic costs on both the state and local communities.<sup>40</sup> Rather than treating the drug problem as an issue to be dealt with through the criminal justice system, policymakers are

beginning to embrace a public health model that expands and emphasizes access to treatment and rehabilitation for those convicted of drug law violations.

#### *The Fair Sentencing Act*

On the federal level, President Obama signed the Fair Sentencing Act in 2010, which reduced the two-decades-old sentencing disparity between crack and powder cocaine offenses and eliminated the first mandatory minimum sentence since the 1970s. This discrepancy, known as the 100-to-1 ratio, caused a myriad of problems, including the perpetuation of racial disparities and the wasting of taxpayer money resulting from the mass incarceration of low-level sellers or lookouts.

This historic and unprecedented bipartisan reform indicates an increasing federal willingness to move away from get-tough rhetoric in favor of more evidenced-based policies. The legislation also represents a growing consensus among policymakers that harsh sentencing schemes may not be the best way to address the drug issue because of unwanted side-effects, such as the exacerbation of already-existing racial disparities and poor prioritization law enforcement resources.

While the crack and powder cocaine disparity was significantly reformed under the Fair Sentencing Act of 2010, equalization and statutory retroactivity remain largely unaddressed until recently. The U.S. Sentencing Commission has twice, however, applied retroactive relief in crack cocaine cases – once, after reducing base offense levels by two levels in 2007 and again after the passage of the Fair Sentencing Act. In both instances, the retroactive application was not applicable to all those serving time for crack cocaine offenses. The Commission was evaluated data on the 2007 retroactive application, which averaged a reduction of 26 months, and found there was no significant difference in their recidivism rate.<sup>41</sup> This means “federal drug offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences.”<sup>42</sup> When the Commission applied the Fair Sentencing Act retroactively, it resulted in the average reduction in sentence of 29 months for over 7000 federal prisoners.<sup>43</sup>

#### **Conclusion**

Prison used to be reserved for the most dangerous and incorrigible individuals. Today it has become the default option for a vast number of nonviolent drug offenses that previously would have called for short prison sentences and/or community supervision, such as probation or parole, and should now be dealt with in under a public health model. The overuse of incarceration and draconian prison sentences for nonviolent drug offenses has resulted in the warehousing of thousands of nonviolent prisoners at enormous costs to taxpayers.

It is clear that we should continue to remove violent and dangerous criminals from society in order to protect the public. However, restoring judicial discretion, especially in drug cases, would facilitate the identification of those with addiction problems who would be better served in a treatment program or on community supervision, and allow the justice system to focus on individuals who pose demonstrable threats to society.

The elimination of mandatory sentences will not negatively impact recidivism rates. A major study conducted by the Department of Justice found that formerly incarcerated individuals actually account for a very small percentage of all arrests in the three years

following release.<sup>44</sup> The study concluded that modest changes in length of stay (either increased or decreased) have no impact on recidivism or aggregate crime rates within a state.<sup>45</sup> In fact, evidence is beginning to surface that imprisonment may actually worsen rates of recidivism among drug offenders, when compared to probation and other alternative interventions.<sup>46</sup>

Incarceration triggers a downward spiral of disadvantage that negatively affects the person incarcerated, their family and their community. The overuse of incarceration and mandatory minimum sentencing makes tens of thousands citizens permanent economic and labor market outsiders. It increases and entrenches poverty in our most vulnerable communities. The federal government cannot afford this waste of lives and money. There are cheaper, more effective, and more human ways to deal with the majority of offenders subject to mandatory sentences.

It is time to stop enforcing wasteful policies and begin adopting strategies that are just, fair, and appropriate. It is also critical to reduce the current BOP population, thousands of individuals serving unnecessary and unjust mandatory minimum sentences, in addition to reducing the number of people going into it. To do so, DPA suggests Congress pass

- The Safety Valve Act of 2013, introduced in the U.S. Senate by Judiciary Committee Chairman Patrick Leahy (D-VT) and Senator Rand Paul (R-KY), and in the U.S. House by Congressmen Bobby Scott (D-VA) and Thomas Massie (R-KY). The bill would allow federal judges to sentence nonviolent offenders below the federal mandatory minimum sentence if a lower sentence is warranted.
- The Smarter Sentencing Act of 2013, introduced in the U.S. Senate by Sens. Dick Durbin (D-IL) and Mike Lee (R-UT), which would lower mandatory minimums for certain drug offenses, make the recent reduction in the crack/powder cocaine sentencing disparity retroactive, and give judges more discretion to sentence certain offenders below the mandatory minimum sentence if warranted.
- The Public Safety Enhancement Act, introduced in the U.S. House by Congressmen Jason Chaffetz (R-UT) and Bobby Scott, which would allow certain federal prisoners to be transferred from prison to community supervision earlier if they take rehabilitation classes, saving taxpayer money while improving public safety.

<sup>1</sup> Federal Bureau of Investigation, *Uniform Crime Reports, Crime in the United States: 2011* (2012).

<sup>2</sup> Human Rights Watch, "Decades of Disparity: Drug Arrests and Race in the United States," 2009; and Howard N. Snyder, "Arrest in the United States, 1980-2009," U.S. Department of Justice, Bureau of Justice Statistics (2011).

<sup>3</sup> Congressional Research Service, "The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options," by Nathan James (R42937; Jan. 22, 2013).

<sup>4</sup> Nancy La Vinge and Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, (Washington, D.C.: The Urban Institute, 2012).

<sup>5</sup> Statement of Judge Patti B. Saris (Chair, United States Sentencing Commission), to the Committee on the Judiciary, United States Senate, for the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," September 18, 2013.

<sup>6</sup> United States Sentencing Commission (USSC), *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, (Washington, D.C.: U.S. Government Printing Office, 2011),

<sup>7</sup> Ibid.

<sup>8</sup> P. Guerino, P. Harrison, and W. Sabol., *Prisoners in 2010*. Washington, DC: Bureau of Justice Statistics, 2010; and Marc Mauer and Ryan S. King, *A 25-Year Quagmire: The War on Drugs and its Impact on American Society*, The Sentencing Project, (Washington, D.C.: 2007).

<sup>9</sup> United States Department of Justice, "Federal Prison System FY 2013 Congressional Budget 1 2013," <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>.

<sup>10</sup> La Vinge and Samuels, *The Growth and Increasing Cost of the Federal Prison System*.

<sup>11</sup> gabriel sayegh, "After the Rockefeller Drug Laws: A New Direction in New York and the Nation," (New York: Drug Policy Alliance, 2010).

<sup>12</sup> Ibid, and Laura Sager, "Michigan Enacts Reform of '650-Lifer' Law," Michigan Families Against Mandatory Minimums, 1998.

<sup>13</sup> Mauer and King, *A 25-Year Quagmire*.

<sup>14</sup> The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (Washington, D.C.:2005).

<sup>15</sup> Pew Center on the States, "Prison Time Served in the States." 2012, accessed October 31 2012,

[http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served\\_State\\_Factsheets.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served_State_Factsheets.pdf)

<sup>16</sup> Gregory S. Schneider, "Sentencing Proportionality in the States." *Arizona Law Review* 54, no. 1 (Spring 2012): 241-275.

<sup>17</sup> Bureau of Justice Statistics, "State Court Sentencing of Convicted Felons, 2004, Statistical Tables, Table 1.10." 2007, accessed October 18, 2012,

<http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04110tab.cfm>.

<sup>18</sup> Richard A. Oppel, "Sentencing Shift Gives New Leverage to Prosecutors." *The New York Times*, Sept 25, 2011.

<sup>19</sup> Substance Abuse and Mental Health Services Administration, *Results from the 2009 National Survey on Drug Use and Health: Volume 1. Summary of National Findings*, Office of Applied Studies (Washington, D.C.: September 2010), <http://oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsP.pdf> (accessed February 16, 2011).

<sup>19</sup> Ryan S. King and Marc Mauer, *Incarceration and Crime: A Complex Relationship*, The Sentencing Project (Washington, D.C.: 2005), 6; Jonathan P. Caulkins, et al., *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* RAND: Drug Policy Research Center (Washington, D.C.: 1997), under "Conclusion."

<sup>20</sup> Ryan S. King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prisons*, The Sentencing Project (Washington, D.C.: 2002), [http://www.sentencingproject.org/doc/publications/dp\\_distortedpriorities.pdf](http://www.sentencingproject.org/doc/publications/dp_distortedpriorities.pdf) (accessed January 19, 2011).

<sup>23</sup> Aleks Kajstura, Peter Wagner, and William Goldberg., *The Geography of Punishment: How Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children*. Prison Policy Initiative, 2008.

<sup>24</sup> Families Against Mandatory Minimums, *New Jersey's Mandatory Drug-Free School Zones: A Law in Need of Reform*. 2009.

<sup>25</sup> Scott Ehlers, Vincent Schiraldi, and Jason Ziedenberg, *Still Striking Out: Ten Years of California's Three Strikes*. Justice Policy Institute, 2008.

<sup>26</sup> "Proposition 36 on Three Strikes Law Passes." *Los Angeles Times*, Nov 6, 2012.

<sup>27</sup> U.S. Department of Justice, Overview FY 2013 Budget and Performance Summary (Washington, DC: 2012), <http://www.justice.gov/jmd/2013summary/pdf/fy13-bud-summary-request-performance.pdf#summary>.

<sup>28</sup> La Vinge and Samuels, *The Growth and Increasing Cost of the Federal Prison System*.

<sup>29</sup> James Austin and John Irwin, *It's About Time. America's Imprisonment Binge*, 3<sup>rd</sup> ed. (Palo Alto, CA: Wadsworth, 2000), cited in James Austin and Tony Fabelo, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, The JFA Institute (Washington, D.C.: July 2004), [http://www.nacdl.org/sl\\_docs.nsf/freeform/nationalissues/\\$FILE/BlueprintFinal.pdf](http://www.nacdl.org/sl_docs.nsf/freeform/nationalissues/$FILE/BlueprintFinal.pdf) (accessed January 21, 2011), 11; U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (Washington, D.C.: June 2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (accessed January 21, 2011).

<sup>30</sup> William J. Sabol and Heather Couture, *Prison Inmates at Midyear 2008—Statistical Tables*, Bureau of Justice Statistics (Washington, D.C.: 2008); D.K. Gillard, *Prison and Jail Inmates at Midyear 1998*, Bureau of Justice Statistics (Washington, D.C.: 1999).

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- <sup>38</sup> Urada et al., *Evaluation of Proposition 36*.
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- <sup>40</sup> Justice Policy Institute, *Maryland's Mandatory Minimum Drug Sentencing Laws*, 5.
- <sup>41</sup> Kim Steven Hunt (Senior Research Associate, Office of Research and Data, United States Sentencing Commission) and Andrew Peterson (Research Associate, Office of Research and Data, United States Sentencing Commission), memorandum to Judge Patti B. Saris (Chair, United States Sentencing Commission), "Recidivism of Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment," May 31, 2011.
- <sup>42</sup> Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, September 18, 2013.
- <sup>43</sup> United States Sentencing Commission, *Preliminary Crack Retroactivity Data Report*, (Washington, D.C.: U.S. Government Printing Office, 2013).
- <sup>44</sup> U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*.
- <sup>45</sup> Ibid.
- <sup>46</sup> Cassia Spohn and David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* vol. 40, no. 2 (2002): 329-357, 351.



**Written Statement of the Federal Criminal Justice Clinic at  
the University of Chicago Law School**

**Submitted to the Senate Committee on the Judiciary**

**Hearing on “Reevaluating the Effectiveness of Federal  
Mandatory Minimum Sentences”**

**Wednesday, September 18, 2013**

**Alison Siegler**

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**Clinical Instructor, Federal Criminal Justice Clinic**

**The Federal Criminal Justice Clinic at the University of Chicago Law School strongly supports the Smarter Sentencing Act of 2013 (“SSA”) and the Justice Safety Valve Act of 2013 (“JSVA”).**<sup>\*</sup> By shortening mandatory minimum sentences, expanding the safety valve, and making the Fair Sentencing Act (“FSA”) fully retroactive, these laws will wisely allow judges to sentence people as individuals and to reflect in their sentencing decisions the case-specific considerations Congress has mandated.<sup>1</sup> They will also save taxpayers billions of dollars without compromising our safety.

#### **I. Harsh, One-Size-Fits-All Mandatory Minimum Drug Laws Subject Low-Level Offenders to Draconian Punishments and Create Troubling Disparities.**

As Attorney General Eric Holder observed in his speech to the American Bar Association last month, “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason.”<sup>2</sup> This widespread and “coldly efficient” incarceration “imposes a significant economic burden—totaling \$80 billion in 2010 alone—and it comes with human and moral costs that are impossible to calculate.”<sup>3</sup> In the federal system today, almost half of all federal prisoners are incarcerated for drug offenses.<sup>4</sup>

Existing mandatory minimum drug laws require judges to impose lengthy sentences for numerous drug offenses depending on drug type and quantity.<sup>5</sup> For example, a person who is caught possessing less than two ounces of methamphetamine faces a 10-year mandatory minimum sentence.<sup>6</sup> These harsh laws apply indiscriminately to drug kingpins and low-level drug mules alike.

<sup>\*</sup> Testimony submitted by Alison Siegler (Associate Clinical Professor of Law & Founder and Director of the Federal Criminal Justice Clinic), Erica K. Zunkel (Clinical Instructor in the Federal Criminal Justice Clinic), and James DuBray (University of Chicago Law School Class of 2014).

<sup>1</sup> See 18 U.S.C. § 3553(a) (requiring judges to consider “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, . . . to afford adequate deterrence to criminal conduct, . . . to protect the public from further crimes of the defendant, . . . [and] to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner,” among other things, when imposing sentence, and mandating an overarching requirement that “the court shall impose a sentence sufficient, but not greater than necessary” to comply with these purposes of punishment).

<sup>2</sup> *Attorney General Eric Holder’s Remarks to American Bar Association* (Aug. 12, 2013) [hereinafter Holder Remarks], available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

<sup>3</sup> *Id.*

<sup>4</sup> See E. Ann Carson & William J. Sabol, U.S. Dep’t of Justice, *Prisoners in 2011* 10, tbl. 11 (2012); Bureau of Prisons, *Quick Facts About the BOP*, available at <http://www.bop.gov/news/quick.jsp> (showing 46.8% of all federal prisoners are serving time for a drug offense).

<sup>5</sup> In spite of Attorney General Holder’s recent policy shift, low-level, non-violent drug offenders continue to face a grim fate in federal courts across the country.

<sup>6</sup> See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A) (setting forth a 10-year mandatory minimum penalty for any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance, including 1 kilogram or more of heroin, 5 kilograms or more of cocaine, 280 grams or more of a mixture containing cocaine base, 100 grams or more of PCP, 10 grams or more of LSD, 1000 kilograms or more of marijuana, 50 grams or more of methamphetamine, 500 grams or more of a mixture containing methamphetamine, and a 5-year

There are only two ways to receive a sentence below the mandatory minimum in a federal drug case. First, if an offender has little to no criminal history, he may qualify for safety-valve relief under 18 U.S.C. § 3553(f).<sup>7</sup> In addition to demonstrating that he has little to no criminal history, the offender must also prove that: (1) he did not use violence or possess a firearm or other dangerous weapon in connection with the offense; (2) the offense did not result in death or serious bodily injury to any person; (3) he was not an organizer, leader, manager, or supervisor of others in the offense; and (4) prior to sentencing, he has truthfully provided to the prosecutor all information and evidence concerning the offense and any related offenses.<sup>8</sup> If the offender is not eligible for safety-valve relief, he will *only* receive a sentence below the mandatory minimum if the prosecutor believes he has provided “substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>9</sup>

The current laws have failed us.

First, drug type and quantity are often bad proxies for culpability.<sup>10</sup> On the southern border, for example, dispensable drug mules are frequently sent over the border with multi-kilogram quantities of marijuana, heroin, cocaine, and methamphetamine without being told the

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mandatory minimum for lesser amounts of the same drugs). These statutes extend to anyone who possesses more than a personal-use amount of drugs. If a person commits an offense listed in § 841(b)(1)(A) or § 960(b)(1)(A) after sustaining a “prior conviction for a felony drug offense,” the mandatory minimum increases to 20 years. If a person commits such an offense after two prior felony drug convictions, the mandatory minimum increases to life imprisonment. The statute defines the term “felony drug offense” broadly to mean an offense that is “punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” 21 U.S.C. § 802(44).

<sup>7</sup> Pursuant to 18 U.S.C. § 3553(f)(1), little to no criminal history is defined as not having “more than 1 criminal history point, as determined under the sentencing guidelines.” The Guidelines, in turn, calculate criminal history points as follows: (1) three points for each prior sentence exceeding 13 months that was imposed within 15 years of the offense; (2) two points for each prior sentence exceeding 59 days that was imposed within ten years of the offense; and (3) one point for each prior sentence not counted under (1) or (2). See U.S.S.G. § 4A1.1(a)–(c) & Application Notes (1)–(3). Two additional points are added to the criminal history score if the offender committed the offense “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” U.S.S.G. § 4A1.1(d). The total number of criminal history points determines an offender’s Criminal History Category, ranging from Category I to Category VI. Criminal History Category I encompasses zero or one criminal history points. Criminal History Category II encompasses two or three criminal history points. Criminal History Category III encompasses four, five, or six criminal history points. This rigid scoring paradigm means that an offender can receive more than one criminal history point for just one minor prior conviction.

<sup>8</sup> 18 U.S.C. § 3553(f)(2)–(5).

<sup>9</sup> 18 U.S.C. § 3553(e).

<sup>10</sup> See U.S. Sent’g Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 350 (Oct. 2011) [hereinafter “Mandatory Minimums Report”], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Chapter\\_12.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_12.pdf) (“Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress expected.”).

type or quantity of the drug they are transporting. Often the drug cartel recruiters tell offenders that they will be transporting a small amount of marijuana, when in fact they will be transporting a more serious drug.<sup>11</sup> Because the drug cartels hide drugs in cars, trucks, and boats in ever-expanding efforts to evade law enforcement, offenders typically never lay eyes on the drugs they transport.<sup>12</sup> Drug mules are promised a small payment—often just a few hundred dollars, which is a pittance compared to the overall value of the drugs on the street. Yet they face the same mandatory minimum sentences as high-level, sophisticated drug offenders who know all about the drugs they are transporting and trafficking.<sup>13</sup> **The SSA and the JSVA will remedy these problems by lowering the statutory mandatory minimums for certain drug offenses and directing the United States Sentencing Commission to reduce the drug guidelines accordingly.**

Second, the two ways drug offenders have any hope of receiving a sentence below the mandatory minimum are difficult to satisfy and often lead to absurd results. The safety-valve provision's requirement that the offender have no more than one criminal history point under the U.S. Sentencing Guidelines excludes many low-level, non-violent drug offenders who would otherwise be eligible, because it disqualifies any offender who has a prior conviction for which he received at least 60 days within ten years of the offense.<sup>14</sup> In 2012, just 23% of drug offenders facing a mandatory minimum received safety valve.<sup>15</sup> Yet only 6% of those sentenced under mandatory minimum drug laws were considered to be high-level offenders: leaders, managers, or supervisors in drug enterprises.<sup>16</sup> This does not make good sense—low-level drug offenders who do not use violence or weapons should be eligible for sentences below the mandatory minimum if the judge, in her discretion, determines under § 3553(a) that the mandatory minimum sentence is greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. Moreover, the substantial assistance provision often provides no relief to low-level drug offenders, because it benefits high-level offenders with the knowledge and contacts to help

<sup>11</sup> See Profile of Jonathan Cruz, *infra* pp. 6–7.

<sup>12</sup> See *United States v. Valdez-Gonzalez*, 957 F.2d 643, 649–50 (9th Cir. 1992) (affirming the district court's downward adjustment to account for the defendant's mitigating role in the offense and noting that the district court had analyzed the socioeconomics and politics of the drug trade along the Mexican border and had determined that the defendants—who were day laborers paid to transport drugs across the border—were mere “mules” with “less to gain from the success of the drug enterprise than ordinary underlings in conspiracy cases”).

<sup>13</sup> Indeed, is not uncommon for high-level offenders to receive sentences similar to low-level offenders like those profiled in Part II *infra*. For example, several high-ranking members of a large drug trafficking organization in Southern California received sentences at or near the 10-year mandatory minimum in spite of their leadership roles and their participation in a multi-year methamphetamine conspiracy. See *United States v. David Chavez-Chavez*, 07-CR-1408 (S.D. Cal. Nov. 30, 2009) (121-month sentence for high-level manager of a methamphetamine drug trafficking organization); *United States v. Joel Chavez-Chavez*, 07-CR-1408 (S.D. Cal. July 26, 2010) (same).

<sup>14</sup> In a 2011 report, the Sentencing Commission recommended to Congress that it “consider expanding the safety valve at 18 U.S.C. § 3553(f) to include certain offenders who receive two, or perhaps three, criminal history points under the guidelines.” Mandatory Minimums Report, *supra* note 10, at 355.

<sup>15</sup> See U.S. Sent'g Comm'n, 2012 Sourcebook of Federal Sentencing Statistics, tbl. 44 (2013) [hereinafter “2012 Sourcebook”], available at

[http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table44.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table44.pdf).

<sup>16</sup> See *id.* at tbl. 40.

prosecutors investigate and prosecute others. Low-level offenders in drug cases tend to lack this kind of information. **The SSA and the JSVA will remedy these problems by expanding safety-valve relief.**

Third, safety valve and substantial assistance provide prosecutors, rather than judges, with near-total control over who will receive a sentence beneath the mandatory minimum. Assuming an offender has met all of the other requirements, safety valve requires the prosecutor to affirm to the judge that the offender has provided all truthful and complete information about the offense. It is virtually impossible for an offender to obtain safety valve relief without the prosecutor's support, because he would have to convince the judge—over the prosecutor's opposition—that he has been truthful and complete. Substantial assistance, in turn, is entirely dependent on the prosecutor's recommendation. The statute specifically states that a sentencing judge only has the authority to sentence beneath the mandatory minimum for substantial assistance “[u]pon motion of the government.”<sup>17</sup> **The SSA and the JSVA will remedy these problems by expanding safety-valve relief and providing judges with more discretion to sentence a non-violent, low-level offender beneath the mandatory minimum if certain requirements are met.**

Finally, indiscriminate mandatory minimum sentences have a disparate effect on the most vulnerable among us—the poor, women, and people of color. Low-level drug offenses are often crimes of poverty, and are linked to substance abuse.<sup>18</sup> Drug cartels—especially those operating at the Mexican border—prey on those who are desperate for money, whether to provide for their families, put themselves through school, or support a drug or alcohol problem. Women—the fastest growing sector of our country's prison population<sup>19</sup>—are uniquely susceptible to serving as drug couriers to support their families or to appease boyfriends or husbands who are higher-level drug offenders.<sup>20</sup>

Mandatory minimums also create racial disparities. As Attorney General Holder acknowledged in his speech to the American Bar Association, studies show that people of color receive sentences nearly 20% longer than their white counterparts who are convicted of similar crimes.<sup>21</sup> The Sentencing Commission has similarly found that the cumulative sentencing impacts of criminal history and weapon involvement (which renders an offender ineligible for safety valve) are “particularly acute for Black drug offenders.”<sup>22</sup> Thus, a full three-quarters of

<sup>17</sup> 18 U.S.C. § 3553(e).

<sup>18</sup> See, e.g., Phillip Beatty et al., *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties*, Justice Policy Institute (2007).

<sup>19</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2010* (Dec. 2011) (the female incarcerated population grew by 2.2% since 2000; the male incarcerated population grew by 1.6% since 2000).

<sup>20</sup> Nakima Levy-Pounds, *From the Frying Pan to the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 Santa Clara L. Rev. 285, 294–95 (2007).

<sup>21</sup> See Holder Remarks, *supra* note 2; see also Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, *Judicature* Vol. 94, No. 1 (July–Aug. 2010) (“Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.”).

<sup>22</sup> Mandatory Minimums Report, *supra* note 10, at 354.

black drug offenders convicted of an offense carrying a mandatory minimum penalty in Fiscal Year 2010 were excluded from safety valve eligibility due to criminal history scores of more than one point.<sup>23</sup> Additional racial disparities are created by the fact that offenders arrested before the FSA's passage in 2010 are serving dramatically higher sentences for crack cocaine offenses than their white counterparts sentenced for powder cocaine offenses, even as Congress has recognized that those offenders were "sentenced under a law that virtually everyone agrees is unjust."<sup>24</sup>

These shameful disparities cannot and should not continue. **The SSA and the JSVA will move us closer to alleviating these disparities by making the Fair Sentencing Act retroactive and by giving judges more discretion to sentence beneath the mandatory minimum if certain requirements are met.**

## II. Mandatory Minimum Drug Laws Exact Incalculable Human Costs.

Every day, across the country, federal judges sentence low-level, non-violent drug offenders to mandatory minimum sentences that are far greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. These long sentences not only cost taxpayers dearly, but they also unnecessarily devastate families and lives. **The individuals profiled below are just a few of the victims of our mandatory minimum drug laws and are compelling examples of why it is imperative for Congress to take action and pass the SSA and the JSVA.**

### A. Casey Dinwiddie (Case No. 06-CR-1461, Southern District of California).

Casey Dinwiddie was still a teenager when she was arrested for attempting to bring less than two pounds of methamphetamine into the United States in 2006. Casey was going through a particularly hard time in her life as she was struggling with a methamphetamine addiction that began when she was just 16 years old. Her addiction led her to agree to bring drugs across the border. Although Casey's drug addiction had gotten her into trouble before her federal arrest, her past involvement in the criminal justice system had been fairly minor. She had two prior convictions for which she had received sentences of 26 days and 30 days in jail, respectively. Those cases rendered her ineligible for safety valve relief even though she met all of the other requirements—she did not use violence or a weapon during the offense, the offense did not result in death or serious bodily injury, and she unequivocally did not play a leadership role. Casey had no substantial assistance to provide because she was an expendable drug mule.

This left Casey without any hope of receiving a sentence below the mandatory minimum. In turn, that meant that the judge could not consider Casey's genuine remorse, her age, her family support, or any other mitigating circumstances at the sentencing hearing.

<sup>23</sup> *Id.*

<sup>24</sup> Senator Richard Durbin, 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010). Attorney General Holder has likewise acknowledged the injustice of the high crack cocaine sentences many offenders continue to serve: "this Administration successfully advocated for the reduction of the *unjust* 100-to-1 sentencing disparity between crack and powder cocaine." Holder Remarks, *supra* note 2 (emphasis added).

During the sentencing hearing, the judge expressed deep reservations about sentencing Casey to 10 years in prison. He stated, on the record:

Ms. Dinwiddie, I have to tell you, sending people to prison is never something that I find easy to do. It's easier to do in those cases where I think that my sending people to prison's going to act as a deterrent or is going to send a message to someone or is going to prevent future bad conduct, and I'm certainly not shy about doing that. In this particular case, I have to tell you that I am – my conscience tells me that I should do something different than what I'm about to do, but the law is the law, and I have to follow what the law is. I'm not – I wasn't appointed to second-guess the Congress, the people that are in charge of making laws. I wish that there was some way that I could avoid what Congress has said that I have to do and that I could do it in good conscience and in keeping with what I think the law is, but I can't.<sup>25</sup>

After closely considering the circumstances of the offense, Casey's personal history, and public safety concerns, the judge wisely recognized that Casey did not merit such a harsh sentence, but his hands were tied. Noting that the guideline range of 63 to 78 months was lower than the mandatory minimum, the judge went on to say: "If I could impose that 63-month sentence today, I would do it in a heartbeat."<sup>26</sup> The prosecutor remarked during the hearing that he would have recommended a sentence higher than 10 years if Casey had not agreed to an expedited plea deal. The court then asked the prosecutor: "Do you really think there's any judge anywhere that would be inclined to give this young lady more than 120 months?"<sup>27</sup> The prosecutor responded, "No, I don't, not at all, Your Honor, not under the circumstances."<sup>28</sup>

Now 27 years old, Casey was recently released to a Bureau of Prisons ("BOP") residential reentry center to serve out the final months of her 10-year sentence. She has lost her twenties to federal prison. She will never get those years of her life back.

**Under the SSA, Casey would have faced a 5-year mandatory minimum—the sentence the judge wanted to give her in the first place. Under the JSVA, the judge would have had the discretion to go below the mandatory minimum to account for the many mitigating factors in Casey's case.**

#### **B. Jonathan Cruz (Case No. 11-CR-3639, Southern District of California).**

Like Casey, Jonathan Cruz is serving a 10-year mandatory minimum sentence for attempting to bring methamphetamine into the United States from Mexico. He was just 19 years old at the time of the offense. Smugglers provided Jonathan with a car for the sole purpose of ferrying the drugs over the border and told him that he would be transporting marijuana. When federal agents told him that they had found methamphetamine in the car, Jonathan was shocked.

<sup>25</sup> *United States v. Casey Dinwiddie*, 06-CR-1461 (S.D. Cal. Nov. 14, 2006), Sentencing Transcript at 14 (on file with authors).

<sup>26</sup> *Id.* at 17.

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.*

Jonathan, who was born in the United States and is a United States citizen, grew up right across the border from San Diego, California, in Tijuana, Mexico. He was abused as a child and developed a serious drug addiction when he was 13 years old. He has only a sixth grade education. When he was a teenager, he was hit by a car and suffered a severe head injury. Coupled with his drug addiction, the injury caused numerous mental health issues, including depression, anxiety, and hallucinations.

When he was a juvenile, Jonathan was adjudicated a delinquent for attempting to bring marijuana into the United States. He was sent to a juvenile camp to receive drug treatment and vocational training. As a result of this juvenile adjudication,<sup>29</sup> Jonathan was not eligible for safety-valve relief, even though he met all of the other requirements and had no adult convictions on his record. At sentencing, the judge struggled with assessing two criminal history points for Jonathan's juvenile adjudication, which placed Jonathan in Criminal History Category II and rendered him ineligible for safety valve: "I mean, in my view, I would love to give Mr. Cruz every break and benefit of the doubt, but I think the law is the law."<sup>30</sup>

Like Casey, Jonathan had no substantial assistance to provide because he was an expendable drug mule. Rather than plead guilty to a certain 10-year sentence, Jonathan exercised his constitutional right to trial and was convicted.

The mandatory minimum prevented the judge from fully fashioning a sentence that accounted for Jonathan's cognitive disabilities or his youth, even though he wanted to: "My intent is to give you the least amount of time under the elements that I now have here, because I think the equities, given your mental health, drug addiction, and all of these other factors that are mentioned here, warrant that."<sup>31</sup> Even the prosecutor thought a 10-year sentence was excessive. He stated, on the record: "Now, do I think as an individual, as a citizen or a person, that Jonathan Cruz deserves to go to prison for ten years for this? Nope, I don't. But this is not my place to say."<sup>32</sup> The judge sentenced Jonathan to 10 years in prison. This is the first jail sentence Jonathan has ever served.

Jonathan was arrested in 2011; he is scheduled to be released in 2020, when he is 28 years old.

**Under the SSA, Jonathan would have been eligible for safety-valve and would have faced a 5-year mandatory minimum, rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the discretion to go below the mandatory minimum to account for the many mitigating factors in Jonathan's case.**

<sup>29</sup> Even though a juvenile adjudication is not a true "conviction" and is imposed for rehabilitative purposes, not punishment, the Guidelines count a juvenile adjudication as a "prior sentence" if imposed "within five years of the defendant's commencement of the current offense." U.S.S.G. § 4A1.2(a), (d).

<sup>30</sup> *United States v. Jonathan Cruz*, Case No. 11-CR-3639 (S.D. Cal. April 4, 2013), Sentencing Transcript at 22 (on file with authors).

<sup>31</sup> *Id.* The Guidelines in Jonathan's case were higher than the mandatory minimum. The judge acknowledged the higher Guidelines, but rejected them: "And it's my intention to impose the mandatory minimum, frankly." *Id.* at 25.

<sup>32</sup> *Id.* at 18.

**C. Gabriela Perez (Case No. 11-CR-5756, Southern District of California).**

Gabriela Perez, a young single mother, is currently serving a 10-year mandatory minimum sentence for attempting to bring one pound of methamphetamine into the United States from Mexico. Gabriela confessed her involvement in the offense to Customs and Border Protection agents. Significantly, she told them that she did not know what kind of drug she was transporting. She also told them that the drug smugglers had promised to pay her a mere \$600 if she was successful.

Gabriela was just 25 years old at the time of her arrest; her son, Luis, was 7. Gabriela committed the offense because she desperately needed money. The father of her young son was not paying child support. She had held a full-time job as a dental hygienist for five years, but had recently been laid off because of the economic downturn. After months of trying, Gabriela had not found a new job, and she felt that she had no one to turn to for financial assistance.

Gabriela was a classic unsophisticated drug mule. She did not own the drugs she attempted to bring into the United States, nor did she package or manufacture them. Sophisticated drug smugglers strapped the drugs to Gabriela's body. Her sole role was to ferry them across the border and turn them over to other sophisticated drug smugglers.

Prior to the offense, Gabriela had pled guilty to two minor cases, one resulting in probation and the other ending in a sentence of two weeks in jail. Thus, she had more than one criminal history point and was not eligible for safety-valve relief even though she met all of the other requirements. Even worse, because one of Gabriela's prior convictions was for drugs, the prosecutor had the discretion to file an enhancement that would have raised her mandatory minimum sentence from 10 years to 20 years.<sup>33</sup> Gabriela pled guilty to avoid the threatened enhancement.

Because she was not safety-valve eligible, Gabriela's only hope for getting below the mandatory minimum sentence was to provide substantial assistance to the prosecutor. But like Casey and Jonathan, Gabriela was a low-level drug courier and therefore did not have any information that would help the prosecutors investigate and prosecute criminals. Because Gabriela had no way to get below the 10-year mandatory minimum, the judge was not able to consider any of her personal characteristics, the nature of the offense, or why Gabriela committed the crime. In fact, the judge was not permitted to consider any of the mitigating factors Gabriela's attorney presented at the time of sentencing. The judge's hands were tied by the mandatory minimum, and she sentenced Gabriela to 10 years behind bars.

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<sup>33</sup> See 21 U.S.C. § 851. This enhancement is just another example of the way current mandatory minimum laws shift power from judges to prosecutors. A federal judge recently excoriated prosecutors' § 851 decisions as being "shrouded in such complete secrecy that they make the proceedings of the former English Court of Star Chamber appear to be a model of criminal justice transparency." *United States v. Young*, 2013 U.S. Dist. LEXIS 116042, at \*4 (N.D. Iowa Aug. 16, 2013). The judge rested his opinion on Sentencing Commission statistics revealing that prosecutors apply the enhancement in a "stunningly arbitrary" way that results in "jaw-dropping, shocking disparity." *Id.* at \*2.

Gabriela is scheduled to be released from BOP custody in 2020. While Gabriela serves her 10-year sentence at a cost of \$29,027 dollars per year to United States taxpayers,<sup>34</sup> her young son, Luis, is growing up without his mother, his only parent.

**Under the SSA, Gabriela would have been facing a 5-year mandatory minimum rather than a 10-year mandatory minimum, and the prosecutor would not have been able to threaten her with a 20-year enhancement because of her prior drug offense. Under the JSVA, the judge would have had the discretion to account for the many mitigating factors in Gabriela's case.**

**D. Marvin Webster (Case No. 98-CR-403, Northern District of Illinois).**

Marvin Webster was sentenced to a 10-year mandatory minimum for a hand-to-hand sale of 3.9 ounces of crack to an undercover DEA agent when he was just 23 years old.<sup>35</sup> No weapons or violence were involved in the offense.<sup>36</sup> The prosecutor did not bring charges against Marvin for a full year after the sale, demonstrating that he did not consider Marvin to be a public safety risk. Marvin was raised in a rough neighborhood in Chicago and suffers from mental health problems. His father died when he was eight and his mother supported Marvin and his six siblings on public assistance. By the time charges were brought, he had moved to a different state and had begun to turn his life around. He was working two jobs, including as a garbage collector, to support his long-time girlfriend and their six young children.

Before his federal case, Marvin had never before been sentenced to prison time and had no convictions for anything remotely violent. But he was not eligible for safety-valve relief because of two prior convictions for simple possession of marijuana for which he had received probation.<sup>37</sup> Because Marvin's prior convictions were for drugs, he pled guilty and relinquished his trial and appellate rights to avoid a § 851 enhancement that would have raised his mandatory minimum sentence from 10 years to 20 years.

At sentencing, the judge lamented that he was required to impose a 10-year penalty:

I think 10 years is too long. Between you and me I think it's too long. But as [your attorney] has told you, I don't have any discretion on this one. That's the mandatory minimum. So I'm not going to sentence you to a day more than I have to in this case because I think in your case the punishment is too severe. I don't think you've decided to go into a life of crime.<sup>38</sup>

<sup>34</sup> Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options 1*, Summary & 15 tbl. 1 (Jan. 22, 2013) [hereinafter CRS Report], available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>35</sup> *United States v. Marvin Webster*, 98-CR-403-1 (N.D. Ill. May 6, 1999), Plea Agreement at 2–3 (on file with authors).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *United States v. Marvin Webster*, 98-CR-403-1 (N.D. Ill. May 6, 1999), Sentencing Transcript at 9 (on file with authors).

The judge also spoke about the corrosive effects prison can have on a person who is trying to live a law-abiding life: “I’m sentencing you under circumstances where you’re going to be surrounded by influences just at least as bad as the influences you were trying to get away from. . . . You’re going to have a lot of people in prison telling you to do the wrong thing. And you’re not going to have very many positive influences.”<sup>39</sup> The judge was not able to fashion a sentence that accounted for this concern, nor was he allowed to consider Marvin’s responsibilities to his family, his lengthy and verified work history, his youth, or his mental health issues.

If the FSA had been made retroactive, Marvin have been eligible for a significant sentencing reduction. He would have been facing only a 5-year mandatory minimum. In fact, the amount of drugs he was responsible for is less than half that required to reach the threshold for a 10-year mandatory minimum today. But Marvin served his 10-year sentence and successfully completed a full 5 years of supervised release. By the time he was through paying his debt, he was nearly 40 years old.

**Under the SSA, Marvin would have faced a 5-year mandatory minimum rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the authority to account for the many mitigating factors in Marvin’s case and sentence him below the mandatory minimum.**

**E. Karl Lindell (Case No. 08-CR-227, Northern District of Illinois).**

Karl Lindell is currently serving a 10-year mandatory minimum sentence for attempting to sell less than one-sixth of a pound of crack cocaine to a government confidential informant in November 2007. At the time of his offense, Karl was a struggling 37 year old with a debilitating substance abuse problem who agreed to sell crack cocaine to an individual from his Chicago neighborhood. That person happened to be a confidential informant working for the government. According to the charging documents, the informant had at least eleven prior arrests in the Chicago area, including arrests for aggravated assault, domestic battery, and resisting a police officer.<sup>40</sup> In contrast, Karl had only one prior conviction. Before his federal case, Karl had never spent more than 10 months behind bars.

Karl stood to make approximately \$300 on the drug sale with this informant. The investigating agents described the transaction with Karl as a “stand-alone buy” that was not part of a larger drug conspiracy. There were no weapons or violence involved in the offense, and Karl immediately confessed his involvement to agents. In spite of the fact that the offense was non-violent and Karl did not have any sort of leadership role, he was ineligible for safety valve because of his prior conviction. Because of his low level of involvement, Karl did not have any information to provide to the government that would have led to the prosecution of others.

The low-end of Karl’s guideline range—87 months—was well below the mandatory minimum. If he had been sentenced after the FSA was enacted, his guidelines would have been far lower, and approximately half the 10-year mandatory minimum: 57 to 71 months. Because

<sup>39</sup> *Id.* at 9–10.

<sup>40</sup> *United States v. Karl Lindell*, 08-CR-227 (N.D. Ill.), Complaint at 3, ECF No. 1.

the judge was bound by the mandatory minimum sentence of 10 years, she could not consider any of Karl's mitigating circumstances, including Karl's efforts to address the drug problem that was the source of his involvement in the criminal justice system by completing a drug treatment program in jail. The judge also could not consider the sympathetic letters from Karl's mother and sister in support of a reduced sentence, the horrible conditions of his pre-trial detention, or his remorse.

Karl is currently incarcerated at Forrest City Federal Correctional Complex in Eastern Arkansas, far from his mother, sister, and Chicago, the only home he has ever known. Karl is set to be released on December 26, 2016.

**Under the SSA, Karl would have faced a 5-year mandatory minimum rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the discretion to go consider Karl's equities and sentence him below the mandatory minimum.**

### **III. Mandatory Minimum Drug Laws Impose High Fiscal Costs and Do Not Make Us Safer.**

The human toll described above is incalculable and poses pressing moral concerns. Beyond their human costs, mandatory minimum drug laws have also become an excessively heavy burden on taxpayers, but have not provided public safety benefits justifying those costs. We do not need to keep paying billions of dollars to keep low-level, non-violent offenders like Casey, Jonathan, Gabriela, Marvin, and Karl in prison. **The SSA and the JSVA will reduce those fiscal costs significantly and will increase public safety.**

#### **A. The SSA and the JSVA Will Reduce the Exorbitant Costs of Mandatory Minimum Drug Laws.**

Mandatory minimums have contributed significantly to the dramatic growth of the federal prison population in the last three decades. That population has skyrocketed since 1980, increasing by almost 800%, from 25,000 federal prisoners then to over 219,000 today.<sup>41</sup> As a result, our federal prisons are severely overcrowded and are operating at 139% of capacity.<sup>42</sup> Mandatory minimums are largely to blame for these dramatic increases:

Mandatory minimum penalties have contributed to the federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. . . . Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods.<sup>43</sup>

As the federal prison population has exploded, its costs have ballooned as well. Between Fiscal Year 2000 and Fiscal Year 2012 alone, the per capita cost of incarceration for all inmates

<sup>41</sup> CRS Report, *supra* note 34, at 1.

<sup>42</sup> *Id.* at Summary & 20.

<sup>43</sup> *Id.* at 8.

increased from \$21,603 to \$29,027.<sup>44</sup> Over this same period, BOP appropriations increased from \$3.668 billion to \$6.641 billion.<sup>45</sup> Today, corrections costs devour over 25% of the Department of Justice's budget.<sup>46</sup>

Incarceration costs are rightly part of the debate over the efficacy of mandatory minimums. As legal scholars have noted, "there is no good reason to keep the question of cost out of the discussion of what justice requires."<sup>47</sup> In fact, many federal judges have expressed discontent over the fiscal cost of unduly harsh sentences that "put nonviolent offenders in prison for years, . . . ruin the lives of the prisoners [and] their families, and . . . also hurt our economy and our communities by draining billions of dollars from the taxpayers and keeping potentially productive members of society locked up."<sup>48</sup>

**By expanding the safety valve and lowering mandatory minimums, the SSA and the JSVA will dramatically reduce corrections costs.** Almost half of those in federal prison are there for drug offenses.<sup>49</sup> Notably, in Fiscal Year 2011, approximately two-thirds of drug offenders were convicted of an offense carrying a mandatory minimum.<sup>50</sup> Such penalties prevent federal judges from crafting sentences that employ far cheaper alternatives to incarceration for non-violent drug offenders. Sentences with a supervisory component allow offenders to better their lives in their own communities through education and rehabilitation under the close supervision of a probation officer. This is much less costly for society: One year of a supervisory sentence in the community costs taxpayers just \$3,347.31, one tenth as much as a year of prison. **The SSA and the JSVA will reduce costs by giving judges the discretion to impose supervisory sentences on low-level drug offenders who qualify for safety valve and to impose shorter sentences on offenders who are not safety-valve eligible.**<sup>51</sup>

<sup>44</sup> *Id.* at Summary & 15 tbl. 1.

<sup>45</sup> *Id.* at Summary, 11, 12 fig. 5.

<sup>46</sup> Statement of Michael E. Horowitz, Inspector General, U.S. Dep't of Justice, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies, 9 (Mar. 14, 2013), *available at* <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

<sup>47</sup> Michael A. Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 Fed. Sent'g Rep. 161, 163 (2012).

<sup>48</sup> *United States v. Chavez*, 230 F.3d 1089, 1092 (8th Cir. 2000) (Bright, J., concurring).

<sup>49</sup> See sources cited *supra* note 4.

<sup>50</sup> See Mandatory Minimums Report, *supra* note 10, at 153, *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).

<sup>51</sup> By cutting certain mandatory minimum penalties in half, the SSA will significantly reduce costs to taxpayers. For example, it will cost approximately \$290,000 to incarcerate a single person sentenced today to a 10-year mandatory minimum under the current drug statute. Under the SSA, that individual will face a 5-year mandatory minimum that will cost half as much: around \$145,000. Similarly, it costs nearly \$145,000 to incarcerate a person sentenced today to a 5-year mandatory minimum. Under the SSA, that person's prison time will cost less than half as much: approximately \$58,000.

### B. The SSA and the JSVA Will Increase, Rather Than Diminish, Public Safety.

The lower mandatory imprisonment terms under the SSA will not only reduce sentencing costs, but will also increase public safety and reduce recidivism. The JSVA will further reduce costs and increase public safety by allowing judges to sentence a larger class of non-violent, low-level offenders beneath the mandatory minimum when certain requirements are met.

These reforms will not compromise public safety. Notably, the increased cost of imprisonment has not been accompanied by a public safety gain, because the over 6 billion dollars being spent annually on federal incarceration is primarily not going toward violent individuals who pose threats to their communities. The vast majority of federal drug inmates are not kingpins. Rather, we are spending hundreds of thousands of dollars every year to incarcerate people like Casey, Jonathan, Gabriela, Marvin, and Karl, who pose little threat to public safety.

Moreover, the billions of dollars we spend to incarcerate non-violent drug offenders are not reducing recidivism. As a result of overcrowding, the BOP is woefully unable to provide rehabilitative and treatment services that are known to prevent people from reoffending. To cut costs, the BOP has made significant cuts to rehabilitative programs. In January 2005, the BOP discontinued its Intensive Confinement Center (“ICC”) programs, commonly known as “boot camps.”<sup>52</sup> These programs, which were available to offenders with minimal criminal histories, had been successfully operating across the country for years to reduce recidivism rates for low-level, non-violent inmates. Furthermore, the BOP’s intensive drug treatment program (the 500-hour Residential Drug Abuse Program), which has also been shown to be effective in reducing recidivism, is oversubscribed and is therefore closed to many otherwise-eligible inmates.<sup>53</sup> Even more troubling, only a small fraction of federal prisoners with mental illnesses actually receive mental health treatment in the BOP.<sup>54</sup> Thus, while the majority of federal prisoners suffer from either a mental illness, a drug addiction, or both,<sup>55</sup> because of BOP’s ballooning costs, our federal prison system is unable to provide the treatment necessary to help prevent individuals with drug addictions and mental illnesses from recidivating. Finally, research also shows that increased use of incarceration on its own does not deter people from committing crimes.<sup>56</sup>

<sup>52</sup> Bureau of Prisons, *Legal Resource Guide to the Federal Bureau of Prisons 2008*, 10 n.6, available at [http://www.bop.gov/news/PDFs/legal\\_guide.pdf](http://www.bop.gov/news/PDFs/legal_guide.pdf) (last visited Sept. 10, 2013).

<sup>53</sup> United States District Court for the Northern District of Ohio, *Bureau of Prisons Info, Programming*, available at <http://www.ohnd.uscourts.gov/home/u-s-pretrial-services-probation-office/general-information/bureau-of-prisons-info/programming/> (last visited Sept. 10, 2013) (explaining that with respect to RDAP, “[i]f entering into the prison with a sentence of less than 36 months, [a federal prisoner] most likely will not be eligible.”).

<sup>54</sup> Research conducted by the Department of Justice shows that only 15% of mentally ill inmates receive treatment in the BOP. Office of Justice Programs, Dep’t of Justice, *Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates*, NCJ 213600, at 9 (Sept. 2006).

<sup>55</sup> *Id.* at 4, 5 (revealing that 45% of federal inmates suffer from mental illness and 49.5% of federal inmates have a substance abuse problem). These categories are not mutually exclusive but together encompass far more than half of all federal inmates, because, for example, 63.6% of those with a mental health issue also have a substance abuse issue.

<sup>56</sup> Gary Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a “Collective Wisdom”?*, 59 *Crime & Delinquency* 1006, 1031–33 (2013).

Meanwhile, studies demonstrate that in certain cases public safety is better served by non-incarceration sentences. The Sentencing Commission has conducted extensive research into the question of what kinds of sentences best protect the public, and has concluded “that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant’s need for treatment and the need to protect the public,” and “that successful completion of treatment programs may reduce recidivism rates.”<sup>57</sup> In fact, prison may actually *increase* rates of recidivism.<sup>58</sup> **By giving judges greater discretion to impose less prison time and address offenders’ individualized treatment needs, the SSA and the JSVA will reduce recidivism and increase public safety.**

The conclusion that harsh sentences are not the key to protecting public safety and reducing crime is no longer one just shared by those traditionally concerned with mass incarceration, such as the NAACP, FAMM, and liberal academic scholars. Rather, individuals across the political spectrum are now in agreement about the need to reduce our reliance on incarceration. For example, Rick Perry, the current Republican Governor of Texas, has stated: “I believe we can take an approach to crime that is both tough and smart... there are thousands of non-violent offenders in the system whose future we cannot ignore. Let’s focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again.”<sup>59</sup> Steven Levitt, a University of Chicago economist who once believed that increased incarceration led to corresponding public safety gains, has also changed course: “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today . . . I think we should be shrinking the prison population by at least one-third.”<sup>60</sup>

And finally, organizations such as the Family Resource Council, who once focused their efforts exclusively on the victims of crime, have begun to question the status quo:

Given incarceration’s impact on families, doesn’t it make more sense to place lower-level offenders under mandatory supervision in the community, allowing them to remain connected to their relatives, gainfully employed and available to parent their children? I am not proposing this approach for all incarcerated parents. Violent and career criminals

<sup>57</sup> The Sentencing Commission recently “expand[ed] the availability of alternatives to incarceration” under the Guidelines to reflect its own “multi-year study of alternatives to incarceration.” See Federal Register, Vol. 75, No. 93, U.S.S.G., App. C, Amendment 738, Reason for Amendment (May 14, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-05-14/html/2010-11552.htm>. In doing so, the Commission recognized that “[s]ome public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant’s need for treatment and the need to protect the public.” *Id.*

<sup>58</sup> Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S (2011).

<sup>59</sup> Texas Governor Rick Perry, 2007 State of the State Speech (Feb. 6, 2007), available at <http://governor.state.tx.us/news/speech/5567/>.

<sup>60</sup> See John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 12, 2012), available at [http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0).

must be locked up to protect society . . . . But for many nonviolent offenders, we should do all we can to keep families together while maintaining public safety.<sup>61</sup>

**The SSA and the JSVA will make us safer while dramatically reducing the costs of incarceration.**

#### **IV. The SSA and the JSVA Will Not Unlock the Prison Doors For Offenders Who Warrant Stiff Sentences.**

Sentencing judges' restrained response to the landmark U.S. Supreme Court decision that expanded judicial discretion demonstrates that the modest expansion of judicial discretion under the SSA and the JSVA will not lead to overly lenient sentences. In 2005, the Supreme Court made the formerly mandatory Guidelines advisory.<sup>62</sup> Federal sentencing statistics demonstrate that, since then, judges have been "remarkably restrained in exercising their discretion" and have continued to adhere closely to the Guidelines.<sup>63</sup> Average sentences have stayed virtually static, decreasing from 46 months in 2005 to 44 months in 2012.<sup>64</sup> And in Fiscal Year 2012, fully 82.2% of all federal sentences and 80.7% of federal drug trafficking sentences were within or above the Guidelines range or were the result of prosecutors' requests for sentences below the range.<sup>65</sup>

If the SSA and the JSVA are passed, the Guidelines will continue to anchor judges' sentencing decisions. As the Supreme Court recently explained: "The . . . federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."<sup>66</sup> The Guidelines constrain federal judges' sentencing decisions in numerous ways. First, the law requires sentencing judges to correctly calculate the Guidelines and use them as the starting point in every case.<sup>67</sup> Second, the federal courts of appeals closely police sentencing judges' decisions, reversing sentences that do not start with a proper Guidelines calculation, do not properly apply Guideline departures and adjustments, or are lenient without a sufficient legal

<sup>61</sup> Tony Perkins, *Building Stronger Families and Safer Communities* (Jul. 29, 2013), available at <http://www.frc.org/op-eds/building-stronger-families-and-safer-communities>.

<sup>62</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>63</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1681 (2012).

<sup>64</sup> See 2012 Sourcebook, tbl. 13, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table13.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table13.pdf); U.S. Sent'g Comm'n, 2005 Sourcebook of Federal Sentencing Statistics, tbl. 13, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2005/table13\\_pre.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2005/table13_pre.pdf).

<sup>65</sup> See 2012 Sourcebook, tbl. N, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/TableN.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf) (all sentences); tbl. 27, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table27.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table27.pdf) (drug trafficking sentences).

<sup>66</sup> *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013).

<sup>67</sup> "[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (emphasis added).

explanation.<sup>68</sup> And third, a number of appellate courts explicitly presume that a Guidelines sentence is proper, a practice that has been upheld by the Supreme Court<sup>69</sup> and leads many sentencing judges to hew closely to the Guidelines.<sup>70</sup>

**The SSA and JSVA will operate in concert with the existing Guidelines system to ensure that judges continue to exercise their sentencing discretion in a measured fashion.**

## V. Conclusion

For too long, we have used mandatory sentencing as a substitute for individualized justice. It's time to change course. It's time to recognize that the fiscal cost of mandatory minimums is too high a price to pay. And it's time to stop devastating the lives of low-level, non-violent offenders and their families. The SSA and the JSVA will save billions of taxpayer dollars while giving federal judges the authority to set sentences that protect the public, provide rehabilitation, and appropriately punish offenders. **Let the punishment fit the crime by passing the SSA and the JSVA.**

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<sup>68</sup> See *Peugh*, 133 S. Ct. at 2083 (“Failing to calculate the correct Guidelines range constitutes procedural error.”).

<sup>69</sup> See *Rita v. United States*, 551 U.S. 338, 347 (2007) (holding that “a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects proper application of the Sentencing Guidelines”).

<sup>70</sup> See *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (“[J]udges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines.”).



Written Statement of Antonio M. Ginatta  
Advocacy Director, US Program  
Human Rights Watch

to

United States Senate, Committee on the Judiciary

**Hearing on "Reevaluating the Effectiveness of Federal  
Mandatory Minimum Sentences"**

September 18, 2013

Chairman Leahy, Ranking Member Grassley, and members of the Committee, thank you for the opportunity to provide a written statement for the record for today's hearing, "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences."

Human Rights Watch has been concerned about the flaws in mandatory minimum sentencing schemes for over 15 years. We are very pleased that your Committee is taking up this issue, as we believe it is well past time for Congress to eliminate or significantly restrict mandatory minimum sentences, which we have found often lead to excessive and unfair sentences.

Imprisonment is the most coercive and drastic sanction short of the death penalty that can be lawfully imposed on individuals by government. International human rights standards, particularly the inherent dignity of the individual, the prohibition on inhuman or degrading punishment, and the right to liberty, require that sentences be proportionate to the gravity of the individual's conduct and culpability and should be no longer than necessary to further the purposes of punishment.

#### **Case Study: Failure and Reform of the Rockefeller Drug Laws in New York**

In 1973, New York enacted harsh mandatory sentencing laws for drug offenses and for second-time felony offenders. The purpose of the drug laws was to deter people from using or selling drugs and to isolate from society those who were not deterred. "It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment."<sup>1</sup> Strongly supported by Governor Nelson Rockefeller, the new drug laws (commonly referred to as the Rockefeller laws) established a scale of extraordinarily punitive mandatory sentences for the unlawful possession and sale of controlled substances keyed to the weight of the drug involved.

In 1997, Human Rights Watch released a report on the harsh sentences that had resulted from the Rockefeller drug laws entitled *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*. In that report, we documented how the mandatory minimum sentences established by the Rockefeller drug laws disproportionately punished low-level offenders in the state.<sup>2</sup>

In our report we told the story of Roberta Fowler, a twenty-year-old with two children at the time of sentencing. Fowler had previous convictions for possession of drug paraphernalia, prostitution, and larceny.<sup>3</sup> She received a term of four years to life imprisonment for providing \$20 worth of cocaine to an undercover agent. We also noted the case of John Gamble, indicted for selling a \$10 vial of crack cocaine to an undercover police officer. He had one prior felony, for possessing a car four days after

<sup>1</sup> *People v. Broadie*, 37 N.Y. 2d 100, 115 (1975) (citations omitted), cert. denied, 423 U.S. 950 (1975).

<sup>2</sup> Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2 (B), March 1997, <http://www.hrw.org/reports/1997/usny>.

<sup>3</sup> *Carmona v. Ward*, 439 U.S. 1091 (1979).

it was stolen. He had never been imprisoned. Gamble was convicted after trial and received a ten-to-twenty-year sentence for the cocaine sale.<sup>4</sup>

Mandatory minimum sentences — both in New York and, as described below, elsewhere — often result in sentences that are disproportionate to the offense. The mandatory minimum sentences in New York were punishing people whose actions caused minimal harm, while at the same time having little deterrent effect.

The tide has turned in New York — the state began moving away from its Rockefeller drug laws in the 2000s, first by reducing the length of many mandatory minimums in 2004 and subsequently by completely eliminating many of these excessive mandatory minimums in 2009.<sup>5</sup> Crime rates in the state continue to drop after the elimination of these sentences.<sup>6</sup>

#### **Mandatory minimums in the federal system**

Federal crimes with mandatory minimum sentences have proliferated in the past two decades — from 98 in 1991 to 195 in 2011.<sup>7</sup>

Mandatory sentencing at the federal level has been particularly common for drug-related crimes. Sixty percent of federal drug offenders in fiscal year 2012 received a mandatory sentence, accounting for three-quarters of all federal defendants receiving a mandatory minimum sentence.<sup>8</sup> More than a quarter of federal drug offenders (28 percent) received five-year mandatory minimum sentences; almost one-third (32 percent) received 10-year mandatory minimum sentences.<sup>9</sup>

When Congress enacted mandatory minimum sentences for federal drug offenders in 1986 and 1988, it intended those sentences to punish major traffickers and kingpins. But because the sentences are triggered by drug quantities involved in the offense and not by role in drug hierarchies, even low-level offenders receive them. For example, more than two-thirds (68 percent) of street-level dealers (i.e., those who sell directly to users in quantities of less than one ounce) received a mandatory minimum sentence.<sup>10</sup> Harsh penalties based solely on drug type and quantity

<sup>4</sup> Ibid.

<sup>5</sup> Madison Gray, “A Brief History of New York’s Rockefeller Drug Laws,” *Time* magazine, April 2, 2009, <http://content.time.com/time/nation/article/0,8599,1888864,00.html> (accessed September 17, 2013).

<sup>6</sup> Timothy O’Connor and Tim Henderson, “New York drug-law reforms, drop in crime reduce prison population,” *Journal News*, <http://www.lohud.com/article/20111016/NEWS02/110160330/New-York-drug-law-reforms-drop-crime-reduce-prison-population> (accessed September 17, 2013).

<sup>7</sup> United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, p. 71.

<sup>8</sup> Ibid., p. 122.

<sup>9</sup> United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) (accessed September 17, 2013), Table 43.

<sup>10</sup> United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, p. 168, Figures 8-11.

fail to distinguish between varying levels of culpability, and fail to ensure that those who occupy more senior positions in criminal organizations receive higher sentences than peripheral participants.

Mandatory minimum sentencing laws bear heavy responsibility for distortions in federal sentencing, including sentences that are disproportionately severe relative to the individual crime and the offender's culpability. By enacting an increasing number of mandatory minimums, Congress has deprived federal judges of the ability to calibrate sentences according to the specific conduct and culpability of the individual defendant, taking into account the purposes of sentencing. As a practical matter, sentencing decisions have been transferred from an independent judiciary with no personal stake in the outcome of a case to prosecutors, representatives of the executive branch with personal as well as institutional interests in securing convictions. Their choices as to what offenses to charge — and what plea bargains to accept — dictate the sentence.

In the federal system, prosecutors also have the authority under the law to file motions in court that mandatorily increase a defendant's sentence upon conviction based upon certain facts, e.g. past record or possession of a gun in furtherance of a crime. At the prosecutors' discretion, federal drug offenders facing a ten-year mandatory minimum sentence can have their sentence mandatorily doubled to twenty years because of a prior drug conviction; and their sentence can metastasize into a life sentence if they have two prior drug convictions, as shown in the case of Roy Lee Clay:

*Roy Lee Clay, 48 years old, was sentenced by a federal court on August 27, 2013 to life behind bars. He was convicted after trial of one count for a conspiracy to distribute one kilogram or more of a mixture or substance containing heroin. According to the prosecutors he was part of a heroin distribution group centered in Baltimore, Maryland. He obtained heroin in New York between 2009 and 2011 and distributed it to other dealers and to users as well. The mandatory minimum sentence for distributing one kilogram of heroin is ten years. But Clay had two prior drug convictions – one a 1993 federal conviction for possession with intent to distribute 100 grams of heroin and a state drug distribution conviction in 2004 – that made him eligible for a mandatory sentence enhancement to life. The prosecutors sought the enhancement and the judge had no choice but to impose that sentence, even though at sentencing she indicated that she thought a thirty year sentence would have been more appropriate.”*<sup>11</sup>

Federal law also mandates additional consecutive sentences for drug offenders who possess firearms in connection with their drug crimes.<sup>12</sup> The guns do not have to be used, brandished or discharged and the gun offenses can all be part of the same case. Indeed, defendants who possess

<sup>11</sup> *United States v. Garcia, et al*, no. 11-cr-0569-CCB (D. Md. 2013); see also Ian Duncan, “Heroin dealer gets mandatory term of life without parole,” *Baltimore Sun*, August 27, 2013, <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-heroin-dealer-sentence-20130827,0,6489102.story> (accessed September 17, 2013).

<sup>12</sup> 18 U.S.C. 924(c) (2013).

guns can have gun offenses attached to a conspiracy to commit a drug crime and to the offense of committing that crime. The first gun violation carries a five-year mandatory penalty consecutive to the drug sentence; the second gun offense, and every subsequent one, carries a twenty-five year consecutive sentence. The total sentence adds up quickly:

*Rick Barton sold oxycontin and cocaine in rural Virginia and West Virginia, and at least four times accepted guns as payment for drugs. He was convicted after trial and sentenced to 1020 months (85 years) in prison: 60 months for his conviction of possession with intent to distribute the drugs and 960 months for his conviction on four counts for possessing guns in furtherance of his drug business.<sup>13</sup>*

Mandatory minimums have not only given prosecutors unprecedented power to determine what a defendant's sentence will be, they have ratcheted up the power of prosecutors to secure guilty pleas from federal drug defendants. In 2012, 97 percent of all federal drug convictions were the result of pleas.<sup>14</sup> Regardless of their innocence, the strength of their case, or the weakness of the prosecutor's case, most defendants cannot risk trial because they will face a far greater sentence if convicted after trial than if they plead guilty.

Finally, proponents of mandatory minimums suggest that these sentences help to promote public safety, yet the available evidence shows otherwise. Seventeen states have curtailed or eliminated their mandatory minimum laws and their crime rates have continued to decline.<sup>15</sup>

#### **Turning the corner on federal mandatory minimums**

Though Congress is late to reforms, we have been encouraged by recent steps in the direction of sentencing reform. The Fair Sentencing Act of 2010 reduced the statutory penalties for crack offenses by increasing the quantity threshold required to trigger a mandatory sentence. It also repealed the federal five-year mandatory minimum for simple possession of crack cocaine — the first federal repeal of a mandatory minimum since the 1970s.<sup>16</sup>

Senators Rand Paul and Patrick Leahy have introduced the Justice Safety Valve Act, improving on the current federal “safety valve,” which exempts certain drug offenders from otherwise applicable mandatory minimum sentences if their crime is minor, involves no violence, the offender has no or a negligible prior criminal record, and the offender is willing to provide information to the government. Welcome as the existing safety valve is, it leaves far too many defendants subject to mandatory

<sup>13</sup> *United States v. Barton*, 442 F. Supp. 2d 301 (W.D. Va. August 14, 2006).

<sup>14</sup> United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) (accessed September 17, 2013).

<sup>15</sup> Julie Stewart, “Mandatory Ineffectiveness,” *U.S. News & World Report*, September 2, 2013, <http://www.usnews.com/opinion/articles/2013/09/02/eric-holder-is-right-to-give-courts-more-discretion-on-mandatory-minimums> (accessed September 17, 2013).

<sup>16</sup> Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010).

sentence. The Justice Safety Valve Act would be a substantial improvement as it would give sentencing flexibility to judges in a much broader number of cases involving mandatory minimums. Senators Dick Durbin and Mike Lee have also proposed improvements to the safety valve through their recently introduced Smarter Sentencing Act.

In August 2013, US Attorney General Eric Holder instructed federal prosecutors to try to avoid charges carrying mandatory minimum sentences for certain low-level, nonviolent drug offenders and to refrain from seeking sentencing enhancements based on prior convictions unless the defendant's conduct warranted such severe sentences.<sup>17</sup>

### **Recommendations**

We recommend that Congress continue this momentum and follow the lead of the many states that have decided to eliminate or significantly restrict mandatory minimum sentences.

To the extent that mandatory minimums remain in place, we further recommend that Congress ensure through legislation that the minimum sentences be calculated to be proportionate to the least serious conduct covered by the statute and no greater than necessary to achieve the legitimate goals of punishment.

Congress should eliminate mandatory enhancements based on prior records, and eliminate mandatory consecutive sentences based on firearms or any other additional factor. Judges can take prior records into account in fashioning proportionate sentences.

Congress should establish broader safety valve provisions that authorize judges to sentence below the mandatory minimum, including sentences to probation and community supervision, if the individual circumstances of the case and the individual characteristics of the offender merit such a reduction to serve the interests of justice and further the goals of punishment and a higher sentence would be greater than necessary to further those goals.

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<sup>17</sup> "Attorney General Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates," United States Department of Justice press release, August 12, 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> (accessed September 17, 2013). The criteria for this policy to apply would exclude a substantial share of cases, so it is unclear how significant of an impact this change will have.

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**STATEMENT OF  
WADE HENDERSON, PRESIDENT & CEO  
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**“REEVALUATING THE EFFECTIVENESS OF FEDERAL MANDATORY MINIMUM  
SENTENCES”**

**SENATE COMMITTEE ON THE JUDICIARY**

**SEPTEMBER 18, 2013**

Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding the issue of federal mandatory minimum sentences.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the lesbian, gay, bisexual, and transgender (LGBT) community, and faith-based organizations.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. Yet, the wholly unfair and inherently biased nature of our criminal justice system, has led to mass incarceration, which is at odds with securing these rights for all Americans.

Undermining critical work from the 1960s civil rights movement, mass incarceration, in large part fueled by mandatory minimums, is a legalized form of systematic discrimination, which punishes individuals and groups through the eradication of their education, housing, voting, and employment rights. In order to restore every American's civil and human rights, Congress needs to eliminate mandatory minimum sentences.

As Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, so eloquently stated:

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind. It



is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans...we have not ended racial caste in America; we have merely redesigned it.”<sup>1</sup>

Mass incarceration, a steady and strategic outgrowth of historic racial and economic caste systems, is arguably the new structure of systematic enclosure and exploitation, specifically targeting people of color.

The Leadership Conference believes addressing the issue of mass incarceration is one of the great civil rights challenges of this century. To address this urgent need, we support policy proposals that seek to address not only racial disparities in the criminal justice system, but also the ways in which we can reduce our federal prison population and restore fairness in sentencing. The first essential step is elimination of mandatory minimum sentencing schemes.

Fortunately, and partly as a result of the financial constraints, policymakers have recognized a need for reform, and begun to work toward remedying the mistakes of the past. In a recent statement, Senator Rand Paul (R-KY) stated, “Our federal mandatory minimum sentences are simply heavy-handed and arbitrary...we should not have laws that ruin the lives of young men and women who have committed no violence.”<sup>2</sup> The Leadership Conference supports the efforts of members of this Committee to pass bipartisan legislation that will address the issue of mandatory minimum sentences.

### Introduction

Over the last forty years, the American penal system has ballooned out of control. State and federal prison populations have skyrocketed, due in large part to the War on Drugs, as well as the rise of so-called “get tough” laws such as “Three Strikes,” “Truth in Sentencing,” and “Mandatory Minimum” sentencing policies. Decades of these tough sentencing policies have led to the U.S. holding the record for incarcerating more people, and a higher percentage of its population, than any country in the world. Furthermore, federal and state policies affecting the formerly incarcerated after their release obstruct the road to reintegration into society and all but ensure that 67 percent will recidivate.<sup>3</sup>

Prior to the onset of the War on Drugs and “Get Tough” sentencing laws, America’s incarceration rate hovered for decades between 100 and 125 per 100,000 people. Yet, today, more than 2.2 million people live behind bars (triple the amount in 1987),<sup>4</sup> and 7 million people are under some form of correctional control.<sup>5</sup> At the same time, the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent.<sup>6</sup> The Federal Bureau of Prisons is overcrowded, operating at nearly 40

<sup>1</sup> Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, p. 2.

<sup>2</sup> Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://fammm.org/the-facts/#publicsafety>

<sup>3</sup> MU News Bureau. (2011, October 3). Prison Education Programs Reduce Inmate Prison Return Rate, MU Study Shows: Correctional facility educational programs a good investment for state of Missouri. Retrieved from <http://munews.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows/>.

<sup>4</sup> American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>.

<sup>5</sup> The Sentencing Project. *Ending mass Incarceration: Charting a New Justice Reinvestment*. Retrieved September 17, 2013, p. 3, available at [http://sentencingproject.org/doc/publications/sen\\_Charting%20a%20New%20Justice%20Reinvestment.pdf](http://sentencingproject.org/doc/publications/sen_Charting%20a%20New%20Justice%20Reinvestment.pdf).

<sup>6</sup> Bureau of Justice Statistics, U.S. Dep’t of Justice, *Correctional Populations in the United States, 2010* (2011), retrieved September 17, 2013, available at <http://www.bjs.gov/content/pub/pdf/cpus1Q.pdf>.

percent over capacity and housing a large population of non-violent drug offenders, at a significant cost to taxpayers. A recent report by the Congressional Research Service (CRS) concludes one of the single most important elements in explaining the record incarceration numbers at the federal level could be “mandatory minimum” sentencing requirements.<sup>7</sup>

Moreover, these policies have exacerbated large racial disparities in U.S. prison system.<sup>8</sup> As of 2008, 1 in every 15 Black men 18 or older was behind bars compared to 1 in 106 White men.<sup>9</sup> Furthermore, Blacks are incarcerated on drug charges at a rate 10 times higher than Whites, though Whites engage in drug activity at a higher rate than Blacks.<sup>10</sup> In 2000, the National Institute on Drug Abuse conducted a study of drug usage by students, in which it found that White students used cocaine seven times more than Black students, crack cocaine eight times more than Black students, heroin seven times more than Black students, and marijuana at a very similar rate.<sup>11</sup> This sentencing disparity was largely attributed to a quantity disparity that existed between crack and powder cocaine prior to the passage of the Fair Sentencing Act of 2010 (FSA). However, even with the enactment of the FSA, which reduced the disparity from 100-to-1 to 18-to-1, and provided some relief, large racial disparities remain today. Our country can no longer afford this trend and serious reform of our criminal justice system and federal sentencing laws is well overdue.

#### **Mandatory Minimums are Bad Public Policy**

Beginning in the mid-twentieth century, Congress expanded its use of mandatory minimum penalties by generally enacting more mandatory minimum penalties, broadening its use of mandatory minimums to different offenses, particularly controlled substances, and lengthening the mandatory minimum sentencing.<sup>12</sup> Mandatory minimums require uniformed, automatic, binding prison terms of a particular length for people convicted of certain federal and state crimes.<sup>13</sup>

Mandatory minimums were enacted for a variety of reasons. Proponents believed that they would: increase certainty in sentencing; act as a deterrent to potential offenders; warn that specific behaviors would result in harsh punishment; and increase public safety by removing dangerous criminals from our streets. This ideology was further buttressed by the belief by some that significant declines in crime over the last several decades were directly related to federal mandatory minimum penalties. Yet, since that time, we have learned that the imposition of mandatory minimum penalties have decreased certainty in sentencing; have not significantly deterred criminal behavior; have no causal relationship to reductions in

<sup>7</sup> Congressional Research Service. The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options (Jan. 22, 2013), retrieved from <http://www.fas.org/spp/crs/misc/R42937.pdf>

<sup>8</sup> Washington D.C. Bureau of Justice Statistics. “Prisoners in 2010.” available at <http://www.sentencingproject.org/template/page.cfm?id=122>.

<sup>9</sup> The PEW Center on the States. *One in 100: Behind Bars in America 2008*. Retrieved September 17, 2013, available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf).

<sup>10</sup> American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>

<sup>11</sup> Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, 2012, p. 99.

<sup>12</sup> U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011.. Retrieved September 17, 2013, available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/2011031\\_RIC\\_PDF/Executive\\_Summary.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/2011031_RIC_PDF/Executive_Summary.pdf)

<sup>13</sup> Families Against Mandatory Minimums. Retrieved September 17, 2013, available at <http://famm.org/mandatory-sentencing/mandatory-minimums/>

crime; have increased the likelihood of recidivism; and have had a direct impact on rising incarceration costs.

#### **Exacerbating Racial Disparities: The Application of Mandatory Minimums**

Mandatory minimum sentencing systems are especially problematic because they require judges to act on a “one-size-fits-all” mandate for individuals, eliminating any of their judicial discretion and preventing courts from considering all relevant factors, such as culpability and role in the offense, and tailoring the punishment to the crime and offender. There is no space to check and balance the prosecutors’ decisions in individual cases.

The U.S. Sentencing Commission conducted a study in 2010 that demonstrated the quantitative impact of mandatory minimums. Out of 73,239 offenders sentenced in the federal courts, more than one-quarter (27.2 percent) of those were convicted of an offense carrying a mandatory minimum penalty. More specifically, 77.4 percent of those convictions that carried a mandatory minimum penalty were for drug trafficking offenses.<sup>14</sup> The Commission’s study highlighted the disparity among races, with Hispanic offenders accounting for 38.3 percent of those convicted with a mandatory minimum, Black offenders at 31.5 percent, White offenders at 27.4 percent, and “other race” offenders, at 2.7 percent.<sup>15</sup>

In addition, the study also illustrated that for those offenders who were relieved from their mandatory minimum penalty, Black offenders received relief from federal courts *least* often, compared with White, Hispanic, and Other Race offenders. Under a mandatory minimum penalty, Blacks received relief in 34.9 percent of their cases, compared to Whites who received relief in 46.5 percent of their cases, Hispanics who received relief in 55.7 percent of their cases, and Other Races who received relief in 58.9 percent of their cases. Further, even in cases where individuals sought relief under the “safety valve”, Blacks qualified for relief 11.1 percent of the time, compared with Whites who qualified 26.7 percent of the time, Hispanics who qualified 42.8 percent of the time, and Other Races who qualified 36.6 percent of the time.<sup>16</sup>

Finally, the study also found racial disparities in the percentage of all federal offenders who were subject to a mandatory minimum penalty sentencing. Black offenders remained subject to the highest rate of any racial group at 65.1 percent of their cases, followed by Whites at 53.5 percent, Hispanics at 44.3 percent, and Other Races at 41.1 percent. Those who were convicted of their offense were subjected to 139 months, compared to 63 months for those offenders who received relief from their mandatory minimum penalty.<sup>17</sup>

As a result of this report, the Commission concluded 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

<sup>14</sup>U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011. Retrieved September 17, 2013, available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/2011031\\_RtC\\_PDF/Executive\\_Summary.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/2011031_RtC_PDF/Executive_Summary.pdf)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*



punishment, and (3) be applied consistently.”<sup>18</sup> The Commission further recommended the following actions, which The Leadership Conference supports:

- 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;
- 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;
- 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;
- 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);
- 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; and
- finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.<sup>19</sup>

Clearly, what was once thought to be sound criminal justice policy has had the unintended consequence of increasing disparities in the administration of justice and has led to mass incarceration.

#### **Mandatory Minimums Bear No Significant Relationship to Crime Reduction or Deterrence**

Aside from anecdotal accounts, there is no statistical evidence to demonstrate a significant relationship between federal mandatory minimum penalties and reductions in crime. While there have been considerable declines in crime since the early 1990’s, and ostensible rises in prison populations, this does not clearly suggest a direct relationship. According to a report by The Sentencing Project, “about 25% of the decline in violent crime can be attributed to increased incarceration. While one-quarter of the crime drop is not insubstantial, we then know that most of the decline — three-quarters— was due to factors other than incarceration.”<sup>20</sup> Without conclusive data, it is impossible to determine that federal mandatory minimum penalties in fact have an impact on crime rates.

Although concerns for public safety are valid, evidence suggests that it is unlikely that these penalties impact public safety. Prevailing research on the subject demonstrates that sheer increases in the likelihood of punishment are much more likely to serve as a deterrent than enhancements to the severity of punishment.<sup>21</sup> It is also true that mandatory minimums are particularly ineffective in addressing drug

<sup>18</sup> *Id.* at 345.

<sup>19</sup> *Id.* at 355-56, 364 - 65.

<sup>20</sup> The Sentencing Project, *Incarceration and Crime: A Complex Relationship*. Retrieved September 17, 2013, available at [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf)

<sup>21</sup> Vincent, Barbara. Federal Judicial Review. *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*. Retrieved September 17, 2013, available at

[http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf)



crimes. This is due in part to the nature of the drug trade. For example, in most cases, mandatory minimum sentences target mid-level and low-level offenders, and once they have been removed, they are replaced in the trade by someone else, creating a cycle of extended incarceration. With a 1,100 percent drug offense increase from 1980 to today, there are more people incarcerated today for drug offenses than there were in all offenses in 1980.<sup>22</sup> And in most cases, these offenders present no threat to society and deserve shorter sentences.<sup>23</sup>

#### **Mandatory Minimums Can Increase the Likelihood of Recidivism**

Additionally, given that harsh mandatory minimum penalties serve to increase the length of time in prison by mandating certain terms of imprisonment, studies have noted there is some relationship between longer stays and recidivism. A 2002 meta-analysis of recidivism studies concluded that longer periods of imprisonment “were associated with a small increase in recidivism.” Moreover, prison terms that are seen to be in excess and do not serve the legitimate interest of rehabilitation can have a deleterious effect on an individual’s ability to re-integrate into a society that has changed dramatically from the time of their incarceration.<sup>24</sup> To best serve the interests of re-entry and public safety, it is important for policy makers to consider the negative impacts that longer stays can have on low-level offenders.

#### **A Financially Irresponsible Move**

Finally, in a time where the vise of fiscal uncertainty acts a cloud over our society, the cost to incarcerate individuals for lengthy periods of time has become too great. Since 1980, and the transition from the War on Poverty to the War on Drugs in 1982, the United States has spent about \$540 million on federal prisons. In 2013, the U.S. will spend over 12 times that amount, reaching \$6.8 billion.<sup>25</sup> Mandatory minimums are completely cost-ineffective. Taxpayers spend almost \$70 billion a year on prisons and jails,<sup>26</sup> raising state spending on corrections more than 300 percent over the last two decades.<sup>27</sup> The Department of Justice has cut funding for crime-fighting equipment and personnel, and spends one out of four of its dollars to lock up mostly non-violent offenders.<sup>28</sup>

In a time of such financial crisis, there is simply no rationale to spend millions of dollars on the prison system. Our country must look towards criminal justice models that rely less on punishment and focus more on rehabilitation and prevention. Resources should be funneled to programs that have that been

<sup>22</sup> Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, 2012, p. 60

<sup>23</sup> Vincent, Barbara. Federal Judicial Review: The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings. Retrieved September 17, 2013, available at [http://www.fjc.gov/public/pdf.nsf/lookup/commnmin.pdf/\\$file/commnmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/commnmin.pdf/$file/commnmin.pdf)

<sup>24</sup> Testimony of Marc Mauer Executive Director The Sentencing Project The Impact of Mandatory Minimum Penalties in Federal Sentencing Prepared for the United States Sentencing Commission, May 27, 2010, available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20100527/Testimony\\_Mauer\\_Sentencing\\_Project.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Mauer_Sentencing_Project.pdf)

<sup>25</sup> Families Against Mandatory Minimums. The Facts (with Sources/References). Retrieved September 17, 2013, available at <http://fammin.org/the-facts-with-sourcesreferences/>

<sup>26</sup> American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>

<sup>27</sup> Families Against Mandatory Minimums. *The Cost*. Retrieved September 17, 2013, available at <http://fammin.org/the-facts/#thecost>

<sup>28</sup> Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://fammin.org/the-facts/#publicsafety>



proven to impact criminal behavior by diverting low level non-violent offenders away from prison and to treatment.

We have an opportunity to correct our previous mistakes. Restoring certainty and fairness in sentencing and reducing an imploding prison population is both the moral and financially responsible course of action. Studies have demonstrated that mandatory minimums are inherently unfair and ineffective. They have a disproportionate impact on communities of color, eliminate judicial discretion in the sentencing process, and apply a one size-fits-all approach, resulting in exactly what policy makers intended to guard against – uncertainty in sentencing and no real deterrent in criminal behavior.

#### **Recommendations for Sentencing Reform**

The Leadership Conference applauds the efforts by members of this Committee to ameliorate the injustice imposed by mandatory minimum sentencing laws, through the introduction of two bipartisan pieces of legislation, “The Justice Safety Valve Act of 2013,” by Senators Patrick Leahy (D-VT) and Rand Paul (R-KY) and “The Smarter Sentencing Act,” by Senators Dick Durbin (D-IL) and Mike Lee (R-UT). Although these two proposals differ vastly, both seek to provide a pathway to reform of harsh sentencing penalties.

The Justice Safety Valve Act takes a broad approach in reforming mandatory minimum sentences. If enacted, the legislation would:

- Create a brand-new, broad “safety valve” that would apply to all federal crimes carrying mandatory minimum sentences. If passed, the Justice Safety Valve Act would allow judges to sentence federal offenders below the mandatory minimum sentence whenever that minimum term does not fulfill the goals of punishment and other sentencing criteria listed at 18 U.S.C. § 3553(a). This approach builds off of the existing success that the initial imposition of the safety valve for drug offenses has had on incarceration. For example, while there is no proof of a direct causal relationship between crime and mandatory minimum penalties, application of the safety valve has been proven to decrease the crime. Since the safety valve was initiated, the crime rate has decreased 44 percent, and about 86,000 drug offenders have received shorter sentences.<sup>29</sup>

The Smarter Sentencing Act takes a more moderate approach to achieve the same result. This bill would:

- Modestly expand the existing federal “safety valve;”
- Promote sentencing consistent with the bipartisan Fair Sentencing Act by allowing certain inmates sentenced under the pre-Fair Sentencing Act sentencing regime to petition for sentence reductions consistent with the Fair Sentencing Act and current law. Federal courts successfully and efficiently conducted similar crack-related sentence reductions after 2007 and 2011 changes to the Sentencing Guidelines. This provision alone could save taxpayers more than \$1 billion;
- Increase individualized review for certain drug sentences. The Act does not repeal any mandatory minimum sentences and does not lower the maximum sentences for these offenses. This approach keeps intact a floor at which all offenders with the same drug-related offense will be held accountable but reserves the option to dole out the harshest penalties where circumstances warrant.<sup>30</sup>

<sup>29</sup> <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2011/crime-in-the-u.s.-2011/tables/table-1>

<sup>30</sup> <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736>



In both cases, these bills seek to restore justice and reduce the financial and human cost of harsh sentencing laws. Congress needs to act and eliminate mandatory minimum sentences by passing legislation similar to these bills.

#### Conclusion

The culture of punishment, together with “tough-on-crime” rhetoric, have heavily impacted the relentless growth of the American penal system. This whole system of mass incarceration, and vast expansion of correctional control, did not occur inadvertently, but rather through policy choices that imposed punitive sentences which resulted in longer terms of imprisonment and in many cases contrary to rehabilitative sentences.<sup>31</sup>

It is now time to chart a new course for reform of our criminal justice system, one that uses an evidence-based approach to public safety. The set of Justice Reinvestment initiatives that have been implemented primarily at the state and local level uses such an approach. These reforms have typically been accomplished in three phases: (1) an analysis of criminal justice data to identify drivers of corrections spending and the development of policy options to reform such spending to more efficiently and effectively improve public safety; (2) the adoption of new policies to implement reinvestment strategies, usually by redirecting a portion of corrections savings to community-based interventions; and (3) performance measurement.

Using this model, 21 states – including Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont – have implemented initiatives, and six others are pursuing similar legislation. In these states, great improvements have been made, resulting in almost immediate reductions in costs and prison populations. One state in particular, Texas, saw a huge impact on its budget and prison populations. The 2007 reinvestment initiative in Texas stabilized and ultimately reduced its prison population between 2007 and 2010.<sup>32</sup> It also produced a 25 percent decrease in parole revocations between September 2006 and August 2008, at a considerable savings to taxpayers.<sup>33</sup>

These are but a few examples of the positive impact of reforming sentencing policies and practices. It is now time for our federal government to redirect its efforts toward common sense reforms, in order to reduce disparities, increase the chances of successful re-entry, improve supervision programming, and increase overall public safety.

It is the duty of policymakers to enact legislation that promotes fairness and equity in our criminal justice system and our country as a whole. Reform of mandatory minimum sentencing schemes is a necessary step toward fulfilling that duty.

Thank you for your leadership on this critical issue.

<sup>31</sup> The Sentencing Project, “Ending Mass Incarceration: Charting a New Justice Reinvestment” (2013).

<sup>32</sup> See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Gov’t’s Justice Ctr., The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending (2011); National Alliance for Model State Drug Laws, Justice Reinvestment Initiatives (2012).

<sup>33</sup> Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 11 (2010).