

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 Commission¹ 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*,² 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.³ The size of the Federal Bureau of Prisons (BOP) population exceeds the BOP's capacity by 38 to 53 percent on average.⁴ Meanwhile, the nation's budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as

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

² 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.

³ 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>.

⁴ 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.⁵ 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.⁶

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 2010,⁷ 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

⁵ U.S. Dept. of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dept. of Justice FY 2014 Budget Request), www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs; see also Letter from Jonathan Wroblewski, U.S. Dept. 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).

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

⁷ Pub. L. No. 1116220, 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.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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

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

⁹ 28 U.S.C. § 991.

¹⁰ Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111684, 123 Stat. 2190, 2843 (2009).

¹¹ 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.¹² 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.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ 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.

¹² *Id.* at 111-13.

¹³ *Id.* at 255.

¹⁴ *Id.* at 113-14.

¹⁵ *Id.* at xxviii.

¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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 71,608.²⁰ By December 31, 2012, that number had more than tripled to 217,815 inmates.²¹

¹⁷ See U.S. Sentencing Commission, *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; 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.”).

¹⁸ 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.

¹⁹ *Id.* at 166-70.

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

²¹ Carson & Golinelli, *supra* note 3, at 2.

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.²² 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.²³ Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing ó who had not received relief from that mandatory sentence ó increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.²⁴

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 1991²⁵ to \$8.23 billion this year,²⁶ 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.²⁷ 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.²⁸ 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.²⁹ In order to determine whether drug offenders serving reduced sentences

²² 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.

²³ *Id.* at 81.

²⁴ *Id.*

²⁵ Pub. L. No. 1016515, 104 Stat. 2101, 2114 (1990).

²⁶ U.S. Dept of Justice FY 2014 Budget Request, *supra* note 5.

²⁷ Mandatory Minimum Report, *supra* note 2, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Commøn (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).

²⁸ 18 U.S.C. § 3553(a)(2)(B) and (C).

²⁹ U.S. Sentencing Commøn, *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. 1116220, 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.³⁰ The analysis showed no statistically significant difference between the two groups.³¹

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.³²

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

³⁰ 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.

³¹ *Id.* at 2.

³² *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.³³ That bed savings would translate to very significant cost savings,³⁴ 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.

³³ 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.

³⁴ 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. 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),³⁵ 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.³⁶ 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,³⁷ 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,"³⁸ 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."³⁹ 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.⁴⁰ 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.⁴¹ The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.⁴²

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

³⁵ Fair Sentencing Act, Pub. L. No. 1116220, 124 Stat. 2373 (2010) (FSA).

³⁶ FSA § 2.

³⁷ 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. (background).

³⁸ U.S. Sentencing Commission, *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).

³⁹ See generally FSA.

⁴⁰ Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

⁴¹ U.S. Sentencing Commission, *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.

⁴² *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.”⁴³ 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.⁴⁴ 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.⁴⁵ While this

⁴³ Mandatory Minimum Report, *supra* note 2, at xxxi.

⁴⁴ *Id.* at 346.

⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹ The

⁴⁶ Mandatory Minimum Report, *supra* note 2, at 356.

⁴⁷ *See id.* at xxx.

⁴⁸ *See, e.g., id.* at xxxi.

⁴⁹ *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.⁵⁰

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.⁵¹ 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.⁵²

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).⁵³ 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.⁵⁴ 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

⁵⁰ See *id.* at 356.

⁵¹ See Notice of Final Priorities, *supra* note 6.

⁵² See Mandatory Minimum Report, *supra* note 2, at xxx.

⁵³ See Notice of Final Priorities, *supra* note 6.

⁵⁴ *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.



**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
jmccurdy@dcacLU.org**

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.¹ In 1951, Congress began to enact more mandatory minimum penalties for more federal crimes.² The Boggs Act, which provided mandatory minimum sentences for drug offenses, was passed in 1951.³ 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.⁴

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, 1970.⁵

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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ The threat of mandatory minimum penalties may cause defendants to give false information,¹¹ to plead guilty to charges of which they may actually be innocent,¹² or to forfeit a strong defense.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ 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 2010.¹⁷

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.¹⁸ The increased time served by drug offenders accounted for almost one-third of the total federal prison population growth between 1998 and 2010.¹⁹ 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.²⁰

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.²¹ 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.²² 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.²³ 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.²⁴ 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.²⁵

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.²⁶
- 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.²⁷
- 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.²⁸

- 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).²⁹
- 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.³⁰
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.³¹

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.³² 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.³³ 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.³⁴ 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.”³⁵
- **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.”³⁶
- **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.”³⁷
- **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.”³⁸
- 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.”³⁹
- 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."⁴⁰

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.⁴¹ 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.”⁴²

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.

¹ 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, hereinafter “*Mandatory Minimum Penalties in the Federal Criminal Justice System*.”

² *Id.* at 63.

³ See Pub. L. No. 82–255, § 1, 65 Stat. 767, 767 (1951).

⁴ See Narcotics Control Act of 1956, §§ 103, 105, 107, 108, Pub. L. No. 84–728, 70 Stat. 567, 568, 570–71.

⁵ Pub. L. No. 91–513, 84 Stat. 1236 (1970).

⁶ 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/

⁷ Pub. L. No. 99–570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).

⁸ Pub. L. No. 100–690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

⁹ 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/viewspeeches.aspx?Filename=sp_08-09-03.html.

¹⁰ [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).

¹¹ 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 Yaroshefsky, 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”).

¹² Nachmanoff, *supra* note 8, at 13.

¹³ [Prepared Statement of Cynthia Hujar 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.”).

¹⁴ 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].

¹⁵ 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).

¹⁶ Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* pg. 9 (January 22, 2013) (hereinafter CRS report)

¹⁷ LaVigne Urban Institute Report at 5

¹⁸ CRS Report at 8.

¹⁹ Kamala Mallik-Kane, Barbara Parthasarathy, William Adams, Examining Growth in the Federal Prison Population, 1998 to 2010 pg. 3 (2012)

²⁰ Federal Bureau of Prisons, Quick Facts about the Bureau of Prisons, <http://www.bop.gov/news/quick.jsp>

²¹ *CRS report at 51*

²² 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].

²³ New Release, *Sentencing Commission Issues Comprehensive Report On Statutory Mandatory Minimum Penalties, Sends Recommendations for Statutory Changes to Congress*, October 31, 2011.

²⁴ U.S.Sentencing Commission Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, [Hereinafter USSC 2011 Mandatory Minimum Report]

²⁵ *Id.* at xxx-xxxi.

²⁶ *Id.* at 355-56.

²⁷ *Id.* at 356.

²⁸ *Id.* at 364.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 365.

³² See Attorney General Eric Holder American Bar Association Speech, August 12, 2013, San Francisco, California

³³ *Id.* at 5

³⁴ Id.

³⁵ Kennedy, [William French Smith Memorial Lecture](#), Pepperdine University, February 3, 2010.

³⁶ Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rep. 180 (1999)

³⁷ Rehnquist, "[Luncheon Address](#)," in U.S. Sentencing Commission, Drugs and Violence, 2005.

³⁸ <http://www.famm.org/aboutsentencing/WhattheExpertsSay.aspx>

³⁹ See Famm *supra* at note 3

⁴⁰ <https://docs.google.com/viewer?url=http://www.texaspolicy.com/sites/default/files/documents/2010-01-PP02-conservativesaresaying-ml.pdf&chrome=true>

⁴¹ See generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.

⁴² USSC 2011 Mandatory Minimum Report at 345.

Testimony of Jessica M. Eaglin

Counsel, Brennan Center for Justice at NYU School of Law

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 Law¹ 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

¹ 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.²

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

² 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.

their incarceration rates. Indeed, the prison population in several states, like in the federal system, has continually increased over the past decade.³ 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.⁴ 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.⁵ 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,⁶ and that the most successful legislation has been implemented with support from both the left and the right.⁷ 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

³ 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 (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.

⁴ See E. Ann Carson & Daniela Golinelli, Bureau of Justice Statistics, Prisoners in 2012 – Advance Counts 1 (2013).

⁵ Inimai Chettiar, Letter to the Editor, *The Decline of the Prison Population*, N.Y. TIMES, Aug. 2, 2013, at A18.

⁶ 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 (quoting Rep. Jason Chaffetz as saying, “There’s a new era of bipartisanship on this issue”).

⁷ 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 (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.⁸ Today, there are more than 217,000 prisoners incarcerated in federal prisons, and the majority of inmates are incarcerated for nonviolent crimes.⁹

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.¹⁰ 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.¹¹ 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.¹² 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 195.¹³ 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.¹⁴ Since 1951, mandatory minimum penalties have been enacted to punish a broader scope of crimes, including drug offenses, firearm offenses and identity theft.¹⁵

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.¹⁶ By

⁸ NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 51 (Jan. 2013) [Hereinafter CRS REPORT].

⁹ See Carson & Sabol, *supra* note 3, at 10, tbl. 11 (indicating that less than 10% of federal prisoners sentenced in 2011 committed violent crimes).

¹⁰ 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”).

¹¹ 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.”).

¹² UNITED STATES SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71-74 (2011) [hereinafter MANDATORY MINIMUMS REPORT].

¹³ *Id.* at 71.

¹⁴ *Id.* at 22.

¹⁵ *Id.*

¹⁶ *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.¹⁷ 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.”¹⁸ 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.¹⁹ This result undermines Congress’s intention to target offenders for their particular role in the offense when creating these statutory limitations.²⁰ 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.²¹ 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.²² However, the legislation did not clearly indicate retroactive application,

¹⁷ *Id.* (indicating that 52.6% of offenders serving sentences with mandatory minimum penalties had mandatory sentences of ten or more years).

¹⁸ CRS REPORT, *supra* note 7, at 8.

¹⁹ 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.

²⁰ 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.”).

²¹ The Fair Sentencing Act, Pub. L. 111-220, 111th Cong. (2010).

²² 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.²³

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.²⁴ 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.²⁵ Additionally, the Justice Department recently clarified its enforcement policy where states have legalized marijuana.²⁶

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.²⁷ In 2013, the BOP commanded twenty-five percent of the Justice Department’s budget, a 4.2 increase from fiscal year 2012.²⁸ This percentage will increase to nearly thirty percent by 2020 absent any change in course.²⁹

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.

Hearing Before the S. Judiciary Committee, Statement of Julie Stewart, President of Families Against Mandatory Minimums 3 (2013).

²³ *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).

²⁴ 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>.

²⁵ 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>.

²⁶ 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.

²⁷ *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/hhr-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).

²⁷ *Id.* (estimating a net increase of 6,000 inmates annually through 2015).

²⁸ CRS REPORT, *supra* note 7, at 7.

²⁹ 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.³⁰ 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

³⁰ 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 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

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Associate Clinical Professor of Law & Director, Federal Criminal Justice Clinic

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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”).* 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.¹ 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.”² 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.”³ In the federal system today, almost half of all federal prisoners are incarcerated for drug offenses.⁴

Existing mandatory minimum drug laws require judges to impose lengthy sentences for numerous drug offenses depending on drug type and quantity.⁵ For example, a person who is caught possessing less than two ounces of methamphetamine faces a 10-year mandatory minimum sentence.⁶ These harsh laws apply indiscriminately to drug kingpins and low-level drug mules alike.

* 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).

¹ 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).

² *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>.

³ *Id.*

⁴ 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).

⁵ 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.

⁶ 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).⁷ 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.⁸ 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.”⁹

The current laws have failed us.

First, drug type and quantity are often bad proxies for culpability.¹⁰ 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

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).

⁷ 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.

⁸ 18 U.S.C. § 3553(f)(2)–(5).

⁹ 18 U.S.C. § 3553(e).

¹⁰ 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 (“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.¹¹ 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.¹² 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.¹³ **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.¹⁴ In 2012, just 23% of drug offenders facing a mandatory minimum received safety valve.¹⁵ 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.¹⁶ 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

¹¹ See Profile of Jonathan Cruz, *infra* pp. 6–7.

¹² 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”).

¹³ 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).

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.”¹⁷ **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.¹⁸ 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 population¹⁹—are uniquely susceptible to serving as drug couriers to support their families or to appease boyfriends or husbands who are higher-level drug offenders.²⁰

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.²¹ 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.”²² Thus, a full three-quarters of

¹⁷ 18 U.S.C. § 3553(e).

¹⁸ 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).

¹⁹ 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).

²⁰ 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).

²¹ 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.”).

²² 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.²³ 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."²⁴

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.

²³ *Id.*

²⁴ 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.²⁵

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."²⁶ 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?"²⁷ The prosecutor responded, "No, I don't, not at all, Your Honor, not under the circumstances."²⁸

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.

²⁵ *United States v. Casey Dinwiddie*, 06-CR-1461 (S.D. Cal. Nov. 14, 2006), Sentencing Transcript at 14 (on file with authors).

²⁶ *Id.* at 17.

²⁷ *Id.* at 18.

²⁸ *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,²⁹ 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."³⁰

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."³¹ 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."³² 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.

²⁹ 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).

³⁰ *United States v. Jonathan Cruz*, Case No. 11-CR-3639 (S.D. Cal. April 4, 2013), Sentencing Transcript at 22 (on file with authors).

³¹ *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.

³² *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.³³ 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.

³³ 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,³⁴ 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.³⁵ No weapons or violence were involved in the offense.³⁶ 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.³⁷ 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.³⁸

³⁴ 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>.

³⁵ *United States v. Marvin Webster*, 98-CR-403-1 (N.D. Ill. May 6, 1999), Plea Agreement at 2–3 (on file with authors).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *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.”³⁹ 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.⁴⁰ 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

³⁹ *Id.* at 9–10.

⁴⁰ *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.⁴¹ As a result, our federal prisons are severely overcrowded and are operating at 139% of capacity.⁴² 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.⁴³

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

⁴¹ CRS Report, *supra* note 34, at 1.

⁴² *Id.* at Summary & 20.

⁴³ *Id.* at 8.

increased from \$21,603 to \$29,027.⁴⁴ Over this same period, BOP appropriations increased from \$3.668 billion to \$6.641 billion.⁴⁵ Today, corrections costs devour over 25% of the Department of Justice's budget.⁴⁶

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."⁴⁷ 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."⁴⁸

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.⁴⁹ Notably, in Fiscal Year 2011, approximately two-thirds of drug offenders were convicted of an offense carrying a mandatory minimum.⁵⁰ 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.**⁵¹

⁴⁴ *Id.* at Summary & 15 tbl. 1.

⁴⁵ *Id.* at Summary, 11, 12 fig. 5.

⁴⁶ 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>.

⁴⁷ 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).

⁴⁸ *United States v. Chavez*, 230 F.3d 1089, 1092 (8th Cir. 2000) (Bright, J., concurring).

⁴⁹ See sources cited *supra* note 4.

⁵⁰ 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.

⁵¹ 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.”⁵² 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.⁵³ Even more troubling, only a small fraction of federal prisoners with mental illnesses actually receive mental health treatment in the BOP.⁵⁴ Thus, while the majority of federal prisoners suffer from either a mental illness, a drug addiction, or both,⁵⁵ 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.⁵⁶

⁵² 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 (last visited Sept. 10, 2013).

⁵³ 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.”).

⁵⁴ 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).

⁵⁵ *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.

⁵⁶ 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.”⁵⁷ In fact, prison may actually *increase* rates of recidivism.⁵⁸ **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.”⁵⁹ 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.”⁶⁰

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

⁵⁷ 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.*

⁵⁸ Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S (2011).

⁵⁹ Texas Governor Rick Perry, *2007 State of the State Speech* (Feb. 6, 2007), available at <http://governor.state.tx.us/news/speech/5567/>.

⁶⁰ 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.

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.⁶¹

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.⁶² 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.⁶³ Average sentences have stayed virtually static, decreasing from 46 months in 2005 to 44 months in 2012.⁶⁴ 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.⁶⁵

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."⁶⁶ 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.⁶⁷ 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

⁶¹ 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>.

⁶² *United States v. Booker*, 543 U.S. 220 (2005).

⁶³ Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1681 (2012).

⁶⁴ See 2012 Sourcebook, tbl. 13, available at

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.

⁶⁵ See 2012 Sourcebook, tbl. N, available at

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 (drug trafficking sentences).

⁶⁶ *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013).

⁶⁷ "[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.⁶⁸ And third, a number of appellate courts explicitly presume that a Guidelines sentence is proper, a practice that has been upheld by the Supreme Court⁶⁹ and leads many sentencing judges to hew closely to the Guidelines.⁷⁰

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.**

⁶⁸ See *Peugh*, 133 S. Ct. at 2083 (“Failing to calculate the correct Guidelines range constitutes procedural error.”).

⁶⁹ 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”).

⁷⁰ 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."¹ 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.²

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.³ 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

¹ *People v. Broadie*, 37 N.Y. 2d 100, 115 (1975) (citations omitted), cert. denied, 423 U.S. 950 (1975).

² 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>.

³ *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.⁴

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 2009.⁵ Crime rates in the state continue to drop after the elimination of these sentences.⁶

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 2011.⁷

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.⁸ 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.⁹

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.¹⁰ Harsh penalties based solely on drug type and quantity

⁴ Ibid.

⁵ 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).

⁶ 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).

⁷ United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, p. 71.

⁸ Ibid., p.122.

⁹ United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm (accessed September 17, 2013), Table 43.

¹⁰ 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.¹¹

Federal law also mandates additional consecutive sentences for drug offenders who possess firearms in connection with their drug crimes.¹² 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

¹¹ *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).

¹² 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.¹³

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.¹⁴ 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.¹⁵

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.¹⁶

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

¹³ *United States v. Barton*, 442 F. Supp. 2d 301 (W.D. Va. August 14, 2006).

¹⁴ United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm (accessed September 17, 2013).

¹⁵ 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).

¹⁶ 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.¹⁷

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.

¹⁷ "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.



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.”¹ In the

¹U.S. Department of Justice. *Smart on Crime: Reforming the Criminal Justice System for the 21st 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 2009.²

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

² 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.



**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.”¹

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.”² 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.³

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),⁴ and 7 million people are under some form of correctional control.⁵ At the same time, the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent.⁶ The Federal Bureau of Prisons is overcrowded, operating at nearly 40

¹ Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, p. 2.

² Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://famm.org/the-facts/#publicsafety>

³ 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/>.

⁴ American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>.

⁵ 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.

⁶ 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.bis.gov/content/pub/pdf7cpus1Q.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.⁷

Moreover, these policies have exacerbated large racial disparities in U.S. prison system.⁸ As of 2008, 1 in every 15 Black men 18 or older was behind bars compared to 1 in 106 White men.⁹ 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.¹⁰ 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.¹¹ 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.¹² Mandatory minimums require uniformed, automatic, binding prison terms of a particular length for people convicted of certain federal and state crimes.¹³

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

⁷ Congressional Research Service. The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options (Jan. 22, 2013), retrieved from <http://www.fas.org/sfp/crs/misc/R42937.pdf>

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¹¹ Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, 2012, p. 99.

¹² 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_RtC_PDF/Executive_Summary.pdf

¹³ Families Against Mandatory Minimums. Retrieved September 17, 2013, available at <http://fam.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.¹⁴ 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.¹⁵

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.¹⁶

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.¹⁷

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

¹⁴U.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

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

punishment, and (3) be applied consistently.”¹⁸ 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.¹⁹

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.”²⁰ 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.²¹ It is also true that mandatory minimums are particularly ineffective in addressing drug

¹⁸ *Id.* at 345.

¹⁹ *Id.* at 355-56, 364 - 65.

²⁰ 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

²¹ 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 1980.²² And in most cases, these offenders present no threat to society and deserve shorter sentences.²³

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.²⁴ 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.²⁵ Mandatory minimums are completely cost-ineffective. Taxpayers spend almost \$70 billion a year on prisons and jails,²⁶ raising state spending on corrections more than 300 percent over the last two decades.²⁷ 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.²⁸

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

²² Alexander, Michelle. (2012). *The New Jim Crow*, New York: The New Press, 2012, p. 60

²³ 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)

²⁴ 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

²⁵ Families Against Mandatory Minimums. The Facts (with Sources/References). Retrieved September 17, 2013, available at <http://famm.org/the-facts-with-sourcesreferences/>

²⁶ American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>

²⁷ Families Against Mandatory Minimums. *The Cost*. Retrieved September 17, 2013, available at <http://famm.org/the-facts/#thecost>

²⁸ Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://famm.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.²⁹

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.³⁰

²⁹ <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2011/crime-in-the-u.s.-2011/tables/table-1>

³⁰ <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.³¹

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 2010.³² It also produced a 25 percent decrease in parole revocations between September 2006 and August 2008, at a considerable savings to taxpayers.³³

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.

³¹ The Sentencing Project. “Ending Mass Incarceration: Charting a New Justice Reinvestment” (2013).

³² See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Govt’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).

³³ Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 11 (2010).



**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, bi-sexual, 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, punishing 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 and disrupt mass incarceration.

Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, said it best, “[w]hat 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."¹ Mass incarceration is arguably the new structure of systematic enclosure and exploitation, specifically targeting people of color, and has become a steady and strategic outgrowth of historic racial and economic caste systems.

The Leadership Conference believes this is one of the defining moral and 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 towards remedying the mistakes of the past. In a recent statement, Senator Rand Paul (R-KY) opined, "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."² 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.³

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 are live behind bars (triple the amount in 1987),⁴ and 7 million people are under some form of correctional control.⁵ At the same time, the federal prison population has jumped from 25,000 to 219,000

¹ Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, p. 2.

² Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://famm.org/the-facts/#publicsafety>

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inmates, an increase of nearly 790 percent.⁶ The Federal Bureau of Prisons is overcrowded, operating at nearly 40 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.⁷

Moreover, these policies have exacerbated large racial disparities in U.S. prison system.⁸ As of 2008, 1 in every 15 Black men 18 or older was behind bars compared to 1 in 106 White men.⁹ Furthermore, Black people are incarcerated on drug charges at a rate 10 times higher than White people, yet, White people engage in drug activity at a higher rate than Black people.¹⁰ 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.¹¹ 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 – 1 to 18 – 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.

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⁷ Congressional Research Service. *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (Jan. 22, 2013), retrieved from <http://www.fas.org/sgp/crs/misc/R42937.pdf>

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¹⁵ *Id.*

¹⁶ *Id.*

139 months, compared to 63 months for those offenders who received relief from their mandatory minimum penalty.¹⁷

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 punishment, and (3) be applied consistently.”¹⁸ The Commission further recommended and The Leadership Conference supports the following regarding mandatory minimums:

- expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines);
- 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.¹⁹

It is clear, what was once thought to be sound criminal justice policy, has had the unintended consequence of increasing disparities in the administration of justice and led to mass incarceration.

Mandatory Minimums show no significant relationship with 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 the prison populations were ostensibly rising, 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

¹⁷ *Id.*

¹⁸ *Id.* at 345.

¹⁹ *Id.* at 355-56, 364 - 65.

factors other than incarceration.”²⁰ 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.²¹ It is also true, that mandatory minimums are particularly ineffective in addressing drug 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 1980.²² And in most cases, these offenders present no threat to society and deserve shorter sentences.²³

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.²⁴ To best serve the interests of reentry 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 spent about \$540 million on federal prisons. In

²⁰ 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

²¹ 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)

²² Alexander, Michelle. (2012). *The New Jim Crow*. New York: The New Press, 2012, p. 60

²³ 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)

²⁴ 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

2013, we will spend over 12 times that amount, reaching \$6.8 billion.²⁵ Mandatory Minimums are completely cost-ineffective. Taxpayers spend almost \$70 billion a year on prisons and jails,²⁶ raising state spending on corrections more than 300 percent over the last two decades.²⁷ 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.²⁸

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 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 and restore certainty and fairness in sentencing and reduce an imploding prison population, which is not only the moral thing to do, but also a financially responsible thing to do. 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, apply a one size-fits-all approach, all of which produces the exact result 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 wrought by mandatory minimum sentencing laws, with the introduction of two bi-partisan 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).

²⁵Families Against Mandatory Minimums. The Facts (with Sources/References). Retrieved September 17, 2013, available at <http://famm.org/the-facts-with-sourcesreferences/>

²⁶American Civil Liberties Union. Retrieved September 17, 2013, available at <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>

²⁷Families Against Mandatory Minimums. *The Cost*. Retrieved September 17, 2013, available at <http://famm.org/the-facts/#thecost>

²⁸Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, available at <http://famm.org/the-facts/#publicsafety>

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.²⁹

Conversely, 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: *The Smarter Sentencing Act* allows 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.³⁰

In both cases, these bills seek to restore justice and reduce 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, and “tough-on-crime” rhetoric has 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.³¹

It is now time that we chart a new course for reform of our criminal justice system, one that implores evidence based approach to public safety. One such example, is the set of Justice Reinvestment initiatives that have been implemented primarily at the state and local level. 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,

²⁹ <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2011/crime-in-the-u.s.-2011/tables/table-1>

³⁰ <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736>

³¹ The Sentencing Project. “Ending Mass Incarceration: Charting a New Justice Reinvestment” (2013).

usually by redirecting a portion of corrections savings to community-based interventions; and (3) performance measurement.

Using this model, 21 states have implemented initiatives – 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 – 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 2010.³² It also produced a 25 percent decrease in parole revocations between September 2006 and August 2008, at a considerable savings to taxpayers.³³

These are but a few examples of how, reforming sentencing policies and practices have positively impacted publicly and costs. It is now time for our federal government to redirect its efforts towards common sense reforms, in order to reduce disparities, increase the chances of successful reentry, 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 fulfilling that duty.

Thank you for your leadership on this critical issue.

³² See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Govt'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).

³³ Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 11 (2010).



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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.¹ 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.

¹ 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.

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."²

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."³ 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.

² 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).

³ *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).

I. The Failure of Mandatory Minimum Sentences

Though mandatory minimums have been criticized on numerous grounds,⁴ 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 195.⁵ 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.⁶ 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.”⁷

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

⁴ 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. (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).

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

⁶ 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>.

⁷ *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.”).

supervision simply by virtue of the longer periods of incarceration.”⁸ 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.⁹ Based on fiscal year 2012 cost data, the cost of supervising an offender for one month is approximately \$279.¹⁰ 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.¹¹

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”¹² and are “blunt and inflexible tool[s].”¹³

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

⁹ 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.

¹⁰ 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).

¹¹ 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.”).

¹² *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.”).

¹³ 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

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.¹⁴ 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,¹⁵ they are based on the weight of drugs regardless of purity,¹⁶ they apply conspiracy principles to drug sentences,¹⁷ 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.¹⁸

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).

¹⁴ 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.

¹⁵ 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.”).

¹⁶ *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.”).

¹⁷ *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].”).

¹⁸ *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

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.¹⁹ 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.²⁰

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.”).

¹⁹ 2009 Hearing, *supra* note 3, at 43 (statement of Chief Judge Julie E. Carnes).

²⁰ See, e.g., *United States v. Leitch*, 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.”).

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,²¹ the Guidelines have been skewed out of shape and upward by the inclusion of sentence ranges which have not been empirically constructed.²² 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.²³ The Commission concluded that the two systems are "structurally and functionally at odds."²⁴ 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."²⁵ Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.²⁶

²¹ 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.").

²² 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.").

²³ 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

²⁴ *Id.*

²⁵ 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).

²⁶ 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).

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.”²⁷ 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.²⁸ 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.”²⁹ 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.³⁰ 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.³¹ On recommendation of the Committee, the Conference endorsed the concept.³²

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,³³ mandatory minimum sentencing statutes have created what the late Chief Justice Rehnquist aptly identified as “unintended consequences.”³⁴ Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous

²⁷ JCUS-SEP 13, p. __.

²⁸ 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.).

²⁹ JCUS-SEP 91, p. 56.

³⁰ JCUS-SEP 93, p. 46.

³¹ *Id.*

³² *Id.*

³³ 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.”).

³⁴ 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”).

Honorable Patrick J. Leahy

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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,

A handwritten signature in black ink, appearing to read "Robert Holmes Bell", with a long horizontal flourish extending to the right.

Robert Holmes Bell

Identical letter sent to: Honorable Charles E. Grassley

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.”¹ 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.”²

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.³

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."⁴ 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."⁵ 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.⁶

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.⁷ 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.”⁸ 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.”⁹ 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.”¹⁰ 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.**¹¹

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.¹² 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”¹³

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.”¹⁴ 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."¹⁵ 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.¹⁶

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.¹⁷ 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."¹⁸

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.

¹ 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).

² 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).

³ See 21 U.S.C. § 841(b)(1)(A)(iii).

⁴ Stephanie George's Supplemental Statement in Support of her Petition for Clemency.

⁵ Case No. 3:96-cr-78, George Sentencing Tr. at 13 (N.D. Fla. May 5, 1997).

⁶ U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at 155-56 (Oct. 2011).

⁷ 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).

⁸ U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, *supra*, at 346.

⁹⁹ *Id.*

¹⁰ George Sentencing Tr. at 13.

¹¹ *Id.* at 11-12 (emphasis added).

¹² 21 U.S.C. § 841(b)(1)(A)(iii).

¹³ George Sentencing Tr. at 13.

¹⁴ 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).

¹⁵ 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.*

¹⁶ 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.

¹⁷ 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).

¹⁸ Stephanie George's Supplemental Statement in Support of her Petition for Clemency.

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.¹ 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.² 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 2012.³ 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.⁴ 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

¹ Pub. L. 111-220, 111th Cong. (2010).

² 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.

³ *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, with 2012 SOURCEBOOK at Figure J.

⁴ 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.⁵ 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.

⁵ 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/20111031_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).**⁶ Ms. Martinson’s case, often referred to as a “girlfriend case,” is not unique.

⁶ 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.

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.⁷

⁷ 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.⁸ 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.**⁹

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.

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.

⁸ MM REPORT at 87.

⁹ 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*¹⁰ - *and the crime rate has dropped a whopping 44 percent*.¹¹ 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.**¹²

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.¹³ 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.¹⁴

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

¹⁰ 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.

¹¹ 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.).

¹² 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 (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).

¹³ HB 349, 152nd Gen. Assem., Reg. Sess. (Ga. 2013).

¹⁴ 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."¹⁵ 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.¹⁶ 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.¹⁷ BOP facilities are operating at 37 percent above capacity and will be at 45 percent over capacity if current trends continue.¹⁸ 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.¹⁹ 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.²⁰

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:

¹⁵ 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>.

¹⁶ 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>.

¹⁷ CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGE, ISSUES, AND OPTIONS 1 (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 (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).

¹⁸ Horowitz Statement at 8.

¹⁹ CRS REPORT at 8.

²⁰ 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.²¹

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.²² 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.

²¹ 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.

²² 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.²³

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,²⁴ 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

²³ 2012 SOURCEBOOK at Tbls. 37, 39, 40, 44.

²⁴ 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.”²⁵ 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.”²⁶

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.²⁷ 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.²⁸ *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.²⁹ 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

²⁵ MM REPORT at 158.

²⁶ *Id.* at 171, Fig. 8-11.

²⁷ *Id.* at 163-64.

²⁸ *Id.* at 273.

²⁹ *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.³⁰ 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.³¹ 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.³² 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.³³ **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**

³⁰ 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.

³¹ 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).

³² MM REPORT at Table 7-1.

³³ 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.**³⁴ 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.³⁵ 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

³⁴ 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>.

³⁵ 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.³⁶

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.³⁷ **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,³⁸ 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

³⁶ 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-](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf)

[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.

³⁷ 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).

³⁸ 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."³⁹ 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,

³⁹ 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.

“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.¹ 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,² 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.³ 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.”⁴ 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.⁵ The Sentencing Commission’s report found that low-level drug offenders often receive mandatory minimum sentences, not traffickers or kingpins.⁶ In fact, it was street-level drug sellers who bear the brunt of federal mandatory minimum sentencing.⁷

Impact of Mandatory Minimum Sentencing

Mass Incarceration

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the Drug
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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.⁸ 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.⁹ This overcrowding poses a serious risk to the safety of both prisoners and staff.¹⁰

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.¹¹ The Rockefeller Drug Laws became a national model, with other states enacting their own mandatory minimum sentencing statutes.¹² 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.¹³

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.¹⁴ 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 1990.¹⁵ 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.¹⁶ 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.¹⁷

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.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ 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.²²

During the last 30 years, many states implemented sentencing enhancement laws, such as instituting mandatory minimum sentences for drug crimes taking place with 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,²³ while New Jersey's school zone law resulted in blacks and Latinos being convicted of 96 percent of school zone violations.²⁴

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.²⁵ 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.”²⁶

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,²⁷ totaling almost \$7 billion.²⁸ 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.²⁹ 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.³⁰

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.³¹ And tragically, incarceration promotes a cycle of involvement with the criminal justice system for the children of offenders.³²

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.³³ 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.³⁴

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.³⁵ 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.³⁶ 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.³⁷

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.³⁸ Meanwhile, incarceration rates and criminal justice costs continue to rise as a result of harsh sentencing policies.³⁹

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.⁴⁰ 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.⁴¹ 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.”⁴² 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.⁴³

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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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.

¹ Federal Bureau of Investigation, *Uniform Crime Reports, Crime in the United States: 2011* (2012).

² 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).

³ Congressional Research Service, “The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options,” by Nathan James (R42937; Jan. 22, 2013).

⁴ 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).

⁵ 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.

⁶ 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),

⁷ Ibid.

⁸ 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).

⁹ 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>.

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The Justice Safety Valve Act of 2013

S. 619

Written Statement of Shon Hopwood¹

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.²

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.³ 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.”⁴

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.⁵ 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.⁶ 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.”⁷ 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,⁸ 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,⁹ persons convicted of child rape,¹⁰ and some murderers.¹¹

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.¹² 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.

¹ I am a Gates Public Service Law Scholar at the University of Washington School of Law and the

² See *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003).

³ 18 U.S.C. § 924(c)(1)(C)(i).

⁴ *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (citing 1 Works of James Wilson 363 (J. Andrews ed. 1896)).

⁵ 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.

⁶ In fact, it's not a prosecutor's role to do so. They are one side in the adversary system, not a judge.

⁷ *Setser v. United States*, 132 S. Ct. 1463, 1471-72 (2012).

⁸ 18 U.S.C. § 924(c)(1)(C)(i); see also 18 U.S.C. §§ 922(g) & (h).

⁹ http://www.justice.gov/opa/pr/2006/June/06_crm_389.html

¹⁰ http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Of_fense_Topics/199503_Federal_Rape_Cases.PDF

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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.