Federal Public & Community Defenders
Legislative Committee

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August 13, 2018

Senator Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, D.C. 20510

Senator Chuck Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

Re: The First Step Act (H.R. 5682); Sentencing Reform

Dear Senators:

We write on behalf of the Federal Public and Community Defenders ("Federal Defenders") regarding the First Step Act. Federal Defenders represent the majority of indigent defendants in 91 of the 94 federal judicial districts nationwide. Over 80 percent of people charged with federal crimes cannot afford a lawyer, and nearly 80 percent of people charged with federal crimes are Black, Hispanic, or Native American. Our clients bear the disproportionate brunt of the overly severe sentencing regime in federal courts. As such, we strongly support meaningful prison and sentencing reform. Unfortunately, our review of the First Step Act reveals that it will provide only slight benefits to some of our clients and create serious problems for many others. We therefore urge you and your colleagues not to support this bill in its current form, and ask that you amend the bill to address each of its failings.

Introduction

As discussed in more detail below, the bill is touted by its proponents for its expansion of recidivism-reducing programming. But, in fact, the bill will likely *reduce* programming for those who need it most. For instance, it directs the Attorney General to create a strategy to expand prison work programs only for those who are least likely to recidivate. By encouraging work programs only for low and minimum risk prisoners (programs that are currently in short supply with a lengthy waiting list), the bill would necessarily crowd out opportunities for medium and high risk prisoners. This runs counter to evidence-based studies showing that work programs are most effective at reducing recidivism for prisoners at the greatest risk of re-offending.

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The bill also relies heavily on the discretion of Attorney General Sessions to implement its goals. This despite the fact that Attorney General Sessions opposes the bill and has openly and repeatedly disavowed its goals. The Department of Justice's recent letter to the White House confirms what its actions demonstrate to date. The Attorney General does not support rehabilitation, supports only longer incarceration, and cannot be entrusted with discretion to implement prison reform.[1]

Moreover, real prison reform and expanded programming cannot succeed in the absence of resources and basic institutional safety. Attorney General Sessions has cut staffing, sought budget cuts, and closed at least nineteen halfway houses, even while Bureau of Prisons facilities are 16% overcrowded.[2] Private prisons, which have higher rates of assault and use of force than comparable BOP facilities,[3] are 17% overcrowded.[4] The current situation is unsafe for inmates and staff alike, and DOJ projects a 3.5% increase in the prison population by 2019, at a cost of at least $234 million a year, due to the Attorney General's policies to pursue the highest sentences and to prosecute more non-violent drug and immigration offenders.[5] Between 2009 and 2016 the average sentence for drug offenders fell by 15% due to the combined effects of the Fair Sentencing Act of 2010, a small reduction in the drug guidelines, and partial implementation of a charging policy targeted at more serious offenders. In just the first four and a half months under the Attorney General's policies in 2017, it grew by 6%.[6]

For this reason, any meaningful reform of the criminal justice system must address the pernicious and wasteful effects of mandatory minimum sentences. Without reform of mandatory minimums, over-incarceration, unsafe conditions, and the waste of taxpayer dollars will continue to grow. Mandatory minimums not only run counter to public safety, they distort traditional legal norms by removing sentencing authority from neutral judges and giving it to prosecutors, providing a single partisan actor with unchecked power that is wholly inconsistent with due process, the separation of powers, and simple fairness. The Attorney General's directive to prosecutors to charge and pursue those offenses that carry the "most substantial" mandatory minimum and guideline sentences promotes extreme injustices,[7] including the routine use of ultra-harsh mandatory sentences to coerce guilty pleas and punish defendants for exercising their right to trial. Too many people are languishing in prison for decades or life for the sole reason that they exercised their constitutional right to a trial. This state of affairs does not advance public safety and is anathema to American values. Mandatory minimums should be eliminated altogether. At the very least, criminal justice reform must include the ameliorating reforms of the Sentencing Reform Act of 2017, including each of its retroactivity provisions.

Below in Parts I-III is a detailed discussion of the First Step Act. We address the need for sentencing reform in Part IV.

I. The First Step Act does not require that evidence-based programming be provided to prisoners who need it, and is therefore unlikely to rehabilitate prisoners, reduce recidivism, or increase public safety.

The bill purports to require BOP to provide all prisoners the opportunity to participate in recidivism reduction programming or productive activities, and to give first priority for recidivism

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reduction programming to high and medium risk prisoners.[8] It then encourages the opposite, directing the Attorney General to create a strategy to provide prison work programs—the most effective programming especially for young minorities at the greatest risk—only to low and minimum risk prisoners who need it least.[9] The bill does not otherwise require the Attorney General to ensure the existence of any kind or amount of programming. Instead, it gives the Attorney General the power and discretion to determine the kind, amount and intensity of programming to be provided to each prisoner,[10] and to direct the Bureau of Prisons regarding the provision of any programming.[11] And the bill requires that any expansion of programming must be done through partnerships with private providers under policies of the Attorney General, and subject to the availability of appropriations.[12]

Without evidence-based programming for those who need it, prison reform has no foundation. People who are unemployed, under-educated, addicted, in psychological distress, or mentally ill recidivate more often than others. Research has shown that inmates who participate in BOP's educational, vocational, work, and substance abuse treatment programs are significantly less likely to recidivate.[13] However, for far too many people serving lengthy, often decades-long sentences in federal prison, nothing of value happens. The waitlist for prison work programs is 25,000. For education and vocational training the wait list is 15,000. The Attorney General is mandated by statute to ensure that BOP provides a GED program for those who need it, but the earning potential of a GED holder is similar to that of a high school dropout.[14]

In January 2016, the Colson Task Force advised that BOP "needs to immediately expand occupational training and educational programs," and urged Congress to expand Federal Prison Industries (FPI) in order to more effectively reduce recidivism and improve employment outcomes.[15] The task force also found that cognitive behavioral therapy and mental health treatment was not available in many facilities and that participation was restricted by lack of resources and staff.[16] Other independent evaluations likewise found significant shortages and gaps in education, occupational training, cognitive behavioral therapy, and mental health treatment.[17] Accordingly, under the previous administration, BOP began to build a centralized school system to provide all levels of education, occupational training, and marketable job skills, to expand access to FPI, and planned to add social workers, psychologists and treatment specialists to expand access to cognitive behavioral therapy and mental health treatment.[18] At the same time, the Inspector General reported that private prisons had higher rates of assault and use of force than comparable BOP facilities, were not providing basic medical care, were placing inmates in solitary confinement for no reason, and were generally placing inmates' rights and needs at risk.[19] Further, the "rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource."[20] Accordingly, the previous administration directed BOP to reduce and ultimately end the use of private prisons.[21]

Unfortunately, the current administration immediately ordered increased use of private prisons, cut existing staff, programming and reentry services, and has actively sought budget cuts to reduce them even more. Even if the administration supported real prison reform, which it plainly does not, the bill does not authorize sufficient funds to implement it.

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A. Providing prison work programs to 75 percent of low and minimum risk prisoners is contrary to the evidence that these programs are most needed by, and most effective for, prisoners at the greatest risk.

Federal Prison Industries has been proven to reduce recidivism more than any other program—inmates who participate in FPI work programs are 24% less likely to recidivate for as long as 12 years following release as compared to similarly situated non-participants.[22] By giving them marketable job skills, they were also 14% more likely than non-participants to be employed 12 months after release.[23] These programs "especially benefit young minorities who are at the greatest risk for recidivism," and who "experience the sharpest decrease in risk of recidivism."[24] The Colson Task Force recommended expansion of FPI, noting that research showed that "earning a working wage as a component of prison industry participation may enhance such program's effectiveness in reducing recidivism and improving employment outcomes."[25] As the committee report emphasizes, if FPI is not expanded, "it will be difficult to implement many of the recidivism reduction programming goals of this bill."[26]

Yet, the First Step Act directs the Attorney General to develop a strategy to expand prison work programs so that "not less than 75 percent of eligible minimum and low risk offenders have the opportunity to participate in a prison work program for not less than 20 hours per week."[27] BOP has not previously excluded high or medium risk prisoners from prison work programs, but that is the likely effect of the bill. The current waitlist for work programs is 25,000. Under BOP's current security classification system, nearly 100,000 prisoners are minimum or low risk and 76,000 are medium or high risk; the rest are "unclassified."[28] If 75,000 low and minimum risk prisoners were given jobs for 20 hours a week, it would not be possible for 76,000 medium and high risk prisoners to have access to work absent an enormous infusion of money and resources which are absent from the bill.

The bill's notable failure to mention medium and high risk prisoners as part of the strategy to expand work programs, and its failure to incentivize their participation in programming by allowing them to use credits toward prerelease custody – as the bill does for low and minimum risk prisoners – is a major failing. The consequence will be a denial of programs for those who are most in need of them. The result is not only unfair but will adversely affect public safety.

B. Giving the Attorney General discretion to direct all aspects of programming, risk/needs assessments, and prerelease credits would further diminish any prospect of success.

Rather than seek to address shortages and gaps in BOP programming, the current administration has cut existing programming and reentry services and has actively sought budget cuts to reduce them even more. And yet the bill would empower this same administration to do the following: (1) direct the Bureau of Prisons regarding system-wide programming and the addition of any new programming; (2) develop policies for entering into partnerships with private providers for any expansion of programming; (3) develop the risk assessment tools that will form the basis of all individual program assignments and credits; (4) create the rules governing the implementation of those instruments; and (5) create the rules governing penalties, including

52 Duane Street,10th Floor
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reducing prerelease credits, for violations. The effects of these decisions will last long after this administration's term.

Upon taking office, Attorney General Sessions directed BOP to increase its use of private prisons,[29] and halted the expansion of vocational and educational programming then underway.[30] The administration has steadfastly refused to hire sufficient correctional staff, instead requiring teachers, counselors, nurses, kitchen staff, and other non-custodial staff to act as guards (a practice called "augmentation").[31] In January of this year, within days of BOP wardens being told to prepare for a 12 to 14 percent reduction in staffing,[32] they were instructed to "increase population levels in private contract facilities."[33]

Staff cuts and augmentation have created unsafe conditions within the prisons, reduced access to programming, and deprived inmates of timely medical care. Assaults on staff and fights among inmates have increased by 15 percent.[34] Pulling a teacher into guard duty can result in the cancelation of as many as five classes a day. The number of inmates earning GEDs dropped by nearly 60 percent from fiscal year 2016 to fiscal year 2017. Inmates with serious medical conditions are not being treated in a timely way.[35]

The administration has also cut residential reentry centers (RRCs), which, until now, have been vital to preparing prisoners for reentry, as intended by the Second Chance Act. In the summer of 2017, it closed sixteen RRCs across the country,[36] capped bed space in those remaining, and in some instances just stopped referring inmates to RRCs.[37] In addition, it eliminated from all RRCs social services coordinators who assist people with finding employment, housing, substance abuse and mental health treatment, and eliminated cognitive behavioral programming.[38] In 2018, the administration closed at least three more RRCs—two in North Carolina and one in Kansas City, Missouri.

Federal Defenders report that people are being "released with no support network directly to the street," or with as little as a month in a halfway house. Others have been relocated from a newly-closed halfway house near home to one far away where they will not be living. People have been "forced to quit their jobs," and will not be able to keep any job they get in the new location. "It's been difficult for them to maintain stability and plan for the future." People are routinely told at the last minute that their halfway house time has been canceled or delayed. "My client had his bus ticket and bags packed for leaving on a Monday for the halfway house and they came to him on a Sunday and told him he could not leave for another two months. He never went." Judges are being forced to return people to prison for violating a condition of supervised release when all agree that they belong in a halfway house. "My client was ready to work and engage in treatment, and just needed to get out of a drug-infested environment, but there was nowhere for him to go."[39] This is not helping inmates re-integrate, ensuring public safety, or saving money. (DOJ's assertion that halfway houses are costlier than prison is false; it's $4,000 less per person per year.[40])

Despite objections from the House Subcommittee on Crime, Senators of both parties, and the Criminal Law Committee of the Judicial Conference,[41] the administration re-emphasized that non-custody staff must participate in augmentation,[42] closed additional halfway houses, and requested reductions in correctional and programming staff in its 2018 budget request.[43] Congress

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

rejected that request, appropriated an additional $105 million, and directed BOP to immediately hire sufficient correctional staff, stop the routine use of augmentation, maintain residential reentry centers and other recidivism reduction measures, and provide a detailed report on its use of private prisons in light of the serious problems identified by the Inspector General.[44] To the increasing frustration of the Senate Appropriations Committee, none of that occurred,[45] and the administration is now seeking a reduction of $121.5 million in its 2019 budget to further reduce correctional staff and to eliminate programming and reentry staff within BOP.[46]

The administration characterizes these actions as "working hard to improve its evidence-based recidivism-reduction efforts to help prisoners become contributing members of society."[47] That, of course, is utter nonsense.

Under these circumstances, relying on the Attorney General to willingly carry out the bill's rehabilitative and recidivism-reducing purposes is untenable. The bill could at least mandate that the Attorney General "shall ensure" that the BOP "has in effect" educational, vocational, work, substance abuse, and mental health treatment programs to provide such programming to all prisoners who have educational, vocational, employment, substance abuse or mental health needs,[48] but it doesn't.

Moreover, there appears to be no good reason that any expansion of programming must be done only through partnerships with private providers, or under policies of the Attorney General. Programming should presumptively be delivered by appropriately trained BOP staff. Outsourcing should be permitted only if necessary to obtain more effective evidence-based programming, given that the "rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource."[49] Any programming should be evaluated and certified by an independent body, like the National Institute of Corrections, as under the Corrections Act.[50]

The bill contains no effective mechanism for oversight and accountability. It would require the Attorney General, beginning two years after enactment, to essentially conduct a self-evaluation of the administration's progress on a limited part of the bill, then a GAO audit beginning five years after enactment, four and a half years after the Attorney General directs BOP what to do, and two years after BOP implements the Attorney General's directives,[51] when it is too late. The Corrections Act, which itself has many flaws, at least provides for some contemporaneous congressional oversight and accountability. *See*, *e.g.*, S. 1994, Sec. 101(a)(3) (requiring Attorney General to submit to the appropriations and judiciary committees a "strategic plan for the expansion of recidivism reduction programming" within one year of enactment); Sec. 101(b) (requiring National Institute of Corrections to evaluate all programming and certify whether such programming is evidence-based and effective); Sec. 104(a)(1)(A)-(C) (requiring annual report by Attorney General "in coordination with Comptroller General," to include how any "problems or shortages . . . should be remedied"); Sec. 104(c) (requiring Attorney General to report recidivism rates to appropriations committees "in consultation with the Administrative Office of the United States Courts"); Sec. 104(d) (requiring congressional committees to review effectiveness of incentives). The First Step Act contains no such measures. Strong measures are obviously needed, but the bill does not contain any.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

Lastly, before any progress can be made, the administration must be required to hire sufficient correctional staff and halt the routine use of augmentation, which is unsafe and takes teachers and counselors away from their assigned duties. The administration must also be required to provide reentry assistance as intended by the Second Chance Act. To that end, Congress could amend 18 U.S.C. § 3624(c) to mandate that BOP provide reentry assistance to all prisoners during the final months of their terms of imprisonment by deleting the phrase, "to the extent practicable."

C. Even if the administration supported prison reform, the bill does not provide sufficient funds to implement it.

The bill authorizes to be appropriated $50 million per year for five years. Of the amount actually appropriated (which may be less or nothing), 20 percent would go to the development of all aspects of the system and training BOP staff to use it, and 80 percent to all aspects of BOP's implementation, including administering risk/needs assessments, providing programming, and releasing inmates early to prerelease custody.[52]

Optimistically, then, $40 million a year would be appropriated for programming and prerelease custody, both of which would have to be significantly expanded. In 2017, it would have cost $10 million to provide educational and vocational programming to 1,890 additional inmates.[53] Thus, it would cost $80 million just to accommodate the waitlist of 15,000 for educational and vocational programs. In 2017, it would have cost $56.3 million just to add 1,870 RRC beds to meet the more limited requirements of the Second Chance Act.[54] Even if RRCs had not been significantly cut, RRCs would have to be significantly expanded to accommodate longer periods of time in a halfway house, at a cost far in excess of $56.3 million.

While the committee report states that it is "imperative" that any cost savings be "reinvested into the evidence-based recidivism reduction programs offered by the Bureau of Prisons,"[55] the bill says only that it is the "sense of Congress" that any savings associated with reduced recidivism "should" be reinvested in programming,[56] and invites the Attorney General to recommend "how to reinvest any savings" in "Federal, State and local law enforcement activities."[57] In addition, as the Judicial Conference has pointed out, any such savings may be "an insufficient or unreliable source of funding, because much of the 'savings' will be in the form of future cost avoidances rather than current excess appropriations that could be reinvested."[58]

Lastly, prison reform cannot succeed under current conditions, where staff cuts have created unsafe conditions and reduced access to programming as teachers and counselors are routinely pressed into guard duty. To remedy that situation, a significant number of correctional officers would need to be hired.[59] And, DOJ is projecting a 3.5 increase in the prison population, or 6,435 prisoners, by 2019,[60] at a cost of at least $234 million a year.[61]

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

II. The bill's apparent promise of rewards is illusory, unfair, and contrary to evidence-based practices.

The bill would give prisoners the impression that they would be rewarded for participating in programming, but this is unlikely to materialize. Some inmates purportedly could be transferred earlier to prelease custody, but the bill does nothing to ensure that sufficient halfway houses or supervision for home confinement would exist. Assuming there was somewhere to go, a long list of inmates would be excluded from earning time credits. Many others would be denied the use of credits through a complicated and unscientific scheme combining a misuse of risk/needs assessments with the warden's discretion in each case. Risk assessments misclassify people who do not re-offend as high or moderate risk at least half the time, and using risk categories to deny pre-release credits would perpetuate racial disparities.[62] For those reasons, both the Colson Task Force and one of the creators of the Post Conviction Risk Assessment (PCRA), the risk assessment instrument currently used by the United States Probation Department, have warned that risk/needs assessments should be used solely for their evidence-based purpose: identifying needs and assigning programming targeted to those needs, not to determine the length of imprisonment.

The rewards scheme would create uncertainty and unfairness. Prisoners who are lined up now to participate in programming would soon correctly realize that the rewards are illusory and unfair. This would be unfortunate because many programs in fact reduce recidivism, regardless of risk categories. These problems could all be avoided by using risk/needs assessments only for their evidence-based purpose, and providing real but limited time off to all prisoners who complete programming and maintain good behavior, just like the Residential Drug Abuse Program (RDAP) currently does.

A. The bill does nothing to ensure that there would be anywhere to go.

Under today's law, prisoners are supposed to be transferred to a halfway house or home confinement for a portion of the final months of their terms of imprisonment not to exceed 12 months.[63] According to the bill, low and minimum risk prisoners could be transferred to a halfway house or home confinement once they've earned time credits equal to the remainder of their term of imprisonment, if they are not on the excluded list and the warden finds them "otherwise qualified" to be transferred.[64] Nearly 100,000 prisoners are minimum or low risk under BOP's current security classification system. The CBO has not estimated how many halfway houses and supervisors of home confinement would need to be added, but there is no doubt that it would be substantial.

The Attorney General has openly opposed early transfer to prelease custody under the bill, even though halfway houses and home confinement cost less than imprisonment (contrary to DOJ's recent letter to the White House), and the prison population is expected to increase by 3.5 percent by 2019 (due to the Attorney General's policies).

But the bill nowhere requires that halfway house capacity be expanded. Without some kind of enforceable mandate, this would not happen. As to inmates who might be transferred early to home confinement, the bill indicates that they would be supervised by probation officers, either

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New York, NY 10007
Tel: (212) 417-8738

under agreements "to the extent practicable" or by "offering" to supervise inmates not under their supervision.[65] U.S. Probation, which is in the Judicial Branch, cannot donate resources to supervise inmates in BOP custody, but the bill does not provide for reimbursement of U.S. Probation. Thus, as the Judicial Conference has pointed out, "the Judiciary will be unable to carry out the provisions of the bill as intended without diverting resources from other critical activities that are needed to ensure public safety and the efficient administration of justice."[66] In other words, Probation Officers will not be supervising people transferred early to home confinement.

Since the bill contains no plan to ensure expansion of halfway houses or home confinement, prisoners would receive no reward for participating in programming, thus creating false expectations and interfering with rehabilitation.

B. The bill would arbitrarily exclude 60 categories of inmates from even earning time credits.

The bill would exclude nearly 60 categories of prisoners from earning time credits based on their offense of conviction, or if they are an "inadmissible or deportable alien."[67] These prisoners will be released someday, yet the bill would create no prerelease incentives for them to participate in programming, contrary to the goal of increasing public safety. It would punish people again who are already punished severely by the length of their sentences. For example, a defendant convicted of distributing any amount of a controlled substance could earn no credit if death or serious bodily injury resulted from use of the substance. These are cases involving accidental overdoses, not homicides. Defendants in these cases, often addicts themselves, are punished by at least a 20-year mandatory minimum, no matter how small the amount they distributed.[68]

In addition, the bill would exclude from earning credits any "inadmissible or deportable alien," even though no court ordered deportation. (DOJ's inflammatory claim in its letter to the White House that "illegal aliens" would be released "early" to home confinement is wrong.) The Corrections Act takes a more sensible approach. It would not prevent people who are or might be deportable from earning time credits. It would require BOP, upon transfer to prerelease custody of a prisoner whose deportation was ordered or who is subject to a detainer filed for purposes of determining her deportability, to deliver her to ICE "for the purpose of conducting proceedings relating to [her] deportation."[69] The First Step Act would bypass any legal process by excluding any "inadmissible or deportable alien" from earning time credits, keep people in prison for longer who are never ordered deported, and delay deportation of persons who are.

C. Many prisoners would be denied the use of credits through a complicated and unscientific scheme combining a misuse of risk/needs assessments with the warden's discretion in every case.

The bill directs the Attorney General to "develop and release" a risk and needs assessment system within 180 days of enactment, to be used to determine the "recidivism risk of each prisoner" at intake and periodically to classify each prisoner as minimum, low, medium, or high risk, to assign programming based on prisoners' criminogenic needs, and to determine whether and when

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prisoners could be transferred to a residential reentry center or home confinement.[70] Eligible prisoners classified as minimum or low risk would earn 15 days per 30 days of successful participation; those classified as medium or high risk would earn 10 days per 30 days.[71]

Only prisoners categorized as minimum or low risk, and "classified by the warden" as "otherwise qualified to be transferred into prerelease custody," could use time credits. A prisoner classified as medium or high risk at intake who did not lower his category to low or minimum could be transferred to prerelease custody only if approved by the warden after the warden's determination that the prisoner "would not be a danger to society," had made a "good faith effort" to lower his category by participating in programming, is "unlikely to recidivate," and transfer is "otherwise appropriate."[72]

Thus, each individual warden would have complete discretion in every case to deny transfer to prelease custody. Prisoners assigned to a high or medium risk category by a risk/needs tool could not use time credits, except in the unlikely event the warden was willing to predict that the person "would not be a danger to society," and was "unlikely to recidivate."

Using risk categories to grant or deny early transfer to prelease custody is a misuse of risk/needs assessment tools for numerous reasons. First, risk categories are too rough a measure upon which to base punishment. They classify individuals who do not re-offend as high or moderate risk at least half the time. And most people do not lower their risk categories even in the community, but the data show that this does not mean they re-offend. Nonetheless, the bill would prevent the vast majority of inmates categorized as medium or high risk from using time credits.

Contrary to misleading language throughout the bill, risk assessments do not predict that any person will or will not recidivate.[73] They only roughly group people into a given number of categories. In doing so, they classify many people as high or moderate risk who do not reoffend. For example, 58 percent of offenders on probation or supervised release classified by the PCRA as high risk are not re-arrested.[74] A meta-analysis of several tools found that only 52 percent of those categorized as moderate or high risk went on to commit any offense, meaning that almost half (48%) were actually no risk.[75] Risk assessment tools "can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case," and "the view" that "criminal risk can be predicted in most cases is not evidence based."[76] Moreover, risk assessments misclassify Black offenders as high risk more often than White offenders.[77]

Most people do not reduce their risk categories even in the community where it is easier to change dynamic factors like employment status, family stability, and pro-social support. Only 29% of offenders on probation or supervised release who were initially classified as high or moderate risk by the PCRA reduced their risk categories, and "most" of these "decreased only one level."[78] But the fact that a person does not reduce his risk category does not mean that he will recidivate. Of those whose risk categories did not decrease, over 50% of those assessed as high risk and nearly 70% of those assessed as moderate risk were not re-arrested within 12 months.[79]

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The bill directs the Attorney General to evaluate the system to ensure that it bases risk categories on "indicators of progress, and of regression that are dynamic and that can reasonably be expected to change while in prison."[80] That sounds good, but any statistically validated tool necessarily places heavy weight on static factors, in particular criminal history. For example, the PCRA has a maximum of 18 points, consisting of 9 points for the static factors of criminal history and age at intake, and 9 points for dynamic factors that could potentially change in the community.[81] The bill would permit the Attorney General to use "existing tools." If this means BOP's security level classification system, it would be even more difficult for inmates to reduce their risk categories, as it places far more weight on static factors than the PCRA: 42 points for age, past criminal history, and current offense, 3 points for educational level and substance abuse, and a possible 5 points off for factors that could change in prison.[82]

Second, as noted, validated risk/needs assessments give more weight to criminal history than any other factor. Criminal history correlates with race because it reflects unwarranted racial disparity earlier in the criminal justice system or disadvantage earlier in life. Using the "needs" side of the assessment to provide programming helps to address racial and socioeconomic disparities by improving reentry success. But using "risk" categories to keep people in prison longer perpetuates racial disparity. As the Colson Task Force has explained, because "static factors can exacerbate unjust disparities," assessment tools must be "employed solely to guide the individualized delivery of treatment and programming to improve reentry success"[83]

Criminal history is the product not only of participation in crime but selection by law enforcement officials. There is no evidence that Blacks sell drugs or possess guns at a greater rate than Whites, but Blacks are arrested and convicted for those crimes at a greater rate than Whites, primarily due to biased policing practices. Numerous recent studies show that Blacks are stopped and frisked or searched at higher rates than Whites, but that Whites who are frisked or searched are found with contraband at higher rates than Blacks who are frisked or searched.[84] Thus, Blacks have greater criminal history than similarly situated Whites when they enter the federal criminal justice system. And that criminal history increases guideline and mandatory minimum sentences in multiple ways, often exponentially. Under the bill, it would also ensure a higher risk category based on a factor that cannot change, thus perpetuating and exacerbating the impact of racially disparate policing practices.

Researchers, including one of the PCRA's creators, found differences in PCRA scores between Black and White offenders, and that criminal history accounted for two thirds of the difference.[85] They concluded that these "differences are relevant to disparate impact associated with the *use* of a test," given that "Black offenders are already incarcerated at a much greater rate than White offenders."[86] Whether this racial difference in scores produces "inequitable consequences" depends "on how those scores are used—that is, what decision they inform."[87] While "the PCRA is used strictly to inform risk reduction efforts, so … disparate impact is not an issue," other applications, such as determining the length of prison sentences, "might exacerbate racial disparities in incarceration."[88]

Third, the only way to reduce racial disparity reflected in risk categories is to eliminate racial disparity from policing practices and prosecutorial decisions that produce criminal

52 Duane Street,10th Floor
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history. The bill does not attempt to do that. In fact, the bill misunderstands the issue. It directs the Attorney General to evaluate "rates of recidivism among similarly classified prisoners to identify any unwarranted disparities," and make revisions to the risk/needs assessment "system" to "ensure that any [such] disparities are reduced."[89] Nothing can be done to a risk assessment tool to change unwarranted disparities in "rates of recidivism." That could be done only by training police officers to stop racial profiling and prosecutors to stop disparate charging practices.

D. True evidence-based reform would eliminate these problems and be more effective and less costly.

Evidence-based prison reform would: (1) use risk/needs assessments to identify each prisoner's criminogenic needs, to design and implement a case plan for each prisoner including programming targeted to those needs throughout the sentence, and to assess system-wide programming needs; and (2) provide a dependable and fair reward for participation in programming.

The first component can be accomplished by improving BOP's security level classification system. The only criminogenic needs it captures are educational level and substance abuse; it does not capture history of unemployment, unstable family situation, lack of pro-social support, attitude toward change, unstable or no home, or financial stressors. As a result, it does not adequately identify individual or system-wide programming needs. The Colson Task Force and an independent consulting group have already identified the deficiencies.[90] All that needs to be done is to follow through on a solution.[91]

Like the RDAP, which rewards prisoners with up to 12 months off their sentences, *see* 18 U.S.C. § 3621(e), a true prison reform bill should provide real time off for successful completion of other programs, many of which reduce recidivism as much or more than the RDAP.[92] This approach would be certain, simple and fair, and therefore far more effective. It would cost less, save more, and avoid the serious problems outlined above.

Giving prisoners real time off would not present a threat to public safety. Time credits could be revoked for serious misconduct in prison. Prisoners would still go to a halfway house or home confinement at the conclusion of their sentences, assuming BOP complied with 18 U.S.C. § 3624(c). All prisoners would still serve a term of supervised release for three to five years thereafter—in the community, on home confinement, in a halfway house, or any combination of those—under the supervision of a probation officer.

III. Good Time Credit

The bill would amend the good conduct time statute in an effort to increase good conduct time from the 47 days per year to 54 days per year of the sentence imposed by the court. We support this needed change, but it would simply undo BOP's longstanding misinterpretation of the current statute governing good time credits, allowing prisoners to be released a few days, weeks, or months earlier than they are now, and it does not outweigh our serious concerns outlined above.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

In any event, we are concerned that the language may not accomplish its goal, and suggest that 18 U.S.C. § 3624(b)(1) be amended to simply state that the credit shall be computed at the rate of 54 days per year of the sentence imposed by the court, beginning on the date on which the sentence commences, by multiplying the number of days of the sentence imposed by the court by .148. This would ensure that a prisoner sentenced to 10 years receives 540 days of good time credit, rather than the 470 days she receives now. We also suggest that Congress not adopt any language without first requiring DOJ and BOP to confirm, in writing, that the language will be interpreted to increase good conduct time by 7 days per year of the sentence imposed by the court.

IV. Criminal Justice Reform Must At Least Include the Ameliorating Reforms of the Sentencing Act of 2017.

Criminal justice reform must address the pernicious and wasteful effects of mandatory minimum sentences. The most significant driver of the five-fold increase in the federal prison population over the past three decades has been mandatory minimums, particularly those for drug offenses.[93] The extreme level of incarceration comes at a human and financial cost that is unjustified by the legitimate purposes of sentencing, and that perversely undermines public safety. Repeated analyses by the Sentencing Commission have shown that the rate of recidivism for drug offenders released early under retroactive amendments to the drug guidelines is the same or less than that for those who served their full sentences.[94] The research is unanimous that long prison sentences do not deter future crime, and that short prison terms and probation are just as effective in protecting public safety.[95] As the National Institute of Justice has pointed out, long prison terms often have the opposite effect, as inmates "learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment."[96]

Mandatory minimum statutes are not only unnecessarily severe in most cases in which they are or can be applied, but they remove sentencing authority from neutral judges and give it to prosecutors. This provides a single partisan actor with unchecked power that is wholly inconsistent with due process, the separation of powers, and simple fairness. As noted above, Attorney General Sessions has directed prosecutors to charge and pursue those offenses that carry the most substantial mandatory minimums. Without mandatory minimum reform, over-incarceration, unsafe conditions, the waste of taxpayer dollars, and the frequency of tragic injustices can only grow. Mandatory minimums should be eliminated altogether, and sentencing authority placed back in the hands of neutral judges where it has traditionally resided. A strong majority of Americans of all political stripes and demographics agree.[97] The Sentencing Reform Act of 2017, itself a compromise, is much more modest. It would potentially impact about 2,400 defendants per year going forward, and about 6,400 prisoners already sentenced under unjust laws. Meanwhile, DOJ projects an increase of 6,435 prisoners by 2019.

A. Mandatory minimums are routinely applied to low-level, non-violent drug offenders.

For most of its history since Congress enacted mandatory minimums for drug transactions in 1986 and extended them to conspiracies in 1988, the Department of Justice has directed prosecutors to charge and pursue offenses carrying the highest sentence. As a result, prosecutors

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

have routinely subjected low-level drug offenders to mandatory minimums Congress intended for kingpins and serious traffickers.[98] For example, the category of drug offender "most often subject to mandatory minimum penalties at the time of sentencing" in 2010 were "street level dealers, who were many steps down from high-level suppliers and leaders of drug organizations."[99] In 2012, the year before a more targeted charging policy was temporarily adopted, 60.4 percent of drug offenders received a mandatory minimum.[100] Of those, only .5 percent used, threatened or directed the use of violence, 8.8 percent played any aggravated role, and 16.5 percent had any weapon "involvement" (*i.e.*, anything from being present in a closet, in the attic, or in the trunk of a car, to being possessed by a confederate, to being possessed by the defendant).[101]

From 2013 through 2016, the Department of Justice, for the first time, discouraged prosecutors from using mandatory minimums against low-level, non-violent drug offenders. Under this "Smart on Crime" policy, the percentage of drug offenders who received a mandatory minimum dropped to 44.5 percent by 2016.[102] The seriousness of their offenses increased somewhat, but still the vast majority were low-level, non-violent offenders: 98.7 percent did not use, threaten or direct the use of violence, 88 percent played no aggravated role, and 77.5 percent had no weapon involvement.[103] The Inspector General found that progress had been made, but that "some districts did not develop or update their policies as directed, while others developed policies that are in whole or in part inconsistent with *Smart on Crime*."[104] It takes time to break a bad habit. What progress had been made was reversed by Attorney General Sessions' May 2017 directive to charge and pursue those offenses carrying the most substantial sentences.

One way to lessen the application of mandatory minimums to non-violent, low-level drug offenders is to expand the "safety valve." Under the current safety valve statute, a judge is authorized to determine a low-level, non-violent drug offender's sentence without regard to a mandatory minimum, but only if the defendant has no more than 1 criminal history point.[105] Because of this limitation, the safety valve does not apply to a great many non-violent, low-level drug offenders. For example, Keith Harrison and his co-workers bought contraband cigarettes from an undercover agent, first with money, then with crack cocaine at the agent's request. They were charged with possessing with intent to distribute 280 or more grams of crack. Mr. Harrison was not safety-valve eligible, because, at age 53, he had 4 criminal history points: 1 for driving with "no operator's license," 2 for committing the instant offense while on probation for the driving offense, and 1 for possession of marijuana for which he served a day in jail. He was sentenced to the ten-year mandatory minimum. Similarly, Wanda Barton, a 30-year-old mother of four with an Associate of Arts degree and fairly steady employment until the year before her arrest, was charged with conspiracy to possess with intent to distribute 50 or more grams of crack cocaine, subject at the time to a ten-year mandatory minimum. She was ineligible for the safety valve because she had 2 criminal history points for two shoplifting offenses five years previously for which she was sentenced to a fine and probation. Ms. Barton was sentenced to the ten-year mandatory minimum. Another example is Larhonda Devine, a 36-year-old mother of three. After her arrest for conspiracy to distribute 28 grams or more of crack, she excelled in and successfully completed inpatient treatment for mental health problems and drug dependence. She was ineligible for the safety valve because she had 2 criminal history points for two misdemeanor traffic violations for which she received probation, and 2 more because she was on probation for one of the traffic offenses during the instant offense. She was sentenced to the five-year mandatory minimum.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

These people, and many others like them, had no serious criminal history and engaged in no violence. The Sentencing Reform Act of 2017 would expand the existing safety valve by increasing the number of points to 4 (but the defendant could not have a prior conviction for a serious or violent offense), and it would add a safety valve to reduce the ten-year mandatory minimum to a five-year mandatory minimum if the defendant had no prior conviction for a serious drug or violent felony and did not play an aggravated role. In doing so, it would make about 2,300 additional low-level non-violent drug offenders, without a violent or otherwise serious criminal history, eligible for some form of safety valve relief each year going forward.

B. Prosecutors use severe mandatory enhancements to coerce guilty pleas and punish defendants for exercising their right to trial, and they apply these enhancements in a racially disparate manner.

1. Section 851 enhancements

If a drug offender has one or more prior convictions for a "felony drug offense," the prosecutor has the option to file a § 851 enhancement. The prosecutor's filing doubles the otherwise applicable mandatory minimum (from 5 to 10 years, or from 10 to 20 years), or increases it to mandatory life, and the judge has no choice but to impose it. A "felony drug offense" includes simple possession of drugs, misdemeanors in some states, offenses for which the defendant served no jail time, diversionary dispositions where the defendant was not convicted under state law, and there is no limit on how old the offense can be. When Congress first enacted § 851 in 1970 (when it would only increase the statutory maximum), the Department of Justice represented that prosecutors would file these enhancements only for "hardened," "professional criminals."[106]

But, since Congress enacted the mandatory minimums in 1986 and 1988, prosecutors have used § 851 enhancements, not to incapacitate hardened professional criminals, but to coerce defendants to plead guilty and to punish those who exercise their right to trial. A judge and former federal prosecutor explained: "The single most important factor that influences the government's decision whether to file or threaten to file a prior felony information (or to withdraw or promise to withdraw one that has previously been filed) is illegitimate. … To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one* – not even the prosecutors themselves – thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty."[107]

This assessment is borne out by the data. Among defendants who were eligible for a § 851 enhancement in 2012, those who went to trial were 8.4 times more likely to have the enhancement applied than those who pleaded guilty.[108] In 2016, when there was a policy *against* using § 851 enhancements to deter or punish exercise of the right to trial,[109] defendants against whom § 851 enhancements were filed were over five times more likely to have gone to trial than eligible defendants for whom the enhancement was not filed.[110] What is worse, these enhancements are applied in a racially disparate manner. The Sentencing Commission reported just last month that Black defendants were 42.2% of those eligible for a § 851 enhancement, but 57.9% of those who

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

received it; 5.4% of eligible Black defendants received the enhancement, while only 3.4% of eligible White defendants received it.[111] And the impact is severe. The average sentence for defendants who were eligible for a § 851 enhancement but for whom the government did not file one was 86 months, while the average sentence of those who were subject to the enhancement at sentencing was 225 months.[112]

The visible examples of these injustices are those where defendants turn down a plea offer, go to trial, and suffer an extraordinary sentence as a result. For example, Jessie Traylor was sentenced to mandatory life for his participation in a small Illinois drug conspiracy. A jury convicted Mr. Traylor of conspiracy for acting as a part-time drug courier transporting drugs from a Chicago supplier to a distributor in Decatur, Illinois. The judge described him as "a very average drug courier"—he had no authority over the other people in the small conspiracy, carried no weapon, and played a purely non-violent and low-level role. The other, more culpable members of the conspiracy cooperated with the government, testified at Mr. Traylor's trial, and received sentences of 52 months for the supplier in Chicago, 133 months for the distributor in Decatur, and 70 months for the street-level dealer. Wholly unrelated to culpability, Mr. Traylor's fate was sealed by his choice to go to trial, and the government's choice to file a double § 851 enhancement, thus requiring mandatory life. The double-enhancement was based on two prior low-level drug convictions. Having no discretion, the district court imposed a life sentence, lamenting that "[t]his is not my sentence," and assuring Mr. Traylor that he didn't believe a life sentence was warranted, but "Congress says I don't get that choice."[113]

Similarly, Olivar Martinez-Blanco was sentenced to mandatory life for his participation in an Atlanta-area cocaine conspiracy. Mr. Martinez-Blanco's more culpable co-defendants pled guilty and received lower sentences, but he went to trial, lost, and paid the price. His mandatory life sentence was premised on two convictions that occurred when he was in his early 20's, addicted to drugs, and involved small amounts of drugs. The government filed the double § 851 enhancement two years after the indictment and two weeks before trial. Mr. Martinez-Blanco objected at sentencing that the "government filed the two § 851 notices to coerce him into entering a plea," that "his codefendants received lesser sentences but were more culpable," and that "the mandatory life sentence was cruel and unusual." The sentencing judge agreed that "the mandatory life imprisonment was 'savage, cruel and unusual'" and "regretted [his] lack of discretion in determining the sentence," but his "hands were tied," and he sentenced Mr. Martinez-Blanco to life in prison.[114]

Other cases represent a less visible but far more common scenario in which mandatory minimums distort sentences behind the scenes. Lulzim Kupa was charged with being part of a conspiracy to distribute cocaine and faced a 10-year mandatory minimum. Because he had prior convictions for marijuana distribution, he was subject to the filing of a prior felony information. The prosecutor initially offered a plea agreement of roughly 9 to 11 years in prison. Kupa turned it down. As the trial approached, the prosecutor informed Kupa that if he went to trial the government would file a prior felony information containing both of his prior marijuana convictions. The result would be a mandatory life sentence after conviction. Ultimately, Kupa agreed to yet a different "offer," pled guilty, and was sentenced to 140 months imprisonment. If he lived to age 75, his trial penalty would have been an additional 30 years imprisonment.[115]

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

The Kupa scenario is hidden from view, yet it represents routine business in federal courts. When the judge questioned the prosecutor about why the United States Attorney was using the threat of a prior felony information to coerce a guilty plea, the prosecutor claimed that the decision was based on an "individualized assessment" of the defendant and generically listed things such as "the seriousness of the defendant's crimes, the defendant's role in those crimes, the duration of the crimes, and whether the defendant used or threatened communities and society as a whole." The judge responded:

> That sounds nice, but actions speak louder than words. Whatever the result of the "individualized assessment" with regard to Kupa, he was indisputably stuck with a prior felony information – and a life sentence – only if he went to trial, and he was indisputably not stuck with it only if he pled guilty. Despite the government's patter, there was only one individualized consideration that mattered in his case, and it was flat-out dispositive: Was Kupa insisting on a trial or not? If he was, he would have to pay for a nonviolent drug offense with a mandatory life sentence, a sentence no one could reasonably argue was justified.[116]

Even proponents of severe sentences cannot reasonably claim that severity should be determined almost exclusively by an accused person's decision to exercise the constitutional right to a jury trial. But that is the result of granting so much unchecked power to prosecutors.

The Sentencing Reform Act of 2017 would lessen that power somewhat by reducing the life mandatory minimum for two § 851s to 25 years and the 20-year mandatory minimum for one § 851 to 15 years, and by limiting the applicability of the enhancement to prior "serious drug offenses," *i.e.*, those with at least a ten-year statutory maximum for which the defendant served more than 12 months and was released within 15 years of the commencement of the instant offense.

This would reduce the sentences of about 60 defendants a year going forward, and would potentially provide retroactive relief to 3,000 prisoners already subjected to the unjust law. A court could retroactively reduce a prisoner's sentence only if he was never convicted of a serious violent felony, and only after consideration of the facts of the offense, the history of the offender, the purposes of sentencing, the danger to any person or the community, and the prisoner's post-sentencing conduct.

2. Stacking Section 924(c)s

Section 924(c) requires a mandatory consecutive sentence of 5, 7 or 10 years if the defendant possessed, carried, brandished or discharged a firearm during or in furtherance of a drug trafficking crime or a crime of violence, to run consecutively to the penalty for the underlying offense. In addition, the statute mandates 25 consecutive years for each "second or subsequent conviction." Twenty-five years ago, the Supreme Court interpreted the "second or subsequent" provision to apply not only to a recidivist who was previously convicted, sentenced, and served prison time for a § 924(c), but to a person charged with multiple § 924(c) counts in the same indictment.[117] This is called "stacking," and results in a sentence of at least 30 years for two counts,

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

55 years for three counts, and up to hundreds of years, even when the defendant has no prior record, and even when the defendant did not use a gun,[118] or even touch a gun.[119]

Like the § 851 enhancement, § 924(c) is applied in a racially disparate manner. An analysis by the Sentencing Commission showed that Black defendants were 48% of those eligible for a § 924(c) enhancement, but 64% of those who received it.[120] And the opportunity to stack § 924(c) charges lends itself to extreme abuses.

Wendall Rivera-Ruperto's sentence of over 161 years is one example. As part of an FBI operation to root out police corruption in Puerto Rico, undercover FBI agents hired Mr. Rivera-Ruperto to provide armed security for six fake drug deals involving large amounts of fake cocaine. FBI agents determined the quantity for each transaction, and instructed Mr. Rivera-Ruperto to bring a firearm with him each time. Since no actual drugs existed, the government charged each transaction as a conspiracy and attempt to possess with intent to distribute several kilograms of cocaine. And it charged six separate such conspiracies/attempts so that it could charge six separate counts of possession of a firearm in relation to a drug trafficking crime in violation of § 924(c). The government offered 12 years if Mr. Rivera-Ruperto would plead guilty, but he exercised his right to trial. He was found guilty and sentenced to a total of 161 years and 10 months, with 130 years for the six § 924(c)s for bringing a firearm as instructed by the agents.[121]

When he appealed, the majority affirmed his sentence, "[p]utting aside, as we are required to do, whatever misgivings we might have as to the need for or the wisdom in imposing a near two-life-term sentence to punish a crime that involved staged drug deals, sham drugs, and fake dealers."[122] The dissenting judge, who would have reversed the sentence as grossly disproportionate under the Eighth Amendment, observed:

> The FBI ensured that more than five kilograms of composite moved from one agent's hands to another at each transaction; the FBI also made sure that the rigged script included Rivera-Ruperto's possession of a pistol at each transaction. This combination—more than five kilograms of composite, a pistol, and separate transactions—triggered the mandatory consecutive minimums of 18 U.S.C. § 924(c), which make up 130 years of Rivera-Ruperto's sentence. . . .
>
> If Rivera-Ruperto had instead knowingly committed several real rapes, second-degree murders, and/or kidnappings, he would have received a much lower sentence; even if Rivera-Ruperto had taken a much more active role in, and brought a gun to, two much larger real drug deals, he would still have received a much lower sentence. . . . For the fictitious transgressions concocted by the authorities, however, Rivera-Ruperto will spend his entire life behind bars—a sentence given to first-degree murderers, … or those who cause death by wrecking a train carrying high-level nuclear waste.[123]

The Sentencing Reform Act of 2017 would clarify what Congress likely intended in the first place: that the mandatory consecutive 25-year sentence for a "second or subsequent offense" applies only after a prior conviction becomes final. It would reduce the sentences of about 60

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

defendants per year going forward. Mr. Rivera-Ruperto, for example, would be sentenced to 36 years and 10 months rather than 161 years. The act would also potentially provide retroactive relief to about 730 prisoners already subject to stacking, but only if their instant offense was a drug trafficking crime (not a crime of violence), they did not brandish or discharge a firearm, and they were never convicted of a serious violent felony. In addition to those limitations, a court could retroactively reduce a prisoner's sentence only after considering the facts of the offense, the history of the offender, the purposes of sentencing, the danger to any person or the community, and the prisoner's post-sentencing conduct.

Finally, the Sentencing Reform Act of 2017 would make the Fair Sentencing Act retroactive, thus potentially providing relief to about 2,600 prisoners sentenced under the unjust 1:100 crack-to-powder ratio.

B. The justifications for opposing sentencing reform do not withstand scrutiny.

The Attorney General's claim that there is no such thing as a low-level, non-violent drug offender, and that all drug offenders are violent and incorrigible, is demonstrably false. In 2016, when the Attorney General believes sentences for drug offenses were too low,[124] .9% of all drug offenders used, threatened or directed violence; 7.5% played any aggravated role (20.6% played a mitigating role and 71.9% played no aggravated or mitigated role); 82.4% had no weapon involved in any way in their offenses; and 49.6% had no criminal history or 1 criminal history point.[125]

Further, federal drug offenders' rate of recidivism is relatively low even over the long term. For federal drug offenders released in 2005, the rate of reconviction for a misdemeanor or felony was 30.8 percent, and the rate of re-incarceration for a misdemeanor, felony or supervised release violation was 23.4 percent, eight years after release.[126] That is, almost 70 percent were not re-convicted and 76.6 percent were not re-incarcerated eight years after release.

Nor are mandatory minimums justified as a means to obtain cooperation against more serious offenders. The relatively few serious federal drug offenders receive reduced sentences for cooperating against underlings more often than the other way around. In 2010, for example, the "highest rates of relief based on substantial assistance were for Manager (50.0%) and Organizer/Leader (39.1%)," while the "lowest rates of relief based on substantial assistance were for Mule (19.5%), Street-Level Dealer (23.4%), and Courier (27.1%)." Mules, street level dealers, and couriers comprised 45% of drug offenders, while managers and organizer/leaders comprised only 4.2%.[127] Low-level offenders often have nothing to cooperate with, so they receive sentences intended for kingpins and serious traffickers. Moreover, rates of cooperation are the same or higher in cases in which there is no mandatory minimum.[128] Cooperation did not decline as a result of the Fair Sentencing Act,[129] or the "Smart on Crime" policy in effect under the previous administration.[130]

Most remarkably, the Department's recent letter to the White House appears to claim that a decrease in sentences for drug offenders and in the prison population from 2009 through 2016 caused the opioid crisis and an increase in the national violent crime rate. It is "likely no coincidence," it says, that "at the same time, we are in the midst of the largest drug crisis in our

52 Duane Street,10th Floor
New York, NY 10007
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nation's history" and "recently experienced the two largest single-year increases in the national violent crime rate in a quarter of a century."[131]

The cause of the opioid crisis, according to Health and Human Services, is that in the late 1990s, "pharmaceutical companies reassured the medical community that patients would not become addicted to opioid pain relievers and healthcare providers began to prescribe them at greater rates," which "led to widespread misuse of both prescription and non-prescription opioids before it became clear that these medications could indeed be highly addictive."[132]

There is no plausible connection between the 15% decrease in the average sentence length for federal drug offenders and the 16% decrease in the federal prison population from 2009 to 2016, and any change in the national violent crime rate. For one thing, former federal prisoners contribute little if anything to the national violent crime rate. Federal prisoners comprise 6-7% of all prisoners released each year,[1] and their recidivism rate is far lower than that for state prisoners. As noted above, the re-incarceration rate for federal drug offenders released in 2005 was just 23.4% eight years after release, compared to 53.3% for state prisoners only five years after release.[133] U.S. Probation reported just last week that recidivism of federal offenders on supervision decreased from 2009 to 2016.[134] For another, while the national violent crime rate increased by 3.3% in 2015 and 2016 from its all-time low in 2014,[135] it also increased in 2005, 2006, and 2012,[136] when the length of federal drug sentences and the federal prison population were steadily on the rise. Moreover, it is important to recognize that the national violent crime rate hasn't been as low as it was in 2016 since 1970.[137] The overall rate for 2017 is not yet available, but in the 30 largest cities in the United States from 2016 to 2017, there was a 2.1 percent decline in the overall crime rate, a 1.0 percent decline in the violent crime rate, and a 3.4 percent decline in the murder rate.[138]

For the foregoing reasons, we urge you to adopt the ameliorating reforms of the Sentencing Act of 2017, including all of its retroactivity provisions, and we urge you not to adopt any measure that would increase punishment. For example, the consecutive enhancement of up to five years for offenses involving fentanyl is entirely unnecessary. Those offenses are already subject to severe mandatory minimums and it takes smaller quantities of fentanyl (or a substance containing an analogue of fentanyl) than heroin to trigger them.[139]

Conclusion

Federal defendants are imprisoned for far too long and they are not getting the help they need to become productive citizens. Real prison reform is needed, but we do not believe that the First Step Act as written can plausibly deliver it. We therefore urge you to amend the bill to address each of its serious flaws, and to adopt meaningful sentencing reform.

[1] *See* National Reentry Resource Center (641,100 people sentenced to state or federal prison released in 2015), https://csgjusticecenter.org/nrrc/facts-and-trends/; Bureau of Prisons, Release Numbers (48,745 federal inmates released in 2015), https://www.bop.gov/about/statistics/statistics_inmate_releases.jsp.

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Thank you for your attention to our views.

Very truly yours,

/s
Neil Fulton
Federal Defender, District of South Dakota
Co-Chair, Federal Defender Legislative Committee

/s
David Patton
Executive Director, Federal Defenders of New York
Co-Chair, Federal Defender Legislative Committee

/s
Jon Sands
Federal Defender, District of Arizona, Co-Chair, Federal Defender Legislative Committee

cc: Members of the Senate

[1] Letter from Assistant Attorney General Stephen E. Boyd to Marc Short, Assistant to the President (July 12, 2018).

[2] U.S. Department of Justice, Federal Prison System, FY 2019 Performance Budget, Congressional Submission at 7, https://www.justice.gov/jmd/page/file/1034421/download.

[3] Office of the Inspector General, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons* at 14 (Aug. 2016).

[4] FY 2019 Performance Budget, at 7, *supra* note 2.

[5] *Id.* (estimating an increase from 185,617 in 2017 to 192,052 in 2019), *supra* note 2.

[6] *See* U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 13 (2009-2017) (77.9 months in 2009, 66 months in 2016, 70 months in 2017). The Sessions charging and sentencing policy issued May 10, 2017, four and a half months before the end of the Commission's fiscal on September 30, 2017.

[7] Memorandum for All Federal Prosecutors from Attorney General Jefferson B. Sessions III on Department Charging and Sentencing Policy (May 10, 2017).

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[8] H.R. 5682 at 34 (18 U.S.C. § 3621(h)(6)).

[9] H.R. 5682 at 26-27 (18 U.S.C. § 3634(4)).

[10] H.R. 5682 at 4-5, 6-8, 22-23, 23-24 (18 U.S.C. § 3631(b)(2), (3), (4)(B); 18 U.S.C. § 3632(a)(3), (4), (b), (f), (g); 18 U.S.C. § 3633).

[11] H.R. 5682 at 24 (18 U.S.C. § 3633(5)).

[12] H.R. 5682 at 33-34 (18 U.S.C. § 3621(h)(5)).

[13] *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 4-5 (Aug. 1, 2012); FPI and Vocational Training Works: Post-Release Employment Project (PREP); Davis, et. al, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, at xvi-xvii, 1, 27-28, 32-33, 40, 47 (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf.

[14] J. J. Heckman and Y. Rubinstein. The Importance of Noncognitive Skills: Lessons from the GED Testing Program. The American Economic Review, Vol. 91, No.2, Papers and Proceedings of the Hundred and Thirteenth Annual Meeting of the American Economic Association at 145-149 (May 2001).

[15] *Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* at 36 (Jan. 2016), https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf.

[16] *Id*. at 35.

[17] *See* Federal Bureau of Prisons Education Program Assessment, Final Report, Bronner Group, LLC, at i-xi (Nov. 29, 2016); Reducing Recidivism through Programming in the Federal Prison Population Final Report: BOP Programs Assessment, Boston Consulting Group at 61, 81-83 (Sept. 2016).

[18] U.S. Dep't of Justice, *Prison Reform: Reducing Recidivism by Strengthening the Bureau of Prisons*, https://www.justice.gov/archives/prison-reform.

[19] Office of the Inspector General, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons* at i-iii, 1-3, 14, 18, 21-23, 28-30, 31-36, 45 (Aug. 2016).

[20] Memorandum for the Acting Director, Federal Bureau of Prisons, Reducing our Use of Private Prisons, Sally Q. Yates, Deputy Attorney General (Aug. 18, 2016), https://www.justice.gov/archives/opa/file/886311/download.

[21] *Id*.

[22] FPI and Vocational Training Works: Post-Release Employment Project (PREP), http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

[23] *Id*.

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[24] *Id*.

[25] *Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* at 36 (Jan. 2016).

[26] H.R. Rep. No. 115-699, at 22-23 (2018).

[27] H.R. 5682 at 26-27 (18 U.S.C. § 3634(4)).

[28] *See* https://www.bop.gov/about/statistics/statistics_inmate_sec_levels.jsp.

[29]Memorandum for the Acting Director, Federal Bureau of Prisons, Rescission of Memorandum on Use of Private Prisons, Jefferson B. Sessions III (Feb. 21, 2017), https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf.

[30] *Federal Bureau Of Prisons Fires Head Of An Obama-Era Education Effort, Putting Reform Under Trump In Doubt*, Huffington Post (May 19, 2017).

[31] *See Oversight of the Federal Bureau of Prisons*, U.S. House of Representatives, Com. on the Judiciary, Subcom. On Crime, Terrorism, Homeland Security, and Investigations (Apr. 17, 2018); Report on Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2019, S. Rep. No. 115-275, at 85-88 (2018); Letter from E.O. Young, National President, AFGE CPL C-33, to Senators Grassley, Feinstein and Durbin, and Representatives Goodlatte and Nadler (May 8, 2018); Danielle Ivory and Caitlin Dickerson, *Safety Concerns Grow as Inmates Are Guarded by Teachers and Secretaries*, N.Y. Times, June 17, 2018; Samantha Michaels, *Team Trump is Slashing Programs that Help Prisoners Adapt to Life on the Outside*, Mother Jones (Dec. 15, 2017); Molly Osberg, *How Prisoners on the Verge of Freedom Are Being Screwed by the Feds*, Splinter (Nov. 6, 2017).

[32] Eric Katz, *Leaked Memo: Trump Admin to Boost Use of Private Prisons While Slashing Federal Staff*, Government Executive (Jan. 25, 2018), https://www.govexec.com/management/2018/01/trump-administration-looks-boost-use-private-prisons-while-slashing-federal-staff/145496/.

[33] Memorandum from F. Lara, Assistant Director, Correctional Programs Division (Jan. 24, 2018).

[34] Danielle Ivory and Caitlin Dickerson, *Safety Concerns Grow as Inmates Are Guarded by Teachers and Secretaries*, N.Y. Times, June 17, 2018; *see also* Letter from E.O. Young, National President, AFGE CPL C-33, to Senators Grassley, Feinstein and Durbin, and Representatives Goodlatte and Nadler (May 8, 2018); Ryan J. Reilly, *Demoralized Federal Prison Officers Feel Left Behind by "Law and Order" Trump*, Huffington Post, July 5, 2018.

[35] *Ibid*.

[36] Sixteen were eliminated in the summer of 2017—two in Colorado, two in Ohio, and one each in Illinois, Kentucky, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, South Dakota, Texas, West Virginia, Wisconsin.

[37] Letter from Hon. Ricardo S. Martinez, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Mark Inch, Director, Federal Bureau of Prisons (Apr. 16, 2018).

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[38] *Compare* Statement of Work, Residential Reentry Center, October 2016 *with* Statement of Work, Residential Reentry Center, April 2017.

[39] These are representative comments in response to a survey of Federal Defenders in July 2018.

[40] BOP most recently reported that in 2017, the annual cost per year in prison was $36,299.25, while the average cost per year in an RRC was $32,309.80. Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863 (Apr. 30, 2018).

[41] *See Oversight of the Federal Bureau of Prisons*, U.S. House of Representatives, Com. on the Judiciary, Subcom. On Crime, Terrorism, Homeland Security, and Investigations (Apr. 17, 2018); Letter from Senators Cornyn, Grassley, Whitehouse, Portman, Klobuchar, Franken, Tillis and Schatz to Deputy Attorney General Rosenstein and Director Inch (Oct. 27, 2017); Letter from Senators Booker and Van Hollen to Attorney General Sessions (Apr. 3, 2017); Letter from Hon. Ricardo S. Martinez, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Mark Inch, Director, Federal Bureau of Prisons (Apr. 16, 2018).

[42] On April 17, 2018, after a hearing before the House Subcommittee on Crime in which many members voiced concerns about reliance on augmentation, BOP employees received the following message: "Secretaries, teachers, health services staff, case managers, recreation staff, cook foremen, etc. . . . ALL respond, regardless of title, function, or assigned area of expertise." Message from the Director, Correctional Excellence (Apr. 17, 2018).

[43] Dep't. of Justice, Federal Prison System, FY 2018 Performance Budget, Salaries and Expenses, at 20, 43, https://www.justice.gov/file/968971/download.

[44] S. Rep. No. 115-139, at 78-81 (2017). Congress appropriated $7,008,800,000 for 2017, and $7,114,000,000 for 2018. *See id*. at 78; S. Rep. No. 115-275, at 84 (2018).

[45] S. Rep. No. 115-275, at 84-88 (2018).

[46] U.S. Department of Justice, Federal Prison System, FY 2019 Performance Budget, Congressional Submission at 1, 19, 43, https://www.justice.gov/jmd/page/file/1034421/download.

[47] Letter from Assistant Attorney General Stephen E. Boyd to Marc Short, Assistant to the President (July 12, 2018).

[48] For example, 18 U.S.C. § 3624(b)(3) requires that "[t]he Attorney General shall ensure that the Bureau of Prisons has in effect" a GED program "for inmates who have not earned a high school diploma or its equivalent."

[49] *See* Memorandum for the Acting Director, Federal Bureau of Prisons, Reducing our Use of Private Prisons, Sally Q. Yates, Deputy Attorney General (Aug. 18, 2016), https://www.justice.gov/archives/opa/file/886311/download.

[50] S. 1994, Sec. 101(b).

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[51] H.R. 5682 at 24-25 (18 U.S.C. § 3634(1)-(2)); H.R. 5682 at 43-44 (Sec. 103)). The bill directs the Attorney General to release the "system" to BOP within 180 days of enactment, BOP to conduct risk assessments on each prisoner 180 days after that, BOP to provide programming 2 years after that, and GAO to begin an audit 2 years after that. *See* H.R. 5682 at 6, 30-32, 43.

[52] H.R. 5682 at 45 (Sec. 104(a)).

[53] *See* Dep't. of Justice, Federal Prison System, FY 2017 Performance Budget, Congressional Submission, Salaries and Expenses, at 80, https://www.justice.gov/jmd/file/821381/download. Congress appropriated a total of $177 million less than DOJ's total request for salaries and expenses for 2017.

[54] *Id*.

[55] H.R. Rep. No. 115-699, at 22 (2018).

[56] H.R. 5682 at 45 (Sec. 104(b)).

[57] H.R. 5682 at 27.

[58] Letter from James C. Duff, Secretary, Judicial Conference of the United States, to Kevin McCarthy, Majority Leader, U.S. House of Representatives (May 22, 2018).

[59] According to one report, there were 2,137 correctional officer vacancies as of March 2018. Danielle Ivory and Caitlin Dickerson, *Safety Concerns Grow as Inmates Are Guarded by Teachers and Secretaries*, N.Y. Times (June 17, 2018)

[60] U.S. Department of Justice, Federal Prison System, FY 2019 Performance Budget, Congressional Submission Salaries and Expenses, at 7 (estimating an increase from 185,617 in 2017 to 192,052 in 2019), https://www.justice.gov/jmd/page/file/1034421/download.

[61] The annual cost of incarceration in FY 2017 was $36,299.25 ($99.45 per day). Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863 (Apr. 30, 2018).

[62] *See* II.C, *infra*.

[63] 18 U.S.C. § 3624(c).

[64] H.R. 5682 at 10-11 (18 U.S.C. § 3632(d)(4); H.R. 5682 at 36-37, 39-40 (18 U.S.C. § 3624(g)(1)-(2)).

[65] H.R. 5682 at 41-42 (18 U.S.C. § 3624(g)(6)-(7)).

[66] Letter from James C. Duff, Secretary, Judicial Conference of the United States, to Kevin McCarthy, Majority Leader, U.S. House of Representatives (May 22, 2018).

[67] H.R. 5682 at pp. 11-21.

[68] *See* 21 U.S.C. § 841(b)(1)(A)-(C).

[69] S. 1994, Sec. 103.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[70] H.R. 5682 at 6-8 (18 U.S.C. § 3632(a)-(b)).

[71] H.R. 5682 at 10-21 (18 U.S.C. § 3632(d)(4)-(5)).

[72] H.R. 5682 at 35-37 (18 U.S.C. § 3624(g)).

[73] *See*, *e.g.*, H.R. 5682 at 5 ("each prisoner's risk of recidivism"), *id*. at 7-8 (same); *id*. at 11 ("has not increased their risk of recidivism").

[74] Christopher T. Lowenkamp *et al.*, *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 Psych. Services 87, 93 (2013).

[75] Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 British Medical J. 1, 4 (2012).

[76] *Id*. at 5.

[77] Kevin Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 Crim. Just. Pol'y Rev. 330 (2006); *see also* Matthew Fennessy & Matthew T. Huss, *Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity*, 40 Crim. Just. & Behav. 40, 53 (Jan. 2013).

[78] Of 64,716 offenders, 3,048 offenders were high risk, 11,594 were moderate risk, 28,342 were low/moderate risk, and 21,732 were low risk. Of the 14,642 whose initial risk categories were high or moderate, 29.2% (4,288) reduced their category: 38% (1,158) of the high risk offenders, and 27% (3,130) of the moderate risk offenders. *See* Thomas H. Cohen et al., *Does Change in Risk Matter? Examining Whether Changes in Offender Risk Characteristics Influence Recidivism Outcomes*, 15 Criminology & Pub. Pol'y 263, 274 fig.1 (2016).

[79] *Id*. at 278 fig. 3. The authors found that lower arrest rates were associated with decreases in risk categories but that "this research is correlational and, hence, does not imply causation between changes in PCRA risk domains and recidivism." *Id*. at 291.

[80] H.R. 5682 at 5.

[81] The PCRA is scored as follows: GED or less than high school (1 point); currently unemployed even if a student, homemaker, or retired (1 point); unstable work history over the past 12 months (1 point); current alcohol problem (1 point); current drug problem (1 point); single, divorced, separated (1 point); unstable family situation (1 point); lack of positive pro-social support (1 point); attitude toward supervision and change (1 point). Supervisees are assigned to one of four risk categories based on their number of points: low (0-5 points); low/moderate (6-9 points); moderate (10-12 points); high (13-18 points). *See* Thomas H. Cohen et al., *Does Change in Risk Matter? Examining Whether Changes in Offender Risk Characteristics Influence Recidivism Outcomes*, 15 Criminology & Pub. Pol'y 263, 271-72, 294 (2016); PCRA Officer Section, http://www.ned.uscourts.gov/internetDocs/jpar/RGK-FSR2014-PCRA%20Officer%20Section.pdf.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[82] The maximum base score for male inmates is 45, with 42 points for the unchangeable factors of age, past criminal history, and current offense, and only 3 points for the changeable factors of educational level and substance abuse. Program Statement P5100.08, Ch. 6, at 2-9. They are also scored on factors that can change in prison for better or worse—percentage of time served, program participation, living skills, incident reports, frequency of incidents, efforts to maintain family and community ties—for which male inmates can get a maximum of only 5 points off and up to 8 points added. *Id*., Ch. 6, at 9-15. They are placed in one of four security levels based on a number of points: minimum (0-11 points); low (12-15 points); medium (16-23 points); high (24 or more points). *Id*., Ch. 5, at 12.

[83] *Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* at 34 (Jan. 2016).

[84] Baron-Evans & Patton, *A Response to Judge Pryor's Proposal to "Fix" the Guidelines: A Cure Worse than the Disease*, 29 Fed. Sent. R. 104, 112-13 (Dec. 1, 2016-Feb. 1, 2017); *see also* Rand Paul, Op Ed: *Sessions' sentencing plan would ruin lives*, May 15, 2017 (explaining why the poor and racial minorities are arrested and convicted at higher rates than similarly situated whites).

[85] Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 Am. Soc'y of Criminology 680, 704 (2016). Employment/education accounted for the other third.

[86] *Id*. at 703.

[87] *Id*.

[88] *Id*. at 703, 705.

[89] H.R. 5682 at 5-6; *see also id*. at 44 (same language regarding the GAO audit).

[90] *See Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* at 32-34 (Jan. 2016); Reducing Recidivism through programming in the Federal Prison Population in the Federal Prison Population FINAL REPORT: BOP Programs Assessment, Boston Consulting Group at 64, 123-25 (Sept. 2016), https://www.justice.gov/archives/dag/page/file/914031/download.

[91] BOP previously engaged an independent social science research organization to propose a solution, but the contract was canceled.

[92] Inmates who complete RDAP are 16 percent less likely to recidivate and 15 percent less likely to relapse within 3 years after release; those who participate in vocational or occupational training are 33 percent less likely to recidivate; those who participate in education programs are 16 percent less likely to recidivate. *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 4-5 (Aug. 1, 2012). Inmates who participate in FPI work programs are 24% less likely to recidivate for as long as 12 years following release. *See* FPI and Vocational Training Works: Post-Release Employment Project (PREP).

[93] *See* U.S. Sent'g. Comm'n, Statement for the S. Jud. Comm. Hr'g "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," at 6 (Sept. 18, 2013); U.S. Sent'g. Comm'n, Fifteen Years of

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

Guideline Sentencing at 48, 54, 76 (2004); Federal Bureau of Prisons, Statistics, Offenses (78,561 federal prisoners are serving a sentence for a drug offense).

[94] *See* U.S. Sent'g. Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions*: *The 2011 Fair Sentencing Act Guideline Amendment* at 7 (Mar. 2018); U.S. Sent'g. Comm'n, Recidivism Among Offenders Receiving Retroactive Sentence Reductions at 3 (May 2014).

[95] U.S. Department of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *Five Things About Deterrence* 1 (2016); *see also* Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (Jeremy Travis *et al.* eds., 2014); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 202 (2013); Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 Criminology 357 (2010); Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison Journal 48S (2011).

[96] Nat'l Inst. Of Justice, *Five Things About Deterrence*, *supra*.

[97] *See* Public Opinion Strategies/Justice Action Network, National Poll Results (Jan. 25, 2018); Benenson Strategy Group/American Civil Liberties Union, *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds* (Nov. 16, 2017); Greenberg Quinlan Rosner Research/Vera Institute, *The Evolving Landscape of Crime and Incarceration* (April 19, 2018).

[98] "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. 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." U.S. Sent'g. Comm'n Testimony, Senate Jud. Com. at 5 (Sept. 18, 2013).

[99] *Id*.

[100] U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 43 (2012).

[101] U.S. Sent'g. Comm'n, Individual Datafiles, FY 2012.

[102] U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 43 (2016).

[103] U.S. Sent'g. Comm'n, Individual Datafiles, FY 2016.

[104] U.S. Dep't of Justice, Office of the Inspector General, Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative at 9 (June 2017).

[105] 18 U.S.C. § 3553(f).

[106] *See Drug Abuse Control Amendments 1970, Part 1: Hearing on H.R. 11701 and H.R. 13743 Before the Subcomm. on Pub. Health and Welfare of the H. Comm. on Interstate and Foreign Commerce,* 91st Cong. (1970), H.R.Rep. No. 91–45, at 81 (statement of John N. Mitchell, Att'y Gen. of the United States); *id.* (statement of John Ingersoll, Comm'r of Bureau of Narcotics and Dangerous Drugs); *Narcotics Legislation:*

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

Hearing on S. Res. 48, S. 1895, S. 2590, and S. 2637 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 91st Cong., S. Doc. No. 521–3, at 681 (1969).

[107] *United States v. Kupa*, 976 F. Supp.2d 417, 432-34 (E.D.N.Y. 2013).

[108] Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 5, 2013) (analyzing Sentencing Commission data).

[109] Memorandum from Attorney General Eric Holder on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), *available at* https:// www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf.

[110] U.S. Sent'g. Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* at 27 (July 2018).
[111] *See* U.S. Sent'g. Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* at 33, 34 tbl. 5 (July 2018); *see also* U.S. Sent'g. Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 257 (30% of eligible Black defendants and 25% of eligible White received a § 851 enhancement).

[112] *Id*. at 30.

[113] Sentencing Transcript, *United States v. Traylor*, 08-cr-20036 (C.D. Ill. Jan. 8, 2010), Doc. No. 106.

[114] *United States v. Martinez-Blanco*, 351 Fed. Appx. 339, 340 (11th Cir. 2009).

[115] *Kupa*, 976 F. Supp.2d at 432-34.

[116] *Id*. at 434-35.

[117] *United States v. Deal*, 508 U.S. 129 (1993).

[118] *See, e.g.*, *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004).

[119] *See, e.g.*, *United States v. Hungerford*, 465 F.3d 1113, 1118-23 (9th Cir. 2006); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

[120] U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing at 90 (2004).

[121] *See United States v. Rivera-Ruperto*, 852 F.3d 1, 4-5 (1st Cir. 2017); *United States v. Rivera-Ruperto*, 846 F.3d 417, 425 (1st Cir. 2017).

[122] 852 F.3d at 5.

[123] 852 F.3d at 19 (Torruella, J., dissenting).

[124] Letter from Assistant Attorney General Stephen E. Boyd to Marc Short, Assistant to the President (July 12, 2018).

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[125] *See* U.S. Sent'g. Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, tbls. 37, 39, 40; U.S. Sent'g. Comm'n, Guideline Application Frequencies, § 2D1.1(b)(2) (2016).

[126] U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* at App. A2, A3 (Mar. 2016). The re-arrest rate was 49%, *id*. at App. A1, but this includes all arrests for supervised release violations. The majority of these (69%) are for technical violations (not new crimes), and 65% of supervised release cases are closed without revocation. *See* U.S. Courts, Statistical Tables for the Federal Judiciary, tbl. E-7A, Federal Probation System, Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending December 31, 2017, http://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2017/12/31.

[127] U.S. Sent'g Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 171, App. D, fig. D-2.

[128] In 2016, the rate of departures for cooperation in drug trafficking cases was 21.8% overall, and 21.6% for the major drug types in which mandatory minimums can apply (powder, crack, heroin, marijuana, methamphetamine, PCP). U.S. Sent'g Comm'n, Interactive Sourcebook, Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type, Fiscal Year 2016. For the 763 cases involving Oxycodone/Oxycontin, MDMA/Ecstasy, Hydrocodone, Steroids and GHB, in which no mandatory minimum can apply, the rate was higher: 24.9%. *Id*. The rate was 71.4% in antitrust cases, 27% in national defense cases, 26.5% in money laundering cases, 34.0% in bribery cases, and 23.9% in arson cases, none of which are subject to mandatory minimums. U.S. Sent'g Comm'n, Interactive Sourcebook, Sentences Relative to the Guideline Range By Each Primary Offense Category, Fiscal Year 2016.

[129] U.S. Sent'g Comm'n, Report to the Congress: Impact of the Fair Sentencing Act of 2010, at 25 & fig. 15A, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.

[130] DOJ Press Release, "New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants," March 21, 2016.

[131] Letter from Assistant Attorney General Stephen E. Boyd to Marc Short, Assistant to the President (July 12, 2018).

[132] U.S. Dep't of Health and Human Services, *What is the U.S. Opioid Epidemic?*, https://www.hhs.gov/opioids/about-the-epidemic/index.html.

[133] Matthew Durose, Alexia Cooper, and Howard Snyder, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* at 15 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

[134] U.S. Courts, *Using Evidence-Based Strategies to Protect Communities* (Aug. 2, 2018) (study following prisoners released from 2009 through 2013 for three years found a decrease in the rearrest rate from 19.3% to 16.4%), http://www.uscourts.gov/news/2018/08/02/using-evidence-based-strategies-protect-communities.

[135] FBI, 2016 Crime in the United States, tbl. 1, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1.

52 Duane Street,10th Floor
New York, NY 10007
Tel: (212) 417-8738

[136] The national violent crime rate rose by 1.3% in 2005, 2.2% in 2006, and .2% in 2012. *See* FBI, 2016 Crime in the United States, tbl. 1, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1.

[137] The national violent crime rate was 386.3 per 100,000 residents in 2016. *Id*. It was 363 per 100,000 inhabitants in 1970, and 396 per 100,000 inhabitants in 1971. https://www.ucrdatatool.gov/Search/Crime/State/OneYearofData.cfm.

[138] Ames Gawert, James Cullen, and Vienna Thompkins, Brennan Center for Justice, *Crime in 2017: Final Analysis* (June 2018), https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2017_A_Final_Analysis.pdf.

[139] *See* 21 U.S.C. § 841(b)(1)(A) (400 g. of a mixture or substance containing a detectable amount of fentanyl or 100 g. of a mixture or substance containing a detectable amount of any analogue of fentanyl/1 kg. of a mixture or substance containing a detectable amount of heroin); *id*. § 841(b)(1)(B) (40 g. of a mixture or substance containing a detectable amount of fentanyl or 10 g. of a mixture or substance containing a detectable amount of any analogue of fentanyl/ 100 g. of a mixture or substance containing a detectable amount of heroin).