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October 31, 2017

Senator Chuck Grassley  
Chair, Senate Judiciary Committee  
135 Hart Senate Office Building  
Washington, D.C. 20510

Senator Dianne Feinstein  
Ranking Member, Senate Judiciary Committee  
331 Hart Senate Office Building  
Washington, D.C. 20510

Re: Sentencing Reform and Corrections Act of 2017 (S. 1917);  
Smarter Sentencing Act of 2017 (S. 1933)

Dear Senators:

We write on behalf of the Federal Public and Community Defenders to urge passage of legislation to reform federal mandatory sentencing laws. Federal Defenders represent most of the 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 overwhelming, and disproportionate, brunt of mandatory minimum sentences.

Real sentencing reform is desperately needed. The most significant driver of the five-fold increase in the federal prison population over the past thirty years has been mandatory minimums, particularly those for drug offenses.<sup>1</sup> The extreme levels of incarceration come at a human and

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<sup>1</sup> Not only are mandatory minimums themselves a “significant driver of this population increase,” 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) (reporting a 178.1 percent increase in the number of federal prisoners convicted of an offense carrying a mandatory minimum from 1995 to 2010), but the drug guidelines are linked to the two mandatory minimum levels specified in 21 U.S.C. § 841, and spread across seventeen levels between, above, and below those levels. “Given that drug trafficking constitutes the largest offense group sentenced in federal courts,” the increase in prison terms due to the mandatory minimums and their incorporation into the guidelines “has been the single sentencing policy change having

financial cost that is unjustified by the legitimate purposes of sentencing, and that perversely undermines public safety. The mandatory minimums that Congress intended for drug kingpins and serious traffickers are routinely and most often applied to low-level non-violent offenders. Moreover, mandatory minimums have a racially disparate impact, and have been shown to be charged in a racially disparate manner.

The decision to charge mandatory minimums, or not, is entirely in the hands of prosecutors. This provides a single government actor with unchecked power that is wholly inconsistent with traditional notions of legality and due process. In light of the proven, longstanding problems created by mandatory minimums, they should be eliminated altogether. Sentencing authority should be placed back in the hands of neutral judges where it has traditionally resided.

Short of those more comprehensive reforms, the Smarter Sentencing Act or the Sentencing Reform and Corrections Act would be a good start. Both bills, in different ways and to different extents, would reduce mandatory minimums and expand judicial discretion, thus reducing unnecessarily harsh sentences and lessening unchecked prosecutorial power. Neither bill is perfect.<sup>2</sup> Congress should pass one or the other, or a combination of the two. Each of these bills represents a compromise, and should not be weakened any further.

We urge you not to pass the Corrections Act as a standalone measure. It would provide time off at the end of a sentence only for certain select inmates, and would have little or no impact on the poor and racial minorities who comprise the vast majority of federal prisoners and are most in need of relief. All inmates should have an opportunity to earn time off at the end of their sentences through demonstrated efforts at rehabilitation. This too is consistent with traditional notions of punishment. However, the Corrections Act would make incentives to participate in rehabilitative programming unavailable to those who need it most.

We do support the Mens Rea Reform Act of 2017 because it embodies the fundamental principle that a person should be convicted of and punished for a crime only if he or she acted with a guilty mind, and because it would prevent many of our clients with low-level involvement in drug offenses from being over-charged and over-punished for the conduct of others of which they were not aware and that they did not intend. However, mens rea reform is not a substitute for

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the greatest impact on prison populations.” U.S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing at 76* (2004); *see also id.* at 48, 54.

<sup>2</sup> For example, unlike the Smarter Sentencing Act, the Sentencing Reform and Corrections Act would not reduce all mandatory minimums in drug cases, and would add a consecutive sentence of up to five years for fentanyl, although fentanyl is already subject to mandatory minimums that are triggered by smaller quantities than mandatory minimums for heroin. The Sentencing Reform and Corrections Act, however, would eliminate the stacking of § 924(c) counts, while the Smarter Sentencing Act would not.

sentencing reform. True criminal justice reform must tackle the single biggest contributor to injustice in the federal system: mandatory minimum sentences.

## **I. The Human and Financial Costs of the Current Mandatory Minimum Laws Are Unjustified.**

From 1986, when Congress enacted the current mandatory minimums for drug offenses, to its highest point in 2013, the federal prison population quintupled.<sup>3</sup> Although the population has declined slightly in the past few years,<sup>4</sup> the Bureau of Prisons is still 14 percent overcrowded, and has projected a two percent increase for 2018 due to new Department policies,<sup>5</sup> including a policy encouraging prosecutors to charge the offense that carries the highest sentence.<sup>6</sup> The cost of

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<sup>3</sup> See Federal Bureau of Prisons, Statistics (40,330 in 1985, 219,298 in 2013), [https://www.bop.gov/about/statistics/population\\_statistics.jsp#old\\_pops](https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops).

<sup>4</sup> *Id.* (219,298 in 2013, 192,170 in 2016). Factors contributing to a deceleration and eventual decrease include the guidelines being rendered advisory by the Supreme Court in 2005, the Fair Sentencing Act of 2010, a two-level retroactive reduction in the drug guidelines in 2014, and Department of Justice charging policies in effect from late 2013 through 2016. The charging policies, which discouraged the use of mandatory minimums against low-level, non-violent drug offenders and delineated certain factors prosecutors should take into account, were first instituted in August of 2013 in response to the Supreme Court's holding that prosecutors must prove to a jury beyond a reasonable doubt any fact triggering or increasing a mandatory minimum, *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and in reliance on longstanding Principles of Federal Prosecution requiring charges to be based on an individualized assessment of the proportionality of the penalty to the seriousness of the conduct and prohibiting the use of charges to exert leverage in plea bargaining. See Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013); Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 29, 2013); Memorandum to Department of Justice Attorneys from the Attorney General, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014).

<sup>5</sup> U.S. Department of Justice, Federal Prison System, FY 2018 Performance Budget, Congressional Submission at 1, 6-7, <https://www.justice.gov/file/968971/download>.

<sup>6</sup> Memorandum for All Federal Prosecutors from Attorney General Sessions on Department Charging and Sentencing Policy (May 10, 2017).

housing the prison population in 2016 was about \$6.1 billion.<sup>7</sup> The Department has requested over \$7 billion for 2018.<sup>8</sup>

The lengthy mandatory minimums for drug trafficking offenses now on the books are unnecessary to protect public safety. Sentencing Commission research has shown that sentences can be reduced with no increase in recidivism.<sup>9</sup> 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.<sup>10</sup> Indeed, 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.”<sup>11</sup> Here, the federal government could learn something from the states. The state imprisonment rate has declined since 2007 as many states “made research-driven policy changes to control prison growth, reduce recidivism, and contain costs.”<sup>12</sup>

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<sup>7</sup> The cost in 2016 was about \$6.1 billion to house 192,170 prisoners at \$31,977.65 each. Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016).

<sup>8</sup> U.S. Department of Justice, Federal Prison System, FY 2018 Performance Budget, Congressional Submission at 1 (requesting \$7,085,248,000), <https://www.justice.gov/file/968971/download>.

<sup>9</sup> The Commission found no statistically significant difference in the rates of recidivism after five years of prisoners released early under the retroactive amendment to the crack guidelines and prisoners who served their full sentences; in fact, the recidivism rate for those who served their full sentences was slightly higher. U.S. Sent’g. Comm’n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* at 1, 3 (May 2014), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>10</sup> U.S. Department of Justice, Office of Justice Programs, Nat’l Inst. of Justice, *Five Things About Deterrence* 1 (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>; 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*, *Prison Journal* 91: 48S (2011).

<sup>11</sup> Nat’l Inst. Of Justice, *Five Things About Deterrence*, *supra* note 10.

<sup>12</sup> Pew Charitable Trusts, *Growth in Federal Prison System Exceeds States’* (Jan. 2015), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/growth-in-federal-prison-system-exceeds-states>; see also Pew Charitable Trusts, *State Reforms Reverse Decades of Incarceration Growth* (March 2017), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth>; Pew Charitable Trusts, *National Imprisonment and Crime*

As Senator Rand Paul said: “Mandatory minimum sentences have unfairly and disproportionately incarcerated a generation of minorities. ... We should be treating our nation’s drug epidemic for what it is -- a public health crisis, not an excuse to send people to prison and turn a mistake into a tragedy.”<sup>13</sup>

## II. Real Reform Is Necessary to Prevent the Use of Mandatory Minimums for Purposes for Which They Were Not Intended.

### A. Sentences Intended for Kingpins and Serious Traffickers Are Routinely and Mostly Applied to Low-Level Offenders.

The vast majority of federal drug offenders are low-level and non-violent. From 1998 through 2016, between four and seven percent of all drug offenders played any aggravated role in the offense; less than one percent used, threatened to use, or directed the use of violence; and between 12 and 17 percent had any weapon “involvement” (*i.e.*, anything from a weapon being merely present in the vicinity -- in a closet, in the attic, or in the trunk of a car -- to being possessed or used by a confederate, to being possessed or used by the defendant).<sup>14</sup> Yet, from 1998 through 2013, 60 to 70 percent of drug offenders were convicted of an offense carrying a mandatory minimum.<sup>15</sup>

When Congress enacted mandatory minimums for drug transactions in 1986 and extended them to conspiracies in 1988, it intended that the ten-year mandatory minimum would apply to “kingpins—the masterminds who are really running these operations,” and that the five-year mandatory minimum would apply to “middle-level dealers,” and thought that a defendant’s role in the offense would correspond to the quantity of drugs involved in the offense.<sup>16</sup> Congress also

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*Rates Continue to Fall* (Dec. 2016),  
[http://www.pewtrusts.org/~media/assets/2017/03/pspp\\_national\\_imprisonment\\_and\\_crime\\_rates\\_fall.pdf](http://www.pewtrusts.org/~media/assets/2017/03/pspp_national_imprisonment_and_crime_rates_fall.pdf)

<sup>13</sup> Rand Paul, Op Ed: *Sessions’ sentencing plan would ruin lives*, May 15, 2017, <http://www.cnn.com/2017/05/15/opinions/sessions-is-wrong-rand-paul-opinion/>.

<sup>14</sup> See U.S. Sent’g. Comm’n, Sourcebook of Federal Sentencing Statistics, tbls. 39, 40 (1998-2016); U.S. Sent’g. Comm’n, Guideline Application Frequencies, § 2D1.1(b)(2) (2011-2016).

<sup>15</sup> U.S. Sent’g. Comm’n, Sourcebook of Federal Sentencing Statistics, tbl. 43 (1998-2013). That percentage dropped to 50.1% in 2014, 45.8% in 2015, and 44.5% in 2016. U.S. Sent’g. Comm’n, Sourcebook of Federal Sentencing Statistics, tbl. 43 (2014-16).

<sup>16</sup> Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation:

For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years.... Our proposal

expected that this structure would encourage the Department to direct its “most intense focus” on “major traffickers” and “serious traffickers” in order “to focus scarce law enforcement resources.”<sup>17</sup>

As it turned out, Congress was mistaken that a defendant’s role in the offense would correspond to the quantity involved in the offense.<sup>18</sup> In fact, the “quantity of drugs involved in an offense is not closely related to an offender’s function in the offense.”<sup>19</sup> And for most of its history, the Department of Justice has charged mandatory minimums indiscriminately, subjecting low-level drug offenders to mandatory minimums intended for kingpins and serious traffickers.<sup>20</sup> Indeed, 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.”<sup>21</sup>

In 2012, a typical year, 60.4 percent of drug offenders received a mandatory minimum.<sup>22</sup> Of those, only 8.8 percent played an aggravated role, 16.5 percent had any weapon involvement, and .5 percent used, threatened or directed the use of violence.<sup>23</sup> In late 2013, prosecutors began

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would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense.

132 Cong. Rec. 27,193–94 (Sept. 30, 1986).

<sup>17</sup> H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

<sup>18</sup> *United States v. Dossie*, 851 F. Supp.2d 478, 480-81 (E.D.N.Y. 2012) (providing a thorough explanation of the history and mistaken rationale of mandatory minimum sentences in drug cases).

<sup>19</sup> U.S. Sent’g Comm’n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 168.

<sup>20</sup> “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), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918\\_SJC\\_Mandatory\\_Minimums.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918_SJC_Mandatory_Minimums.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> U.S. Sent’g. Comm’n, *Sourcebook of Federal Sentencing Statistics*, tbl. 43 (2012).

<sup>23</sup> U.S. Sent’g. Comm’n, *Individual Datafiles*, Fiscal Year 2012.

to make more targeted use of mandatory minimums under a charging policy discouraging their use for low-level non-violent offenders, and encouraging their use for more serious cases. By 2016, the percent of drug offenders who received a mandatory minimum had dropped to 44.5 percent,<sup>24</sup> and the seriousness of their offenses had increased somewhat: 12.0 percent played an aggravated role, 22.5 percent had any weapon involvement, and 1.3 percent used, threatened or directed the use of violence.<sup>25</sup> But even under the more limited charging approach, the vast majority of defendants who received a mandatory minimum were low-level, non-violent offenders.<sup>26</sup> Under the new policy requiring prosecutors to charge the offense carrying the highest sentence, the modest progress that was being made will be reversed.

Congress also expected, based on the Department of Justice's express representation, that prosecutors would file enhancements under 21 U.S.C. § 851 only for "hardened," "professional criminals."<sup>27</sup> Section 851 gives prosecutors discretion to double the mandatory minimum or increase it to mandatory life if a defendant has one or more prior convictions for selling or merely possessing drugs, no matter how old, and no matter if no jail time was previously imposed.<sup>28</sup> Congress expected prosecutors to exercise this discretion sparingly, but § 851 enhancements have

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<sup>24</sup> U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 43 (2016).

<sup>25</sup> U.S. Sent'g. Comm'n, Individual Datafiles, Fiscal Year 2016.

<sup>26</sup> The Inspector General found that the Department had made progress in reducing the use of mandatory minimums in drug cases, reducing the use of § 851 enhancements, and focusing mandatory minimums on more serious cases, 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*, particularly regarding recidivist enhancements." 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).

<sup>27</sup> See *Kupa v. United States*, 976 F. Supp. 2d 417, 419, 424-27 (E.D.N.Y. 2013); *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: 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).

<sup>28</sup> The term "prior conviction for a felony drug offense" includes simple possession of drugs, misdemeanors in states where misdemeanors are punishable by more than one year (such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont), and diversionary dispositions where the defendant was not convicted in state court, and places no limit on how old the conviction or diversionary disposition can be.

been routinely filed or threatened, not to incapacitate hardened professional criminals, but to coerce offenders to plead guilty and to punish those who exercise their right to trial.<sup>29</sup>

**B. Severe Mandatory Enhancements Are Routinely Threatened to Coerce Guilty Pleas, Or Imposed to Punish Exercise of the Right to Trial.**

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. One such example is *United States v. Midyett*, 07 Cr. 874 (KAM) (E.D.N.Y. June 17, 2010). Tyquan Midyett was charged with selling small quantities of crack cocaine at the age of 26 after a short lifetime of substance abuse which began at the age of 14 when he was in foster care. He was charged when the 100:1 crack/powder cocaine disparity was still in effect. His guideline range called for approximately 7-9 years imprisonment (it would have been 4 to 4 ½ years absent the crack/powder disparity), but the government charged him with the 10-year mandatory minimum for a kingpin despite its own assertion that he played only a minor role. He turned down the “offer” of a mandatory 10 years, at which point the government filed a prior “felony drug offense” information pursuant to § 851. Midyett went to trial, lost, and was sentenced to the mandatory minimum of 20 years, a sentence twice what the government offered before he went to trial, and five times the guideline sentence for a comparable amount of cocaine.<sup>30</sup>

There are also many examples of prosecutors imposing mandatory life sentences for no reason other than to punish a defendant for going to trial. 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. But Mr. Traylor was sentenced to die in prison.

Wholly unrelated to culpability, Mr. Traylor’s fate was sealed by his choice to go to trial rather than cooperate, 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

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<sup>29</sup> “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.” *Kupa*, 976 F.Supp.2d at 420.

<sup>30</sup> Tyquan Midyett’s story is relayed in *Kupa*, 976 F. Supp. 2d at 436-37.

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.”<sup>31</sup> Haunted by the role he was playing in sentences like Mr. Traylor’s, Judge McCuskey soon resigned from the bench.

Similarly, Olivar Martinez-Blanco was sentenced to mandatory life for his participation in an Atlanta-area cocaine conspiracy. His sentence was driven not by his relative culpability, but by a double § 851 enhancement filed in response to his decision to go to trial. 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 die in prison.<sup>32</sup>

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. Assuming he lives to the age of 75, his trial penalty would have been an additional 30 years imprisonment.<sup>33</sup>

Kupa’s co-defendant, Joseph Ida, was considered by the government to have played a minor role in the conspiracy, yet it charged him with a count carrying a 10-year mandatory minimum. To persuade him to plead guilty, the prosecutor agreed to a roughly five-year prison

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<sup>31</sup> Sentencing Transcript, *United States v. Traylor*, 08-cr-20036 (C.D. Ill. Jan. 8, 2010), Doc. No. 106.

<sup>32</sup> *United States v. Martinez-Blanco*, 351 Fed. Appx. 339, 340 (11th Cir. 2009).

<sup>33</sup> *United States v. Kupa*, 976 F. Supp.2d 417, 432-34 (E.D.N.Y. 2013).

term. Had he gone to trial, the effect would have been a doubling of his sentence -- for someone the government itself believed played a minor role.<sup>34</sup>

The Kupa and Ida scenarios are hidden from view or any statistical compilation, yet they represent 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.<sup>35</sup>

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. And yet that is the result of granting so much unchecked power to prosecutors.

The opportunity to stack § 924(c) charges lends itself to the same abuses. Section 924(c) provides for 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 crime of violence or a drug trafficking crime, to run consecutively to the penalty for the underlying offense. In addition, the statute mandates 25 consecutive years for each “second or subsequent conviction.” While it is unclear that Congress intended this result, 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.<sup>36</sup> The latter is called “stacking,” and results in a sentence of at least 30 years for

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<sup>34</sup> *Id.* at 431 n.59.

<sup>35</sup> *Id.* at 434-35.

<sup>36</sup> *United States v. Deal*, 508 U.S. 129 (1993).

two counts, 55 years for three counts, and up to hundreds of years, even when the defendant has no prior record, and even when s/he did not use a gun.<sup>37</sup>

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, Mr. Rivera-Ruperto (who was not a police officer) was hired to provide armed security for six drug deals involving large amounts of cocaine. The deals were fake, and the substance was not a controlled substance at all. FBI agents determined the quantity for each sham 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, thus permitting it to 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 based on the six § 924(c)s for bringing a firearm as instructed by the agents.<sup>38</sup>

When he appealed, the majority affirmed his sentence on strict legal grounds, reluctantly “[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.”<sup>39</sup> 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

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<sup>37</sup> 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); *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004).

<sup>38</sup> *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).

<sup>39</sup> 852 F.3d at 5.

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.<sup>40</sup>

If Congress were to eliminate stacking, a person in Mr. Rivera-Ruperto’s position would be sentenced to “only” 36 years and 10 months, assuming the FBI would stage six sham deals without the opportunity to stack § 924(c)s. But unless and until Congress, or the Supreme Court, steps in, the government is free to use the statute in this manner.

**C. High-Level Offenders Escape Severe Mandatory Minimums by Cooperating Against Low-Level Offenders.**

Mandatory minimums are justified by some as a necessary means to obtain cooperation against more serious offenders. But the truth is, the relatively few serious offenders receive reduced sentences for cooperating against underlings, who have nothing to cooperate with and so receive sentences Congress intended for kingpins and serious traffickers. This converts a refusal or inability to cooperate into an aggravating sentencing factor “in violation of a basic principle of our sentencing regime.” *United States v. Dossie*, 851 F. Supp.2d 478, 487 (E.D.N.Y. 2012) (citing U.S.S.G. § 5K1.2 (“A defendant’s refusal to assist in the investigation of other persons may not be considered as an aggravating sentencing factor.”)).

Judge William W. Wilkins, the first Chair of the U.S. Sentencing Commission, warned of this problem in 1993:

Who is in a position to give such “substantial assistance”? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . . There are few federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.<sup>41</sup>

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<sup>40</sup> 852 F.3d at 19 (Torruella, J., dissenting).

<sup>41</sup> *Federal Mandatory Minimum Sentencing*: Hearing Before the Subcomm. On Crime & Criminal Justice of the H. Comm. On the Judiciary, 103rd Cong. 66 at 107 (1993) (statement of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Comm’n).

In fact, high-level offenders obtain relief for substantial assistance at higher rates than low-level offenders. “The highest rates of relief based on substantial assistance were for Manager (50.0%) and Organizer/Leader (39.1%). The lowest rates of relief based on substantial assistance were for Mule (19.5%), Street-Level Dealer (23.4%), and Courier (27.1%).”<sup>42</sup> Mules, street level dealers, and couriers comprised 45% of the sample; managers and organizer/leaders comprised only 4.2% of the sample.<sup>43</sup>

Moreover, a host of data show that severe mandatory minimums are not necessary to obtain cooperation. Rates of departure for cooperation are the same or higher in cases in which there is no mandatory minimum. 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).<sup>44</sup> 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%.<sup>45</sup> 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.<sup>46</sup>

In addition, the Department of Justice reported in March 2016 that prosecutors’ ability to obtain cooperation did not decline as a result of the reduced number of mandatory minimums charged and recidivist enhancements filed under the Smart on Crime charging policy.<sup>47</sup> And the Commission reported to Congress that “the rate of sentences that were below the guideline due to a government substantial assistance motion ... remained stable throughout the 2005-2013 period,”

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<sup>42</sup> U.S. Sent’g Comm’n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 171.

<sup>43</sup> *Id.*, App. D, fig. D-2.

<sup>44</sup> U.S. Sent’g Comm’n, Interactive Sourcebook, Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type, Fiscal Year 2016.

<sup>45</sup> *Id.*

<sup>46</sup> U.S. Sent’g Comm’n, Interactive Sourcebook, Sentences Relative to the Guideline Range By Each Primary Offense Category, Fiscal Year 2016.

<sup>47</sup> 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 19 (June 2017) (citing 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, <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and>).

indicating that the reduction in penalties under the Fair Sentencing Act “did not generally reduce the willingness of offenders to provide assistance to the government in the prosecution of others.”<sup>48</sup>

#### **D. Mandatory Minimums Result in Stark Racial Disparities.**

Repeated analyses have shown racial disparity in the decision whether to charge the severe enhancements under 21 U.S.C. § 851 and 18 U.S.C. § 924(c) among those eligible for such enhancements. Eligible Black offenders are charged at a higher rate than eligible White offenders.<sup>49</sup>

Further, mandatory minimums and the existing provisions for relief from them, *i.e.*, safety valve and substantial assistance motions, “impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.”<sup>50</sup> In 2010, 63.7 percent of White offenders received relief from mandatory minimums, while only 39.4 percent of Black offenders received relief.<sup>51</sup> In 2012, Black offenders comprised 26.3 percent of drug offenders, but 35.2 percent of drug offenders who got no relief.<sup>52</sup> The Commission concluded that the only solution to this racial disparity is for Congress to reduce the length of mandatory minimum drug penalties.<sup>53</sup>

The damage to individuals and communities is hard to overstate. As the Honorable Patti Saris, former Chair of the Sentencing Commission, explained:

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<sup>48</sup> 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](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf).

<sup>49</sup> See U.S. Sent’g Comm’n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 257 (30 percent of eligible African American offenders received § 851 enhancements, while 25 percent of eligible White offenders received the enhancement); U.S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing* at 90 (2004) (African Americans were 48 percent of offenders eligible for a § 924(c) enhancement, but 64 percent of those who received it).

<sup>50</sup> U.S. Sent’g Comm’n, Statement for the S. Jud. Comm. Hr’g “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences,” at 3 (Sept. 18, 2013).

<sup>51</sup> U.S. Sent’g Comm’n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 159.

<sup>52</sup> U.S. Sent’g Comm’n, Statement for the S. Jud. Comm. Hr’g “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences,” at 4 (Sept. 18, 2013).

<sup>53</sup> *Id.* at 11.

Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing. In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

The Honorable Patti Saris, *A Generational Shift for Federal Drug Sentences*, 52 American L. Rev. 1, 10-11 (2015).

### **III. The Resolution of These Problems Cannot Depend On Department of Justice Charging Policies.**

Under longstanding Principles of Federal Prosecution, prosecutors should not bring and pursue charges simply because they produce the highest sentence. Rather, they should charge “the most serious offense that is consistent with the nature of the defendant’s conduct,” to be determined based on “an individualized assessment of the extent to which particular charges fit the specific circumstances of the case,” including “whether the penalty ... is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves [the] purposes of ... punishment, protection of the public, specific and general deterrence, and rehabilitation.”<sup>54</sup> Nor should charges “be filed simply to exert leverage to induce a plea.”<sup>55</sup>

Unfortunately, these principles have been routinely violated for many years regardless of whether the current charging policy ignores them,<sup>56</sup> embraces them,<sup>57</sup> or might be somewhere in

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<sup>54</sup> USAM 9-27.300 (1997-2017).

<sup>55</sup> USAM, 9-27.310 (Oct. 1, 1988); USAM 9-27.300 (1997-2016); USAM 9-27.300 & 9-27.400 (Jan. 1, 2017).

<sup>56</sup> Memorandum from John Ashcroft, Att’y Gen. of the United States, to All Federal Prosecutors Re: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003).

<sup>57</sup> See Holder Memoranda, *supra* note 4.

the middle,<sup>58</sup> and they are unenforceable. The current charging policy states that prosecutors “should charge and pursue the most serious, readily provable offense,” which “by definition” are “those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” It also states that a prosecutor may seek approval from the U.S. Attorney to deviate from strict application of the policy if it is “not warranted” because of unspecified “unusual facts.” It is too soon to be able to gather comprehensive data, but in response to a recent inquiry to the field, Federal Defenders in many districts reported that prosecutors are again charging mandatory minimums against low-level non-violent offenders, stating that they have no discretion not to do so, and that some U.S. Attorneys’ Offices have made clear that they will not consider any exception regardless of the circumstances. There has been a marked resurgence of threats to file or not to withdraw § 851 enhancements and stacked § 924(c)s if defendants go to trial, or exercise other legal rights such as filing a motion to suppress or contesting pretrial detention.

Regardless of the charging policy, prosecutors are not legally constrained from using severe mandatory minimums for purposes that Congress did not intend and that are indefensible. The only answer is to eliminate mandatory minimums and give more control over sentencing to neutral judges.

While neither the Smarter Sentencing Act nor the Sentencing Reform and Corrections Act eliminates mandatory minimums, either would be a good start in the right direction. In different ways and to different extents, both bills would reduce mandatory minimums and expand judicial discretion, thus reducing unnecessarily harsh sentences and providing a needed check on prosecutorial overreaching. Neither bill is perfect. Each represents a compromise and should not be weakened any further. Despite their imperfections, Congress should pass one or the other, or a combination of the two.

#### **IV. Other Criminal Justice Reform Bills Will Not Fix These Serious Problems.**

We urge you not to pass the Corrections Act as a standalone measure, but only as part of the Sentencing Reform and Corrections Act or in conjunction with the Smarter Sentencing Act. The Corrections Act would permit only those prisoners classified as low risk to fully earn and use credits to be released from prison early. It would have little or no impact on the poor and racial minorities who comprise the vast majority of federal prisoners and are most in need of relief. All inmates should have an opportunity to earn time off at the end of their sentences through demonstrated efforts at rehabilitation, but the Corrections Act would make these incentives unavailable to those most in need of rehabilitative treatment.

As far as we are aware, no state uses risk assessment tools in this manner. Instead, the states use risk/needs assessment tools to identify prisoners’ programming needs and award credits

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<sup>58</sup> Memorandum for All Federal Prosecutors from Attorney General Sessions on Department Charging and Sentencing Policy (May 10, 2017).

to all on an equitable basis.<sup>59</sup> This makes sense because many programs and jobs have been shown to reduce the rate of recidivism.<sup>60</sup> The approach taken by the Corrections Act is problematic because risk assessment tools misclassify about half of persons as moderate or high risk when they are actually low risk and commit no further crimes<sup>61</sup>; risk assessment tools misclassify Black offenders as high risk more often than White or Hispanic offenders<sup>62</sup>; risk factors, including but not limited to criminal history, correlate with socioeconomic class and race<sup>63</sup>; criminal history is not race-neutral<sup>64</sup>; and giving the maximum incentive to participate in recidivism reduction

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<sup>59</sup> Federal Defender Analysis of Corrections Act (S. 467) at 1-7, [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/federal\\_defender\\_analysis\\_of\\_corrections\\_act.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/federal_defender_analysis_of_corrections_act.pdf).

<sup>60</sup> 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 4-6 (Aug. 1, 2012), <http://www.justice.gov/ola/testimony/112-2/08-01-12-bop-samuels.pdf>; FPI and Vocational Training Works: Post-Release Employment Project (PREP) at [http://www.bop.gov/resources/pdfs/prep\\_summary\\_05012012.pdf](http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf); Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, [http://www.bop.gov/inmates/custody\\_and\\_care/unicor.jsp](http://www.bop.gov/inmates/custody_and_care/unicor.jsp).

<sup>61</sup> A recent meta-analysis showed that only 52% of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half (48%) of all persons who were actually low risk were mis-classified as moderate or high risk. 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, 4-5 (2012), <http://www.bmj.com/content/345/bmj.e4692>; see also BMJ Group, *Concerns Over Accuracy of Tools to Predict Risk of Repeat Offending* (2012), <http://group.bmj.com/group/media/latest-news/concerns-over-accuracy-of-tools-to-predict-risk-of-repeat-offending>.

<sup>62</sup> 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).

<sup>63</sup> See Testimony of Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, for the Public Meeting of the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015); Glenn D. Walters, *Relationships Among Race, Education, Criminal Thinking, and Recidivism: Moderator and Mediator Effects*, Assessment (2012) (online version); ACLU, *School to Prison Pipeline: Talking Points* (2008).

<sup>64</sup> See 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) (reviewing studies demonstrating extreme disparities in arrests, searches, and charges of similarly situated Black and white individuals); see also Rand Paul, Op Ed: *Sessions' sentencing plan would ruin lives*, May 15, 2017, <http://www.cnn.com/2017/05/15/opinions/sessions-is-wrong-rand-paul-opinion/>.

programming to low-risk inmates and no meaningful incentive to high-risk inmates most in need of programming is contrary to evidence-based practices and the goal of public safety.<sup>65</sup>

We understand that the bill is based on the expectation that prisoners can change their risk categories in prison, but this expectation is untested by research or experience. Existing risk assessment tools give the static factors of age and criminal history heavy weight (at least half the total points) based on their statistical correlation with recidivism.<sup>66</sup> Static factors cannot change, and the most prevalent dynamic factors, such as employment and family ties, are impossible or very difficult to change in a prison setting.<sup>67</sup> Moreover, risk assessments are too unreliable a basis for setting the length of prison sentences, and adding too many dynamic factors make them even more unreliable.<sup>68</sup> And, as noted, risk assessment tools are not race neutral because of their heavy reliance on criminal history and other factors that skew against racial minorities.

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<sup>65</sup> See, e.g., The Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* 4 (2011), <http://www.ovsom.texas.gov/docs/Risk-Needs-Assessment-101-New-Tools-to-Manage-Offenders-2011.pdf>; Joselyne L. Chenane et al., *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 *Crim. Just. & Behav.* 286, 287 (2015); Latessa et al., *Creation and Validation of the Ohio Risk Assessment System: Final Report* at 6-7 (2009).

<sup>66</sup> See, e.g., Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Release Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, 78 *Fed. Probation* 41, 42 (2014) (criminal history and age account for 9 of 18 points); Latessa et al., *Creation and Validation of the Ohio Risk Assessment System: Final Report*, Appendix A, 56-59 (2009) (23 of 37 points for factors that occurred in the past and cannot change).

<sup>67</sup> Dynamic factors are “slow changing.” David Robinson, *The Service Planning Instrument (SPIn); A New Assessment and Case Planning Model for Adult Offenders* 18 (2007), [http://www.ohhaonline.ca/SPIN\\_Overview.pdf](http://www.ohhaonline.ca/SPIN_Overview.pdf). A study of the PCRA showed that the most commonly occurring dynamic factors for people on federal probation and supervised release were deficits in education/employment and social networks. Thomas Cohen & Scott VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders under Federal Supervision*, 78 *Fed. Probation* 41, 47 fig.3 (2014). Those who were able to lower their risk levels typically did so by becoming employed and having a more stable work history. *Id.* at 49 tbl.4, 50. There was very little change in education deficits over time. *Id.* at 49, tbl.4, 50. There was relatively little change over time in “social networks” factors (*i.e.*, single, divorced or separated, unstable family situation, lack of prosocial support). *Id.* at 49, tbl.4, 50. If these factors are slow to change in the community, it would be nearly impossible to change them from behind bars.

<sup>68</sup> See Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* 7 (2009), [http://nccdglobal.org/sites/default/files/publication\\_pdf/special-report-evidence.pdf](http://nccdglobal.org/sites/default/files/publication_pdf/special-report-evidence.pdf); James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 16 (2013), <http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population->

We do support the Mens Rea Reform Act of 2017. It would prevent many of our clients with low-level involvement in drug offenses from being over-charged and over-punished for the conduct of others of which they were not aware and that they did not intend. However, mens rea reform is not a substitute for mandatory minimum reform.

### **Conclusion**

True criminal justice reform must address the pernicious effects of mandatory minimum sentencing statutes. They distort traditional legal process by removing sentencing authority from neutral judges and handing it to prosecutors. And they result in the most tragic injustices in the system. Too many people are languishing in prison for decades or life for the sole reason that they exercised their constitutional right to a trial. The state of affairs does not advance public safety and it is anathema to American values.

We are grateful to you and your colleagues for your efforts to make sentencing reform a reality, and 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: Senate Judiciary Committee

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Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf; Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* v-vi (2013), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/244477.pdf>.