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LEGISLATIVE TESTIMONY

CRIMINAL JUSTICE REFORM

**Testimony before the Committee on Oversight and Government
Reform**

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The Heritage Foundation

Chairman Chaffetz, Ranking Member Cummings, and distinguished Members of Congress:

Thank you for the opportunity to speak to you today about criminal justice reform, and, more particularly, sentencing reform. I applaud you for convening this hearing.

My name is John Malcolm. I am the Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.¹ The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the U.S. Justice Department, and a criminal defense attorney. Therefore, I can speak to you today as someone who has experience on both sides of the courtroom.

I would like to stress at the outset that sentencing reform is a difficult issue. Some believe that our current sentencing regime is unfair, that too much discretion has been removed from judges, that the pendulum has swung too far in terms of imposing harsh sentences, and that increased incarceration has led to other inequities in our society. Others believe that increased incarceration and harsh sentences have taken some very dangerous people off of the streets and have resulted in dramatic decreases in crime, and that if such sentences are cut, crime may well increase to the detriment of society. I understand both of these perspectives and understand why people of good will passionately disagree about this issue.

When crime rates soared in the 1960's, the idea of putting more people in prison for longer periods of time made a lot of sense, and, at least to some extent, it worked. Crime rates eventually leveled off and, since the 1990s, have dropped rather precipitously. While there are certainly places in this country where crime rates remain staggeringly and persistently high, we are, for the most part, much safer.

According to the Bureau of Justice Statistics, from 1993 to 2013, violent crime rates fell from 80 to 23 victimizations per 1,000 people, and property crimes fell from 352 to 131

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victimizations per 1,000 households.² Increased incarceration, especially of violent offenders, certainly deserves some of the credit for this steep drop in crime rates, along with other factors like advances in policing techniques such as hot-spot policing in high-crime areas and greater attention by homeowners to self-protection through the installation of locks, burglar alarms, and other measures.³ How much credit these factors deserve, though, is a matter of some debate among criminologists.

At the high end, University of Chicago economist Steven Levitt has estimated that approximately 25% of the decline in violent crime can be attributed to increased incarceration.⁴ William Spelman of the University of Texas at Austin estimates that the figure may be as high as 35%.⁵ While hardly insignificant, this means that there are other factors that would account for

² The FBI's numbers, although different, support this conclusion. The primary reason for the differences is that the BJS and the FBI use different definitions. For example, the BJS includes simple assault but not homicide when calculating violent crime rates, whereas the FBI does just the opposite. Similarly, BJS includes simple theft when calculating property crime rates, whereas the FBI does not. See JENNIFER L. TRUMAN & LYNN LANGTON, DEPT. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/cv13.pdf>. See also FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2013 (2014), Table 1 Data Declaration, available at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls/@template-layout-view?override-view=data-declaration. Furthermore, while the BJS calculates violent and property crime rates per 1000 victims and households, respectively, the FBI calculates crime rates per 100,000 people in the entire United States. According to the FBI's Uniform Crime Reporting (UCR) Program, the total number of violent crimes dropped from an estimated 1,857,670 in 1994 (a rate of 714 violent crimes per 100,000 people) to an estimated 1,163,146 in 2013 (a rate of 368 violent crimes per 100,000 people), and the total number of property crimes also dropped from an estimated 12,131,873 in 1994 (a rate of 4,660 property crimes per 100,000 people) to an estimated 8,632,512 in 2013 (a rate of 2,731 property crimes per 100,000 people). See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2013 (2014), Table 1, available at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls. Preliminary data indicates that violent crime and property crime continued to drop through the first half of 2014. The FBI estimates that the number of violent crimes dropped by 4.6 percent through the first six months of 2014 as compared to figures from the first six months of 2013, and that the number of property crimes dropped by 7.5 percent through the first six months of 2014 as compared to figures from the first six months of 2013. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, PRELIMINARY SEMI-ANNUAL UNIFORM CRIME REPORT, JANUARY – JUNE 2014 (2015), available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/preliminary-semiannual-uniform-crime-report-january-june-2014>.

³ See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012).

⁴ Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163 (2004). In another paper, however, Levitt acknowledged that the continued increase in the number of drug offenders in prisons may lead to a "crowding out" effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime. Ilyana Kuziemko & Steven Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2056 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf>.

⁵ William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97 (Alfred Blumstein & Joel Wallman eds., 2000).

the remaining 65% or more of the reduction in violent crime. Moreover, incarceration, while certainly necessary, is a very expensive option.⁶

The cost of incarcerating a single federal prisoner has steadily risen over the past 15 years. In Fiscal Year 2000, the per capita cost of incarceration for federal prisoners was \$21,603.⁷ Today, it costs \$30,620 per year to incarcerate each federal prisoner.⁸ It costs even more to incarcerate a prisoner in the state system. As of Fiscal Year 2010, the average annual cost of incarcerating a state prisoner was \$31,286, with the costs ranging from \$14,603 in Kentucky to \$60,076 in New York.⁹

In addition to budgetary expenditures, increased incarceration comes with a human cost that we should not ignore. There are now over two million adults behind bars in this country. As of March 2009, roughly one out of every 31 adults was under some form of correctional control, either through incarceration or supervision; this compares to one out of every 77 adults during the presidency of Ronald Reagan.¹⁰ This has an impact not only on the life prospects of the offenders themselves, but also on their family members, who are often unintended casualties when a loved one is sent away to prison for a long time. The Pew Charitable Trusts estimates that as of 2010, one out of every 28 children had a parent behind bars, up from one out of every 125 children in 1985.¹¹

Some parental figures, of course, are violent or commit crimes that endanger their children. Not surprisingly, when such a parent is incarcerated, family prospects may actually improve. That is not the case for the vast majority of families, however. Parents who commit crimes may not be the best role models, but they are bread winners, and are usually better than having no role model at all.¹² Poverty and homelessness rates are higher among families when

⁶ Moreover, Prof. Levitt has recognized that the continued increase in the number of drug offenders in prisons may lead to a “crowding out” effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime. Ilyana Kuziemko & Steve Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2056–62 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf>.

⁷ NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2014), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

⁸ Annual Determination of Average Cost of Incarceration, Bureau of Prisons Notice, 80 Fed. Reg. 45, 12523 (Mar. 9, 2015), available at <http://regulations.justia.com/regulations/fedreg/2015/03/09/2015-05437.html>.

⁹ Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST., OF JUST., (Jan. 2012) (updated July 20, 2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

¹⁰ See *One in 31: The Long Reach of American Corrections*, PEW CTR. ON THE STATES (Mar. 2009), available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

¹¹ *Collateral Costs: Incarceration’s Effect on Economic Mobility*, PEW CHARITABLE TRUSTS (Sep. 2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf. See also TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 103 (2007); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in *THE FUTURE OF IMPRISONMENT* 27, 42–47 (Michael Tonry ed., 2004).

¹² Two-thirds of men in state prisons were employed at the time of their incarceration, 44% lived with their children prior to incarceration, and more than half (52% of mothers and 54% of fathers) were the primary earners for their children. The average child’s family income decreased by 22% the year after a father was incarcerated. *Collateral*

the father is in prison. Without a positive role model in their lives, many children flounder. Studies show that the children of an incarcerated father struggle more in school, act more aggressively, and have difficulty forming positive relationships with their peers.¹³ Many studies indicate that children with incarcerated parents struggle and often turn to crime themselves.¹⁴

Nobody in his right mind disputes the fact that there are some people who should go to prison and never return to society because of the continuing threat that they pose to public safety. Most inmates do not fall into that category, though, and most (approximately 95%) of them will, in fact, return to our communities.¹⁵

Congress is currently considering a number of proposals to address what I call front-end and back-end reforms, although some refer to the latter as prison reform. Front-end reform involves proposals that would reduce the amount of time that certain offenders are sentenced to, most prominently, proposals to reform federal mandatory minimum laws. The major front-end reform proposals currently being considered by Congress are the sweeping Justice Safety Valve Act of 2015¹⁶, and the more-limited Smarter Sentencing Act of 2015¹⁷, as well as portions of the Safe, Accountable, Fair, and Effective (SAFE) Justice Act.¹⁸

Back-end reform involves proposals that would enable an offender to get time cut off his or her sentence or to change his or her conditions of confinement. Such proposals usually involve three things: (1) expanding prison programs likely to reduce the risk of recidivism, such as educational, job-skills, mental health, and substance abuse programs; (2) encouraging inmates to avail themselves of those programs; and, (3) along with using needs and risk-assessment tools, matching inmates with programs based on their needs and providing incentives such as the prospect of early release to low- and moderate-risk inmates, and other benefits for high-risk inmates, who complete such programs. The major back-end proposals currently being

Costs: Incarceration's Effect on Economic Mobility, PEW CHARITABLE TRUSTS (Sep. 2010), at 21, available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf.

¹³ *Id.*; Amanda Geller, et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 1 DEMOGRAPHY 49 (Feb. 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3703506/pdf/nihms474354.pdf>.

¹⁴ Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIM. AND JUST.: A REVIEW OF RESEARCH 133 (2008), available at <https://www.i-hop.org.uk/ci/fattach/get/201/0/filename/Murray+and+Farrington+-Effects+of+Parental+Imprisonment+on+Children.pdf>; Joseph Murray, David P. Farrington, & Ivana Sekol, *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOLOGICAL BULLETIN 175 (Jan. 9, 2012), available at <http://psycnet.apa.org/journals/bul/138/2/175.pdf&uid=2012-00399-001&db=PA>; Elizabeth Davies, et al., *Understanding the Experiences and Needs of Children of Incarcerated Prisoners: View From Mentors*, URBAN INST. (2008), available at http://www.urban.org/research/publication/understanding-needs-and-experiences-children-incarcerated-parents/view/full_report.

¹⁵ See TIMOTHY HUGHES & DORIS JAMES WILSON, DEPT. OF JUST., BUREAU OF JUST. STATS., REENTRY TRENDS IN THE U.S., (updated July 8, 2015), available at <http://www.bjs.gov/content/reentry/reentry.cfm#highlights>.

¹⁶ The Senate version of this bill, which was introduced by Sen. Rand Paul (R-KY) and Sen. Patrick Leahy (D-VT), is S. 383, and the House version of this bill, which was introduced by Rep. Bobby Scott (D-VA), is H.R. 706.

¹⁷ The Senate version of this bill, which was introduced by Sen. Mike Lee (R-UT) and Sen. Richard Durbin (D-IL), is S. 502, and the House version of this bill, which was introduced by Rep. Raul Labrador (R-ID), is H.R. 920.

¹⁸ The SAFE Act, which was introduced by Rep. James Sensenbrenner (R-WI) and Rep. Bobby Scott (D-VA), is H.R. 2944.

considered by Congress are the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act of 2015¹⁹, the Recidivism Risk Reduction Act²⁰, as well as portions of the SAFE Justice Act.

Let me address front-end sentencing reform proposals first.

Since the enactment of mandatory minimum sentencing laws for drug offenses in the 1980s, the federal prison population has increased by more than 850%. In 1980, there were just over 24,000 offenders in federal prison.²¹ As of July 2, 2015, there are over 208,000 people incarcerated in federal prisons, roughly 49% of them for drug-related offenses.²²

In 2014, 50.1% of all federal drug offenders were convicted of an offense carrying a mandatory minimum sentence²³ (62.1% in 2013).²⁴ In 2014, 66.7% of drug offenders received no relief under the currently existing safety valve²⁵ (65.3% in 2013).²⁶ In 2014, 48.6% of drug offenders had little or no criminal history²⁷ (49.6% in 2013).²⁸ And only 7% of drug offenders in both 2013 and 2014 were sentenced under the “career offender” sentencing guideline, which requires two prior convictions for a drug offense or a crime of violence.²⁹

¹⁹ The CORRECTIONS Act, which was introduced by Sen. John Cornyn (R-TX) and Sen. Sheldon Whitehouse (D-RI), is S. 467.

²⁰ The Recidivism Risk Reduction Act, which was introduced by Rep. Jason Chaffetz (R-UT), is H.R. 759.

²¹ *Federal Prison System Shows Dramatic Long-Term Growth*, PEW CHARITABLE TRUSTS (Feb. 2015), available at http://www.pewtrusts.org/~media/Assets/2015/02/Pew_Federal_Prison_Growth.pdf.

²² See FED. BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES, available at http://www.bop.gov/about/statistics/population_statistics.jsp; FED. BUREAU OF PRISONS, STATISTICS: OFFENSES, available at http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last accessed July 6, 2015).

²³ U.S. SENTENCING COMM’N, ANNUAL REPORT, FISCAL YEAR 2014, at A-5, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/2014-Annual-Report.pdf>.

²⁴ U.S. SENTENCING COMM’N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf.

²⁵ U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FED. SENTENCING STATS., Table 44, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table44.pdf>. See also *infra* note 38.

²⁶ ANNUAL REPORT, FISCAL YEAR 2013, *supra* note 24.

²⁷ 2014 SOURCEBOOK OF FED. SENTENCING STATS., *supra* note 25, at Table 37, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table37.pdf>.

²⁸ U.S. SENTENCING COMM’N 2013 SOURCEBOOK OF FED. SENTENCING STATS., Table 37, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table37.pdf>.

²⁹ See *id.* at Figure B & Table 22, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureB.pdf> and <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table22.pdf>. See also U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FED. SENTENCING STATS., Figure & Table 22, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureB.pdf> and <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table22.pdf>.

Let me be clear that I believe that drug dealing is harmful to society and poses a threat to public safety. The potential for violence, gang involvement, and lethal overdose is inherent in most drug transactions. Indeed, although my primary focus was on fraud and public corruption, I prosecuted several drug dealers when I was an Assistant United States Attorney. I believe drug dealers should be punished, but the question is for how long.

In a speech last year at Georgetown Law School, Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts and current Chair of the United States Sentencing Commission, stated:

[M]andatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were [sic] street level dealers—many levels down from kingpins and organizers.³⁰

Similarly, appearing before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice in 1993, former federal judge Vincent Broderick testified that:

[t]here 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.³¹

In Fiscal Year 2000, the Bureau of Prisons constituted roughly 18% of the Department of Justice's discretionary budget.³² Today, it is 26% of DOJ's budget³³ and is projected to exceed

³⁰ See Hon. Patti B. Saris, A Generational Shift For Drug Sentences, Address at the Georgetown University Law Center (Mar. 26, 2014) at 4, *available at* <http://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Saris-Georgetown-Law-Center-Speech-20140326.pdf>.

³¹ A transcript of the hearing is available at http://archive.org/stream/federalmandatory00unit/federalmandatory00unit_djvu.txt.

³² See Memorandum from Michael E. Horowitz, Inspector General, to the Attorney General, on Top Management and Performance Challenges Facing the Department of Justice (Nov. 10, 2014), *available at* <https://oig.justice.gov/challenges/2014.htm>.

³³ See DEPT. OF JUST., FED. PRISON SYS., FY 2016 BUDGET REQUEST AT A GLANCE, *available at* http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/30_bs_section_ii_chapter_-_bop.pdf; See also DEPT. OF JUST., FY 2016 BUDGET SUMMARY, *available at* http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016_budget_summary_pages_5-12.pdf.

28% by Fiscal Year 2018.³⁴ This does not include the costs of the U.S. Marshals Service to detain and transfer prisoners, which is currently 6.5% of the Department's budget.³⁵ This means less money for investigators, prosecutors, victims' services, grants to state and local law enforcement authorities, and other Departmental priorities. Federal prisons are 33% over capacity and, at the current rate of incarceration, are projected to climb to 38% over capacity by 2018.³⁶

The problem, by the way, is even worse in many states, where prisons are overcrowded and prison costs are the second largest item in their budgets, behind only Medicaid. Necessity being the mother of invention, a number of states, including conservative states like Texas, Georgia, Mississippi, South Carolina, Alabama, and North Dakota, have started experimenting with different ways of addressing the problem in ways which lower costs and do no harm to (indeed, may improve) public safety. Some of the results look very promising.

With the exception of last year, when the Department of Justice's budget increased slightly, the Department of Justice's budget has declined every year since 2010.³⁷ Given current fiscal constraints, I think it is safe to say that the federal government will not be embarking on a federal prison expansion project for the foreseeable future. Much as some might wish that the federal government would make cuts elsewhere (while others might wish for tax increases) in order to increase the Justice Department's budget for prison expansion, wishing will not make it so.

Given this reality, I see each prison cell as very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. In my opinion, under our current system, too many relatively low-level drug offenders are locked up for 5, 10, and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence, and retribution.

I would also note that there are many ways to reform mandatory minimum laws. One way would be to restore the discretion of federal judges to sentence an offender below a mandatory minimum sentence, regardless of the type of offense, if the judge believes it would be appropriate to do so, which is the approach taken by the Justice Safety Valve Act. Another would be to focus on drug offenders, which is the approach taken by the Smarter Sentencing Act and the SAFE Act, and either reduce the length of the mandatory minimum sentences for all drug

³⁴ See Memorandum from Michael E. Horowitz, Inspector General, to the Attorney General, on Top Management and Performance Challenges Facing the Department of Justice (Dec. 2013, updated May 2014), *available at* <https://oig.justice.gov/challenges/2013.htm>.

³⁵ See DEPT. OF JUST., U.S. MARSHALS SERVICE, FY 2016 BUDGET REQUEST AT A GLANCE, *available at* http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/23_bs_section_ii_chapter_-_usms.pdf. See also DEPT. OF JUST., FY 2016 BUDGET SUMMARY, *available at* http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016_budget_summary_pages_5-12.pdf.

³⁶ See Memorandum, *supra* note 32.

³⁷ DEPT. OF JUST., TOTAL DISCRETIONARY BUDGET AUTHORITY AND FULL-TIME EQUIVALENT, FY 2006 – FY 2016, *available at* http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/1._ba_by_position_and_organization_fy06-fy16.pdf.

offenders or expand the number of relatively low level offenders with a modest criminal history who qualify for the “safety valve” that currently exists,³⁸ or some combination thereof.

Some people fear that reforming mandatory minimum laws will reduce the incentives of low level drug dealers (so-called “little fish”) to cooperate with law enforcement authorities in their efforts to go after the organizers and leaders of such activity (so-called “big fish”). Others fear that loosening mandatory minimum laws will result in dangerous criminals being released too soon, thereby threatening to undermine the gains we have made in terms of reduced crime rates.³⁹ Both concerns are, of course, understandable and legitimate.

I do not mean to underestimate the argument that reforming mandatory minimum laws will reduce the incentives for little fish to cooperate against big fish and would concede that lowering mandatory minimum sentences or expanding the currently existing safety valve would reduce some of the leverage that prosecutors currently enjoy to induce cooperation. I would contend, however, that even if our federal mandatory minimum laws were revised, there would still be still plenty of incentives for defendants to cooperate against “bigger fish.” First, those who wish to qualify for the existing (or any expanded version of) the safety valve would still have to provide complete and truthful information to the government, since that is one of the conditions for qualification.⁴⁰ Second, with the exception of the Justice Safety Valve Act, while some of the proposals under consideration would reduce the level of mandatory minimum sentences, they would not eliminate them. Third, it is worth remembering that what we are talking about here is the minimum sentence that a judge must impose. Drug crimes invariably carry statutory maximum sentences that are well above these minimums, so a sentencing judge is always free to impose a higher sentence if he or she believes it is warranted under the circumstances. Fourth, I would note that even if there were no mandatory minimum sentences at all, there would still be incentives for defendants to cooperate in order to obtain a favorable recommendation from the prosecutor, which often carries considerable sway with a sentencing judge. Sentencing judges are far more likely to look favorably on a defendant when the prosecutor says, “Your honor, the defendant has told us everything he knows and is cooperating with our ongoing investigation,” as opposed to when the prosecutor says, “Your honor, we have reason to believe that the defendant has a lot of useful information which we could use, but he has refused to cooperate with our ongoing investigation.” And finally, regardless of the merits of this argument, as a general matter, in this country, people are sentenced based on what they deserve considering the gravity of the crimes they committed. If all we cared about was

³⁸ The safety valve is codified at 18 U.S.C. § 3553(f). Under the current “safety valve,” the offender may qualify for a sentence below the mandatory minimum if he or she satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he or she must be a “mule” or street dealer, in other words, someone at the very bottom of the totem pole in the drug ring). Second, the defendant must provide complete and truthful information to the government (although since the defendant is at the lowest level in the organization, the government is likely to know already what the defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury to anyone. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And fifth, the defendant must have no more than one criminal history point (i.e., no more than one prior conviction which resulted in a sentence of 60 days’ incarceration or less).

³⁹ William G. Otis, *The Case Against the Smarter Sentencing Act*, 26 FED. SENTENCING REP. 302 (June 2014), available at http://www.jstor.org/stable/10.1525/fsr.2014.26.5.302?seq=1#page_scan_tab_contents.

⁴⁰ See *supra* note 38.

leveraging cooperation against other wrongdoers, then we would make all federal crimes involving more than one person, including all “conspiracy” charges, into mandatory minimum offenses. The reason we don’t do that is because it would result in lots of disproportionate sentences, which is precisely what happens now to too many “little fish” involved in the drug trade.

I would further note that to the extent Congress pursues front-end reform by expanding the number of people who might qualify for the safety valve, rather than lowering mandatory minimum sentences, this ought to ameliorate the concerns of law enforcement officials for two reasons. First, as noted above, it is already a requirement that anyone hoping to qualify for the current or any expanded safety valve must provide complete and truthful information to the government. And second, by limiting the safety valve expansion to relatively low level drug dealers, the government could be reasonably assured that it would still be able to exert the same pressure it currently does on those with the most information to provide, specifically, more involved individuals who would not qualify for the expanded safety valve, and who would therefore be subject to the current mandatory minimum penalties unless they render “substantial assistance”⁴¹ to the government.

To those who fear that reforming mandatory minimum laws will invariably lead to increases in crime, I would note that over 30 states have taken steps to roll back mandatory sentences, especially for low level drug offenders, since 2000.⁴² Crime rates have, for the most part, continued to drop in those states. For example, Michigan eliminated mandatory minimum sentencing for most drug offenses in 2002 and applied the change retroactively (nearly 1,200 inmates became eligible for immediate release), yet between 2003 and 2012, violent crime rates dropped 13 percent and property crime rates dropped 24 percent. Texas has implemented a number of changes, including reduced sentences for drug offenders,⁴³ and crime rates are their lowest level in that state since 1968.⁴⁴

⁴¹ See USSG § 5K1.1; 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n), as amended.

⁴² According to the Vera Institute of Justice, at least 29 states have revised their mandatory sentences since 2000. See Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INST. OF JUST. (updated April 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf>. Since then, at least two states (Maryland and Florida) have also revised their mandatory minimum laws. See also *The State of Sentencing 2014: Developments in Policy and Practice*, SENTENCING PROJECT (Feb. 2015), available at http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf; Mike Riggs, *Maryland Passes Mandatory Minimum Sentencing Reform*, FAMILIES AGAINST MANDATORY MINIMUMS (May 26, 2015), available at <http://famm.org/maryland-passes-mandatory-minimum-sentencing-reform/>. For additional information about new sentencing initiatives recently enacted by various states, see Ram Subramanian, Rebecka Moreno & Sharyn Broomhead, *Recalibrating Justice: A Review of 2013 State Sentencing and Correction Trends*, VERA INST. OF JUST. (July 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2013-v2.pdf>.

⁴³ Other changes include more substance abuse and mental health treatment programs in prison and post-release programs in communities, intermediate sanctions facilities for probation and parole violators giving them a short-term alternative instead of a direct return to prison for longer periods of incarceration, expanded use of specialty courts (mental health, drugs, veterans, and prostitution), and alternatives for low-level, nonviolent offenders, including some drug offenders.

⁴⁴ See *Hearing on Prison Reform before Subcomm. on Crime, Terrorism, Homeland Security of the H. Comm. on the Judiciary*, 113th Cong. 2014 (statement of Jerry Madden, Right on Crime), available at

Indeed, in a recent report, The Pew Charitable Trusts found that over a five-year period (from 2008 to 2013), the ten states that instituted reforms and *cut* their imprisonment rates the most experienced *greater* drops in crime (13% average crime rate reduction) than the ten states that *increased* their imprisonment rates the most (8% average crime rate reduction).⁴⁵ Of course, every state is different, and some anomalies exist. What this demonstrates, however, is that we should no longer take it as a given that simply putting more offenders away for longer periods of time is the only -- or even the best -- way of reducing crime in our communities.

Let me turn now to back-end reform proposals.

Our faith in our correction system's ability to successfully rehabilitate offenders has waxed and waned over the years between viewing prison primarily as a place of confinement or as a place that should serve (or at least attempt to serve) as a "correctional" institution for those amenable to and capable of being "corrected." While some hardened and violent offenders will likely always pose a threat to public safety and should remain incarcerated, many offenders, particularly those with only a modest prior record who take advantage of prison rehabilitation and skills training programs, could end up becoming productive, law-abiding members of society, breaking the revolving door cycle that currently exists. In my view, so long as we are realistic and methodical in our approach, and so long as the results are rigorously analyzed and our approaches continuously re-evaluated, we should not give up on those whose lives can be salvaged.

The back-end proposals currently being considered by Congress, including the Recidivism Risk Reduction Act that was introduced by Chairman Chaffetz, (1) direct the Attorney General to develop a robust, scientifically-sound and statistically-valid, post-sentencing risk and needs assessment tool that incorporates both static and dynamic factors; (2) require all eligible offenders (some categories of offenders, such as terrorists, certain repeat offenders, sex offenders, and violent offenders, are ineligible under these proposals) to undergo regular risk assessments to determine whether they are a low, moderate, or high risk of re-offending; and (3) provide incentives to eligible offenders who participate in and successfully complete programs or engage in other productive activities that are designed to meet their particular needs and which will, it is hoped, decrease the likelihood that they will recidivate once released. The incentives are in the form of "earned time credit"⁴⁶ for low and moderate-risk offenders (with low-risk

<http://judiciary.house.gov/cache/files/b214ccf1-503c-4852-ade7-35df2862dd35/madden-testimony.pdf>.

⁴⁵ *Most States Cut Imprisonments and Crime*, PEW CHARITABLE TRUSTS (Nov. 10, 2014), available at <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime>. Overall, imprisonment rates among the states declined by 6% over this time period, while crime rates declined by 16% over this time period.

⁴⁶ Earned time credit should be distinguished from good time credit, which is awarded based on being compliant with prison rules and not causing problems, rather than completing programs or engaging in other productive activities designed to improve the skill sets of inmates, making it less likely that they will recidivate upon release. See 18 U.S.C. § 3624(b) ("a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.").

offenders receiving a greater benefit) or other benefits such as increased phone use or visitation privileges for high-risk offenders.

Predicting the future about anything, including the risk that a particular offender will re-offend upon release, is a difficult undertaking, especially when that prediction is made by someone on a subjective basis. Risk and needs assessment tools, which are already being used by several states,⁴⁷ are designed to help predict in an objective way the recidivism risks for different offenders at different points in the criminal justice system.⁴⁸ Although such tools vary somewhat, they typically utilize an actuarial approach, based on data compiled in a large number of cases, that is designed to assess risks and needs associated with an offender accompanied by an evaluation by professionals of answers to questions on a variety of criminogenic risk factors associated with that offender including criminal history, employment history, financial stresses, educational background, familial relations, residential stability, substance abuse history, associations with criminal peers, anti-social thinking, mental health history, emotional control and aggression, coping mechanisms, problem solving abilities, and other pertinent personality traits.⁴⁹

The various proposals under consideration envision incorporating both “static” and “dynamic” risk factors. The former are factors related to a defendant’s background, past actions, and current conditions that might be predictive of future criminal behavior, while the latter are factors that an individual can change over time through positive (or negative) behavior.

⁴⁷ For a list of some states that have recently expanded their use of risk and needs assessments, see Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INST. OF JUST. (updated April 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf>.

⁴⁸ For a general discussion of risk and needs assessment tools and good time credits, See Paul J. Larkin, Jr., *Managing Prison By The Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL’Y 1 (2014). It should be noted that some, including former U.S. Attorney General Eric Holder, have questioned whether the use of such assessments might undermine the values of individualized and equal justice and might exacerbate unjust disparities in sentencing practices. See, e.g., Eric Holder, U.S. Attorney General, Remarks Before the Nat’l Ass’n of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html>; Jesse Jannetta, Justin Breaux & Helen Ho, *Could Risk Assessment Contribute to Racial Disparity in the Justice System?* URBAN INST. (Aug. 11, 2014), available at http://blog.metrotrends.org/2014/08/risk-assessment-contribute-racial-disparity-justice-system/?utm_source=iContact&utm_medium=email&utm_campaign=Justice%20Policy%20Center&utm_content=September+2014+newsletter; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 4 STAN. L. REV. 66 (2014); Margaret Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43 (2009). Although not as accurate as the “precogs” in the 2002 movie *Minority Report* when it comes to predicting criminal conduct, the evidence strongly supports the notion that risk assessments can be very effective at identifying risk factors that can be of invaluable assistance in devising educational or treatment programs that are likely to reduce the likelihood of recidivism and increase the likelihood of successful re-entry into society. And, of course, if certain controversial, but predictive, variables associated with protected categories are eliminated from risk assessment tools, the less useful those tools become in terms of assessing the risks of recidivism and the need for certain treatments.

⁴⁹ See, e.g., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND SETERTYPES 96–97, 318 n.19 (2006) (listing studies favoring actuarial assessments).

Dynamic factors are, of course, important -- at least to the extent they are scientifically-sound and statistically-valid -- because they give an inmate hope that by taking positive steps to improve their prospects, they can increase the likelihood of ultimately becoming a productive member of society and can shorten the amount of time it will take before he or she can leave prison to be reintegrated into society.

This type of reform also has critics. Some fear that white collar criminals will end up spending very little time in prison and that this may exacerbate racial disparities among the prison population.⁵⁰ I acknowledge that these are possibilities, but still support back-end reforms.

“Back-end” reform is important because huge numbers -- probably over half -- of state and federal inmates have mental health problems, substance abuse issues, and, in many cases, both.⁵¹ Both conditions are associated with staggeringly high rates of recidivism and, prison programs addressing these conditions are sparse. As things stand, we are spending billions of dollars cleaning up the mess left by recidivating offenders who suffer from untreated alcohol, drug dependency, and mental illness issues. In my opinion, we should be spending some of that money helping people overcome these problems at a time when we actually have control over them and can provide incentives, both positive (in the case of prisoners) and negative (in the case of probationers), to participate in and complete such programs.⁵² Until that changes, prisons are likely to remain what they too often are today -- a revolving door.

Helping inmates to overcome addiction and problems with mental illness and teaching them job skills or parenting skills or to be able to read and write, to draft a resume, to complete a job application, to know how to dress for an interview, to know how to respond to questions during an interview, to learn how to balance a checkbook, to know how to respond appropriately to adverse situations at work or in their personal lives — these are all worthwhile ventures that can change their lives, and are certainly a better use of inmates’ time than watching TV.

This is an exciting time for those of all political stripes seeking to reform some of our criminal justice system. In addition to the sentencing proposals I have discussed, Congress is considering, among other things, important regulatory and mens rea reform proposals, proposals

⁵⁰ See, e.g., Dara Lind, *The Best Hope for Federal Prison Reform: A Bill That Could Disproportionately Help White Prisoners*, VOX (Feb. 12 2015), available at <http://www.vox.com/2015/2/12/8019711/corrections-act-prison-race>.

⁵¹ It is estimated that 65% of all inmates meet the medical criteria for substance abuse or addiction, but only 11% receive treatment at federal and state prisons and local jails. See *Behind Bars II: Substance Abuse and America’s Prison Population*, NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV. (Feb. 2010), available at <http://www.casacolumbia.org/addiction-research/reports/substance-abuse-prison-system-2010>.

⁵² Various states have, for example, adopted innovative programs designed to help probationers with substance abuse problems through rigorous testing with the threat of swift and certain, but measured, punishment for those who fail those tests. Such programs include Hawaii’s Opportunity Probation with Enforcement (HOPE) program and South Dakota’s 24/7 sobriety program. A videotaped program with Hon. Larry Long (who devised South Dakota’s 24/7 program) and Hon. Steven Alm (who devised the HOPE program) is available at <http://www.heritage.org/events/2014/08/24-7-sobriety-and-hope>. See also Paul Larkin, *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 116 (Feb. 28, 2014), available at <http://www.heritage.org/research/reports/2014/02/the-hawaii-opportunity-probation-with-enforcement-project-a-potentially-worthwhile-correctional-reform>.

to reform civil asset forfeiture laws, and proposals to reform our juvenile justice system. These are all important issues, worthy of serious debate and consideration. I look forward to working with each of you as you consider these and other proposals to reform our criminal justice system.

I thank you for inviting me here to testify today, and I look forward to answering any questions you might have.