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Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security

October 17, 2019 Oversight Hearing on
"The Federal Bureau of Prisons and
Implementation of the First Step Act"

Mr. Chairman and Members of the Subcommittee:

Thank you for opportunity to testify before the Subcommittee on the October 17, 2019. At the hearing, Chairman Nadler inquired whether Section 404 of the First Step Act, which makes the Fair Sentencing Act of 2010 retroactive, is being implemented as Congress intended. The following supplemental statement addresses that inquiry.

DOJ Has Aggressively Resisted Implementation of Section 404 of the First Step Act, Contrary to the Plain Language of the Statute and Congressional Intent.

As Congress recognized in enacting the Fair Sentencing Act, the former penalty scheme for crack offenses was far too harsh and its excessive severity fell disproportionately on African Americans. But the Fair Sentencing Act was not made retroactive, leaving thousands of people in prison serving unjust sentences under the old law. Congress passed Section 404 of the First Step Act to rectify that problem. As you know, those sentenced under the old law who remain in prison have been incarcerated for at least 10 years, and many for 20 or 30 years, for being convicted of possessing, selling, or conspiring to possess or sell a relatively small amount of crack. Most of these prisoners are at or past the age when recidivism is likely.[1] And most have engaged in rehabilitative programming and have little or no serious disciplinary history.

Unfortunately, the Department of Justice (DOJ) has aggressively resisted implementation of Section 404, by directing prosecutors to make specific arguments that are disingenuous at best. As courts have noted, these arguments are "inconsistent with the plain language," and if adopted, would be "unjust," "draconian and contrary to the remedial purpose of [] Act," "completely impractical," "lead to absurd results," "perpetuate an unconstitutional practice,"

[1] "Even those individuals who commit crimes at the highest rates begin to change their criminal behavior as they age. The data show a steep decline at about age 35." National Institute of Justice, Five Things About Deterrence (May 2016), at 2, available at https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.

"impugn the integrity of the judiciary [and] the judicial proceeding," and "generate disrespect for the criminal justice system."[2] Fortunately, the government has been unsuccessful in most cases thus far, but with significant costs. Protracted litigation in case after case has delayed release of prisoners who have already served more time than the court finds appropriate, and has resulted in a significant waste of resources. What is worse, courts have accepted the government's arguments in a few cases, resulting in the denial of relief for an unfortunate few, while at least 2,000 similarly situated people have been granted relief.[3] Perhaps most concerning, defendants in certain corners of the country are denied counsel, requiring them to face an aggressive adversary on their own. When this happens in a court of appeals, the law is at risk for everyone in that circuit.

Section 404 is a straightforward statute with a clear remedial purpose. It defines a "covered offense" as a violation of a "Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010."[4] It then provides that a court that "imposed a sentence for a covered offense may," in its discretion, "impose a reduced sentence as if" section 2 and 3 of the FSA "were in effect." It prohibits relief in two narrow circumstances: the sentence was already imposed or reduced in accordance with sections 2 and 3 of the Fair Sentencing Act, or a court has denied a Section 404 motion "after a complete review of the motion on the merits." Otherwise, relief is discretionary. Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841 note).

In short, every defendant sentenced for a crack offense before the FSA's date of enactment who is still serving that sentence is eligible for consideration of a reduced sentence. As concisely summarized by its sponsors:

> Section [404] allows prisoners sentenced before the Fair Sentencing Act of

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[2] *See United States v. Rose*, 379 F. Supp. 3d 223, 229-30 (S.D.N.Y. 2019); *United States v. Washington*, 2019 WL 4750575, at *3 (C.D. Ill. Sept. 30, 2019); *United States v. Thompson*, 2019 WL 4040403, at **7-8 (W.D. Pa. Aug. 27, 2019); *United States v. Taylor*, 2019 WL 3852383, at **3, 4-5 (N.D. Ohio Aug. 16, 2019); *United States v. Stone*, 2019 WL 2475750, at *2 (N.D. Ohio June 13, 2019).

[3] According to the Sentencing Commission, 1,674 First Step Act motions had been granted as of July 31, 2019. U.S. Sentencing Commission First Step Act of 2018 Resentencing Provisions Retroactivity Data Report, tbls. 1, 3 (Aug. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20190903-First-Step-Act-Retro.pdf. This figure does not include a number of motions that had been granted by that date, and in any event, it is safe to say that over 2,000 motions have been granted by now.

[4] In 2012, the Supreme Court held that sections 2 and 3 of the FSA applied to defendants who committed the offense before August 3, 2010 if they were sentenced on or after that date. *See Dorsey v. United States*, 567 U.S. 260, 282 (2012).

> 2010 reduced the 100-to-1 disparity in sentencing between crack and powder cocaine to petition the court for an individualized review of their case.[5]

And that is exactly how the vast majority of courts have applied it. Eligibility turns on a simple categorical question: Were the "statutory penalties" for a "statute" of which the defendant was convicted "modified by" section 2 of the Fair Sentencing Act?[6] If so, the defendant is eligible, and the court decides in its discretion whether, and to what extent, to impose a reduced sentence. In doing so, it considers the applicable statutory limits, the

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[5] S. Comm. on the Judiciary, 115th Cong., The First Step Act of 2018 (S.3649) – as introduced by Senators Grassley, Durbin, Lee, Whitehouse, Graham, Booker, Scott, Leahy, Ernst, Klobuchar, Moran, and Coons (Nov. 15, 2018). *See also* 164 Cong. Rec. S7020, S7021, 2018 WL 6004155 (Nov. 15, 2018) (statement of Sen. Durbin) ("What we [] set out to do with this bill … is to give a chance to thousands of people who are still serving sentences for offenses involving crack cocaine under the old 100-to-1 ruling to petition individually. . . to the court for a reduction in the sentencing."); 164 Cong. Rec. S7753-01, S7774, 2018 WL 2018 WL 6624758 (Dec. 18, 2018) (statement of Sen. Feinstein) ("Unfortunately, this new law did not apply retroactively . . . . The bill before us today fixes that and finally makes the Fair Sentencing Act retroactive so that people sentenced under the old standard can ask to be resentenced under the new one."); 164 Cong. Rec. S7745-01, S7748 (Dec. 18, 2018) (statement of Sen. Klobuchar) ("[The bill simply allows people to petition courts . . . for an individualized review based on the particular facts of their case."); 164 Cong. Rec. S7753-01, S7756 (Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime."); Executive Business Meeting on S. 1410, Smarter Sentencing Act of 2013 Before the S. Comm. on the Judiciary, 113th Cong. (Jan. 30, 2014, 50:37) (statement of Sen. Durbin) ("[T]he bill would allow individuals incarcerated for crack cocaine to petition judges . . . for review of their cases on a case by case basis . . . If they can make the case on an individual basis to a judge for adjustment of their sentence, we give them the opportunity under this bill."); 159 Cong. Rec. S6184-01, S6185, 2013 WL 3957272 (Aug. 1, 2013) (statement of Sen. Durbin) ("Because of the timing of their sentences, some individuals are still in jail serving lengthy, pre-Fair Sentencing Act sentences [so the bill] allows individuals sentenced under the old [law] to petition courts … for a review of their case.").

[6] *See, e.g.*, *United States v. Rose*, 379 F.Supp.3d 223 (S.D.N.Y. 2019); *United States v. Boulding*, 379 F.Supp.3d 646 (W.D. Mich. 2019); *United States v. Thompson*, 2019 WL 4040403 (W.D. Pa. Aug. 27, 2019); *United States v. Williams*, 2019 WL 4014241 (N.D. Ill. Aug. 25, 2019); *United States v. Williams*, 2019 WL 4014241 (N.D. Ill. Aug. 25, 2019); *United States v. Moore*, 2019 WL 3966168 (D. Neb. Aug. 22. 2019); *United States v. Taylor*, 2019 WL 3852383 (Aug. 16, 2019); *United States v. Billups*, 2019 WL 3884020, at *2 (S.D.W. Va. Aug. 15, 2019); *United States v. Askins*, 2019 WL 380022 (D. Ariz. Aug. 6, 2019); *United States v. Vanzant*, 2019 WL 3468207 (S.D. Ala. July 31, 2019); *United States v. Terrell*, 2019 WL 3431449 (E.D. Tenn. July 29, 2019); *United States v. White*, 2019 WL 3228335, at *4 (S.D. Tex. July 17, 2019) (collecting dozens of cases); *United States v. Henderson*, 2019 WL 3211532 (W.D. La. July 15, 2019); *United States v. Barber*, 2019 WL 2526443 (D.S.C. June 19, 2019); *United States v. Shaw*, 2019 WL 2477089 (W.D. Wis. June 13, 2019); *United States v. Pride*, 2019 WL 2435685 (W.D. Va. June 11, 2019); *United States v. Smith*, 2019 WL 2092581 (W.D. Va. May 13, 2019); *United States v. Allen*, 384 F.Supp.3d 238 (D. Conn. 2019); *United States v. Davis*, 2019 WL 1054554 (W.D.N.Y. Mar. 6, 2019).

advisory guideline range, the § 3553(a) purposes and factors, and the defendant's post-sentencing conduct.[7]

DOJ, however, seeks to prevent individualized consideration of a reduced sentence for most defendants. According to DOJ, a defendant is *ineligible* when the government says it "could have charged" the defendant with the new threshold quantity under the Fair Sentencing Act — based on uncharged, unconvicted conduct. This theory would "require the court to employ a prosecutor-friendly 'way-back machine'" to hypothesize charges that were never brought and convictions that were never obtained, under a remedial statute intended to benefit defendants subjected to the unfair crack penalty scheme. *United States v. Pierre*, 372 F.Supp.3d 17, 22 (D.R.I. 2019). Courts have rejected this theory because (1) it is contrary to the plain language of Section 404(a); (2) it would exclude a great many prisoners contrary to Congress's remedial intent; (3) Congress did not authorize courts to retroactively amend the indictment or conviction; (4) Congress could not have intended the courts to violate the Constitution; (5) uncharged, unconvicted quantities recited in "hearsay-riddled presentence reports" are unreliable and were often uncontested by the defendant because they made no difference[8]; and (6) if Congress had wanted to burden the courts with fact-finding beyond the elements of conviction, it would have specifically mandated it.

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[7] *See*, *e.g.*, *Boulding*, 379 F.Supp.3d at 652-53; *Rose*, 379 F.Supp.3d at 234–35; *United States v. Mack*, 2019 WL 3297495, at *11 (D.N.J. July 23, 2019); *United States v. Shelton*, 2019 WL 1598921, at *2 (D.S.C. Apr. 15, 2019); *Wright v. United States*, 393 F.Supp.3d 432, 440 (E.D. Va. 2019); *United States v. Valentine*, 2019 WL 2754489, at *5 (W.D. Mich. July 2, 2019); *United States v. Jones*, 2019 WL 3767474, at *4 (W.D. Va. Aug. 9, 2019); *United States v. Vanburen*, 2019 WL 3082725, *3 (W.D. Va. July 15, 2019); *United States v. Martin*, 2019 WL 2571148, at *2 (E.D.N.Y. June 20, 2019); *United States v. Stone*, 2019 WL 2475750, at *2 (N.D. Ohio June 13, 2019); Memorandum at 6, *United States v. Matos*, No. 08-30019 (D. Mass. June 4, 2019); *Boulding*, 379 F.Supp.3d at 656 n.7; *United States v. Smith*, 2019 WL 2092581 at *3 (W.D. Va. May 13, 2019); *United States v. Francis*, 2019 WL 1983254 (S.D. Ala. May 3, 2019); *United States v. Dodd*, 372 F.Supp.3d 795, 797-98 (S.D. Iowa 2019); *United States v. Allen*, 384 F.Supp.3d 238, 242-43 (D. Conn. 2019); *United States v. Simons*, 2019 WL 1760840 at *6 (E.D.N.Y. Apr. 22, 2019).

[8] The information to which the government points for its hypothetical charges is known as "relevant conduct," which by definition, was not charged in an indictment, found by a jury beyond a reasonable doubt, or admitted by the defendant as an element in a guilty plea, U.S.S.G. § 1B1.3, and is permitted to be used only to calculate the advisory guideline range. At best, it is found by a judge by a "preponderance" of "information without regard to its admissibility under the rules of evidence applicable at trial." U.S.S.G. § 6A1.3. No drugs need be actually seized, or actually possessed or sold by the defendant. U.S.S.G. § 2D1.1, cmt. n. 5. It often consists of estimates based on hearsay from informants in law enforcement reports. The government conveys the information to a probation officer, who puts it in a presentence report. The defendant does not object when it makes no difference, for example, a mandatory exceeds the guideline range or the applicable guideline range is not based on drug quantity. *See, e.g.*, *United States v. Taylor*, 2019 WL 3852383, at *3 (Aug. 16, 2019). As Justice Scalia explained, "*judges* determine 'real conduct' on the basis of bureaucratically prepared, hearsay-riddled presentence reports." *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part). And that is why the Supreme Court held that the mandatory guidelines violated the Sixth Amendment.

Another theory of non-eligibility, which the government argued in every available case until DOJ conceded error in the Fourth Circuit two months ago, was that defendants whose sentences were partially commuted by President Obama were *ineligible* because they were now serving a "sentence imposed by the President," which Congress and the courts were powerless to reduce. Courts rejected this argument because Section 404 contains no such limitation, and the government's theory would violate the separation of powers. *See*, *e.g.*, *United States v. Pugh*, 2019 WL 1331684, at *3 (N.D. Ohio Mar. 25, 2019) ("[T]he President has no constitutional role in 'defining crimes or fixing penalties' which are legislative functions," and a commuted sentence is "a modification of [a sentence] previously imposed by a court which Congress and the courts have the power to reduce.").

Even if the defendant is eligible, the government argues, the court has little or no discretion under one of two theories. First, in determining the statutory range "as if" the FSA were in effect, the court must purportedly use uncharged, unconvicted conduct, rather than the facts established by the defendant's conviction; hence, the mandatory minimum and statutory maximum remain the same. Courts have rejected this argument because it would violate the Constitution, Congress knows that it is unconstitutional, and "Congress would not have expected federal courts to then double-down on ... unconstitutional findings in applying the First Step Act." *United States v. Williams*, 2019 WL 4014241, at *5 (N.D. Ill. Aug. 25, 2019).

Second, if the defendant's statutory range is lower but the guideline range is not, the government claims that the court's discretion is circumscribed by the limits in 18 U.S.C. § 3582(c)(2) and a Sentencing Commission policy statement, which require a guideline range that has been lowered by the Commission and prohibit a sentence below the guideline range. Accordingly, the government claims, the court has no discretion to consider mitigating factors to impose a sentence below the guideline range; put another way, the guidelines are mandatory.[9] Courts have rejected this argument because § 3582(c)(2) and its policy statement apply only to retroactive guideline amendments. Section 404 contains no such restrictions, and instead gives the court discretion whether and to what extent to impose a reduced sentence "after a complete review ... on the merits." Further, treating the guidelines as mandatory is unconstitutional.

In sum, although the government is free to argue that the court should exercise its discretion to deny or limit relief for any reason grounded in § 3553(a), it most often concentrates its efforts on claiming that the defendant is ineligible for any individualized review, or telling the courts that they have little or no discretion.

To my knowledge, courts have denied relief based on one of the arguments outlined above in about 20 cases. This not only perpetuates the unwarranted disparities Congress sought to remedy in those cases, but creates unwarranted disparities between these few defendants and

[9] For a typical example, *see United States v. Thompson*, 2019 WL 4040403, at **2-3 (W.D. Pa. Aug. 27, 2019).

the approximately 2,000 similarly situated defendants who have already been granted relief. Assuming these defendants will prevail on appeal, relief for them will be long delayed.

Another source of disparity is government appeals. To my knowledge, the government is appealing less than a dozen of the hundreds of orders rejecting its argument that defendants are ineligible based on hypothetical charges and convictions. Should the government succeed in any case, it will seek to return that person to prison. Yet these defendants are no different than the 2,000 who have already been granted relief. Through this litigation tactic, DOJ is creating unwarranted disparity.

Inconsistent Appointment of Counsel is Another Obstacle to the Full Implementation of Section 404 of the First Step Act.

There are two federal districts (of 94) in which there is no Federal Public Defender Office. In those districts, which rely entirely on panel attorneys to represent people who cannot afford counsel, judges have refused to appoint counsel to represent defendants in Section 404 and similar proceedings. Even in a few districts that do have Federal Public Defender Offices, some individual judges have refused to appoint counsel in these cases. If counsel is not appointed in the district court, counsel is also not appointed on appeal. This threatens the orderly development of the law. In these courts, individuals in prison, many of whom lack basic education much less a law degree, are forced to respond on their own to the kinds of government arguments described above. Without any adversarial process, these courts have already issued numerous denials. Indeed, there have been orders deeming counsel "unnecessary" because the court—without counsel—denied the defendant's Section 404 motion based on its erroneous conclusion that an entirely different statute applies.

Again, I appreciate the opportunity to testify before the Subcommittee and the opportunity to supplement my testimony. As mentioned in my testimony, vigorous oversight is integral to the successful implementation of the First Step Act. I appreciate the Subcommittee's commitment to the success of all parts of the Act.