

**Testimony of Kyana Givens**  
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**Before the Judiciary Committee of the House of Representatives**  
**Subcommittee on Crime, Terrorism, and Homeland Security**

***Hearing on Undoing the Damage of the War on Drugs:***  
***A Renewed Call for Sentencing Reform***

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Chairman Nadler, Subcommittee Chair Jackson-Lee, and members of the Subcommittee, thank you for inviting me to participate in this important hearing. My name is Kyana Givens and I am an Assistant Federal Public Defender in Raleigh, North Carolina. At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all individuals in the federal criminal system because they cannot afford counsel.

## I. INTRODUCTION

Today I will focus my remarks on two drivers of mass incarceration: mandatory minimum sentences and the federalization of local crime. But first, I want to speak a little bit about where my perspective comes from.

I have spent 16 years as a public defender on the front lines of the so-called “War on Drugs.” From this vantage point, I have watched the implementation of law enforcement policies purportedly adopted in the name of ending drug misuse, reducing supply, and making streets safer. I have watched as harsh mandatory minimums and the unjust discriminatory 100-to-1 (now 18-to-1) crack cocaine penalties sent my clients—many young men of color—to crowd our prisons. I have seen the broken families and communities left behind. And I’ve witnessed through my clients that these policies are a failure.

Tens of millions of Americans continue to struggle with addiction and its consequences.<sup>1</sup> Near-daily headlines reporting large scale seizures of a variety of drugs prove that our nation’s choice to address drug dependence through sweeping

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<sup>1</sup> Substance Abuse and Mental Health Serv. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health* 2 (2020), <https://bit.ly/2RvoZQp> (In 2019, approximately 20.4 million people aged 12 or older had a substance use disorder related to their use of alcohol or illicit drugs in the past year).

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and severe law enforcement efforts, rather than public health responses, has failed to alleviate the demand for illicit drugs or decrease overdose deaths.<sup>2</sup>

Meanwhile, these laws and enforcement policies have destroyed communities, broken families, and branded millions of people as felons. Perversely, these extreme levels of incarceration *undermine* public safety. There is overwhelming research that long prison sentences do not deter future crime.<sup>3</sup> Lengthy prison terms weaken family structure, limit economic opportunity, and discourage rehabilitation. Evidence gathered by the Sentencing Commission and the Colson Task Force has shown that many of these oversize sentences can be reduced with no increase in recidivism.<sup>4</sup>

I have been encouraged by the last decade's bipartisan movement toward reform. In 2010, Congress enacted the Fair Sentencing Act to reduce the unjust disparity between crack and cocaine from 100-to-1 to 18-to-1.<sup>5</sup> President Obama granted clemency to almost 2,000 individuals serving lengthy sentences for drug offenses, and during his administration the Department of Justice (Department) curtailed its use of mandatory minimums.<sup>6</sup> Two-and-a-half years ago, Congress passed the First

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<sup>2</sup> See, e.g., U.S. Customs and Border Protection, *CBP Air and Marine Operations and Partners Seize Combined 4 Tons of Cocaine in Eastern Pacific* (Apr. 7, 2021), <https://bit.ly/327YXo6>; News Release, *Law Enforcement Seizures of Methamphetamine, Marijuana Rose During Pandemic*, Nat'l Inst. on Drug Abuse (Mar. 2, 2021), <https://bit.ly/3wOCLxq>; U.S. Customs and Border Control, *Border Patrol Agents Seize Over 800 Pounds of Marijuana* (Apr. 6, 2021), <https://bit.ly/3dabduG>; Stella Chan & Amanda Jackson, *DEA Announces Biggest Domestic Seizure of Meth in Agency History*, CNN (Oct. 14, 2020), <https://cnn.it/3uFeSGO>.

<sup>3</sup> U.S. Dep't of Just., Off. of Just. Programs, Nat'l Inst. of Just., *Five Things About Deterrence* 1 (2016); see also Nat'l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134–40, 337 (Jeremy Travis *et al.* eds., 2014); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 202 (2013); Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 Criminology 357 (2010); Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S (2011).

<sup>4</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://bit.ly/3pPHD2t>; see also Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections at 21 (Jan. 2016), <https://urbn.is/3cJNj8Q>.

<sup>5</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat 2372 (Aug. 3, 2010).

<sup>6</sup> Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, Wash. Post (Jan. 19, 2017) (granting a total of 1,715 clemencies) <https://wapo.st/3cFZHq9>; United States Dep't of

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Step Act of 2018 with overwhelming bipartisan support, reducing sentences for certain drug offenses, curtailing “stacking” of § 924 charges, and making the Fair Sentencing Act of 2010 retroactive.<sup>7</sup> To date, more than 3,770 individuals serving unduly long sentences imposed under the discriminatory 100-to-1 crack-cocaine ratio have seen reductions in their sentences.<sup>8</sup> But other critical aspects of the First Step Act were *not* made retroactive, leaving far too many behind.<sup>9</sup>

Just this week, the Supreme Court ruled unanimously in *Terry v. United States*, 593 U.S. \_\_, Slip Op. (May 4, 2021), that the First Step Act does not entitle individuals convicted of extremely low-level crack offenses to reduced sentences. The petitioner, Tarahrick Terry, pled guilty to possession with the intent to distribute about four grams of crack or, as Justice Sotomayor wrote, “less than the weight of four paper clips.”<sup>10</sup> Justice Sotomayor explained that “[h]is Guidelines range would normally have been about three to four years. But Terry was sentenced as a career offender because of two prior drug convictions committed when he was a teenager and for which he spent a total of only 120 days in jail.”<sup>11</sup> The bipartisan lead sponsors of the First Step Act, Senators Durbin, Grassley, Booker and Lee, urged the Supreme Court to hold that the First Step Act “makes retroactive relief broadly available to all individuals sentenced for crack-cocaine offenses before the Fair Sentencing Act.”<sup>12</sup> But the Supreme Court held that the language of the First Step act would not “bear that meaning.”<sup>13</sup>

The First Step Act of 2018 was just that—a step. But it was not transformational. Since the First Step Act, Congress has not acted to eliminate or reduce pervasive one-size-fits-all mandatory minimums. Without serious reform, prosecutors remain armed with the cudgel of outsize mandatory minimums that they deploy disproportionately against communities of color. Decades of data show that Black, Indigenous, Hispanic, and other people of color are over-represented in mandatory

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<sup>7</sup> Just. In Milestone for Sentencing Reform, Attorney General Holder Announces Record Reduction in Mandatory Minimums Against Nonviolent Drug Offenders (Feb. 17, 2015), <https://bit.ly/2U9hCiV>.

<sup>8</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

<sup>9</sup> Federal Bureau of Prisons, *First Step Act*, <https://bit.ly/3vqD13J> (Jan. 24, 2020).

<sup>10</sup> See FAMM, *Bill Summary: First Step Implementation Act, S.1014* (summarizing sentencing provisions of the First Step Act that were not made retroactive), <https://bit.ly/3wsv5jY>.

<sup>11</sup> *Terry*, 593 U.S. at 5 (Sotomayor, J. concurring).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.*

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minimum sentences.<sup>14</sup> Fortunately, as Justice Sotomayor reminded us this week in *Terry*, “Congress has numerous tools to right this injustice.”<sup>15</sup>

It is impossible to address all the factors that fuel mass incarceration in the United States today. Instead, I will focus on two issues I encounter on a near-daily basis in the courtrooms of Raleigh, North Carolina: (1) the excessive and disparate application of mandatory minimum prison sentences, particularly those for drug offenses,<sup>16</sup> and (2) the shift in focus of federal prosecutors from crimes with obvious interstate connections to crimes that were once thought of as purely local.<sup>17</sup>

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<sup>14</sup> Marit Rehavi and Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. of Pol. Econ. 6 at 1350–1351 (Dec. 2014) (hereinafter Rehavi, *Racial Disparity*); U.S. Sent’g Comm’n, *Quick Facts, Mandatory Minimum Penalties*, <https://bit.ly/2Tu5LLZ>.

<sup>15</sup> *Terry*, 593 U.S. at 8.

<sup>16</sup> Rehavi, *Racial Disparity*, 122 J. of Pol. Econ. 6 at 1323 (Dec. 2014) (finding “black men have 1.75 times the odds of facing such charges, which is equivalent to a 5-percentage point (or 65 percent) increase in the probability for the average defendant. The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics”). We have known for decades that not only are mandatory minimums themselves a “significant driver of this population increase,” *Reevaluating the Effectiveness of Mandatory Minimum Sentences*, Hearing Before the Comm. on the Judiciary at 5, 113th Cong. (Sept. 2013) (Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission), (hereinafter Saris, *Reevaluating Mandatory Minimums*) (reporting a 178.1 percent increase in the number of federal prisoners convicted of an offense carrying a mandatory minimum from 1995 to 2010), <https://bit.ly/3pVQ2Bf>, 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 the greatest impact on prison populations.” U.S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing* at 76 (2004), <https://bit.ly/2TxvGlF> (hereinafter U.S.S.C., *Fifteen Years of Guideline Sentencing*); see also *id.* at 48, 54.

<sup>17</sup> See David Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L.J. 1011, 1012–1021 (2020) (hereinafter, Patton, *Criminal Justice Reform and Guns*); Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 317 (2007) (hereinafter Gardner, *Separate and Unequal*); Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 Duke L. J. 1641, 1660–68 (2002); Daniel Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 374–75, 279 (2001).

## II. MANDATORY MINIMUMS FUEL MASS INCARCERATION AND RACIAL DISPARITIES

The most significant driver of the five-fold increase in the federal prison population has been mandatory minimums, particularly those for drug offenses.<sup>18</sup> In 1971, President Nixon declared drug abuse as “America’s public enemy number one.”<sup>19</sup> “In order to fight and defeat this enemy,” he said, “it is necessary to wage a new, all-out offensive.”<sup>20</sup> Fifteen years later, Ronald Reagan warned that “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles.” We must “do all we can to defeat the drug menace threatening our country.”<sup>21</sup> Congress heeded this command, enacting sweeping and severe penalties like the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986.<sup>22</sup> A decade later, on the eve of his reelection, Bill Clinton reported “we passed ‘three strikes and you’re out’ and the death penalty for drug kingpins and cop killers,” touting the accomplishments of the Violent Crime Control and Law Enforcement Act of 1994.<sup>23</sup> The laws from this era imposed harsh mandatory minimums for a variety of offenses, including drug offenses, and introduced the now-discredited 100-to-1 ratio between crack and powder cocaine.<sup>24</sup> The racial impact built into the design of these laws soon became clear; imposing severe sentences based on a person’s criminal record disproportionately targets people of color, who are more

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<sup>18</sup> See Fed. Bureau of Prisons, *Statistics* (40,330 in 1985, 219,298 in 2013), <https://bit.ly/35kjcRm> (The federal prison population quintupled from 1986 when Congress enacted the current mandatory minimums for drug offenses to its highest point in 2013.).

<sup>19</sup> Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), <https://bit.ly/3wutoTi>.

<sup>20</sup> *Id.*

<sup>21</sup> *Remarks on Signing the Just Say No to Drugs Week Proclamation*, Ronald Reagan Presidential Libr. & Museum (May 20, 1986), <https://bit.ly/3gyPOf3>.

<sup>22</sup> See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (Oct. 12, 1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986).

<sup>23</sup> The President’s Radio Address, 32 Weekly Comp. Pres. Doc. 2282 (Nov. 2, 1996), <https://bit.ly/3xk816X>; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Jan. 25, 1994).

<sup>24</sup> See Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 212 (2019); see also Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Ctr. for Am. Progress (May 10, 2019), <https://ampr.gs/3cIriHv>.

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likely to have a record in the first place because of unequal contact with police and unequal charging practices.<sup>25</sup>

The harms from “War on Drugs” enforcement priorities were exacerbated by the misguided belief—which emerged forcefully during the 1990s—that some of our children are incurable “super-predators” deserving of long prison sentences.<sup>26</sup> We now know from neurodevelopmental research that, in general, adolescents lack the capacity to effectively contemplate the risks and consequences of their actions.<sup>27</sup> Neurologists, psychiatrists, and the U.S. Sentencing Guidelines all recognize that youthful offenders’ brain development continues after age 18 and up to age 26.<sup>28</sup> Yet the stain from the “superpredator” myth has left an indelible mark on our country: current data from the Bureau of Prisons (“BOP”) shows that over 8,000 young people under the age of 26 are federally incarcerated, and many over that age are serving sentences enhanced by prior convictions for crimes committed in adolescence.

One of the most pernicious vestiges of the “tough on crime” rhetoric that fueled the War on Drugs is the outsize power wielded by federal prosecutors. The federal criminal system places enormous power into the hands of the Department and its prosecutors: they control who is charged, what they’re charged with, and often, the severity of a potential sentence.<sup>29</sup> Mandatory minimum statutes equip prosecutors with unchecked power that is inconsistent with due process, the separation of powers, and fundamental fairness. They also distort the traditional role of the judge by improperly transferring sentencing authority from neutral judges to prosecutors,

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<sup>25</sup> Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Center for American Progress (May 10, 2019), <https://ampr.gs/3cIriHv>.

<sup>26</sup> See The Campaign for the Fair Sentencing of Youth, *The Superpredator: The Child Study Movement to Today* (May 2021), <https://bit.ly/2RYN2aY>.

<sup>27</sup> *Miller v. Alabama*, 567 U.S. 460, 492 (2012) (Sotomayor, J. concurring) (Yet “the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.”).

<sup>28</sup> *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (Noting “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”); U.S.S.G. § 5H1.1. (age, including youth may be relevant in determining whether a departure is warranted).

<sup>29</sup> Although the court decides the ultimate sentences, prosecutors can control the options available to the judge through choices about the initial charges levied, whether a plea is offered (and its terms), relief from the mandatory minimum under 18 U.S.C. § 3553(e), and sentencing recommendations.

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and restricting judges from applying the breadth of individualized sentencing discretion otherwise mandated by Congress in 18 U.S.C § 3553(a). The decision to charge mandatory minimums, or not, is entirely in the hands of prosecutors. And that power is routinely abused. Emily Bazelon has explained that “[t]he unfettered power of prosecutors is the missing piece for explaining how the number of people incarcerated in the United States has *quintupled* since the 1980s . . .”<sup>30</sup>

Mandatory minimum sentences also are a major contributor to wrongful convictions because they incentivize unreliable cooperators’ testimony.<sup>31</sup> Often the only way a person facing a mandatory minimum can try to escape it is to cooperate. “This reality introduces an extraordinary incentive to lie. Empirical evidence shows that lying cooperators account for an astounding 15 percent to 45 percent of wrongful convictions.”<sup>32</sup> Further, prosecutors generally decide if and how to reward cooperation. There are only two ways individuals can receive a sentence below the mandatory minimum: safety valve and substantial assistance.<sup>33</sup> To get either form of relief, individuals must satisfy—in the prosecutor’s view—several difficult criteria. As a result, relief under the provisions is granted unevenly, and in a racially disparate manner.<sup>34</sup>

To this day, mandatory minimums fuel mass incarceration and will do so until Congress takes decisive action. Contrary to congressional intent, prosecutors

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<sup>30</sup> Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* xxv (2019).

<sup>31</sup> Reliance on cooperators can also “focus” racial disparities. See, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 673 (2004). Cooperators typically can cooperate only against people they know. *Id.* To the degree that they live racially segregated lives, then law enforcement reliance on them “becomes a kind of focusing mechanism guaranteeing that law enforcement will expend resources in” their “community whether or not the situation there independently warrants it.” *Id.*

<sup>32</sup> *Controlled Substances: Federal Polices and Enforcement*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary at 17, 117th Cong. (Mar. 2021) (Statement of Alison Siegler, Erica Zunkel, and Judith P. Miller) (hereinafter Siegler, *University of Chicago Statement*”), <https://bit.ly/3iHq2s0> (gathering sources).

<sup>33</sup> Cong. Res. Serv., *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions* 3 (2019), <https://bit.ly/2RX0uMm>.

<sup>34</sup> It is up to the government whether to offer 18 U.S.C. §3553(e) mandatory minimum relief or §5K1.1 sentencing reductions for cooperation. In the last five years, white individuals sentenced under primary guideline §2D1.1 received §5K1.1 departures almost twice as often as Black or Hispanic individuals. See USSC, FY 2016 – 2020 Individual Datafiles ((In Fiscal Years 2016 through 2020, 32.5 percent of white individuals sentenced under primary guideline §2D1.1 received §5K1.1 reductions, while only 18.6 percent of Black individuals and 17.7 percent of Hispanic individuals received §5K1.1 reductions).

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routinely seek lengthy mandatory minimum sentences against minimally-involved individuals. Too often, that is because prosecutors depend on the threat of extreme sentences to deter individuals from exercising their right to trial. Meanwhile, enforcement efforts continue to target Black and Brown individuals with mandatory minimum offenses, fueling stark racial disparities in the federal system.

**A. Sentences intended for kingpins and serious traffickers are routinely and mostly applied to minimally-involved individuals and street-level dealers, an enforcement approach that exacerbates racial disparities and does not deter crime.**

When Congress enacted mandatory minimums for drug transactions in 1986 and extended them to conspiracies in 1988, it was taking aim at high-level operators in drug trafficking organizations. It intended that the ten-year mandatory minimum would apply to “kingpins—the masterminds who are really running these operations,” that the five-year mandatory minimum would apply to “middle-level dealers,” and thought that an individual’s role in the offense would correspond to the quantity of drugs involved in the offense.<sup>35</sup> Congress also 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>36</sup>

Congress was mistaken that an individual’s role in the offense would correspond to the quantity involved in the offense.<sup>37</sup> A decade ago, the U.S. Sentencing Commission determined that the “quantity of drugs involved in an offense is not

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<sup>35</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 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>36</sup> H.R. Rep. No. 99-845, pt. 1, at 11–12 (1986).

<sup>37</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).

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closely related to an individual’s function in the offense.”<sup>38</sup> But for most of its history, the Department has charged mandatory minimums indiscriminately, subjecting minimally involved individuals to mandatory minimums intended for kingpins and serious traffickers.<sup>39</sup> Indeed, the category of individuals “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>40</sup>

From 2013 through 2016, the Department, for the first time, discouraged prosecutors from using mandatory minimums against minimally involved individuals charged with drug offenses. Under this “Smart on Crime” policy, the percentage of individuals facing federal drug charges who were convicted of an offense carrying a mandatory minimum dropped to 44.5 percent by 2016,<sup>41</sup> a significant decrease from 2010, when approximately two-thirds of individuals facing drug charges were convicted of such an offense.<sup>42</sup> But still, the vast majority of these cases did not involve violence, or leadership roles: 98.7 percent did not use, threaten or direct the use of violence, 88 percent played no aggravated role, and 77.5 percent had no weapon involvement.<sup>43</sup> In 2017, the Inspector General found that progress had been made, but that “some districts did not develop or update their policies as

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<sup>38</sup> U.S. Sent’g Comm’n, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 168, <https://bit.ly/3iNd8sa> (hereinafter USSC, 2011 Report).

<sup>39</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 individuals charged with drug offenses were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences.” Saris, *Reevaluating Mandatory Minimums Sentences* at 5.

<sup>40</sup> *Id.*

<sup>41</sup> See Letter from Neil Fulton, David Patton, and Jon Sands, Co-Chairs, Federal Public & Community Defenders Legis. Comm., to the Hons. Mitch McConnell & Chuck Schumer, *Re: The First Step Act* (H.R. 5682); *Sentencing Reform* (Aug. 13, 2018), <https://bit.ly/3grpKDX> (hereinafter “Fulton Letter”).

<sup>42</sup> U.S. Sent’g Comm’n, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System (October 2017), <https://bit.ly/3xeR4e6>.

<sup>43</sup> Fulton Letter at 14.

directed, while others developed policies that are in whole or in part inconsistent with *Smart on Crime*.<sup>44</sup>

Any progress that was made was reversed by former Attorney General Sessions' May 2017 directive to charge and pursue those offenses carrying the most substantial sentences. I was glad to see the rescission of the Sessions' Directive by the Department on January 29, 2021,<sup>45</sup> but am troubled that Attorney General Garland has not issued new charging policies that even reinstate, let alone expand, on the "Smart on Crime" policy. The 2017 OIG report found that the delays in promulgating and disseminating that policy limited its impact. Any delays by Attorney Garland in promulgating and disseminating new policies may cripple effort to ameliorate and reverse Trump-era polices, and to redress mass incarceration.

**B. Prosecutors misuse severe mandatory enhancements to coerce guilty pleas and punish defendants for exercising their right to trial.**

For most in the federal system, "the right to a trial is a choice in name only."<sup>46</sup> "Individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose."<sup>47</sup> The potential consequences of going to trial are so extreme that in the federal criminal legal system, trials are "on the verge of extinction."<sup>48</sup> In 2019, about 97.9 percent of federal criminal convictions came from guilty pleas.<sup>49</sup>

Prosecutors wield disproportionate and often unilateral power in charging offenses carrying mandatory minimum sentences. In nonviolent drug distribution offenses,

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<sup>44</sup> U.S. Dep't of Just., Off. of the Inspector Gen., Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative at 9 (June 2017), <https://bit.ly/35jZogO>.

<sup>45</sup> Mem. from Monty Wilkinson, Act'g Att'y Gen., U.S. Dep't of Just., to All Federal Prosecutors on Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing (Jan. 29, 2021), <https://bit.ly/3gB1aiG> (rescinding the Sessions directive and reinstating guidance May 19, 2010 charging guidance from former Attorney General Holder, which directs prosecutors to conduct an individualized assessment of relevant facts in making charging and sentencing decisions.)

<sup>46</sup> Nat'l Ass'n of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* at 6 (2018), <https://bit.ly/3zo7ZwJ> ("Trial Penalty Report").

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.* at 1.

<sup>49</sup> U.S. District Cts., *Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Entering Dec. 31, 2019* (Dec. 2019), <https://bit.ly/2TsmJKv>.

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for example, the simple act of including the weight of the drugs in the charging document can have drastic consequences by invoking the mandatory minimum penalty.<sup>50</sup>

Even after filing the initial charge, prosecutors retain a variety of mechanisms to influence sentencing outcomes and force pleas.<sup>51</sup> Certain federal statutes require mandatory, non-discretionary sentencing enhancements—but they apply only if the prosecution has charged an individual for the conduct triggering the enhancement. Two of the most common enhancements are penalties under 18 U.S.C. § 924(c), and recidivist enhancements charged under 18 U.S.C. § 851. In the First Step Act of 2018, Congress voted on an overwhelmingly bipartisan basis to reform certain aspects of these statutes, but it did not make those changes retroactive. And even after those reforms, the penalties triggered by § 924(c) and § 851 remain harsh and coercive.

**Section 924(c) Penalties.** The penalties attached to § 924(c) are among the most commonly imposed mandatory-minimum sentences in the United States.<sup>52</sup> According to the U.S. Sentencing Commission, convictions for § 924(c) offenses “significantly contribute” to the federal prison population, constituting 14.3 percent of that population.<sup>53</sup> I am all too familiar with the harm wrought by these harsh penalties: the Eastern District of North Carolina has the second highest number of cases involving § 924(c) convictions in the country.<sup>54</sup>

Section 924(c) requires a mandatory consecutive sentence of 5, 7 or 10 years if an individual possessed, carried, brandished or discharged a firearm during or in furtherance of a drug trafficking crime or a crime of violence.<sup>55</sup> In addition, for every “second or subsequent” firearms offense, individuals face a 25-year enhancement.<sup>56</sup> Prior to the First Step Act, the Supreme Court interpreted § 924(c) such that it did

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<sup>50</sup> Mem. from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Just., to All Federal Prosecutors on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://bit.ly/3guWPxD>.

<sup>51</sup> *Trial Penalty Report* at 25–30.

<sup>52</sup> U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 16 (March 2018), <https://bit.ly/3wqZQFM>.

<sup>53</sup> U.S. Sent’g Comm’n, *Quick Facts: Federal Offenders in Prison- March 2021*, <https://bit.ly/3wkMhrw>.

<sup>54</sup> U.S. Sent’g Comm’n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* <https://bit.ly/2SARInD>.

<sup>55</sup> 18 U.S.C. 924(c)(1)(A)(i)–(iii).

<sup>56</sup> *Id.* at 924(c)(1)(C)(i).

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not require a previous final conviction and could include multiple counts in the same indictment.<sup>57</sup> As a result, courts were sometimes required to impose overly harsh, decades-long sentences for charges brought in a single indictment. This practice, called “stacking,” resulted in a sentence of at least 30 years for two counts, 55 years for three counts, and up to hundreds of years, even when the person charged has no prior record, and even when they did not use a gun, or even touch a gun. In the First Step Act of 2018, Congress ended this abusive practice. But many individuals who were punished for exercising their trial right with enhanced 924(c) sentences are still serving prison terms that would not be imposed today.

Consider the case of Robert Bernhardt, or “Bob” to those who know him. Mr. Bernhardt is a 65-year-old U.S. Army Vietnam veteran serving a mandatory life sentence for weapons-for-drugs transactions in the District of Colorado. Mr. Bernhardt was a law-abiding citizen until he began to abuse methamphetamine at the age of 38 and engaged in crime to support his addiction. Although the prosecutor offered a plea deal of 12 years, Mr. Bernhardt exercised his right to a jury trial. Upon conviction, he faced mandatory life because of the “stacking” of his two 924(c) convictions. Were he sentenced today, he would face a 35-year sentence, not life. A federal district judge in Colorado concluded that Mr. Bernhardt “could not be sentenced today as he was in 1998.”<sup>58</sup> During his 25 years in prison, Mr. Bernhardt has maintained a spotless disciplinary record without a single infraction. BOP staff have described him as a “model inmate.” And Mr. Bernhardt’s original prosecutor believes that “his life sentence is now far greater than necessary to achieve the ends of justice in this case,” and Mr. Bernhardt “has done enough time.” Despite this, Mr. Bernhardt’s life sentence remains in place.<sup>59</sup>

Although the First Step Act curtailed the worst abuses of § 924(c), prosecutors still misuse the statute to ratchet up sentences for individuals charged with non-violent

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<sup>57</sup> See *Deal v. United States*, 508 U.S. 129 (1993).

<sup>58</sup> *United States v. Bernhardt*, No. 96-CR-203-WJM, 2020 WL 2084875, at \*2 (D. Colo. Apr. 30, 2020).

<sup>59</sup> Since the passage of the First Step Act of 2018, Mr. Bernhardt has sought a reduction in his sentence two times. In early 2019, Mr. Bernhardt filed pro se motion arguing his stacked 924(c)s were invalid under the First Step Act. The district court recognized that Mr. Bernhardt “could not be sentenced today as he was in 1998,” but concluded that the changes to the 924(c) provisions did not apply retroactively and denied relief. *United States v. Bernhardt*, No. 96-CR-203-WJM, 2020 WL 2084875, at \*2 (D. Colo. Apr. 30, 2020). In June 2020, Mr. Bernhardt tried again, filing a motion for compassionate release. Again, the Court acknowledged that Mr. Bernhardt couldn’t be sentenced to mandatory life today for his crimes, described him as “an exemplary inmate” who found “ways to serve children and the underprivileged,” but denied him relief because it wanted him to serve “half of the sentence” Mr. Bernhardt could have received if he were sentenced today. *United States v. Bernhardt*, No. 96-CR-203-WJM, 2020 WL 4041458, at \*3 (D. Colo. July 17, 2020).

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drug offenses and transfer discretion away from the sentencing judge. The case of my client, “Margo Smith,”<sup>60</sup> illustrates this point. Ms. Smith, a 24-year old college student athlete, juggled low-wage jobs and schoolwork as she tried to complete her education after her school arbitrarily reduced her scholarship. But she could not make ends meet and turned to selling drugs to bridge the financial gap. In 2019, police stopped and searched a car her friend was driving and found less than an ounce of marijuana and methamphetamine. When police searched Ms. Smith, they recovered a gun. Although non-mandatory minimum charges were available, prosecutors charged her with a violation of 18 U.S.C. § 924(c), triggering a five-year mandatory sentence and stripping away the judge’s discretion to tailor a sentence that would reflect her youth and minimal history.

**Section 851 Enhancements.** The opportunity for prosecutors to file § 851 enhancements lends itself to similar abuses. Prior to the enactment of the First Step Act of 2018, if an individual charged with a drug offense had one or more prior convictions of a “felony drug offense,” the prosecutor had the option to file a § 851 enhancement.<sup>61</sup> The prosecutor’s filing would double the otherwise applicable mandatory minimum (from 5 to 10 years, or from 10 to 20 years), or increase it to mandatory life. In practice, the definition of “felony drug offense” allowed prosecutors to seek enhanced mandatory minimums based on relatively minor prior convictions, regardless of how long ago, including simple possession of drugs, misdemeanors in some states, offenses for which the defendant served no jail time, diversionary dispositions where the defendant was not convicted under state law.

Congress expected, based on the Department’s express representation, that prosecutors would file enhancements under 21 U.S.C. § 851 only for “hardened,” “professional criminals.”<sup>62</sup> Instead, prosecutors improperly use § 851 enhancements to coerce individuals to plead guilty and to punish those who exercise their right to trial. A judge and former federal prosecutor explained:

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<sup>60</sup> I have changed my client’s name to protect her privacy.

<sup>61</sup> U.S. Sent’g Comm’n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, <https://bit.ly/3cFXOtO> (hereinafter USSC, § 851 Report).

<sup>62</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).

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The single most important factor that influences the government’s decision whether to file or threaten to file a prior felony information (or to withdraw or promise to withdraw one that has previously been filed) is illegitimate. ... To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one* – not even the prosecutors themselves – thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.<sup>63</sup>

One example is *United States v. Midyett*, 07-CR-874 (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 to 9 years imprisonment (it would have been 4 to 4 ½ years had the law treated crack the same as cocaine), but the government charged him with the 10-year mandatory minimum intended for kingpins despite its own assertion that he played only a minor role. Mr. Midyett declined to plead guilty, at which point the government filed a prior “felony drug offense” information pursuant to § 851. Mr. 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>64</sup>

In the First Step Act of 2018, Congress somewhat blunted the coercive power of § 851 enhancements by reducing the life mandatory minimum to 25 years and the 20-year mandatory minimum to 15 years, and by limiting the applicability of the enhancement to individuals with prior “serious drug offenses,” i.e., those with at least a ten-year statutory maximum for which the defendant served more than 12 months and was released within 15 years of the commencement of the instant offense.<sup>65</sup> But it did not make those changes to the law retroactive, and to this day, thousands of individuals subjected to the unjust law remain locked in prison.

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<sup>63</sup> *Kupa*, 976 F. Supp.2d at 432–34 (E.D.N.Y. 2013).

<sup>64</sup> Tyquan Midyett’s story is relayed in *Kupa*, 976 F. Supp. 2d at 436-37.

<sup>65</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

### C. Mandatory Minimums Exacerbate Stark Racial Disparities in the Federal Legal System

**The Discredited Crack-Cocaine Ratio.** As part of the 1986 drug laws passed during the escalating drug panic, the Anti-Drug Abuse Act of 1986 established mandatory minimum sentences for possession of specific amounts of cocaine but established a 100-to-1 ratio between distribution of powder and crack cocaine. Crack, it was claimed, was more harmful, more dangerous, than powder cocaine. These claims lacked a scientific basis—the two have similar effects.<sup>66</sup> The difference between crack and powder cocaine is that crack contains water and baking soda, and crack use is correlated to low income.<sup>67</sup> A media frenzy, incorporating racial stereotyping associating crack use with Black communities, fed hysterical narratives about inner city crime that spurred an expansive enforcement approach.<sup>68</sup> In *Terry*, Justice Sotomayor explains that “Black people bore the brunt of this disparity. Around 80 to 90 percent of those convicted of crack offenses between 1992 and 2006 were Black, while Black people made up only around 30 percent of powder cocaine offenders in those same years.”<sup>69</sup>

Congress has twice acted to correct the unfairness and racial disparities caused by the crack-cocaine disparity: first, by reducing the ratio to 18-to-1 in the Fair Sentencing Act of 2010, and then by making that change retroactive in the First Step Act of 2018. The demographics of those who have received relief from that change show how Black communities were targeted for crack-cocaine enforcement. Since the First Step Act of 2018’s passage, courts have granted 3,705 motions for a sentence reduction; 91.8 percent of which were for Black individuals.<sup>70</sup> The average reduction in sentence has been six years.<sup>71</sup>

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<sup>66</sup> D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?*, J. Am. Med. Assoc. (Nov. 1996), <https://bit.ly/3cZhWY7>.

<sup>67</sup> Joseph J. Palamar, et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, J. Drug Alcohol Depend. (Apr. 2015), <https://bit.ly/3gw5NdW>.

<sup>68</sup> Drug Pol’y Alliance, *A Brief History of the Drug War* (last visited June 14, 2021), <https://to.pbs.org/3iH6js8>.

<sup>69</sup> *Terry*, 593 U.S. at 3.

<sup>70</sup> U.S. Sent’g Comm’n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* at tbl. 4 (May 2021), <https://bit.ly/2SzsqGj>.

<sup>71</sup> *Id.* at tbl. 6.

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But work remains to be done. Despite overwhelming evidence that distinguishing between crack and cocaine drives flawed policy, crack cocaine is still penalized more harshly than powder cocaine, and prosecutors continue to target Black individuals for enforcement. In fiscal year 2019, over 80 percent of those prosecuted for crack offenses were Black, even though Black individuals make up about 13 percent of the total United States population.<sup>72</sup> Yet studies have shown that upwards of 66 percent crack users are white.<sup>73</sup>

**Disparate charging decisions.** There is overwhelming evidence, stretching back to 1993, that prosecutors disparately charge mandatory minimum offenses and enhancements against Black and Brown individuals.<sup>74</sup> These disparities are overwhelming in the Eastern District of North Carolina. From 2016-2020, 57.5 percent of individuals subjected to a federal mandatory minimum in my district were Black, and 18.4 percent of individuals were Hispanic.<sup>75</sup> But in North Carolina, Black individuals make up only 22.2 percent and Hispanic individuals only 9.8 percent of the total population.<sup>76</sup>

Repeated analyses have also 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 individuals are charged with § 851 enhancements at a higher rate than eligible White individuals.<sup>77</sup> A 2018 analysis by the U.S. Sentencing Commission showed that Black individuals were 42

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<sup>72</sup> U.S. Sent'g Comm'n, *Quick Facts: Crack Cocaine Trafficking Offenses* (FY 2019), <https://bit.ly/3wkMhrw>; U.S. Census Bureau, *United States Quick Facts*, (last accessed Jun. 14, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045219> (U.S. population estimates as of July 2019).

<sup>73</sup> Joseph J. Palamar, et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, J. Drug Alcohol Depend. (Apr. 2015), <https://bit.ly/3gw5NdW> (67.4% in this study); Deborah Vagins & Jesselyn McCurdy, *Twenty Years of the Unjust Federal Crack Cocaine Law*, The Am. Civil Liberties Union; Washington, DC: 2006. (Oct. 2006), <https://bit.ly/3gv98Ks>.

<sup>74</sup> U.S. Gov't Accounting Office, GAO/T-GGD-93-40, *Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them?* at 4 (1993), <https://bit.ly/3xrMmdj>.

<sup>75</sup> See USSC, *FY 2016 – FY 2020 Individual Datafiles*.

<sup>76</sup> United States Census, *Quick Facts: North Carolina*, <https://bit.ly/2SAbdg4> (last accessed on June 15, 2021).

<sup>77</sup> See USSC, *2011 Report* at 257 (30 percent of eligible African American offenders received § 851 enhancements, while 25 percent of eligible white offenders received the enhancement); U.S.S.C, *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).

percent of those eligible for a § 924(c) enhancement, but 51 percent of those against whom the government sought an 851 enhancement, and 57 percent of those convicted under it.<sup>78</sup> Importantly, although Congress has reduced some penalties associated with § 851 enhancements, they still trigger severe mandatory minimums. And even after the First Step Act’s § 851 reforms, prosecutors still disproportionately target black individuals with these enhancements. In the year after the First Step Act was enacted, 53.8 percent of the § 851 of enhancements prosecutors chose to file were against Black individuals.<sup>79</sup>

Similar racial disparities exist when it comes to § 924(c) enhancements. An analysis by the Sentencing Commission showed that Black defendants were 48 percent of those eligible for a § 924(c) enhancement, but 64 percent of those who received it.<sup>80</sup> There are also significant disparities for individuals convicted of multiple counts under § 924(c): Black individuals accounted for more than two-thirds of individuals convicted of multiple counts under § 924(c) but comprised just over half of individuals convicted of § 924(c) overall.<sup>81</sup>

These statistics show that Congress’s failure to make the First Step Act’s changes to § 851 and § 924 retroactive fall hardest on people of color. Correcting this imbalance is not only a matter of fundamental fairness, it is a matter of racial equity.

### **III. FEDERAL INITIATIVES TO CRACK DOWN ON “LOCAL” CRIME DRIVE MASS INCARCERATION AND SYSTEMATICALLY TARGET MINORITY COMMUNITIES.**

Another key driver of mass incarceration in America has been federal prosecutor’s shift of “focus from crimes with obvious interstate connections to crimes once thought of as purely local.”<sup>82</sup> For three decades, federal initiatives touted by prosecutors as the panacea to violent crime have targeted minority communities, with questionable benefit to public safety.<sup>83</sup> Under these initiatives, people who are arrested by state and local police for certain offenses are prosecuted in federal court

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<sup>78</sup> USSC, § 851 Report at 7.

<sup>79</sup> U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* at 16 (May 2021), <https://bit.ly/2SzsqGj>.

<sup>80</sup> U.S.S.C, *Fifteen Years of Guideline Sentencing* at 90 (2004), <https://bit.ly/2TxvGlF>

<sup>81</sup> U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* at 24 (May 2021), <https://bit.ly/2SzsqGj>.

<sup>82</sup> Patton, *Criminal Justice Reform and Guns* at 1011.

<sup>83</sup> *Id.*

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for the express purpose of imposing more severe prison sentences.<sup>84</sup> The people prosecuted are overwhelmingly people of color.”<sup>85</sup>

The Trump Department doubled down on “tough-on-crime” policies that disproportionately targeted Black and Brown communities. Former Attorney Generals Sessions and Barr established a series of task forces and enforcement initiatives that prioritized federal prosecution of drug, gun and immigration offenses—all categories in which non-white individuals are consistently over-represented.<sup>86</sup>

Policymakers must resist pressure to perpetuate and expand these failed strategies as a “rise in crime rates threatens to push cities back toward old patterns, imperiling the many overdue experiments in public safety finally taking place.”<sup>87</sup> But there are troubling signs that the Department will not heed the lessons of the past.

On May 26, 2021, Deputy Attorney General Lisa Monaco announced the Department’s “Comprehensive Strategy for Reducing Violent Crime,” which centers on expanding a nationwide program called “Project Safe Neighborhoods.”<sup>88</sup> Project Safe Neighborhoods, launched by President Bush, was an effort to increase firearm prosecutions nationwide. The federal government hired hundreds of new prosecutors and law enforcement agents to bring federal prosecutions for gun

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<sup>84</sup> *Id.*; see also *Legitimacy and Federal Criminal Enforcement Power*, 123 Yale L.J. 2236, 2246 (2014) (“On the whole, federal prosecution results in a more certain conviction and a likely higher sentence than a defendant would receive were he prosecuted in a local county courthouse.”). [

<sup>85</sup> Patton, *Criminal Justice Reform and Guns* at 1012.

<sup>86</sup> See, e.g., Mem. From Jeff Sessions, Att'y Gen., U.S. Dep't of Just., to all Federal Prosecutors on *Commitment to Targeting Violent Crime* (March 8, 2017), <https://bit.ly/2StYoUJ>; Press Release, Dep't of Just., Attorney Jeff Sessions Announces the Formation of Operation Synthetic Opioid Surge(S.O.S) (Jul. 12, 2018) (“Each participating United States Attorney’s Office (USAO) will choose a specific county and prosecute every readily provable case involving the distribution of fentanyl, fentanyl analogues, and other synthetic opioids, regardless of drug quantity.”), <https://bit.ly/3gBdm33>; Press Release, Dep't of Just., Attorney General William P. Barr Announces Launch of Operation Legend (Jul. 8, 2020), <https://bit.ly/3iJkzkd>.

<sup>87</sup> See Editorial Board, *Violent Crime is Spiking. We Must Still Reimagine Public Safety*, Wash. Post (Jun. 5, 2021), <https://wapo.st/3xpwRSP>.

<sup>88</sup> Mem. from Lisa Monaco, Deputy Att'y Gen., U.S. Dep't of Just., to Department of Justice Employees on *Comprehensive Strategy for Reducing Violent Crime* (May 26, 2021), <https://bit.ly/3guWPxD> (describing Project Safe Neighborhoods as the “leading initiative that brings together federal, state, local, and tribal law enforcement officials, prosecutors, and a broad array of community stakeholders to identify the most pressing violent crime problems in an area and to develop comprehensive solutions to address them”).

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crimes—largely simple possession—that would have otherwise proceeded in state courts.<sup>89</sup> Under the program, which has been in place since 2001, federal prosecutions for “felon-in-possession” have proliferated.<sup>90</sup> Since 1968, it has been a federal crime for anyone previously convicted of a felony to possess a gun—with no requirement that the person used the gun in a crime or traveled across state lines.<sup>91</sup> The overwhelming majority of Project Safe Neighborhoods gun prosecutions focus on felon-in-possession charges, despite the existence of “twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form.”<sup>92</sup> From 2016-2020, 78.5 percent of federal firearm convictions nationally were for being a felon in possession of a firearm.<sup>93</sup>

“[Project Safe Neighborhoods]specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court.”<sup>94</sup> More than half of all Black individuals in the United States live in just 30 cities, all of which were targeted as part of Project Safe Neighborhoods.<sup>95</sup> In the Eastern District of Michigan, “almost ninety percent of those prosecuted under Project Safe Neighborhoods [were] African American.”<sup>96</sup> Likewise, in the Southern District of New York, “testimony show[ed] that more than eighty percent of defendants prosecuted under the project were African American.”<sup>97</sup> And in the Southern District of Ohio, “more than ninety percent” of individuals prosecuted under the program were Black.<sup>98</sup> These are the disparities from cities that collect and disclose their task force priorities and data, or were required to produce discovery about them in civil rights litigation. But there are many local police departments and sheriffs’ offices that do not collect and/or disclose special

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<sup>89</sup> Gardner, *Separate and Unequal* at 311.

<sup>90</sup> Patton, *Criminal Justice Reform and Guns* at 1013–1022

<sup>91</sup> Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1221 (1968).

<sup>92</sup> Gardner, *Separate and Unequal* at 313.

<sup>93</sup> See U.S. Sent’g Comm’n, *FY 2016 – FY 2020 Individual Datafiles*.

<sup>94</sup> Patton, *Criminal Justice Reform and Guns* at 1203.

<sup>95</sup> Emma Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation’s Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143,163 (2018); Gardner, *Separate and Unequal* at 316.

<sup>96</sup> Gardner, *Separate and Unequal* at 313–317.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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enforcement data. Without transparency, special enforcement projects are not accountable to this body or the public. Task forces supported with federal funds should be required to keep and disclose data. These consistent disparities in cities spread across the country show that policies which divert gun crimes to federal court disproportionately subject Black individuals to federal prosecution and sentencing. This is true in the Eastern District of North Carolina, where the government prosecutes Black people in 81.4. percent of felon-in-possession cases.<sup>99</sup>

The racial disparities in federal firearm prosecutions are inextricably linked to the War on Drugs. The disparate enforcement of drug laws against Black and Brown individuals has shaped a criminal justice system in which people of color are overrepresented: A 2021 Sentencing Project report found that Black men are six times more likely than white men to be incarcerated at some point during their lifetimes.<sup>100</sup> And there is little to show in improvements to public safety for this devastating approach: “[E]mpirical research on the relationship between federal gun possession prosecutions and crime rates strongly suggests that the prosecutions have little or no impact.”<sup>101</sup>

The Department’s newest iteration of Project Safe Neighborhoods shows some awareness of these issues, and Senior Justice Department officials have emphasized that Project Safe Neighborhoods will include non-prosecutorial strategies, and “measure progress based on how many crimes were averted, rather than on the number of arrests and prosecutions.”<sup>102</sup> But past experience gives good reason to fear that the prosecutorial component of Project Safe Neighborhoods will dominate, further entrenching stark racial disparities and continuing to drive mass incarceration. In original form, the Project Safe Neighborhoods toolkit included both prosecutorial and non-prosecutorial tools, but the latter were “much less frequently and sporadically implemented.”<sup>103</sup>

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<sup>99</sup> See U.S. Sent’g Comm’n, *FY 2016 – FY 2020 Individual Datafiles*.

<sup>100</sup> The Sentencing Project, *Trends in U.S. Corrections* at 5 (updated May 2021) <https://bit.ly/3vyC6i5>.

<sup>101</sup> Patton, *Criminal Justice Reform and Guns* at 1020–21.

<sup>102</sup> Blake Diaz, ‘Culture of Transparency,’ *Police Overhauls Can Reduce Violent Crime: DOJ* (May 27, 2021), <https://bit.ly/3vmfGQN> .

<sup>103</sup> Patton, *Criminal Justice Reform and Guns* at 1019.

#### IV. Policy Recommendations

President Biden has pledged to move away from the failed War on Drugs by ending the use of mandatory minimums<sup>104</sup> and to eradicate racial inequities in the criminal justice system.<sup>105</sup> These principles should guide the Subcommittee's deliberations about how to respond to the daunting challenge of overincarceration. It is time for the government to adjust its policies to prioritize evidence-based strategies to stop people from entering prison, shorten the length of sentences, and better support individuals who reenter the community from prison. It goes without saying that we cannot incarcerate our way out of a mass incarceration crisis. Professors Alison Siegler, Erica Zunkel, and Judith P. Miller of the Federal Criminal Justice Clinic, have proposed a comprehensive set of policy reforms that could correct many of these problems; I recommend them and incorporate them here.<sup>106</sup>

**End Mandatory Minimums.** The most important step that Congress and the Administration could take to remediate America's harmful and ineffective sentencing would be to enact legislation to end mandatory minimums, especially in drug cases, and apply those changes retroactively. There is widespread, bipartisan agreement that mandatory minimum drug laws are "inhumane, racially discriminatory, waste taxpayer money, and deprive judges of sentencing discretion."<sup>107</sup> Further, any reform legislation must be retroactive: legal reforms that are not unfairly leave far too many behind bars.

Short of repealing all mandatory minimums, there are several existing legislative proposals to address mandatory minimums and make sentencing fairer:

- The First Step Implementation Act would allow courts to apply the sentencing reform provisions of the First Step Act of 2018 to reduce sentences that were imposed prior to the enactment of the FSA, modestly expand the safety valve, and make technical corrections to the First Step Act<sup>108</sup>;

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<sup>104</sup> Joe Biden, *The Biden Plan for Strengthening America's Commitment to Justice*, <https://bit.ly/32l6Abb> (last visited April 12, 2021).

<sup>105</sup> Proclamation 10171, *A Proclamation on Second Chance Month, 2021*, 86 Fed. Reg. 64, 17689–90 (March 31, 2021), <https://bit.ly/328V8ze>.

<sup>106</sup> Siegler, *University of Chicago Statement*.

<sup>107</sup> *Id.* at 17.

<sup>108</sup> First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021).

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- The EQUAL Act (Eliminating a Quantifiably Unjust Application of the Law) would eliminate the crack-powder 18-1 crack ratio.<sup>109</sup>
- Pass legislation to expand safety valve provisions to allow judges to sentence below the mandatory minimum. The Justice Safety Valve Act of 2019 gives courts broad discretion to impose a sentence below a mandatory minimum if the court finds that it is necessary to do so in order to impose a sentence that is not greater than necessary to comply with the statutory purposes of sentencing enumerated in 18 U.S.C. 3553(a). It requires courts to give the parties reasonable notice of its intent to do so and provide a written statement of reasons for imposing a sentence below the mandatory minimum.<sup>110</sup>
- The Mandatory Minimum Reform Act of 2020 would eliminate mandatory minimum sentences for drug offenses.<sup>111</sup>
- The Second Look Act would allow any individual who has served at least 10 years in federal prison to petition a court to take a “second look” at their sentence before a judge and determine whether they are eligible for a sentence reduction or release. The legislation would create a rebuttable presumption of release for petitioners who are 50 years of age or older.<sup>112</sup>
- The Smarter Sentencing Act would reduce the mandatory minimums for certain drug offenses in the Controlled Substances Act (21 U.S.C. § 841(b)(1) and the Controlled Substances Import and Export Act (21 U.S.C. § 960(b)) from 5, 10, and 20 years to 2, 5, and 10 years.<sup>113</sup>
- The MORE Act (Marijuana Opportunity Reinvestment and Expungement Act) would begin to repair the racially-disparate effects of past marijuana

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<sup>109</sup> EQUAL Act, S. 79., 117th Cong. (2021); Reps. Jeffries, Scott, Armstrong, and Bacon Introduce Bipartisan Bill to Eliminate Sentencing Disparity Between Crack and Powder Cocaine (Mar. 9, 2021), <https://bit.ly/3xnewWQ>.

<sup>110</sup> Justice Safety Valve Act of 2019, S. 399, 116th Cong. (2019).

<sup>111</sup> Mandatory Minimum Reform Act of 2020, 116th Cong. (2019).

<sup>112</sup> Second Look Act of 2019, S. 2146, 116th Cong. (2019); Booker, Bass to Introduce Groundbreaking Bill to Give “Second Look” to Those Behind Bars (Jul. 15, 2019). <https://bit.ly/3wrElVA>.

<sup>113</sup> Smarter Sentencing Act, S. 1013, 117th Cong. (2021); Press Release, Durbin, Lee Introduce Smarter Sentencing Act (Mar. 26, 2021), <https://bit.ly/3pV24e4>.

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policy and begin to curb the destructive effects of longstanding federal policy.<sup>114</sup>

- Congress should also allow the classwide scheduling of fentanyl analogues to expire in October 2021.<sup>115</sup> Classwide scheduling returns us to the failed and unjust strategies of the drug war by expanding mandatory minimums and prosecutorial discretion to target communities of color.<sup>116</sup>

In addition to proposals already included in proposed laws, Congress should consider other interventions to ameliorate the severity of the federal legal system:

- Congress should eliminate or reduce recidivist enhancements, by repealing 21 U.S.C. § 851 and amending 21 U.S.C. § 841 and § 960 accordingly;
- Follow the U.S. Sentencing Commission's recommendation to remove individuals with prior drug convictions from the Career Offender directive in 21 U.S.C. § 994(h).<sup>117</sup>
- Congress must act to clarify that the First Step Act of 2018 entitles individuals who commit the least serious crack-cocaine offenses to a reduced sentence.
- Marijuana convictions should not trigger recidivist mandatory minimum enhancements in cases prosecuted in federal jurisdictions where marijuana is legal.
- Marijuana possession in connection with a 924(c) should not be eligible for the five-year mandatory minimum for individuals below the age 26 and first-time federal offenders.

There are also several steps that Congress could take to blunt the coerciveness of the Trial Penalty:

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<sup>114</sup> Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2019–2020); *see also* Siegler, *University of Chicago Statement* at 46–50.

<sup>115</sup> *Extending Temporary Emergency Scheduling of Fentanyl Analogue Act*, Pub. L. 117-12 (2021).

<sup>116</sup> Hearing on “An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce, 117th Cong. 4 n.18 (Apr. 14, 2021) (Testimony of Patricia L. Richman, National Sentencing Resource Counsel for the Federal Public & Community Defenders), <https://bit.ly/3iGCOa4>.

<sup>117</sup> U.S. Sent’g Comm’n, *Report to Congress: Career Offender Sentencing Enhancements* 27 (2016), <https://bit.ly/35kQxvg>; *see also* Siegler, *University of Chicago Statement* at 34–35.

- Under current law, an individual may be sentenced for conduct that a jury has acquitted him or her of at trial. This is deeply unfair, weakens the finality and citizen oversight that a jury trial provides, and disincentivizes defendants from going to trial. The bipartisan Prohibiting Punishment of Acquitted Conduct Act, introduced during the 116th Congress, would eliminate consideration of acquitted conduct by federal courts during sentencing;<sup>118</sup>
- Enact open-file discovery to ensure fair trials, by ensuring that individuals are given full access to all relevant evidence, including any exculpatory information, and grand jury transcripts prior to entry of a guilty plea and trial.

***Curtail the Federalization of Local Crime.*** Congress can also intercede to reduce the footprint of the federal legal system and decrease federal prosecutions for local crime:

- Programs like Project Safe Neighborhoods are driven by federal grant dollars that focus on enforcement-oriented goals and outcomes. Congress should overhaul the Department of Justice's grantmaking strategy to focus on goals of ending mass incarceration, promoting comprehensive public health and safety, and ensuring accountability in policing. Department grant recipients should be required to keep enforcement data like locations, age of arrestees, race, ethnicity and Use of Force criteria.
- This subcommittee should also conduct oversight hearings to examine the Department of Justice's charging and enforcement policies for simple gun and drug possession offenses in majority Black and Brown communities.

***Adopt a Public Health Approach to Drug Misuse and Mental Health:*** It is time for the government to adjust its drug policy to prioritize evidence-based strategies to effectively fight this critical public health issue. Congress should encourage robust partnerships with doctors, psychiatrists, psychologists and public health experts. Further, the government must prioritize delivering quality mental health and substance abuse treatment to incarcerated and reentering individuals by adequately funding substance abuse rehabilitation and reentry centers.

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<sup>118</sup> Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601, 117th Cong. (2021).

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Several legislative proposals under consideration in the 117th Congress hold the potential to move drug policy in our country in the right direction, including:

- The Medicaid Reentry Act of 2021<sup>119</sup> provides a bridge for individuals reentering the community by providing health care 30 days prior to release and on reentry. Ninety-five percent of the more than 2 million adults who are incarcerated in the United States will be released and the transition back into the community is a critical period for those with mental illness and substance use disorder.<sup>120</sup> One study found that risk of a fatal drug overdose is 129 times as high as it is for the general population during the two weeks after release.<sup>121</sup>
- The Mainstreaming Addiction Treatment Act of 2021<sup>122</sup> eliminates the redundant “X-waiver” to prescribe buprenorphine for substance use disorder treatment. Buprenorphine is one of the three medications approved by the FDA to treat opioid use disorder and reduces mortality by up to fifty percent.<sup>123</sup>
- The Support, Treatment, and Overdose Prevention of Fentanyl Act of 2021<sup>124</sup> proposes a comprehensive health- and evidence-based response to fentanyl and its analogues. Rather than turn to policing and incarceration, the STOP Fentanyl Act adopts an evidence-based response to the opioid crisis.

**Ensure Parity in Sentencing Policy.** Finally, Congress must also make structural changes to the criminal justice system to diversify the voices who shape federal sentencing policy. For example, the composition of the U.S. Sentencing Commission shows the pervasive tilt towards law enforcement in sentencing policy. The U.S. Sentencing Commission is tasked, *inter alia*, with “advis[ing] and assist[ing] Congress and the executive branch in the development of effective and

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<sup>119</sup> H.R. 955 (2021).

<sup>120</sup> See Lakeesha Woods et. al., *The Role of Prevention in Promoting Continuity of Health Care in Prisoner Reentry Initiatives*, 103 Am. J. Pub. 830–8 (2013), <https://bit.ly/3mGuA1N>.

<sup>121</sup> See Ingrid A. Binswanger, et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 New Eng. J. Med. 157–65 (Jan. 11, 2007), <https://bit.ly/3uDbMTE>.

<sup>122</sup> H.R. 1384 (2021).

<sup>123</sup> Nat'l Acads. of Sci., Eng'g, and Med, *Medications for Opioid Use Disorder Save Lives* (2019), <https://bit.ly/3uJfWto>.

<sup>124</sup> H.R. 2366 (2021).

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efficient crime policy.”<sup>125</sup> The seven voting members on the Commission are appointed by the President and confirmed by the Senate to serve six-year terms. The Attorney General and the Parole Commission serve as nonvoting, ex officio members of the Commission. But the Commission has no such role for the federal public defenders—who represent most of the individuals in the federal criminal legal system. Congress should improve the quality of, and public confidence in, the U.S. Sentencing Commission’s work by adding a Federal Defender ex officio representative to balance existing representatives from the executive branch. The Judicial Conference has long endorsed the need for this reform.

## V. CONCLUSION

It is a myth that longer sentences improve public safety. The wide net of “tough on crime” policies disproportionately impact people of color, our youth, and vulnerable individuals with addiction and mental illness. In the words of Chairman Nadler, “[m]andatory minimum penalties are unwise, unjust, and unfair. The status quo is unacceptable, and we need to take a hard look at reforming these penalties.”<sup>126</sup> Congress is equipped to tackle these problems and to chart a new path. I urge this Subcommittee to treat these issues with the urgent attention they need and thank the Subcommittee and appreciate the invitation to share my perspective on this important issue.

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<sup>125</sup> 18 U.S.C. § 994.

<sup>126</sup> Press Release, House Committee on the Judiciary, Chairman Nadler Statement for Subcommittee Hearing on “Controlled Substances: Federal Policies and Enforcement,” (Mar. 11, 2021), <https://bit.ly/3gvUSRw>.