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to

United States Senate, Committee on the Judiciary

**Hearing on “Reevaluating the Effectiveness of Federal  
Mandatory Minimum Sentences”**

September 18, 2013

Chairman Leahy, Ranking Member Grassley, and members of the Committee, thank you for the opportunity to provide a written statement for the record for today's hearing, "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences."

Human Rights Watch has been concerned about the flaws in mandatory minimum sentencing schemes for over 15 years. We are very pleased that your Committee is taking up this issue, as we believe it is well past time for Congress to eliminate or significantly restrict mandatory minimum sentences, which we have found often lead to excessive and unfair sentences.

Imprisonment is the most coercive and drastic sanction short of the death penalty that can be lawfully imposed on individuals by government. International human rights standards, particularly the inherent dignity of the individual, the prohibition on inhuman or degrading punishment, and the right to liberty, require that sentences be proportionate to the gravity of the individual's conduct and culpability and should be no longer than necessary to further the purposes of punishment.

### **Case Study: Failure and Reform of the Rockefeller Drug Laws in New York**

In 1973, New York enacted harsh mandatory sentencing laws for drug offenses and for second-time felony offenders. The purpose of the drug laws was to deter people from using or selling drugs and to isolate from society those who were not deterred. "It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment."<sup>1</sup> Strongly supported by Governor Nelson Rockefeller, the new drug laws (commonly referred to as the Rockefeller laws) established a scale of extraordinarily punitive mandatory sentences for the unlawful possession and sale of controlled substances keyed to the weight of the drug involved.

In 1997, Human Rights Watch released a report on the harsh sentences that had resulted from the Rockefeller drug laws entitled *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*. In that report, we documented how the mandatory minimum sentences established by the Rockefeller drug laws disproportionately punished low-level offenders in the state.<sup>2</sup>

In our report we told the story of Roberta Fowler, a twenty-year-old with two children at the time of sentencing. Fowler had previous convictions for possession of drug paraphernalia, prostitution, and larceny.<sup>3</sup> She received a term of four years to life imprisonment for providing \$20 worth of cocaine to an undercover agent. We also noted the case of John Gamble, indicted for selling a \$10 vial of crack cocaine to an undercover police officer. He had one prior felony, for possessing a car four days after

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<sup>1</sup> *People v. Broadie*, 37 N.Y. 2d 100, 115 (1975) (citations omitted), cert. denied, 423 U.S. 950 (1975).

<sup>2</sup> Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2 (B), March 1997, <http://www.hrw.org/reports/1997/usny>.

<sup>3</sup> *Carmona v. Ward*, 439 U.S. 1091 (1979).

it was stolen. He had never been imprisoned. Gamble was convicted after trial and received a ten-to-twenty-year sentence for the cocaine sale.<sup>4</sup>

Mandatory minimum sentences — both in New York and, as described below, elsewhere — often result in sentences that are disproportionate to the offense. The mandatory minimum sentences in New York were punishing people whose actions caused minimal harm, while at the same time having little deterrent effect.

The tide has turned in New York — the state began moving away from its Rockefeller drug laws in the 2000s, first by reducing the length of many mandatory minimums in 2004 and subsequently by completely eliminating many of these excessive mandatory minimums in 2009.<sup>5</sup> Crime rates in the state continue to drop after the elimination of these sentences.<sup>6</sup>

### **Mandatory minimums in the federal system**

Federal crimes with mandatory minimum sentences have proliferated in the past two decades — from 98 in 1991 to 195 in 2011.<sup>7</sup>

Mandatory sentencing at the federal level has been particularly common for drug-related crimes. Sixty percent of federal drug offenders in fiscal year 2012 received a mandatory sentence, accounting for three-quarters of all federal defendants receiving a mandatory minimum sentence.<sup>8</sup> More than a quarter of federal drug offenders (28 percent) received five-year mandatory minimum sentences; almost one-third (32 percent) received 10-year mandatory minimum sentences.<sup>9</sup>

When Congress enacted mandatory minimum sentences for federal drug offenders in 1986 and 1988, it intended those sentences to punish major traffickers and kingpins. But because the sentences are triggered by drug quantities involved in the offense and not by role in drug hierarchies, even low-level offenders receive them. For example, more than two-thirds (68 percent) of street-level dealers (i.e., those who sell directly to users in quantities of less than one ounce) received a mandatory minimum sentence.<sup>10</sup> Harsh penalties based solely on drug type and quantity

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<sup>4</sup> Ibid.

<sup>5</sup> Madison Gray, “A Brief History of New York’s Rockefeller Drug Laws,” *Time* magazine, April 2, 2009, <http://content.time.com/time/nation/article/0,8599,1888864,00.html> (accessed September 17, 2013).

<sup>6</sup> Timothy O’Connor and Tim Henderson, “New York drug-law reforms, drop in crime reduce prison population,” *Journal News*, <http://www.lohud.com/article/20111016/NEWS02/110160330/New-York-drug-law-reforms-drop-crime-reduce-prison-population> (accessed September 17, 2013).

<sup>7</sup> United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, p. 71.

<sup>8</sup> Ibid., p.122.

<sup>9</sup> United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) (accessed September 17, 2013), Table 43.

<sup>10</sup> United States Sentencing Commission, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, p.168, Figures 8-11.

fail to distinguish between varying levels of culpability, and fail to ensure that those who occupy more senior positions in criminal organizations receive higher sentences than peripheral participants.

Mandatory minimum sentencing laws bear heavy responsibility for distortions in federal sentencing, including sentences that are disproportionately severe relative to the individual crime and the offender's culpability. By enacting an increasing number of mandatory minimums, Congress has deprived federal judges of the ability to calibrate sentences according to the specific conduct and culpability of the individual defendant, taking into account the purposes of sentencing. As a practical matter, sentencing decisions have been transferred from an independent judiciary with no personal stake in the outcome of a case to prosecutors, representatives of the executive branch with personal as well as institutional interests in securing convictions. Their choices as to what offenses to charge — and what plea bargains to accept — dictate the sentence.

In the federal system, prosecutors also have the authority under the law to file motions in court that mandatorily increase a defendant's sentence upon conviction based upon certain facts, e.g. past record or possession of a gun in furtherance of a crime. At the prosecutors' discretion, federal drug offenders facing a ten-year mandatory minimum sentence can have their sentence mandatorily doubled to twenty years because of a prior drug conviction; and their sentence can metastasize into a life sentence if they have two prior drug convictions, as shown in the case of Roy Lee Clay:

*Roy Lee Clay, 48 years old, was sentenced by a federal court on August 27, 2013 to life behind bars. He was convicted after trial of one count for a conspiracy to distribute one kilogram or more of a mixture or substance containing heroin. According to the prosecutors he was part of a heroin distribution group centered in Baltimore, Maryland. He obtained heroin in New York between 2009 and 2011 and distributed it to other dealers and to users as well. The mandatory minimum sentence for distributing one kilogram of heroin is ten years. But Clay had two prior drug convictions – one a 1993 federal conviction for possession with intent to distribute 100 grams of heroin and a state drug distribution conviction in 2004– that made him eligible for a mandatory sentence enhancement to life. The prosecutors sought the enhancement and the judge had no choice but to impose that sentence, even though at sentencing she indicated that she thought a thirty year sentence would have been more appropriate.<sup>11</sup>*

Federal law also mandates additional consecutive sentences for drug offenders who possess firearms in connection with their drug crimes.<sup>12</sup> The guns do not have to be used, brandished or discharged and the gun offenses can all be part of the same case. Indeed, defendants who possess

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<sup>11</sup> *United States v. Garcia, et al*, no. 11-cr-0569-CCB (D. Md. 2013); see also Ian Duncan, "Heroin dealer gets mandatory term of life without parole," *Baltimore Sun*, August 27, 2013, <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-heroin-dealer-sentence-20130827,0,6489102.story> (accessed September 17, 2013).

<sup>12</sup> 18 U.S.C. 924(c) (2013).

guns can have gun offenses attached to a conspiracy to commit a drug crime and to the offense of committing that crime. The first gun violation carries a five-year mandatory penalty consecutive to the drug sentence; the second gun offense, and every subsequent one, carries a twenty-five year consecutive sentence. The total sentence adds up quickly:

*Rick Barton sold oxycontin and cocaine in rural Virginia and West Virginia, and at least four times accepted guns as payment for drugs. He was convicted after trial and sentenced to 1020 months (85 years) in prison: 60 months for his conviction of possession with intent to distribute the drugs and 960 months for his conviction on four counts for possessing guns in furtherance of his drug business.<sup>13</sup>*

Mandatory minimums have not only given prosecutors unprecedented power to determine what a defendant's sentence will be, they have ratcheted up the power of prosecutors to secure guilty pleas from federal drug defendants. In 2012, 97 percent of all federal drug convictions were the result of pleas.<sup>14</sup> Regardless of their innocence, the strength of their case, or the weakness of the prosecutor's case, most defendants cannot risk trial because they will face a far greater sentence if convicted after trial than if they plead guilty.

Finally, proponents of mandatory minimums suggest that these sentences help to promote public safety, yet the available evidence shows otherwise. Seventeen states have curtailed or eliminated their mandatory minimum laws and their crime rates have continued to decline.<sup>15</sup>

### **Turning the corner on federal mandatory minimums**

Though Congress is late to reforms, we have been encouraged by recent steps in the direction of sentencing reform. The Fair Sentencing Act of 2010 reduced the statutory penalties for crack offenses by increasing the quantity threshold required to trigger a mandatory sentence. It also repealed the federal five-year mandatory minimum for simple possession of crack cocaine — the first federal repeal of a mandatory minimum since the 1970s.<sup>16</sup>

Senators Rand Paul and Patrick Leahy have introduced the Justice Safety Valve Act, improving on the current federal “safety valve,” which exempts certain drug offenders from otherwise applicable mandatory minimum sentences if their crime is minor, involves no violence, the offender has no or a negligible prior criminal record, and the offender is willing to provide information to the government. Welcome as the existing safety valve is, it leaves far too many defendants subject to mandatory

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<sup>13</sup> *United States v. Barton*, 442 F. Supp. 2d 301 (W.D. Va. August 14, 2006).

<sup>14</sup> United States Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm) (accessed September 17, 2013).

<sup>15</sup> Julie Stewart, “Mandatory Ineffectiveness,” *U.S. News & World Report*, September 2, 2013, <http://www.usnews.com/opinion/articles/2013/09/02/eric-holder-is-right-to-give-courts-more-discretion-on-mandatory-minimums> (accessed September 17, 2013).

<sup>16</sup> Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010).

sentence. The Justice Safety Valve Act would be a substantial improvement as it would give sentencing flexibility to judges in a much broader number of cases involving mandatory minimums. Senators Dick Durbin and Mike Lee have also proposed improvements to the safety valve through their recently introduced Smarter Sentencing Act.

In August 2013, US Attorney General Eric Holder instructed federal prosecutors to try to avoid charges carrying mandatory minimum sentences for certain low-level, nonviolent drug offenders and to refrain from seeking sentencing enhancements based on prior convictions unless the defendant's conduct warranted such severe sentences.<sup>17</sup>

## **Recommendations**

We recommend that Congress continue this momentum and follow the lead of the many states that have decided to eliminate or significantly restrict mandatory minimum sentences.

To the extent that mandatory minimums remain in place, we further recommend that Congress ensure through legislation that the minimum sentences be calculated to be proportionate to the least serious conduct covered by the statute and no greater than necessary to achieve the legitimate goals of punishment.

Congress should eliminate mandatory enhancements based on prior records, and eliminate mandatory consecutive sentences based on firearms or any other additional factor. Judges can take prior records into account in fashioning proportionate sentences.

Congress should establish broader safety valve provisions that authorize judges to sentence below the mandatory minimum, including sentences to probation and community supervision, if the individual circumstances of the case and the individual characteristics of the offender merit such a reduction to serve the interests of justice and further the goals of punishment and a higher sentence would be greater than necessary to further those goals.

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<sup>17</sup> "Attorney General Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates," United States Department of Justice press release, August 12, 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> (accessed September 17, 2013). The criteria for this policy to apply would exclude a substantial share of cases, so it is unclear how significant of an impact this change will have.