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to

United States House of Representatives, Committee on the Judiciary

Over-Criminalization Task Force Hearing on Penalties

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Chairman Sensenbrenner, Ranking Member Scott, and members of the Task Force, thank you for the opportunity to provide a written statement for the record for today's hearing on Penalties.

Americans pride themselves on being a pragmatic and fair people. That pride has been shaken by three decades of punitive sentencing laws that impose disproportionately severe punishment. The laws have given the United States the world's highest rate of incarceration and have spawned widespread and wholly warranted public doubts about the fairness of the US criminal justice system. Once hailed internationally as the land of the free, the United States has become a nation of prisons.

Congress is rightfully concerned about the soaring federal prison population – and the role mandatory minimum sentencing laws for drug offenders have played in its growth. Since 1980, the number of incarcerated federal drug defendants has increased an astonishing 2,024 percent¹ and as of April of this year, just under half of all federal prisoners were convicted of federal drug crimes.² In fiscal year 2013, some sixty percent of federal drug defendants were convicted of charges carrying mandatory minimums – and this figure does not include the unknown number who originally faced a mandatory minimum sentence but avoided it through a plea agreement.³

The critics of mandatory minimums are legion – and their arguments are compelling and grounded in facts, a keen appreciation for the harm unduly long sentences for drug offenses cause individuals, communities, and the country, and by the realization that the country cannot incarcerate its way out of drugs. Human Rights Watch agrees that the elimination of all disproportionately severe sentences or at the very least major reform to federal drug laws is imperative. In this testimony we want to draw attention to how mandatory minimum drug sentencing laws permit federal prosecutors to strong-arm drug defendants into pleading guilty. This coercion blights the federal criminal justice system, and cannot be squared with respect for the right to liberty and to a fair trial. Our statement draws heavily from a Human Rights Watch report released last December, *An Offer You Can't Refuse*, which was the result of dozens of interviews with federal prosecutors, defense attorneys, and judges, the review of hundreds of legal cases and academic articles, and an analysis of United States Sentencing Commission sentencing data.

¹ The Sentencing Project, "The Expanding Federal Prison Population," March 2011, http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2011.pdf (accessed May 27, 2014), p. 2; and Federal Bureau of Prisons, "Offenses," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014).

² Federal Bureau of Prisons, "Population Statistics," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014); and Federal Bureau of Prisons, "Offenses," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014).

³ United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (accessed May 27, 2014), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

Mandatory Sentencing Provisions for Federal Drug Defendants

Prosecutors are able to coerce plea bargains by threatening defendants with: mandatory minimum sentences based on drug quantity; mandatory sentencing enhancements for drug offenders with one or more prior convictions; and mandatory sentences consecutive to the drug sentences when a firearm was involved in the drug offense. Prosecutors offer defendants shorter prison terms if they plead guilty. Defendants who refuse to plead guilty are punished with mandatory sentences that judges – who have been legally bound to impose them – have described as “shockingly harsh,”⁴ “so excessively severe they take your breath away,”⁵ and “unconscionable.”⁶

The willingness of prosecutors to inflict draconian sentences on even low-level drug defendants is illustrated by Sandra Avery’s case.

Sandra Avery was a survivor of childhood sexual abuse who served in the army and the army reserves, earned a college degree, overcame an addiction to crack, became a born-again Christian, and worked as an accountant. But in her early forties, her life spun out of control: she became addicted to crack cocaine again, lost her job, and started delivering and selling small amounts of crack for her husband, a crack dealer.

In 2005, Avery was arrested and indicted by a federal grand jury for possessing 50 grams of crack with intent to deliver, an offense then carrying a mandatory minimum sentence of 10 years. That sentence was itself remarkably long for a low-level drug dealer. But worse was to come. Avery refused to accept a plea agreement that left the 10-year minimum unchanged. Because she would not plead, the government decided to trigger a mandatory sentencing enhancement based on Avery’s earlier convictions for possessing small amounts of crack for her own use. Because of that decision by the prosecutors, when Avery was convicted after trial, the judge had no choice but to enhance her sentence from 10 years to life.⁷

Congress might rightly ask how prosecutors who thought a 10-year minimum sentence was appropriate for Avery could then seek a life without parole sentence. When we asked one of Avery’s prosecutors whether he thought the life sentence was just, he refused to comment.

Mandatory Sentences Based on Weight of Drugs

Most federal drug defendants are prosecuted under laws which key five- and ten-year minimum sentences to the weight of the drugs involved in the offense, regardless of the defendant’s role or culpability. While Congress apparently intended the five- and ten-years to be minimum sentences

⁴ *United States v. Washington*, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).

⁵ Statement of Reasons, *United States v. Kupa*, 2013 U.S. Dist. LEXIS 146922, 9-10 (E.D.N.Y. 2013).

⁶ *United States v. Washington*, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).

⁷ Information on the case of Sandra Avery obtained from documents filed in *United States v. Avery*, United States District Court for the Middle District of Florida, Case No. 8:05-CR-389, which are available on PACER; from Human Rights Watch correspondence with Avery; and from Human Rights Watch telephone interview with James Preston, federal prosecutor, Middle District of Florida, August 6, 2013.

for mid- and senior-level figures in the drug business, prosecutors routinely seek them for low-level players as well.

Take, for example, Jamel Dossie, a 20-year-old small-time street-level drug dealer's assistant who earned about \$140 for acting as a go-between in four hand-to-hand sales totaling 88 grams of crack. Prosecutors charged him with an offense carrying a five-year mandatory minimum.⁸ Depending on how prosecutors choose to exercise their charging discretion, someone hired to drive a box of drugs across town, for example, can face the same mandatory sentence as the major trafficker who orchestrated the delivery and was caught with the box. A defendant involved in a multi-member drug conspiracy can face a mandatory sentence based on the amount of drugs handled by all the co-conspirators, even if the defendant had only a minor role and personally distributed only a small amount of drugs or none at all. For example, Natacha Pizarro Campos was charged as part of a meth selling conspiracy involving between 1.5 and 5 kilograms. She personally sold a little more than 400 grams in five transactions. She pled guilty to the conspiracy to distribute 500 grams or more, for which she was sentenced to 10 years, the mandatory minimum.⁹

In fiscal year 2013, 62 percent of convicted federal drug defendants received mandatory minimum sentences based on drug weight.¹⁰

We do not know how many drug defendants were originally charged with offenses carrying a 10-year mandatory minimum but had the minimum reduced to five years or no mandatory minimum through plea agreements. But our interviews with judges, defense attorneys, and prosecutors made clear that this is a common practice. And it is common practice that if defendants do not agree to plead, they will face the higher charge, even if prosecutors believe it is higher than the defendant deserves. Thus, for example, Anthony Bowens was part of a multi-year 43-person crack conspiracy in a public housing project. He collected money from customers and provided them with the cocaine they purchased according to arrangements made by his bosses. The indictment included only one act involving Bowens, the sale of 63 vials of crack. As a member of a conspiracy that allegedly distributed 50 grams or more of crack, he faced a 10-year mandatory minimum sentence. Prosecutors offered to let him plead guilty to a single count to distribute crack carrying a five-year mandatory sentence under the then-existing law. Because he chose to go to trial, the prosecutors tried him under the original conspiracy charge carrying a ten-year minimum sentence. The judge sentenced him to 15 years, a sentence subsequently reduced to 12 years following the retroactive changes in 2010 to the guidelines for crack cocaine offenses.¹¹

⁸ *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

⁹ Information on the case of Natacha Jihad Pizarro-Campos obtained from documents filed in *United States v. Campos*, United States District Court for the Middle District of Florida, Case No. 6:2010-cr-00191, which are available on PACER.

¹⁰ United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (accessed May 27, 2014), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

¹¹ Information on the case of Anthony Bowens obtained from court documents filed in *United States v. Bowens*, District Court for the Southern District of New York, Case No. 1:04-cr-00048, which are available on PACER and from Human Rights Watch interview with Melinda Sarafa, Anthony Bowens' defense counsel, New York, New York, February 23, 2013.

Mandatory Sentences for Prior Convictions

The provision requiring mandatory sentences for prior convictions is the one that doomed Sandra Avery to die behind bars. Often referred to as a prior felony enhancement, it increases the mandatory minimum based on drug weight when a drug defendant has prior felony drug convictions. The increase is not automatic; prosecutors have complete discretion whether to seek the increased sentence. If they choose to seek an enhancement based on one prior conviction, the defendant's sentence will be doubled, e.g. from ten years to twenty. But if a defendant facing a 10-year mandatory minimum based on the quantity of drugs in his case has two prior convictions, the prosecutor can choose to have the sentence raised to life without parole.

Congress apparently intended the prior felony enhancements to ensure truly hardened, professional traffickers with long records received sufficient punishment. But the statute only requires that the prior convictions were punishable by one year or more – the defendant may never have served any time. And it does not require the prior offenses to be serious. In one recent case prosecutors sought to enhance a defendant's sentence because he had a state conviction for simple possession of marijuana.¹² Moreover, the prior convictions could have happened decades ago: in another recent case, prosecutors sought to enhance a cocaine dealer's sentence based on a marijuana selling conviction that was more than 25 years old.¹³ Surely this is not what Congress intended or wants to see happen today.

According to Judge Mark Bennett, the prior felony sentencing enhancement law has created a situation like a “Wheel of Misfortune:” similarly situated defendants receive dramatically different sentences based solely on a prosecutor's unreviewable decision whether to seek an enhancement for eligible defendants.¹⁴ This arbitrariness and disparity in sentences would be reason enough to eliminate the provision. But even worse, Judge John Gleeson has said, the provision that might be justified if used “against the worst of the worst drug trafficking defendants has instead become a tool to prevent all recidivist drug trafficking defendants from exercising their Sixth Amendment right to trial by jury.”¹⁵ Our analysis of Sentencing Commission data indicates that among defendants eligible for the enhancement based on prior convictions, those who went to trial were 8.4 times more likely to receive the enhancement than those who pled guilty.¹⁶ Prosecutors readily acknowledged to us that they use these enhancements for plea bargaining purposes.

Last year, Human Rights Watch attended the sentencing hearing of a federal drug defendant in a multi-defendant cocaine trafficking conspiracy who had refused to plead guilty despite various sentencing inducements. Shortly before trial, the government upped his minimum sentence from 10

¹² Information on the case of Bill Oscar Lee obtained from court documents filed in, *United States v. Lee*, United States District Court for the Northern District of Alabama, Case No. 5:10-CR-00313, which are available on PACER.

¹³ *United States v. Berry*, 701 F.3d 374 (11th Cir.2012).

¹⁴ *United States v. Young*, No. CR-12-4107-MWB, 2013 U.S. Dist. LEXIS 116042, 22 (N.D. Iowa 2013)

¹⁵ *United States v. Kupa*, No. 11-CR-345, 2013 U.S. Dist. LEXIS 146922, 44 (E.D.N.Y. 2013).

¹⁶ Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse>, p. 52.

years to life by filing a prior felony information with the court based on the defendant's two prior marijuana convictions. The government offered to withdraw the prior felony information if the defendant would plead. Not surprisingly, he did. As the judge noted, the defendant "buckled under [the] pressure and agreed to forgo a trial."¹⁷

Mandatory Sentences for Weapon Involvement

A third mandatory sentencing provision, referred to as 924(c), permits prosecutors to obtain additional consecutive sentences for a drug defendant if a weapon was involved in the drug offense. "Involved" is a term of art – the weapon need not have been carried or fired in connection with a drug crime; if the offender owned the gun, prosecutors will argue he or she did in connection with the drug business, qualifying it for a 924(c) charge. The first 924(c) conviction carries a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and subsequent convictions each carry 25-year consecutive sentences—resulting in grotesquely long sentences for drug defendants when prosecutors "stack" the charges. For example, Marnail Washington, a 22-year-old with no criminal history, was sentenced to 40 years for conviction of possession with intent to distribute crack cocaine and two 924(c) counts.¹⁸ The judge who was required to impose this "shockingly harsh" mandatory sentence said it was "the worst and most unconscionable" he had given in 23 years on the federal bench.¹⁹

Prosecutors have complete discretion whether or not to pursue 924(c) charges. If they do not file the charges and a weapon was involved, the defendant may receive an increased sentence under the sentencing guidelines. The increase under the sentencing guidelines is not as great as that under 924(c) – hence the threat to file 924(c) charges is a powerful way to secure a plea, and to punish those who refuse to plead.

Mary Beth Looney, a Texan who told us she had owned guns all her life, refused a plea offer of 17 years for possessing methamphetamine with intent to distribute and possessing three guns in furtherance of drug trafficking. She went to trial on those charges and on additional charges for conspiracy to possess and for possession of a firearm in connection with that conspiracy. She was sentenced to 45 years in prison – 188 months for the drugs and 360 months for the guns.²⁰ As the court of appeals said there was no evidence that the defendant "brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house. ...[T]he prosecutor exercised his discretion – rather poorly we think – to charge her with counts that would provide for what is, in effect, a life sentence."²¹ (Looney was 52 at time of sentencing.)

¹⁷ *United States v. Kupa*, No. 11-CR-345, 2013 U.S. Dist. LEXIS 146922, 56 (E.D.N.Y. 2013).

¹⁸ *United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004).

¹⁹ *Ibid* at 1309.

²⁰ Information on the case of Mary Beth Looney obtained from documents filed in *United States v. Looney*, United States District Court for the Northern District of Texas, Case No. 7:05-CR-005-R, which are available on PACER; Human Rights Watch interview with Jason Hawkins, federal public defender, Dallas, Texas, April 10, 2013; and from Human Rights Watch email correspondence with Looney.

²¹ *United States v. Looney*, 532 F. 3d 392, 397-398 (5th Cir. 2008).

In Utah, Weldon Angelos, was offered a plea of 15 years (ten years for drugs and five for one gun count) for dealing marijuana. Prosecutors told him if he did not accept that offer, they would issue a superseding indictment with multiple gun counts – a threat they made good on when Angelos went to trial. He was convicted of three 924(c) gun counts for a total sentence of 55 years to run consecutive to whatever sentence would be imposed for the drug charges. Distraught because of the 55-year mandatory gun sentence, the judge sentenced Angelos to just one day on the drug counts.²²

The Trial Penalty

Mary Pat Brown, a former federal prosecutor and senior official in the Justice Department told us that the higher sentences a defendant faces if convicted after going to trial puts “enormous pressure [on defendants] to plea.”²³ Once a choice to consider, plea agreements have become an offer drug defendants dare not refuse. Only three percent of federal drug defendants are willing to risk the “trial penalty” by exercising their right to put the government to its proof. In 1985, before the mandatory minimum drug sentencing laws were enacted, 20 percent of defendants went to trial.²⁴

Using sentencing data from individual cases collected by the United States Sentencing Commission, Human Rights Watch developed statistics that shed light on the size of the trial penalty. We recognize that each case contains a unique mix of factors that result in the final sentence, but our findings nonetheless offer deeply troubling evidence of the high price federal drug defendants pay if they refuse to plead.

Our findings include the following:

- Among all federal drug defendants, the average sentence for those who went to trial was three times longer than for those who pled guilty (16 years versus 5 years, 4 months).
- Among federal drug defendants convicted of offenses carrying mandatory minimum sentences, those who went to trial received sentences that were on average 11 years longer than those who pled guilty (215 months versus 82.5 months).
- The trial penalty exists even for first-time drug offenders with no weapon involved in their offense and who had the same offense level under the sentencing guidelines: those who went to trial had almost twice the sentence length of those who pled guilty (117.6 months versus 59.5 months).²⁵

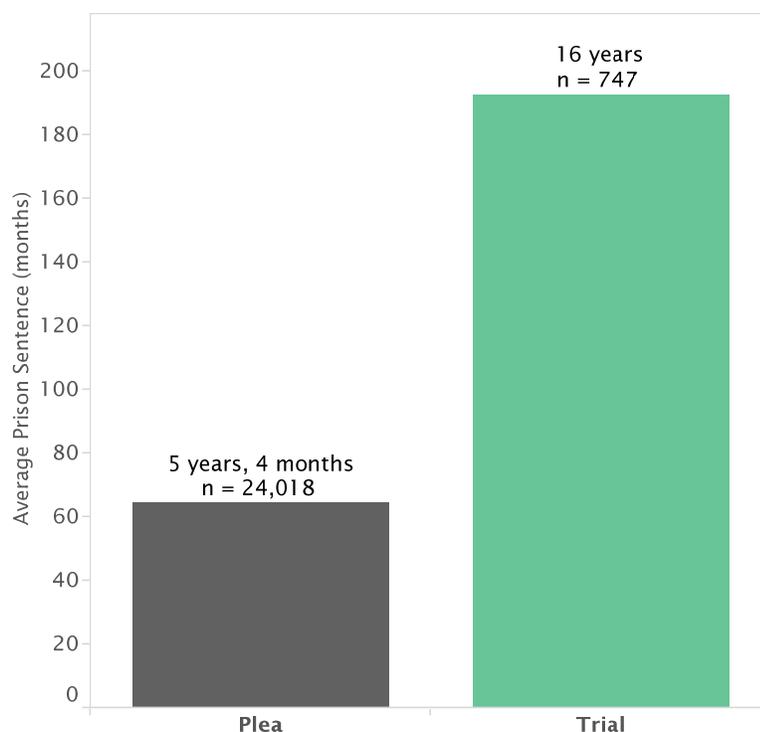
²² Information on the case of Weldon Angelos obtained from documents filed in *United States v. Angelos*, United States District Court for the District of Utah, Case No. 2:02-cr-00708, which are available on PACER.

²³ Human Rights Watch telephone interview with Mary Pat Brown, former prosecutor and senior Department of Justice official, Washington, D.C., June 5, 2013.

²⁴ Ronald F. Wright, “Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background,” Wake Forest University Legal Studies Paper (2005), accessed May 27, 2014, <http://dx.doi.org/10.2139/ssrn.809124>, appendix 4.

²⁵ Human Rights Watch, *An Offer You Can't Refuse*, p. 7-8.

Figure 1: Average Sentence for Federal Drug Defendants by Plea/Trial (FY 2012)



Source: Human Rights Watch analysis of United States Sentencing Commission FY 2012 Individual Datafiles. <http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm>

The Need for Reform

Attorney General Holder has told federal prosecutors that they should avoid charging offenses carrying mandatory minimums for certain low-level nonviolent offenders and that they should also avoid seeking mandatory sentencing enhancements based on prior convictions when the severe sentences are not warranted. His directives are welcome, but they contain easily-exploited loopholes. More importantly, they do not carry the force of law; there is no remedy if a prosecutor chooses to ignore the Attorney General's directives. Judges must still apply mandatory minimum sentencing laws to convicted defendants if prosecutors choose to pursue them.

Although it was not Congress' intent, one of the most dramatic effects of federal mandatory minimum sentencing laws has been to transfer sentencing from an independent federal judiciary with no personal stake in the outcome of a case to representatives of the executive branch with personal as well as institutional interests at stake. While all prosecutors are in a powerful position vis-a-vis criminal defendants, the power of federal prosecutors in drug cases has been strengthened immeasurably by mandatory sentencing laws. Judges cannot sentence lower than the applicable

minimum no matter how egregiously disproportionate that sentence might be to the defendant's role in the offense or conduct. They cannot sentence lower than the minimum even if the prosecutor sought that minimum solely because the defendant refused to plead guilty.

The impact of mandatory minimum sentencing laws on defendants' rights to justice is also deeply troubling. The current sentencing regime has given prosecutors a coercive power that cannot be squared with basic human rights. Most people would agree that a defendant presented with the choice of pleading to a 10-year sentence or receiving a life sentence if convicted after trial is not facing a real "choice." The Supreme Court has ruled that it is constitutionally permissible for prosecutors to confront defendants with far harsher sentences if they refuse to plead. But that doesn't justify threats of hugely disproportionate punishment, nor does it make the practice acceptable under universal norms of fairness and justice. The right to trial is a sham if it can only be exercised at the risk of far higher sentences.

In general, prosecutors seek convictions; they do not seek the lowest sentence that serves the goals of punishment or that is commensurate with the defendant's conduct. When asked about the fairness of sentences that may result from their charging and plea bargaining decisions in individual cases, they place responsibility for sentencing on Congress or the courts. We agree that Congress is responsible for placing mandatory minimum sentencing laws in the hands of prosecutors. But prosecutors are wrong to place responsibility for sentencing outcomes on the courts, since current laws preclude judges from exercising that quintessential judicial role.

Mandatory minimums permit prosecutors to punish defendants with sentences that are grossly disproportionate to the gravity of the offense and that greatly exceed what is needed to satisfy the purposes of punishment. Prosecutors do not believe it is their job to ensure proportionate sentences. There are of course many prosecutors who try to avoid unjust results by seeking fair sentences, but they do so in the context of plea agreements. If the defendant insists on going to trial, all bets are off. At the very least he will be tried on the original charges – even if the prosecutors had brought the charges for bargaining purposes. Worse, many prosecutors threaten to seek even higher sentences – based on prior convictions or gun charges – if the defendant does not plead. They make good on those threats because they do not want to develop a reputation for bluffing; they want their threats to be effective in future cases. The end result are sentences that no one may think fair – but that are inevitable given the toxic mix of plea bargaining and mandatory minimum sentencing laws.

Our criticism of plea bargaining within the context of mandatory minimum sentencing laws has focused on the injustice to individual defendants that can follow. We wish to emphasize that there is nothing inherently wrong with resolving cases through pleas – it reduces the many burdens of trial preparation and the trial itself on all parties involved and the courts. If prosecutors offered modest sentence reductions from proportionate sentences to reward defendants who choose to plead guilty, such a discount would not offend human rights. But prosecutors should not be able to force

defendants to plead to avoid grotesquely long sentences or to punish defendants who go to trial with such sentences.

We would be remiss not to also tell Congress that we believe there is something deeply wrong with a criminal justice system in which almost all cases are resolved with plea agreements. When only three percent of cases go to trial, we have lost the checks and balances that guarantee the system its integrity. There is no independent assessment of the strength of the government's case and scant pressure on prosecutors to ensure cases are based on strong and legally obtained evidence. Absent scrutiny by judge and juries, it is easy for the government to become sloppy and to cut corners.

Recommendations

If Congress wants fair sentences and public faith in the quality of justice in federal drug cases, it must return sentencing discretion to the federal judiciary. It should abolish federal mandatory minimums for drug offenders based on the quantity of the drug involved, the number and nature of prior convictions, or the possession of weapons in furtherance of their drug business. By eliminating these mandatory sentencing laws, Congress would restore to federal judges the authority to ensure drug sentences satisfy the requirements of justice in individual cases – i.e., the sentences are consistent with the gravity of the offense and the purposes of punishment. Prosecutors could still argue for high sentences. But the power of prosecutorial threats and ability to punish defendants who choose to go to trial would be markedly diminished.

Some prosecutors and law enforcement agents argue against reform of mandatory sentencing laws. They claim that the laws provide them leverage to secure cooperation from defendants. But “leverage” is a euphemism for the ability to strong-arm defendants into giving up their right to trial. Getting rid of mandatory minimum sentences would not leave prosecutors devoid of ways to encourage cooperation. The sentencing guidelines offer strong inducements to defendants to plead and to cooperate with the government. In addition, even without mandatory minimum sentences, prosecutors could encourage defendants to plead by making agreements regarding various factors in the guidelines that can raise or lower sentences. We note, finally, that a preponderance of defendants pled guilty before there were mandatory minimums. No doubt they would continue to do so if those laws no longer existed.

Conclusion

We welcome the growing national recognition that excessively harsh laws are not needed to keep communities safe or to hold offenders accountable for their crimes. We are encouraged by the growing number of officials and members of the public who recognize community well-being is best served by fair laws and just sentences, by the appropriate use of alternatives to incarceration, and by restraint – as well as common sense – in the exercise of the governments' penal powers.

We hope this Committee will recognize that any objective assessment of the costs and benefits of the federal mandatory minimum sentencing laws would conclude they have cost too much with little to show for it but bulging prison populations. The United States cannot incarcerate its way out of drug use and abuse. Long mandatory sentences for drug offenders have done far too much harm to individuals, communities, and the federal criminal justice system. We have learned much over the three decades since those laws were enacted. It is time for Congress to act on those lessons.