



RESEARCH AND ADVOCACY FOR REFORM

**Testimony of Marc Mauer
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**Before the House Judiciary
Subcommittee on Crime,
Terrorism and Homeland
Security**

**Hearing on “How Mandatory
Minimum Sentencing Laws Transfer
Power From Judges to Prosecutors”**

June 26, 2007

Thank you for the invitation to testify before the Subcommittee today on the issue of mandatory sentencing. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal justice policy issues. I have been engaged in this work for 30 years and am the author of two books and many journal articles on various aspects of current policy.

This hearing is being held in the wake of the mandatory sentences given to two U.S. Border Patrol agents convicted of the shooting and coverup of an alleged drug smuggler fleeing to Mexico. While the circumstances of the case are unusual, they are in many ways illustrative of the problems that have beset the federal courts since the adoption of mandatory penalties in the 1980s. Reasonable people may disagree about the sentences imposed in these particular cases, but they clearly point to the enhanced significance of prosecutorial discretion in the charging decision and the extremely limited ability of the judiciary to engage with the characteristics of the defendants.

My comments today will focus on the experience with the current generation of mandatory sentencing policies in the federal system, the vast majority of which have been applied to drug offenses, and the lessons we should learn from that in order to develop more effective public policy. My remarks will address three main themes:

- 1) Mandatory sentencing policies have been largely based on false premises, and are particularly unwise in the federal system.
- 2) Mandatory penalties in the federal system have not proven to achieve their objectives.
- 3) A variety of policy initiatives could be enacted that would result in more fair and effective sentencing, and would produce better public safety results.

MANDATORY SENTENCING POLICIES ARE BASED ON FALSE PREMISES

The mandatory penalties adopted by Congress in the 1980s were enacted to respond to rising rates of crime, and in particular to the perceived rise in drug abuse and drug-related crime. The theory behind mandatory penalties was that they would “send a message” to potential lawbreakers that regardless of their personal circumstances they would all be subject to the same prison sentence. In focusing on drug offenses in particular, the rationale was that the scourge of drug abuse could be curbed by harsh and certain penalties.

Unfortunately, the theory and practice of mandatory sentencing was flawed in several key respects:

- *Mandatory sentencing is not always mandatory* – Mandatory sentencing was premised in part on a myth that many judges were imposing inappropriately lenient sentences and therefore, limiting their discretion would result in uniformly punitive prison terms. The criminal justice system, though, is comprised of multiple decisionmaking points at which discretion can be exercised, and in the case of mandatory sentencing, discretion has merely been enhanced in the prosecutors’ offices. As seen in the border patrol case, prosecutors are now more influential than ever in determining which defendants will be charged with offenses carrying a mandatory penalty and which ones will be permitted to plead to a charge below the mandatory. The 1991 report on mandatory sentencing by the United States Sentencing Commission documented that in a sample of cases involving cases where a mandatory could have been charged, the dynamics of plea negotiations

resulted in 35% of defendants pleading guilty to a non-mandatory or reduced mandatory minimum offense. The Commission concluded that “Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised.”

- *Deterrent value of increasing prison terms is very limited* – The effect of mandatory prison terms on deterring crime is limited because they address the “severity” of punishment rather than the “certainty.” Research on criminal penalties over many years has demonstrated that deterrence is far more effective if the risk of apprehension (“certainty”) can be increased rather than raising the level of punishment (“severity”). That is, people who don’t expect to be caught, as few offenders do, are not thinking about the penalties they will face if convicted.
- *Increasing incarceration is less effective as a crime control strategy for drug crimes than for other offenses* – Whatever benefits incarceration may bring to crime control are significantly limited for drug crimes due to the “replacement” nature of the offense. For offenses such as murder or robbery, when an individual is imprisoned there is no “market” for another person to become a robber. But with drug offenses, incarcerating an individual drug seller essentially creates an opportunity for other sellers who seek to meet the demand for illegal drugs. Therefore, the impact on drug availability or use is often very modest.
- *Federal mandates face additional limitations* – Even to the extent that one may believe that mandatory sentences provide some deterrent effect, federal drug penalties are likely to be particularly limited in their impact. This is a function of the fact that despite the rise in federal drug prosecutions, most

drug offenses are still charged as state crimes. Thus, even if a potential offender is considering the consequences of committing a drug crime, he or she will not necessarily assume that it will be charged as a federal crime.

FEDERAL MANDATORIES HAVE NO PROVEN RECORD OF SUCCESS

We now have 20 years of experience with mandatory penalties, so this provides a good opportunity to review that experience and to evaluate the effect of these sanctions on crime control. Overall, there is little evidence to support the idea that mandatory penalties have produced measurable gains for public safety. Key findings in this regard include the following:

- *Effect of federal penalties difficult to isolate* – While some proponents of these laws contend that they have been effective in reducing crime, there are in fact no studies available that isolate any impact of *federal mandatory sentences* in particular, as opposed to the expansion of imprisonment broadly. Since federal convictions represent less than 6% of all convictions annually, and those carrying mandatory penalties only a fraction of those, any contention that mandatory penalties in themselves are responsible for changes in crime rates is extremely speculative. A further limiting factor is that the mandatory penalties merely enhance punishments for behavior that is already criminalized. Therefore, in order to demonstrate any deterrent effect of mandatory penalties, one would need to show that they increase deterrence over and above whatever impact the previous penalties generated.

- *Fluctuations in crime rates demonstrate complexity of the incarceration-crime relationship* – Even to the extent that one might consider mandatory penalties to have contributed to the decline in crime in the 1990s, this experience is directly contradicted by trends immediately following the adoption of new mandatory sentencing laws in the mid-1980s. Nationally, crime rates rose by 17% from 1984-1991. This suggests that at best, rising incarceration has only an inconsistent relationship to crime, and that a host of additional factors are far more influential.
- *Federal mandatory penalties contribute to over-federalization of crime control* – A key development in court processing since the 1980s has been the expansion of federal prosecution, particularly for drug crimes. In many instances this has involved federal charging for cases that many believe would be more appropriately handled under the purview of state justice systems. Mandatory drug penalties have contributed to that shift by establishing more severe penalties than many states would impose, thus encouraging greater levels of federal attention by prosecutors seeking to impose maximum penalties.
- *Drug quantity levels for crack cocaine encourage prosecution of low-level offenders* By establishing mandatory penalties for crack cocaine beginning at just five grams these laws inevitably result in disproportionate prosecutions of low-level offenders, precisely the opposite of what federal policy should encourage. Analysis by the U.S. Sentencing Commission documents that 62.5% of crack cocaine offenders are prosecuted for low-level activities, primarily serving as street-level dealers. In theory, the resources available to the federal system enable it to address the complex and high-profile crimes that may be too difficult for state systems to address, yet the current penalty

structure inappropriately burdens the federal system with cases that state prosecutors are in fact well equipped to handle.

- *Mandatory penalties have exerted a disproportionate effect on communities of color* – In combination with law enforcement practices, federal mandatory minimums have produced unwarranted disparate effects on Black and Latino communities. This has resulted from arrest rates among minorities that are disproportionate to the degree that these groups use or sell drugs, aggravated by the lengthy terms required by mandatory penalties. Mandatory penalties are not necessarily the source of these disparities, but they compound the effect of disparities produced earlier in the system. According to the U.S. Sentencing Commission’s report, *Fifteen Years of Guideline Sentencing*, “...this one sentencing rule [crack cocaine mandatory penalty] contributes more to the difference in average sentences between African-American and White offenders than any possible effect of discrimination.” In addition, these dynamics have contributed to a delegitimization of law enforcement in many communities of color, based on a widespread perception that these communities have unfairly been the target of overly zealous prosecutions. Such trends harm the relationship between law enforcement and the community that is vital to effective policing, while also diverting resources from addressing other community public safety concerns.

RECOMMENDATIONS FOR MORE EFFECTIVE PUBLIC POLICY

Developments over the past two years suggest that now is an appropriate time for Congress to consider the adoption of policies that would utilize court resources more effectively and produce better public safety outcomes. These developments include the *Booker/Fanfan* decisions by the Supreme Court in 2005 granting greater sentencing discretion to federal judges, the 2007 report to Congress by the U.S. Sentencing Commission on *Cocaine and Federal Sentencing Policy*, and state legislative changes. These all suggest growing support for granting the judiciary greater latitude to consider the unique circumstances of each offense in imposing a sentence.

Two consequences of the *Booker* decision are of particular relevance at this point. First, there is no credible evidence that federal judges have abused the newfound discretion granted to them. In fact, the proportion of sentences imposed within the guidelines range is not substantially different than in the pre-*Booker* period, and when judges have sentenced outside the guidelines the available evidence suggests that they have done so in a reasonable manner.

The second consequence of *Booker* is that the mandatory penalty structure is now even more at variance with sentences imposed in non-mandatory cases. Since two-thirds of drug cases involve mandatory sentences, federal sentencing in many ways now is two-tiered, with an overly restrictive sentencing regime for drug cases and a reasonably flexible system for non-drug cases. It is difficult to see how this can be justified under any coherent sentencing philosophy.

After examining the relevant information and analysis, my recommendation to policymakers is that federal mandatory penalties be repealed since they fail to contribute to public safety and produce a variety of negative consequences. Recognizing that such a step may take some time, I would offer the following interim recommendations for Congress to consider in addressing these issues:

- *Request that the U.S. Sentencing Commission conduct a study on mandatory sentencing* – In 1991, the U.S. Sentencing Commission produced a comprehensive report on federal mandatory sentencing which concluded that “...the most efficient way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines...rather than through mandatory minimums.” It is now 16 years since the publication of that report and it would be appropriate for Congress to encourage the Commission to conduct a comprehensive analysis of the effects of mandatory minimums on public safety, deterrence, fairness in sentencing, and racial disparity.
- *Revise drug quantity levels to reduce excessive prosecutions of low-level cases* – As noted above, low thresholds for prosecution of crack cocaine cases in particular have resulted in a distortion of federal priorities. As long as mandatory minimums remain as public policy, establishing a threshold of 500 grams of crack cocaine for imposition of mandatory penalties would restore an appropriate balance in how drug crimes are sentenced.
- *Reconsider the role of drug quantity in federal sentencing* – The use of drug quantities to determine sentencing levels was premised on distinguishing between higher and lower levels of drug offending. But as has become clear over the past 20 years, the quantity of drugs that an individual is caught with

is not necessarily indicative of that person's role in the offense, and often suggests either a greater or lesser role in drug activity than is the case. Mandatory penalties thus unduly restrict judicial consideration of the full circumstances of an individual's conduct as it should be considered in reference to sentencing. Adopting such a policy should be quite feasible since, as we have seen, the U.S. Sentencing Commission has clearly developed a means of defining offender roles in its various reports on cocaine sentencing.

- *Consider expanding the use of the safety valve provision* – The adoption of the safety valve provision in 1994 for convictions carrying mandatory penalties represented a significant step toward providing more appropriate use of discretion by judges. The degree to which it is used in drug cases – currently more than a third of all such cases – is an indication that federal judges perceive the mandatory penalties to be far too severe in many cases. It is equally important to note that there is no evidence of any substantial problem with the sentences imposed in these cases, such as higher rates of recidivism than in comparable cases.

I am aware that there is currently legislation pending to restrict the use of the safety valve in certain drug cases. This seems unwise to me for the primary reason that use of the safety valve is entirely discretionary. A judge who believes that a given defendant is inappropriate for such consideration even if he or she meets the legal requirements is under no obligation to sentence below the mandatory. Therefore, given the significant number of cases in which judges have found the safety valve to provide the most appropriate sentence, Congress should consider expanding the range of cases that could be considered for inclusion. It is difficult to see why providing judges with

the option, but not the requirement, of this sentencing policy would result in any abuse of this prerogative, given the experience to date.

Finally, let me suggest that members of Congress pay attention to trends in the states in regard to sentencing reform. In the period 2004-06, 22 states enacted reforms to their sentencing policies, including expanding access to drug treatment, probation and parole reforms designed to reduce time served in prison, and the development of a greater range of alternatives to prison. These reforms have been embraced by both Republican and Democratic governors, who have recognized that such policies provide more effective approaches to public safety while prioritizing scarce prison resources for offenders who present a substantial threat to the public. These policy changes have generally been met with public support and there are no indications of any serious backlash to these developments. Therefore, Members of Congress may wish to review this experience with a goal of assessing its relevance for federal sentencing policy.

I appreciate the opportunity to present this testimony to the Subcommittee and I would be pleased to work with the members in their ongoing consideration of these issues.



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