



HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

TIMOTHY J. HEAPHY
DIRECT DIAL: 202 • 778 • 2239
EMAIL: theaphy@hunton.com

July 16, 2015

Via E-Mail

The Honorable Charles Grassley
Chairman
United States Senate Judiciary Committee
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
United States Judiciary Committee
Washington, DC 20510

Re: S. 1410 - The Smarter Sentencing Act of 2015

Dear Chairman Grassley and Ranking Member Leahy,

As former United States Attorneys and officials of the United States Department of Justice in both Democratic and Republican administrations, we share a lifelong commitment to enhancing the effectiveness of the American criminal justice system. That shared commitment leads us to speak out in favor of specific proposals to improve the system within which we have worked for so long. Today we write in strong support the Smarter Sentencing Act of 2015, which would if passed make the federal criminal justice system both more just and more effective.

Our support for the Smarter Sentencing Act (“SSA”) is motivated by a financial imperative that threatens the long term stability of the federal judicial system. If we don’t curtail the amount of money needed to sustain the Bureau of Prisons (“BOP”), we will have a critical shortage of resources to devote to the other priorities of the Department of Justice. Enactment of the Smarter Sentencing Act (“SSA”) would save billions of dollars – money that would be available for hiring investigators and prosecutors, providing aid to state and local law enforcement, and supporting viable prevention and reentry programs.



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We do not believe that the SSA would lead to the negative outcomes suggested by others, including some current federal prosecutors and former colleagues of ours from the Department of Justice. We do not believe that the Smarter Sentencing Act will undo the historic reductions in crime we have enjoyed over the past 20 years. Sentencing reforms in various state systems have led to both cost savings and continued decreases in crime. We also do not believe reducing the length of certain mandatory minimum sentences will eliminate the leverage federal prosecutors use to obtain cooperation. Recent data compiled by the Department of Justice since the implementation of the “Smart on Crime” initiative suggests that federal drug defendants will continue to cooperate at approximately the same level as before the reduction in the number of mandatory minimum charges brought by Department prosecutors. Accordingly, we urge you to support this important bill.

I. The Increasing Cost of Incarceration Is Creating a Critical Shortage of Funds Needed for Other Core DOJ Functions

Over the past 35 years, the population of the United States has increased by roughly 1/3. During that same period of time, the federal prison population has increased by almost 800 percent. The United States has just 5% of the world’s population, yet we incarcerate 25% of the world’s prisoners. Approximately ½ of all federal inmates are serving time for drug offenses. Our prisons are overcrowded. There are currently more than 215,000 people in federal prison, which is 40% higher than planned capacity.

Our overcrowded prisons are expensive to build, staff and maintain. Funding for the Bureau of Prisons has steadily increased over the past 20 years, as the prison population has continued to expand. In Fiscal Year 2013, the BOP portion of the overall DOJ budget was approximately 25%. That percentage is projected to increase to 40% by 2022. Numerous factors drive these increases, most significantly the fact that due to historically lengthy sentences in drug offenses, more people enter federal prison than are released each year.

The increasing cost of incarceration has occurred during a time in which the overall DOJ budget has remained flat. Due to the impact of the Congressionally-mandated sequester cuts, the Department’s budget actually fell slightly in 2012. While subsequent budgets avoided the sequester cuts, Department leadership expects at best flat funding levels for the foreseeable future. Level funding actually means a reduction in the Department’s budget, given increases in fixed costs. Accordingly, the percentage of the DOJ budget devoted to the



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BOP will increasingly crowd out funding for other priorities. In other words, the size of the overall budget “pie” will stay the same, while the BOP slice will continue to grow.

The rising percentage of the DOJ budget devoted to incarceration has tremendous opportunity cost. We have already seen and will continue to see fewer dollars devoted to core DOJ operations, as well as grant funding to state and local law enforcement and important prevention and reentry programs. United States Attorneys’ offices have numerous vacancies that they cannot fill given budget constraints. Federal investigative agencies also face critical staffing shortages. The Department makes substantially less money available to state and local law enforcement in the form of COPS, Byrne/JAG, and other grant programs. Grants that support prevention and reentry organizations have also diminished. As state and local law enforcement organizations across the country rely on federal support to fulfill their important mission, we must protect the availability of grants to those key partners. Grants to viable prevention and reentry programs save money in the long run, as they discourage criminal choices and reduce recidivism.

The Justice Department estimated last year that the Smarter Sentencing Act would save \$24 billion over 20 years and eliminate the need to build of over a dozen new prisons and hire of thousands of new correctional officers. Within a flat DOJ budget, that \$24 billion will go to pay for prosecutors, investigators, grants to state and local agencies, and vital prevention programs. If we do not curtail the spiraling growth of correctional spending, the Department will be forced to make drastic cuts in these core functions. We will be woefully unable to fill critical needs unless we curtail the snowballing cost of incarceration.

II. Reductions in Mandatory Minimum Sentences Will Not Lead to Increased Crime

Since 2000, 29 states have enacted laws limiting mandatory penalties, increasing judicial discretion, and funding additional treatment and community supervision programs. In Michigan, the state legislature eliminated all mandatory minimum sentences in 2002. Since then, the state has closed 20 prisons and lowered correctional spending by almost 10 percent. In Kentucky, legislators modified sentencing rules to increase community supervision and evidence-based alternatives to incarceration for non-violent drug offenders. The state prison population decreased by 3000 inmates, at a cost savings projected to reach of \$400 million by the end of this decade. In Texas, the legislature shifted funding from incarceration to addiction treatment for nonviolent offenders, and modified the state’s parole policy. These reforms reduced the Texas state prison population by 5000 inmates and saved millions of



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dollars. Similar reforms have been enacted with bipartisan support in North Carolina, Pennsylvania, and Ohio.

Every state which has shifted funds from incarceration to prevention has experienced subsequent reductions in crime. In Michigan, serious violent crime declined by 13 percent and property crime declined by 24 percent in the 10 years after the sentencing reforms were enacted. In Kentucky, the state saw drops in murder, rape, robbery and assault in the first year following the sentencing reforms. Recidivism also declined immediately – 4% in the first year, with further reductions projected in years ahead. Similar results have been achieved in Texas, where the state's crime and recidivism rates are down sharply since sentencing reforms were enacted.

The results of these state-level reforms provide a powerful rebuttal to the argument that reducing mandatory minimum sentences will roll back the historic reductions in crime we have experienced in recent years. They show that sentencing reform not only saves money, but also helps achieve community safety. We believe that failure to act boldly to curtail the cost of incarceration is more likely to lead to increases in crime, as it will diminish the Department's ability to fund essential functions. While it is difficult to establish why crime rises or falls, we believe the daily work of federal, state and local law enforcement agencies have a more direct impact on the crime rate than the length of criminal sentences. The SSA reflects that reality and is more likely to reduce crime than our current system of unsustainable growth in prison spending.

III. Decreased Reliance on Mandatory Minimum Charges Has Not Decreased The Number of Guilty Pleas or Amount of Cooperation in Federal Drug Cases

We also disagree with the notion that reductions in mandatory minimum sentences in drug cases will make it more difficult for federal prosecutors to obtain cooperation from drug defendants and resolve cases against substantial drug traffickers. Our experience on the front lines of these cases has taught us that cooperation is primarily motivated by swift and certain punishment, not on the disproportionate length of a mandatory minimum sentence. Defendants will more readily cooperate if they know that their charge will likely lead to conviction and punishment. While the length of that punishment has an impact, the certainty of incarceration is much more persuasive.



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The Smarter Sentencing Act maintains mandatory minimum sentences, which we believe continue to be an important tool for federal prosecutors when used appropriately. If the SSA becomes law, Assistant United States Attorneys will still be able to obtain substantial mandatory sentences against sophisticated drug dealers. The changes proposed in the SSA will not impact drug defendants who carry guns or commit other violent crimes. It will not apply to drug offenses that take place near schools or parks. It will not alter the factors within the Sentencing Guidelines which judges consider in imposing sentences in drug cases – facts like a defendant’s managerial role or the fact that distributed drugs cause a specific death or serious bodily injury. The bill does not modify the Continuing Criminal Enterprise or RICO statutes, which federal prosecutors have effectively used to dismantle large-scale drug organizations. These provisions of law will continue to provide the statutory apparatus used by AUSAs to remove dangerous drug sellers from our communities.

The SSA’s proposed reduction in the length of certain mandatory sentences is a tailored reform which allows us to maintain the leverage of certain punishment, yet reduce the amount of time and ultimately numbers of people serving time in our federal prisons. The SSA strikes the appropriate balance between maintaining leverage and saving money. It will allow federal prosecutors to separate the more dangerous offenders who merit lengthy incarceration from the lower-level, non-violent drug defendants who may be appropriately punished with lesser periods of incarceration.

In 2013, the Attorney General announced his “Smart on Crime” initiative, which directed all federal prosecutors to refrain bringing a mandatory minimum drug charge unless the individual defendant triggered a specific aggravating factor, such as possession of a weapon, involvement in a substantial drug trafficking organization or criminal gang, or significant criminal history. In the year before the Smart on Crime charging policy took effect, roughly 64 percent of federally-charged drug trafficking offenses carried a mandatory minimum sentence. Last year, the new policy brought that number down to approximately 51 percent – a reduction of 20 percent relative to the prior year.

Since the Department implemented the Smart on Crime initiative, drug defendants have continued to cooperate and plead guilty at approximately the same percentages as they did when the Department more aggressively utilized mandatory minimum charges. Even though mandatory minimum charges have been brought less frequently, the percentage of cases in which the defendant provides “substantial assistance to law enforcement” and earns a reduction in sentence has remained exactly the same. The number of guilty pleas in federal



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drug cases has also remained steady. In the year before Smart on Crime took effect, federal prosecutors secured guilty pleas in approximately 97 percent of drug trafficking cases. A year later, despite significant reductions in the use of mandatory minimums, this percentage stands at 97.5. And perhaps most significantly, the federal prison population actually declined in 2014, the first reduction in 32 years.

This data provides a powerful counterpoint to the argument that reduced reliance on mandatory minimums will remove an essential tool necessary to successfully prosecute drug defendants. It rather demonstrates that federal charges alone provide powerful incentive for cooperation and resolution in drug cases. These numbers show that we can simultaneously reduce crime and lower prison populations.

V. Conclusion

The Smarter Sentencing Act has generated a great deal of bipartisan support in Congress and among criminal justice professionals across the country. We are impressed and encouraged by the diversity of voices in support of this legislation, and we hope that consensus leads to its passage. As United States Attorneys and law enforcement professionals who served in different administrations, we want to add our views to the discussion. While we do not typically agree on every policy proposal, we collectively agree that the reforms proposed by the SSA will improve our criminal justice system and ultimately lead to safer communities. That is a goal we know all of you share.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Timothy Heaphy".

Timothy J. Heaphy
Former United States Attorney, Western District of Virginia

Richard J. Pocker
Former United States Attorney, District of Vermont

Tristram J. Coffin
Former United States Attorney, District of Vermont



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Mike McKay
Former United States Attorney, Western District of Washington

Jenny A. Durkan
Former United States Attorney, Western District of Washington

Marcos D. Jimenez
Former United States Attorney, Southern District of Florida

Timothy Q. Purdon
Former United States Attorney, District of North Dakota

Matthew D. Orwig
Former United States Attorney, Northern District of Texas

Ronald C. Machen, Jr.
Former United States Attorney, District of Columbia

Pete Strom
Former United States Attorney, District of South Carolina

Brendan V. Johnson
Former United States Attorney, District of South Dakota

Jerry E. Martin
Former United States Attorney, Middle District of Tennessee

David B. Barlow
Former United States Attorney, District of Utah

Richard A. Rossman
Former United States Attorney, Eastern District of Michigan

Neil H. MacBride
Former United States Attorney, Eastern District of Virginia



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Brett L. Tolman
Former United States Attorney, District of Utah