Written Statement of the Federal Criminal Justice Clinic at the University of Chicago Law School

Submitted to the Senate Committee on the Judiciary

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

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Alison Siegler
Associate Clinical Professor of Law & Director, Federal Criminal Justice Clinic

Erica K. Zunkel
Clinical Instructor, Federal Criminal Justice Clinic
The Federal Criminal Justice Clinic at the University of Chicago Law School strongly supports the Smarter Sentencing Act of 2013 (“SSA”) and the Justice Safety Valve Act of 2013 (“JSVA”). By shortening mandatory minimum sentences, expanding the safety valve, and making the Fair Sentencing Act (“FSA”) fully retroactive, these laws will wisely allow judges to sentence people as individuals and to reflect in their sentencing decisions the case-specific considerations Congress has mandated. They will also save taxpayers billions of dollars without compromising our safety.

I. Harsh, One-Size-Fits-All Mandatory Minimum Drug Laws Subject Low-Level Offenders to Draconian Punishments and Create Troubling Disparities.

As Attorney General Eric Holder observed in his speech to the American Bar Association last month, “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason.” This widespread and “coldly efficient” incarceration “imposes a significant economic burden—totaling $80 billion in 2010 alone—and it comes with human and moral costs that are impossible to calculate.” In the federal system today, almost half of all federal prisoners are incarcerated for drug offenses.

Existing mandatory minimum drug laws require judges to impose lengthy sentences for numerous drug offenses depending on drug type and quantity. For example, a person who is caught possessing less than two ounces of methamphetamine faces a 10-year mandatory minimum sentence. These harsh laws apply indiscriminately to drug kingpins and low-level drug mules alike.

* Testimony submitted by Alison Siegler (Associate Clinical Professor of Law & Founder and Director of the Federal Criminal Justice Clinic), Erica K. Zunkel (Clinical Instructor in the Federal Criminal Justice Clinic), and James DuBray (University of Chicago Law School Class of 2014).

1 See 18 U.S.C. § 3553(a) (requiring judges to consider “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need for the sentence imposed … to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, . . . to afford adequate deterrence to criminal conduct, . . . to protect the public from further crimes of the defendant, . . . [and] to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner,” among other things, when imposing sentence, and mandating an overarching requirement that “the court shall impose a sentence sufficient, but not greater than necessary” to comply with these purposes of punishment).


3 Id.

4 See E. Ann Carson & William J. Sabol, U.S. Dep’t of Justice, Prisoners in 2011 10, tbl. 11 (2012); Bureau of Prisons, Quick Facts About the BOP, available at http://www.bop.gov/news/quick.jsp (showing 46.8% of all federal prisoners are serving time for a drug offense).

5 In spite of Attorney General Holder’s recent policy shift, low-level, non-violent drug offenders continue to face a grim fate in federal courts across the country.

6 See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A) (setting forth a 10-year mandatory minimum penalty for any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance, including 1 kilogram or more of heroin, 5 kilograms or more of cocaine, 280 grams or more of a mixture containing cocaine base, 100 grams or more of PCP, 10 grams or more of LSD, 1000 kilograms or more of marijuana, 50 grams or more of methamphetamine, 500 grams or more of a mixture containing methamphetamine, and a 5-year
There are only two ways to receive a sentence below the mandatory minimum in a federal drug case. First, if an offender has little to no criminal history, he may qualify for safety-valve relief under 18 U.S.C. § 3553(f).\(^7\) In addition to demonstrating that he has little to no criminal history, the offender must also prove that: (1) he did not use violence or possess a firearm or other dangerous weapon in connection with the offense; (2) the offense did not result in death or serious bodily injury to any person; (3) he was not an organizer, leader, manager, or supervisor of others in the offense; and (4) prior to sentencing, he has truthfully provided to the prosecutor all information and evidence concerning the offense and any related offenses.\(^8\) If the offender is not eligible for safety-valve relief, he will only receive a sentence below the mandatory minimum if the prosecutor believes he has provided “substantial assistance in the investigation or prosecution of another person who has committed an offense.”\(^9\)

The current laws have failed us.

First, drug type and quantity are often bad proxies for culpability.\(^10\) On the southern border, for example, dispensable drug mules are frequently sent over the border with multi-kilogram quantities of marijuana, heroin, cocaine, and methamphetamine without being told the

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\(^7\) Pursuant to 18 U.S.C. § 3553(f)(1), little to no criminal history is defined as not having “more than 1 criminal history point, as determined under the sentencing guidelines.” The Guidelines, in turn, calculate criminal history points as follows: (1) three points for each prior sentence exceeding 13 months that was imposed within 15 years of the offense; (2) two points for each prior sentence exceeding 59 days that was imposed within ten years of the offense; and (3) one point for each prior sentence not counted under (1) or (2). See U.S.S.G. § 4A1.1(a)–(c) & Application Notes (1)–(3). Two additional points are added to the criminal history score if the offender committed the offense “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” U.S.S.G § 4A1.1(d). The total number of criminal history points determines an offender’s Criminal History Category, ranging from Category I to Category VI. Criminal History Category I encompasses zero or one criminal history points. Criminal History Category II encompasses two or three criminal history points. Criminal History Category III encompasses four, five, or six criminal history points. This rigid scoring paradigm means that an offender can receive more than one criminal history point for just one minor prior conviction.

\(^8\) 18 U.S.C. § 3553(f)(2)–(5).

\(^9\) 18 U.S.C. § 3553(e).

\(^10\) See U.S. Sent’g Comm’n, Mandatory Minimum Penalties in the Federal Criminal Justice System 350 (Oct. 2011) [hereinafter “Mandatory Minimums Report”], available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory _Minimum_Penalties/20111031_RtC_PDF/Chapter_12.pdf (“Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress expected.”).
type or quantity of the drug they are transporting. Often the drug cartel recruiters tell offenders that they will be transporting a small amount of marijuana, when in fact they will be transporting a more serious drug. Because the drug cartels hide drugs in cars, trucks, and boats in ever-expanding efforts to evade law enforcement, offenders typically never lay eyes on the drugs they transport. Drug mules are promised a small payment—often just a few hundred dollars, which is a pittance compared to the overall value of the drugs on the street. Yet they face the same mandatory minimum sentences as high-level, sophisticated drug offenders who know all about the drugs they are transporting and trafficking. The SSA and the JSVA will remedy these problems by lowering the statutory mandatory minimums for certain drug offenses and directing the United States Sentencing Commission to reduce the drug guidelines accordingly.

Second, the two ways drug offenders have any hope of receiving a sentence below the mandatory minimum are difficult to satisfy and often lead to absurd results. The safety-valve provision’s requirement that the offender have no more than one criminal history point under the U.S. Sentencing Guidelines excludes many low-level, non-violent drug offenders who would otherwise be eligible, because it disqualifies any offender who has a prior conviction for which he received at least 60 days within ten years of the offense. In 2012, just 23% of drug offenders facing a mandatory minimum received safety valve. Yet only 6% of those sentenced under mandatory minimum drug laws were considered to be high-level offenders: leaders, managers, or supervisors in drug enterprises. This does not make good sense—low-level drug offenders who do not use violence or weapons should be eligible for sentences below the mandatory minimum if the judge, in her discretion, determines under § 3553(a) that the mandatory minimum sentence is greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. Moreover, the substantial assistance provision often provides no relief to low-level drug offenders, because it benefits high-level offenders with the knowledge and contacts to help

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11 See Profile of Jonathan Cruz, infra pp. 6–7.
12 See United States v. Valdez-Gonzalez, 957 F.2d 643, 649–50 (9th Cir. 1992) (affirming the district court’s downward adjustment to account for the defendant’s mitigating role in the offense and noting that the district court had analyzed the socioeconomics and politics of the drug trade along the Mexican border and had determined that the defendants—who were day laborers paid to transport drugs across the border—were mere “mules” with “less to gain from the success of the drug enterprise than ordinary underlings in conspiracy cases”).
13 Indeed, it is not uncommon for high-level offenders to receive sentences similar to low-level offenders like those profiled in Part II infra. For example, several high-ranking members of a large drug trafficking organization in Southern California received sentences at or near the 10-year mandatory minimum in spite of their leadership roles and their participation in a multi-year methamphetamine conspiracy. See United States v. David Chavez-Chavez, 07-CR-1408 (S.D. Cal. Nov. 30, 2009) (121-month sentence for high-level manager of a methamphetamine drug trafficking organization); United States v. Joel Chavez-Chavez, 07-CR-1408 (S.D. Cal. July 26, 2010) (same).
14 In a 2011 report, the Sentencing Commission recommended to Congress that it “consider expanding the safety valve at 18 U.S.C. § 3553(f) to include certain offenders who receive two, or perhaps three, criminal history points under the guidelines.” Mandatory Minimums Report, supra note 10, at 355.
16 See id. at tbl. 40.
prosecutors investigate and prosecute others. Low-level offenders in drug cases tend to lack this kind of information. The SSA and the JSVA will remedy these problems by expanding safety-valve relief.

Third, safety valve and substantial assistance provide prosecutors, rather than judges, with near-total control over who will receive a sentence beneath the mandatory minimum. Assuming an offender has met all of the other requirements, safety valve requires the prosecutor to affirm to the judge that the offender has provided all truthful and complete information about the offense. It is virtually impossible for an offender to obtain safety valve relief without the prosecutor’s support, because he would have to convince the judge—over the prosecutor’s opposition—that he has been truthful and complete. Substantial assistance, in turn, is entirely dependent on the prosecutor’s recommendation. The statute specifically states that a sentencing judge only has the authority to sentence beneath the mandatory minimum for substantial assistance “[u]pon motion of the government.”\footnote{17} The SSA and the JSVA will remedy these problems by expanding safety-valve relief and providing judges with more discretion to sentence a non-violent, low-level offender beneath the mandatory minimum if certain requirements are met.

Finally, indiscriminate mandatory minimum sentences have a disparate effect on the most vulnerable among us—the poor, women, and people of color. Low-level drug offenses are often crimes of poverty, and are linked to substance abuse.\footnote{18} Drug cartels—especially those operating at the Mexican border—prey on those who are desperate for money, whether to provide for their families, put themselves through school, or support a drug or alcohol problem. Women—the fastest growing sector of our country’s prison population\footnote{19}—are uniquely susceptible to serving as drug couriers to support their families or to appease boyfriends or husbands who are higher-level drug offenders.\footnote{20}

Mandatory minimums also create racial disparities. As Attorney General Holder acknowledged in his speech to the American Bar Association, studies show that people of color receive sentences nearly 20\% longer than their white counterparts who are convicted of similar crimes.\footnote{21} The Sentencing Commission has similarly found that the cumulative sentencing impacts of criminal history and weapon involvement (which renders an offender ineligible for safety valve) are “particularly acute for Black drug offenders.”\footnote{22} Thus, a full three-quarters of

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19 Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 2010 (Dec. 2011) (the female incarcerated population grew by 2.2\% since 2000; the male incarcerated population grew by 1.6\% since 2000).
21 See Holder Remarks, supra note 2; see also Marc Mauer, The Impact of Mandatory Minimum Penalties in Federal Sentencing, Judicature Vol. 94, No. 1 (July–Aug. 2010) (“Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.”).
22 Mandatory Minimums Report, supra note 10, at 354.
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black drug offenders convicted of an offense carrying a mandatory minimum penalty in Fiscal Year 2010 were excluded from safety valve eligibility due to criminal history scores of more than one point. Additional racial disparities are created by the fact that offenders arrested before the FSA’s passage in 2010 are serving dramatically higher sentences for crack cocaine offenses than their white counterparts sentenced for powder cocaine offenses, even as Congress has recognized that those offenders were “sentenced under a law that virtually everyone agrees is unjust.”

These shameful disparities cannot and should not continue. The SSA and the JSVA will move us closer to alleviating these disparities by making the Fair Sentencing Act retroactive and by giving judges more discretion to sentence beneath the mandatory minimum if certain requirements are met.

II. Mandatory Minimum Drug Laws Exact Incalculable Human Costs.

Every day, across the country, federal judges sentence low-level, non-violent drug offenders to mandatory minimum sentences that are far greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. These long sentences not only cost taxpayers dearly, but they also unnecessarily devastate families and lives. The individuals profiled below are just a few of the victims of our mandatory minimum drug laws and are compelling examples of why it is imperative for Congress to take action and pass the SSA and the JSVA.

A. Casey Dinwiddie (Case No. 06-CR-1461, Southern District of California).

Casey Dinwiddie was still a teenager when she was arrested for attempting to bring less than two pounds of methamphetamine into the United States in 2006. Casey was going through a particularly hard time in her life as she was struggling with a methamphetamine addiction that began when she was just 16 years old. Her addiction led her to agree to bring drugs across the border. Although Casey’s drug addiction had gotten her into trouble before her federal arrest, her past involvement in the criminal justice system had been fairly minor. She had two prior convictions for which she had received sentences of 26 days and 30 days in jail, respectively. Those cases rendered her ineligible for safety valve relief even though she met all of the other requirements—she did not use violence or a weapon during the offense, the offense did not result in death or serious bodily injury, and she unequivocally did not play a leadership role. Casey had no substantial assistance to provide because she was an expendable drug mule.

This left Casey without any hope of receiving a sentence below the mandatory minimum. In turn, that meant that the judge could not consider Casey’s genuine remorse, her age, her family support, or any other mitigating circumstances at the sentencing hearing.

\[23 \text{Id.}\]
\[24 \text{Senator Richard Durbin, 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010). Attorney General Holder has likewise acknowledged the injustice of the high crack cocaine sentences many offenders continue to serve: “this Administration successfully advocated for the reduction of the unjust 100-to-1 sentencing disparity between crack and powder cocaine.” Holder Remarks, supra note 2 (emphasis added).}\]
During the sentencing hearing, the judge expressed deep reservations about sentencing Casey to 10 years in prison. He stated, on the record:

Ms. Dinwiddie, I have to tell you, sending people to prison is never something that I find easy to do. It’s easier to do in those cases where I think that my sending people to prison’s going to act as a deterrent or is going to send a message to someone or is going to prevent future bad conduct, and I’m certainly not shy about doing that. In this particular case, I have to tell you that I am – my conscience tells me that I should do something different than what I’m about to do, but the law is the law, and I have to follow what the law is. I’m not – I wasn’t appointed to second-guess the Congress, the people that are in charge of making laws. I wish that there was some way that I could avoid what Congress has said that I have to do and that I could do it in good conscience and in keeping with what I think the law is, but I can’t.25

After closely considering the circumstances of the offense, Casey’s personal history, and public safety concerns, the judge wisely recognized that Casey did not merit such a harsh sentence, but his hands were tied. Noting that the guideline range of 63 to 78 months was lower than the mandatory minimum, the judge went on to say: “If I could impose that 63-month sentence today, I would do it in a heartbeat.”26 The prosecutor remarked during the hearing that he would have recommended a sentence higher than 10 years if Casey had not agreed to an expedited plea deal. The court then asked the prosecutor: “Do you really think there’s any judge anywhere that would be inclined to give this young lady more than 120 months?”27 The prosecutor responded, “No, I don’t, not at all, Your Honor, not under the circumstances.”28

Now 27 years old, Casey was recently released to a Bureau of Prisons (“BOP”) residential reentry center to serve out the final months of her 10-year sentence. She has lost her twenties to federal prison. She will never get those years of her life back.

Under the SSA, Casey would have faced a 5-year mandatory minimum—the sentence the judge wanted to give her in the first place. Under the JSVA, the judge would have had the discretion to go below the mandatory minimum to account for the many mitigating factors in Casey’s case.

B. Jonathan Cruz (Case No. 11-CR-3639, Southern District of California).

Like Casey, Jonathan Cruz is serving a 10-year mandatory minimum sentence for attempting to bring methamphetamine into the United States from Mexico. He was just 19 years old at the time of the offense. Smugglers provided Jonathan with a car for the sole purpose of ferrying the drugs over the border and told him that he would be transporting marijuana. When federal agents told him that they had found methamphetamine in the car, Jonathan was shocked.

26 Id. at 17.
27 Id. at 18.
28 Id.
Jonathan, who was born in the United States and is a United States citizen, grew up right across the border from San Diego, California, in Tijuana, Mexico. He was abused as a child and developed a serious drug addiction when he was 13 years old. He has only a sixth grade education. When he was a teenager, he was hit by a car and suffered a severe head injury. Coupled with his drug addiction, the injury caused numerous mental health issues, including depression, anxiety, and hallucinations.

When he was a juvenile, Jonathan was adjudicated a delinquent for attempting to bring marijuana into the United States. He was sent to a juvenile camp to receive drug treatment and vocational training. As a result of this juvenile adjudication, Jonathan was not eligible for safety-valve relief, even though he met all of the other requirements and had no adult convictions on his record. At sentencing, the judge struggled with assessing two criminal history points for Jonathan’s juvenile adjudication, which placed Jonathan in Criminal History Category II and rendered him ineligible for safety valve: “I mean, in my view, I would love to give Mr. Cruz every break and benefit of the doubt, but I think the law is the law.”

Like Casey, Jonathan had no substantial assistance to provide because he was an expendable drug mule. Rather than plead guilty to a certain 10-year sentence, Jonathan exercised his constitutional right to trial and was convicted.

The mandatory minimum prevented the judge from fully fashioning a sentence that accounted for Jonathan’s cognitive disabilities or his youth, even though he wanted to: “My intent is to give you the least amount of time under the elements that I now have here, because I think the equities, given your mental health, drug addiction, and all of these other factors that are mentioned here, warrant that.” Even the prosecutor thought a 10-year sentence was excessive. He stated, on the record: “Now, do I think as an individual, as a citizen or a person, that Jonathan Cruz deserves to go to prison for ten years for this? Nope, I don’t. But this is not my place to say.” The judge sentenced Jonathan to 10 years in prison. This is the first jail sentence Jonathan has ever served.

Jonathan was arrested in 2011; he is scheduled to be released in 2020, when he is 28 years old.

Under the SSA, Jonathan would have been eligible for safety-valve and would have faced a 5-year mandatory minimum, rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the discretion to go below the mandatory minimum to account for the many mitigating factors in Jonathan’s case.

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29 Even though a juvenile adjudication is not a true “conviction” and is imposed for rehabilitative purposes, not punishment, the Guidelines count a juvenile adjudication as a “prior sentence” if imposed “within five years of the defendant’s commencement of the current offense.” U.S.S.G. § 4A1.2(a), (d).
31 Id. The Guidelines in Jonathan’s case were higher than the mandatory minimum. The judge acknowledged the higher Guidelines, but rejected them: “And it’s my intention to impose the mandatory minimum, frankly.” Id. at 25.
32 Id. at 18.
C. Gabriela Perez (Case No. 11-CR-5756, Southern District of California).

Gabriela Perez, a young single mother, is currently serving a 10-year mandatory minimum sentence for attempting to bring one pound of methamphetamine into the United States from Mexico. Gabriela confessed her involvement in the offense to Customs and Border Protection agents. Significantly, she told them that she did not know what kind of drug she was transporting. She also told them that the drug smugglers had promised to pay her a mere $600 if she was successful.

Gabriela was just 25 years old at the time of her arrest; her son, Luis, was 7. Gabriela committed the offense because she desperately needed money. The father of her young son was not paying child support. She had held a full-time job as a dental hygienist for five years, but had recently been laid off because of the economic downturn. After months of trying, Gabriela had not found a new job, and she felt that she had no one to turn to for financial assistance.

Gabriela was a classic unsophisticated drug mule. She did not own the drugs she attempted to bring into the United States, nor did she package or manufacture them. Sophisticated drug smugglers strapped the drugs to Gabriela’s body. Her sole role was to ferry them across the border and turn them over to other sophisticated drug smugglers.

Prior to the offense, Gabriela had pled guilty to two minor cases, one resulting in probation and the other ending in a sentence of two weeks in jail. Thus, she had more than one criminal history point and was not eligible for safety-valve relief even though she met all of the other requirements. Even worse, because one of Gabriela’s prior convictions was for drugs, the prosecutor had the discretion to file an enhancement that would have raised her mandatory minimum sentence from 10 years to 20 years.33 Gabriela pled guilty to avoid the threatened enhancement.

Because she was not safety-valve eligible, Gabriela’s only hope for getting below the mandatory minimum sentence was to provide substantial assistance to the prosecutor. But like Casey and Jonathan, Gabriela was a low-level drug courier and therefore did not have any information that would help the prosecutors investigate and prosecute criminals. Because Gabriela had no way to get below the 10-year mandatory minimum, the judge was not able to consider any of her personal characteristics, the nature of the offense, or why Gabriela committed the crime. In fact, the judge was not permitted to consider any of the mitigating factors Gabriela’s attorney presented at the time of sentencing. The judge’s hands were tied by the mandatory minimum, and she sentenced Gabriela to 10 years behind bars.

33 See 21 U.S.C. § 851. This enhancement is just another example of the way current mandatory minimum laws shift power from judges to prosecutors. A federal judge recently excoriated prosecutors’ § 851 decisions as being “shrouded in such complete secrecy that they make the proceedings of the former English Court of Star Chamber appear to be a model of criminal justice transparency.” United States v. Young, 2013 U.S. Dist. LEXIS 116042, at *4 (N.D. Iowa Aug. 16, 2013). The judge rested his opinion on Sentencing Commission statistics revealing that prosecutors apply the enhancement in a “stunningly arbitrary” way that results in “jaw-dropping, shocking disparity.” Id. at *2.
Gabriela is scheduled to be released from BOP custody in 2020. While Gabriela serves her 10-year sentence at a cost of $29,027 dollars per year to United States taxpayers, her young son, Luis, is growing up without his mother, his only parent.

Under the SSA, Gabriela would have been facing a 5-year mandatory minimum rather than a 10-year mandatory minimum, and the prosecutor would not have been able to threaten her with a 20-year enhancement because of her prior drug offense. Under the JSVA, the judge would have had the discretion to account for the many mitigating factors in Gabriela’s case.

D. Marvin Webster (Case No. 98-CR-403, Northern District of Illinois).

Marvin Webster was sentenced to a 10-year mandatory minimum for a hand-to-hand sale of 3.9 ounces of crack to an undercover DEA agent when he was just 23 years old. No weapons or violence were involved in the offense. The prosecutor did not bring charges against Marvin for a full year after the sale, demonstrating that he did not consider Marvin to be a public safety risk. Marvin was raised in a rough neighborhood in Chicago and suffers from mental health problems. His father died when he was eight and his mother supported Marvin and his six siblings on public assistance. By the time charges were brought, he had moved to a different state and had begun to turn his life around. He was working two jobs, including as a garbage collector, to support his long-time girlfriend and their six young children.

Before his federal case, Marvin had never before been sentenced to prison time and had no convictions for anything remotely violent. But he was not eligible for safety-valve relief because of two prior convictions for simple possession of marijuana for which he had received probation. Because Marvin’s prior convictions were for drugs, he pled guilty and relinquished his trial and appellate rights to avoid a § 851 enhancement that would have raised his mandatory minimum sentence from 10 years to 20 years.

At sentencing, the judge lamented that he was required to impose a 10-year penalty:

I think 10 years is too long. Between you and me I think it’s too long. But as [your attorney] has told you, I don’t have any discretion on this one. That’s the mandatory minimum. So I’m not going to sentence you to a day more than I have to in this case because I think in your case the punishment is too severe. I don’t think you’ve decided to go into a life of crime.

36 Id.
37 Id.
38 United States v. Marvin Webster, 98-CR-403-1 (N.D. Ill. May 6, 1999), Sentencing Transcript at 9 (on file with authors).
The judge also spoke about the corrosive effects prison can have on a person who is trying to live a law-abiding life: “I’m sentencing you under circumstances where you’re going to be surrounded by influences just at least as bad as the influences you were trying to get away from. . . . You’re going to have a lot of people in prison telling you to do the wrong thing. And you’re not going to have very many positive influences.” The judge was not able to fashion a sentence that accounted for this concern, nor was he allowed to consider Marvin’s responsibilities to his family, his lengthy and verified work history, his youth, or his mental health issues.

If the FSA had been made retroactive, Marvin have been eligible for a significant sentencing reduction. He would have been facing only a 5-year mandatory minimum. In fact, the amount of drugs he was responsible for is less than half that required to reach the threshold for a 10-year mandatory minimum today. But Marvin served his 10-year sentence and successfully completed a full 5 years of supervised release. By the time he was through paying his debt, he was nearly 40 years old.

Under the SSA, Marvin would have faced a 5-year mandatory minimum rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the authority to account for the many mitigating factors in Marvin’s case and sentence him below the mandatory minimum.

E. Karl Lindell (Case No. 08-CR-227, Northern District of Illinois).

Karl Lindell is currently serving a 10-year mandatory minimum sentence for attempting to sell less than one-sixth of a pound of crack cocaine to a government confidential informant in November 2007. At the time of his offense, Karl was a struggling 37 year old with a debilitating substance abuse problem who agreed to sell crack cocaine to an individual from his Chicago neighborhood. That person happened to be a confidential informant working for the government. According to the charging documents, the informant had at least eleven prior arrests in the Chicago area, including arrests for aggravated assault, domestic battery, and resisting a police officer. In contrast, Karl had only one prior conviction. Before his federal case, Karl had never spent more than 10 months behind bars.

Karl stood to make approximately $300 on the drug sale with this informant. The investigating agents described the transaction with Karl as a “stand-alone buy” that was not part of a larger drug conspiracy. There were no weapons or violence involved in the offense, and Karl immediately confessed his involvement to agents. In spite of the fact that the offense was non-violent and Karl did not have any sort of leadership role, he was ineligible for safety valve because of his prior conviction. Because of his low level of involvement, Karl did not have any information to provide to the government that would have led to the prosecution of others.

The low-end of Karl’s guideline range—87 months—was well below the mandatory minimum. If he had been sentenced after the FSA was enacted, his guidelines would have been far lower, and approximately half the 10-year mandatory minimum: 57 to 71 months. Because

39 Id. at 9–10.
the judge was bound by the mandatory minimum sentence of 10 years, she could not consider any of Karl’s mitigating circumstances, including Karl’s efforts to address the drug problem that was the source of his involvement in the criminal justice system by completing a drug treatment program in jail. The judge also could not consider the sympathetic letters from Karl’s mother and sister in support of a reduced sentence, the horrible conditions of his pre-trial detention, or his remorse.

Karl is currently incarcerated at Forrest City Federal Correctional Complex in Eastern Arkansas, far from his mother, sister, and Chicago, the only home he has ever known. Karl is set to be released on December 26, 2016.

Under the SSA, Karl would have faced a 5-year mandatory minimum rather than a 10-year mandatory minimum. Under the JSVA, the judge would have had the discretion to go consider Karl’s equities and sentence him below the mandatory minimum.

III. Mandatory Minimum Drug Laws Impose High Fiscal Costs and Do Not Make Us Safer.

The human toll described above is incalculable and poses pressing moral concerns. Beyond their human costs, mandatory minimum drug laws have also become an excessively heavy burden on taxpayers, but have not provided public safety benefits justifying those costs. We do not need to keep paying billions of dollars to keep low-level, non-violent offenders like Casey, Jonathan, Gabriela, Marvin, and Karl in prison. The SSA and the JSVA will reduce those fiscal costs significantly and will increase public safety.

A. The SSA and the JSVA Will Reduce the Exorbitant Costs of Mandatory Minimum Drug Laws.

Mandatory minimums have contributed significantly to the dramatic growth of the federal prison population in the last three decades. That population has skyrocketed since 1980, increasing by almost 800%, from 25,000 federal prisoners then to over 219,000 today.41 As a result, our federal prisons are severely overcrowded and are operating at 139% of capacity.42 Mandatory minimums are largely to blame for these dramatic increases:

Mandatory minimum penalties have contributed to the federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. . . . Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods.43

As the federal prison population has exploded, its costs have ballooned as well. Between Fiscal Year 2000 and Fiscal Year 2012 alone, the per capita cost of incarceration for all inmates

41 CRS Report, supra note 34, at 1.
42 Id. at Summary & 20.
43 Id. at 8.
increased from $21,603 to $29,027. Over this same period, BOP appropriations increased from $3.668 billion to $6.641 billion. Today, corrections costs devour over 25% of the Department of Justice’s budget.

Incarceration costs are rightly part of the debate over the efficacy of mandatory minimums. As legal scholars have noted, “there is no good reason to keep the question of cost out of the discussion of what justice requires.” In fact, many federal judges have expressed discontent over the fiscal cost of unduly harsh sentences that “put nonviolent offenders in prison for years, . . . ruin the lives of the prisoners [and] their families, and . . . also hurt our economy and our communities by draining billions of dollars from the taxpayers and keeping potentially productive members of society locked up.”

By expanding the safety valve and lowering mandatory minimums, the SSA and the JSVA will dramatically reduce corrections costs. Almost half of those in federal prison are there for drug offenses. Notably, in Fiscal Year 2011, approximately two-thirds of drug offenders were convicted of an offense carrying a mandatory minimum. Such penalties prevent federal judges from crafting sentences that employ far cheaper alternatives to incarceration for non-violent drug offenders. Sentences with a supervisory component allow offenders to better their lives in their own communities through education and rehabilitation under the close supervision of a probation officer. This is much less costly for society: One year of a supervisory sentence in the community costs taxpayers just $3,347.31, one tenth as much as a year of prison.

The SSA and the JSVA will reduce costs by giving judges the discretion to impose supervisory sentences on low-level drug offenders who qualify for safety valve and to impose shorter sentences on offenders who are not safety-valve eligible.

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44 Id. at Summary & 15 tbl. 1.
45 Id. at Summary, 11, 12 fig. 5.
48 United States v. Chavez, 230 F.3d 1089, 1092 (8th Cir. 2000) (Bright, J., concurring).
49 See sources cited supra note 4.
51 By cutting certain mandatory minimum penalties in half, the SSA will significantly reduce costs to taxpayers. For example, it will cost approximately $290,000 to incarcerate a single person sentenced today to a 10-year mandatory minimum under the current drug statute. Under the SSA, that individual will face a 5-year mandatory minimum that will cost half as much: around $145,000. Similarly, it costs nearly $145,000 to incarcerate a person sentenced today to a 5-year mandatory minimum. Under the SSA, that person’s prison time will cost less than half as much: approximately $58,000.
B. The SSA and the JSVA Will Increase, Rather Than Diminish, Public Safety.

The lower mandatory imprisonment terms under the SSA will not only reduce sentencing costs, but will also increase public safety and reduce recidivism. The JSVA will further reduce costs and increase public safety by allowing judges to sentence a larger class of non-violent, low-level offenders beneath the mandatory minimum when certain requirements are met.

These reforms will not compromise public safety. Notably, the increased cost of imprisonment has not been accompanied by a public safety gain, because the over 6 billion dollars being spent annually on federal incarceration is primarily not going toward violent individuals who pose threats to their communities. The vast majority of federal drug inmates are not kingpins. Rather, we are spending hundreds of thousands of dollars every year to incarcerate people like Casey, Jonathan, Gabriela, Marvin, and Karl, who pose little threat to public safety.

Moreover, the billions of dollars we spend to incarcerate non-violent drug offenders are not reducing recidivism. As a result of overcrowding, the BOP is woefully unable to provide rehabilitative and treatment services that are known to prevent people from reoffending. To cut costs, the BOP has made significant cuts to rehabilitative programs. In January 2005, the BOP discontinued its Intensive Confinement Center (“ICC”) programs, commonly known as “boot camps.” These programs, which were available to offenders with minimal criminal histories, had been successfully operating across the country for years to reduce recidivism rates for low-level, non-violent inmates. Furthermore, the BOP’s intensive drug treatment program (the 500-hour Residential Drug Abuse Program), which has also been shown to be effective in reducing recidivism, is oversubscribed and is therefore closed to many otherwise-eligible inmates. Even more troubling, only a small fraction of federal prisoners with mental illnesses actually receive mental health treatment in the BOP. Thus, while the majority of federal prisoners suffer from either a mental illness, a drug addiction, or both, because of BOP’s ballooning costs, our federal prison system is unable to provide the treatment necessary to help prevent individuals with drug addictions and mental illnesses from recidivating. Finally, research also shows that increased use of incarceration on its own does not deter people from committing crimes.

54 Research conducted by the Department of Justice shows that only 15% of mentally ill inmates receive treatment in the BOP. Office of Justice Programs, Dep’t of Justice, Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates, NCJ 213600, at 9 (Sept. 2006).
55 Id. at 4, 5 (revealing that 45% of federal inmates suffer from mental illness and 49.5% of federal inmates have a substance abuse problem). These categories are not mutually exclusive but together encompass far more than half of all federal inmates, because, for example, 63.6% of those with a mental health issue also have a substance abuse issue.
Meanwhile, studies demonstrate that in certain cases public safety is better served by non-incarceration sentences. The Sentencing Commission has conducted extensive research into the question of what kinds of sentences best protect the public, and has concluded “that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant’s need for treatment and the need to protect the public,” and “that successful completion of treatment programs may reduce recidivism rates.” In fact, prison may actually increase rates of recidivism. By giving judges greater discretion to impose less prison time and address offenders’ individualized treatment needs, the SSA and the JSVA will reduce recidivism and increase public safety.

The conclusion that harsh sentences are not the key to protecting public safety and reducing crime is no longer one just shared by those traditionally concerned with mass incarceration, such as the NAACP, FAMM, and liberal academic scholars. Rather, individuals across the political spectrum are now in agreement about the need to reduce our reliance on incarceration. For example, Rick Perry, the current Republican Governor of Texas, has stated: “I believe we can take an approach to crime that is both tough and smart… there are thousands of non-violent offenders in the system whose future we cannot ignore. Let’s focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again.” Steven Levitt, a University of Chicago economist who once believed that increased incarceration led to corresponding public safety gains, has also changed course: “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today . . . I think we should be shrinking the prison population by at least one-third.”

And finally, organizations such as the Family Resource Council, who once focused their efforts exclusively on the victims of crime, have begun to question the status quo:

Given incarceration’s impact on families, doesn’t it make more sense to place lower-level offenders under mandatory supervision in the community, allowing them to remain connected to their relatives, gainfully employed and available to parent their children? I am not proposing this approach for all incarcerated parents. Violent and career criminals

57 The Sentencing Commission recently “expand[ed] the availability of alternatives to incarceration” under the Guidelines to reflect its own “multi-year study of alternatives to incarceration.” See Federal Register, Vol. 75, No. 93, U.S.S.G., App. C, Amendment 738, Reason for Amendment (May 14, 2010), available at http://www.gpo.gov/fdsys/pkg/FR-2010-05-14/html/2010-11552.htm. In doing so, the Commission recognized that “[s]ome public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant’s need for treatment and the need to protect the public.” Id.
must be locked up to protect society . . . But for many nonviolent offenders, we should do all we can to keep families together while maintaining public safety.61

The SSA and the JSVA will make us safer while dramatically reducing the costs of incarceration.

IV. The SSA and the JSVA Will Not Unlock the Prison Doors For Offenders Who Warrant Stiff Sentences.

Sentencing judges’ restrained response to the landmark U.S. Supreme Court decision that expanded judicial discretion demonstrates that the modest expansion of judicial discretion under the SSA and the JSVA will not lead to overly lenient sentences. In 2005, the Supreme Court made the formerly mandatory Guidelines advisory.62 Federal sentencing statistics demonstrate that, since then, judges have been “remarkably restrained in exercising their discretion” and have continued to adhere closely to the Guidelines.63 Average sentences have stayed virtually static, decreasing from 46 months in 2005 to 44 months in 2012.64 And in Fiscal Year 2012, fully 82.2% of all federal sentences and 80.7% of federal drug trafficking sentences were within or above the Guidelines range or were the result of prosecutors’ requests for sentences below the range.65

If the SSA and the JSVA are passed, the Guidelines will continue to anchor judges’ sentencing decisions. As the Supreme Court recently explained: “The . . . federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.”66 The Guidelines constrain federal judges’ sentencing decisions in numerous ways. First, the law requires sentencing judges to correctly calculate the Guidelines and use them as the starting point in every case.67 Second, the federal courts of appeals closely police sentencing judges’ decisions, reversing sentences that do not start with a proper Guidelines calculation, do not properly apply Guideline departures and adjustments, or are lenient without a sufficient legal

67 “[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” Gall v. United States, 552 U.S. 38, 50 n.6 (2007) (emphasis added).
explanation. And third, a number of appellate courts explicitly presume that a Guidelines sentence is proper, a practice that has been upheld by the Supreme Court and leads many sentencing judges to hew closely to the Guidelines.

The SSA and JSVA will operate in concert with the existing Guidelines system to ensure that judges continue to exercise their sentencing discretion in a measured fashion.

V. Conclusion

For too long, we have used mandatory sentencing as a substitute for individualized justice. It’s time to change course. It’s time to recognize that the fiscal cost of mandatory minimums is too high a price to pay. And it’s time to stop devastating the lives of low-level, non-violent offenders and their families. The SSA and the JSVA will save billions of taxpayer dollars while giving federal judges the authority to set sentences that protect the public, provide rehabilitation, and appropriately punish offenders. Let the punishment fit the crime by passing the SSA and the JSVA.

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68 See Peugh, 133 S. Ct. at 2083 (“Failing to calculate the correct Guidelines range constitutes procedural error.”).
70 See United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (“[J]udges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines.”).