An Honest Drug Offender Sentencing Letter

Lucius T. Outlaw III*

To the Honorable United States District Court Judge of District Anywhere USA:

Both of us are very familiar with this point in a case. My client has pled guilty to a drug trafficking crime. You have accepted the plea. The presentence report is done and in your hands. The mathematics of the sentencing guidelines is complete. The prosecutor has provided a vivid account of my client's criminal conduct and his criminal history to justify the sentence she has recommended.

You turn to me.

Now is my opportunity to ask for leniency—to explain why you should impose a sentence that is below what is advised by the federal sentencing guidelines and requested by the prosecutor. In other words, it is time for me to beg.

Typically, my begging consists of humanizing my client. This involves talking about a life that is all too often marked by absent or neglectful parents, a family history of drug and alcohol abuse that my client inherited and extended, an abandoned formal education, and often an incident of violence or sexual abuse that profoundly affected my client at an early age. More times than not, it involves explaining that drug dealing is a family or neighborhood legacy. It involves talking about my client's children and how the cycle of dysfunction and criminality will continue if their father or mother is incarcerated during the children's formative years. It involves a straining attempt to distinguish my client's criminal acts from that of other drug defendants that you hear about every day. I will provide a passionate yet pained effort to convince you that society need not fear my client.

You take it all in. You ask me few questions. Then it is time for you to protect your sentence against a future appeal. You use words such as discretion, deterrence, and community. You explain the process of sentencing and cite the right case law. You express sympathy for my client's dreadful childhood. You make it clear to those who will read the transcript in future days that you have considered all that you are legally required and allowed, including what was said during the sentencing hearing up to this point.

And then the moment comes—you hand down your sentence. My client goes limp with hopelessness. His family falls into a deep pool of shock and sorrow. And with a "good luck" from you, it is over. I have a few moments to offer some hope to my dumbfounded client as he is whisked away by the marshals. Then I am left

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trying to offer his family an explanation that provides some understanding and solace.

I know that this is the system—the way it is done. And I believe that the American criminal justice system is a model for the world. But it is not without its faults. And one of the faults is that sentencing is steadily becoming performance theater rather than a probing exercise of dispensing punishment and justice, particularly when it comes to drug offenses.

Before I point the finger anywhere else, I must point it at myself. I am a knowing, willing, and contributing cast member. I know that when a defendant is poor, black, or brown (or white and poor) the system offers few favors and the outcome is largely predetermined. Yet despite knowing this (or maybe *in spite* of knowing), I stand in front of you and beg that you spare months and years of my client's freedom. Unfortunately, my plea contains a few fictions. You and I both know it.

I. MY FICTION #1: THE DRUG-DEALING LIFE WAS UNAVOIDABLE FOR MY CLIENT

The tragedy and despair that was my client's childhood and formative years is heartbreaking and undeniable. Equally devastating is his community continually reinforcing the belief that drug-dealing provides the greatest (if not only) opportunity for economic and social advancement for those trapped within it.

Notwithstanding this reality, my attempt to characterize my client's participation in "the game" as unavoidable is a blatant attempt to hide in plain view the choice he made. No one can deny or discount that my client's demoralizing childhood in a community of negative reinforcement limited his opportunities and pushed him to the narcotics trade. However, it is equally undeniable that at some point in time he had an opportunity of choice—even if it was the slightest of moments and everything around him reinforced that dealing drugs was his only choice. There are hundreds of people in his community who have lived through similar despair and have faced the same forces. Yet, they made another choice—a choice away from the narcotics trade. They balanced the near-certain death and prison time accompanying "the game" against the fleeting riches that come with it, and chose a different path.

II. MY FICTION #2: IN ACCEPTING RESPONSIBILITY FOR HIS CRIMINAL CONDUCT, MY CLIENT UNDERSTANDS THAT HIS ACTIONS WERE WRONG (AND NOT JUST UNLAWFUL)

The system rewards a defendant who accepts responsibility for his criminal activity and expresses remorse.[1] The reward includes a reduction in prison exposure

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[1] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018) (reduces a defendant's guidelines offense level by up to three levels if the defendant "demonstrates acceptance of responsibility for his offense" and pleads guilty in a timely manner).

under the sentencing guidelines and added benefits while a defendant serves his prison term.

To be sure, my client is sorry for the pain and hardship that his arrest and incarceration will cause his family. He is sorry that he will be separated from his family, particularly his children. He is sorry that he is being stripped of his freedom for a specified time.

But most of all, he is sorry that he was caught.

Any *moral* remorse my client feels is outweighed by his anger at the system using its full might to incarcerate him. It is trumped by his anger toward the cops who have harassed him for years, and who have lied to secure warrants, an arrest, and ultimately his conviction. It is drowned by his rage toward the cooperator who put him in the crosshairs of the police and federal agents for a reward of money or a lesser sentence. It is clouded by the shock of the mandatory minimum sentence he faces. It is pushed aside by his dismay that the system will punish him if he exercises his constitutional right to a trial and loses. It is blunted by the chorus of cell buddies, jailhouse lawyers, family members, and friends who are continuously telling him that he can beat the charge, or that a better plea deal is out there for the taking, and that his predicament is not his fault. And any remorse he does feel is drowned by his despair, frustration, and anger at the institutional and societal forces that lock out the economic and educational opportunities that you take for granted from reaching his community.

He also knows, however, that his anger will get him nowhere with you, and so he must temporarily bury it. He understands that an expression of remorse and responsibility is necessary to fulfill your need to believe that you are making an impact on his life, and that the sentence you impose has meaning beyond just punishment. He understands your need to feel that you are a part of his redemption and rebirth, just as much as you are society's instrument for retribution and punishment. He understands that if he provides you with that feeling, then you will lessen the federal boot on his neck ever so slightly.

III. MY FICTION #3: MY CLIENT'S GUILTY PLEA WAS FREE OF COERCION

When my client stood before you to formally enter his guilty plea under the terms of the plea agreement, you asked him (as required by law) whether he was doing so voluntarily and free of coercion.[2] He responded that he was, and I seconded his answer. Nothing could be further from the truth.

Today, coercion is a hallmark of plea negotiations, particularly in drug cases. The coercion largely comes through the "trial tax"[3] a prosecutor threatens to impose

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[2] *See* FED. R. CRIM. P. 11(b)(2).

[3] Trial tax is the increased punishment over the plea offer a defendant receives (or expects to receive) for rejecting a plea offer, insisting on a trial, and losing at trial. *See generally* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019).

if a defendant does not accept a plea deal whose terms are largely dictated by the government. Today, refusing a plea offer and going to trial can lead a defendant to serve a sentence that is, on average, three times longer than if he had accepted the government's plea deal.[4]

There is very little a prosecutor cannot do, or threaten to do, in order to increase the trial tax and thereby increase the coercion of a defendant.[5] They regularly file or threaten to file additional charges, particularly ones carrying mandatory minimum penalties, to increase the trial tax by years, even decades.[6] They can set pressure-inducing limits on how much time my client has to contemplate a plea offer.[7] They are even allowed to (and do) threaten to charge my client's family and loved ones if he does not accept the plea offer.[8]

Plea bargaining is an accepted, useful, and beneficial tool of our criminal justice system. It increases efficiency, saves resources, narrows cases, and clarifies the positions of the government and the defendant. It has long been recognized that plea bargaining rests on the principle that "you don't get something for nothing." Both sides understand that there is exchange at work—less time (for the defendant) for less work (for the government). Today, however, prosecutors' charging power has shifted the balance of this exchange so far that it is no longer an exercise in bargaining, but rather coercion.

Despite the will-breaking coercion my client experienced, he and I know that he has to lie and say that his decision to plead guilty and accept the government's plea deal was completely voluntary. To tell the truth—that he pled guilty because the government threatened to impose a heavy trial tax on him or his loved ones if he exercised his constitutional right to a trial—would not save him from those threats or the prison time behind them.

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[4] *Id.*; *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17–20 (2018) (finding that in 2015 defendants who were convicted at trial received prison sentences that were on average three times longer than defendants who pled guilty—10.8 years compared to 3.3 years).

[5] *See* Brady v. United States, 397 U.S. 742, 751 (1970) (setting the line that prosecutors cross into impermissible coercion only when they employ "actual or threatened physical harm or . . . mental coercion overbearing the will of the defendant.").

[6] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (finding that the prosecutor did not commit prosecutorial misconduct by threatening during plea negotiations to seek a subsequent indictment under recidivist statute if the defendant chose not to plead guilty).

[7] *See, e.g.*, Kelly v. United States, No. 6:09-cv-Orl-19KRS, 2010 WL 2991577, at *8 (M.D. Fla. July 27, 2010) (holding it was permissible for a prosecutor to set a 24-hour time limit for accepting a plea offer).

[8] *See, e.g.*, United States v. Seng Chen Young, 926 F.3d 582, 591 (9th Cir. 2019) ("Every federal court of appeal to consider the issue . . . has held that plea agreements that condition leniency for third parties on the defendant's guilty plea are permissible so long as the Government acted in 'good faith,' meaning that it had probable cause to prosecute the third party.").

IV. MY FICTION #4: I AM MAKING A LARGE AND SIGNIFICANT DIFFERENCE

My presence and involvement is constitutionally required.[9] To achieve the promise of the Sixth Amendment, I zealously advocate for my client and hold the government to its obligations and burdens without compromise. I bring all the thunder and fury I can muster to push back on the government's allegations, to challenge the claims by the prosecutor, cooperators, and law enforcement officers working together against my client, and to appeal to you. Yet through it all, I know that I am but a speed bump on the conveyer belt of inevitability. That at the end of the day, despite all my dedicated advocacy, my client is headed to prison, likely longer than he deserves, and there is nothing I can do about it or the collateral consequences that will follow for him and his family.

Yes, there are days when I achieve a "pure" win for my client—a case dismissal, a not guilty verdict, or even a no-prison time sentence. But those days are few and far between. Other days will yield "public defender victories" such as persuading a judge to impose a term of imprisonment shorter than what was sought by the government. Most days, however, I am rendered largely powerless against the mandatory minimum penalties, sentencing guidelines, conspiracy law, and other tools available to the prosecution that favor imprisoning my client for long stretches of time. I have become a constitutionally-mandated cog in the machine of our judicial system with very little power to influence or disrupt it.

Those are my fictions. But I am not alone in this. Your black robe does not insulate you from the fictions you perpetuate.

V. YOUR FICTION #1: JUDICIAL DISCRETION REIGNS

Nearly every sentencing hearing involves the judge commenting about how sentencing was changed forever by the Supreme Court case that returned sentencing power back to judges by declaring the federal sentencing guidelines advisory and no longer mandatory.[10] My client (and his family) is left with the impression that his fate rests with your authority and ability to fashion a sentence that is tailored to the specific circumstances of his case and my client without being caged by the guidelines. But the truth is that even though the Supreme Court opened the cage door, prosecutorial discretion and mandatory minimum penalties keep the opening ever so slight in drug cases, and impede and prevent you from fully exercising your discretion.

As you are keenly aware, the explosion of offenses carrying mandatory minimum penalties has shifted a considerable amount of sentencing power from you to prosecutors. In 1991, there were 98 federal criminal statutes that carried a

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[9] U.S. CONST. amend. VI.; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires states to provide attorneys to criminal defendants who cannot afford their own attorneys).

[10] United States v. Booker, 543 U.S. 220 (2005).

mandatory minimum sentence.[11] By 2011, that number nearly doubled to 195 statutes.[12] With the war on drugs, most of the expansion is connected to drug offenses. Today, drug trafficking offenses account for approximately two-thirds of the offenses carrying a mandatory minimum penalty.[13]

Prosecutors are using the unchecked power of mandatory minimums to tie your hands well before you ever see my client and similarly situated drug defendants. For example, out of the 18,964 federal drug trafficking defendants sentenced in fiscal year 2018, 58.4% were convicted of an offense carrying a mandatory minimum sentence.[14] This is a rate decline (some would say improvement) from the start of the decade where 66.1% of the 23,963 federal drug offenders sentenced in fiscal year 2010 were convicted of a mandatory minimum offense.[15]

Prosecutors cherish and embrace the power provided by mandatory minimums. After conducting a survey of federal prosecutors and defense attorneys in 13 judicial districts, the Sentencing Commission concluded that the "ability to charge an offense carrying a mandatory minimum penalty appears to be a threshold consideration in determining whether to exercise federal jurisdiction over certain types of criminal cases."[16] The surveyed defense attorneys, in particular, "concurred with the overall view that prosecutors charge an offense carrying a mandatory minimum penalty if available."[17] And once such an offense is charged, federal prosecutors are steadfastly disinclined to dismiss a count carrying a mandatory minimum.[18] In short, if there is an opportunity to cut you out of the sentencing process by tying your hands with an offense carrying a mandatory minimum penalty, prosecutors will take it.

In your hearts, you and your fellow judges resent this profound shift in power. One of your brethren who has been on the bench since 1979 recently put it best and bluntly: "The most sacred quality that judges guard most is discretion, which is [a] choice. . . . Mandatory minimums take that choice away . . . ."[19] This is all to say that by the time my client's case gets to you for sentencing, his fate is largely sealed.

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[11] U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES 1 (2011).

[12] *Id.*

[13] U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (2017).

[14] U.S. SENTENCING COMM'N, QUICK FACTS: DRUG TRAFFICKING OFFENSES 1 (2019).

[15] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 153 (2011).

[16] *Id.* at 107.

[17] *Id.*

[18] *See Id.* at 108.

[19] Lori Atherton, *Federal Judge, Former U.S. Attorney Discuss Mandatory Minimum Sentences at Michigan Law*, U. MICH. L. (Nov. 26, 2018), https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law_112618.aspx (quoting Judge Avern Cohn of the United States District Court for the Eastern District of Michigan) (internal quotations omitted).

Your "discretion" is dictated, controlled, and limited by federal prosecutors wielding the unyielding might of mandatory minimums.

VI. YOUR FICTION #2: ALTERNATIVES AVAILABLE TO MY CLIENT ARE ONES YOU WOULD CHOOSE FOR YOURSELF (OR YOUR CHILDREN)

As admitted earlier, my client exercised his freedom of choice by choosing to distribute drugs. But that is not the end of the story or the analysis, because a person's freedom of choice is only as valuable as the choices available to that person. And the truth is that the alternatives (to drug dealing) available to my client are ones that you would never freely choose for yourself, and certainly not for your children. Like many drug defendants that have stood before you, the alternatives available to my client were limited—staying in a school that you would not (and do not) send your children to attend, and/or working low-paying jobs that barely allow him to support himself and his family (if at all). The reasons for this are numerous and complex, but they certainly include his school system that was unequipped and incapable of educating him. It also certainly includes the poverty of his community that has closed off all but a few opportunities for lawful employment, which more times than not, do not provide sufficient earnings to change the circumstances of my client and his family. It certainly includes the historic collaboration between the government and the real estate industry to use redlining and other tactics to keep our cities racially segregated (with the black and brown confined to the least desirable neighborhoods), and hamper people of color from enjoying the upward socioeconomic mobility that accompanies homeownership.[20] No one comes out of the womb wanting and choosing to be a drug dealer knowing that the end result is likely death or imprisonment. So, while my client had a choice, it was a choice among alternatives that no person, particularly you, would ever want for himself or his children.

VII. YOUR FICTION #3: A FEDERAL PRISON OFFERS MY CLIENT AN OPPORTUNITY TO GAIN THE EDUCATION AND SKILLS HE NEEDS TO PURSUE A NONCRIMINAL LIFE WHEN HE IS RELEASED

By the government's own measure, federal prisons are failing to prepare inmates for a noncriminal life outside of their walls. The most recent comprehensive Department of Justice audit of reentry programs offered by Bureau of Prison ("BOP") facilities found that "31 to 69 percent of institutions . . . failed to meet their occupational, General Educational Development (GED), English-as-a-Second

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[20] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Ta-Nehisi Coats, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

Language (ESL), Adult Continuing Education (ACE), or parenting goals."[21] Moreover, in the face of this high failure rate, the auditors discovered that "the BOP did not have a mechanism in place to hold institutions accountable for meeting goals," and the "institutions were not required to develop or implement corrective actions plans to remedy performance and ensure that goals [were] met in the future."[22] In other words, the BOP is failing miserably to meet the reentry preparedness goals that *it set*, and then is turning a blind eye to the failure.

In terms of education and skills, the odds are that my client will emerge from federal prison the same as when he went in. He will be released into the same community in which he lived prior to his time in federal custody—the same community that lacks sufficient legitimate opportunities outside of "hustling" for my client to support himself and his family. Yet, you still believe (or rather hope) that a federal prison will provide my client with the means to instigate change, despite the clear evidence that BOP offers little that will equip my client to change his path in life.

VIII. YOUR FICTION #4: DRUG LAWS—PARTICULARLY MANDATORY MINIMUMS—ARE NOT RACIST

I am not saying that the members of Congress who drafted and passed drug mandatory minimums and other drug sentencing laws are racist. Nor am I saying that federal judges or federal prosecutors are racist. What I *am* saying is that many drug sentencing laws are having a measurable racially disproportionate effect on who is prosecuted and the sentences imposed on the convicted, and as more time passes the racial impact cannot be divorced from the laws themselves.

When it comes to drug mandatory minimums, the numbers show that blacks are sentenced to mandatory minimum penalties at a higher rate than whites even though both racial groups are convicted for drug offenses at a similar rate, and blacks constitute 13.4% of the total population.[23] Of the 23,964 federal drug offenders sentenced in fiscal year 2010, 26.2% were white and 27.3% were black.[24] Yet, of the subset group of 15,831 offenders who were convicted of an offense carrying a mandatory minimum penalty, 30.3% were black compared to the 23.1% who were white.[25] The disproportion widened once these offenders reached sentencing. Of

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[21] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., AUDIT REPORT 04-16, THE FEDERAL BUREAU OF PRISONS INMATE RELEASE PREPARATION AND TRANSITIONAL REENTRY PROGRAMS, at iv (2004).

[22] *Id.*

[23] *See* U.S. CENSUS BUREAU, QUICK FACTS, https://www.census.gov/quickfacts/fact/table/US/PST045219 (last visited Apr. 17, 2020) (as of July 1, 2018, whites constituted 76.5% and blacks constituted 13.4% of the U.S. population).

[24] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, Table 8-1, at 154 (2011).

[25] *Id.*

the 7,212 drug offenders who remained subject to a mandatory minimum penalty at sentencing, 40.4% were black compared to 18.4% who were white.[26] This disproportion has narrowed in recent years, but it still exists.[27] Of course, there are many factors that contribute to the disproportion, but race is a factor that cannot be ignored or eliminated.

Indeed, the infamous crack-powder cocaine mandatory minimum disparity makes it clear that race plays a role in the disproportionate effect of our drug laws. It appears race neutral that, on its face, 21 U.S.C § 841's five-year mandatory minimum penalty is triggered by 500 grams of powder cocaine compared to just 28 grams of crack cocaine, and its ten-year mandatory minimum penalty is triggered by 5,000 grams of powder cocaine compared to 280 grams of crack.[28] But the racial and socioeconomic realities of who generally uses and sells crack versus powder cocaine is well reflected by the statistic that 80% of those convicted for crack cocaine offenses in fiscal year 2018 were black.[29] And once charged, blacks are subjected to the harsh mandatory minimum penalties for crack at an increased rate compared to whites charged with trafficking powder cocaine. For instance, in fiscal year 2010, 1,966 black offenders were subject to a mandatory minimum sentence for crack, compared to the 194 white offenders who were subject to the powder cocaine mandatory minimum penalties.[30] As one of your fellow federal judges succinctly put it, the crack-powder sentencing policy has resulted in a "racial disparity [that] is more extreme, more state-sponsored, and more entrenched than any racial disparity said to exist before the guidelines were enacted."[31]

There is no justification for the 18-1 disparity. Chemically, crack is the same as powder cocaine, and therefore causes the same physiological and psychotropic effects as powder cocaine.[32] Moreover, all the justifications cited for the disparity (even wider at that point) when the disparity was first enacted into law—e.g. crack

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[26] *Id.*

[27] *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017) (Of the 19,584 federal drug offenders sentenced in fiscal year 2016, 23.4% were white, 23.5% were black. Of the subset group of 8,760 offenders who were convicted of an offense carrying a mandatory minimum, 23.6% were black compared to the 21.9% who were white. Of the 4,241 offenders who remained subject to a mandatory minimum penalty at sentencing, 31.4% were black compared to 23% who were white).

[28] 21 U.S.C. § 841 (2018).

[29] U.S. SENTENCING COMM'N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES 1 (2019).

[30] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, Table 8-4, at 154, Table 8-7 at 192 (2011) (for that same fiscal year, 110 white offenders remained subject to a mandatory minimum for a crack offense, and 556 black offenders remained subject to a mandatory minimum for a powder cocaine offense).

[31] Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 28 CRIM. JUST. 26, 29 (2014).

[32] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

is more addictive—have long been debunked.[33] That the disparity continues to exist despite you (and your fellow judges), prosecutors, and Congress knowing that it is unjustified and contributing to the growing racial disparity of our prison population, is why I say such laws are racist.

You and I see every day what the data reflects—the growing racial disproportionality in this country's prison population.[34] We are witnessing from front row seats how harsh drug sentencing laws and enforcement policies are causing generations of black and brown Americans (mostly men) to be lost in disproportionate numbers to mass incarceration and locked into second-class citizenship as convicted felons.

IX. YOUR FICTION #5: FEEL FREE TO EXERCISE YOUR RIGHT TO A TRIAL

The Sixth Amendment guarantees a federal drug defendant a jury trial if he so chooses. Every drug offense defendant still has the right to trial by a jury of his peers. What has changed is the *cost* of exercising that right—and by cost, I mean years in prison, and not legal fees. It is a reality that cannot be sugar-coated: federal drug defendants are being coercively priced out of their Sixth Amendment trial right by the prosecutorial power supplied by mandatory minimum penalties and the federal sentencing guidelines.

Prosecutors are using their unchecked power to stack the costs of losing a trial at coercively high levels. Prosecutors present offenders with a simple choice: plead guilty and receive a sentence that is harsh, but allows you to walk free one day, or go to trial and spend your life (or most of it) in prison if you lose. As discussed earlier, the trial tax is the added prison time that a defendant is exposed to for exercising his Sixth Amendment trial right. It is a choice and a tax that people charged with federal offenses face daily, and the result for those who choose to exercise their trial right is sobering. In 2012, the average post-trial sentence of a federal drug offender was three times higher than an offender who pled guilty: sixteen years versus five years and four months.[35] Even first time drug offenders are not spared. First timers (with no weapon involved in the offense) who faced a mandatory minimum sentence and chose to go to trial received sentences twice as long as similarly situated first-timers who accepted a plea: 117.6 months versus 59.5 months.[36] This wide gap, reflecting the expensive trial tax that accompanies drug

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[33] *See* Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, AM. CIV. LIBERTIES UNION, at 4–5 (2006), https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law.

[34] *See, e.g.*, HUMAN RIGHTS WATCH, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, AM. CIV. LIBERTIES UNION, at 2 (2016), https://www.hrw.org/news/2016/10/12/us-disastrous-toll-criminalizing-drug-use.

[35] *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

[36] *Id.* at 7–8.

cases involving mandatory minimums, has driven the extinction of trials in drug cases. From the early 1980s—prior to the adoption of Section 841's mandatory minimum scheme—to 2012, the percentage of federal drug cases being resolved by guilty pleas instead of trials jumped from 68.6% to 96.9%.[37] The costs of using a trial to hold the government to its burden of proof has become too expensive by decades of prison time.

X. YOUR FICTION #6: YOU ARE WINNING THE WAR ON DRUGS

Mass incarceration is both a backbone tactic and a goal of the war on drugs. The generals of this war continually believe that the supply, as well as the demand, of drugs can be stymied by "tough on crime" sentencing policies, such as harsh mandatory minimum sentences and the elimination of parole for federal offenders. These policies drafted you into the war. Now when you put on your black robe, you are putting on the uniform of a war-on-drugs soldier. Cops and agents may staff the front lines, but you are responsible for housing, managing, and punishing the enemy combatants they capture.

And you keep playing your role as a dutiful solider despite indicators that your side is losing—and losing badly. Between 1980 and 2013, the number of incarcerated federal drug defendants increased by 2,006%, from 4,749 inmates to 100,026 inmates.[38] Today, 45.2% (74,222 people) of the federal prison population were convicted of a drug offense.[39] By comparison, the second largest offense population today consists of people convicted of weapons, explosives, and arson related offenses—a distant 19% (31,299 people).[40] Yet, despite the government's ability to capture enemy combatants at this staggering rate, the continuous decline in the price of heroin and cocaine, along with the increasing purity of these drugs, shows that the war's supply-side attack strategy has had little effect on the availability or purity of illegal drugs.[41] Nor has the war led to a significant decrease in drug use by Americans.

The inability to affect the supply of drugs is understandable considering that the war's "success" is largely limited to imprisoning lower and middle level drug offenders—i.e. drug offenders who have minimal to no control over large-scale and large-volume manufacturing, importation, and distribution of narcotics. Take for instance, people convicted of crack-related offenses. In 2016, street-level dealers accounted for 45% of crack defendants that year, followed by wholesalers who

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[37] *Id.* at 31.

[38] HUMAN RIGHTS WATCH, *supra* note 35, at 17.

[39] FED. BUREAU OF PRISONS, INMATE STATISTICS: OFFENSES, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Feb. 20, 2020).

[40] *Id.*

[41] *See* Katie Hunt, *Report: Cheaper, Purer Illegal Substances Suggest Global War on Drugs is Failing*, CNN (Oct. 1, 2013), http://www.cnn.com/2013/10/01/world/war-on-drugs-failing/.

constituted a distant 25.1%.[42] Organizational leaders represented just 6.5% of crack defendants that year.[43] The low rate that your war captures and imprisons those at or near the top of the illegal drug trafficking operations is not limited to crack. Overall, the most common functions of convicted federal drug defendants in recent years were courier (23%), followed by wholesaler (21.2%) and street-level dealer (17.2%).[44]

Putting aside the lack of "success," the war is also bankrupting your side. More specifically, the cost of incarcerating drug offenders is consuming a crippling amount of resources and threatening the government's ability to fight other types of crime and terrorism. For starters, the federal system is arresting, convicting, and sentencing people to extended prison terms at a rate that surpasses the system's capacity to house the convicted. System-wide, at the end of 2017, BOP was operating at 14% *over* capacity.[45] For high security facilities, the problem was worse at 24% *over* capacity.[46]

The packing and overpacking of our prisons come with burdensome economic costs that are increasingly co-opting the Department of Justice's resources. From fiscal year 2001 to fiscal year 2013, pretrial detention costs more than doubled from $617 million to $1.5 billion.[47] Over that same time period, the BOP's budget for incarcerating sentenced offenders became a dramatically increased amount of the DOJ's budget: from 20% ($4.3 billion) of the Justice Department's FY 2001 discretionary budget to 25% ($6.4 billion) of its FY 2013 budget.[48] It is not hard to see how the housing, feeding, caring for, and providing rehabilitative services to a rapidly growing prison population has become burdensomely expensive. Medical care costs alone have become crippling. The price tag for providing medical care to all federal inmates reached $1.18 billion for fiscal year 2017.[49] Medical costs will only increase as the growing prison population ages. As the BOP recently warned Congress, the agency's "medical care costs are growing at an unsustainable rate."[50] The growth in "unsustainable" costs is not contained to medical care. Indeed, as a deputy attorney general told the American Bar Association, "the 'unsustainable' cost of the prison system represents 'a crisis that . . . has the potential to swallow up so

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[42] *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 115 (2017).

[43] *Id.*

[44] HUMAN RIGHTS WATCH, *supra* note 35, at 18.

[45] DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, FY 2019 PERFORMANCE BUDGET 11 (2018), https://www.justice.gov/jmd/page/file/1034421/download.

[46] *Id.*

[47] Memorandum from Dep't of Justice Inspector Gen. Michael Horowitz to Dep't of Justice Attorney Gen. (Dec. 20, 2013), http://www.justice.gov/oig/challenges/2013.htm [hereinafter Inspector General Memorandum].

[48] *Id.*

[49] FED. BUREAU OF PRISONS, *supra* note 45, at 19.

[50] *Id.* at 23.

many important efforts in the fight against crime,' and that '[e]very dollar we spend at the [DOJ] on prisons and detention . . . is a dollar we are not spending on law enforcement efforts aimed at violent crime, drug cartels, public corruption cases, financial fraud cases, human trafficking cases, [and] child exploitation . . . .'" [51]

Finally, if there ever was a clear sign of the failure of the war on drugs, it is the growing number of states that are decriminalizing and legalizing marijuana possession and sale. These states have not only abandoned the war, but instead seek to manage and profit from of the war's primary targets.

So here we are—both exposed. We tell ourselves that these fictions serve a broader purpose, but really we are just not ready to do without them. The fictions make it easier for us to get through this case and on to the next—because there is always a next case. If we were to forsake the fictions, we would be forced to confront the hard truths about why more than 2.2 million people are incarcerated in this country, and 6.6 million are under the supervision of a correctional system.[52] We are allowing our courts to divorce reason and deep introspection in favor of the mistress of judicial economy and expediency.

At some point we will be forced from the comfort of these fictions. The jails and prisons will be full, and the consequences of fatherless and motherless, mostly inner-city, communities will flood main street life. But I guess that is a challenge for another day, because right now it is time to call the next case on the docket.

Sincerely,

Assistant Federal Public
Defender of Anywhere USA

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[51] Inspector General Memorandum, *supra* note 47.

[52] Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, DEP'T OF JUST. (2018).