



Written statement of Human Rights Watch

to

The United States House of Representatives
Committee on Oversight and Government Reform

“Criminal Justice Reform”

July 14, 2015

Chairman Chaffetz, Ranking member Cummings, members of the Committee, thank you for the opportunity to submit a statement to the Committee on the topic of criminal justice reform.

Human Rights Watch is an independent, international organization that works in more than 90 countries around the world as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all. We scrupulously investigate abuses, expose the facts widely, and press those with power to respect rights and secure justice. Within the United States, we have long worked on domestic human rights concerns, including in the area of criminal justice.

The attention that this Committee and others are paying to the issue of criminal justice reform is a highly positive development, and one that is long overdue. We offer the comments below in the hopes of informing reform efforts, to ensure that they address the key underlying causes of many of the problems—excessive sentencing, mass incarceration—that this Committee and others are examining.

In particular, we wish to emphasize the importance of restraining prosecutorial power in federal drug cases in criminal justice reform. Prosecutorial discretion is important to securing justice. But mandatory drug sentencing laws have given prosecutors too much power—they are able to strong-arm drug defendants by offering them a choice: significantly shorter prison terms if they plead guilty and excessively severe sentences if they go to trial. Coerced pleas and disproportionately harsh sentences should not be part of federal criminal justice.

In December of 2013, Human Rights Watch released “An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty,” a report that details how prosecutors extract guilty pleas from federal drug defendants by charging or threatening to charge them with offenses carrying harsh mandatory sentences and by seeking or threatening to charge them with additional mandatory sentencing enhancements.¹ Prosecutors acknowledge that their plea bargaining offers are made with an eye to securing pleas and without regard to whether the resulting sentences would be fair or proportional to the defendant’s alleged criminal conduct.

¹ Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>

When Congress enacted the current mandatory sentencing scheme, it did not intend to provide prosecutors a bludgeon to coerce defendants into pleading. Yet that has been the effect. Today 97 percent of federal drug defendants plead guilty, an increase of 40 percent from the early 1980s, before mandatory drug sentences were enacted.² Prosecutors make good on their threats for those few defendants who have the temerity to insist on their right to trial. If they go to trial, and are convicted, they receive sentences on average three times as long as those who accept a plea bargain.³

Prosecutors are able to coerce plea bargains by threatening defendants with: mandatory minimum sentences based on drug quantity; mandatory sentencing enhancements for drug offenders with one or more prior convictions; and mandatory sentences consecutive to the drug sentences when a firearm was involved in the drug offense. Prosecutors and defense counsel know that the mandatory nature of the drug sentences and enhancements will preclude judges from imposing sentences that are better tailored to the defendant's conduct and role in the offense. Armed with mandatory sentences keyed to the charges they file, prosecutors—who represent the executive branch—have, in effect, been able to assume a sentencing function that rightly belongs with the judiciary. Judges cannot countermand prosecutorial decisions that yield disproportionately long or cruelly excessive sentences.

“An Offer You Can’t Refuse” contains many examples of unjustifiably long sentences that resulted from prosecutorial decisions. For example, Sandra Avery, a small-time drug dealer, rejected a plea of 10 years for possessing 50 grams of crack cocaine with intent to deliver. The prosecutor triggered a sentencing enhancement based on her prior convictions for simple drug possession, and Avery was sentenced to life without parole.⁴

Sentencing cudgels in the prosecutor’s toolbox

Mandatory minimum sentences based on drug weights

Most federal drug defendants are prosecuted under laws which key five- and ten-year minimum sentences to the weight of the drugs involved in the offense, regardless of the

² Out of more than 25,000 convicted federal drug defendants in 2012, only 771 were convicted after trial. USSC, 2012 Sourcebook, “Table 38: Plea and Trial Rates of Drug Offenders in Each Drug Type, Fiscal Year 2012,”

http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table38.pdf (accessed July 13, 2015).

³ Human Rights Watch, *An Offer You Can’t Refuse*, p. 102.

⁴ Information on the case of Sandra Avery obtained from documents filed in *United States v. Avery*, United States District Court for the Middle District of Florida, Case No. 8:05-CR-389, which are available on PACER; from Human Rights Watch correspondence with Avery; and from Human Rights Watch telephone interview with James Preston, federal prosecutor, Middle District of Florida, August 6, 2013.

defendant's role or culpability. While Congress apparently intended the five- and ten-year sentences to be minimum sentences for mid- and senior-level figures in the drug business, prosecutors routinely seek them for low-level players as well.

Depending on how prosecutors choose to exercise their charging discretion, someone hired to drive a box of drugs across town, for example, can face the same mandatory sentence as the major trafficker who orchestrated the delivery and was caught with the box. Take, for example, Jamel Dossie, a 20-year-old small-time street-level drug dealer's assistant who earned about \$140 for acting as a go-between in four hand-to-hand sales totaling 88 grams of crack. Prosecutors charged him with an offense carrying a five-year mandatory minimum.⁵

At least half of convicted federal drug defendants were sentenced under federal laws mandating five- or ten-year mandatory minimum sentences.⁶ But those who plead guilty have sentences that are on average 11 years shorter than those convicted after trial. In some cases—there is no data indicating how many—as part of a plea agreement prosecutors drop charges from one containing a ten-year mandatory minimum to one with a five-year mandatory minimum. Prosecutors also offer defendants sentencing relief if they agree to provide substantial assistance to the government in prosecuting other cases. Plea agreements may also contain an assurance that even though mandatory minimum charges are retained, the prosecutors will support a lower guideline sentence. Our interviews with judges, defense attorneys, and prosecutors made clear that offering defendants who face mandatory minimum sentences some sort of sentencing concession is a common practice in plea bargains. But, as one former US Attorney told us, “If you reject the plea, we’ll throw everything at you. We won’t think about what is a ‘just’ sentence.”⁷

Mandatory sentences for prior drug convictions

When prosecutors file an information with the court to secure a prior drug felony sentencing enhancement based on a drug defendant's prior record (also referred to as an “851” because of the statutory provision⁸ that authorizes it), they greatly increase the mandatory sentence the defendant would face. Prosecutors have complete discretion

⁵ *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

⁶ United States Sentencing Commission, 2014 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table43.pdf> (accessed July 13, 2015), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

⁷ Human Rights Watch telephone interview with former US attorney (name withheld), Utah, April 25, 2013.

⁸ 21 USC 851.

whether to file an information, but if they do and the defendant had qualifying prior convictions, judges have no choice but to impose the higher sentence upon conviction.⁹ If the prosecutor chooses to file an information notifying the court of a single prior conviction, the defendant's sentence will be doubled, e.g., from ten years to 20. But if a prosecutor chooses to notify the court of two prior convictions, for a defendant facing a 10-year mandatory minimum based on the quantity of drugs in his case, the prosecutor will have required the judge to impose a mandatory sentence of life without parole.

Congress apparently intended the prior felony enhancements to ensure truly hardened, professional traffickers with long records received sufficient punishment. But the statute only requires that the prior convictions were punishable by one year or more—the defendant may never have actually served any time. And it does not require the prior offenses to be serious. In one case, prosecutors sought to enhance a defendant's sentence because he had a state conviction for simple possession of marijuana.¹⁰ Moreover, the prior convictions could have happened decades ago: in another recent case, prosecutors sought to enhance a cocaine dealer's sentence based on a marijuana selling conviction that was more than 25 years old.¹¹

In 2013, Human Rights Watch attended the sentencing hearing of a federal drug defendant in a multi-defendant cocaine trafficking conspiracy who had refused to plead guilty despite various sentencing inducements offered by the prosecutor. Shortly before trial, the government upped his minimum sentence from 10 years to life by filing a prior felony information with the court based on the defendant's two prior marijuana convictions. The government offered to withdraw the prior felony information if the defendant would plead. Not surprisingly, he did. As the judge noted, the defendant “buckled under [the] pressure and agreed to forgo a trial.”¹²

Mandatory sentences for weapon involvement

A third mandatory sentencing provision, referred to as 924(c), permits prosecutors to obtain additional consecutive sentences for a drug defendant if a weapon was involved in the drug offense. The first 924(c) conviction carries a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and

⁹ The only way for a defendant to avoid a sentence enhancement is to establish that the prior convictions are not valid or eligible to trigger the enhancement.

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

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

¹² *United States v. Kupa*, No. 11-CR-345, 2013 U.S. Dist. LEXIS 146922, 56 (E.D.N.Y. 2013).

subsequent convictions each carry 25-year consecutive sentences—resulting in grotesquely long sentences for drug defendants when prosecutors “stack” the charges. For example, Marnail Washington, a 22-year-old with no criminal history, was sentenced to 40 years for conviction of possession with intent to distribute crack cocaine and two 924(c) counts.¹³ The judge who was required to impose this “shockingly harsh” mandatory sentence said it was “the worst and most unconscionable” he had given in 23 years on the federal bench.¹⁴ Again, prosecutors have complete discretion whether or not to pursue 924(c) charges, but judges have no choice but to impose the mandatory increase if they do.

Recommendations

1. *Pass the SAFE Justice Act.* Introduced this month, H.R. 2944 (the SAFE Justice Act) would help to rein in the ability of federal prosecutors to threaten disproportionately long and unfair sentences. It would modify mandatory minimum sentences so that they exclude people whose role in a drug trafficking offense is low-level or minimal, and give judges more discretion through “safety valves” to impose sentences on drug offenders shorter than those required by mandatory minimums. Further, the SAFE Justice Act would narrow sentencing enhancements and require the acts that trigger them to be serious and recent before being used to double mandatory minimums. The Act would also reform 924(c) provisions on weapons involvement that would end the practice of “stacking” sentence enhancements.
2. *Codify 2013 Department of Justice charging directives and collect data on practices.* As of mid-2013, a directive issued by then-Attorney General Eric Holder instructed federal prosecutors to avoid charging offenses carrying mandatory minimums for certain low-level nonviolent offenders and also to avoid seeking mandatory sentencing enhancements based on prior convictions when the severe sentences are not warranted. There is little data to show whether these directives are being followed in practice. The Department of Justice should collect and disseminate data on charging practices that can help inform whether prosecutors are adjusting

¹³ *United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004). Washington pled guilty to possessing different guns in connection with two different quantities of drugs in separate locations and on separate occasions six days apart, and was convicted of two stacked counts of violating § 924(c). The sentence therefore consisted of five years of imprisonment on the first § 924(c) count and 25 years of imprisonment on the second count, with those 30 years running consecutive to the underlying 10-year sentence.

¹⁴ *Ibid* at 1309.

their charging practices. But directives from the Attorney General are not binding and do not carry the force of law. Congress should codify these directives so that they are incorporated into the laws prosecutors are obliged to follow.