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ELIMINATING MANDATORY MINIMUM SENTENCES: PUTTING SENTENCING POWER BACK IN THE HANDS OF THE JUDICIARY

Hunter Anderson¹ and Joseph Dummar²

Ron Miller had been a general manager of a company for twenty-four years with no criminal record when his best friend asked him to allow a shipment of drugs to be delivered to his company's address. Ron reluctantly agreed to help his friend, who was desperate for money. Before the drugs arrived, Ron backed out and asked his friend not to send the drugs, but by that point the shipment had already been made. The police tracked the shipment to Ron and arrested him. Even though Ron never knew the type nor the quantity of drug that was delivered to his company, the judge of Ron's trial was required to base Ron's sentence on mandatory minimum sentencing laws. Ron was unable to trade information for a lesser

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 - 2 Joseph Dummar is a Sophomore at BYU pursuing a major in Philosophy and minors in Logic, Business, and Psychology. He is an editor for Aporia, BYU's philosophy journal and an author for Preamon, BYU's international current events journal. He thanks Hunter Anderson for being the best of co-author in the world and Neal Hillam and Holly Castleton for their help in the research and editing process.

sentence because he played such a small role in the crime and he received a ten-year prison sentence.³

The sentencing judge stated the mandatory sentence had created a “vicious circle” because small crime players, like Ron, were getting long sentences, without any information to trade for a lower sentence because of his minor involvement.⁴ Thousands of people with no criminal record and minimal involvement in drug crimes have been sentenced to extensive time in prison without chance of parole under mandatory sentencing laws.⁵ This paper will discuss the history and consequences of mandatory minimum sentences (MMS), specifically in the realm of non-violent drug offenses. We will discuss the inefficiencies that result from MMS and suggest reform to address these shortcomings.

I. BACKGROUND

Since their inception, the legislature has often used mandatory minimum sentences as a decisive tool to quell public fear. Congress first instituted MMS in 1790⁶ in response to the national crisis of piracy. The second round of federal MMS laws came during the Civil War, when Congress passed legislation requiring all Confederate spies to be killed upon conviction.⁷ It wasn’t until the turn of the 20th century, that a commission suggested the elimination of most MMS laws and

3 Families Against Mandatory Minimums, *Mandatory sentencing was once America’s law-and-order panacea. Here’s why it’s not working.*, Families Against Mandatory Minimums, 8, (Feb. 21, 2020, 11:47 PM). <https://www.prisonpolicy.org/scans/famm/Primer.pdf>.

4 Families Against Mandatory Minimums, *Mandatory sentencing was once America’s law-and-order panacea. Here’s why it’s not working.*, Families Against Mandatory Minimums, 8, (Feb. 21, 2020, 11:47 PM). <https://www.prisonpolicy.org/scans/famm/Primer.pdf>.

5 Lauren-Brooke & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Feb. 2, 2020, 11:55 PM), <https://time.com/4596081/incarceration-report/>.

6 Crimes Act, H.R. Chap. IX, 1 Stat. 112 (1790).

7 The Confiscation Act, S. ch. XXV, § 4, 12 (1862) Stat. 339, 340.

many were repealed.⁸ During the 1900s, drug abuse became more prominent, and widespread outcry grew. Although they had been inefficient in the past, Congress once again turned to MMS laws in response to public fears. In 1951 and 1970, legislation was passed that required certain drug crimes to carry mandatory sentences.⁹

In 1975, a bill was introduced that would authorize the creation of a commission purposed with creating sentencing guidelines for judges. Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act (1984), which created the United States Sentencing Commission (USSC).¹⁰ The USSC established federal sentencing guidelines that take into consideration factors relating “both to the subjective guilt of the defendant and to the harm caused by his facts.”¹¹ The USSC cited sentencing disparity, lack of certainty of punishment and crime control as the judicial shortcomings which merited the creation of the sentencing guidelines.¹² Although the guidelines are not strictly mandatory, judges are required to consider them when issuing sentences. If a judge decides to increase or decrease the sentence from what the guidelines suggest, they must state in open court what “aggravating or mitigating circumstances” warranted the departure.¹³

8 The United States Sentencing Commission, *History of Mandatory Minimum Penalties And Statutory Relief Mechanisms*, 18 (Feb. 27, 2020), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

9 *Id.*

10 Comprehensive Crime Control Act, 98th Cong., 1762, (1984) (enacted).

11 *Federal Sentencing Guidelines*, Cornell Law School (Feb. 22, 2020, 12:55 AM), https://www.law.cornell.edu/wex/federal_sentencing_guidelines.

12 United State Sentencing Commission, *An Overview of the United State Sentencing Commission*, 1 (Feb. 27, 2020, 12:57 AM), https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

13 Comprehensive Crime Control Act, 98th Cong., 1762, (1984) (enacted).

The creation of the USSC and implementation of federal sentencing guidelines did not solve the growing drug abuse problem.¹⁴ In the 1980s, many still feared that drug abuse could affect their homes, schools, and communities.¹⁵ The country was shocked when Len Bias died from a cocaine overdose in the summer of 1986, only two days after being drafted by the Boston Celtics.¹⁶ Congress, facing immense pressure to address the public fear of drug abuse, acted as they had in the past and quickly enacted strict legislation.¹⁷ While a typical bill takes one to two years to become law from the time it is introduced,¹⁸ the Anti-Drug Abuse Act of 1986 became law just five months after the death of Bias.¹⁹ Years after its passage, the principal drafting attorney of the Anti-Drug Abuse Act expressed his regret

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- 14 More Imprisonment Does Not Reduce State Drug Problems, PEW (Feb. 27, 2020, 12:55 AM), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>.
- 15 Jennifer Robison, *Decades of Drug Use: The '80s and '90s*, Gallup Poll (Mar. 7, 2020, 9:18 AM), <https://news.gallup.com/poll/6352/decades-drug-use-80s-90s.aspx>.
- 16 Mike Frandsen, *Remembering Maryland Basketball Star Len Bias*, The Bleacher Report (Feb. 27, 2020, 12:58 AM), <https://bleacherreport.com/articles/1230358-remembering-maryland-basketball-star-len-bias>.
- 17 Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, Cracks in the System, The American Civil Liberties Union 1, (October 2006), https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf
- 18 *Statistics and Historical Comparison*, Gov Track (Feb. 27, 2020, 1:03 AM), <https://www.govtrack.us/congress/bills/statistics>.
- 19 Anti-Drug Abuse Act, H.R.5484, 99th Cong. (1986) (Sterling, the drafting attorney of the Anti-Drug and Abuse Act said that Congress "...had no hearings. We did not consult with the Bureau of Prisons, or with the federal judiciary, or with DEA, or with the Justice Department, to at least find out from those folks what would be the effect of mandatory minimums."); Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, The Atlantic (Mar. 7, 2020, 9:40 AM), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/>.

for being involved in the hasty process, and claimed that the bill "had been the worst legislation [he'd] ever been involved with."²⁰

The Anti-Drug Abuse Act created MMS based on drug type and quantity. An individual convicted of trafficking 100 grams or more of heroin would face a minimum sentence of five years.²¹ The trafficking of one kilo or more of heroin would increase the sentence to a minimum of ten-years.²² The minimum sentences are enhanced if the trafficker had prior drug felony convictions, or if death or serious injury resulted from the drug offense.²³ Other minimum sentences were created for crimes involving powder cocaine, crack cocaine, marijuana, and other drugs.

The safety valve provision was created to allow certain first-time drug offenders to be exempted from extreme MMS. Individuals who meet specific criteria may qualify for a sentence below the statutory minimum. The defendant must have no or a limited criminal history, the crime must be non-violent, the crime must not result in death or serious bodily injury, the defendant must not be an organizer in the offense, and the defendant must cooperate by truthfully providing all known information concerning the crime.²⁴ Although there are many first-time offenders charged with drug offenses that carry MMS, very few are eligible for a reduced sentence. In 2015, only 13% of drug offenders qualified for the safety valve provision.²⁵

Near the beginning of the 21st century, critics began to speak in opposition to MMS. A law professor said: "the weight of the evidence

20 Mary-Jayne McKay, *More Than They Deserve Judges Protest Mandatory Sentencing In Drug Cases*, 60 Minuets (Feb. 27, 2020, 1:10 AM), <https://www.cbsnews.com/news/more-than-they-deserve/>.

21 *Mandatory Minimum Sentencing of Federal Drug Offenses*, Every CRS Report, (Jan. 28, 2020, 6:26pm), https://www.everycrsreport.com/reports/R45074.html#_Ref503372497.

22 *Id.*

23 *Id.*

24 Federal Sentencing Statute, 18 U.S.C. § 3553(a) (1987).

25 Families Against Mandatory Minimums, *Safety Valves*, Families Against Mandatory Minimums (Feb. 27, 2020, 7:39 PM), <https://fammm.org/our-work/u-s-congress/safety-valves/>.

clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.²⁶ Others that spoke against MMS postulated that they removed discretionary power from the hands of judges and created a proportionality disparity between the offender and the sentence, resulting in low-level offenders often receiving extremely harsh sentences.²⁷ It wasn't until 2010 that Congress responded by passing considerable reformatory legislation. The Fair Sentencing Act made significant changes to MMS.²⁸ The penalty for simple possession of crack cocaine was repealed, and the crack cocaine quantity threshold for five and ten-year MMS was increased. From 1993 to 2013, over 60% of drug offenders were convicted of an offense carrying a MMS. In 2014, the percentage began to drop. In 2016, it had fallen to 46.8%.²⁹ It is unclear if the decrease in convictions carrying MMS can be completely explained by the Fair Sentencing Act, although the increased quantity thresholds certainly resulted in a reduction of the federal prison population.³⁰

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- 26 Michael Tonry, *Mandatory Penalties*, in 243, The University of Chicago Press Journals, (1992).
- 27 Families Against Mandatory Minimums, *Mandatory sentencing was once America's law-and-order panacea. Here's why it's not working.*, Families Against Mandatory Minimums, 5, (Feb. 21, 2020, 11:47 PM). <https://www.prisonpolicy.org/scans/famm/Primer.pdf>.
- 28 The United States Sentencing Commission, *2015 Report to the Congress: Impact of the Fair Sentencing Act of 2010*, The United States Sentencing Commission (Feb. 27, 2020, 8:10 PM), <https://www.uscc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010>.
- 29 *Id.*
- 30 Gregory Midgette & Steven Davenport & Jonathan P. Caulkins AND Beau Kilmer, *What America's Users Spend on Illegal Drugs, 2006–2016*, RAND Corporation (Mar. 9, 2020, 7:44 PM), https://www.rand.org/pubs/research_reports/RR3140.html (The decrease in convictions carrying an MMS could partially be the result of a general shift away from cocaine (which has strict MMS enforcement) to marijuana use (which has much lighter penalties)).

The First Step Act (2019) is the most recent piece of legislation that reformed MMS.³¹ It primarily focused on improving prison conditions for inmates, increasing their ability to earn time towards an early release for good behavior, and expanding the safety valve provision, potentially allowing for more low-level drug offenders to receive reduced sentences. Some MMS were also shortened. For example, conviction of a felony drug offense that used to carry a 20-year minimum sentence was reduced to 15 years.³² It additionally created new programs that seek to rehabilitate offenders through means other than imprisonment.³³ In the summer of 2019, the Department of Justice announced that 3,100 inmates would be released and 1,691 sentences had been reduced due to the First Step Act.³⁴ Currently, there is not adequate data available to measure the extent to which the First Step Act is affecting current prisoners and new drug offenders. Nonetheless, this reform marks a large step in the right direction.

The scope of this paper is limited to discussing the MMS laws for non-violent drug crimes. The remainder of the paper details the inefficiencies and faults created by the loss of judicial discretion. We argue that MMS involving drug offenses should be eliminated. We will show that eliminating them will restore discretionary power to

31 The United States Sentencing Commission, *History of Mandatory Minimum Penalties And Statutory Relief Mechanisms*, 18 (Feb. 27, 2020), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

32 United States Sentencing Commission, *First Step Act Signed Into Law*, 2, (2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf.

33 Federal Bureau of Prisons, *An Overview of the First Step Act*, Federal Bureau of Prisons (Feb. 27, 2020, 8:17 PM), <https://www.bop.gov/inmates/fsa/overview.jsp>.

34 Office of Public Affairs, *Department Of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment System*, The Department Of Justice (Feb. 27, 2020, 8:20 PM), <https://www.justice.gov/opa/pr/departement-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>.

the judiciary when sentencing. We propose a course of action for the reformation of the federal sentencing guidelines. Judges will take these non-binding guidelines into account when determining sentences.

II. RESTORING JUDICIAL DISCRETIONARY POWER

Current reform has not been enough to resolve the problems created by the Anti-Drug Act. MMS restrict judges from exercising judicial discretion. After defining judicial discretion, the myriad of resulting problems will be discussed, including sentencing disparity and unduly harsh punishments, the unintentional transfer of discretionary power from judges to prosecutors, and the damaging effects of MMS on the US federal prison system. Notwithstanding the arguments that advocates cite to justify MMS, in the case of non-violent drug offenses, the costs far outweigh the benefits. Decisions on sentencing should be made by judges and not by legislators or prosecutors.

A. Judicial Discretion

The first substantial effect of MMS that we will address is the loss of judicial discretion. The other shortcomings and problems that will be discussed would be resolved by restoring the judiciary's discretionary power. Judicial discretion is defined as "a judge's power to make decisions based on fairness or a weighing of the facts and circumstances."³⁵ In other words, judges are able to give more personalized rulings by taking into consideration all available information. It must be well understood what the limits of judicial discretion are. Chief Justice John Marshall said, "Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."³⁶ Judges do not have the power

35 *Judicial Discretion*, Cornell Law School, (Feb. 21, 2020, 11:16 PM), https://www.law.cornell.edu/wex/judicial_discretion.

36 Thomas A. Zonay, *Judicial Discretion: Ten Guidelines for Its Use*, The National Judicial College (Feb. 27, 2020, 8:27 PM), <https://www.judges.org/judicial-discretion-ten-guidelines-for-its-use/>.

to choose to disregard the law, but rather ensure that it is effected properly.

The practicality of discretion is illustrated by the following example of a mother with two sons. One is very extroverted and loves to spend time with his friends. The other child is introverted and prefers to spend his free time watching TV. Both children skip class, and the mother finds out. Because the mother knows her children well, she is aware of the most effective approach to punishing them. She may restrict her extroverted child from seeing his friends and keep her introverted child from using the television. A third party, who does not know the individual children, might suggest that the mother use the same punishment for both children. Because they are so different, using the same punishment would not effectively discipline both children. This simple example shows the vital role discretionary power plays when applying punishments to unique individuals.

In the example of the mother, her discretion was used to decide the best punishment for her children. In our legal system, judicial discretion is used both in sentencing and interpreting the law. The degree to which judicial discretion may be exercised when interpreting a law is dependent on the specificity of the relevant statute. Laws that are strict and narrow leave little room for a judge's interpretation. Conversely, broad laws that simply prohibit unsafe behavior, without making further specifications on what practices constitute unsafe conduct, leave it to the judiciary to determine what actions are considered breaking the law. For instance, a law that simply stipulates safe driving gives little to no direction to judges in how to interpret the law. However, if multiple judges begin to rule that texting and driving is unsafe, a legal precedent will be established. The precedent grows stronger or more binding as more judges rule similarly. Because the judiciary aims for a standard of consistency, a judge is unlikely to rule in contrary to a precedent that has already been established by many judges.³⁷

The legislature will often pass clear and specific laws to preserve consistency in the legal system. By doing so, they establish a

37 ISU Law School, *The Importance of Precedent*, ISU (Mar. 3, 2020, 8:52 PM), <https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html>.

binding precedent to which the judiciary must adhere. Historically, the legislation defining drug offenses has been quite strict; this was true even before Congress passed the Anti-Drug Act. There was not much room for judges to use their discretion when determining whether or not a certain action was a drug crime.³⁸ However, judges were still able to exercise their discretion when issuing sentences for drug offenses before the implementation of MMS.³⁹

B. Sentencing Disparity

By establishing mandatory minimum sentences for non-violent drug crimes, Congress established control over a significant part of the judicial process and took away the judiciary's ability to exercise discretion when sentencing.⁴⁰ Advocates of MMS argue that one reason Congress passed the Anti-Drug Act was to eliminate sentencing disparity.⁴¹ The principle of sentencing disparity is illustrated by the following example. If all judges punished the criminal offense of arson with five years in prison, a strong precedent would exist. It would become common knowledge that anyone convicted of arson would receive a five-year sentence. However, sentencing disparity would exist if some judges began to sentence differently for the same crime of arson. These different sentences could include a ten-year penalty in some instances or a one-year penalty in others. Sentencing

38 The Harrison Narcotics Act of 1914, The Marihuana Tax Act of 1937, The Controlled Substances Act of 1970, the establishment of the Drug Enforcement Administration (DEA), and The Comprehensive Crime Control Act of 1984 are what define drug crimes; Lisa N. Saco, *Drug Enforcement in the United States: History, Policy, and Trends*, Congressional Research Service, 2-8, (Mar. 7, 2020, 9:10 AM), <https://fas.org/sgp/crs/misc/R43749.pdf>.

39 *Id.*

40 Legal Information Institute, *Judicial Discretion*, Cornell Law School (Feb. 27, 2020, 8:25 PM), https://www.law.cornell.edu/wex/judicial_discretion.

41 Statement of Michael J. Sullivan before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, July 14, 2009, <https://www.govinfo.gov/content/pkg/CHRG-111hhr51013/html/CHRG-111hhr51013.htm>.

disparity weakens or even eliminates whatever sentencing precedent may exist. There are many reasons why a judge may use their discretion to order a sentence for an individual that isn't commensurate with the precedent. A judge's sentence might be influenced by their own personal belief. Aggravated or mitigated sentences could also be the result of the characteristics of the offender, such as the presence or lack of a criminal record, age, race, education, etc.

Sentencing disparity often carries a negative connotation. It has been defined as "unequal treatment [in criminal punishment] that is often of unexplained cause and is at least incongruous, unfair and disadvantaging in consequence."⁴² Critics of sentencing disparity claim that it weakens the legal system by creating inconsistency in how the law is enforced.⁴³ If the public believes judges are taking advantage of discretionary power, courts may become distrusted and disrespected.⁴⁴ Judges may be accused of racism if whites and blacks receive different sentences after committing the same crime.⁴⁵ Other critics point out that judges could misuse their discretion to practically let some people off the hook for crimes⁴⁶ while severely punishing

42 Alfred Blumstein, *Research on Sentencing: The Search for Reform*, 9, Volume II, 1983.

43 Hans Zeisel & Shari Seldman Diamond, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, University of Chicago Law School, 110, (Mar. 7, 2020, 10:00 AM), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12072&context=journal_articles.

44 *Id.*, at 111.

45 American Civil Liberties Union, *Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, Inter-American Commission on Human Rights, 1, (Mar. 7, 2020, 10:04 AM), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

46 Ray Sanchez, *Stanford rape case: Inside the court documents*, CNN (Mar. 7, 2020), <https://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/index.html>.

others.⁴⁷ Before the Anti-Drug Act was passed, sentencing disparity in non-violent drug offenses was prominent. By establishing MMS, the legislature addressed these concerns by reducing sentence disparity from 16% to 8% through the restriction of judicial discretion.⁴⁸

However, it should be remembered that federal judges are appointed and voted on before they take office. They are individuals that have considerable legal experience and are trusted by a majority of government officials to oversee that the law is appropriately realized. Like other government officials, judges are subject to removal of office for abusing their power and office. They are not left free to act however they please. Historically, only fifteen federal judges have been impeached, and even fewer have been convicted and removed from office. The reasons for impeachment included bribery, perjury, intoxication on the bench, and, in two instances, favoritism towards litigants.⁴⁹ Although action to remove federal judges is extremely rare, the existence of a removal process keeps judges accountable to their oath to interpret the law to the best of their ability.

The implementation of MMS reduced sentencing disparity as defined before. However, this was achieved at a significant cost: judges could no longer consider disparities between individual offenders. This often resulted in the imposition of overly harsh sentences. The stories of Johnny Patillo, Kemba Smith, and Brenda Valencia illustrate this principle. Johnny Patillo was a 27-year-old

47 Josh Harkinson, *23 Petty Crimes That Have Landed People in Prison for Life Without Parole: New ACLU report documents the disturbing growth of endless sentences.*, Mother Jones (Mar. 7, 2020, 10:23 AM), <https://www.motherjones.com/politics/2013/11/23-petty-crimes-prison-life-without-parole/>.

48 James M. Anderson, Jeffrey R. Kling, AND Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, The University of Chicago Press for The Booth School of Business, University of Chicago & The University of Chicago Law School, 295, (Mar. 2, 2020 6:09 PM) <https://www.jstor.org/stable/pdf/10.1086/467426.pdf?refreqid=excelsior%3Aaf7ab3fe2831fc53786359af97c82508>.

49 Federal Judicial Center, *Impeachments of Federal Judges*, Federal Judicial Center (Mar. 9, 2020, 8:29 PM), <https://www.fjc.gov/history/judges/impeachments-federal-judges>.

African-American. He had obtained a college education and worked a steady job. In 1992, he accepted a neighbor's offer of \$500 to deliver a package containing illegal drugs to Texas. Patillo had no record of prior criminal activity. The package which Patillo attempted to deliver contained 681 grams of crack cocaine, which resulted in a minimum sentence of ten-years without the possibility of parole.⁵⁰ The sentencing judge called attention to the overwhelming effect that the type of drug had on the sentence, stating "If the package contained a different narcotic, or a lesser quantity of the same substance, [the] defendant might have been sentenced to straight probation."⁵¹ While the crime of drug trafficking cannot go unpunished, a ten-year prison sentence for a first-time offender who was minimally involved is excessive.⁵²

The outcome of Patillo's trial was not unique. Another individual similarly affected was Kemba Smith. At the age of 19, she fell in love with Peter Hall, who was eight years older than Smith. After moving in with Hall, Smith discovered he was an abusive partner. Unbeknownst to Smith, he was also the leader of a multi-million crack cocaine ring and was one of the FBI's 15 most wanted. Smith

50 United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993) (On April 14, 1992, the defendant Johnny Patillo pled guilty to a single count indictment that charged him with possession with intent to distribute approximately 680.7 grams of crack cocaine. 21 U.S.C. § 841(a) (1) (1988 and Supp. III 1991). On December 18, 1992, the court sentenced defendant, after orally making findings that it was compelled to impose a mandatory minimum sentence of ten-years under 21 U.S.C. § 841(b) (1) (A) (1988 and Supp. III 1991). The Sentencing Guidelines called for a sentence of between 151 and 188 months (twelve years seven months to fifteen years), a range from which the court found departure appropriate); *U.S. District Court for the Central District of California - 817 F. Supp. 839 (C.D. Cal. 1993)*, Justia U.S. Law (Feb. 21, 2020), <https://law.justia.com/cases/federal/district-courts/FSupp/817/839/1459460/>.

51 United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993).

52 Paul Larkin, Jr., *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUNDATION (Feb. 21, 2020, 11:33 PM), <https://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against>.

made several attempts to leave Hall due to his physical and emotional abuse, but they were all unsuccessful.⁵³ Later, Hall was found murdered. The courts held Smith accountable for the total amount of the drugs in his conspiracy charge. Smith testified before the Inter American Commission on Human Rights in 2006 that, “I did not traffic in drugs, but I knew my boyfriend did. I knew while living with him that he did not have a job and we were living off of the proceeds of his drug crimes. I never claimed total innocence and this is the reason why I pled guilty.”⁵⁴ Smith was sentenced to 24 years in prison. The fact that she only delivered the money to Hall’s associates out of fear of her life, that she was a first-time offender, that her relationship was abusive, or that she was being charged with a non-violent crime did not matter. Similarly, Brenda Valencia’s life was forever changed by MMS. When she was 19-years-old, Valencia drove her roommate’s stepmom to West Palm Beach to pick up money from a cocaine dealer. The police raided the exchange, and Brenda was taken into custody with the actual drug dealers.⁵⁵ Brenda had no previous record of breaking the law. She was charged with cocaine conspiracy and received a sentence of 12 years and 7 months in prison. This sentence is twice as many years as she would have received if she had been convicted of manslaughter.⁵⁶

J. Spencer Letts⁵⁷ declared “Statutory mandatory minimum sentences create injustice because the sentence is determined without

53 United States v. Smith, 113 F. Supp. 2d 879 (E.D. Va. 1999) (Smith was a college student at Hampton University in Hampton, Virginia when she got involved in a drug ring that distributed cocaine and crack cocaine from New York City to the District of Columbia, Virginia, North Carolina, and elsewhere.); *Kemba Smith*, The Sentencing Project (Feb. 22, 2020, 1:08 AM), <https://www.sentencingproject.org/stories/kemba-smith/>.

54 *Id.*

55 Mary-Jayne McKay, *More Than They Deserve*, CBS NEWS 60 MINUTES (Feb. 22, 2020, 1:15 AM), <https://www.cbsnews.com/news/more-than-they-deserve/>.

56 *Id.*

57 United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993).

looking at the particular defendant.”⁵⁸ If MMS were nonexistent, Judge Letts would have been able to give the sentence that best fit the defendant based on all the facts and circumstances. In the case of Johnny Patillo, the sentence could have reflected the fact that he had no criminal record, was a college graduate, and held a job. Letts

58 Families Against Mandatory Minimums, *Mandatory sentencing was once America’s law-and-order panacea. Here’s why it’s not working.*, Families Against Mandatory Minimums, 5, (Feb. 21, 2020, 11:47 PM). <https://www.prisonpolicy.org/scans/famm/Primer.pdf>.

and many other judges⁵⁹ claim that MMS strip them of their power to correctly apply the law to unique individuals and situations. The presiding judge in any given case will hear many facts that pertain not only to the crime that was committed but also pertaining to the defendant. Judges have a significant opportunity to better understand the character, upbringing, and motives of the offender. Clearly, the presiding judge has an advantage in prescribing the correct punishment to

59 Lori Atherton, *Federal Judge, Former US Attorney Discuss Mandatory Minimum Sentences at Michigan Law*, Michigan Law (Feb. 22, 2020, 12:49 AM), https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law_112618.aspx, (“The most sacred quality that judges guard most is discretion, which is choice. Mandatory minimums take that choice away from a judge. You’re obligated to follow the statute, and if you don’t follow the statute, your decision is going to go to the court of appeals and get reversed. And judges don’t like to have their decisions reversed.” Avern Cohn, US District Judge); Rachel Martin, *A Federal Judge Says Mandatory Minimum Sentences Often Don’t Fit The Crime*, NPR (Feb. 22, 2020, 12:08 AM), <https://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime> (“These mandatory minimums are so incredibly harsh, and they’re triggered by such low levels of drugs that they snare at these non-violent, low-level addicts who are involved in drug distribution mostly to obtain drugs to feed their habit. They have a medical problem. It’s called addiction, and they’re going to be faced with five and 10 and 20-year and sometimes life mandatory minimum sentences. I think that’s a travesty.” Mark Bennett, Federal Judge of Iowa); Kevin Sharp, *Another Federal Judge is Speaking Out against Mandatory Minimum Sentences*, Medium (Feb. 22, 2020, 12:13 AM), <https://medium.com/@civilrightsorg/another-federal-judge-is-speaking-out-against-mandatory-minimum-sentences-e30301ad2211> (“If there was any way I could have not given him life in prison I would have done it,” said Kevin Sharp, the now-former federal judge, recalling a sentencing hearing in 2014. “What they did was wrong, they deserved some time in prison, but not life.”); Carimah Townes, *Federal Judge Calls Attorney General’s Mandatory Sentencing Decision ‘Bad Policy’*, The Appeal (Feb. 22, 2020, 12:43 AM), <https://theappeal.org/federal-judge-calls-attorney-generals-mandatory-sentencing-decision-bad-policy-489786fa8562/>, (“There are many, many horror stories about the application of mandatory minimums to defendants who really should not have gone to prison for as long as they did... I think it’s bad policy to take the discretion away from trial court judges.” Judge William Smith Chief US District Court).

the offender. Regardless, the prison time is determined by a group of congressmen who will never meet the individual defendants nor hear the distinct circumstances accompanying each case.

Patillo, Smith, and Valencia are just a few of the thousands of people that have suffered many years in prison for their minimum involvement in a non-violent drug offense.⁶⁰ None of these aforementioned defendants had a criminal record. We would expect the safety valve provision to have applied in each of these cases. Instead, the defendant's complete lack of a criminal history in no way decreased their sentence, illustrating how impersonal mandatory minimum sentencing laws have made the judicial system. Punishments. Although it has been expanded,⁶¹ the safety valve provision is simply not efficient in ensuring low-level offenders are exempted from long, harsh punishments.⁶² Only completely repealing MMS will protect people like Patillo, Smith, and Valencia from spending years in prison.

Under MMS, judges are unable to consider disparities between different drug offenders and are forced at times to give the same sentence to first-time offenders and hardened drug dealers alike.⁶³ Furthermore, one of the only reasons a judge can mitigate a MMS is if the offender cooperates by trading information or aiding in the arrest of

60 Sari Horwitz, *From a first arrest to a life sentence*, The Washington Post (Mar. 7, 2020, 10:47 AM), <https://www.washingtonpost.com/sf/national/2015/07/15/from-a-first-arrest-to-a-life-sentence/>.

61 *Id.*

62 United States Courts, *Mandatory Minimum Sentences Decline*, Sentencing Commission Says, United States Courts (Mar. 7, 2020, 8:41 AM), <https://www.uscourts.gov/news/2017/07/25/mandatory-minimum-sentences-decline-sentencing-commission-says>. (“The number of federal prison inmates convicted under mandatory minimum laws decreased by 14 percent from 2010 to 2016, although they still make up more than half of all federal inmates, according to a new report by the United States Sentencing Commission.”).

63 Emma Andersson, *Why Low-Level Offenders Can Get Longer Sentences Than Airplane Hijackers*, American Civil Liberties Union (Mar. 7, 2020, 10:48 PM), <https://www.aclu.org/blog/smart-justice/sentencing-reform/why-low-level-offenders-can-get-longer-sentences-airplane>.

a different individual. Low-level offenders, such as Ron Miller, often do not have information to trade because they are barely involved. This results in dealers and high-level offenders often because they trade information for a lower sentence. A judicial system that may result in a first-time offender spending a decade or more in prison while drug kingpins barely see time behind bars is seriously flawed. Once the drug type and quantity have been identified, the “correct” sentence could be given by any person who can read a chart, and there no longer exists a need for a judge. This impersonality in sentencing can lead to excessive amounts of time spent in prison, particularly for first time offenders. The elimination of MMS is necessary to empower the judiciary to punish criminals while ensuring the sentence is appropriate for the individual offender.

C. Prosecutorial Discretion

An unintended consequence of mandatory minimum sentences was the transition of discretionary power from judges to prosecutors.⁶⁴ The judicial branch was designed to be impartial and unbiased, ensuring fair trials and a proper interpretation of the law. Conversely, prosecutors have every incentive to see defendants found guilty and sentenced to serve time in prison. By restricting a judge’s ability to use discretion in sentencing, their role in a criminal trial is limited to determining what evidence the jury may hear by ruling on objections, and sentencing after the jury has ruled. On the other hand, prosecutors exercise their discretion throughout the proceedings of a criminal trial, including the decision of what charges are pressed against the defendant. It is true that judicial discretion is not entirely impartial or unbiased. Similarly, prosecutorial discretion is not without its own faults. In the late 1970s, a law professor claimed that prosecutorial discretion is “commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial,” “usually exercised by people of less experience and less

64 Rachel E. Barkow, *The Problem With Mandatory Minimum Sentences*, *The New York Times* (Mar. 9, 2020, 4:30 PM), <https://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/the-problem-with-mandatory-minimum-sentences>.

objectivity than judges,” and “commonly exercised on the basis of less information than judges possess.”⁶⁵

The following example exhibits prosecutorial discretion in action. A man is arrested and charged for two different drug offenses, respectively carrying a ten and twenty-year MMS. A prosecutor might cut a deal with the defendant, offering to drop the charges on the offense carrying a twenty year sentence on the condition that he plead guilty on the charge carrying a ten-year sentence. If the defendant accepts the deal and pleads guilty the first offense, he will be sentenced to ten-years in prison without being judged by a jury of their peers. Because the average sentence for a federal drug defendant who pleads guilty is five years and four months, while defendants that go to trial receive an average sentence of 16 years,⁶⁶ many defendants feel they cannot afford the risk of taking their case to trial. Prosecutors are extremely proficient at obtaining guilty pleas; currently, only 3% of federal drug defendants go to trial.⁶⁷ These conversations between defendants and prosecutors happen behind closed doors, leaving prosecutors free to use coercive tactics to elicit guilty pleas from defendants without any oversight.

The lack of transparency when prosecutorial discretion is exercised is very concerning.⁶⁸ Contrarily, when a judge exercises their judicial discretion, it is a matter of public record. Every decision a judge makes during a legal proceeding is made manifest for scrutiny or praise, resulting in judges being considerably more accountable

65 Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, *The University of Pennsylvania Law Review*, 564.

66 United States Sentencing Commission, *Commission Datafiles*, United States Sentencing Commission (Mar. 3, 2020, 12:11 AM), <https://www.ussc.gov/research/datafiles/commission-datafiles>.

67 Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, *The New York Times* (Mar. 9, 2020, 4:34 PM), <https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> (97% of all federal court cases end in a plea deal).

68 Nancy Gertner, *Prosecutorial Discretion: Transparency and Federalism*, *Slate* (Mar. 9, 2020, 4:36 PM), <https://slate.com/news-and-politics/2008/04/prosecutorial-discretion-transparency-and-federalism.html>.

when using discretion than are prosecutors. Whatever the reason justifying the restriction of judicial discretion may be, placing unchecked discretionary power in the hands of those with the most to gain from a trial resulting in a prison sentence is not the solution. MMS must be repealed before discretionary power can be put back into the hands of those best equipped to use it objectively and responsibly, the judges.

D. The Federal Prison Problem

Despite recent reforms, more than half of all prison inmates are convicted under Mandatory Minimum Sentences.⁶⁹ From 1980 to 2014, the incarceration rate in the United States grew 220%⁷⁰, despite the fact that crime rates fell significantly over this same time period.⁷¹ Although MMS are just one element in the increase in incarceration rates, they are an incredibly significant one.⁷² In contrast, the primary elements of the incarceration boom were "changes in the severity of sentencing and enforcement."⁷³

A primary reason that MMS were put into effect was to act as a deterrent against crime.⁷⁴ Since MMS have been enacted, extensive research has been conducted to measure their effectiveness in

69 United States Courts, *Mandatory Minimum Sentences Decline, Sentencing Commission Says*, United States Courts (Mar. 7, 2020, 8:41 AM), <https://www.uscourts.gov/news/2017/07/25/mandatory-minimum-sentences-decline-sentencing-commission-says>.

70 Office of the Press Secretary, *CEA report: Economic Perspectives on Incarceration and the Criminal Justice System*, The White House (Mar. 2, 2020, 6:22 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.

71 *Id.*

72 *Id.*

73 *Id.*

74 S.K., *Longer jail sentences do deter crime, but only up to a point*, The Economist (Mar. 2 2020, 8:10 PM), <https://www.economist.com/free-exchange/2016/03/29/longer-jail-sentences-do-deter-crime-but-only-up-to-a-point>.

stopping crime. It is estimated that a 10% increase in average sentence length corresponds to a zero to 0.5% decrease in arrest rates.⁷⁵ Additionally, MMS may result in increased recidivism rates. Other research has found that for every year added to a sentence, the average rate of re-arrest for that crime goes up by 4-7%.⁷⁶ Currently, nearly half of all offenders who serve a prison sentence are behind bars again within eight years.⁷⁷ As prison populations increase, it becomes increasingly difficult for the basic health and safety needs of prisoners to be met. In prisons, rates of human immunodeficiency virus (HIV) and hepatitis C virus (HCV) are 5–28 times higher than in the general population, respectively.⁷⁸ Based on the latest national figures available from the Bureau of Justice Statistics,

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- 75 Executive office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, 4 (2016).
- 76 Office of the Press Secretary, *CEA report: Economic Perspectives on Incarceration and the Criminal Justice System*, The White House (Mar. 2, 2020, 6:22 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.
- 77 The United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, The United States Sentencing Commission (Mar. 2, 2020 4:44 PM), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>.
- 78 Timothy P. Flanigan, Nickolas Zaller, Lynn Taylor, Curt Beckwith, Landon Kuester, Josiah Rich, AND Charles C.J. Carpenter, *HIV and Infectious Disease Care in Jails and Prisons: Breaking Down the Walls with the Help of Academic Medicine*, Trans Am Clin Climatol Assoc. (Mar. 2, 2020, 4:54 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2744543/>.

4,980 prisoners in US correctional facilities died in 2014.⁷⁹ Additionally, 24,661 inmates were raped in 2015.⁸⁰

Longer sentences for non-violent drug offenders are excessively harsh and ineffective punishments. Since the implementation of MMS, the number of prisoners has risen to a point where the US now detains nearly 25% of the world's prisoners.⁸¹ This quantity of prisoners equates to a massive fiscal cost for the United States. The incarceration expenditures of the criminal justice system⁸² approach \$80 billion.⁸³ US citizens are forced to finance a flawed prison system that is not deterring future crime. Since poor living conditions resulting from mass incarceration⁸⁴ could potentially explain the failure of prisons to rehabilitate offenders and decrease recidivism

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- 79 Michael Sainato, *Why are so many people dying in USUS prisons and jails?*, The Guardian (Mar. 2, 2020, 6:19 PM), <https://www.theguardian.com/us-news/2019/may/26/us-prisons-jails-inmate-deaths>.
- 80 Alysia Santo, *Prison Rape Allegations Are on the Rise: But the accusations are still rarely found to be true*, The Marshall Project (Mar. 7, 2020, 2:00 PM), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise>.
- 81 Michelle Ye Hee Lee, *Does the United States really have 5 percent of the world's population and one quarter of the world's prisoners?*, The Washington Post (Mar. 2, 2020 4:38 PM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/> (The USUS contains only 5% of the world's population).
- 82 Prison Policy, *Mass Incarceration: The Whole Pie 2019*, Prison Policy (Mar. 2, 2020, 7:53 PM), <https://www.prisonpolicy.org/reports/pie2019.html> (The criminal justice system tries and detains nearly 2.3 million people every year).
- 83 Office of the Press Secretary, *CEA report: Economic Perspectives on Incarceration and the Criminal Justice System*, The White House (Mar. 2, 2020, 6:22 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice> (Since the early 2000's the criminal justice system's expenditures have increased by 70%).
- 84 The National Academies Press, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academy of Sciences Engineering and Medicine (Mar. 7, 2020, 2:18 PM), <https://www.nap.edu/read/18613/chapter/2>.

rates, action to reduce inmate overpopulation is necessary. Repealing MMS would dramatically decrease prison populations. With fewer inmates to accommodate, prison conditions could be drastically improved. Furthermore, the US would save billions of dollars that could be invested in other reformative programs to deter future crimes and rehabilitate offenders.

III. PROPOSAL

There is a fear that following the repeal of MMS, the judiciary would possess virtually unchecked discretionary power. Judges would be free to rule as they please, sentencing in accordance with their personal preferences. It is true that each judge is unique. Pertinent facts and circumstances of each case will influence each particular judge's sentence differently. Disparity, for better or worse, will certainly exist when judges may exercise discretion while sentencing. However, we propose a safeguard that could keep judges from exercising judicial discretion to push a personal agenda. We acknowledge that this is perhaps not a perfect solution. Regardless, alternatives to MMS need to be put forth and considered.

Federal sentencing guidelines play a key role in our proposal. However, as they now exist, the guidelines are quite similar to MMS in the amount of time a convicted offender will spend in prison. Comprehensive reform of the guidelines is necessary before they will effectively aid judges in determining the correct sentence for individuals. No suggestions for new guidelines will be discussed in this paper, but rather a broad reformative process will be briefly outlined.

The current sentencing guidelines should be completely eliminated. The legislature and the USSC have access to an abundance of data on types of drug offenders, effects of current prison sentences, recidivism rates, the success of non-incarceratory programs, and more. Using this data, Congress can determine reasonable standards based on the offense, level of involvement, and criminal history of the offender. As the new guidelines are implemented, data will be gathered indicating whether they are leading to the successful rehabilitation of drug offenders. The results of situations where judges have departed from the guidelines will also be taken into

consideration. These new guidelines will ideally be subject to reform every few years. Over time, Congress would approach guidelines that suggest sentences with a strong track record of rehabilitating the offender and deterring future crimes. Since the guidelines are not mandatory,⁸⁵ they would give judges a reasonable starting point when determining a sentence. If a judge makes an extreme departure from what the guidelines suggest, this could be cause for a prosecutor or defendant to appeal⁸⁶ the sentence to a higher court.

IV. LOOKING FORWARD

Throughout history, Congress has passed mandatory minimum sentences to curb public fears. In 1986, the Anti-Drug Act was enacted in response to extreme drug abuse. Now, over 30 years later, MMS have stripped judges of judicial discretion, placed that discretion in the hands of prosecutors, and significantly inflated the federal prison population. Under our proposal, reformed federal sentencing guidelines would play a key role in allowing judges to exercise judicial discretion while maintaining the integrity of the judicial system. While we recognize this is not a perfect solution, action must be taken. Our reform would put sentencing power back in the hands of the judiciary and make a necessary step towards mitigating drug offenses.

85 *Federal Sentencing Guidelines*, Cornell Law School (Feb. 22, 2020, 12:55 AM), https://www.law.cornell.edu/wex/federal_sentencing_guidelines.

86 *Appeals*, UNITED STATES COURTS (Feb. 22, 2020, 12:57 AM), <https://www.uscourts.gov/about-federal-courts/types-cases/appeals>.