

April 11, 2016

Re: Sentencing Reform and Corrections Act (S. 2123)

Dear Senator:

We write to share the views of our organizations whose members are federal and state law enforcement agents and prosecutors responsible for the investigation and prosecution of drug traffickers and other violent offenders involved in the distribution and sale of dangerous drugs.

As you know, our organizations have raised multiple concerns in the past about the Sentencing Reform and Corrections Act and its impact on public safety. We are mindful of ongoing attempts by the bill's proponents to portray new revisions to the bill as defusing our concerns and mitigating the bill's harmful effects. That is certainly not the case, and we are prompted to correct the record. Indeed, provisions that were viewed as favorable from a law enforcement perspective have now been removed, and provisions that could be viewed as favorable from a drug cartel's perspective have been added. For a variety of reasons, the nation can ill-afford the kinds of dramatic changes in our criminal justice system that the Sentencing Reform and Corrections Act would bring about.

First, let's be clear about the current environment in which criminal justice reform is being proposed. The federal prison population is in decline, far-reaching changes in federal sentencing policy are already in the works, and states and local communities are experiencing the unintended negative consequences of so-called sentencing reforms at the state level. Misguided legislation like the Sentencing Reform and Corrections Act comes about when myth and misunderstanding overwhelm fact and reality. The assertion that the federal prison population is exploding is myth; the federal prison population is, in fact, decreasing and the rate of decrease will only accelerate as early releases continue, both by administrative fiat and Presidential commutation. The Bureau of Prison projects the federal prison population will drop next year to its lowest level since 2004. A series of dramatic reductions in the federal sentencing guidelines by the United States Sentencing Commission are now in place and will continue to result in the early release of tens of thousands federal prisoners incarcerated for drug trafficking offenses, along with gun-related and other violent crimes. Without doubt, public safety will be negatively impacted by these early releases, given the high incidence of repeat crime associated with drug trafficking. Indeed, this is already happening, as the tragic triple-murders committed by early releasee Wendell Callahan in Columbus, Ohio recently demonstrated. And, it is important to note that under the revised bill, thousands of drug traffickers with profiles like that of Callahan will be eligible for early release.

Meanwhile, the national crime rate continues to rise, as violent crime explodes in cities around the country; and the nation is mired in the worst drug epidemic in its history, with daily drug overdose deaths, including those from heroin use, exceeding those caused by auto accidents. Americans' level of concern about crime and violence is at its highest point in 15 years, according to Gallup. Fifty-three percent of U.S. adults say they personally worry "a great deal" about crime and violence, an increase of 14 percentage points since 2014. This figure is the highest Gallup has measured since March 2001. There can be no mistake: the Sentencing Reform and Corrections Act, if enacted, will be counter to American sentiment, a gift to drug dealers and the cartels they serve, and an insult to the thousands of American families dealing with the terrible consequences of addiction fueled by dealers of heroin and other deadly drugs.

For the law enforcement community, the Sentencing Reform and Corrections Act (SRCA), as revised, will make it even more difficult for investigators and prosecutors to pursue the most culpable drug dealers and secure their cooperation to pursue others in drug distribution rings and networks, domestic and international. The bill will over-expand judicial discretion to apply the leniency of the "safety valve" to major drug traffickers, including those with multiple prior criminal convictions. Under current law, the safety valve permits minor participants in drug trafficking crimes with minor criminal records to reduce their sentencing exposure to avoid mandatory minimum sentences, even if they choose not to cooperate. In contrast, drug traffickers with significant criminal histories and/or those who occupy leadership roles or use violence and threats of violence as part of their criminal conduct remain subject to the mandatory minimum sentences, unless they agree to cooperate and assist the government in investigating and prosecuting their confederates or other crimes. This cooperation allows these offenders the opportunity to receive reduced sentences, including the possibility of sentences below the applicable mandatory minimum. Under the revised bill, however, the safety valve will be turned wide open to create a flood gate of legal jailbreaks, with the expansion of its coverage to cover nearly anyone in a drug distribution network, except for the highest level leaders and managers.

The revised bill will not require offenders to cooperate, as proponents claim, and in fact will lead to less cooperation, not more. The "second safety valve" established by the SRCA will eviscerate the 10-year mandatory minimums for drug trafficking and destroy the incentive under current law for offenders to reduce their sentences through cooperation with law enforcement in the pursuit of gangs and criminal organizations. This is because the second safety valve will expand the authority of judges to reduce the current 10-year mandatory minimum sentence for drug trafficking to anyone considered a "minor or minimal participant" in drug distribution conspiracies.

Furthermore, as a result of the newly included definition of "serious drug offense" in Section 101 of the bill, which significantly narrows the class of prior felony drug trafficking convictions which can be counted for purposes of recidivist

enhancements, serial drug traffickers with multiple convictions could become eligible for relief from the second safety valve. This combination of expanded judicial discretion, along with further sentence reductions under the corrections title of the bill, could effectively reduce ten-year sentences for trafficking to as little as 2.5 years, a pale reflection of the ten-year minimum sentence intended by Congress. Moreover, felons who enjoy the benefits of the second safety valve will not be required to cooperate with law enforcement, nor disclose anything more than their role and knowledge of the underlying offense. These felons will not be required to testify against their criminal associates or cooperate in any way in other criminal investigations. Thus, the bill seriously undermines law enforcement investigatory efforts by giving serious criminals the best of both worlds: less sentencing exposure and the choice to not cooperate with law enforcement in further investigatory efforts.

As if this were not enough, proposed revisions of the bill purport to exclude retroactive sentencing reductions to those who have previously committed “serious violent felonies,” an approach likely to create endless litigation throughout the federal courts over the vagueness of that term in light of the U.S. Supreme Court’s decision in *Johnson v. United States*, 576 U.S. ___ (2015). Significant variations in judicial interpretations of the term are likely to result, echoing the same injustices that existed in the 1980’s that prompted Congress to respond with more determinative measures like mandatory minimums. Moreover, the Supreme Court’s multiple decisions over the past several year, in cases like *Johnson* questioning Congressional drafting of repeat offender statutes, add risk to the term’s constitutional validity. Ultimately, the retroactivity provisions remaining under the revised bill still allow for reduced sentences for some of the most dangerous drug traffickers who possessed firearms as part of their criminal activity.

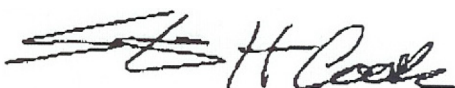
Finally, inexplicably, the bill now adds leniency for those who smuggle drugs into the United States by boats and submarines. Drug smugglers using vessels in international waters are routinely very serious traffickers moving substantial amounts of drugs. According to a recent study, 80% of all illegal drugs smuggled into the United States in 2012 arrived via maritime routes.¹ In FY2015, U.S. Customs and Border Protection (CBP), Air and Marine Operations crews were involved in 198 such interdiction events, recovering an average of 1,045 pounds of cocaine per seizure (213,000 pounds total). According to CBP, these transshipment routes are used by “transnational criminal organizations . . . for the movement of narcotics, precursor chemicals, bulk cash and weapons.” Such activity continues unabated. On March 24, 2016, AMO arrested four people transporting more than 12,800 pounds

¹ Byron Ramirez and Robert J. Bunker, Eds., *Narco-Submarines: Specially Fabricated Vessels Used for Drug Smuggling Purposes*, Foreign Military Studies Office – Interagency Research Collaboration, U.S. Army (May 2014).

of cocaine with an estimated value of more than \$1.9 million in a “self-propelled semi-submersible vessel.”²

Ultimately, respect for the rule of law and confidence in our criminal justice system rests with the fulfillment of truth in sentencing and the assurance that sentences will stick. The institutional capacity of law enforcement authorities to fulfill their mission and assure crime-stricken communities that justice will be delivered is undermined by the Sentencing Reform and Corrections Act. For these reasons, we remain opposed to the legislation and the revisions under discussion.

Sincerely yours,



Steve Cook
President
National Association of Assistant
United States Attorneys



Nate Catura
President
Federal Law Enforcement Officers
Association



Ron Hosko
President
Law Enforcement Action Network



Robert Bushman
President
National Narcotics Officers'
Associations' Coalition

² Press Release, U.S. Customs and Border Protection, *CBP P-3 Detects Semisubmersible* (Mar. 24, 2016), available at <http://1.usa.gov/22naPtr>