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Safeguarding Justice for All Americans

September 8, 2016

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Re: Sentencing Reform Act of 2015, H.R. 3713

Dear Member of the House of Representatives:

As the voice of career federal prosecutors across the country, we write to make clear our strong and unequivocal opposition to the Sentencing Reform Act of 2015, H.R. 3713. This legislation, and other bills being advanced under the euphemistic label of criminal justice and prison or sentencing “reform,” will seriously undermine our ability to disrupt and dismantle violent gangs, domestic and international drug trafficking organizations, weaken federal firearm laws, and release thousands of violent convicted felons from federal prison. To explain our concern, we would like to make three points.

1. The federal criminal justice system is not broken.

The federal criminal justice system is not broken and is working exactly as Congress carefully intended and designed it to work. In the mid-1980s, in response to a serious national crime wave, Congress passed legislation creating mandatory minimum penalties for certain drug and firearm offenses. This legislation included amendments to the Controlled Substance Act, which created incremental mandatory minimum penalties for high-level drug trafficking. For example, Congress established a mandatory ten-year sentence for trafficking a ton of marijuana or a kilogram (2.2 pounds) of heroin. Congress also enacted the Armed Career Criminal Act, which created a mandatory minimum fifteen-year term of imprisonment for felons who have three or more prior serious drug trafficking or other violent felony convictions and are caught in possession of a firearm. At about the same time, Congress enacted a federal sentencing guideline system to assure fairness and consistency in the judicial application of prison sentences. These reforms were necessary to reign in the exercise of pre-existing, unlimited judicial discretion that had created gross sentencing disparities around the country and to prevent the imposition of light sentences for serious crimes.

Using the new tools, made available by these laws passed in the 1980’s and 90’s, federal, state, and local law enforcement agencies worked together to secure cooperation from high-level drug traffickers, gang and cartel members, and other violent criminals, putting away the worst of the worst across the country. By 2014, violent crime had been cut in half. And while we are now seeing a reversal of that trend due to factors discussed below, it is indisputable that mandatory minimum penalties played—and continue to play—a central role in the dismantlement of high-level drug trafficking and domestic and international drug trafficking organizations.

2. Over the last decade the federal criminal justice system has been weakened or “reformed” in significant ways, discounting the need for any further reform.

Despite the above-mentioned successes, or perhaps because of them, well-organized and well-funded anti-law enforcement groups like Families Against Mandatory Minimums, the National Association of Criminal Defense Attorneys, the American Civil Liberties Union and George Soros, have mounted calculated attacks against these statutes. These attacks have included aggressive litigation, lobbying before Congress, the Department of Justice, and the United States Sentencing Commission, media campaigns and even public protests outside courthouses during trials. Their efforts have resulted in a significantly weakened federal criminal justice system.

For example, in 1994, Congress added the “safety valve” to exempt truly low level, non-violent drug offenders with no significant criminal history from the application of drug mandatory minimum penalties. In 2005, in *United States v. Booker*,¹ the U.S. Supreme Court held that the Sentencing Guidelines, which narrowly limited judicial discretion to avoid sentencing disparity and inappropriate sentences, were only “advisory” and not binding on judges. This returned vast discretion to judges, limited only in instances involving the imposition of mandatory minimum sentences, for example, as required by the drug trafficking, firearm, and Armed Career Criminal statutes. In 2007, at the urging of the same groups, the Sentencing Commission reduced the sentencing guidelines for crack dealers and made these changes retroactive to previously convicted traffickers already in prison. As a result, the sentences of 16,511 convicted crack dealers were reduced. Then in 2010, Congress reduced the statutory penalties for trafficking in crack cocaine, prompting the Sentencing Commission to apply these reductions retroactively to those already in federal prison – over the objections of many in Congress – and reduce the sentences of 7,748 convicted crack dealers.

More recently, in 2013, former Attorney General Eric Holder ordered all federal prosecutors to stop using mandatory minimum sentences against certain drug traffickers, even when they were caught red handed trafficking in quantities that would trigger application of those penalties. Since then, federal prosecutions have dropped 27.4 percent.² A year later, the Sentencing Commission reduced the sentencing guidelines for all drug traffickers (regardless of the type of drug they distributed, their criminal history or history of violence, ties to gangs, or drug cartels), and again made the reduction applicable to all traffickers in federal prison. As a result, over 46,000 convicted drug traffickers became eligible for early release. More than half have already been released.

Then, last year, the Supreme Court, in *Johnson v. United States*³ held that a part of the Armed Career Criminal Act was unconstitutional. As a result, the *Johnson* decision has injected significant uncertainty into the state of criminal law and has far-reaching repercussions. Until addressed by Congress, *Johnson* will limit the future use of the Armed Career Criminal Act and the ability of federal law enforcement to remove some of the most violent repeat offenders from our streets. In addition, because the Supreme Court ruled that *Johnson* applies retroactively, the sentence of virtually every armed career criminal must be reviewed and relitigated, likely

¹ *United States v. Booker*, 543 U.S. 220 (2005).

² TRAC Reports: *Prosecutions for July 2016 Percent Change from 5 years ago (Excluding Magistrate Court)*, available at <http://trac.syr.edu/tracreports/bulletins/overall/monthlyjul16/fil/>

³ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

resulting in the earlier release of significant numbers of armed career criminals from federal prison. In fact, the U.S. Circuit Courts of Appeals are currently flooded with petitions by federal prisoners sentenced under this and other federal criminal statutes with similar language.

Moreover, recently the Sentencing Commission promulgated an amendment to the sentencing guidelines, based on *Johnson*, to weaken the guideline definition of “career offender” and, as a result, lower the probable sentence for many offenders with multiple prior violent convictions. This sentence reduction will apply not only to those being sentenced for drug trafficking, but also to a wide range of other federal crimes, including bank robbery, carjacking, kidnapping, child pornography, and human trafficking. If the amendment is made retroactive, sentencing for thousands of the most serious repeat offenders of these crimes will be reopened and many will be eligible for substantial reductions in their sentences. This amendment is much broader than the *Johnson* opinion and, if Congress permits it to stand, will unduly undermine public safety. Many of those sentenced under the Armed Career Criminal Act and as “career offenders” are the worst of the worst criminals in the federal system and, according to the Sentencing Commission, tend to recidivate at higher rates than non-career offenders and commit more violent offenses.

Finally, President Obama has commuted the sentences of hundreds of violent drug traffickers. Despite public assurances that only so-called “low-level, nonviolent drug offenders” without a “significant criminal history” would be eligible for consideration, drug kingpins, traffickers with substantial criminal histories, those who used firearms, and previously convicted felons who were caught with firearms have benefited from these commutations. For example, one individual who was the leader of an organization responsible for trafficking over ten tons of cocaine received a reduced sentence. Another major methamphetamine trafficker caught with forty firearms and convicted of using firearms in his drug trafficking was granted clemency. Another recipient had eight prior felony drug trafficking convictions. Dozens have been drug traffickers convicted of possessing or using firearms and at least six were “kingpins” convicted under the Continuing Criminal Enterprise statute. At least one estimate predicted that as many as 10,000 convicted drug traffickers currently in federal prison could receive clemency by President Obama.

3. The historic reduction in violent crime rates has begun to reverse course and in many cities across the country violent crime is skyrocketing. At the same time, we are suffering from the worst opioid epidemic in the history of our Nation. Now is the wrong time to remove or further weaken the very tools that federal prosecutors and law enforcement officers need to stem the tide of rising crime and prosecute domestic and international drug traffickers, violent gangs, and other violent offenders.

As a result of the weakening of our federal criminal justice system over the last decade and similar, sometimes more drastic, changes in some state systems, our hard fought success in cutting violent crime in half over the last two and a half decades is quickly being reversed. Our federal prison population has dropped by eleven percent over the last four years and, alarmingly, violent crime is now spiraling upward across the country. In 2015 there was a shocking 17% rise in homicides in the 56 largest U.S. cities.⁴ In the first quarter of 2016 homicides increased

⁴ Sean Kennedy and Parker Abt, *Trump is right about violent crime: It's on the rise in major cities*, Washington Post, Aug 5, 2016, available at https://www.washingtonpost.com/opinions/trump-is-right-about-violent-crime-its-on-the-rise-in-major-cities/2016/08/05/3cf6b55e-5b11-11e6-9aee-8075993d73a2_story.html?utm_term=.af4ccdb10831

another 9% in the largest 63 U. S. cities.⁵ This is a trend the media has been reporting on for over a year.⁶ At the same time, we are in the middle of what has been called the worst opioid addiction epidemic in our history. In 2014 (the last year of statistics published by the Center for Disease Control), over 47,000 people in the United States died from drug overdoses—a majority from heroin and prescription opioids.⁷ Just days ago, Cincinnati, Ohio suffered from an unprecedented 174 heroin overdoses in just six days.⁸

Why H.R. 3713 Will Harm Public Safety

The Sentencing Reform Act, H.R. 3713, will gut the mandatory minimum penalty structure, undermine already weakened firearm offenses, and release armed career criminals and serial armed violent offenders from federal prison. More specifically, it will:

- Cut by 1/3 the mandatory penalty for Armed Career Criminals and reopen sentencing for previously convicted Armed Career Criminals serving sentences in federal prison;
- Cut penalties for serial armed violent offenders and drug traffickers who were convicted of multiple firearms offenses and reopen sentencing for those who are serving time in federal prison for those crimes;
- Cut penalties for drug trafficking recidivists and reopen sentencing for those already serving time in federal prisons for those crimes;
- Expand the current “Safety Valve” to exempt drug traffickers from application of mandatory minimum penalties, even though the traffickers have significant criminal histories; and
- Narrow application of 10-year drug trafficking mandatory minimums by creating a second “Safety Valve” to exempt couriers and permit judges to ignore an offender’s criminal history.

These provisions will substantially undermine the mandatory minimum penalties applicable to high-level drug traffickers, armed career criminals, serial violent felons, and armed drug

⁵Heather Mac Donald, *The Nationwide Crime Wave Is Building*, Wall St. J., May 24, 2016, available at <http://www.wsj.com/articles/murder-rate-rises-in-29-of-largest-u-s-cities-in-first-half-of-2016-1469485481>

⁶ Aamer Madhani, *Several big U.S. cities see homicide rates surge*, USA Today, July 10, 2015, available at <http://www.usatoday.com/story/news/2015/07/09/us-cities-homicide-surge-2015/29879091/> (“After years of declining violent crime, several major American cities experienced a dramatic surge in homicides during the first half of this year.”); Vernon Odom, *Philadelphia violent crime rate on the rise*, <http://6abc.com/news/philadelphia-violent-crime-rate-on-the-rise/927865/> (“Citywide the murder and violence rate is running significantly ahead of last year’s. 692 people have been shot so far this year - 161 murdered. In 2014 at this point there were 621 wounded by gunfire - 149 shot dead.” “This is something that’s happening all over the country, and police agencies as well as social service agencies are now trying to work together to get an explanation as to why it’s happening.”); Heidi Kulicke, *As Crime Surges, Downtowners Worry*, LA Downtown News, July 28, 2015, available at http://www.ladowntownnews.com/news/as-crime-surges-downtowners-worry/article_57e4f716-3247-11e5-aa62-079b56f2b0c8.html (“The crime statistics released this month by the Los Angeles Police Department were sobering, particularly in Downtown Los Angeles, where all manner of law-breaking shot up.”)

⁷ Center for Disease Control Report, *Drug overdose deaths hit record numbers in 2014*, available at <http://www.cdc.gov/media/releases/2015/p1218-drug-overdose.html>

⁸ *‘This is Unprecedented’: 174 Heroin Doses in 6 Days in Cincinnati*, Washington Post, August 29, 2016, available at <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/this-is-unprecedented-174-heroin-overdoses-in-6-days-in-cincinnati/>

traffickers. Most provisions will not only apply to future cases, but will also apply to those convicted and in federal prison now.

“Reform” proponents point to two parts of H.R. 3713 that supposedly will guard against abuse of the law and protect the public: (1) prior-release review by a judge; and (2) the “serious violent felony” exception. Plain and simple, they will not.

The assurance that a judge will review prior release appears to provide comfort. But in reality, and based upon our experiences as federal prosecutors, it will not. The history of three major rounds of federal sentencing reductions over the past decade, involving over 60,000 applications, has involved initial review by federal judges. In some cases, that reliance has yielded disastrous and deadly consequences.

Motions for sentence reduction are placed on the dockets of judges and prosecutors who already have full workloads. Very often, when it is time to review the case, some or all of the original participants are gone. The cases are assigned to a new AUSA (probably working under the direction of a U.S. Attorney appointed by a different administration), a new judge (likely appointed by a different president than the original sentencing judge), and a new probation officer, all of whom have little or no familiarity with the case. Even when some of the original participants are available, the cases are old business on busy dockets and garner little focus. Rather than receiving careful review as proponents suggest, courts (and U.S. Attorneys’ Offices) have processed the sentence reductions mechanically⁹ sometimes with disastrous and fatal results. With respect to the Sentencing Commission’s recent across-the-board reductions for all drug traffickers in federal prison, consider this:

- “A federal analysis of the expected impact of the first wave of those approved for early release shows 663 prisoners from California had filed for shorter sentences as of late July. Federal judges denied 92 of them.” *The face of the federal prison release: A heavy dose of meth, crack and cocaine*, Los Angeles Times, Oct. 10, 2015;
- “The U.S. Attorney’s Office in Pittsburgh declined to comment for this story, but Cogan said the office ‘erred on the side of granting them.’” *16 Pittsburgh-area offenders to get early prison release under new sentencing guidelines*, Trib. Live, Oct. 31, 2015;
- “In the Northern District of New York, the [court, prosecution, and defense] agreed on the eligibility of almost all of the inmates, and disagreed on only five cases that became the subject of litigation. . . . Of those five cases, a judge ordered early release for three, and rejected one. A fifth case is pending.” *Upstate NY gang members on secret list of 6,000 freed early from prison: See who’s out*, Syracuse.com, Nov. 20, 2015; and
- “In Northwest Indiana, 218 people applied to have their sentences reduced as a result of the changes, according to a U.S. Sentencing Commission report published in April. Of that number, 182 petitions were granted, 36 were denied. . . . In the Northern District of Illinois, which includes Chicago, there were 452 petitions for sentencing modifications. All but two of those were granted.” *After*

⁹ In fact, many courts use a check-the-box and fill-in-the-blank form to expedite entry of orders reducing early release.

federal changes, some Northwest Indiana drug traffickers see reduced sentences,
NWI Times, July 24, 2016.

The seriousness and dangers associated with the early release of these dangerous felons is perhaps best illustrated by the early release of Wendell Callahan. Although Callahan, in federal prison for dealing crack cocaine, had a prior violent felony conviction, his sentence was reduced not once but twice after judicial review, with the judge finding that his early release “would not present a danger to the public safety.”¹⁰ Not long after his judicially approved early release, Callahan brutally attacked his former girlfriend, stabbing her to death, then slit the throats of her eight- and ten-year old daughters. The triple murder gained national attention and is highlighted in a YouTube video.¹¹ Callahan is only one of many examples of offenders released from federal prison after judicial review who have then committed serious crimes (ranging from murder to high level drug trafficking) that could have been prevented by requiring them to complete their original sentence.

Proponents also point to H.R. 3713’s provision excluding those with a “serious violent felony” conviction from receiving a sentencing reduction. This provision is nothing but legal window dressing, and reliance on it to protect the public is deeply misplaced. First, the exclusion only of “serious violent” felons from early release, while permitting the release of all other violent felons, raises serious public safety questions. To be clear, the statute permits the early release of armed career criminals, serial armed violent felons, and serial armed drug traffickers as long as their prior violent felony convictions do not fall in the narrow federal statutory definition of “serious violent felony.” Noteworthy, again, is the Callahan case. Because his prior violent felony conviction for felonious assault would not qualify as a “serious violent felony,” this safeguard would not have prevented Callahan’s release or the ensuing triple murder.¹²

Reliance on this exception as a safeguard is flawed for a second reason. The bill relies on a narrow technical definition of “serious violent felony.” Specifically, the bill provides:

(58) The term ‘serious violent felony’ means an offense—
(A) described in section 3559(c)(2)(F) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; or
(B) that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.”

¹⁰ *United States v. Callahan*, 2:06-cr-146, Order on Motion for Reduction of Sentence (Nov. 8, 2011 S.D. Ohio).

¹¹ <https://www.youtube.com/watch?v=N4BcAqbn38k>

¹² Callahan’s prior conviction for attempted felonious assault is not an itemized offense. Accordingly, in order for it to qualify it must meet the element-of-use prong which requires that the “offense [was] punishable by a maximum term of imprisonment of 10 years or more.” That is highly unlikely. At the time Callahan was convicted in 1999, attempted felonious assault was a Felony in the Third Degree. Presently, attempted felonious assault in Ohio has been upgraded to a more serious offense – Felony in the Second Degree. But, today, the maximum sentence is only eight years; it is highly unlikely that the penalty for this offense would have decreased while the category the offense was listed in became more serious. In short, felonious assault in the Third Degree in 1999 did not carry a maximum term of imprisonment of ten years or more.

Under Section 3559(c)(2)(F) of title 18 of the United States Code:

(A) the term "serious violent felony" means--

- (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111 [[18 USCS § 1111](#)]); manslaughter other than involuntary manslaughter (as described in section 1112 [[18 USCS § 1112](#)]); assault with intent to commit murder (as described in section 113(a) [[18 USCS § 113\(a\)](#)]); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242 [[18 USCS §§ 2241](#) and [2242](#)]); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2) [[18 USCS § 2244\(a\)\(1\)](#) and (a)(2)]); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118 [[18 USCS § 2111](#), [2113](#), or [2118](#)]); carjacking (as described in section 2119 [[18 USCS § 2119](#)]); extortion; arson; firearms use; firearms possession (as described in section 924(c) [[18 USCS § 924\(c\)](#)]); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
- (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense... .

This statute and the narrow limitations it imposes are hardly a model of simplicity or clarity in light of the Supreme Court's line of cases beginning with *Taylor*,¹³ and continuing through the *Shepard*¹⁴ and *Mathis*¹⁵ decisions. In fact, the reverse is true. After *Shepard* and its progeny, and especially after *Mathis*, determining whether a prior conviction falls within any of the crimes described above will become a legal nightmare with highly unpredictable and inconsistent outcomes in the courts. The analysis mandated by this line of cases was described by Justice Alito as requiring "sentencing judges to delve into pointless abstract questions" and is so convoluted that it "has increasingly led to results that Congress could not have intended" so much so that it "should set off a warning bell."¹⁶ The amount of government resources consumed litigating this will be substantial. Meanwhile, as this litigation consumes the limited prosecutorial and judicial resources of the federal system, other federal criminal offenses will be left unaddressed.

In conclusion, the federal criminal justice system has been significantly weakened over the last decade, the federal prison population continues to drop, homicide and violent crime rates are spiraling up across the country, and we are in the grip of the worst heroin and opioid epidemic in

¹³ *Taylor v. United States*, 495 U. S. 575, 602 (1990).

¹⁴ *Shepard v. United States*, 544 U.S. 13 (2005).

¹⁵ *Mathis v. United States*, 136 S. Ct. 2243 (2016).

¹⁶ *Mathis v. United States*, 136 S. Ct. 2243, 2268 (2016) (Alito, J. dissenting).

the history of our Nation. Now is the wrong time to remove or weaken the last tools available to federal prosecutors and law enforcement agents to combat these problems.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. H. Cook".

Steven H. Cook
President, National Association of Assistant United States Attorneys