

## RESPONSES OF MARC MAUER TO SENATE JUDICIARY COMMITTEE MEMBERS

### Hearing on “S. 2123, Sentencing Reform and Corrections Act of 2015”

#### Response to Sen. Franken

Making the Fair Sentencing Act retroactive would bring a greater measure of justice and fairness to federal sentencing and corrections, but is not sufficient in itself to eliminate racial and economic disparities in drug sentencing. In order to make further progress in this area, Congress should pursue reforms in three separate areas:

1. Law enforcement arrest practices – The primary driver of racial disparities in drug sentencing is racially disparate policing of drug offenses by law enforcement agencies. Government data demonstrate that blacks, whites, and Latinos use illegal drugs at roughly similar rates, yet people of color are considerably more likely to be arrested for drug crimes. While it is true that most drug offenders in federal prison have been convicted of drug selling, not simple possession, scholarly research suggests that people generally purchase drugs from those of the same race. Therefore, the disparity we see in incarceration for drug offenses results in significant measure from a heavier law enforcement presence in communities of color. Therefore, it would be useful to engage with the Drug Enforcement Agency and other federal law enforcement officials to examine the decisionmaking process by which drug selling offenses are pursued by federal agents, and to assess the degree to which any unintentional discriminatory practices have emerged from current strategic approaches.
2. Prosecutorial charging policies – A second decision point that contributes to racial disparities in the drug war is the charging decision by federal prosecutors. Findings from the U.S. Sentencing Commission’s analysis of the impact of mandatory sentencing indicate that in cases where the facts of the crime suggest a defendant could be charged with an offense carrying a mandatory penalty, white defendants are more likely than African Americans to be offered a plea option that does not involve a mandatory minimum. The Sentencing Commission was not able to determine whether these differences reflected relevant sentencing considerations or biased decisionmaking, but it would be useful for the Department of Justice to explore these findings in greater detail and to correct for any biased practitioner decisionmaking.
3. Mandatory sentencing policies – The reduction in the scale of the drug quantity disparity between crack cocaine and powder cocaine brought about by the Fair Sentencing Act was commendable, but it remains problematic that there is still an 18:1 quantity disparity between the two forms of cocaine. There is little evidence to suggest that the harsher penalties for crack cocaine have produced any significant deterrent benefits, and recidivism data compiled by the Sentencing Commission following its 2007 guideline reduction for crack offenses show no difference in reoffending rates for persons who served less time in prison. Therefore, in addition to concerns for fairness, it seems clear that public safety outcomes would not be harmed by equalizing the penalties for the two forms of cocaine.

## Response to Sen. Vitter

While it may seem to make intuitive sense that longer sentences are responsible for the currently low rates of violent crime, rigorous scholarly assessments demonstrate that this is not the case. For certain offenders, such as serial rapists, incarceration clearly contributes to public safety. But both the scale and nature of incarceration today have resulted in diminishing returns for public safety.

In 2014 the National Research Council released a major study of the causes and consequences of the growth of incarceration in the United States. The report was the culmination of a two-year study by 20 leading scholars and practitioners on issues of crime and punishment. Their finding was that “the growth in incarceration rates reduced crime, but *the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large*” (emphasis added). Several key findings support this conclusion.

First, as imprisonment has expanded, persons sentenced to prison have been increasingly lower-level offenders, since the “pool” of higher level offenders is limited. Therefore, as successive numbers of lower level offenders are sent to prison, the crime control benefits of expanded incarceration become increasingly less cost-effective and produce diminishing returns for public safety.

Second, and of particular relevance for the federal justice system, the crime control impact of incarcerating drug offenders is generally less than for other crime categories. This is due to the “replacement” effect, whereby the incarceration of lower-level drug sellers often results in new recruits to the drug trade taking the place of those who are imprisoned. As long as the demand for drugs exists there is a seemingly endless supply of people willing to take the risk of becoming street-level sellers. And as research from the Sentencing Commission has demonstrated, a substantial portion of drug offenders in the federal system is comprised of individuals in the lower levels of the drug trade.

Third, excessively long sentences expend resources to keep people in prison after they have “aged out of crime” and pose a smaller risk to public safety. There is evidence that reasonable reductions in excessive prison populations can be conducted in ways that are consistent with public safety. In the federal system, we have seen this resulting from the 2007 decision by the Sentencing Commission to reduce the sentencing guidelines for crack cocaine offenses.

At the state level three states -- California, New Jersey, and New York -- have reduced their prison populations by about 25% in the past 15 years. This came about at a time when crime rates were generally declining nationally. An analysis of the decarceration effects on crime rates in these states found that in almost all categories the crime decline in the three states matched or exceeded that of other states in this period.