



April 10, 2018

The Honorable Lindsey Graham
U.S. Senate Judiciary Committee
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
U.S. Senate Judiciary Committee
Washington, D.C. 20510

RE: Subcommittee Hearing on Defeating Fentanyl: Addressing the Deadliest Drugs Fueling the Opioid Crisis

Dear Chairman Graham and Ranking Member Whitehouse,

As the Judiciary Committee’s Subcommittee on Crime and Terrorism prepares to hear testimony tomorrow regarding the nation’s crisis-level of opioid overdose deaths, The Sentencing Project wishes to share with you our recent report, “[Opioids: Treating an Illness, Ending a War](#).” The report outlines lessons learned from the War on Drugs and recommends that federal resources be directed towards policies that will expand access to drug treatment to stop the skyrocketing death toll from overdoses caused by fentanyl and other opioids.

“The best empirical evidence suggests that the successive iterations of the war on drugs—through a substantial public policy effort—are unlikely to have markedly or clearly reduced drug crime over the past three decades,” concluded leading scholars in a report for the National Academy of Sciences in 2014.¹ Within the federal system, the enactment of harsh drug sentencing laws increased the number of people imprisoned for a drug offense from 4,700 in 1980 to 103,200 in 2011.² Blacks and Hispanics comprised 76% of federal prison population sentenced for a drug offense in 2016—even though research has shown that people across racial and ethnic lines use drugs at similar rates and tend to buy drugs from those of their own race or ethnicity.³

¹ Travis, J., Western, B., & Redburn, S. (Eds.) (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington, D.C.: National Academies Press, Pg. 154. Available at: <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

² The number of people serving a prison sentence for a drug offense in state prisons increased from 19,000 in 1980 to a peak of 273,600 in 2007. See: Ghandnoosh, N. & Anderson, C. (2017). *Opioids: Treating an Illness, Ending a War*. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2017/12/Opioids-Treating-an-Illness-Ending-a-War.pdf>.

³ Johnston, L. D., O’Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2012). *Monitoring the Future: National Survey Results on Drug Use, 1975- 2012*. Ann Arbor, MI: The University of Michigan Institute for Social Research; Beckett, K., Nyrop, K., & Pflingst, L. (2006). *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*. *Criminology*, 44(1),

Increasing already high penalties for drug offenses is not effective because 1) Most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or criminally offend with their judgment compromised by substance abuse or mental health problems, and; 2) Those who are apprehended and sentenced are often in the lower levels of the drug trade and are readily replaced by other sellers willing to fill their roles.⁴ Moreover, punitive policies—with 11.3 years being the average federal sentence served for a drug offense in 2012⁵—do nothing to address the substance use disorders that users, and many sellers themselves, struggle with.

In a 2011 report to Congress, the bipartisan United States Sentencing Commission unanimously agreed that mandatory minimum sentences were often applied too broadly, were set too high, and were unevenly applied.⁶

Reforms implemented during the presidencies of George W. Bush and Barack Obama have helped to scale back the drug war.⁷ The number of people serving a federal prison term for a drug offense has declined by 23% since reaching its peak level in 2011 and states have achieved a similar level of decarceration.⁸ The majority of Americans support further reforms to scale back the drug war. More than 6 in 10 Americans (63%) in a 2014 Pew Research Center poll said that it was a “good thing” that some states have moved away from mandatory prison sentences for non-violent drug crimes, up from 47% in a 2001 survey.⁹

To end the opioid crisis, policymakers should pursue evidence-based approaches to prevent and treat opioid use disorder. As described in The Sentencing Project’s report, these efforts should include policies to reduce opioid use—by expanding access to effective treatment for substance

105–37 (pp. 16–7); Riley, K. J. (1997). *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Major U.S. Cities*. National Institute of Justice.

⁴ Nearly half (48%) of individuals receiving a federal drug sentence in 2009 were at or below the level of “street-level dealers,” which is defined as selling less than one ounce of drugs. United States Sentencing Commission (2011). *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Figure D-2, pages 165-7.

⁵ Taxy, S., Samuels, J., & Adams, W. (2015). *Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data*. United States Department of Justice, Bureau of Justice Statistics.

⁶ Saris, P. (2015). Statement of Judge Patti B. Saris Chair, United States Sentencing Commission For the Hearing on “S. 2123, Sentencing Reform and Corrections Act of 2015” Before the Committee on the Judiciary United States Senate. Washington, D.C.: United States Sentencing Commission. Available at:

https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20151021_Saris_Testimony.pdf;

United States Sentencing Commission (2011). *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, D.C.

⁷ Ghandnoosh, N. (2017). *Federal Prisons at a Crossroads*. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2017/06/Federal-Prisons-at-a-Crossroads.pdf>.

⁸ Ghandnoosh, N. (2017). *Can We Wait 75 Years to Cut the Prison Population in Half?* Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2018/03/Can-we-wait-75-years-to-cut-the-prison-population-in-half.pdf>.

⁹ Pew Research Center (2014). *America’s New Drug Policy Landscape*. Washington, D.C. Available at: <http://www.people-press.org/2014/04/02/section-1-perceptions-of-drug-abuse-views-of-drug-policies/>.

use disorder—as well as harm-reduction measures that seek to reduce overdose deaths. Indeed, surveys reveal that while nearly half of people with substance use disorder did not seek out professional treatment because they were not ready or did not want it, one-third did not do so because they lacked health care coverage or could not afford the cost. Even people with health insurance or in treatment programs often struggle to access medication-assisted treatment with methadone or buprenorphine, which combined with professional counseling and behavioral therapy is the most effective treatment for dependence on heroin and other illicit opioids according to the Centers for Disease Control and Prevention, the National Institute on Drug Abuse, and the World Health Organization.

Furthermore, the Bureau of Prisons should be required to follow the recommendation of the President’s Commission on Combating Drug Addiction and the Opioid Crisis to increase access to medication-assisted treatment. Nearly half (45%) of people serving federal prison terms reported having a drug use disorder in the year prior to their incarceration in 2004.¹⁰ And yet the Bureau of Prisons still does not have an established medication-assisted treatment program in its prisons.¹¹ Among incarcerated people with a drug use disorder in federal facilities, only 17% received professional drug treatment in 2004, and there is no reason to expect progress in more recent figures.

After nearly a half century of responding to drug addiction with punitive policies, many policymakers and the majority of Americans now support pursuing evidence-based policies that prevent and treat drug use disorder rather than fruitlessly, and harmfully, ratcheting up criminal penalties for sellers. Like past policies, increasing these sentences will disproportionately target people of color who are low-level participants in the drug trade and who are often struggling with drug use disorder themselves. We urge you to work to correct, rather than exacerbate, these problems in federal law and to pursue effective policies to end the opioid crisis.

Sincerely,

A handwritten signature in black ink that reads "Marc Mauer". The signature is written in a cursive, slightly slanted style.

Marc Mauer
Executive Director

¹⁰ Mumola, C.J., Karberg, J.C. (2006). Drug Use and Dependence, State and Federal Prisoners, 2004. Bureau of Justice Statistics.

¹¹ The Bureau of Prisons has conducted a field trial to provide this treatment to individuals in the final months of their incarceration and had planned in 2016 to expand medication-assisted treatment in its reentry facilities.