

March 14, 2016

The Honorable Chuck Grassley  
Chairman  
Senate Judiciary Committee  
Washington, DC 20510

The Honorable Patrick Leahy  
Ranking Member  
Senate Judiciary Committee  
Washington, DC 20510

The Honorable Bob Goodlatte  
Chairman  
House Judiciary Committee  
Washington, DC 20515

The Honorable John Conyers, Jr.  
Ranking Member  
House Judiciary Committee  
Washington, DC 20515

**Re: State law offenses in pending sentencing legislation (S. 2123 & H.R. 3713)**

Dear Chairmen Grassley and Goodlatte and Ranking Members Leahy and Conyers:

As the heads of public defenders offices in four major cities, we write to express our concerns about certain sections of pending sentencing reform legislation. Despite the growth of the federal criminal justice system in recent decades, the vast majority of criminal prosecutions take place at the state level. Further, of the nearly 20 million criminal cases in state courts each year, roughly a quarter are handled by public defenders. In 2015, our offices had a combined caseload of more than 60,000 felony and misdemeanor cases. While we take no position on S. 2123 and H.R. 3713, we believe the bills' use of certain state criminal offenses to enhance sentences or deny reductions will have a significant, racially disparate impact, undermining the overall purposes of the legislation.

While the US Sentencing Commission has estimated the impact of many of the bills' provisions, we understand no effort has been undertaken to estimate the impact of the referenced state law predicates. In response to inquiries from Members of Congress, our offices sought to identify the number and race of persons represented by our attorneys or sentenced within our jurisdictions with convictions falling into the following categories:

1. persons convicted of a "serious violent felony" for which they served 12 months imprisonment (triggers enhanced mandatory minimums for individuals convicted of federal drug trafficking);
2. persons convicted of a drug trafficking or violent offense for which they received a sentence of at least 60 days' imprisonment (denied safety valve relief from mandatory minimum); and
3. persons convicted of any offense for which they received a sentence of 13 months or more of imprisonment (denied safety valve relief from mandatory minimum).<sup>1</sup>

While we think the data compiled by our offices provides valuable insight, two caveats are necessary. First, while the frequency and racial demography of the referenced state law

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<sup>1</sup> We did not compile data on "serious violent felony" convictions or "serious drug felony" convictions due to the significant overlap with categories 2 and 3. Also, for individuals convicted of certain firearms offenses, a consecutive mandatory 15-year sentence is triggered by a state prior that is a crime of violence that has as an element the carrying, brandishing, or use of a firearm. Due to the range of offenses covered, only one office was able to generate data for this type of offense. For that office, these offenses comprised 4% of their felony caseload, and these clients were 80% persons of color.

offenses will necessarily impact federal sentencing, we cannot say how many of these clients will ultimately face federal criminal charges. Second, determining which state offenses fall within the bills' definitions is not always an easy matter and required some judgment calls (a fact that will no doubt contribute to the reputed complexity of federal sentencing).

The state law predicates referenced in the bills figure prominently in our daily work. On average, offenses that qualify as "serious violent felonies" make up more than 5% of our felony caseloads. The two major offense categories that bar safety valve relief are likewise quite common, although our records reveal stark disparities between offices and jurisdictions. Most prominently, 13-month or greater sentences make up 19% of Harris County, Texas, felonies, compared to 4% of those handled by the San Francisco Public Defender.

This disparity raises another concern about the use of state law predicates (and unavoidably imprecise definitions) to determine federal sentencing ranges: assigning such significance to state-level sentencing policies and practices will skew federal sentencing outcomes based on factors that may not be relevant to the purposes of sentencing. While these jurisdictional disparities may justifiably reflect differences in crime control policies and priorities and other local factors, it is difficult to see why such disparities should play such a prominent role at the federal level.

Another factor not presented by the data but warranting consideration is the quality of justice received by defendants at the state level. Our offices enjoy a national reputation for providing zealous and effective advocacy, but the quality of indigent defense varies widely across the country and some jurisdictions are in crisis. Regrettably, this can affect not only whether the defendant is convicted, but the type of conviction and length of sentence. For defendants with the referenced state prior offenses, the measures will inevitably compound the impact of any deficient representation.

One fact that remains relatively consistent across all of our offices is the disproportionate number of persons of color prosecuted for the referenced offenses. With non-white defendants generally accounting for 80% or more of our clients in these cases, there is little doubt that these disparities will be further reflected at the federal level.

While we reiterate that we have no position on S. 2123 and H.R. 3713, we believe the above data sheds light on how these various provisions may operate to undermine the bills' primary purposes. We commend you on your efforts to correct certain well-known flaws in federal sentencing. Please to not hesitate to contact us if we can be of any assistance.

Sincerely,

Rick Jones  
Executive Director  
Neighborhood Defender Service of Harlem

Alex Bunin  
Harris County (TX) Public Defender

Lisa Schreibersdorf  
Executive Director  
Brooklyn Defender Services

Jeff Adachi  
San Francisco Public Defender

CC: Senate Judiciary Committee Member and House Judiciary Committee Members