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INTRODUCTION

Thank you for holding this hearing and for the opportunity to speak with you regarding over-criminalization in the federal system. I head the Federal Defenders of New York, and together with my colleagues from around the country who serve in federal public defender offices or on panels of appointed private attorneys, we represent defendants in federal criminal cases who are too poor to afford lawyers. Nationwide, our clients comprise over 80 percent of all federal defendants.

I am honored to speak with you at this time of great crisis and great opportunity for the criminal justice system. The crisis is obvious from the truly staggering rates of incarceration in the United States – rates that set us far apart from our own American history and from every modern country in the world. The numbers have become numbingly familiar: with only five percent of the world’s population America has 25% of the world’s prisoners; one in one hundred American adults is incarcerated; and one in thirty is under the supervision of the criminal justice system. The federal prison population has increased 1000% since 1980 and has grown at a rate three times higher than state prison populations in the past 10 years.

In recent years, mass incarceration has been heavily criticized from both the left and right side of the political spectrum. Conservatives denounce the unnecessary and unwise fiscal costs, the assault on personal liberty, and the harshness of a system that has become unmoored from foundational religious principles such as redemption and mercy. Liberals focus their criticism on the social injustices created by the vastly disproportionate number of poor and minority defendants arrested and prosecuted, and the resulting damage to the families and communities left behind.

The great opportunity for the criminal justice system is precisely that both sides are now vigorously airing those concerns. Government accountability and commitment to individual liberty are not ideological issues, and a growing consensus is emerging that fundamental American values are advanced when we exercise a measure of restraint in the prosecution of criminal laws. As the late Professor William Stuntz wrote in his recent, final book, “The Collapse of American Criminal Justice” (a distinctly non-partisan critique of the justice system): “Legal condemnation is a necessary but terrible thing – to be used sparingly, not promiscuously.”

The Task Force on Over-Criminalization deserves great credit for reminding us of that honorable American tradition and for investigating ways to return to it. Here, I discuss the federal criminal justice system from my perspective as a federal public defender and offer thoughts about how the damaging effects of over-criminalization can be addressed.

I. Over-Criminalization: A Defender Perspective

Commentators mean many different things when using the term “over-criminalization” in the context of the federal criminal justice system. This is so because “over” describes almost everything about the current system. The term can be used to describe:

- the sheer proliferation in the number of criminal laws (the federal criminal code has increased to over 4,000 crimes, about double what it was in 1970 and one third more than 1980);¹
- the vastly expanded enforcement of those laws (100,366 persons were charged with federal crimes in 2010, up from 39,914 in 1980, 66,341 in 1990, and 83,963 in 2000);²
- the explosion in the prison population (from a federal inmate population of 24,252 in 1980 to 209,771 in 2010, and growing at a pace three times faster than state inmates between 2000-2010);³
- the high rates of pretrial detention (in 1984 before passage of the Bail Reform Act, 74% of defendants were released on bail; last year 34% were released);
- the ever multiplying number of conditions and restrictions associated with probation or supervised release (including life time terms of supervision, invasive penile plethysmograph, limitations on contact with family and friends, DNA collection for everyone, residency restrictions, and many others);⁴ or
- the large number of collateral consequences that attend most convictions, often affecting not only the individuals convicted but also their families (restricting access to public housing, employment opportunities, government benefits including nutrition assistance, loans for education, access to professional licenses, and civic participation including voting and jury service).⁵

The Task Force has already heard from numerous witnesses about many of those topics. Bryan Stevenson spoke eloquently about the human toll of severity and over-incarceration. Marc Levin, from Right on Crime, testified about the fiscal costs and the damage to traditional notions of federalism. And Mathias Heck, a prosecutor, and Rick Jones, a defense lawyer, spoke on behalf of the ABA and NACDL, respectively, about the ever-expanding collateral consequences that attend criminal convictions – consequences that impede successful rehabilitation and productivity, and ultimately harm public safety.

As part of today’s panel on the effects of over-criminalization, I will discuss two additional harms that perhaps receive less attention in public discourse: (1) damage to the traditional role of the American jury; and (2) the strain on defender resources and lack of parity between defenders and prosecutors. Both developments have troubling consequences for the quality of justice in America.

A. Over-Criminalization: The Demise of the Jury and the Age of Inquisition

If there is a single defining feature of the American justice system, it is the jury. The Constitution’s insistence that ordinary citizens stand as a check on the government’s power to deprive individuals of life or liberty expresses one of America’s highest commitments to

restraining government overreach. Indeed, jury service is the most direct and meaningful form of democracy most citizens will ever exercise.

Sadly, we are now witnessing the decline of this great institution. In its place we are left with the government itself, *via* prosecutors, determining guilt, innocence, and punishment, with little check from other actors. In the federal criminal justice system today, a mere 2.7% of defendants exercise their right to a jury trial. As the Supreme Court stated two years ago in *Lafler v. Cooper*, “criminal justice today is for the most part a system of pleas not a system of trials.”⁶

This “system of pleas” is not rooted in traditional American values. For the first half of our country’s history, pleas were looked upon with disfavor, and at times found to be constitutionally suspect.⁷ Even throughout most of the 20th Century as guilty pleas became a routine part of the criminal justice system, they did not represent the overwhelming feature of criminal justice in the way they do today. A mere 30 years ago, the trial rate in federal court was five times higher than it is today.⁸

1. Why Are Federal Trials Disappearing?

So what caused the recent precipitous decline in trial rates? Most scholars point to the significant changes in federal criminal laws beginning in the mid-1980s that correspond precisely with disappearing trials, including (1) the combination of greatly increased severity in sentencing laws, (2) unprecedented rigidity in sentencing via mandatory minimums and strictly enforced Sentencing Guidelines, and (3) the enactment of the Bail Reform Act which greatly reduced the number of accused persons who were released pending the determination of their guilt.

These changes brought an enormous shift in power from judges and juries to prosecutors. The shift occurred because prosecutors, who always had unfettered charging discretion, now became empowered to determine sentences with nearly the same ease. This meant that prosecutors could create stark differences in the amount of time an accused person faced based on nothing more than whether the person went to trial – the so-called “trial penalty.” Prosecutors used that leverage chiefly to pressure those charged with crimes to either cooperate or plead guilty. And as the 97% plea rate has shown, prosecutors used that new found power liberally.

Prosecutors have been most prolific about using their leverage in drug cases. In 1980, of the 6,343 persons charged with federal drug crimes, nearly 25% went to trial.⁹ In 1990, three times the number of people were charged -- 19,271 -- and only 16.9% went to trial.¹⁰ By 2010, 28,756 people were charged with federal drug crimes, and only 2.9% went to trial.¹¹ A big reason is surely that the trial penalty in drug cases is a sentence three times as long as the sentence for those who plead guilty.¹²

Although the statutes carrying five and 10-year mandatory minimum sentences were meant by Congress to apply only to the most serious offenders -- managers of drug trafficking organizations and the leaders and organizers of the operations, respectively -- they have been used far more indiscriminately, capturing mostly lower level offenders. This happens because the role in the offense does not actually trigger a mandatory sentence -- the weight of the drugs

involved does.¹³ Thus, even a minor participant in a larger conspiracy can face the most draconian of sentences.

The visible examples of injustices relating to the trial penalty are those where defendants turn down a plea offer, go to trial, and suffer an extraordinary sentence as a result. One such example from my home district is *United States v. Midyett*, 07 Cr. 874 (KAM)(E.D.N.Y. June 17, 2010). Tyquan Midyett was charged with selling small quantities of crack cocaine at the age of 26 after a short lifetime of substance abuse which began at the age of 14 when he was in foster care. He was charged during the time when the 100:1 crack/powder cocaine disparity was still in effect. His Guidelines range called for approximately 7-9 years imprisonment, but he faced a 10-year mandatory minimum (absent the crack/powder disparity, his Guidelines range would have been roughly 4 to 4 ½ years). He turned down the “offer” of a mandatory 10 years at which point the Government filed a “prior felony information” pursuant to 18 U.S.C. § 851. Section 851 allows prosecutors to double or increase to life the already steep mandatory minimum if a defendant has one or two prior convictions for selling or merely possessing drugs, no matter how old, and no matter if no jail time was imposed.¹⁴ Midyett went to trial, lost, and was sentenced to the mandatory minimum of 20 years. It was a sentence four times longer than even the Department of Justice had claimed was fair -- before he went to trial.

The story of Tyquan Midyett is relayed by United States District Judge John Gleeson, himself a former prosecutor (and not a sheepish one), in a recent opinion he authored regarding another sentencing. That case, *United States v. Kupa*, 11 Cr. 345 (JG) (E.D.N.Y. 2013), represents the less visible, yet far more common scenario in which mandatory minimum sentences regularly distort the justice system. Cases like Kupa’s – and his co-defendant Joseph Ida -- are stark examples of why we see trials disappearing.

Kupa was charged with being part of a conspiracy to distribute cocaine and faced a 10-year mandatory minimum. Because he had prior convictions for marijuana distribution, he was subject to the filing of a prior felony information – just like Midyett had been. The prosecutor initially offered a plea agreement of roughly 9-11 years in prison. Kupa turned it down. As the trial approached, the prosecutor informed Kupa that if he went to trial the government would file a prior felony information containing both of his prior marijuana convictions. The result would be a mandatory life sentence after conviction. Ultimately, Kupa agreed to yet a different “offer,” pled guilty, and was sentenced to 140 months imprisonment. Assuming he lives to the age of 75, his trial penalty would have been an additional 30 years imprisonment. Indeed, even the mere consideration and planning for trial cost him three years – the difference between his first offer and the last.

Kupa’s co-defendant, Ida, was considered by the Government to have played a minor role in the conspiracy, yet it charged him with a count carrying a 10-year mandatory minimum. To persuade him to plead guilty, the prosecutor agreed to a roughly five-year prison term. Like Midyett, had he gone to trial, the effect would have been a doubling of his sentence -- for someone the government itself believed played a minor role.

The Kupa and Ida scenarios are hidden from any statistical compilation, yet they represent routine business in federal courts. When Judge Gleeson questioned the prosecutor

about why the United States Attorney was using the threat of a prior felony information to coerce a guilty plea, the prosecutor claimed that the decision was based on an “individualized assessment” of the defendant and generically listed things such as “the seriousness of the defendant’s crimes, the defendant’s role in those crimes, the duration of the crimes, and whether the defendant used or threatened communities and society as a whole.” To that, Judge Gleeson responded:

That sounds nice, but actions speak louder than words. Whatever the result of the “individualized assessment” with regard to Kupa, he was indisputably stuck with a prior felony information – and a life sentence – only if he went to trial, and he was indisputably not stuck with it only if he pled guilty. Despite the government’s patter, there was only one individualized consideration that mattered in his case, and it was flat-out dispositive: Was Kupa insisting on a trial or not? If he was, he would have to pay for a nonviolent drug offense with a mandatory life sentence, a sentence no one could reasonably argue was justified.

Even proponents of severe sentences cannot reasonably claim that severity should be determined almost exclusively by an accused person’s decision to exercise the constitutional right to a jury trial. And yet that is the result of granting so much unchecked power to prosecutors.

2. Why Should We Care that Criminal Trials Are Disappearing?

Some defenders of the current state of prosecutorial control and mass incarceration essentially respond, “So what?” Those commentators make the claim that increased prosecutorial power and the steep rise in rates of imprisonment worked over the past three decades to reduce crime dramatically – so much so that the tradeoffs in the loss of individualized justice and fairness are worth it.¹⁵ Whatever one might think of the morality of that trade off, the evidence shows they are simply wrong.

Two of the most highly respected criminology scholars, Professors Michael Tonry and David Farrington, have convincingly shown that many other western countries, including Canada, experienced a rise and fall in crime rates that closely mirror those of the United States over the past several decades, yet none of those countries saw a significant increase in incarceration rates – much less an increase remotely close to the quadrupling of rates in the United States.¹⁶ And the vast majority of researchers agree that no matter one’s view of how severe penalties ought to be, severity of punishment as a method for reducing crime is almost certainly the weakest method of those available.¹⁷

So what are we sacrificing in the name of a benefit most researchers think is non-existent? Sadly, the answer is an awful lot. Jury trials are a vital part of the criminal justice system not just for the symbolic role they play in our constitutional democracy. They are vital because they actually represent the best mechanism in the history of the world for sorting facts, separating the guilty from the innocence, and holding the government to account in a responsible and transparent way.

We know that even with the checks and balances that exist at trial, mistakes get made. The revelations in the past decade from the Innocence Project in which over 300 people have been conclusively proven innocent through the use of DNA evidence, including 18 people who were sentenced to death, has demonstrated this point beyond any doubt. But perhaps one of the most shocking statistics to those not familiar with the criminal justice system is that over 10 percent of those conclusively shown to have been innocent *had pled guilty*.

Of course, a tiny fraction of all cases are subject to conclusive proof of innocence. But as United States District Judge Jed Rakoff noted in a recent speech entitled, “Why Innocent People Plead Guilty,” if even a small fraction of accused persons are wrongfully convicted, the raw numbers are staggering. A mere .5% error rate in the federal courts would mean that more than 1,000 innocent people are currently incarcerated in federal prisons.

When I think about the possibility of an innocent person pleading guilty, I think of a recent case from my office. Justin Rodriguez¹⁸ was charged in the Southern District of New York with robbing a grocery store in the Bronx by holding up the clerk at gunpoint. The evidence included a confident eyewitness and the store’s security video. The likely sentence was in the range of 20 to 25 years, much of it mandatory, because of Mr. Rodriguez’s prior record and the gun enhancement penalty provisions of 18 U.S.C. § 924(c).

Mr. Rodriguez insisted that he was innocent. But he was a recovering heroin addict, had a long rap sheet, and no one believed him. We were assigned to his case, and to be honest, even our lawyer and her investigator were skeptical of his claims. But they dug into the case the way great professionals dig in regardless of what a case looks like at the outset. They started finding pieces of evidence that didn’t add up. The man in the video had tattoos on his arms that didn't seem to match Mr. Rodriguez’s. Our attorney went to the prosecutors, but the prosecutors were not convinced. They thought there were explanations for why the video might appear different or possible ways that his arm’s appearance could have been altered. We filed a motion to suppress the identification of the eyewitness because of how unreliable it was. The prosecutors strongly objected in a lengthy brief in which they explained all the reasons why our client was obviously guilty.

In the meantime, our investigator followed up on the places that Mr. Rodriguez might have been during the time of the robbery. Mr. Rodriguez was married, had a young daughter, and had been steadily putting his life back together after recovering from years of substance abuse. He couldn’t recall precisely where he had been at the time of the robbery. Our investigators went to one of many places he mentioned as a possibility – a children’s furniture store where he and his wife had returned a chair for his daughter. They retrieved the security video from the day of the crime, and sure enough, it showed Mr. Rodriguez and his wife. They were at the furniture store far from the robbed grocery store at the time of the robbery. We presented the evidence to the prosecutors, and they dropped the case.

I think of that case because I wonder what would have happened if we had not been so diligent and lucky in finding that security video. What if the government had offered Mr. Rodriguez a plea offer to 10 years rather than the 25 he faced after a trial? Given his criminal record and the evidence against him, he could have easily decided that a guilty plea was his best

option. By pleading guilty, he could ensure his release from prison in time for his daughter's teenage years rather than missing her childhood entirely. And as his lawyer, I almost surely would have agreed – and possibly even encouraged him, an innocent man, to plead guilty.

Trials are vital not just for the case at hand but for the lessons they teach all of us, including defense lawyers and prosecutors. They teach us that cooperating witnesses sometimes lie. Law enforcement agents sometimes make mistakes. Defendants are sometimes improbably foolish but not criminally malevolent. In a system where plea bargaining is the central means of resolving cases, those truths rarely come to light. There is a reason the great legal scholar John Henry Wigmore famously said that cross-examination, not plea bargaining, “is the greatest legal engine ever invented for the discovery of truth.”

B. Over-Criminalization: The Resource and Information Imbalance

My office, the Federal Defenders of New York, represents indigent federal defendants in the Southern and Eastern Districts of New York. Those two federal districts cover all of New York City, five counties north of the city, and Long Island. We have a total of 39 lawyers. For those same two districts, there are approximately 300 federal prosecutors in the criminal divisions of the United States Attorney's Offices. That is a nearly 8 to 1 ratio even though we represent more than a third of all defendants.¹⁹

When budget crises hit, we are hit particularly hard. That is because we don't have the ability to choose what work we will do: we are entirely responsive to the cases and clients who are assigned to us. Unlike the Department of Justice, we cannot “reprogram” money and shift enforcement priorities. And we have no “fat” to cut in our program – 80 % of our budget goes to the salaries of our already understaffed offices, and the other 20% goes to things like rent and other basic expenses that cannot be cut. In our best years, we are vastly under-resourced as compared to the U.S. Attorney's Office. In a bad year like the one we just experienced during sequestration, we are simply not able to adequately perform our Constitutional and professional duties. Last year my employees and I took 12 days of unpaid furloughs – more than two weeks of not being paid -- pay that will never be recouped. I was also forced to lay off several staff members and leave many positions vacant when others voluntarily left. Our clients and the cause of justice suffered in ways that cannot be measured. And what is the truly absurd aspect of the cuts to our office? When we are cut, it actually costs the taxpayer more money because the cases we cannot handle are assigned to private attorneys who are paid statutory rates at higher expense.

The disparity in the number of staff only tells part of the story about the resource imbalance between the prosecution and defense. Federal, state, and local law enforcement agencies bring additional, vast resources to bear on the cases we must defend. Increasingly, even simple factual scenarios call for complicated research and expert services. Prosecutors routinely use cell phone records and computer data to make claims about a person's whereabouts, activities, and communications. Those claims can be central to the determination of someone's guilt or innocence, but they can also be wrong. In the past year, my office has represented clients against whom cell site data was incorrectly used to allege that they were in places they were not. In other cases, computer “meta data” purporting to show when certain documents or

photographs were created or stored was shown to be inconclusive, contrary to initial government claims. The only way to challenge such evidence is to hire expensive experts and to spend time and money examining the details of the government charges. Sometimes we public defenders have neither to spare.

Adding to the imbalance are discovery rules that severely constrain the defense in attempting to gather information. Unlike the Federal Rules of Civil Procedure, which encourage full factual disclosure in civil cases through the use of such devices as document requests, interrogatories, and depositions of relevant witnesses, criminal defendants receive only the barest of information. Not only are defendants unable to depose witnesses against them, there is no requirement that the government inform defendants of the identity of the witnesses against them until the very moment the witnesses are called at trial. Nor are defendants typically given access to witness statements until the eve of trial at the earliest. And the government and law enforcement have virtually unchecked discretion to decide whether they must disclose evidence tending to show a defendant's innocence to the defense, a situation which recently prompted a prominent Reagan-appointed federal appeals court judge to declare: "There is an epidemic of *Brady* violations abroad in the land."

C. Over-criminalization: The Way Forward

These resource and information imbalances when combined with the awesome power prosecutors wield in making charging and sentencing decisions create a justice system that is too one-sided to expect anything other than a "promiscuous" use of the criminal laws. The resulting state of mass incarceration, with its human and fiscal toll and its damage to the cause of a transparent and accountable democracy, is the inevitable result of policy decisions granting prosecutors too much control over the entire course of a criminal case – from the initial charging decision to the final sentence.

The good news is that there are straightforward, common sense reforms that would return the criminal justice system to its more traditional form.

- Congress should work to alleviate and ultimately eliminate mandatory minimum sentences. They do not result in more uniformity in sentencing, nor do they reflect the seriousness of offenses. They only diminish the traditional role of juries and judges, reduce transparency, and provide prosecutors with enormous, unchecked power.
- In particular, Congress should eliminate the truly draconian penalty provisions of 18 U.S.C. § 851 and 18 U.S.C. § 924(c). They distort the criminal justice system beyond all recognition by threatening defendants with decades and sometimes life in prison for offenses far less serious than many others that carry much lower sentences.
- When Congress amends sentencing laws to make them more just, it should make them retroactively applicable. If a sentence imposed the day after a law is passed would be considered unjust, surely it was unjust the day before the law passed. Judgments involving the highest of stakes should not be left to the fortuity of legislative timing.

- Congress should increase funding for public defenders and other appointed counsel so that the large resource disparities that currently exist between prosecutors and defense counsel for the poor can be ameliorated. The quality of justice dispensed in federal courts should not depend so heavily on the size of defendants' wallets.
- Congress should support expanded discovery in criminal cases. More information will only result in a better truth-seeking process. In appropriate cases where there are compelling, individualized reasons for prosecutors to withhold certain evidence, they should be permitted to do so. But the baseline standard should be greater disclosure.

There are, of course, many other reforms that could improve the quality of justice in American courts, but those five changes would dramatically improve our system and help to solve the problem of over-criminalization.

Conclusion

Every time new laws are passed that expand the criminal code, increase severity, or impose mandatory sentences, prosecutors accumulate more unchecked power. When that happens, it is not surprising that the authority will be abused. We have a system of checks and balances precisely because we believe in a nation of laws, not a nation of men. As John Adams famously said on the eve of American independence: "There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty."

Again, I am profoundly grateful to the Committee for reminding us all of these great principles.

¹See, e.g., John Baker, *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005).

² Judicial Facts and Figures, Table 5.1, available at www.uscourts.gov/uscourts/Statistics/JudicialFactsandFigures/2012/Table501.pdf; see also, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005).

³HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.6.30.2010 (Kathleen Maguire ed.) available at <http://www.albany.edu/sourcebook/pdf/t6302010.pdf> (showing state prison populations grew at a pace of 1.4% from 2000-2009, whereas the federal rate of growth was 4.1%).

⁴See generally Guide to Judiciary Policy, Ch. 2: Conditions of Supervision (2014); Jonathan Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 Ind. L.J. 1327 (2014); 18 U.S.C. § 3663A (restitution); 18 U.S.C. § 3600 (DNA testing); 18 U.S.C. § 3583 (supervised release terms and conditions).

⁵See ABA, *National Inventory of the Collateral Consequences of Conviction*, available at <http://www.abacollateralconsequences.org>(cataloguing collateral consequences in all U.S. jurisdictions).

⁶ 132 S. Ct. 1376, 1388 (2012).

⁷See, e.g., Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PENN. L. REV. 79, 91-92 (2005).

⁸HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINEtbl.5.22.2010 (Kathleen Maguire ed.), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (showing that in 1980, out of a total of 36,560 defendants “disposed of in U.S. District Courts,” 6,816 defendants were convicted or acquitted after trial (18.6%), whereas the corresponding numbers for 2010 were 2,746 out of a total of 98,311 (2.7%)).

⁹*Id.* at tbl. 5.37.2010.

¹⁰*Id.*

¹¹*Id.*

¹²See Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 5, 2013), <http://www.hrw.org/node/120896/section/11>.

¹³See *United States v. Dossie*, 851 F.Supp.2d 478 (E.D.N.Y. 2012)(providing a thorough explanation of the history and rationale of federal mandatory minimum sentences in drug cases).

¹⁴The term “prior conviction for a felony drug offense” includes simple possession of drugs, which can include misdemeanors in states where misdemeanors are punishable by more than one year (such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont), and includes diversionary dispositions where the defendant was not convicted in state court. It also places no limit on how old the conviction or diversionary disposition can be.

¹⁵See, e.g., William Otis, *Statement of William G. Otis Before the House Judiciary Committee Overcriminalization Task Force of 2014 Hearing on “Penalties”* (May 30, 2014).

¹⁶Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1 (2006).

¹⁷See Nat’l Resource Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are “not an effective deterrent”); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 202 (“[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.”); see also Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, Prison Journal 91: 48S(2011); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* 10 Criminology & Pub. Pol’y 13, 37 (2011); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) (“[I]t is unlikely that the dramatic increase in drug imprisonment was cost-effective”).

¹⁸“Justin Rodriguez” is not our client’s real name. For privacy’s sake, I have changed it.

¹⁹Roughly 75% of federal defendants in the SDNY and EDNY require appointed counsel. My office represents every defendant with whom we do not have a conflict. The most common conflict arises from multi-defendant cases – in which we can represent only one defendant. The remaining defendants are represented by private attorneys who serve on the Criminal Justice Act Panel and are paid statutory hourly rates.