

# **The Dangerous Myths of NAAUSA:**

A Response to the National Association of Assistant U.S. Attorneys' Paper Titled  
"The Dangerous Myths of Drug Sentencing 'Reform'"

**By Families Against Mandatory Minimums  
July 27, 2015**

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## EXECUTIVE SUMMARY

The National Association of Assistant U.S. Attorneys (NAAUSA), which represents neither the U.S. Department of Justice nor a significant percentage of assistant U.S. attorneys, opposes mandatory minimum sentencing reform on the basis of several unfounded and patently false claims. This paper rebuts those claims with data and facts, as follows:

### **The federal prison population explosion is real, and it is due to mandatory minimum drug sentences.**

According to the Congressional Research Service:

- The number of inmates in federal prisons has increased 800%, from approximately 25,000 in FY1980 to over 219,000 in FY2013. In comparison, the federal prison population increased by approximately 12,000 inmates between 1930 and 1980.
- Mandatory minimum sentences have driven this growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. See page 3.

### **11,000 people per year receive federal mandatory minimum drug sentences, and most are nonviolent, low-level offenders – not the kingpins Congress hoped to snare.**

- In FY2014, 48.6% of federal drug offenders had little or no prior criminal record, and
- 93% did not play any leadership or management role in the offense. See page 6.

### **Federal drug offenders are not the violent offenders NAAUSA would like us to believe they are – and not all of them should be sentenced as though they are.**

- According to the U.S. Sentencing Commission, of the 22,000 federal drug offenders sentenced in FY 2014:
  - Only 142 (a mere 0.7%) used actual violence or threats of violence, and
  - Only 16% used or possessed a weapon. See page 8.

### **Mandatory minimum sentences are not necessary to get people to plead guilty.**

- According to Deputy Attorney General Sally Yates, who supervises all acting assistant U.S. attorneys in the country, after the Justice Department's 2013 charging policy revisions, "use of mandatory minimums decreased by 20 percent. Although some feared that defendants would stop pleading guilty and stop cooperating, our experience has been just the opposite. In fact, defendants are pleading guilty at the same rates as they were before we instituted the new policy."
- Federal defendants plead guilty at high rates (97%) across the board – whether or not a mandatory minimum applies to their crimes. See page 10.

### **Mandatory minimum sentences can be reformed without causing increases in crime.**

- More than 30 states have reduced, eliminated, or reformed their mandatory minimum and drug sentencing laws over the past decade, and crime has gone down, not up.
- The high prison costs of locking up nonviolent drug offenders are harming public safety: Since FY1998, Congress has increased spending on federal prisons by 45 percent, and cut spending on state and local law enforcement by 76 percent. See pages 11, 14.

## INTRODUCTION

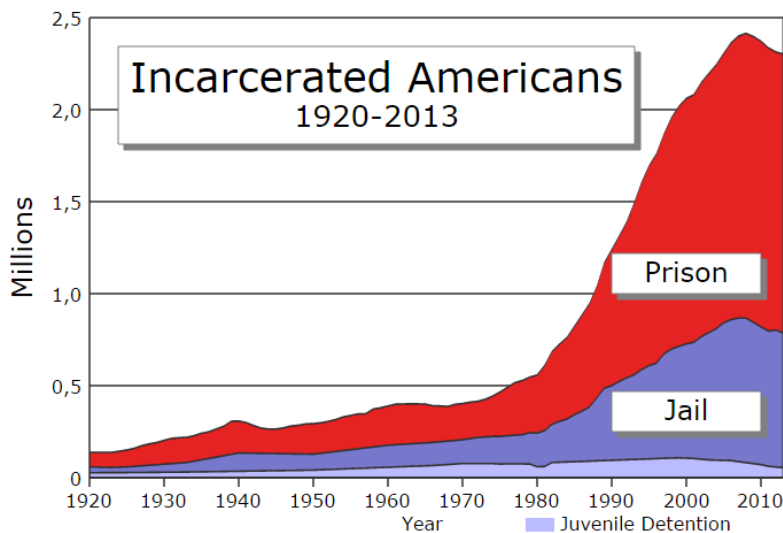
The National Association of Assistant U.S. Attorneys (NAAUSA) recently released a white paper<sup>1</sup> in which it purports to respond to the myths of sentencing reform advocates. Before addressing its substantive points, it is important to keep in mind who NAAUSA represents – or, more important, who it does not represent. NAAUSA does not represent federal prosecutors or the offices in which its members work. The U.S. Department of Justice (DOJ), which represents all federal prosecutors and prosecutes all federal cases, supports mandatory minimum drug sentencing reform. NAAUSA does not even speak for all assistant U.S. attorneys; only 28 percent of the nation’s assistant U.S. attorneys are members of NAAUSA, according to the group’s website.<sup>2</sup> Former federal and state prosecutors now serving in Congress, including Senators Ted Cruz (R-TX), Mike Lee (R-UT), and Patrick Leahy (D-VT), are leading sponsors of federal mandatory minimum sentencing reforms opposed by NAAUSA.

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**NAAUSA’s “Fact” #1:      Our federal prison population is not exploding, and those who are serving prison sentences for drug crimes are incarcerated because of drug trafficking crimes, not recreational drug use.**

### Everyone Else’s Reality:

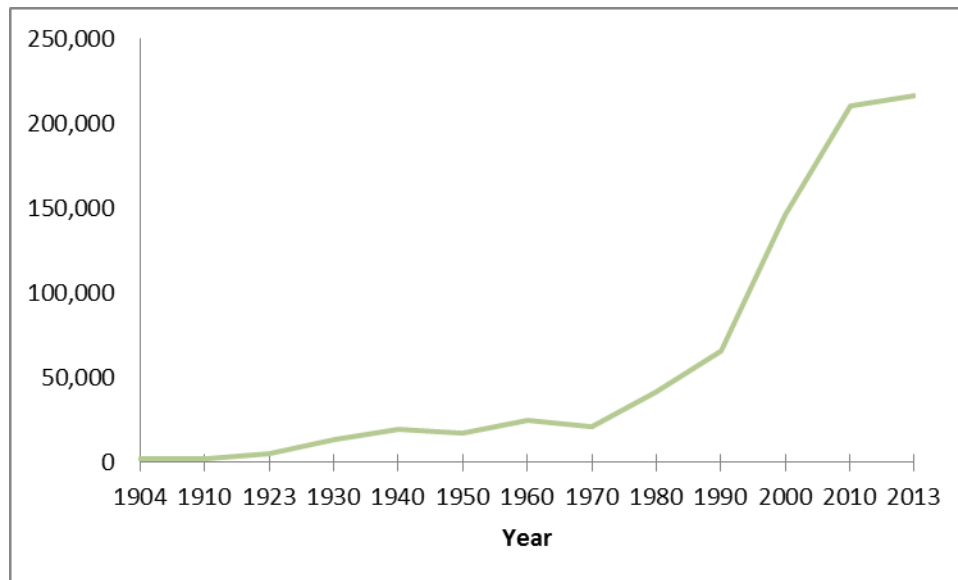
The federal prison population has skyrocketed. Period. NAAUSA spends three pages trying to explain away what is obvious to anyone with eyesight. This chart shows the U.S. prison population over the past 40 years, when drug mandatory minimum sentences were implemented at the federal and state level:



<sup>1</sup> NAAUSA, The Dangerous Myths of Drug Sentencing “Reform” (July 2015), <http://www.naaua.org/2013/images/docs/Dangerous-Myths-of-Drug-Sentencing-Reform.pdf>.

<sup>2</sup> NAAUSA, Our History, at <http://www.naaua.org/history.php>.

If we isolate **just the federal prison population**, we still see explosive growth during the last few decades:



**Growth in Federal Prison Population, 1904-2013**

**Source:** Data provided by the Bureau of Justice Statistics

Compare NAAUSA’s “fact” with the findings of the Congressional Research Service (CRS):

Since the early 1980s, there has been a *historically unprecedented* increase in the number of inmates incarcerated in the federal prison system. The number of inmates under the BOP’s [Bureau of Prisons] jurisdiction has increased from approximately 25,000 in FY1980 to over 219,000 in FY2013. In comparison, the federal prison population increased by approximately 12,000 inmates between 1930 and 1980. Since FY1980, the federal prison population has increased, on average, by approximately 5,900 inmates each fiscal year.<sup>3</sup> (emphasis added)

The CRS report examined the causes of this historically unprecedented growth in the federal prison population. The first factor it explored was the use of mandatory minimum sentences. The report, which relies heavily on the U.S. Sentencing Commission’s 2011 report to Congress on mandatory minimum sentencing laws,<sup>4</sup> is worth quoting at length here. CRS makes clear that one cannot honestly measure the impact of mandatory minimum laws on the federal prison populations by looking, as NAAUSA does, only at the number of individuals who actually receive mandatory minimum sentences. **Mandatory minimums have made all federal sentences longer.** CRS wrote:

<sup>3</sup> CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS Summary (Jan. 22, 2013), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>4</sup> U.S. SENTENCING COMM’N, REPORT TO CONGRESS ON MANDATORY MINIMUM PENALTIES (2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

In a 2011 report, the United States Sentencing Commission (USSC) found that the enactment of a greater number of federal mandatory minimum sentences has, in part, contributed to the growing federal prison population. **Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago.**

The number of mandatory minimum penalties in the federal code expanded as Congress made more offenses subject to such penalties. The USSC reported that the number of mandatory minimum penalties in the federal criminal code nearly doubled from 98 to 195 from 1991 to 2011. Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more.

**While only offenders convicted for an offense carrying a mandatory minimum penalty are subject to those penalties, mandatory minimum penalties have, in effect, increased sentences for other offenders.** The USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.<sup>5</sup> (emphasis added)

The independent, nonpartisan Inspector General of the U.S. Department of Justice says that the growth of the federal prison population is one of the department's biggest management challenges. **DOJ currently spends 25 percent of its budget on prisoners,**<sup>6</sup> a record level that is crowding out spending on FBI agents, investigators, prosecutors, and assistance to state and local law enforcement.<sup>7</sup>

While denying the reality of federal prison population growth, NAAUSA sets out to destroy an argument that no one is making. The group writes that those serving prison time for drug crimes are there "because of drug trafficking crimes, not recreational drug use." NAAUSA is pushing on an open door. No reputable advocate for reform has ever justified his or her position on the premise that federal prisons are being overfilled with recreational drug users. Rather, many have rightly argued that "drug trafficking" is broad enough to include both drug kingpins and street-

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<sup>5</sup> CRS Report at 8.

<sup>6</sup> Office of the Inspector General, U.S. Dep't of Justice, Top Management and Performance Challenges Facing the Department of Justice - 2014 (Nov. 10, 2014), at <http://www.appropriations.senate.gov/news.cfm?method=news.view&id=5aa8e660-f52e-4074-945f-9618eb963ae9>.

<sup>7</sup> *Id.* ("The BOP currently has more employees than any other Department component, including the Federal Bureau of Investigation (FBI), and has the second largest budget of any Department component, trailing only the FBI. The Department's leadership has acknowledged the dangers the rising costs of the federal prison system present to the Department's ability to fulfill its mission in other areas. Nevertheless, federal prison spending continues to impact the Department's ability to make other public safety investments, as the Department's FY 2015 budget request for the BOP is a 0.5 percent increase from the enacted FY 2014 level."); see also Appendix A.

level dealers, and that too many of the latter are being given sentences that Congress intended to target the former. This has been confirmed by data from the U.S. Sentencing Commission: the person most likely to receive a mandatory minimum sentence is a street-level drug seller, not a high-level supplier or kingpin.<sup>8</sup> As the conservative Heritage Foundation has written, “The immediate and most urgent problem facing America’s criminal justice system is that district courts must impose unduly severe mandatory minimum sentences on certain small-scale drug offenders.”<sup>9</sup>

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**NAAUSA’s “Fact” #2:       The majority of drug traffickers sentenced in federal court are not being sentenced pursuant to mandatory minimum sentences.**

**Everyone Else’s Reality:**

In FY 2014, 11,000 Americans received federal drug mandatory minimum sentences.<sup>10</sup> A few years ago, the total was above 15,000.<sup>11</sup> Over the past decade, hundreds of thousands of individuals were given sentences based not on an individualized assessment of their crime, their role in it, and other relevant circumstances, but rather on mandates set by Congress 30 years ago and deemed appropriate by the prosecutors who chose their charges and brought their cases.

NAAUSA argues that these large numbers should not be a concern because “the majority” of drug offenders are not sentenced to mandatory minimum sentences. That’s correct, but why is the majority spared? Because Congress authorized two distinct ways for offenders to avoid a mandatory minimum, even after the prosecutor has charged an offender with a crime that carries a mandatory sentence.

The most common way for offenders to avoid a mandatory minimum sentence is to “snitch” or cooperate against others,<sup>12</sup> but they must do so to an extent that the prosecution deems sufficiently helpful. What NAAUSA does not reveal is that it is the prosecutor alone who gets to decide how much cooperation is enough to merit relief for “substantial cooperation.” Prosecutors are authorized to exempt *any offender* – drug kingpins, major drug importers, and offenders with several prior felony convictions – from receiving a mandatory minimum if they deem their cooperation worthy. That decision is not reviewable by any court or entity.

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<sup>8</sup> U.S. SENTENCING COMM’N, REPORT TO CONGRESS ON MANDATORY MINIMUM PENALTIES at 171, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_08.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf).

<sup>9</sup> Evan Bernick & Paul Larkin, Heritage Foundation, “Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms,” <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>.

<sup>10</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 43 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table43.pdf>.

<sup>11</sup> U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 43 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table43.pdf>.

<sup>12</sup> See 18 U.S.C. § 3553(e) (2014).

In fact, the people most likely to provide “substantial assistance” to prosecutors – and escape a mandatory minimum term – are the very drug offenders Congress intended these long sentences for:

- High-level suppliers/importers: Less than half received mandatory minimums; 32% were relieved because they provided “substantial assistance”
- Organizers/leaders: 55% received mandatory minimums; 40% were relieved by providing “substantial assistance”
- Managers: 42% received mandatory minimums; half were relieved through “substantial assistance”
- Supervisors: 47% received mandatory minimums; 37% were relieved through “substantial assistance.”<sup>13</sup>

The other way an offender can avoid a mandatory minimum is by meeting the strict five-part test to qualify for the existing drug safety valve. In FY 2014, only 16 percent of drug offenders qualified for the safety valve.<sup>14</sup> Unlike the “substantial assistance” exception to mandatory minimums – which prosecutors can give to anyone – the current safety valve<sup>15</sup> is based on objectively found facts and is very narrow. For example, it applies only to drug offenders who have zero or one “criminal history points” under the guidelines. This limited criminal history can be met or exceeded by virtually every city, state, and federal crime, including misdemeanors. Old offenses, including those where a person did not even have to serve prison or jail time, can disqualify him or her from safety valve eligibility. Examples include careless driving, trespassing, insufficient funds check, and disorderly conduct; all count if the sentence was a term of probation of more than one year.<sup>16</sup>

These are not hypothetical scenarios. John Hise, to give one example, received a very real and very long 10-year mandatory minimum sentence for his first felony offense because he had prior state convictions for possession of a small amount of marijuana and a DUI. These offenses were misdemeanors in his state, for which he paid fines and served only one day in jail.<sup>17</sup> Nevertheless, he did not qualify for the safety valve because of this record.

Lots of Americans receive lengthy federal prison sentences for drug crimes. NAAUSA’s complete detachment from public opinion on this point is evident from its statement that “drug offenders make up *only* about 50 percent of the federal prison population” (emphasis added). Only 50 percent? **No other country locks up so many nonviolent drug offenders for so long.**

The status quo in federal sentencing has destroyed not only individuals but also institutions. “It was a great mistake to put routine drug offenses into the federal courts.” Supreme Court Justice

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<sup>13</sup> U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES 168-71, Figs. 8-9, 8-11, available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_08.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf).

<sup>14</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK at Tbl. 44 (2014), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table44.pdf>.

<sup>15</sup> See 18 U.S.C. § 3553(f) (2014).

<sup>16</sup> U.S.S.G. § 4A1.2 (2014).

<sup>17</sup> FAMM, John Hise, <http://famm.org/john-hise/>.

Antonin Scalia testified before Congress. He said that federalizing so many drug cases forced Congress to enlarge the federal court system and diminish “the elite quality of the federal judiciary.”<sup>18</sup> It is clear that NAAUSA’s myopic mission to preserve and increase prosecutorial authority over sentencing has blinded it to the numerous negative consequences of mandatory minimum sentencing laws.

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**NAAUSA “Fact” #3:           It is well-established that drug trafficking is inherently violent and that all drug dealing is dangerous, taking the lives of thousands of Americans, destroying families, and undermining the moral fabric of our communities, regardless of whether any individual offender engages in an act of violence during the commission of a drug offense.**

**Everyone Else’s Reality:**

Most federal drug offenders are not the violent career offenders NAAUSA would like us to believe they are. Data from the U.S. Sentencing Commission show how demonstrably false this claim is. Of the 22,000 federal drug offenders sentenced in FY 2014:

- Only 142 (a mere 0.7%) used violence or threats of violence<sup>19</sup>
- Only 16% used or possessed a weapon<sup>20</sup>
- 48.6% had little or no prior criminal record<sup>21</sup>
- 93% did not play any leadership or management role in the offense<sup>22</sup>
- 1 in 5 (19%) were considered to have minor or minimal roles in the offense<sup>23</sup>
- Only 12 people were convicted under the continuing criminal enterprise statute, designed for high-profit, large-quantity kingpins.<sup>24</sup>

While it is true to some extent that all drug dealing is dangerous, it is also true that not all drug dealing is equally dangerous. For that reason, sentencing laws should be flexible enough to allow

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<sup>18</sup> Testimony of U.S. Supreme Court Justice Antonin Scalia before the U.S. Senate Judiciary Committee at a hearing entitled “Considering the Role of Judges Under the Constitution of the United States,” Oct. 5, 2011, <http://www.judiciary.senate.gov/meetings/considering-the-role-of-judges-under-the-constitution-of-the-united-states>.

<sup>19</sup> U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, GUIDELINE CALCULATION BASED FY2014 28 (2014), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf).

<sup>20</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK at Tbl. 39, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table39.pdf>.

<sup>21</sup> *Id.* at Tbl. 37, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table37.pdf>.

<sup>22</sup> *Id.* at Tbl. 40, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table40.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at Tbl. 17, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table17.pdf>; see 21 U.S.C. § 848 (2014) (Continuing Criminal Enterprise, requiring high profits from sales of very large quantities of drugs); U.S.S.G. § 2D1.5 (2014).



distinctions between drug offenders. The status quo does not allow for such distinctions. Indeed, for 25 years FAMM has collected stories from thousands of run-of-the-mill dealers and addicts who received sentences that Congress intended to apply only to kingpins.

Consider, for the example, the 10-year mandatory minimum sentence given to Shirley Schmitt, a 55 year-old widow who did not sell drugs to *anyone*.<sup>25</sup> As her judge said at sentencing:

All matters of methamphetamine manufacturing are serious. The Court's well aware of that. But this case, the evidence was pretty clear, that **there wasn't anybody really selling any methamphetamine**. There wasn't—nobody had any big cars or stacks of 20s in their pocket or anything like that. It involved a group of addicts who were satisfying their own addiction. (emphasis added)

Despite claims that Ms. Schmitt was a leader of a conspiracy, the judge stated that there can be no leader when the conspiracy is nothing more than “a group of people who had next to no money and were not selling anything and were all working together trying to satisfy their addictions.”

Ms. Schmitt's crime might have been “dangerous,” but she does not present the kind of ongoing threat that warrants a decade and a half behind bars, and she is clearly not the type of dangerous offender to whom the NAAUSA pretends mandatory minimums exclusively apply. The same is true of Mandy Martinson and Melissa Trigg and many other federal offenders profiled by FAMM.<sup>26</sup>

Finally, NAAUSA argues that “[e]ven if illicit drug trafficking could be conducted without violence, the underlying conduct—placing highly addictive and dangerous drugs on the street—is extremely harmful to our nation. We are in the midst of one of the worst drug epidemics in our history. Fatalities through overdoses of illegal drugs are skyrocketing.”

It would be hard to find a more damning indictment of NAAUSA's position than its admission that, 30 years after enacting the harsh sentences it favored to crack down on illegal drug use, we are “in the midst of one of the worst drug epidemics in our history.” Mandatory minimum drug sentences have existed and been enforced for the last 30 years, and they have not stopped this epidemic.

It's time for a new approach. That is why many former federal prosecutors, like Governor Chris Christie (R-NJ), have recommended that we divert some of the funding we are currently using to incarcerate addicts to provide treatment that can save lives and protect public safety.<sup>27</sup>

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<sup>25</sup> FAMM, Shirley Schmitt, <http://famm.org/shirley-schmitt/>.

<sup>26</sup> Find FAMM's federal prisoner profiles here: <http://famm.org/tag/federal-prisoners/>.

<sup>27</sup> See, e.g., Stephen Stirling, *Christie: The War on Drugs Has Failed, Treat NJ Heroin Addiction as an Illness*, NJ.com, Dec. 21, 2014, [http://www.nj.com/politics/index.ssf/2014/12/christie\\_government\\_private\\_sector\\_need\\_to\\_step\\_up\\_fight\\_against\\_heroin\\_in\\_nj.html](http://www.nj.com/politics/index.ssf/2014/12/christie_government_private_sector_need_to_step_up_fight_against_heroin_in_nj.html). In the interview, Governor Christie stated that “not having mandatory incarceration for non-violent offenders but having mandatory treatment is something that's going to yield a much greater result for society in general and for those individuals in particular.” *Id.*

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**NAAUSA’s “Fact” #4: Slashing federal mandatory minimum sentences will undermine the ability of law enforcement officials to dismantle drug trafficking organizations.**

**Everyone Else’s Reality:**

NAAUSA complains that without mandatory minimums prosecutors will not be able to coerce guilty defendants into pleading guilty. This complaint strains credulity when a record-high **97 percent of all defendants already forfeit their constitutional right to trial and plead guilty.**<sup>28</sup> The fact of the matter is that federal prosecutors, backed by the largest law firm in the world, the Department of Justice, and its comparatively vast resources dedicated to investigating and pursuing charges, has such an overwhelming advantage over individual defendants that very few defendants are willing to risk going to trial even if they think they could prevail.

More importantly, current U.S. Deputy Attorney General Sally Yates, a career prosecutor who directly supervises the thousands of acting assistant U.S. attorneys today, has publicly explained that mandatory minimum sentences are not necessary to get people to plead guilty or to work up the chain of a conspiracy to capture more culpable people:

One of the most common concerns that I hear expressed about eliminating or reducing mandatory minimums is that long sentences for low level defendants is the only way to secure cooperation against the worst criminals. **Not only is this inconsistent with my personal experience as a prosecutor, it is inconsistent with the data we have gathered since the Department of Justice recalibrated our drug charging policy two years ago.** As I expect you know, under former Attorney General Holder’s smart on crime policy, prosecutors were directed not to charge mandatory minimums for lower level, non-violent drug offenders and **our use of mandatory minimums decreased by 20 percent.** Although some feared that defendants would stop pleading guilty and stop cooperating, our experience has been just the opposite. In fact, **defendants are pleading guilty at the same rates as they were before we instituted the new policy.** So the fear that not charging mandatory minimums would prevent us from being able to work our way up the chain just hasn’t been borne out.<sup>29</sup> (emphasis added)

Data support Deputy Attorney General Yates and the DOJ’s position. If mandatory minimums were necessary to convince defendants to plead guilty, plea rates for crimes carrying mandatory minimum sentences would be much higher than the plea rates for crimes that don’t carry automatic sentences. They aren’t. According to the U.S. Sentencing Commission, the 2014 plea rate for drug trafficking (97.4%), which carries mandatory minimum sentences, was lower than the plea rate for larceny (98.7%), embezzlement (98.2%), forgery (98.7%), and environmental

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<sup>28</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK at Fig. C, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>.

<sup>29</sup> U.S. Dep’t of Justice, Deputy Attorney General Sally Quillian Yates Delivers Remarks at the Bipartisan Summit on Fair Justice, July 22, 2015, <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-bipartisan-summit-fair>.

offenses (98.5%) and not significantly higher than the plea rates for burglary (97.3%), bribery (97.1%), and administration of justice offenses (96.5%) – none of which carry mandatory minimum sentences.<sup>30</sup>

Data and the experience of the nation’s top federal prosecutor do not lie: mandatory minimum sentences are not necessary to maintain high plea rates.

One thing NAAUSA and supporters of reform agree on is that mandatory minimums and harsh sentences make it easier for prosecutors to threaten defendants, innocent and guilty alike, into foregoing trials where the prosecution would have to prove its case beyond a reasonable doubt. But defenders of the status quo and reformers part ways on whether this is always a good thing. U.S. Representative Raul Labrador (R-ID), a strong backer of mandatory minimum reform, said:

The main concern that I hear coming from advocates of our current sentencing system [is] ... that having tough on crime sentences actually helps you reduce crime because you can use those tough sentences to get people to plea to lesser deals. ... You know, ‘Talk to us about the crime or we’re going to put you in prison for 30 years.’ And the government should never have that much power over somebody’s life. That goes against what our founding fathers wanted.<sup>31</sup>

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**NAAUSA’s “Fact” #5:           It’s easier to quantify the costs of incarceration than the value of public safety.**

**Everyone Else’s Reality:**

NAAUSA says that reducing drug sentences won’t save taxpayers money because the increase in crime-related costs will outweigh any savings from reduced incarceration. This is NAAUSA’s most disingenuous argument.

Supporters of sentencing reform are not suggesting that the public should tolerate more crime (and more crime-related costs) in exchange for lower incarceration costs. Our argument is that we can reform sentencing laws in a way that reduces both the cost of incarceration *and* the cost of crime. We have real-world evidence using what NAAUSA calls “the true measure of success in law enforcement efforts...[which is] the crime rate.”

**More than 30 states have reduced, eliminated, or reformed their mandatory minimum and drug sentencing laws over the past decade, and crime has gone down, not up.**<sup>32</sup> The human

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<sup>30</sup> U.S. SENTENCING COMM’N, 2014 SOURCEBOOK at Tbl. 11, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table11.pdf>.

<sup>31</sup> Evan McMorris-Santoro, *Meet the Man Fighting to Keep Minor Drug Criminals in Jail*, BuzzFeed, May 26, 2014, [www.buzzfeed.com/evanmcsan/younger-republicans-try-to-drag-their-party-into-the-21st-ce?s=mobile](http://www.buzzfeed.com/evanmcsan/younger-republicans-try-to-drag-their-party-into-the-21st-ce?s=mobile).

<sup>32</sup> For reforms, see VERA INSTITUTE OF JUSTICE, DRUG WAR DÉTENTE?: A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009-2013 App. B (Apr. 2014), <http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013-v6.pdf>. For proof of crime reductions, see PEW CHARITABLE TRUSTS, STATES CUT BOTH CRIME AND IMPRISONMENT (Dec. 2013), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2013/states-cut-both-crime-and-imprisonment>.

impact is clear: Fewer people in these states have been killed, raped, robbed, and assaulted. The economic benefits of reduced crime are not inconsequential, either. When the states are able to achieve this level of crime reductions while shrinking their prison populations, as these states did, taxpayers save money in two ways: by reducing the costs associated with crime and reducing the costs of incarceration.

Do we think eliminating mandatory minimums is the reason crime has fallen in all of the states that have passed reform? Not necessarily. It's too early to tell and, frankly, too difficult to determine a causal relationship given the myriad of factors at play. We think there is a connection, however, especially in those states that reformed their mandatory minimum laws and reinvested the savings into police and law enforcement budgets and drug treatment programs. But the burden is on NAAUSA, which does not hesitate to assert that proposed federal reforms will lead to more crime, to explain why crime has gone down in every state that has adopted similar reforms.

NAAUSA's argument seems to focus solely on the role that incarceration played in reducing crime over the past 20 years. Since greater reliance on incarceration helped at one time, NAAUSA argues, it must help at all times. That is not a view held by criminologists and experts, including those cited most frequently by those who agree with NAAUSA.<sup>33</sup> For example, Professor Steven Levitt, the economist and author of *Freakonomics*, said in 2004 that incarceration was responsible for, at most, a third of the drop in crime between 1991 and 2001. Defenders of the status quo cite this estimate often. They ignore, however, that Levitt just eight years later concluded that policymakers had gone too far. He said,<sup>34</sup>

We know that harsher punishments lead to less crime, but we also know that the millionth prisoner we lock up is a lot less dangerous to society than the first guy we lock up. **In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today, my guess is that the costs outweigh the benefits at the margins. I think we should be shrinking the prison population by at least one-third.**<sup>35</sup>

Crime can drop when incarceration drops, and **crime drops in recent years have actually been bigger in states where incarceration was reduced rather than increased**, according to findings from the Pew Public Safety Performance Project:

The crime rate went down in all but four of the 31 states that reduced their imprisonment rates. It went up in one of the 15 states that increased their imprisonment rates. The 10 states with the largest decreases in imprisonment rates had a 12 percent average reduction

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<sup>33</sup> See NATIONAL ACADEMY OF SCIENCES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES Chapter 5 (2014), [http://www.nap.edu/openbook.php?record\\_id=18613&page=130](http://www.nap.edu/openbook.php?record_id=18613&page=130) (summarizing the literature and finding no clear causal link between increased incarceration and decreased crime).

<sup>34</sup> Steven D. Levitt, *Understanding Why Crime Fell in the 1990s*, 18 J. OF ECON. PERSPECTIVES 163, 178-79 (2004), <http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf>.

<sup>35</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, NY TIMES, Dec. 11, 2012, [http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?hp&\\_r=1&\\_](http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?hp&_r=1&_).

in their crime rates, and, in the 10 states with the largest imprisonment rate increases, crime rates fell an average of 10 percent.<sup>36</sup>

In short, NAAUSA's claim that less incarceration will mean more crime is not supported by science, experts, or real-world experience.

Finally, NAAUSA fails to consider the cost-savings that will result from increased crime *prevention* as savings from sentencing reforms for nonviolent drug offenders are reinvested in better policing, more law enforcement officers, better rehabilitation programs in prisons, and more prosecutors. **Since fiscal year 1998, Congress has increased spending on federal prisons by 45 percent. Over the same period, Congress has slashed spending on state and local law enforcement by 76 percent.**<sup>37</sup> What experts, science, and experience do support is that the swiftness and certainty of apprehension and punishment does reduce crime<sup>38</sup> -- and that would be accomplished by cutting prison costs of nonviolent drug offenders and reinvesting those savings in law enforcement.

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## CONCLUSION

While advocates from all points of the political spectrum, law enforcement groups, members of both parties of Congress, House Speaker John Boehner, the Department of Justice, and President Barack Obama all agree that significant mandatory minimum drug sentencing reform is needed – and the sooner the better – NAAUSA is using scare tactics and patently false and unsupported claims to attempt to maintain a status quo that indiscriminately incarcerates thousands of nonviolent drug offenders for decades, at the cost of billions of dollars that could be better invested in law enforcement and crime prevention. NAAUSA wants to maintain a sentencing system that is unjust, ineffective, expensive, harmful to families, and depleting law enforcement of limited resources. NAAUSA may call its opposition to mandatory minimum drug sentencing reform many things, but it cannot be called a serious effort to improve public safety.

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<sup>36</sup> PEW CHARITABLE TRUSTS, U.S. IMPRISONMENT RATE CONTINUES TO DROP AMID FALLING CRIME RATES (Mar. 14, 2014), <http://www.pewtrusts.org/en/about/news-room/press-releases/2014/03/14/us-imprisonment-rate-continues-to-drop-amid-falling-crime-rates>.

<sup>37</sup> See Appendix A, <http://famm.org/how-federal-mandatory-minimums-for-nonviolent-drug-offenders-make-us-less-safe/>.

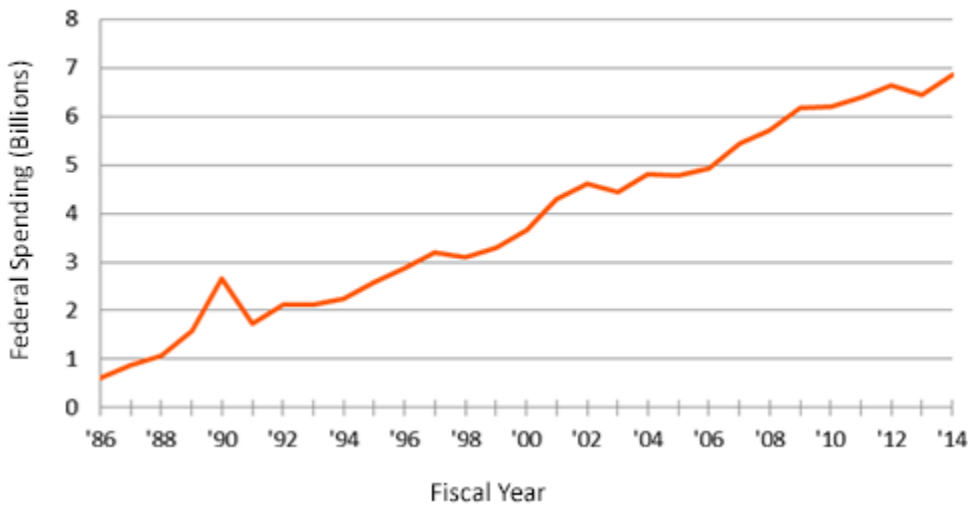
<sup>38</sup> See NATIONAL ACADEMY OF SCIENCES, THE GROWTH OF INCARCERATION IN THE UNITED STATES Chapter 5, 337, [http://www.nap.edu/openbook.php?record\\_id=18613&page=130](http://www.nap.edu/openbook.php?record_id=18613&page=130) (“[I]t is the certainty of apprehension, not an increase in the duration of long sentences, that actively deters would-be offenders.”).

**APPENDIX A**  
**How Federal Mandatory Minimums for Nonviolent Drug Offenders**  
**Make Us Less Safe**

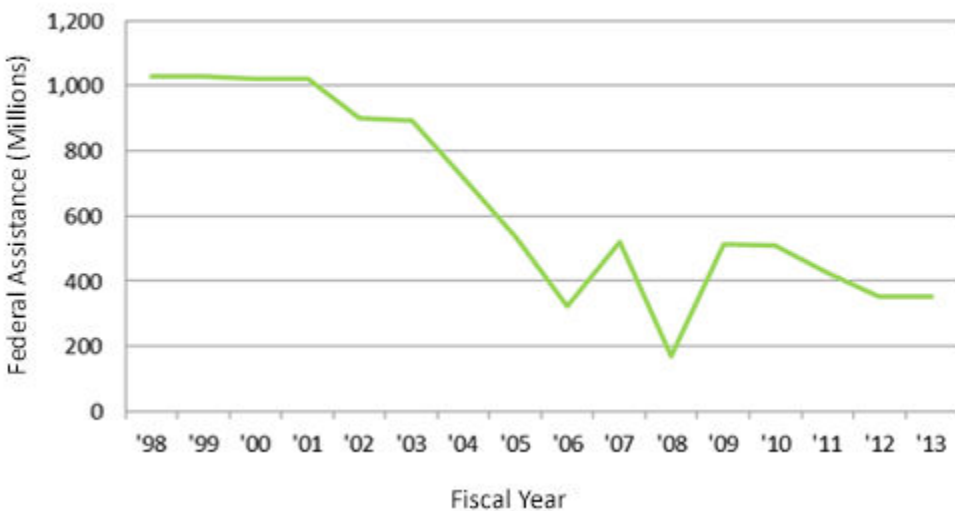
In an era of tight budgets, Congress must make tradeoffs between competing spending priorities. In the area of public safety, Congress has made a clear – and incredibly dangerous – tradeoff over the last 20 years.

**Since fiscal year 1998, Congress has increased spending on federal prisons by 45 percent. Over the same period, Congress has slashed spending on state and local law enforcement by 76 percent.**

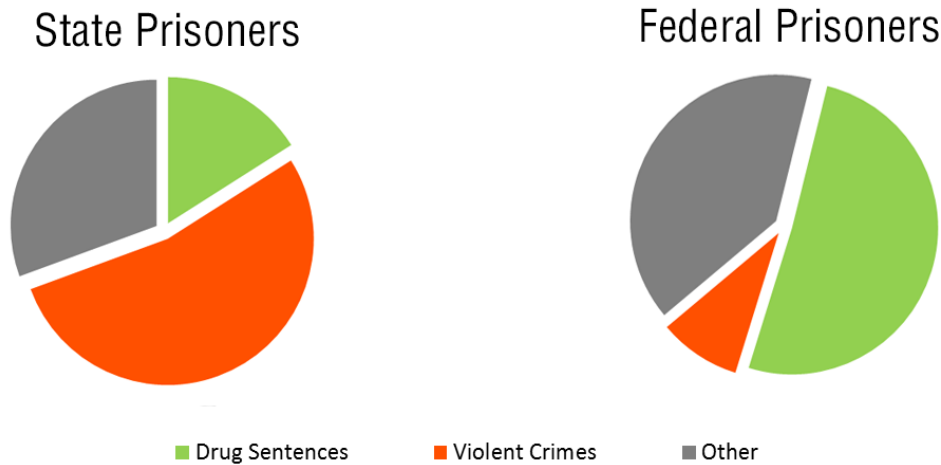
Spending in the Federal Bureau of Prisons



Federal Assistance to State & Local Law Enforcement



Given the front-line role played by police and the makeup of our prison populations, this tradeoff is making us less safe. More than half of all state prisoners (53.4%) are serving time for violent crimes. Only 16 percent are serving drug sentences. The federal system is quite different. Only 10 percent of federal prisoners are being held for violent offenses, while 56 percent committed drug offenses. At the end of 2012, states were holding 707,000 violent felons behind bars, while the federal government held less than 14,000.



Because state and local law enforcement arrest, charge, prosecute, and detain the vast majority of dangerous criminals in this country, Congress provides important grant funds to the states for these anti-crime purposes. Over the past two decades, however, Congress has drastically cut spending for state and local law enforcement in order to divert more funds to keeping nonviolent federal drug offenders behind bars.