To: President-Elect Biden DOJ Agency Review Team

From: Federal Public and Community Defenders

Date: December 22, 2020

Re: Reversing Litigation Positions that Fuel Mass Incarceration

President-elect Biden has committed to ending mass incarceration, rooting out racial disparities in the criminal legal system, and prioritizing redemption and rehabilitation.[1] The Department of Justice (DOJ) can take steps towards fulfilling these commitments during the Administration's first 100 days by (a) reversing retrograde Trump-era litigation positions that undermine the First Step Act of 2018 (FSA)'s reach and purpose, and (b) dismissing unprecedented federal charges brought against participants in the racial justice protests of 2020.

A. The Trump DOJ frustrated the First Step Act's promise. The historic and overwhelmingly bipartisan FSA reformed harsh and unfair provisions of federal criminal law. But Trump's DOJ has undermined the Act by taking litigation positions contrary to its text and clear congressional intent. Senator Durbin, one of the FSA's primary authors, decried the Trump DOJ's interpretation of certain provisions of the FSA as "absolutely wrong."[2]

Relief from mandatory minimums at resentencing (Sec. 401, 403): The FSA reduced two draconian mandatory-minimum penalty structures, both with demonstrated racially disparate impacts. Section 401 reduced war-on-drugs era mandatory minimums for recidivist drug offenses and restricted the kinds of prior drug convictions that trigger the penalties. Section 403 ended enhanced mandatory minimum penalties for "recidivist" firearm offenses under 18 U.S.C. § 924(c) for individuals who were not in fact recidivists, a practice described by Sen. Mike Lee (R-Utah) as "a misinterpretation of law rendered by courts across the country that we are now correcting."[3]

The FSA directs that Sections 401 and 403 apply to sentences imposed after the date of the FSA. Accordingly, most courts have applied the reduced penalties at all post-FSA sentencings—whether initial sentencing proceedings or resentencings after an illegal sentence is vacated. But the Trump DOJ has argued that the reduced penalties apply only at *initial* sentencings and has appealed cases in which district courts have applied the FSA at other types of sentencings. Senators Durbin, Grassley, and Booker—three of the Act's primary authors—have described this interpretation as contrary to Congress's language and intent: "Reduced to its simplest form, that interpretation assumes that Congress intended to

[1]The Biden Plan for Strengthening America's Commitment to Justice, https://joebiden.com/justice/ (last accessed on December 10, 2020).

[2] Senator Dick Durbin, Verified Twitter Account, post on November 7, 2019.

[3] Senate Comm. on the Judiciary, Exec. Business Meeting, 1:36:08 (Oct. 22, 2015), https://www.judiciary.senate.gov/meetings/executive-business-meeting-10-22-15.

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give legal effect to sentences that otherwise are void. That assumption finds no support in the statutory text, contradicts the fundamental considerations that motivated Congress to enact the FSA, and produces inequitable outcomes that undermine the fairness and legitimacy of our criminal justice system. That unquestionably is not what Congress intended."[4] **The Biden DOJ should direct prosecutors to agree to the applicability of Sections 401 and 403 at resentencing.**

Retroactive sentencing relief for individuals convicted of crack cocaine offenses (Sec. 404). In the Fair Sentencing Act of 2010, the Obama-Biden administration narrowed the unjustified disparity between crack and powder cocaine sentences. But the Fair Sentencing Act did not apply to closed cases. Section 404 of the FSA corrected that injustice by permitting individuals convicted of crack cocaine offenses to seek sentence reductions.

The FSA broadly describes the cases that are eligible for consideration and does not limit what courts may consider in determining whether to impose a reduced sentence and, if so, what sentence to impose. But the Trump DOJ has tried to sharply limit who is eligible for relief by adopting litigation positions that exclude whole categories of crack cocaine convictions, including cases involving only a small amount of crack cocaine, or crack cocaine in addition to other controlled substances from eligibility for relief. Trump prosecutors have also argued that courts have limited discretion at resentencing, asking them to discount factors such as post-sentence rehabilitation and to leave uncorrected undisputed errors made at the original sentencing. For example, the Trump DOJ has argued against relief in cases where defendants were erroneously subjected to career-offender enhancements—an error that can double, triple, or even quadruple the guideline range. The Fourth Circuit has described this interpretation as "extreme," and at least two other circuits have already rejected that position as well.[5]

President-Elect Biden has committed to eliminating the crack-powder disparity entirely. This will require legislation, but his DOJ can immediately advance this goal by reversing contrary litigation positions. **The Biden DOJ should direct prosecutors to agree that all convictions involving pre-Fair Sentencing Act crack cocaine offenses are eligible; and in considering whether to impose a reduced sentence, courts should use the legally correct guideline range and should consider all § 3553(a) factors, including post-offense rehabilitation.[6]**

Compassionate release reform (Sec. 603). The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), permits a court to reduce a defendant's sentence if it finds that

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[4] *See* Brief for Amicus Curiae United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker in Support of Defendant-Appellant and Vacatur, *United States v. Mapuatuli*, CA No. 19-10233, ECF No. 22 (9th Cir. May 12, 2020). The Sixth and Seventh Circuits has rejected the Trump DOJ's interpretation. *United States v. Henry*, ---F.3d ---, 2020 WL 7414637 (6th Cir. Dec. 18, 2020); *United States v. Uriarte*, 975 F.3d 596, 602 (7th Cir. 2020) (en banc).

[5] *See United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020); *United States v. Brown*, 974 F.3d 1137 (10th Cir. 2020); *see also United States v. Boulding*, 960 F.3d 774, 776 (5th Cir. 2020).

[6] In a circuit where binding precedent holds otherwise, the DOJ can, of course, explain as much to the court.

"extraordinary and compelling reasons" warrant such a reduction. Before the FSA, courts could reduce a sentence only upon motion of the Bureau of Prisons ("BOP"). The BOP made motions so rarely that this remedy was nearly a dead letter. In the FSA, Congress removed BOP from its gatekeeper role by permitting individuals to ask courts directly for compassionate release, after giving BOP 30 days to file such a motion.

But the Trump DOJ has adopted litigation positions that entrench BOP's gatekeeping role. For example, it has argued that USSG § 1B1.13, the Sentencing Commission's pre-FSA Sentencing Commission policy statement that cabins extraordinary and compelling reasons unless the BOP Director determines otherwise, continues to bind courts considering defendant-filed motions. Four circuit courts have already rejected the argument that BOP, rather than sentencing judges, should decide what constitute "extraordinary and compelling reasons" warranting relief in these cases.[7] The Trump DOJ has nevertheless maintained its position, appealed district court decisions granting relief under the statute, and, at least in the Sixth Circuit, urged district courts not to follow circuit precedent. **The Biden DOJ should direct prosecutors to agree that § 1B1.13 is not applicable to defendant-initiated motions.**

Other litigation positions have been particularly alarming as the deadly coronavirus sweeps through prisons. Defenders are unaware of a *single* case where BOP has moved for compassionate release based on an individual's vulnerability to severe illness from COVID-19. Nevertheless, the Trump DOJ routinely refuses to waive the requirement that a defendant wait 30 days after requesting relief from BOP before filing in court, despite recognizing it is waivable. For example, Darin Taylor died of COVID-19 on October 23, 2020, one week after the government opposed expediting proceedings because it was still attempting to confirm that Mr. Taylor, who had tested positive and was on a ventilator, had requested relief from the warden.

Likewise, last week, John Rodrigues died of COVID-19. Mr. Rodrigues was serving a mandatory life sentence for drug distribution, but if he were sentenced today the minimum sentence would have been only ten years. He filed for compassionate release in October, more than ten years into his sentence. BOP knew that Mr. Rodrigues "had long-term pre-existing medical conditions, which the CDC lists as risk factors for developing more severe COVID-19 illness."[8] Nevertheless, in late October and again in the week before his death, DOJ argued Mr. Rodrigues's medical conditions did not constitute extraordinary and compelling reasons because they were being appropriately managed by BOP. In the early days of the pandemic, to stay a preliminary injunction ordering the transfer of vulnerable

[7] *See United States v. McCoy*, ---F.3d ----, 2020 WL 7050097 (4th Cir. Dec. 2, 2020); *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020*); United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020).

[8] Bureau of Prisons, *Press Release* (Dec. 12, 2016), https://www.bop.gov/resources/news/pdfs/20201216_press_release_tuc3.pdf

inmates, Solicitor General Francisco advised the Supreme Court that DOJ had taken the position that "an inmate's diagnosis with a medical condition that the CDC has identified as an actual risk factor for COVID-19, and from which the inmate is not expected to recover, presents an 'extraordinary and compelling reason[]' that may warrant compassionate release if other criteria are me."[9] Nevertheless, as Mr. Rodrigues's and countless other cases reflect, prosecutors continue to argue that such diagnoses do *not* present an extraordinary and compelling reason for relief. The consequences have been deadly.

In light of the extraordinary nature of the pandemic, the Biden DOJ should direct prosecutors to waive the 30-day waiting requirement, agree that a diagnosis with a chronic medical condition that the CDC has identified as placing an individual at a higher risk for severe illness is an "extraordinary and compelling reason," and join § 3582(c)(1)(A) motions in appropriate cases. This would permit courts to determine whether a reduction is warranted after consideration of the factors set forth in 18 U.S.C. § 3553(a). In this context, where continued incarceration could lead to death, principles of retribution or rehabilitation should carry little weight, and DOJ's position should be driven by public safety: that is, whether the defendant's release would present a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another.

In each of these areas, the Biden DOJ should immediately move to withdraw its appeals taking positions contrary to the text and intent of the FSA. This is especially urgent in cases where these appeals seek to return to custody, in a pandemic, individuals who have already been released from prison.

B. The Biden DOJ should dismiss charges related to 2020 protests that are inconsistent with the administration's priorities. President Trump's DOJ responded to the mostly peaceful protests following the death of George Floyd with armed federal agents and tear gas, as well as the arrests of thousands of protesters. Federal prosecutors across the country filed charges that normally would have been handled at the state level, including arson, rioting, and civil disorder. Prosecutors also moved aggressively to detain protesters pending trial. Consistent with its criminal justice plan goal of restoring trust between police and communities, the Biden DOJ should dismiss these federal charges where possible, allowing state prosecutors to consider them in the context of local priorities.

[9]Reply in Support of Application for Stay, *Williams v. Wilson*, No. 19A1047, at 18 n. 4 (U.S. June 4, 2020).