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Because Freedom Can't Protect Itself

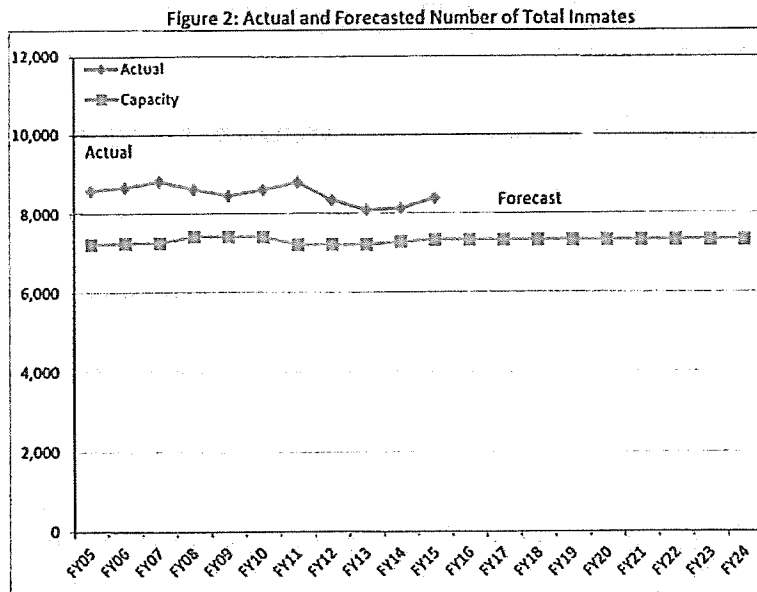
September 24, 2015

Dear Governor Branstad and the Governor's Working Group on Justice Policy Reform,

The ACLU of Iowa applauds the Governor's office for addressing the crisis of racial disparities in our state's criminal justice system. We also note that the items that the Governor has assigned this working group to focus on are not likely to have a substantial impact on the systemic issue of disproportionate minority contact or on reducing mass incarceration long-term for the state. We would like to resubmit the following recommendations for reforms that were submitted to the Public Safety Advisory Board in 2014 that we believe will offer more substantive, lasting changes to the criminal justice system in Iowa.

3 LEGISLATIVE REFORMS TO REDUCE MASS INCARCERATION IN IOWA AND DISPROPORTIONATE MINORITY IMPACT

Iowa's prison population exceeds current capacity, and is expected to grow 40 percent in the next ten years. A significant number are comprised of people convicted of non-violent drug crimes. Equally unacceptable, Iowa has among the very worst rates of disproportionate incarceration of African Americans in the country. The Sentencing Project reports that in Iowa, Black people are incarcerated at 13.6 times the rate of White people.



³ This year's forecast reflects forecasted figures observed in FY 2011 projections. Historic prison forecasts can be found in Appendix VI, Figure 15.

Below is a non-exhaustive list of the current, major, systemic problems that the criminal justice system in our state faces that require strategic, long-term solutions:

1. **Reduce or Eliminate expensive and ineffective warehousing of persons with substance abuse and dependency issues rather than the provision of systems to provide effective public health solutions.**

Non-violent drug convictions are the single biggest driver of the tripling of the prison population in Iowa over the last 25 years. Using August 2013 Department of Corrections data, there are 1,809 people in Iowa's prisons for non-violent drug offenses, comprising 23 percent of Iowa's overall prison population of 7,951. Of 1,809 people serving time for drug offenses, 1,233 are in prison for drug trafficking. Of that number, 560 people, or 45 percent of all people incarcerated for drug trafficking, are in prison for the lowest level trafficking in crack cocaine (less than 10 grams), methamphetamine and amphetamine combined (less than 5 grams). According to the Iowa Department of Corrections 2012 Annual Report, the Iowa prison system costs in excess of \$262 million to run (FY 2012).

Significant taxpayer savings could be achieved through smart reform targeting nonviolent drug crimes, which comprise approximately a quarter of the prison population, and has not been shown to effectively deal with drug abuse in our communities. The state should act to address these harms by:

- (1) ***Eliminating all mandatory minimum sentences for non-violent drug offenses.*** Based on Department of Corrections information provided in August 2013, there are approximately 1,085 people serving mandatory minimum sentences for non-violent sales of controlled substances. This is over 13 percent of the total prison population (7,951 people). In the CJJP's report on mandatory minimums, the Division of Criminal and Juvenile Justice Planning staff found that 62 percent of drug traffickers served mandatory minimums, and that mandatory minimums correlated to higher, not lower, recidivism rates.¹
- (2) ***Eliminating the sentence enhancement for a second or subsequent drug offense.*** The use of enhanced penalties ignores the science of addiction, and is unsupported by any evidence that it works to deter repeated drug use.
 - As of August 2013, there are 303 inmates serving an enhanced sentence under §124.411 for a second or subsequent drug offense, about one sixth of the number of people in prison for all drug crimes (1,809 people).
 - Under this enhancement, a person can be sentenced to up to three times the normal sentence, and three times the authorized minimum sentence, simply because of a qualifying prior drug conviction.
 - The use of enhanced penalties ignores the science of addiction, and is unsupported by evidence that it works to deter repeated drug use.

¹ Public Safety Advisory Board, *Final Report: Outcomes of Mandatory Minimum Sentences for Drug Traffickers* 1 (October 2011)[hereinafter "2011 PSAB Final Report"]. According to the report, 33 percent of those who served mandatory minimums returned to prison, compared to a recidivism rate of 28 percent of those who were eligible for mandatory minimums, but whose

(3) **Eliminate the crack/powder cocaine disparity.** This disparate treatment of equivalent amounts of crack and cocaine work to exacerbate racial disparity in the prison system and arbitrarily penalizes equivalently harmful drug abuse.

- Currently, equivalent amounts of cocaine and crack cocaine are penalized very differently:

Classification	Cocaine or cocaine preparation/mixture	Crack Cocaine
Class B felony under Iowa Code § 124.401(1)(a)	>500 grams (5 people)	>50 grams (4 people)
Class B felony under Iowa Code § 124.401(1)(b)	>100-500 grams (4 people)	>10 grams (23 people)
Class C felony under Iowa Code § 124.401(1)(c)	<100 grams (57 people)	<10 grams (109 people)

- From a public health perspective, this disparity is unjustified, because research consistently demonstrates that the form of cocaine – powder or crack – is not the crucial variable in harm caused; rather, the route of administration (smoked, intravenous administration, or snorted) accounts for behavioral effect differences.²
- U.S. DEA information indicates that a crack user is likely to personally consume anywhere from 3.3-16.5 grams of crack cocaine per week.³ Notably, as shown in the chart above, this range of typical personal usage is treated severely as a Class C and Class B drug trafficking crimes in Iowa.
- While African Americans accounted for 83 percent of crack cocaine admissions in Iowa in FY 2010,⁴ public health information indicates that African Americans make up only 37 percent of all crack cocaine users (whites comprise 50 percent and Latinos 13 percent).⁵ According to the most recent available census data (2010), African Americans only comprise 3.7 percent of the total Iowa population, so the disproportionate minority impact of crack sentencing is particularly pronounced in our state.
- Numerous other states and the federal government have passed reforms to substantially reduce or eliminate this disparity.

² Nora D. Volkow, M.D., Director, Nat'l Insts. of Health, National Inst. on Drug Abuse, U.S. Dept. of Health and Human Svcs., Testimony before the U.S. Senate Judiciary Committee, Subcommittee on Crime and Drugs, *Scientific Research on the Scope, Pharmacology, and Health Consequences on Cocaine Abuse and Addiction* (Feb. 12, 2008), available at <http://www.hhs.gov/asl/testify/2008/02/t20080212c.html>.

³ U.S. Dept. of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 4 (March 2002).

⁴ 2011 PSAB Final Report, *supra* note 1, at 7.

⁵ Substance Abuse and Mental Health Services Administration, Division of Population Survey, Office of Applied Studies, *National Survey on Drug Use and Health* (2008 and 2009).

(4) Correct the amounts of methamphetamine and crack cocaine that enable charging low levels that are typical of personal consumption to be charged as possession with intent to deliver.

- The current threshold amount of drugs that enables charging under Iowa Code § 124.401 as possession with intent to deliver, rather than mere possession, are dramatically lower for methamphetamine and crack cocaine than for other substances. This allows heavy users with addiction problems to be unfairly punished as harshly as true traffickers.
- As of August 2013, Department of Corrections data indicates that there are 1,233 people in prison for drug trafficking; of this number, approximately 70 percent have been convicted of methamphetamine and cocaine offenses. Among them, the largest quantities of prisoners possess low amounts that are consistent with personal use, as the chart below demonstrates. Under existing law, even these low-level amounts trigger a mandatory minimum sentencing scheme, which unfairly punishes heavy users as harshly as real traffickers.

(5) Create and fund alternatives to prison and jail for nonviolent drug offenders.

- There are programs in Iowa that approach drug addiction in a different way, a way that works, and saves the state money. In FY 2010, publicly funded drug treatment programs in Iowa⁶ obtained the following results:

Clients reporting no arrests in the six months following discharge from treatment	80 percent
Clients abstaining from substance abuse in the six months following discharge from treatment	57 percent
Clients full-time or part-time employed six months after discharge from treatment, up from 37 percent at treatment admission	60 percent

- As the data demonstrate, Iowans are safer when offenders have completed adequate substance abuse treatment. Hand in hand with drug crime reforms, alternatives to incarceration need to be increased and fully funded.

2. Eliminate mandatory minimum sentencing, particularly for robbery under § 902.12.

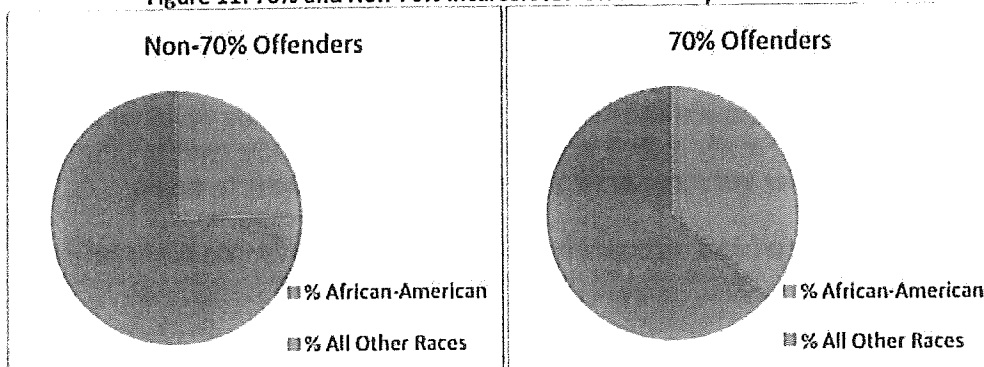
Iowa Code § 902.12 establishes a mandatory minimum sentence of 85 percent of the maximum term be served for all robbery, second degree murder and attempted murder, sexual abuse, and kidnapping.

⁶ Governor's Office of Drug Control Policy, *Iowa Drug Control Strategy 2012 13* (2012), available at http://www.iowa.gov/odcp/drug_control_strategy/Strategy2012.Final.pdf (citing data from The Iowa Consortium for Substance Abuse Research and Evaluation, on behalf of the Iowa Department of Public Health, Division of Behavioral Health (2010)).

Of these crimes, robbery offers the greatest potential to impact mass incarceration and disproportionate minority impact, and is most likely to garner the necessary political will for change.

The Iowa CJPJ has reported that “a high percentage of those serving sentences under § 902.12 are African-American. . . . Of the robbers entering prison to serve 70 percent sentences, 48.0% were African- American (including 50.0% of the Robbery-1 admissions). Thus, it will be difficult to reduce the racial disparity in Iowa’s prison population without somehow modifying 70 percent sentences.”

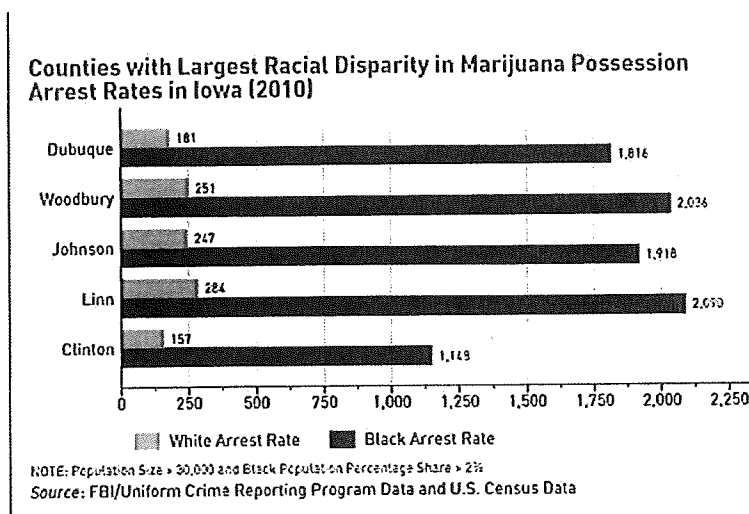
Figure 11: 70% and Non-70% Incarcerated Offenders by Race FY 2014



Source: https://humanrights.iowa.gov/sites/default/files/media/Forecast2014%5B1%5D_0.pdf

3. Combat community policing failures, including racial inequities in arrest rates.

The ACLU, using FBI data, published a widely-cited report finding that Iowa has the greatest racial disparity in arrest rates for possession of marijuana, despite equal usage rates among African American and White Iowans. In Iowa, a Black person is more than 8 times as likely to be arrested than a White person. The full study and analysis, including information that looks at arrest rates at the county level in Iowa, can be read at this url: <http://www.aclu-ia.org/2013/06/04/iowa-ranks-worst-in-racial-disparities-of-marijuana-arrests/>.



a. Replace Low-Level Marijuana Possession Criminal Penalties with Civil Fines

An effective reform that targets this problem is to stop addressing low-level personal use of marijuana as a criminal offense and implement civil and public health solutions. Short of legalization, the state should consider de-criminalization strategies. Decriminalization replaces criminal penalties for low-level drug possession with civil penalties. A civil fine avoids the needless destruction of families and futures of young people, particularly people of color, that comes with arrest.

b. Support an Anti-Racial Profiling Bill

An effective anti-racial profiling bill will at least require that information on the race of people who are stopped, as well as those who are searched, is collected and made publicly available, along with the reasons for the stop and the result, if any. It will fund and mandate regular training for law enforcement about the ineffective and harmful nature of racial profiling in law enforcement. Funding for and minimum policy standards governing body cameras for police statewide should be required when police are interacting with the public. Finally, police should be required to obtain written informed consent to search people or vehicles when they lack probable cause to do so.

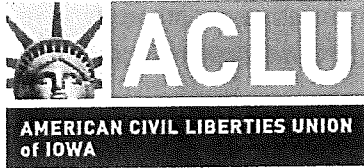
The ACLU's full policy paper and recommendations regarding body cameras can be found here: <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

It's encouraging to see the Iowa's governor express interest take in tackling these types of reforms and we look forward to working with the Governor's office, this Working Group and other stakeholders. Please consider the ACLU of Iowa a resource as you craft specific recommendations for the legislature during upcoming Working Group and subgroup meetings.

Sincerely,



Jeremy Rosen
Executive Director ACLU of Iowa



MEMO

TO: Governor's Working Group on Justice Policy Reforms
FROM: ACLU of Iowa
SUBJECT: Comments regarding recommendations for Iowa's Drug Courts
DATE: October 15th, 2015

We urge the Governor's Working Group on Justice Policy Reforms to adopt safeguards that will ensure that the due process rights of the accused are protected as it contemplates the expansion of Iowa's drug courts. The state's coercive power should not dominate the treatment process, nor should therapy supplant the fairness inherent in our criminal justice system. The following are some factors the group should consider in expanding the drug courts in Iowa.

1. Any drug court must provide the constitutional protections usually attached to criminal prosecutions before any deprivation of liberty.
2. Drug courts should be used to reduce and not exacerbate racial disparities in Iowa's criminal justice system. Unfortunately, numerous studies have shown that access to and graduation rates from drug court programs by people of color are considerably smaller than for white participants.¹ In order to address this disparity, safeguards must be instituted to ensure procedures governing admission to drug courts and penalties for violations or infractions within the program are shielded from implicit and explicit biases. In addition, data regarding minority access to and graduation from Iowa's drug courts should be collected, analyzed and reported annually.
3. Coerced treatment or drug court programs should not be funded at the expense of voluntary programs.
4. Drug courts are collaborative efforts between the party, legal advocates, judges, and treatment professionals, but that collaboration may confuse the lines of authority regarding sentencing decisions. While treatment professionals and others may provide input on sentencing decisions, ultimate authority should rest with the judge. The non-adversarial, collaborative approach of drug courts also should not interfere with preexisting legal relationships among drug court participants, defense attorneys, judges, prosecutors and medical professionals and, in the case of defense attorneys, especially their ethical duties toward their clients.

¹ Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 Ct. Rev. 1, 41 (2013), available

5. Participation in drug courts should never be conditioned on the defendant pleading guilty. Instead, drug court eligibility decisions should be made by judges exercising their discretion, after considering objective criteria.
6. Prosecutors must not be allowed to use information disclosed during treatment against a participant in any future criminal proceeding. Participants must often disclose information about past offenses to fully engage in the program, but any disclosed information should be presumptively excluded from any future criminal proceeding.
7. Drug court programs should not violate the defendants' religious freedom rights by requiring participation in a religious-based program.
8. Drug courts that are truly interested in reducing drug addiction should contemplate a continuum of penalties for relapses and not automatically treat a single relapse as a punishable failure.
9. The total time spent behind bars and in mandatory inpatient treatment should not exceed the original sentence imposed or punishable for the original charge. Part of the reason that our coalition partners find drug courts so appealing is that they are designed to divert non-violent drug offenders away from jails and prisons and into therapeutic environments. But in some drug court systems, the drug offenders end up serving more time under court ordered confinement if they agree to participate in the drug court program than they would have otherwise. Extending the duration of detention at a jail or mandatory inpatient treatment facility deters drug offenders from taking advantage of potentially life saving treatment. To protect against that outcome, the time a participant spends confined for the purpose of treatment should be counted against any sentence that the court could originally have imposed.

Drug courts present an alternative to the mass incarceration policy that has overloaded Iowa's prisons, disproportionately impacted African-Americans, and tightened its corrections budget. But this alternative approach must respect the due process of its participants.