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POSITION ON PROPOSED LEGISLATION

BILL: HB 423 - Crimes – Firearms – Penalties and Procedures (Violent Firearms Offender Act of 2022)

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 02/04/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 423.

HB 423 would exclude the use or possession of a firearm from the definition of a technical violation and implement new or harsher mandatory minimum sentencing schemes for firearm-related offenses. This bill is an unfortunate step in the wrong direction, based on failed policies that have undermined public safety and community stability for decades.

Legislative proposals of this magnitude should be supported by research and data to demonstrate and support passage of laws and policy in a direction that will positively impact crime and reduce recidivism.

While this bill is purported by its proponents to be a "common sense" measure to combat crime, not a single bill proponent has put forth any empirical data or evidence to show that enhancing criminal penalties and increasing lengths of incarceration significantly deters or reduces crime.

Rather, research and data show the opposite, that harsh criminal penalties do not deter crime or prevent recidivism. Tough on crime policies do not make our communities safer because they actually are proven to increase rates of recidivism and the commission of violent crimes.

In Maryland between 2005 and 2014, the average sentence grew by 6.7 months.[1] Longer sentences can harm our clients, they can clash with the lawmakers' intent, they can waste

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[1] This information was reported to Pew by Maryland's Department of Corrections. Ken Willis, Maryland's 2016 Criminal Justice Reform (The Pew Charitable Trusts) (2017), at 3-4,

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taxpayer money, and they can yield worse results than the DOC's other programs. After all, long sentences have never been shown to reduce recidivism.

In fact, longer sentences increase the likelihood of recidivism, and, in this way, they can hurt our clients. More specifically, long sentences can cause our clients to develop mood disorders, and mood disorders correlate with criminal activity, including recidivism. In the journal *Criminal Justice and Behavior,* the psychologist Doris Layton MacKenzie and the sociologist Lynne Goodstein both examined the link between sentence length and mental illness. They found, "The early-LTOs, [the long-term offenders who were still in the early days of their time in prison], were significantly higher than the early non-LTOs in depression, $t(82) = 2.2$, $p < .05$ and psychosomatic illness $t(132) = 2.6$, $p < .05$… Compared to recently admitted LTOs, inmates with shorter sentences remained less depressed and reported fewer psychosomatic illnesses during their first 3 years."[2]

In short, our clients become more likely to develop depression when given a long sentence. Plus, when depressed, our clients become more likely to recidivate. In the journal *The Lancet Psychiatry*, the psychiatrist Seena Fazel measured the link between mood disorders and crime. He found, "Depressive symptoms were associated with increased risk of violent crime… [In 3.2 years], 641 men (3.7%) and 152 (0.5%) women with depression committed a violent crime, compared with 4097 (1.2%) men and 1059 (0.2%) women in age-matched and sex-matched controls."[3] In other words, our clients become more likely to commit crimes during a depressive episode.

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http://goccp.maryland.gov/wp-content/uploads/justice-reinvestment-advisory-20180220-supplemental-materials.pdf.

[2] MacKenzie and Goodstein gave a questionnaire to 1,270 inmates across three prisons: Stateville Correctional Center, Illinois; Somers Correctional Institution, Connecticut; and Stillwater Correctional Facility, Minnesota. They administered the questionnaires on three occasions, at least six months apart. They randomly selected about 250 names during each visit. In a previous study from 1984, they developed a scale to measure the inmates' depression. Here, they used that scale again. More specifically, they used a five-item scale to apathy and lethargy. They measured psychosomatic problems by counting each different type of problem reported by the inmates. For example, if they saw headaches, stomach cramps, and nerve problems, they counted the number three. They used each inmate's reported date of entry in order to calculate each inmate's time served in prison. They defined sentence length as the difference between the entry date and the earliest release date possible. Doris Layton MacKenzie & Lynne Goodstein, *Long-Term Incarceration Impacts and Characteristics of Long-Term Offenders: An Empirical Analysis*, 12 CRIMINAL JUSTICE AND BEHAVIOR 406, 409 (1985), https://journals.sagepub.com/doi/pdf/10.1177/0093854885012004001.

[3] Fazel conducted two studies. In the first, he sampled 47,158 people diagnosed with depression between 2001 and 2009. In the second, he used 23,020 twins as a sample. He controlled for familial confounding by examining the twin study. In sensitivity analyses, he controlled for substance abuse, sociodemographic factors, and previous criminality. Having conducted the study in Sweden, he diagnosed depression and psychosomatic illness by using the International Classification of Diseases, not the DSM. He excluded patients with comorbid personality disorder. He restricted his definition of violent crime only to homicide, attempted homicide, and all forms of assault (including aggravated and assault of an officer). He excluded arson, sexual offenses, and threats and intimidation. He measured the odds of violent crime

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Besides serving as a risk factor for mood disorders, long sentences often result from "maxing out." When our clients "max out," they stay in prison for their full sentence, past their date of eligibility for parole. When a long sentence results from "maxing out," that sentence correlates with a greater recidivism rate for our clients.

In a 2013 brief, The Pew Charitable Trusts compared the recidivism rates for parolees and "max-outs." In New Jersey in 2008, 39% of "max-outs" returned to prison for a new crime within three years of their release.[4] Yet, only 25% of parolees returned to prison for a new crime within three years.[5] Considering these recidivism rates, our clients can benefit when a greater portion of their sentences is suspended.

Even if long sentences did reduce recidivism, some of our clients have become unlikely to recidivate, anyway. Almost everyone agrees on the existence of the age-crime curve. Still, some inmates enter prison as teenagers and then stay there until middle age, long after they age out of their criminal tendencies. In light of the age-crime curve, a lengthy sentence fails to benefit our clients. In one report, the United States Sentencing Commission examined recidivism in federal offenders. For the eight years after prison release, the commision calculated a rearrest rate of 64.8% for the ex-inmates younger than 30, 53.6% for the ex-inmates between the ages of 30 and 39, 43.2% for the ex-inmates between the ages of 40 and 49, 26.8% for the ex-inmates between the ages of 50 and 59, and 16.4% for the ex-inmates older than that.[6] In short, the recidivism rate drops off most sharply after the age of 50. Plus, before the age of 50, ex-inmates are mostly likely to be re-arrested for assault.[7] After the age of 50, they are most likely to be re-arrested for a public-order offense, like public drunkenness.[8] So, it makes little sense to keep someone in prison until middle age. By that point, our clients have become unlikely to recidivate. How could they possibly benefit from a longer sentence? Long sentences can make our clients more likely to recidivate, even though some clients have become unlikely to recidivate in the first place, because of their age.

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no more than a year after each person's depression diagnosis. Seena Fazel et al., *Depression and violence: a Swedish population study*, 2 LANCET PSYCHIATRY 225-7 (2015), https://www.thelancet.com/action/showPdf?pii=S2215-0366(14)00128-X.

[4] The writer, Jennifer Warren, used the data provided by the New Jersey State Parole Board. Jennifer Warren et al., *The Impact of Parole in New Jersey* 1 (The Pew Charitable Trusts) (2013), https://static.prisonpolicy.org/scans/PSPP_NJParole-Brief.pdf.

[5] Warren et al., 2013.

[6] The United States Sentencing Commission examined 25,431 federal offenders released in 2005, and it used a follow-up period of eight years for its definition of recidivism. The Commission selected offenders whose prison records, FBI identification numbers, and state identification numbers were provided by the states. Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications /research-publications/2017/20171207_Recidivism-Age.pdf.

[7] Hunt and Easley, 2017.

[8] Hunt and Easley, 2017.

Not only do long sentences hurt our clients, but they also conflict with the intent of some legislators. Some lawmakers wanted to reduce sentences even before the JRA, and even more lawmakers wanted to reduce sentences after the JRA. Plus, shorter sentences can decrease the likelihood of recidivism, and, obviously, the lawmakers hope to reduce recidivism. In a note on fiscal policy, Maryland's legislature writes, "JRCC, [Justice Reinvestment Coordinating Council], must (1) using a data-driven approach, develop a statewide framework of sentencing and corrections policies to further reduce the State's incarcerated population, reduce spending on corrections, and reinvest in strategies to increase public safety and reduce recidivism."[9] The lawmakers might become more open to reducing sentences, if they are shown the link between recidivism and long sentences.

Moreover, even if the legislators did not believe in shorter sentences' potential to reduce recidivism, they already clarified their preference for shorter sentences by passing the JRA. In a 2016 statement about the JRA, Gov. Hogan said, "By investing more in drug treatment and *incarcerating nonviolent inmates less* [emphasis mine], this new law will result in safer communities and produce significant cost savings for Maryland's taxpayers"[10] Indeed, the JRA reduced the maximum sentences for crimes like felony theft, second-degree murder, and first-degree child abuse.[11] Our clients' long sentences sometimes clash with the intent of the lawmakers who passed the JRA.

Yet, even before the JRA, the legislature wanted to shorten sentences in some cases. In 2012, the legislature lowered the maximum sentence for child abuse. The COMAR says, "Acts 2012, c. 249, § 1, and Acts 2012, c. 250, § 1… in subsec. (b)(2)(ii), substituted 'imprisonment not exceeding 40 years' for 'imprisonment not exceeding 30 years'; and in subsec. (c)(2), substituted 'imprisonment not exceeding 40 years' for 'imprisonment not exceeding 30 years.'"[12] All the way back in 2012, the legislature lowered the penalties for both repeat offenders and for a parent whose abuse results in the death of a child over the age of 13. The JRA served not as a turning point, but an example of an older trend toward shorter sentences. In other words, the legislators intended to shorten some sentences even before the JRA.

Not only do longer sentences diverge from the intent of some lawmakers, but they also waste money both by draining the prisons' budget and by increasing the likelihood of recidivism. Along with her colleagues, the policy analyst Elizabeth K. Drake conducted a meta-study, and they performed a cost-benefit analysis of a law intended to reduce sentences for

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[9] DEPARTMENT OF LEGISLATIVE SERVICES ET AL., FISCAL AND POLICY NOTE FOR SENATE BILL 602 1 (Maryland General Assembly) (2015), http://mgaleg.maryland.gov/2015RS/fnotes/bil_0002/sb0602.pdf.

[10] Governor of Maryland, *Maryland Governor's Message*, May 3, 2016 (2016), https://1.next.westlaw.com/Document/I78A0BA90425D11E6AF088AB341E81C36/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=(oc.Default)&VR=3.0&RS=cblt1.0.

[11] S. 1005, (Md. 2016), http://mgaleg.maryland.gov/2016RS/Chapters_noln/CH_515_sb1005e.pdf.

[12] MD. CODE ANN., Crim. Law § 3-601 (West 2012), https://govt.westlaw.com/mdc/Document/NCB19100164BE11E6A37BE96E68D8378F?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

inmates in Washington state. They calculated for the state to earn $1.88 for every dollar of cost.[13] Drake and her colleagues attributed these earnings to three things: a 3.5% drop in recidivism, lower prison costs from the reduced sentences, and increased earnings for the labor market.[14] In other words, reducing sentences will save money by decreasing the likelihood of recidivism.

On top of wasting taxpayer money by increasing the likelihood of recidivism, long sentences also carry a high cost for the prisons. In 2015, Maryland was spending $1,071,682,231 in total on incarceration. Adjusted for inflation, that amount becomes $1,160,096,456.[15] Since Maryland was keeping 24,028 people in prison that year, the state spending $44,601.39 per inmate. Adjusted for inflation, that amount becomes $48,281.02. Granted, that number reflects the average cost, not the residual cost, but Maryland would still save money by shortening our clients' sentences.

Compared to long sentences, some other DOC programs benefit our clients better, fulfill the laws' intent more faithfully, and carry a cheaper cost. These programs accomplish these things by reducing recidivism. For example, the Alternatives to Violence Project ("AVP") reduces recidivism. Over the course of either two or three days, it allows inmates to solve conflicts without violence by giving them social skills like empathy, communication, interpersonal trust, self-respect, learning from example, and participating in social activities. The psychologist Marsha Miller and the therapist John Shuford measured AVP's effect on recidivism. They found, "At the end of three years following release, only 11.5 percent of the AVP participants had new felony convictions and only half of these were for violent offenses."[16] By contrast, 68% of prisoners nationwide recidivate during the three years after release, according to Mariel Alper and Joshua Markman, the statisticians at the Bureau of Justice Statistics.[17] Compared to lengthy sentences, AVP boasts a better-document record of reducing recidivism.

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[13] Drake and her coworkers looked for corrections evaluation studies produced since 1970 and written in English, and they selected every such study with a control group and an outcome evaluation. Elizabeth Drake et al., *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised*, Publications, 1, 8-9 (2009), http://www.wsipp.wa.gov/ReportFile/1039/Wsipp_Increased-Earned-Release-From-Prison-Impacts-of-a-2003-Law-on-Recidivism-and-Crime-Costs-Revised_Full-Report.pdf.

[14] Drake et al., 2009.

[15] Maryland's Department of Corrections reported this information on a survey. Chris Mai & Ram Subramanian, (Vera Institute of Justice), 6-8 (2017), https://www.justnet.org/pdf/The-Price-of-Prisons-Examining-State-Spending-Trends-2017.pdf.

[16] Miller and Shuford obtained these statistics from randomly selecting 300 AVP participants at the Delaware Correctional Center. Marsha L Miller & John A Shuford, *The Alternatives to Violence Project in Delaware: A Three-Year Cumulative Recidivism Study* (Drane Family Fund of the New Hampshire Charitable Foundation), ii-4 (2005), at ii, 1, 4.

[17] Alper and Markman used the same methodology as the sentencing commission's study, mentioned above. Mariel Alper & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)* (Bureau of Justice Statistics), 15 (2018), https://www.bjs.gov/ content/pub/pdf/ 18upr9yfup0514.pdf.

Besides AVP, some states offer programs mandating employment after release, and these programs also reduce recidivism more than lengthy sentences. Instead of letting inmates "max out," these programs release inmates early on certain conditions. To evaluate these programs, the professor Catie Clark and her colleagues all studied the inverse correlation between employment and recidivism. They wrote, "The next step of the analysis was to consider the effects of any post-prison supervision, split probation/community control, and conditional release on post-prison employment and each of the recidivism outcome measures at one, two, and three years after release… Consistent with survival analysis, the results and effect sizes for any post-prison supervision and split probation/community control are similar. Both groups show significantly reduced odds of arrest for any crime and conviction at one, two, and three years and significantly increased odds of arrest for a felony and return to prison at one, two, and three years. Additionally, both groups show significantly greater odds of being employed after release from prison (12.7% and 11%, respectively) compared to inmates released with no supervision to follow."[18] In other words, our clients become more likely to follow the law not after staying in prison for the longest possible time, but after leaving prison on early, conditional release.

Like conditional release, prison education reduces recidivism more than long sentences do. In Nevada, the DOJ's newsletter reportedly wrote, "Prison-based education is the single most effective tool for lowering recidivism."[19] The criminologists Ryang Hui and Davdi Clark backed up this claim. They calculated the rates of three-year recidivism for inmates who had completed a college program, and they found the rate to be 9.4%.[20] When controlling for self-selection bias, they found the rate to be 17.1%.[21] The comparison group had a recidivism rate of more than twice that.[22] Compared to long sentences, prison education boasts a more successful record in reducing recidivism.

By reducing recidivism, these DOC programs serve as better alternatives to long sentences. Judging by their recidivism rates, these programs better affect our clients, they better

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[18] Catie Clark and her coworkers used the data reported by the Florida Department of Law Enforcement, the Florida Department of Revenue, and the Bureau of Research and Data at the Florida Department of Corrections. They controlled for race, sex, and age. Catie Clark et al., *Assessing the Impact of Post-Release Community Supervision on Post-Release*
Recidivism and Employment Assessing the Impact of Post-Release Community Supervision on Post-Release Recidivism and Employment, 34-5 (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/ 249844.pdf..

[19] John H Esperian, *The Effect of Prison Education Programs on Recidivism*, 61 JOURNAL OF CORRECTIONAL EDUCATION, 324 (2010),
https://www.jstor.org/stable/pdf/23282764.pdf?refreqid=excelsior:9e011a238865a28556e3b12e1775f121.

[20] Kim and Clark used the data reported by New York state, and they used Propensity Score Matching to control for self-selection bias. To measure the effect of the college programs, they used the Cox regression model and a fixed-effects logistic regression. Ryang Hui Kim & David Clark, *The effect of prison-based college education programs on recidivism: Propensity Score Matching approach*, 41 JOURNAL OF CRIMINAL JUSTICE (2013),
https://www.sciencedirect.com/science/article/pii/S004723521300024X..

[21] Kim and Clark, 2013.

[22] Kim and Clark, 2013.

fulfill the laws' intent, and, perhaps most convincingly, they carry a lower cost. Conditional release saves money by reducing the length of prison sentences. AVP saves money by reducing recidivism in a program that takes only two to three days.

Common sense legislation would not ignore factual data disproving its purported intent. A common sense approach to combatting crime would entail looking at past mistakes and learning from failed policies and laws that have only exacerbated problems of crime within our communities and broken systems of justice and rehabilitation.

Proponents of touch on crime policies like HB 423 fail to understand that safety is inextricably intertwined with equity and economic opportunity. Investing in and expanding opportunities for Maryland's communities is a smarter way to address public safety. Instead of attempting to resolve a complex problem with a simple yet costly solution of expanding prison populations, a more thoughtful and comprehensive effort should entail the following: adequate and equitable fund our schools; fair and affordable housing opportunities; employment opportunities for Marylanders returning from incarceration; and investment in community-based crime-intervention programs, which really work.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an [unfavorable report on HB 423.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.