Department of Justice

STATEMENT OF

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BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY

CONCERNING

"PROMOTING INMATE REHABILITATION AND SUCCESSFUL RELEASE PLANNING"

PRESENTED

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Statement of

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Before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives

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Good morning. Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee – It is a pleasure to be here with you today to discuss legislation pending before the Subcommittee: H.R. 261, the "Federal Prison Bureau Nonviolent Offender Relief Act of 2007" and H.R. 4063, the "Restitution for the Exonerated Act of 2007."

H.R. 261 would amend 18 U.S.C. § 3624 ("release of a prisoner") by adding a new subsection (g) to require that, "[n]ot withstanding any other provision of law," the Bureau of Prisons (BOP) release from custody any prisoner who is at least 45 years of age, who has served at least one-half of his or her sentence, and who has neither been convicted of a "crime of violence" nor "engaged in any violation, involving violent conduct" of BOP's "disciplinary regulations."

H.R. 4063 would establish a new grant program and would authorize the Attorney General to award grants to eligible organizations that "provide support services for exonerees."

Such grants would be available to provide, for example, "employment services, vocational training, education, and health care services." To carry out the provisions of the bill, the legislation would authorize appropriations of $1.25 million for each of fiscal years 2008 through 2012.

H.R. 4063 – Restitution for the Exonerated Act 2007

Turning first to H.R. 4063, the Department of Justice opposes its enactment. We do, however, support the purposes of the legislation: to promote the successful transition of persons who have wrongfully been convicted of criminal offenses back into their communities and to support federal, state, and local programs that work to assist in such transitions. The way in which the legislation seeks to achieve these goals is, unfortunately, inconsistent with the Administration's proposals to address, in a comprehensive manner, offenders' reentry into the community.

The Administration's proposals would consolidate the Justice Department's more than seventy existing grant programs into four flexible and competitive grant programs that would enable taxpayers' dollars to be directed to the places and the people where they are most needed.

The President's fiscal year 2008 budget proposes $65 million for a single reintegration and ex-offenders program (including exonerees) in the Department of Labor that would enlist faith-based and community organizations in assisting such persons. The Department recognizes the unique strengths of faith-based and community organizations as primary partners for the delivery of social services and strongly supports the authorization of the Department of Labor's

reintegration program. This will help to ensure that the significant efforts made to date through job training programs that are conducted by community and faith-based groups across the country are allowed to continue and to flourish.

Aside from the Department's opposition to H.R. 4063, for the reasons described above, we have two additional comments about the bill, as currently drafted, should the Subcommittee elect to proceed with it.

First, in section 6(1) (definition of "eligible organization"), it should be made clear, in the bill text or the legislative history, that an "eligible organization" includes a faith-based organization.

Second, in section 6(3) (definition of "factually innocent"), it does not appear that the requirement in paragraphs (A) or (B) – that there be a finding of innocence – is connected in any way to the requirement in paragraph (C) that "[t]he conviction has been vacated or reversed by a court." As currently drafted, if a defendant's case is vacated for <u>any reason whatsoever</u>, the defendant would be considered "factually innocent" (*e.g.,* even in cases involving incorrect jury instructions or incorrect evidentiary rulings by a district court). This would, in our view, be highly inappropriate. At a minimum, paragraph (3) should be amended to read, as follows: "All

counts of conviction [have] been vacated or reversed by a court of competent jurisdiction and no new trial on such counts is ordered or otherwise permitted."

H.R. 261 – Federal Prison Bureau Nonviolent Offender Relief Act of 2007

The Department strongly opposes enactment of H.R. 261.[1]

The legislation would be completely contrary to the longstanding policy of the United States Government, promoted consistently by both Democratic and Republican Administrations and Democratic and Republican Congresses over at least the past twenty years, to achieve "truth in sentencing" in the federal criminal justice system. It wound undermine the purposes of the Sentencing Reform Act of 1984 and, consequently, the thoughtful consideration of appropriate Sentencing Guidelines by the Sentencing Commission.

The bill runs entirely counter to the factors a sentencing court is required to consider in imposing a sentence under 18 U.S.C. § 3553 ("imposition of a sentence"), which include the protection of the public, the need for a sentence to reflect the seriousness of the offense, and the need to provide adequate deterrence against the commission of other offenses. Federal district court judges are required to take these factors into account in the determination of an appropriate sentence; the bill fails to take into account these critical factors. Moreover, certainty of punishment, especially in the imposition of "mandatory minimum" sentences, is a particular

advantage that the federal criminal justice system has over many state sentencing systems and would be completely undermined by this legislation.

[1]We note that there is no "Federal Prison Bureau, as the title of the bill suggests. The correct reference is 'Bureau of Prisons.'"

Consider, for example, a federal judge who is imposing a sentence on a defendant who is 35 years old and, who should, under the Sentencing Guidelines, receive a sentence of 20 years' imprisonment. If H.R. 261 were enacted, the judge could reasonably anticipate that, if he or she imposed a 20-year sentence, it would, in effect, automatically be cut in half. What might a judge do in such a situation? Some judges would no doubt impose the 20-year term called for by the Sentencing Guidelines, knowing that the defendant would only serve ten years. Others might double the sentence to forty years, in order to achieve the 20-year term envisioned by the Guidelines. Still other judges might do something in between. What is clear, though, is that any of these outcomes would result in inconsistent sentencing in similar criminal cases and would thus severely and inappropriately subvert the longstanding and sound principle incorporated in the federal government's criminal justice system of "truth in sentencing," as called for by the Sentencing Reform Act of 1984.

In addition, the Department notes that there are already several early release or furlough programs in place in the federal correctional system that are more consistent with truth-in-sentencing principles. *See, e.g.,* the 15 percent "good time" credit available under 18 U.S.C. § 3624(b) ("credit toward service of sentence for satisfactory behavior"); the ten percent early release program under 18 U.S.C. § 3624(c) ("pre-release custody"), and the furlough program set forth at 18 U.S.C. § 3622 ("temporary release of a prisoner"). This latter program already allows for the pursuit of educational and outside employment opportunities by trustworthy offenders – both of which appear to be goals of H.R. 261.

Perhaps most importantly, this legislation would inequitably and unjustly benefit an entire class of offenders, whose release would present a serious danger to communities and the Nation as a whole. It is altogether unclear why the particular class of offenders identified by the bill (*i.e.*, those over 45 years of age) should be singled out for special and much more lenient treatment. It is neither sound nor fair to provide for the early release of certain offenders – when such release is not available to other offenders – merely because they committed their offenses at points the bill's drafters apparently consider "late" in the offenders' lives or because the crimes committed by such offenders were of such seriousness that they received sentences extending into their "old age." As noted below, the age 45 "cut off" contained in the bill appears to be quite arbitrary and is unsupported by any facts or studies.

Of even greater concern, under section 2(a) of the bill (adding new subsection (g) to 18 U.S.C. § 3624), included among other offenders over the age of 45 for whom release would be required, could be: drug traffickers, spies and others convicted of violating the Nation's espionage laws, life-long fraudsters and other con artists who exploit senior citizens, money launderers, members of terrorist organizations, cyber criminals, gangsters and other organized crime figures, possessors of child pornography, and others convicted of very serious offenses involving public corruption and abuse of the public's trust. All of these offenses constitute real threats to the security of the United States. Lengthy sentences in such cases are entirely appropriate and act as true deterrents to their commission.

To cite but three examples of the kinds of sentences that would be inappropriately shortened if H.R. 261 were enacted, I invite the Subcommittee to consider the following

"spying" cases:

- Ana Montes, a former analyst with the Defense Intelligence Agency, who is now over the age of 45, was convicted in 2002 and received a 25-year sentence, would be eligible for release in 2014.
- David Boone, a former analyst with the National Security Agency, who is now over the age of 45, received a sentence of 24 years in 1999 and would be eligible for release in 2011.
- Harold Nicholson, a former officer with the Central Intelligence Agency, who is over the age of 45, received a sentence of 23 years in 1997 and would be eligible for release in 2009.

The bill presents other serious concerns, as well. It does not define "crime of violence." The bill's failure to define this term could result in the early release of what most would consider violent offenders, including, for example, those who were convicted only of unlawfully possessing firearms. The U.S. Sentencing Guidelines exclude from its definition of "crime of violence" a conviction for an offense involving the possession of a firearm by a previously-convicted felon under the Gun Control Act. *See*, U.S.S.G.§4B1.2, Commentary, Application Note 1. United States Attorneys routinely prosecute offenders for violations of the Gun Control Act whose offenses include the commission of a violent state crime, such as murder or sexual assault, for which there may be an impediment to state prosecution (*e.g.*, an inability to prove an element of the offense). If the Sentencing Commission's definition of "crime of violence" were adopted, federal firearms offenders would be considered "non-violent" and would reap the very

significant benefit of the legislation: mandatory early release – notwithstanding the risk to the public, including victims of the offenses and the witnesses to them.

The bill is completely arbitrary in selecting the age of 45 as the apparent "marker" of reduced crime recidivism. It does not contain any legislative "findings" or any other indication why age 45 was selected as a "cut off." To the best of the Department's knowledge, there are no studies or other facts that support such an altogether capricious determination. In that connection, the legislation – remarkably – fails to take into account an offender's prior criminal history aside from crimes of violence. According to a May 2004 study of recidivism prepared on behalf of the U.S. Sentencing Commission, offenders between the ages of 41 and 50 frequently commit new crimes when they are released. There is no evidence or legitimate argument whatsoever to be made to support the notion that an offender can be expected to abide by the norms of society simply because he or she has obtained the relatively youthful age of 45. It is difficult to imagine, to cite but one example, what a senior citizen who has lost his or her life savings to a fraudster would think about an offender who has had his or her sentence cut in half simply by virtue of turning 45 years of age. The Department also observes with concern that the bill in no way attempts to tie efforts to provide restitution to victims in connection with the proposed mandatory early release plan.

We understand that one of the unstated goals underlying the introduction of H.R. 261 may have been to relieve pressure on the facilities and personnel of the Bureau of Prisons. While such a goal may be laudable, it would be more appropriately and satisfactorily addressed by fully funding the President's budget request for the Federal Prison System for fiscal year

2008. The enactment of legislation such as H.R. 261 should not be accepted as a solution to concerns that would be better addressed by other means.

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Mr. Chairman, when Congress abolished parole in the federal criminal justice system in the Sentencing Reform Act of 1984, it did so, in part, to do away with the gross discrepancies in sentencing that resulted from federal judges' certain knowledge that only a fraction of any sentence they imposed would likely be served. If enacted, H.R 261 would constitute a very highly undesirable step toward a return to the pre-1984 parole regime. Indeed, it would in some respects be worse than the pre-1984 system (*e.g.*, in its mandatory nature, its indiscriminate reliance on an illogical factor (*viz.*, the age of the offender), and its establishment of an altogether arbitrary requirement of a flat prison term reduction, regardless of circumstances). This would be an unfortunate – indeed an unacceptable – result. We strongly urge this Subcommittee not to take that step and to reject H.R. 261.

Mr. Chairman and Members of the Subcommittee, that concludes my prepared statement. I thank you for the opportunity to appear before you today. I would be pleased at this time to respond to any questions that you or other Members of the Subcommittee may have.