

**Testimony of Vincent N. Schiraldi, on behalf of five former Commissioners of New York City Probation, before the New York State Assembly Standing Committees on Codes, Health, Governmental Operations, and Alcoholism and Drug Abuse**

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Good morning Chairs Lentol, Gottfried, Peoples-Stokes, and Rosenthal, and to members of the New York State Assembly Standing Committees on Codes, Health, Governmental Operations, and Alcoholism and Drug Abuse.

Thank you for the opportunity to testify today. I am here testifying on behalf of the following five former Commissioners of New York City Probation Martin Horn, Michael Jacobson, James Payne, Raul Russi and of course, myself. In addition to being New York City Probation Commissioners, among other significant positions, Mike and Marty were New York City Correction Commissioners, Raul and Marty ran New York State Parole, Jim was an adult and juvenile prosecutor in New York City and I ran juvenile corrections and aftercare for Washington, DC and was a Senior Advisor to the Mayor's Office of Criminal Justice.

Through our respective public posts, we became keenly aware of the need to provide for public safety, as well as of the potential of our staff to exert a positive influence on the lives of the men and women under their supervision.

However, our respective past posts have also given us unique insight into the ways in which probation and parole can extend its grasp beyond what public safety requires and, in some instances, actually run contrary to the mission of community corrections. Our public tenures and a growing body of research evidence suggest to us that, in terms of community corrections, less is often more.

In this testimony, we hope to provide context and evidence about how those on probation and parole should be treated under a regime in which marijuana use is taxed, regulated and legally consumed, as this bill proposes. Our professional lives have helped us reach the conclusion that testing for marijuana as a blanket condition of supervision serves little public safety purpose, even absent legalization. Under a legal regime in which marijuana consumption will no longer be a criminal act, we would urge you to codify protections for those under community supervision, to prevent needless violations and incarceration based on actions that would be legal for a member of the general public in our state.

We'd like to begin by quoting a portion of a decision written by Judge Jack B. Weinstein, U.S. District Judge for the Eastern District of New York, just a few months ago. In *U.S. v. Trotter*, rather than revoking community supervision for marijuana use for an otherwise compliant Mr. Trotter, Judge Weinstein instead decided to end his supervision. Judge Weinstein further explained that he would no longer revoke individuals under parole or probation supervision for marijuana consumption as a rule. As an explanation for this decision, he wrote:

Like many federal trial judges, I have been terminating supervision for "violations" by individuals with long-term marijuana habits who are otherwise rehabilitated. No useful purpose is served through the continuation of supervised release for many defendants whose only illegal conduct is following the now largely socially acceptable habit of marijuana use. The cost to taxpayers of long, repeating sentences and extended, unnecessary supervised release is substantial.

While in that particular decision Judge Weinstein was speaking of federal supervised release, more commonly called "parole," we argue that the same reasoning should apply to those on both probation and parole in the State of New York.

## **Summary**

I'd like to give a quick outline of what I'll be discussing today:

First, on behalf of my testimony co-signers and myself, I'll briefly explain how probation and parole have grown significantly in both scope and consequence across the United States, and how conditions of supervision can serve as tripwires to incarceration. Second, I'll describe the impact that supervision, and in particular parole revocations, has on incarceration in New York State and City. Third, I'll make a case that, in the absence of strong evidence to the contrary, testing for marijuana should be tightly controlled if not abolished, in the interest of not only pragmatism, but also racial justice and fairness. Finally, I'll close by making recommendations about how such control can be effectively implemented and codified in ways that protect individual liberty while advancing positive public safety outcomes.

## **The Growth in Scope and Burden of Community Supervision**

To start, I'd like to provide some background on the growth of probation and parole in the United States, and on the burden that conditions of community supervision can pose to those required to abide by them.

Both probation and parole were originally created in the 1800s as mechanisms to reduce the number of people incarcerated. Probation was envisioned as an up-front diversion from incarceration, and parole as a back-end reward for good behavior and signs of rehabilitation while incarcerated. However, community corrections populations in America have mushroomed right alongside incarcerated populations, growing far beyond what its founders could have imagined, and suggesting that they have become add-ons, rather than alternatives to, incarceration for many.

According to the most recent national figures available, there are over four and a half million adults under supervision in America, which is more than double the number of people held in our prisons and jails (Kaeble and Cowhig 2018). This represents more than a three-fold expansion of community corrections since 1980 (Broder et al. 1983) and is more people than *live* in half of U.S. states.

Not only has the number of people living under probation or parole supervision increased dramatically, but the nature of community corrections has changed, as well. Like the criminal justice system as a whole, probation and parole have become more focused on punishment, deterrence, and surveillance, rather than rehabilitation (Corbett 2015; Clear and Frost 2013). Accordingly, the number of rules that individuals under community supervision must abide by have ballooned. Recent reviews of supervision conditions have found that most jurisdictions have around 15 “standard” conditions, with the possibility of additional “special” conditions besides (Corbett 2015; Doherty 2016). The proliferation of conditions has in effect created a rule structure that can be nearly impossible to abide by 100% of the time (Klinge 2013; Childress 2014).

Given this rule structure, it's perhaps predictable that revocations of community supervision have also increased dramatically over the past few decades (Corbett 2015; Burke et al. 2007). At least twelve percent of all people exiting probation in 2016 were incarcerated, 42% of those due to technical violations of their supervision without a new conviction (Kaeble 2018, Appendix Table 3). Nearly 30% of all people exiting parole in 2016 were incarcerated, 60% of whom had revocations rather than new sentences (Kaeble 2018, Appendix Table 7).<sup>1</sup>

Thus, community supervision has become not only a deprivation of liberty in its own right, but also a substantial contributor to mass incarceration. Setting conditions, which in many cases cannot be met, contributes to a revolving door in which individuals who cannot meet those obligations cycle back and forth between community supervision and incarceration without necessarily improving public safety. In fact, the cycle of incarceration and supervision can

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<sup>1</sup> These are likely undercounts, since a substantial number of states do not report detailed information about the outcomes of probation and parole exits. Nearly 16% of all probation exits and 7.5% of all parole exits for 2016 were listed by the Bureau of Justice Statistics as “unknown or not reported.”

actually threaten public safety, and it certainly has harmful and far-reaching consequences for those who are caught up in it, including job loss, disconnection from family, and housing instability (Travis et al. 2014; Council of Economic Advisers, 2015).

### **Trends of Mass Incarceration and Mass Supervision in New York State**

Now, let's discuss New York in particular. Over the past two decades, New York State has been a leader in reducing incarceration and closing prisons, driven by a reduction in state prison commitments from New York City (Greene and Schiraldi 2016). There was a 31% reduction in the number of people in our state's prisons between 1999 and 2017 (New York State Department of Corrections and Community Supervision 2017). Since 2011, the state has closed 13 prisons and eliminated over 6,000 prison beds, saving over \$160 million annually (New York State Office of the Governor 2018; New York State Department of Corrections and Community Supervision 2017).

The community corrections population in New York State has also been shrinking, experiencing a longer and more significant decline than the nation as a whole (Bureau of Justice Statistics).<sup>2</sup> In 2016, there were 918 people on either probation or parole in New York State for every 100,000 adults, roughly half the community supervision rate for the U.S. overall (Kaeble 2018).

However, while the prison and community supervision populations have been shrinking, the number of people incarcerated on parole violations in New York State Department of Corrections and Community Supervision (DOCCS) facilities and in city and county jails has surprisingly been growing. Between 2015 and 2016 alone, prison admissions for parole violations increased by 21.4% (New York State Department of Corrections and Community Supervision 2016).

In fact, for every ten people who successfully completed their parole in New York in 2016, nine people ended their parole supervision by being incarcerated, ranking New York State 7th nationally in exits from parole to incarceration (Kaeble 2018). That year, nearly half -- 47% -- of all parole exits in the state were to incarceration, substantially higher than the national average failure rate of 27% (Kaeble 2018).<sup>3</sup> In 2014, thirty-eight percent of the prison admissions in New York were due to violations of parole compared to a U.S. average of just over one-quarter (28%) of admissions (Alper 2016). Also, in 2015, 15 out of every 100 people on parole who were at risk of reincarceration in New York State were in fact reincarcerated, compared to only 9 out of every 100 at-risk people on parole nationally (Kaeble and Bonczar 2016).

In New York, people released on parole are five times more likely to return to incarceration not for new convictions, but for violating the conditions of their parole. In 2012, 9,372 people were released from DOCCS facilities onto parole (New York State Department of Corrections and

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<sup>2</sup> National community corrections populations have been declining since 2008; New York State community supervision populations have been declining since at least 2003, and the rate of decline has more than doubled the national average in most years. Reporting changes in 2003 make it difficult to assess changes in community supervision populations for New York prior to that year (Bureau of Justice Statistics' *Probation and Parole Populations* series, 2003-2016).

<sup>3</sup> Since New York has a county-based system of probation, and the state does not provide a detailed account of unsuccessful exits from probation to the Bureau of Justice Statistics (only Total Exits, Completed, and Deaths), we cannot know if similar trends hold true for probation (Kaeble 2018, Appendix Table 3).

Community Supervision 2017). Within three years of their release, more than half of these individuals had been reincarcerated. Of those, an overwhelming 84% were reincarcerated for violating the conditions of their parole, while only 16% had returned because they had committed a new crime (New York State Department of Corrections and Community Supervision 2017).

This has impacts at the city level, as well. As state and city leaders generally agree that the jail complex on Rikers Island should be closed, efforts have increased to reduce the New York City jail population (New York City Mayor's Office of Criminal Justice 2017a; Cuomo 2018). The population of New York City's jails dipped below 9,000 late last year for the first time in 35 years, even as crime in the city has continued to decline (New York City Office of the Mayor 2017; Schiraldi 2018). But as the number of people incarcerated pretrial for misdemeanors, non-violent and violent felonies, as well as the city sentenced population, have declined by double-digits over the past four years, only one population in the jail has increased, also by double digits: people held in city jails for state parole violations (New York City Mayor's Office of Criminal Justice 2017b; New York State Division of Criminal Justice Services 2018).

These sanctions fall even more heavily on African-Americans than on whites. African-Americans on parole are more than 12 times more likely to be detained for a parole violation than a white person on parole in New York City (New York City Open Data 2018).

### **Disconnect between Marijuana, Testing, Violations, and Public Safety**

So, to recap, probation and parole have become much larger than originally intended, with burdensome conditions that serve as tripwires to incarceration rather than as alternatives. While New York State has succeeded in reducing both its prison and community supervision populations over recent decades, revocations of supervision are still exerting upward pressure on incarceration numbers in our city and state.

Now, let's transition into discussing the particular case of violations or revocations for use of marijuana, given that the state is poised to tax and regulate the legal use of marijuana among the general adult public.

In short, there is no compelling evidence to suggest that marijuana use threatens public safety in a general sense. For reasons undergirding the bill before you, the NYPD's Commissioner wrote an op-ed on his department's marijuana enforcement policy, stating "[t]he NYPD sees zero value in arresting people for marijuana offenses when those arrests have no direct impact on public safety" (O'Neill 2018).

So, marijuana use among the general public has no impact on public safety. We should assume, then, that there is similarly no impact in the case of individuals on probation or parole. Yet, it is common practice to require routine drug testing for individuals under community supervision, and those drug tests very often include marijuana. There is little evidence to indicate that such testing improves public safety outcomes, whether measured in terms of arrests, new crimes, or any other measure. Research evaluating drug testing regimes is often either quite old, or is actually evaluating a holistic approach to supervision (Duriez et al. 2014; e.g., Hamilton et al. 2016; Grommon et al. 2012). In the case of the latter, drug testing might be an aspect of the

program, but such programs typically also include supports such as treatment or counseling. Therefore, success or failure of the program overall can't responsibly be taken as an indicator of the success or failure of routine drug testing alone. Furthermore, this literature rarely investigates different drugs of choice separately, and so there is virtually no research evidence that justifies routine testing for *marijuana* specifically.

What research does exist suggests that drug testing as a component of community supervision increases the likelihood of incarceration for violations, but does not reduce criminal behavior (Shaffer et al. 2011; Haapanen and Britton 2002).

Moreover, there *is* an established link between drug testing and absconding, otherwise known as ceasing contact with one's probation or parole officer, after a positive test (Haapanen and Britton 2002). This is confirmed by our experience as Commissioners - anecdotally, we know that our clients would skip appointments when they knew they couldn't pass a drug test.

As Governor Cuomo's report indicates, studies of some states that have legalized medical or recreational marijuana use have seen reductions in both opioid deaths and opioid prescribing (New York State Department of Health 2018; Bachhuber et al. 2014). Heroin use ameliorates some of the same pain as marijuana, but also disappears from the bloodstream more quickly. Testing for marijuana thus creates a perverse incentive – the riskier drug, heroin, is the one less likely to be detected in a testing regime. We understand idiosyncratically that parole and probation clients actually followed this perverse incentive, trading marijuana use for heroin use because of the lower risk of detection. Once marijuana is both legal and regulated, we should include protections to be sure that those under community supervision don't feel compelled to make this risky gamble with their health by ceasing testing and violations for marijuana use.

Tests also provide very limited information with which to initiate treatment or intervention – they do not for example indicate if a person is impaired, whether they are using more or less than they have in the past, or whether they used an hour ago or last week. This poses a challenge for the mission of community corrections – if we do have an indication from a test about a client's use of marijuana, we'd need to talk to that client to understand how best to intervene. Yet, the very existence of a testing and violation regime makes it less likely that the client will show up to have that conversation.

This threatens more than just the ability of a parole or probation officer to assist with a client's marijuana use, if it does indeed pose a challenge for that individual. Fear of testing could inhibit the probation or parole officer's ability to provide support for other needed aspects of law-abiding life: housing, employment, family support, medical care, or mental health care. A PO cannot connect a client with supports for any of those basic needs if the client avoids reporting out of fear of being returned to jail for an act that would be legal if not for their supervision status.

The American Law Institute's Model Penal Code recommends that conditions of supervision be limited to those that serve genuine and identifiable purposes. In the case of testing for marijuana, this condition cannot be met as a general condition. Given that under this bill, marijuana use will no longer be a criminal act, there is no criminal conduct to hold individuals accountable for

through testing. It also does little to promote an individual's rehabilitation or reintegration, nor does it reduce risks that they will commit new offenses, unless marijuana use is directly linked to their criminogenic needs. Testing also risks interfering with the daily goals of a probation or parole officers' job. Apart from these pragmatic reasons to avoid testing for a substance that will now be legal, there are also real fairness and racial justice concerns at hand.

As we discussed before, conditions of supervision can serve as unwanted tripwires to incarceration. There are stark racial disparities at both the point of arrest and the point of revocation for marijuana in New York. African Americans are arrested at eight times the rate of white people in New York City despite equal marijuana usage rates (Mueller, Gebeloff and Chinoy 2018). Despite deliberate and oft-discussed efforts by the NYPD, these are worse than national disparities: nationwide, African Americans are 3.7 times more likely to be arrested for marijuana possession than whites (Edwards et al. 2013).

Since an African American is eight times more likely to be arrested for marijuana use, and twelve times more likely to be detained for a parole violation, his or her chance of a violation for marijuana is much greater than a white person's is.

### **Recommendations**

For all of these reasons, we recommend that, once marijuana is taxed, regulated and legally consumed, prohibition of marijuana use should not be imposed as a condition for those under probation or parole supervision except in rare and specific circumstances, which we'll discuss in a minute. It follows that if marijuana use isn't prohibited, then people on probation and parole also shouldn't be tested for marijuana on a routine basis. We recommend that you codify these protections, as I will discuss in a minute, but they are also sensible steps that we encourage state and local parole and probation agencies to implement administratively, even prior to legalization.

Now, there may be some individuals for whom marijuana use is impeding their ability to lead a law-abiding life. In those limited cases, we suggest that prohibition of marijuana use could be added as a special condition of supervision. However, in the interest of due process and to limit potential for abuse, that condition should only be added by a judge, after an adversarial court proceeding where someone can show that marijuana was connected to the individual's criminal behavior, and in which the defendant has had a right to be represented and heard.

There may also be times when a probation or parole officer suspects that a client's marijuana use is hurting his or her ability to meet the other conditions of their supervision – for example, reporting, working or going to school. In that case, we'd suggest that a test for marijuana could be conducted, but only with a supervisor's approval where the PO can make the case to the supervisor that marijuana use is interfering with "activities of daily living" and compliance with conditions. Data on testing for marijuana use, whether it be by supervisorial approval or court order, should be reported to the Department of Criminal Justice Services by race, gender and age so that it can be transparent and monitored by the public, this body and state officials.

In either of these special circumstances, we feel strongly that the outcome of testing for marijuana should never be used as the basis to revoke a person's probation or parole. Instead, a positive test can be used as the basis for intervention, such as targeted treatment or closer work

with the client to achieve successful completion of their sentence. If these interventions fail, then *only* other problematic behavior should be the basis for violation, but not the marijuana use itself.

What we want of probationers is that they lead productive law abiding lives, support themselves and meet their obligations as citizens and as long as they do, we should be no more concerned about them using marijuana than we are of them having a glass of wine. We think extra protections are warranted with respect to marijuana use given the stark racial disparities in both general revocations and arrests for marijuana in this state.

Other jurisdictions that have legalized marijuana use have followed a similar course. Officials in Multnomah County, Oregon (Portland) treat marijuana use in the same manner as alcohol use (Taylor 2018). If it is related to one's criminal behavior or is a condition of supervision, then Multnomah officials test and sanction if appropriate. Otherwise, unless something brings to their attention that marijuana is of major concern for a particular person, they do not test or sanction for use. In Washington State, the Department of Corrections announced in 2014 that it would stop routinely testing parolees for THC, in alignment with state law making marijuana legal for adult consumption (Crombie 2014).

This has also been done before in New York, even prior to legalization or decriminalization. When I was Probation Commissioner, I administratively stopped testing for marijuana, a practice that I believe helped reduce violations by 45% and, in my view, improved the relationships between my staff and those we supervised which in turn helps improve probation outcomes (New York City Department of Probation 2013). Only 4% of those completing probation during my tenure were reconvicted of a felony in the year following their completion of probation.

If that's already possible, you might say, why not leave it to the discretion of community corrections administrators? Well, Commissioner Horn was my immediate predecessor, and had also ceased testing for marijuana under his tenure. It had been successful then, too - during that time New York had the biggest drop in probationer arrests of any county in the state (New York State Division of Criminal Justice Services 2010). Yet, in just the few months that separated us, testing for marijuana had crept back into the daily practice of the department. This speaks to the need for codifying such reforms, so that they're not left to the varied winds of changing bureaucracies.

Probation and parole have grown significantly in both scope and consequence across the U.S., with multiplying conditions that make compliance difficult even for the most dedicated individual. These often serve as tripwires to incarceration. Revocations from community supervision continue to exert an upward pressure on incarceration in both our City and our State, despite significant reductions in prison and community supervision populations over the past two decades.

Added to this context, there is little evidence that blanket policies of testing for marijuana serve any public safety purpose, can actually work against a department's efforts to rehabilitate its clients, and threaten to exacerbate already-stark racial disparities in our criminal justice system. Reforms around marijuana testing have occurred in other jurisdictions and in New York City, but are vulnerable to changes in bureaucratic leadership. I'd like to return here to Judge Weinstein's



*Trotter* decision, in which he wrote, “Many people from all walks of life now use marijuana without fear of adverse legal consequences.” Later, he continues: “[But the criminal-justice system] can trap some defendants, particularly substances abusers, in a cycle where they oscillate between supervised release and prison.”

While we urge state and local parole and probation agencies to implement these measures administratively now, we also urge you to codify protections for individuals under community supervision, so that avoiding marijuana use not be added as a condition of their supervision unless it can be shown in an adversarial hearing that such a prohibition is necessary for their rehabilitation. We also urge you to explicitly limit testing for marijuana to individuals to require supervisory approval, and then only allow the results of testing to prompt treatment and intervention, never violation or revocation. These protections do not endanger public safety, but *do* serve the liberty and rehabilitative interests of the individuals on probation and parole. Violations and revocations for marijuana use made little sense before, and will make no sense once marijuana use is legal for the general adult population. Including explicit protections is one small but important step in removing unnecessary incarceration for our citizens and reducing the harsh disparities in our state’s system of justice.

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