



Written Statement of Mary Price
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to
The United States Sentencing Commission
Public Hearing on
Retroactive Application of 2014 Drug Guidelines Amendment

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Washington, D.C.

Judge Saris and Commissioners, I am grateful for your invitation to appear today. The overwhelming majority of FAMMM members are prisoners and their loved ones. As such, they are directly affected by the decisions you make. I know you have already heard or will hear from many of them. Today I am pleased to publicly join the voices of the board and staff of FAMMM to those of our 75,000 members and supporters in urging the Commission to make the 2014 Drug Guidelines amendment retroactive.

Section 1B1.10 directs the Commission considering retroactivity to assess “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively”¹

We firmly believe that retroactivity is warranted in light of these factors and required in the interest of justice.

Purpose

1. Reducing and Stemming the Growth of the Federal Prison Population, Mindful of Public Safety.

The role played by the Guidelines in the federal prison population crisis is significant. The Commission reflected ten years ago on the impact of its decision to set the bottom of the drug guidelines above the applicable mandatory minimum: “[N]o other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . , had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”²

¹ U.S.S.G. § 1B1.10, Background.

² U.S. Sentencing Comm’n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 49 (Nov. 2004); see also Nathan James,

Commendably, this Commission has stepped up to respond to the admonition in the Sentencing Reform Act guidelines be crafted in a manner designed to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons. . . .”³ Past sentencing policy decisions, not only by earlier commissions but by Congress and the Department of Justice (DOJ), have resulted in prisons whose populations exceed rated capacity, putting staff and prisoners alike in grave danger. The demands of maintaining those prisoners have siphoned funds from the crime prevention, detection and prosecution components of the DOJ. This situation is bad enough, but warnings have been emanating from the DOJ for some time that supporting continued population growth is unsustainable. If unchecked, overpopulation will threaten public safety as more and more funds are diverted to maintain prisoners in the BOP.⁴

The response to this alarm is truly heartening. Members of Congress are advancing the Smarter Sentencing Act, which would, among other things, cut drug mandatory minimum sentences that contribute so much to the current overcrowding crisis. The DOJ, which supports the Smarter Sentencing Act and the drug guideline changes, has also adopted new charging policies designed to lessen its own reliance on mandatory sentencing.⁵ In addition, the DOJ has initiated an unparalleled clemency initiative to address the problem from the back end.⁶ And, of course, the Commission has promulgated the drug guidelines amendment. It is expected to reduce the federal prison population by more than 6,500 people in just the first five years with additional and significant benefits over the ensuing years.

This genuine benefit is dwarfed, however, by the savings that will be realized if the Commission makes the amendment retroactive. The numbers are very encouraging. Retroactivity is estimated to save 83,525 bed years over its course. It is unassailable that this will have the immediate and lasting benefit of significantly reducing the size of our federal prison population. In the first year alone, retroactivity will cut the prison population by nearly 8,000 people. And, whether measured by the flat cost of maintaining one prisoner in one bed for

Cong. Research Serv., *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, 8-9 (2013), available at: <http://www.fas.org/sgp/crs/misc/R42937.pdf> (identifying, as one of four factors leading to overcrowded federal prisons, the growth in mandatory minimums that has in turn led to increased sentencing ranges and lengths under the federal Sentencing Guidelines.).

³ 28 U.S.C. § 994(g).

⁴ See Michael E. Horowitz, Inspector General, U.S. Dep’t. of Justice, Top Management and Performance Challenges Facing the Department of Justice—2013 (Dec. 11, 2013, reissued Dec. 23, 2013) (citing the statement of the Deputy Attorney General that the “unsustainable” cost of federal prison spending represents a “crisis that . . . has the potential to swallow up so many important efforts in the fight against crime.”) available at: <http://www.justice.gov/oig/challenges/2013.htm#1>

⁵ Memorandum from Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), available at: <http://fam.org/wp-content/uploads/2013/07/DOJ-MM-Charging-Policy-Reform-Memo-8.12.13.pdf>

⁶ Dep’t. of Justice, Press Release, “Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants” (Apr. 23, 2014), available at: <http://www.justice.gov/opa/pr/2014/April/14-dag-419.html>.

one year (\$29,000 for a total of \$2.4 billion) or by the marginal cost of removing one prisoner from one bed in an institution (\$10,363 per prisoner for a savings of nearly \$866 million), the savings would be phenomenal.⁷

We expect that this proposal will draw fire from opponents who will cite the dangers posed to the public by early release of drug offenders. The Commission is no stranger to concerns voiced about threats posed to public safety by releasing some prisoners early. For example, in 2007, the DOJ warned that many of the prisoners slated for potential early release by making the so-called “crack minus two” retroactive “will be among the most serious and often most violent offenders in the criminal justice system.”⁸ According to the DOJ, those prisoners would reoffend at higher rates, posing significant risks to communities and requiring resources to detect and prosecute them, which would have to be diverted from prosecuting current crimes.⁹

The Commission can take comfort from past practice and performance as well as from the reassuring fact that despite two rounds of early releases the fears of retroactivity’s critics were not realized. Numbers released by the Commission last month demonstrate that recidivism rates for prisoners released under the auspices of the 2007 retroactivity decision were statistically identical to those for the control group released the previous year. And, crime rates have fallen steadily since 2007 despite the early release of crack cocaine offenders.¹⁰

Moreover, as was the case with the two most recent experiences with retroactivity, those offenders serving increased sentences because of their criminal history, or other aggravating circumstances such as weapon involvement, will face additional challenges. First, each prisoner must convince the court that he or she does not pose a public safety threat. The guidelines direct the judge to “consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the . . . term of imprisonment.”¹¹ We know that judges will carefully review prisoners’ motions under 18 U.S.C. § 3582 (c)(2) on the merits. To the extent any prisoner is deemed a present risk, judges will, as they have in the past, exercise their discretion to deny relief. Moreover, those who receive a reduction will not see their sentences for any enhancements reduced in any manner and the reductions themselves will be limited to the calculated two levels. In short, even if granted retroactive release, prisoners who received extra time based on their criminal history and/or offense circumstances will still serve sentences longer, by virtue of those enhancements, than their enhancement-free counterparts.

⁷ The costs of incarceration in federal prisons can be found in Julie Samuels, *et al.*, Urban Inst. Justice Policy Ctr., *Stemming the Tide: Strategies to Reduce the Growth and Cut the Costs of the Federal Prison System*, 2 (Nov. 2013), available at: <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>.

⁸ Letter from Alice Fisher, Assistant Attorney General to the Honorable Ricardo H. Hinojosa, 6 (Nov. 1, 2007).

⁹ *Id.* at 8.

¹⁰ Jennifer Laudano, “U.S. Imprisonment Rate Continues to Drop Amid Falling Crime Rates,” Pew Charitable Trusts, State and Consumer Initiatives, 1 (Mar. 14, 2014) (stating that crime has fallen 13 percent since 2007), available at: <http://www.pewstates.org/news-room/press-releases/us-imprisonment-rate-continues-to-drop-amid-falling-crime-rates-85899541906>.

¹¹ U.S.S.G. §1B1.10, App. Note 2.

2. Mitigating the Harshness of Guidelines Linked to Statutory Mandatory Minimum Sentences.

Somewhat lost in the discussion about the ameliorative impact on the federal prison population of lowering drug sentences by two levels is another reason for making this change: the drug guidelines are tied to drug mandatory minimums that have been found by the Commission to be unduly severe. Lowering drug sentences by two levels will mitigate in a small way the harshness of these mandatory-minimum dependent guideline sentences.

In 2007, when the Commission acted to lower crack cocaine sentences by two levels, it did so to lower crack cocaine penalties that resulted in unwarranted sentencing disparity. The Commission cited four reports it had issued on the subject of cocaine sentencing; the first published in 1994. The Commission hoped, with its modest crack cocaine reduction -- which was limited to two levels to keep faith with the mandatory minimum for crack cocaine -- and the subsequent decision to make that change retroactive, to undo some of the damage done by the crack cocaine sentencing structure and to spur Congress to act. And soon after, Congress did, passing the Fair Sentencing Act of 2010. The Commission deserves a great deal of credit for that legislation.

Many have remarked on the similarities of the Commission's current actions and their context and audience. Aware of an unjust sentencing structure (then the crack cocaine/powder cocaine sentencing disparity; today, the undue length of mandatory minimums to which the guidelines are anchored), the Commission, following years of reports and research (there were four reports published on the subject of crack sentencing and two on the subject of mandatory minimum sentencing), took a critical if modest step to change what it could change (then by lowering the crack cocaine guideline by two levels; now by lowering the drug guidelines by two levels). The earlier Commission then took the final important step by making the two-level crack reductions retroactive and within two years, Congress acted.

Reducing all drug guidelines by two levels is as well supported by longstanding Commission policy as was the crack reduction. In fact, before the Commission ever published a crack cocaine report (in 1994), it published the first mandatory minimum report (in 1991). That report to Congress found that mandatory minimums, among other things, were unduly severe, increased sentencing disparity, and injected unwarranted uniformity into the sentences of dissimilar defendants. The Commission updated its concerns about mandatory minimums in its report to Congress on the subject in 2011. It found for example that there are too many mandatory sentences which are often too severe and which are too broadly applied. It also found that mandatory minimum sentences are viewed by stakeholders in the criminal justice community as being excessive and as leading to disparate outcomes. The report included a set of policy recommendations.

Certainly, while those assessments are reserved for mandatory minimums, they apply with equal force to the guidelines anchored above them.

Congress has gone on to advance legislation, the Smarter Sentencing Act, that mirrors the Commission's 2011 recommendations and that legislation is pending in both houses.

Today, the Commission is considering whether prisoners who are spending unduly long periods of time in prison due to the operation of the drug guidelines should be permitted the relief it promises future defendants. It would be incongruous to reject retroactivity of the drug guidelines amendment. Doing so would mean that the amendment, which will soften the severity of guidelines linked to mandatory minimums that the Commission now decries, will leave untouched the tens of thousands of prisoners sentenced prior to November 1, 2014. In 2007, the Commission acted with the courage of its convictions. Congress got the message that drug sentences had to come down. Today, the Commission can once again signal to Congress and the American people, by means of its retroactivity decision, its conviction that sentences are too long and that lawmakers who have it within their power to lower them, should do so.

Magnitude of the Change

The Commission has determined that a drug guideline sentence higher than its corresponding mandatory minimum does not meet the purposes of sentencing. That structural feature has dominated the drug guidelines for so long that 51,000 people may be eligible for significant relief. The sheer size of that eligible group argues in favor of retroactivity.

There is no question of the great magnitude this change promises on both a system-wide level and on the most human level. Roughly half the prisoners serving drug sentences will be eligible to seek reductions. The resulting releases will save over 85,000 bed years and a minimum of hundreds of millions of dollars for the Bureau of Prisons and the Department of Justice. As discussed above, one of the purposes of the amendment was to implement the directive in 28 U.S.C. § 994(g) and address the overcrowding in the federal prison population. We are delighted that the Commission is grappling with the mandate. We want to point out, however, that the delay in doing so has had consequences. Guideline sentences longer than their corresponding mandatory minimums have helped fill prisons to overflowing. Correcting that problem going forward is only one step. The next is to address the effects of setting the guidelines too high in the first place by supporting the early release of prisoners sentenced under them.

Retroactivity will have a huge impact at the system level. This is magnitude of the best sort. That retroactivity will affect so many people and save so many bed years and tax dollars is precisely what the Commission is getting at with this amendment. The magnitude of the retroactivity impact will dramatically affect bed years and lower the federal prison population.

The promise of big retroactive effects has been viewed in the past by the Commission as favoring retroactivity. For example, in the public meeting where the Commission voted to make the 2011 crack guideline change retroactive, several commissioners remarked favorably on the substantial numbers of people who could be affected and the significant reductions they would receive.¹²

But I don't want the Commission to overlook the magnitude of the change at the most personal level. Prisoners will see their sentences reduced by an average of 23 months, nearly two years. In those 23 months, babies will be born, speak their first words, become toddlers, and enter the terrible twos. Elderly relatives will slip deeper into dementia, losing the ability to travel or meaningfully communicate. Children will graduate kindergarten, 8th grade, high school, and college, maybe even law school and begin new lives. Parents will die. Fathers and Mothers Days will be celebrated. First steps, first bike rides, first day of school will be applauded. These prisoners will get the chance to be a part of their families and communities and experience all the things that happen over 23 months. Lowering the average sentence from 125 to 102 months and giving those 23 months back is of a magnitude that can't be measured by cost savings or a bed freed up for someone else. It is simply the right thing to do.

Ease of Applying the Amendment Retroactively

We cannot presume to speak with any greater credibility than the judges, probation officers, federal public defenders, appointed counsel and prosecutors on the front lines of implementing retroactivity on the question of the challenges it will present. That said, we recognize the fact that two significant retroactivity efforts were conducted with the collaboration and cooperation of all these parties in the system starting in 2008. Vast resources of knowledge, good will and experience are at their disposal should you decide to make this amendment retroactive.

Moreover, applying the two-level reduction will be straightforward and done on the motions using tried and true methods developed over the last two rounds. Some districts will see higher volumes of cases and will need to address the management challenges they present. We have no doubt that they will be up to the task.

As big a challenge as this might present, it pales in light of the other concerns facing our criminal justice system which is overburdened with prisoners and facing difficult budget choices. It also pales in comparison with those faced by prisoners, many of whom are serving unduly long sentences that the Commission has now decided are longer than necessary to serve the purposes

¹² See U.S.S.G., Transcript of Public Meeting, 14 (June 30, 2011) (remarks of Commissioner Ketanji Brown Jackson, noting estimates "that a substantial number of affected crack cocaine offenders could see a significant change in their sentences"¹²); see also *id.* at 31 (remarks of Commissioner Dabney Friedrich, stating "with respect to the magnitude of the change, the Commission estimates that approximately 12,000 offenders will be eligible for possible sentencing reductions of approximately 23 percent on average. These estimates are substantial and comparable to those associated with the Commission's 2007 amendment.")

of sentencing. We cannot imagine forcing someone to serve a day longer, much less 23 months longer, than deemed sufficient for punishment's sake if it is in one's power to avoid that outcome.

In short, we urge most strongly that the interests of justice not be subsumed by arguments about the challenge retroactivity will present. Individual justice can never be a matter of convenience.

Implement Retroactivity Without Condition.

We ask the Commission to refrain from limiting retroactivity to certain classes of defendants. Doing so would be unprecedented and would undermine retroactivity's potential to address the disturbing overcrowding of our federal prisons. Judges are quite capable of determining if a particular defendant is not worthy or another already received all the sentencing benefits he deserved. To cut out entire classes of prisoners from retroactivity because some may have received the benefit already is the worst sort of line drawing, punishing those who received no such consideration so as to ensure another prisoner does not get too much relief. Similarly, excluding all but those who received the safety valve would unfairly exclude many prisoners for insufficient reasons. For example, only prisoners with one criminal history point are eligible for safety valve relief. The Commission has recognized that this limitation is unwarranted and excludes too many otherwise deserving defendants from the safety valve. It has recommended that Congress expand the number of criminal history points a defendant can have and still be safety valve eligible to 2 or 3. That sound proposal would be undermined by this limitation, should it rely on a safety valve the Commission considers flawed and in need of change.

In sum, there is no reason to categorically limit or instruct further on retroactivity.

Conclusion.

The guidelines ranges for drug sentences will be lowered on November 1, 2014. Implicit in the act is the assessment that the lower guideline sentence is sufficient to achieve the purposes of sentencing. We can think of no principled reason to deny the benefit of that insight to the tens of thousands of prisoners serving sentences based on a guideline that will become obsolete on November 1.

The amendment aims to lessen the prison population and address the undue severity of recommended guideline sentences that exceed the mandatory minimums to which they are tied. These purposes pertain with equal or greater force when considering those people currently incarcerated under the soon discarded guideline. The Commission has recognized that to continue to impose sentences based on guidelines at today's levels would be to impose sentences that are too long. If they are too long for defendants sentenced on or after November 1, they are too long for prisoners serving those sentences today. To fail to correct their sentences is to inject a significant disparity based only on the happenstance of the calendar.

We urge you to make the amendment retroactive and to do so without condition or limitation.

Thank you for considering our views.