

STATEMENT OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

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HEARING ON

RETROACTIVE APPLICATION OF THE PROPOSED
AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES
IMPLEMENTING THE FAIR SENTENCING ACT OF 2010

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WASHINGTON, D.C.

June 1, 2011

Madam Chair and members of the Sentencing Commission:

I appreciate the opportunity to appear before you today to discuss the plan of the Bureau of Prisons (Bureau) for applying the sentencing guidelines that the Commission amended in order to implement the Fair Sentencing Act of 2010 (FSA). First, however, I want to thank the Commission for collaborating with the Bureau on our data-sharing initiative that has allowed for detailed and careful analyses of potential changes to sentencing, including changes to the crack cocaine sentencing guidelines. I look forward to our continued strong working relationship.

As you know, the Bureau is the nation's largest corrections system, responsible for the incarceration of more than 215,000 inmates. And our population continues to grow – from FY 2001 through FY 2010, we experienced annual net growth averaging 6,400 new inmates. So far this year, we have seen an increase of more than 5,800 inmates, and we expect another 5,000 inmates in FY 2012.

The Congressional Budget Office (CBO) has estimated that modified sentences required under the FSA as enacted – that is, without retroactivity – would slow the expected growth in the federal prison population by about 1,550 inmates between 2011 and 2015. The CBO further has estimated that this would result in a cost avoidance of \$42 million over that same period. While the Bureau is in the process of coordinating with the Commission to estimate more accurately the cost savings to the Bureau if the proposed amendment is given limited retroactive effect designed to promote fairness while ensuring public safety, we assume that such retroactive application would result in additional significant savings.

Based upon our experiences with the 2008 amendment to crack cocaine sentencing guidelines, the Bureau has an established a plan to implement retroactive guidelines

contemplated by the Commission. First, we are prepared to allow inmates expanded access to legal materials, legal counsel, and necessary equipment to review their cases and submit legal materials. Second, we are prepared to rapidly and accurately recalculate inmate sentences to reflect amended court orders.

We know from experience that retroactivity will result in a marked increase in inmates seeking to review their Central Files and their Pre-Sentence Reports (PSR) to determine if they are eligible for a sentence reduction. All policies related to the secure maintenance of the Central File would remain in force, including the prohibition on inmates retaining in their possession a copy of their PSR. To accommodate these increases in requests, access would be given as expeditiously as possible with priority given to inmates with the earliest release dates.

We also know that retroactivity would result in increased requests for legal telephone calls that, consistent with policy, can be made on unmonitored telephone lines. For such calls, staff must make reasonable attempts to verify that such calls are to an attorney's office, a process that can be time-consuming if numerous inmates need to make such calls. Of course, inmates can and do make legal calls on monitored Inmate Telephone System (ITS) telephones, thereby ameliorating somewhat the administrative burden of increased legal phone calls.

Legal visits would likely increase in the months following any action regarding retroactivity by the Commission. Institutions would need to contemplate expanding the number of days and the hours that attorney visits are allowed. Additional staff may be required to monitor these visits in accordance with existing policies and procedures, as well as to meet the expected increase in the amount of incoming and outgoing legal mail. Finally, expanded access to the law library would likely be needed to accommodate the increase in inmate legal work, and

we would need to ensure that adequate resources, such as typewriters and copier machines, were available.

No doubt, some inmates potentially impacted by retroactivity will be housed in our Special Housing Units for Administrative Detention or Disciplinary Segregation. Providing these inmates with reasonable access to legal calls, visits, and mail, and access to the law library, presents additional administrative challenges.

In the event that the guideline changes were made retroactive, the Bureau must be prepared to rapidly and accurately recalculate sentences to reflect court-ordered changes. In response to the 2008 guideline changes, the Bureau established a team of staff at our Designation and Sentence Computation Center that was responsible for recalculation of sentences based upon the amended orders. This team was responsible for receiving the amended orders through the e-Designate system from the United States Marshals Service. Upon receipt of the order, the team recalculated the sentence.

In addition to the new release date appearing in our electronic inmate information system (SENTRY), the team also notified staff at each institution of the amended sentence so that institution staff could ensure that the inmate completed appropriate programming and was prepared for release. Because of the effectiveness of these protocols, the Bureau would likely reinstitute this process if the FSA guideline amendment were made retroactive.

Finally, based on our experience with accelerated release dates occasioned by the retroactive application of the 2008 amendment to the guideline applicable to crack cocaine offenses, the Bureau is prepared to take measures to ensure that offenders released due to retroactive application of the FSA are transitioned effectively back into the community. First of

all, we plan to request that judges stay immediate release orders for 10 days to allow the Bureau to make required release notifications (for example, drug, violence and/or sex offender notifications), conduct Adam Walsh Act civil commitment reviews, and conduct detainer reviews.

Further, successful reentry is dependent upon the post-release continuation of both treatment needs (for example, drug treatment, sex offender treatment, or mental health intervention) and programming needs (for example, GED and other educational programs as well as job skills training) that offenders otherwise would have received from the Bureau while serving their sentences. In the past, the majority of offenders scheduled for immediate release who identified medical, psychological, and psychiatric treatment needs generally received such follow-up care as a condition of their supervised release. Similarly, we expect that most programming needs can be met, via supervised release conditions, through existing community programs overseen by the U.S. Probation Office.

For those inmates who will be scheduled for fairly rapid, though not immediate, releases, the Bureau can address some treatment and programming needs through expedited referrals that facilitate inmate placement in the appropriate community-based program. There will certainly be inmates with other reentry programming needs that will not be addressed, however (most notably educational programming needs such as GED completion).

With respect to community-based programming such as Residential Reentry Centers (RRC) and home detention, some inmates identified for immediate release will already have transferred to RRCs and will have access to this important reentry tool. With respect to inmates identified for immediate release who have not yet been placed in RRC, the Bureau would be

open to working with the courts to seek RRC bedspace for these offenders should the court choose to order a period of RRC during supervised release. Coupled with our use of home detention for low-risk/low-needs releasing offenders (many of whom will likely have the earliest release dates should the amendment be made retroactive), we anticipate no significant challenges in this area.

Madam Chair and members of the Commission, I want to thank you for this opportunity to discuss the Bureau's priorities and challenges as they would pertain to the guideline change contemplated today. I am confident that we can effectively manage any proposed sentencing changes for inmates within our population, and I would be pleased to answer any questions you may have.