STATEMENT OF

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UNITED STATES ATTORNEY

NORTHERN DISTRICT OF GEORGIA

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

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HEARING ON

RETROACTIVE APPLICATION OF THE PENDING

DRUG GUIDELINE AMENDMENT

TO THE FEDERAL SENTENCING GUIDELINES

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WASHINGTON, D.C.

June 10, 2014

Judge Saris and members of the Sentencing Commission:

Thank you for the opportunity to share the Department's views on whether and to what extent to apply retroactively the recently promulgated sentencing guideline amendment for drug offenses. I am pleased to be here with my colleague, Bureau of Prisons Director Charles Samuels.

After extensive discussions and consideration of the various policy interests at stake in this matter – including public safety, individual justice for offenders, and public trust and confidence in the federal criminal justice system – we support limited retroactivity of the pending drug guideline amendment. As I will discuss further, we think such an approach strikes the right balance of policy interests and can be rigorously and effectively implemented across the federal criminal justice system within existing resource constraints.

The core principles underlying federal sentencing and corrections are that the sentencing and corrections system must protect the public, be fair to both victims and defendants, reduce recidivism, and control the federal prison population. Sentencing and corrections policy should contribute to the national effort to dismantle gangs and drug trafficking organizations that plague too many of our streets, and should contribute to effectively combating offenses as varied as violent crime, child exploitation, sex trafficking, and financial fraud.

The Commission has articulated several objectives in amending the base offense levels for drug crimes, including a recalibration of guideline ranges to include terms below the applicable statutory mandatory minimum sentences; a decreased emphasis on drug quantity relative to more specific sentencing factors; and a reduction of prison overcrowding that has resulted from long drug sentences. The Department further believes that this amendment is consistent with the assessment that the previous drug offense levels produced sentences in some cases that were longer than necessary to accomplish public safety goals and resulted in an untenably large drug prisoner population that consumes an unsustainable amount of federal law enforcement dollars. In supporting the amendment to reduce the drug guidelines by two levels, the Attorney General recognized that this modest reduction would yield more proportional sentences for some drug offenders while also helping to rein in federal prison spending and focusing limited resources on the most serious threats to public safety.

Assessing whether the amendment should be applied retroactively requires balancing several factors. The primary factor driving our position to support retroactive application of the amendment, albeit limited retroactivity, is that the federal drug sentencing structure in place before the amendment resulted in unnecessarily long sentences for some offenders. While we believe finality in sentencing should remain the general rule, and with public safety our foremost goal, we also recognize that the sentences imposed for some drug defendants under the current sentencing guidelines are longer than necessary, and this creates a negative impact upon both the public's confidence in the criminal justice system and our prison resources.

Twenty eight years ago, Congress passed the Anti-Drug Abuse Act of 1986 to address the scourge of illegal drug use, abuse and trafficking that was ravaging our country. That Act put in place stringent sentencing policy that has helped us disrupt and dismantle drug trafficking organizations and has contributed to a record reduction in violent crime across the country. The Sentencing Commission in turn set guideline penalties for drug offenses linked to – but slightly above – the mandatory minimum penalties. The sentencing policy created by the Act and the guidelines has certainly played a significant role in the two decade long decline in violent crime. But our growing experience in prosecuting these cases and carrying out these stringent drug sentences in our prisons has taught us that the same Act and guidelines also created sentences that were unnecessarily long in some cases. About half of the federal prison population is incarcerated for drug offenses, and 55% percent of these offenders are serving sentences of more than 10 years. As the Attorney General noted when he testified before the Commission, one in 28 children has a parent behind bars. He observed that this level of incarceration is not just unsustainable financially, but comes with "human and moral costs that are impossible to calculate." [1]

In supporting the underlying drug amendment, the Attorney General testified that the amendment is consistent with Department initiatives aimed at "controlling the federal prison population and ensuring just and proportional sentences."[2] More specifically, the Attorney General noted that he had modified the Department's charging policies "to ensure that people convicted of certain low-level, nonviolent federal drug crimes will face sentences appropriate to their individual conduct—rather than the stringent mandatory minimums, which will now be

[1] Testimony of Attorney General Eric H. Holder, Jr., United States Sentencing Commission (March 13, 2014).

[2] *Id.*

applied only to the most serious criminals."[3] Limited retroactive application of the drug amendment, in the manner that we are recommending today, would further these objectives. Imprisonment terms for many of those sentenced pursuant to the old guideline were greater than necessary to serve the purposes of punishment and, we believe, should be moderated to the extent possible consistent with other policy considerations.

First and foremost among these other policy considerations is public safety. Because of public safety concerns that arise from the release of dangerous drug offenders and from the diversion of resources necessary to process over 50,000 inmates, we believe retroactivity of the drug amendment should be limited to lower level, nonviolent drug offenders without significant criminal histories. Limited retroactivity will ensure that release decisions for eligible offenders are fully considered on a case-by-case basis as required, that sufficient supervision and monitoring of released offenders will be accomplished by probation officers, and that the public safety risks to the community are minimized. Release dates should not be pushed up for those offenders who pose a significant danger to the community; indeed, we believe certain dangerous offenders should be categorically prohibited from receiving the benefits of retroactivity.

An important factor that should be considered when assessing retroactivity is the resources necessary to effectuate retroactivity and the corresponding negative impact on public safety from the resultant diversion of those criminal justice system resources. The Commission estimates that full retroactivity would apply to approximately 51,000 inmates. Based on past experience, we can anticipate that a substantial number of ineligible offenders will also file

[3] *Id.*

motions for reduced sentences. In 2007, for example, the Commission estimated that about 20,000 offenders would be eligible for retroactive application of the guideline amendment promulgated that year that reduced crack cocaine penalties. According to the Commission's last report on retroactive application of that amendment, over 25,000 motions were filed seeking reduced sentences. We therefore can fairly anticipate that 60,000 or more offenders will file motions for sentence modification should the 2014 drug amendment be applied retroactively to all drug offenders. This is a striking number in light of the fact that in all of Fiscal Year 2013, only 80,000 offenders were sentenced across the country. Resolution of these 60,000 motions will require the input and participation of federal prosecutors, probation officers, BOP counselors, and even federal defenders or appointed counsel, as well as a review and ruling by the courts. We must recognize that there are real and serious resource limitations for all of these entities in implementing any retroactivity decision.

This diversion of resources within the criminal justice system would have a substantially negative impact on public safety. Not only would 60,000 plus petitions divert prosecutors, judges, and probation officers from their normal caseloads, but the thorough, individualized assessment required of each petition will also add to this burden in a significant way. When considering a petition for resentencing, our foremost consideration is ensuring public safety on the ground. It is a simple fact that many federal drug offenders are very dangerous. Many were involved in violent conduct; many used a weapon in their offense; and many were repeat offenders. This is part of the reality surrounding this policy decision, is part of what the data tell us, and must be front and center as the Commission faces this issue. Section 1B1.10 provides that even if a guideline amendment is made retroactive, its application must be limited if it poses

a significant risk to public safety. Indeed, section 1B1.10 *requires* judges to perform case-by-case assessments of the public safety considerations before awarding any requested reductions pursuant to a retroactive amendment.[4] These case-by-case assessments, if done properly, will not only be costly in the short-term, but will divert prosecutors, judges, and probation officers away from working on cases that are necessary to keep our communities safe. The diversion of such significant resources counsels strongly against full retroactive application of the amendment.

Full retroactivity would also place a significant burden on the courts and probation offices because, according to the Sentencing Commission data, full retroactivity would result in the immediate release of 4,571 inmates, and approximately 7,962 more inmates would be released in the first year than would otherwise be released without full retroactivity. The immediate influx of such a large number of inmates back into the community could also have significant public safety implications.

Further, especially in light of the Supreme Court's *Booker* decision rendering the sentencing guidelines advisory, we continue to believe that retroactive application of guideline amendments should be rare. Indeed, both Congress and the United States Supreme Court have repeatedly recognized the importance of the finality of criminal judgments as "essential to the operation of our criminal justice system."[5] Consistent with this principle, Congress has provided, in 18 U.S.C. § 3582, that a court generally "may not modify a term of imprisonment

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[4] USSG §1B1.10 n.1(B)(ii).

[5] *Teague v. Lane*, 489 U.S. 288 (1988); *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government, no less than states, has an interest in the finality of criminal judgments).

once it has been imposed" except in very limited circumstances. S*ee also, Dillon v. United States*, 560 U.S. 817 (2010). Similarly, the Savings Statute, 1 U.S.C. § 109, presumes that if a statutory penalty is reduced and even if a crime is completely repealed, neither will have retroactive effect. In the context of criminal procedure, the Supreme Court in *Teague v. Lane* held that, with limited exceptions, when a new rule of procedure is announced, it is generally inapplicable to decisions that are final.[6] The Court has explained, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[7] This interest in finality and deterrence is just as relevant – if not more so – in the context of the sentencing guidelines because sentencing is the primary element of the criminal justice process that serves to deter potential offenders.

Balancing all of these factors, the Department supports limited retroactive application of the 2014 drug guideline amendment. We urge the Commission to act consistently with public safety and limit the reach of retroactive application of the amendment only to those offenders who do not pose a significant public safety risk. The Commission has the authority to direct limited retroactivity under both 18 U.S.C. § 994(u) and *Dillon*, which provide authority to the Commission to prescribe the "circumstances" under which an amended guideline is applied retroactively. We believe the Commission should limit retroactive application to offenders in Criminal History Categories I and II who did not receive: (1) a mandatory minimum sentence for a firearms offense pursuant to 18 U.S.C. § 924(c); (2) an enhancement for possession of a dangerous weapon pursuant to §2D1.1(b)(1); (3) an enhancement for using, threatening, or

[6] *Teague*, 489 U.S. at 308.

[7] *Id.* at 309.

directing the use of violence pursuant to §2D1.1(b)(2); (4) an enhancement for playing an aggravating role in the offense pursuant to §3B1.1; or (5) an enhancement for obstruction of justice or attempted obstruction of justice pursuant to §3C1.1.

With these limitations, all of which should have been determined in prior court action and should be documented in the court file in most cases, courts will be able to determine eligibility for retroactivity based solely on the existing record and without the need for transporting a defendant to court or holding any extensive fact finding. Retroactivity would be available to a class of non-violent offenders who have limited criminal history, did not possess or use a weapon, and thus will apply only to the category of drug offender who warrants a less severe sentence and who also poses the least risk of reoffending. While the factors we suggest are not a perfect proxy for dangerousness, they are a reasonable proxy based on the Commission's own research, and identifying them will not require new hearings.

Judge Saris, Commissioners – Our goal at the Department of Justice is to ensure that our sentencing system is tough and predictable, but at the same time promotes public trust and confidence and the fairness of our criminal justice system. Ultimately, we all share the goals of ensuring the public is kept safe, reducing crime, and minimizing the wide-reaching, negative effects of illegal drugs. We believe the policy we are suggesting on retroactivity strikes the proper balance of policy interests at stake here. It addresses an issue of proportionality but does so in a way that will promote public safety.

Thank you for the opportunity to share the views of the Department of Justice on this important topic. We look forward to working with the Commission on this issue and to working with all in the criminal justice system to achieve equity and fairness under the law.