Testimony

of

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on behalf of the

AMERICAN BAR ASSOCIATION

before the

UNITED STATES SENTENCING COMMISSION

for the hearing regarding

RETROACTIVITY OF 2014 DRUG GUIDELINES AMENDMENTS

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Chair Saris, and distinguished members of the United States Sentencing Commission:

Good morning. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am a former Co-Chair of your Practitioners' Advisory Group and am appearing today on behalf of the American Bar Association, for which I serve as Liaison to the Sentencing Commission and as Chair-Elect of the Criminal Justice Section.

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President James Silkenat to present to the Sentencing Commission the ABA's position on the retroactivity of the 2014 drug guidelines amendments. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates.

I. The ABA Supports Retroactive Application of the 2014 Drug Guidelines Amendments.

The retroactive application of the 2014 amendments to the drug guidelines is a moral imperative. It is widely recognized by an array of participants in the criminal justice system that there are too many people in federal prison.[1] It is further recognized that a significant reason for this is that too many nonviolent drug offenders have been sentenced to prison terms that are greater than necessary. The

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[1] *See*, *e.g.*, Statement of Judge Patti Saris on Behalf of the United States Sentencing Commission Before the Committee on the Judiciary of the United States Senate, September 18, 2013 ("The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking"); Testimony of Attorney General Eric Holder before the United States Sentencing Commission, March 13, 2014, at 14 ("certain types of cases result in too many Americans going to prison for too long, and at times, for no truly good law enforcement reason"); Speech of Chief Judge Patti Saris to Georgetown University Law Center, March 26, 2014 ("drug sentences may now be longer than needed to advance the purposes for which we have prison sentences, including public safety, justice, and deterrence"); Speech of Justice Anthony M. Kennedy to the American Bar Association, August 9, 2003, available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html ("Our resources are misspent, our punishments too severe, our sentences too long.").

Commission has done what it can to remedy this going forward, and supports greater efforts in this regard by the Congress.[2] This is the opportunity for the Commission to do what it can for those already imprisoned. The ABA strongly supports retroactive application of the 2014 amendments to the drug guidelines and urges the Commission to take this action.

The Commission has previously selected twenty-nine amendments for retroactive application. *See* U.S.S.G. § 1B1.10(c). In selecting amendments for retroactive application, the Commission typically considers (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively. *See id*. cmt. background. Retroactive application of the 2014 amendments to the drug guidelines satisfies each of these factors.

A. The Purpose of the Amendments Supports Retroactive Application.

The 2014 amendments to the drug guidelines – passed by a unanimous Sentencing Commission – have the compelling purpose of reducing the disproportionate role that the single factor of the drug quantity has played in sentences tied to mandatory minimums for drug offenses. This purpose clearly supports retroactive application.

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[2] *See* Statement of Judge Saris, *supra* note 1.

Like the Sentencing Commission, the ABA has long opposed mandatory minimums because they lead to sentences that are excessive and arbitrary and promote punishments determined solely by charging decisions made by prosecutors. Indeed, I have previously described[3] sentencing by mandatory minimums as "the antithesis of rational sentencing policy" because it reflects a deliberate election to jettison the entire array of undisputedly relevant considerations in favor of a solitary fact – usually a quantity of drugs that may bear no relationship to the defendant's particular culpability. Mandatory minimum sentencing announces as a policy that we are indifferent to a defendant's personal circumstances and disinterested in the full nature or circumstances of the defendant's conduct. Mandatory minimum sentencing blinds the court to the defendant's role in the offense and his or her acceptance of responsibility. Mandatory minimum sentencing is uniformly indifferent to the evaluation of whether the result furthers all or even any of the purposes of punishment.

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[3] *See* Statement of James E. Felman on behalf of the American Bar Association before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary of the United States House of Representatives, October 12, 2011, available at http://judiciary.house.gov/_files/hearings/pdf/Felman%2010112011.pdf; Statement of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission, May 27, 2010, available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Felman_ABA.pdf.

The ABA strongly supports the Commission's efforts to address the unduly harsh sentences that result from the mandatory minimum penalty structure for federal drug offenses. We strongly supported the Commission's recent recommendations to Congress to reduce mandatory minimums in drug offenses, to make the Fair Sentencing Act retroactive, and to expand the safety valve. We strongly support the new two-level reduction across the drug quantity table which will have the effect of modestly reducing guideline penalties for drug trafficking offenses while keeping the guidelines consistent with the current statutory minimum penalties. It would still provide for significant punishment for drug offenses, while more appropriately taking into account individual culpability, deterrence and the overall seriousness of the offense.

The Commission now has the opportunity to do more, and it should. The drug guidelines were anchored to the mandatory minimums in a manner that resulted in sentences even more severe than what the statutes themselves required.[4] The new

[4] *See* Statement of Stephen A. Saltzburg (DOJ Ex Officio Sentencing Commissioner, 1989-90) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 22, 2009; *see also* United States Sentencing

amendments reverse that unnecessarily severe implementation, and the Commission's purpose of ameliorating the impact of those statutes can most fully be achieved through retroactive application to those whose sentences are now widely understood to be potentially excessive. Perhaps no amendment in the history of the Commission presents a greater imperative for retroactive application. And most fortunately, this opportunity arises before the Commission at a time when there is bi-partisan support in both houses of the Congress for reform of mandatory minimums.

Commission, Fifteen Years of Guidelines Sentencing (2004), at 49 ("The Guidelines Manual, Supplementary Report (USSC, 1987) and other documents published at the time of guideline promulgation do no discuss why the Commission extended the ADAA's quantity-based approach in this way. This is unfortunate for historians, because no 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 discussed below, 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"); United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991), at ii ("The Sentencing Commission drafted the new guidelines to accommodate ... mandatory minimum provisions by anchoring the guidelines to them").

B. The Impact of the Amendments Supports Retroactive Application.

The impact of the amendments also supports retroactive application. The Commission estimates that the average extent of reduction in sentence for those eligible for retroactive application would be 18.4 percent.[5] The reductions called for by retroactive application of the 2014 drug guidelines amendments would provide tremendous relief to an already overburdened federal prison system. Retroactive application is also a matter of simple justice: It is unfair for thousands of prisoners to continue serving unduly severe sentences that would be nearly 1/5th lower if imposed today.

C. The Ease of the Amendments' Application Supports Retroactivity.

There can be no serious question that retroactive application of the changes to the base offense level will not be difficult to apply. The change to each and every affected case will be the same. There will be no need for full sentencing hearings, contested evidentiary issues, or consideration of new or different guidelines. It will be a simple matter of plugging an established quantity into a new quantity table. We know this can be done for the obvious and inescapable reason that we just finished

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[5] *USSC Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive* (May 27, 2014) (hereafter "Retroactivity Analysis"), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf.

doing roughly the same thing not once but twice – following the Commission's retroactive application its prior "minus two" crack amendment in 2007 and the retroactive application of the Fair Sentencing Act amendments in 2011. The federal judiciary now has the wisdom and experience gained from its successful implementation both of these retroactive drug guideline amendments. The additional resources required by retroactive application of the 2014 amendments would be a small price to pay for the more important goal of achieving justice and fairness within the federal sentencing system. In addition, of course, substantial resources would be saved by the anticipated reduction in the federal prison population.

II. The Commission's Prior Retroactivity Determinations Support Retroactivity of the 2014 Amendments.

In addition to the moral imperative of making the 2014 amendments to the drug guidelines retroactive and the fact that such retroactivity satisfies each of the criteria considered by the Commission in these determinations, the Commission's prior retroactivity determinations virtually compel retroactive application here. The Commission has amended the drug guideline with the effect of lowering drug sentences on several occasions in the past and has in each and every instance made those changes retroactive. For example, in 1993, the Commission revised the method of calculating the weight of LSD for purposes of determining the guidelines offense level, instructing courts to calculate the amount of LSD by using as constructive

weight of .4 milligrams per dose rather than weighing the carrier medium. U.S.S.G. app. C, Vol. I, Amend.488. The Commission designated the revised guideline as retroactive. U.S.S.G. § 1B1.10(c).

In 1995, the Commission changed the weight calculation applicable to marijuana plants in cases involving more than 50 plants from 1,000 grams per plant to 100 grams per plant for purposes of determining the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend.516. This amendment also was made retroactive. U.S.S.G. § 1B1.10(c). The Commission explained that studies indicated that a marijuana plant does not actually yield 1 kilogram of usable marijuana, and that not every plant will produce any usable quantity of marijuana. U.S.S.G. app. C, Vol. I, Amend.516. To "enhance fairness and consistency," the Commission adopted the lower equivalency for all cases involving marijuana plants and directed retroactive application of the change to correct prior instances of injustice under the previous guideline.

In 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend. 657. As a result of the amendment, sentencing courts are directed to use the actual weight of the oxycodone contained within the tablet in calculating the drug quantity. The Commission explained that the amendment "responds to

proportionality issues in the sentencing of oxycodone trafficking offenses." *See id*., Reason for Amend. The amendment was necessary because tablets sold as prescription pain relievers contain varying amounts of oxycodone, and the change to the drug equivalency tables was necessary to "remedy these proportionality issues." *Id*. As the amendment effectively reduced some oxycodone sentences by remedying a prior proportionality injustice, the Commission made the amendment retroactive. U.S.S.G. § 1B1.10(c).

In 2007, as noted above, the Commission made its "minus two" amendment to the crack guideline retroactive. *Id*. Most recently in 2011, the Commission made its amendments implementing the Fair Sentencing Act retroactive. *Id*. The Commission took these actions in 2007 and 2011 after a careful consideration of each of the relevant considerations set forth above.[6] Simply stated, there is no compelling reason to treat the 2014 mitigating amendments designed to minimize the impact of mandatory minimums widely understood as unduly severe in any different fashion than the manner in which the Commission has treated every other mitigating amendment to the drug offense guidelines. They, too, should be applied retroactively.

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[6]Moreover, the Commission has also urged the Congress to make the Fair Sentencing Act of 2010 retroactive. Statement of Judge Saris, *supra* note 1.

III. The Commission's Recidivism Data Support Retroactive Application.

As noted above, there is widespread consensus among many criminal justice constituents that federal drug sentences tied to the levels dictated by mandatory minimum statutes were frequently greater than necessary to accomplish the purposes of sentencing. This consensus among the actors in the system has now been confirmed by the Commission's data demonstrating that the recidivism rate of those released pursuant to retroactive application of the 2007 crack amendment is actually lower than the recidivism rate for those required to complete their full sentence originally imposed.[7] We need not guess because the data is now in – locking people up for the periods required under current mandatory minimums does not equate to greater public safety. We can shorten these sentences by the modest amounts called

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[7] *See Report of the Sentencing Commission on Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, (hereafter "Recidivism Report"), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf

for by retroactive application of the new amendments, achieve a cost savings of more than 83,000 bed years,[8] and likely lower the rate of recidivism among those released.

Indeed, it can be anticipated that the recidivism rates of those released early under a retroactive application of the 2014 drug guidelines amendments will be even lower than the recidivism rate of those released early under the 2007 crack amendment. The Commission's data show that two factors – age and criminal history – are related to greater recidivism.[9] Those who stand to benefit from retroactivity under the new amendments have an average age of 38,[10] while those released early under the 2007 crack amendment were of an average age of 36.[11] Only 27.3% of those released early under the 2007 crack amendment were in criminal history category I,[12] while a significantly greater percentage of those eligible under the new amendments – 39.5% – are in criminal history category I.[13]

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[8] *See* Retroactivity Analysis, *supra* note 3, at 8.

[9] *Id*. at 15.

[10] *Id*. at 11.

[11] Recidivism Report, *supra* note 4, at 11.

[12] *Id*. at 12.

[13] Retroactivity Analysis, *supra* note 3, at 13.

IV. No Limitations Should Be Placed on the Retroactivity of the 2014 Drug Guidelines Amendments.

The Commission has requested comment on whether the retroactive application of the 2014 drug guidelines amendments should be limited only to a particular category or categories of defendants, such as those who received a "safety valve" adjustment or those sentenced before *United States v. Booker*, 543 U.S. 220 (2005). The ABA does not support such limitations and believes that the new changes to the drug guidelines should be broadly applied to all who are serving sentences influenced in any way by the unduly severe mandatory minimum penalties.

The severe sentences generated by tying the guidelines to the mandatory minimums at the low end of each range are in no way lessened by consideration of whether the defendant qualified for a "safety valve" adjustment. Indeed, if anything the reverse is true, as the safety valve was implemented precisely to mitigate the most glaring inequities under this guideline regime.

The ABA similarly does not support limiting retroactivity by reference to *United States v. Booker*. Even though *Booker* gave district courts increasing discretion to vary from the guidelines range, that does not mean that they felt free to exercise that discretion or that they did so. Indeed, the Commission's impact analysis reflects that only 10.5% of the affected sentences were below the applicable guidelines range for a reason other than substantial assistance to the prosecution.

Given that essentially nine out of ten defendants at issue did not receive a departure or variance, limiting retroactivity to those sentenced before *Booker* does not appear to have any compelling policy-based rationale.

V. Conclusion

In closing, we appreciate the Sentencing Commission's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you all this morning.