

June 10, 2014.

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Before the United States Sentencing Commission

I. Introductory Statement

As a former federal prosecutor and United States Attorney who served 14 years in the U.S. Attorneys office for the Northern District of Florida, and as a private attorney who has represented a number of criminal defendants in federal court, I have been invited to respond to the Commission's request for comment on whether Amendment 782, which reduces the Drug Quantity Tables for illegal drugs of all types, should be given retroactive application. As reflected in the support the proposal has garnered from respected representatives of both political parties, the issue is complex and transcends conventional party labels.

I doubt I can meaningfully add to the substantial data available to the Commission on the impact of retroactive application. However, as a federal prosecutor who served in Florida during the height of the drug incursion of the 80's and 90's and as a private attorney in the years since, I hope I can lend an experienced and evenhanded voice to the Commission on the issue.

Given my experience representing federal defendants in private practice, I know first-hand the trauma and upheaval that accompanies any period of incarceration, much less a long-term sentence in federal prison. Even during my time as a prosecutor, I often empathized with those I prosecuted, remembering as did Benjamin Disraeli, that "there but for the grace of God go I." But this in no way lessened my concern for the victims of the crimes we prosecuted. And though the "victims" of federal drug offenses may not always have been readily discernable, we knew the traffickers we prosecuted left a horrendous trail of suffering in their wake.

Because those harmed by large-scale drug operations are not easily identifiable, drug violations have sometimes been described as "victimless crimes." When our office prosecuted the man who murdered five University of Florida students in the Fall of 1990, we were acting on behalf of the known victims and their families. When we prosecuted the person who had burned some 20 churches throughout the Southeast, we knew precisely who he had been victimized and how they had been harmed. But when we prosecuted 30 members of one of the largest drug trafficking operations in the nation, which was undoubtedly responsible for untold misery and grief to countless thousands, we could not produce a single identifiable "victim." Far from diminishing the seriousness of such offenses, it was precisely their far-reaching and indiscriminate nature that called for so forceful a response from the government. Civilized societies are distinguished by the protections they afford their most vulnerable members, and our government acts its noblest when it speaks for those who otherwise would have no voice. I see the

countless law-abiding citizens who have been affected in one way or other by the illegal drug trade as the nameless victims of the federal drug trafficking offenses at issue in this hearing. It is in a sense on their behalf that I speak today in opposition to the proposed retroactive application of Amendment 782.

## II. Amendment 782 Should Not Be Made Retroactive

I opposed the across-the-board reductions in the drug quantity tables and I oppose the current proposal to apply them retroactively because (1) it perpetuates the false notion that drug offenses are non-violent crimes, (2) it ignores the impact strong drug enforcement has had on the nation's crime rate over the last 25 years, and (3) rather than reducing fiscal burdens as its proponents claim, it merely shifts the cost from the controlled and definable penal system to the victims who will suffer the incalculable toll in personal and financial loss inevitably resulting from our society's increasingly permissive approach toward drug crimes and those who commit them.

### A. Amendment 782 and Retroactive Application Perpetuates the False Notion that Drug Offenses are Non-Violent Crimes.

Proponents argue our prisons are overrun with "non-violent drug offenders" who were casualties of a "failed war on drugs," and that there is no evidence that the enhanced sentences for such crimes resulted in measurable societal benefits. Underlying this argument is the notion that a misplaced emphasis on drug crime has left less money and prison space to effectively prosecute and imprison the truly violent offenders who ought to be there. This alleged distinction between drug offenders and violent criminals ignores a critical fact. Whether it takes the form of crime by users, intimidation by traffickers or the corruption of our nation's youth, violence is an inherent feature of the illicit drug trade.

Department of Justice surveys have consistently shown that some 30% of prisoners incarcerated for murder and a third of those serving time for violent offenses were under the influence of illegal drugs at the time of their crimes. The recent ADAM study published by the ONDCP also confirms the alarming connection between drug use and all types of crimes across all age groups and locations. As the ONDCP director had to acknowledge, drugs are fueling much of the crime in the United States. The study showed that in 2012 more than 60% of all the arrestees in New York, Chicago, Atlanta, Denver and six other major U.S. cities tested positive for illegal drugs. Remarkably, during that same year 80% of the adult males arrested for crimes in Sacramento, California tested positive for at least one illegal drug. But the more telling revelation from the ADAM study is the astounding incidence of drug use among violent arrestees. In Atlanta, 69.2% of those arrested for violent crimes tested positive for at least one controlled substance at the time of their arrest. The percentages of violent arrestees testing positive for illegal drugs were similar in other cities: New York (62.9%), Chicago (66.5%); Sacramento (77.8%) Denver (53.8%). Throughout the nation, law enforcement officers have repeatedly affirmed

that drugs are a major cause of property and violent crime in their communities. One need only drive through any inner city drug market to witness the devastation first hand.

Any claim that our prisons are overcrowded with minor offenders, drug-related or otherwise, is belied by the statistics from the National Institute of Justice showing that over 95% of state prisoners are repeat or violent offenders. Because some 95% of all federal convictions result from the plea bargaining process, the ultimate plea offense does not necessarily capture the full nature of the crime. The only way to obtain an accurate picture of the criminal characteristics of the inmate population serving time for drug offenses is to examine the criminal history and sentencing record of each offender, an analysis not often undertaken by proponents of reduced sentencing for drug crimes. An article published during my term as United States Attorney illustrates the problem. A defense attorney had argued that federal drug sentences were too harsh, citing the case of a drug defendant who received a 46-year sentence. According to the attorney, this man was a “relatively minor drug offender” who “realistically [is] not a threat to society.” The sentencing record revealed, however, that the defendant took a submachine gun to one cocaine deal, and on another occasion pointed a semi-automatic pistol at an undercover officer and threatened, “Don’t f\_\_ with me or I’ll kill you. I’ve killed people for less.” Looking only at the offenses for which he was convicted, this offender would undoubtedly be classified as one of the “non-violent drug offenders” who are clogging up our system.

B. Amendment 782 and its Retroactive Application Ignores the Dramatic Impact Strong Drug Enforcement Initiatives Have Had on the Nation’s Violent Crime Rate

I’m confident that most proponents of the Amendment and its retroactive application believe the changes represent a thoughtful and balanced approach that reflects our society’s changing attitudes toward drugs and its compassion for those who have long been imprisoned for their involvement in the illicit drug trade. But as Thomas Jefferson observed, “tyranny most often springs from an excess of virtue.” In this case, the facts indicate that the increased enforcement and enhanced sentencing associated with the oft maligned “war on drugs” corresponded with a dramatic and undeniable reduction in violent crime throughout the nation. In 1986 Congress passed the Anti-Drug Abuse Act, which set mandatory minimum sentences and enhanced penalties for drug crimes. Over the next 28 years, the national crime rate plummeted. In 1991, when the U.S. had 252 million residents, there were 1.9 million violent crimes, or 758.2 per 100,000 residents. By 2012, our population had grown to 314 million, but violent crimes had dropped to 1.2 million or 386.9 per 100,000 inhabitants. During the same period, murders, burglaries, and robberies all dropped 50%. Murders dropped from 24 to 14 million (from 9.3 to 4.7 per 100,000 inhabitants); burglaries dropped from 3.1 to 2.1 million (from 1,252 to 670.2 per 100,000 inhabitants) and robberies dropped from 687,732 to 354,520 (from 272.7 to 112.9 per 100,000 inhabitants).

Given the studies showing that 60% of those arrested for violent crimes tested positive for one or more controlled substances, that 30% of prisoners incarcerated for murder and a third of those serving time for violent offenses were under the influence of illegal drugs at the time of their crimes, and that nearly 20% of all violent crimes and nearly 30% of all robberies and burglaries are committed by those seeking money to obtain drugs, it is small wonder that the Anti-Drug Abuse Act and the enhanced drug prosecutions and lengthier sentences which followed have corresponded with such a dramatic decrease in our nation's crime rate.

C. Rather Than Saving Money as its Proponents Contend, Amendment 782 and Retroactive Application Will Merely Shift The Cost From the Controlled and Definable Penal System to the Countless Victims Who Will Suffer an Incalculable Toll In Personal and Financial Loss From Society's Increasingly Permissive Approach Toward Drug Crimes and Those Who Commit Them

As noted above, the joint state and federal inmate surveys have consistently shown that a great majority of violent crimes are committed by those under the influence of controlled substances. Proponents of Amendment 782 have dismissed these findings with the observation that the inmates were also under the influence of water at the time they committed their crimes. But these critics are careful to avoid mention of the same surveys' consistent finding that a significant percentage of violent offenses are committed by those seeking money to purchase drugs. For example, a 2004 survey of federal inmates showed that 18% of all violent offenders in federal prison committed their crimes to obtain money to buy drugs. A joint state and federal survey that same year showed that 32% of all state inmates serving time for burglary and 27% of those incarcerated for robbery committed their crimes to obtain money to buy drugs.

According to the FBI's 2012 Uniform Crime Report (UCR) there were 2.1 million burglaries and 354,000 robberies in the United States in 2012. If the inmate survey results are to be believed, in 2012 alone, 672,000 burglaries and 95,580 robberies were committed by those seeking money to purchase drugs. As the New York Times has reported, in one of the most comprehensive studies of its kind researchers at Iowa State University found that as of 2010 each burglary carried a societal cost of \$41,288 and each robbery cost society an average \$335,733. If these costs are accurate, in 2012 alone the 672,000 burglaries and 95,580 robberies committed by those seeking money to purchase drugs carried a societal cost of over \$59 billion dollars. These costs were dramatically higher during the height of the crime wave when there were twice as many robberies and burglaries. But the cost is not measured in dollars alone. Countless innocents have faced the devastating loss of family members to addiction, perished in drug related shootings, and suffered as victims of violent crimes perpetrated by those influenced by or needing drugs.

### III. Conclusion

Those who argue that the war on drugs has failed would do well to stop and consider what our nation would look like if there had been no law enforcement efforts to combat the onslaught. As I noted at the outset, because drug offenses are so wide-ranging and indiscriminate, the many victims of the illicit drug trade are not easily identified. Ironically, many of the beneficiaries of the “war on drugs” will also never be known. They are the untold millions who were able to avoid being victimized by drugs and their inherent violence because of the many drug lords and traffickers who served the better part of their time in the “war” behind bars.

Proponents argue the Amendment and its retroactive application will save money. But this argument seems to overlook the enormous human costs inherent in stepping back from a sentencing formula that has contributed to the largest sustained decrease in crime in our nation’s history. On a bipartisan basis, Congress enacted the Anti-Drug Abuse Act and the mandatory minimum sentences it incorporated in the hope of quelling the unprecedented violent crime epidemic gripping the nation at that time. By all indications the measure worked precisely as Congress had hoped. Americans undoubtedly sleep better at night and work in more safety by day because of it. This is no time to scale back.