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ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

Statement of

Eric E. Sterling, J.D.

Submitted to the

United States Sentencing Commission

Hon. Carlton W. Reeves, Chair

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Mr. Chairman, Distinguished Commissioners,

On behalf of the Law Enforcement Action Partnership (LEAP), I appreciate the opportunity to testify today regarding the proposed amendments to federal drug sentencing guidelines.

LEAP is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience. Our mission is to make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

I have spent my career studying, drafting, and reforming drug sentencing laws, both as Assistant Counsel to the U.S. House Judiciary Committee (1979-1989), where I played a key role in crafting federal drug statutes, and as a lifelong advocate for more just and effective sentencing policies. I co-founded Families Against Mandatory Minimums (FAMM) and led the Criminal Justice Policy Foundation, organizations dedicated to correcting the injustices created by excessively punitive sentencing laws. Recently I served on and chaired the Advisory Commission on Policing in Montgomery County, MD.

The USSC's proposed 2025 amendments are an extremely welcome opportunity to correct policy missteps of previous decades and ensure sentencing laws are both fair and effective.

The outstanding reports of the U.S. Sentencing Commission

I want to take a moment to commend the U.S. Sentencing Commission for your outstanding studies of drug trafficking, especially regarding cocaine. Your reports to Congress in 2002 and 2007 on *Cocaine and Federal Sentencing Policy* were profoundly important for establishing with precision how badly the Department of Justice was misusing the Controlled Substances Act in their focus on the lowest level offenders. Figure 2-4 of your 2007 report, for example, revealed that in 2005, for powder cocaine prosecutions, 12.8 percent of defendants convicted were importers, high-level suppliers, organizers, leaders, growers, manufacturers, financiers or money launderers, compared to 53.1 percent were street-level dealers, couriers, mules, renters, lookouts, loaders, or users (i.e., the lowest level). Aside from any questions of injustice, this demonstrated the failure of the 1986 Anti-Drug Abuse Act's sentencing provisions to accomplish its goal of properly directing the Justice Department to focus intensely on the major traffickers. Then, looking at the crack cocaine convictions, the disparity is even more disturbing. In 2005, only 8.4 percent of the crack cocaine offenders convicted were importers, high-level suppliers, organizers, leaders, growers, manufacturers, financiers or money launderers, compared to 61.5 percent who were street-level dealers, couriers, mules, renters, lookouts, loaders, or users. (United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy,* May 2007, p.19).

The USSC report demonstrated not only by analysis of the role in the offense, but by the quantities of drugs involved in federal cases that federal prosecutors were overwhelmingly prosecuting large numbers of insignificant cases around the country. Tables 5-2 and 5-3 revealed for FY 2006, the median weight of all the crack cocaine cases (4,262) was 51 grams, about the weight of a Hershey bar in those days, and that in some districts the resources of the United States were being absurdly wasted. In the District of New Hampshire, for example, the median weight of 41 federal crack cocaine prosecutions was only 3.1 grams. The median weight nationwide for federal powder cocaine cases was 6 kilograms at a time when seizures involving thousands of kilograms of cocaine were not uncommon. No other agency has done this research into the character of federal drug enforcement.

Your studies and your annual *Sourcebooks on Federal Sentencing Statistics* also starkly revealed outrageous racial disparities in federal drug prosecutions, especially for crack cocaine. Consider that Congress adjusted the trigger quantities for crack cocaine in the Fair Sentencing Act of 2010 (P.L.111-220) to reduce the 100-to-1 powder-to-crack ratio to 18-to-1 by raising the crack trigger quantities as a step to reduce unwarranted racial disparities in cocaine sentencing. Yet, the most recent data, your 2023 *Sourcebook on Federal Sentencing Statistics*, reveals, for FY 2023, white defendants were 6.4 percent of the crack cocaine defendants, and black defendants were 79.0 percent. (United States Sentencing Commission, *2023 Sourcebook of Federal Sentencing Statistics,* Table D-2). That kind of disparity has been typical since the USSC started publishing this data.

Background on the misalignment of punishment and culpability in federal drug sentencing

For almost four decades, federal drug sentencing policies have misaligned punishment and culpability, often failing to distinguish between low-level offenders and major traffickers. The sentencing guidelines, authorized

by the Sentencing Reform Act of 1984 (Chapter II of Title II, Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 STAT. 1987 *et seq.*) were being shaped when Congress enacted the Anti-Drug Abuse Act of 1986 (P.L. 99-570), establishing weight-based mandatory minimum sentences. The early relationship between drug quantity and base offense levels was structured around the drug quantities of that law.

I was the Assistant Counsel to the House Judiciary Committee, Subcommittee on Crime, principally responsible for developing those quantities, first set forth in H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986 (H. Rept. 99-845, Part 1). These flaws were entirely accidental because they were based on a hasty reliance on flawed expertise, including my own. Since the earliest reports of the USSC, these flaws have been clearly demonstrated in your data. Congress has had numerous opportunities to correct this mistake and truly direct the Justice Department to focus on the cases that would punish the most culpable drug offenders – either by raising the trigger quantities, or more appropriately by authorizing sentences based on the appropriately significant earnings of the major players in the drug trade. The failure of Congress to address those errors has limited your ability to guide federal judges to bring more just sentencing to federal drug sentencing. The failure of Congress to address those errors has also allowed the Justice Department and DEA to continue to wasteful and inefficient investigative and prosecutorial practices that have enabled transnational criminal organizations to grow so powerful, achieve such extensive impunity, and kill hundreds of thousands of people in the United States, Mexico, Colombia and Central America.

Let me share my first hand account of the development of statutory mistakes that have distorted the sentencing guidelines and describe the extraordinary haste in developing these provisions. The haste was created by the directive in July 1986 of the Speaker of the House of Representatives, Thomas P. ("Tip") O'Neill (D-MA), to the chairs of the House committees to complete mark-up of anti-drug provisions before the August 1986 congressional recess so that an omnibus anti-drug bill could be voted on shortly after Labor Day in order for Democrats to campaign on an anti-drug platform in the critical 1986 midterm elections.

On June 19, 1986, University of Maryland basketball star signed up with the then NBA championship Boston Celtics. That night he died from a cocaine overdose in his dormitory in College Park, MD. Eight days later, on June 27, Don Rogers, an accomplished member of the Cleveland Browns football team died from a cocaine-related heart attack. While neither death was due to the use of crack cocaine, rumors suggested that was the case, as the country was at the early stages of a significant increase in this new form for ingesting cocaine with dramatic adverse effects. There was enormous interest in the death of Len Bias whose basketball career "inside the Beltway" was well-known to most Members of Congress. His signing with the Boston Celtics was a great point of pride and a huge news story in Boston and in Washington. His death was a huge blow. The House Speaker, from Boston, was keenly aware of the significance of this event and saw a political opportunity that the Democratic controlled House of Representatives could take six years after the Republicans took control of the U.S. Senate after more than 25 years of Democratic control.

Nevertheless, in policy terms, the Congress had a very substantial and important goal in enacting the mandatory minimum sentences "to give greater direction to the DEA and the U.S. Attorneys on how to focus

scarce law enforcement resources…The Committee strongly believes that **the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."** (H. Rept. 99-845, Part 1 to accompany H.R. 5394, Narcotics Penalties and Enforcement Act, pp. 11-12, emphasis added.)

In early August, the first draft of H.R. 5394 that I prepared for the markup of the House Subcommittee on Crime would have triggered the mandatory minimum sentences at the extensive levels identified by the DEA in their class I trafficker category. (I forget what those quantities were. My recollection is that a characteristic measure would have been some hundreds of thousands doses per month for a period of six months.) When the Representative from Louisville, KY objected, noting that there were no drug dealers operating at that scale in Louisville, other Members concurred, and I was directed to bring back a draft with smaller quantities to try to achieve the same goal. No one made the reasonable argument that it was unlikely that the drug traffickers deserving the most intense focus were based in Louisville, KY or traveled to Louisville, KY to make their deals – they were operating in Miami, Houston, Los Angeles, Chicago, New York, etc. and outside the United States. In our extreme haste, I failed to provide the correct guidance that the committee needed. For the quantities that were adopted by the Subcommittee, I consulted a well-regarded street-level narcotics investigator from the Metropolitan Police Department, Washington, DC who was detailed to the House Select Committee on Narcotics Abuse and Control at that time. There were no hearings on the proposed quantities and no opportunity for those with greater expertise to create better metrics for guiding the Justice Department.

It has been clear to everyone familiar with the drug problem that the quantities enacted in 1986 are in no way representative of the production and distribution organized by "major traffickers." But these quantities became the foundation of the drug weights for the sentencing guidelines. At the time, policymakers sought to dismantle large trafficking networks. However, these laws, particularly with their inclusion of mandatory minimums and sentencing enhancements, failed to target kingpins and instead disproportionately punished couriers, street-level dealers, and individuals with minimal control over drug operations.

<u>Inadequate consideration of culpability</u>

The essence of any fair criminal sentencing system must be that the sentence is individualized to the culpability of the defendant. The ever-present demand of the Sentencing Reform Act is uniformity – a uniformity of treating similar offenses similarly.

Federal sentencing still relies far too heavily on drug weight as a proxy for culpability. The current Drug Quantity Table (DQT) fails to account for the actual role of the defendant in an offense. This results in sentencing disparities, such as first-time couriers caught with a package of drugs facing the same sentencing range as a high-level trafficker orchestrating an entire network. Lowering the highest base offense levels is not about reducing penalties for serious drug traffickers, but instead ensuring that punishments accurately reflect

criminal responsibility. The Commission must move away from weight-based sentencing and adopt guidelines that assess a defendant's role, decision-making authority, and level of control in a drug operation.

Specific drug sentencing proposals

PART A. Until the weight-basis for sentencing is revised, the highest base offense level must be set at a level that provides for a just sentence for the lowest-level offenders. Thus, regarding the three options in the proposal in Part A, subpart 1, regarding the highest base offense level, LEAP believes that option 3, with a level 30, with a sentence of 97-121 months for the least criminal history is more than adequate punishment for such offenders and before further enhancements are considered for more serious offenders.

Regarding the reduction for low-level trafficking function in subpart 2, LEAP does not have sufficient expertise to definitively choose between option 1 or option 2, except to state that it would favor providing judges the discretion to identify low-level trafficking in addition to any specified in a list of functions. Granting judges the discretion to provide for a 6 level downward departure also would be consistent with recognition that the weight-based sentences are too high and too broad.

Methamphetamine purity reform

One of the most urgent proposed reforms concerns sentencing guidelines that impose significantly harsher penalties for higher-purity methamphetamine, mirroring the discredited sentencing disparities between crack and powder cocaine. This distinction, which creates a 10:1 quantity ratio for high-quality methamphetamines versus less pure mixtures, has served to promote longer sentences due to standards that consider the vast majority of meth circulating to be high-purity. As a result, we have seen many individuals, including those who played minimal roles in trafficking networks, face excessively long sentences, including life imprisonment. This purity distinction has no bearing in demonstrating a defendant's role in a drug operation, and it does not serve public safety. The Commission's reconsideration of methamphetamine purity as a sentencing standard is a critical step toward ensuring sentencing aligns with culpability rather than chemistry. Given the data cited by the USSC regarding the purity of methamphetamine now involved in federal cases, LEAP supports eliminating the "Ice" category and the pure ("actual") categories and the lower quantities associated with them.

Ending life sentences for nonviolent drug offenses

Eliminating life sentences for nonviolent drug offenses is another essential reform. The United States is one of the few nations in the world that still imposes life imprisonment for drug crimes. These extreme penalties serve no rehabilitative purpose, nor do they advance public safety. A system that permanently condemns nonviolent individuals without consideration of their capacity for change is one that fundamentally misunderstands justice. The Commission must end life without parole recommendations for drug offenses and align federal sentencing policy with modern research and international best practices.

Retroactive application of guideline reforms

A fundamental principle of justice holds that when we recognize a law is unjust, we must not continue punishing people under its outdated framework. There are currently tens of thousands of individuals serving

excessive federal drug sentences based on guidelines that no longer reflect modern sentencing policies. Failing to apply these amendments retroactively would perpetuate injustices for those sentenced under laws we now acknowledge were flawed. The 2014 Drugs Minus Two Amendment proved that retroactive sentence reductions can be implemented safely and effectively. The Commission must ensure that this round of sentencing reforms applies retroactively to those currently incarcerated.

Integration of enforcement with other anti-drug strategies

While these amendments will improve federal sentencing practices, we must acknowledge that the justice system alone cannot solve America's drug crisis. The history of federal drug policy has been marked by its reliance on punishment, but we have seen that incarceration does not effectively address substance use disorders or reduce trafficking. Future sentencing policies must be designed in coordination with harm reduction strategies, substance use treatment programs, and alternatives to incarceration.

Reforms regarding states of mind

It is one of the oldest and most important features of our justice system that an offense is defined regarding the intention of the actor regarding the conduct, circumstances and results of the offense. While this point is often oversimplified as though there are simply a bad act (*actus reus*) and a bad intent (*mens rea*), the criminal law has long recognized that there are different states of knowledge, intent, recklessness or negligence that must be addressed for all the material elements of an offense. How can a judge understand the nature of an offense without knowing the degree of guilty knowledge a defendant brought to the offense?

Conclusion

As someone who was directly involved in drafting the very laws that led us here, I cannot overstate the importance of this moment. The 2025 sentencing amendments present a critical opportunity to end outdated, weight-based models, eliminate life sentences for non-violent drug offenses, ensure retroactive relief, and shift toward a role-based approach to sentencing that better reflects culpability. I urge the Commission to adopt these reforms, ensuring a sentencing system that is fairer, more proportionate, and aligned with the realities of drug enforcement.

Respectfully,

Eric E. Sterling
Assistant Counsel (Fmr.), U.S. House Judiciary Committee
Speaker, The Law Enforcement Action Partnership