



At Sidebar

by Héctor L. Ramos-Vega

Proposed Legislation and Other Initiatives to Reduce Prison Terms for Nonviolent Drug Offenders: A Great Step Toward Curbing Mass Incarceration, But Is It Enough?

Our criminal justice system is in crisis. The U.S.

prison population has grown exponentially in the past four decades, mostly as a result of the war on drugs, a war that has been proven to be a failure. The staggering costs of mass incarceration in the United States go way beyond its impact on the taxpayers. There has been a significant impact for families, communities, and society in general. And sadly, usually the most disadvantaged segments of society are the ones that have been affected the most since our criminal justice system is plagued with inequality toward minorities and the poor. Recently, a report published by the National Research Council recommended that “[g]iven the small crime prevention effects of long prison sentences and the possible high financial, social, and human costs of incarceration, federal and state policymakers should revise current criminal justice policies to significantly reduce the rate of incarceration in the United States.”¹ It was concluded that mandatory prison sentences as well as excessively long sentences should be re-examined and steps taken to improve the experience of the incarcerated, thus reducing the unnecessary harm to their families and communities.

The federal government has recently taken several steps that are consonant with the above recommendation. Two legislative proposals as well as other similar actions taken by the attorney general and the U.S. Sentencing Commission address the evils of mass incarceration, prison overcrowding, and disparities in sentencing.

For instance, the Justice Safety Valve Act of 2013, (S. 619 and H.R. 1695) proposes to authorize federal judges to impose sentences below the applicable statutory minimums if necessary to avoid violating the parsimony principle requiring that sentences be sufficient but not greater than necessary to accomplish the listed goals found at 18 U.S.C. § 3553(a): to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and

provide the defendant with education or vocational training as well as medical care or other correctional treatment in the most effective manner. The act requires the court to provide notice to the parties of its intention to impose a lower sentence and to state in writing the reasons for such decision, including the factors that justify the more lenient sentence.

The Smarter Sentencing Act of 2013 (S. 1410), on the other hand, would among other things (1) expand 18 U.S.C. § 3553(f), also known as the safety valve, which allows a judge to sentence a defendant below the statutory minimums for certain nonviolent, low-level drug offenders, to include defendants with up to three criminal history points²; (2) reduce the mandatory minimum terms of imprisonment set forth in the Controlled Substance Act for various types of drugs and quantities and for certain repeat offenders; (3) and direct the U.S. Sentencing Commission to review and amend the sentencing guidelines manual and policy statements to make them consistent with these proposed statutory changes.

Also, in April 2014, the U.S. Sentencing Commission unanimously voted to amend the sentencing guidelines to reduce the offense levels for drug crimes. Specifically, the amendment adjusts the drug quantity tables across drug types, reducing the offense levels by two. This amendment is expected to bring about an average decrease in drug sentences of approximately 11 months. Judge Patti B. Saris, chair of the U.S. Sentencing Commission, said that “[t]his modest reduction in drug penalties is an important step toward reducing the problem of prison overcrowding at the federal level in a proportionate and fair manner.”³ Judge Saris added that “[r]educing the federal prison population has become urgent, with that population almost three times where it was in 1991.”⁴

Attorney General Eric Holder has followed suit in the efforts to reduce mass incarceration and prison overcrowding with the Department of Justice’s Smart on Crime initiative. The initiative

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has five main goals: to ensure finite resources are devoted to the most important law enforcement priorities; to promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system; to ensure just punishment for low-level, nonviolent convictions; to bolster prevention and re-entry efforts to deter crime and reduce recidivism; and to strengthen protections for vulnerable populations.⁵ Among other things, the initiative calls for meaningful sentencing reform to reduce overburdened prisons. Consistent with said initiative, on Aug. 12, 2013, the attorney general issued a memorandum directing prosecutors to “decline to charge the quantity necessary to trigger a mandatory minimum sentence” in those cases where the defendants meet certain criteria, such as not having been involved in acts of violence, not possessing weapons, not trafficking drugs to or with minors, and not resulting in death or serious bodily injury to any person.⁶ Defendants must also be low-level participants in that they are not organizers, leaders, or managers in a criminal organization and cannot have ties to large-scale organizations or gangs.⁷ Finally, to be considered for the discretionary charging decision, defendants cannot have a significant criminal history, that is, more than three criminal history points.⁸

In addition to the above, and with regard to the U.S. Sentencing Commission amendments to the drug guidelines, “the Justice Department will direct prosecutors not to object if defendants in court seek to have the newly proposed guidelines applied to them during sentencing.”⁹ Moreover, the Justice Department is set to detail more expansive criteria in considering when to recommend clemency applications for the President’s review.¹⁰ It is expected that the expanded criteria would make hundreds of sentenced drug offenders eligible for favorable clemency recommendations.

Clearly, Congress, the U.S. Sentencing Commission, and the Justice Department are doing their part to reduce mass incarceration and restore fairness to sentencing, particularly in drug cases. These are significant steps, and I applaud the efforts. But is it enough? The problem with all of these laudable initiatives is they are not going to produce the desired effects unless the components of the system are open to implement them uniformly. A change in attitude is also needed. The criminal justice system has become addicted to incarceration as the only option in a criminal case. Noncustodial sentences are the exception. The initiatives outlined above are mainly applicable to low-level, nonviolent drug offenders. Which is understandable; the majority of the cases in which we see sentencing disparities and excessive prison terms are drug cases. At the federal level, the quantity of drugs involved drives the statutory minimums and the offense levels under the guidelines. Drug quantity has also been used as a proxy for culpability, when, in reality, the amount of controlled substances involved in the case is often an insignificant factor for purposes of determining whether a defendant needs to be punished more harshly or more leniently.

By way of example, a simple nonviolent drug mule carrying less than 500 grams of cocaine is not necessarily more culpable than a nonviolent drug mule carrying 500 kilograms of the same drug. They are both less culpable than the average defendant in the typical criminal conspiracy and less culpable than other conspirators within the same criminal organization. A drug courier



is certainly less culpable than the owner and leader of the organization, the financiers, the money launderers, violent enforcers, packagers, and street-level sellers. A mule’s role is to move the controlled substance undetected from point A to point B. He or she takes most of the risk and receives a fraction of the profit that the higher ups stand to make. Yet, in our example, the mule with less than 500 grams is not exposed to a statutory minimum sentence. The courier carrying 500 kilograms is exposed to a 10-year statutory minimum sentence and up to life in prison. The disparity in the examples is glaring for these two similarly situated individuals where the only difference between them is the quantity of drugs. Therefore, the efforts taken to ameliorate this disparity by reducing the guideline ranges based on drug quantity and the proposals to allow sentencing judges to go below the statutory minimum should be given urgent consideration. But what about other types of cases?

Notwithstanding the foregoing, sentencing disparities and excessive punishment are not a phenomenon exclusive of drug cases. Nonviolent white-collar crimes, possession of child pornography, and immigration offenses also contribute to our system’s pervasive mass incarceration problem. Legislators and judges are therefore encouraged to not only consider noncustodial sentences, but to realize that in the case of nonviolent offend-

ers, prison is generally the least effective option to meet the goals of sentencing. This is so in part because according to “the best available evidence ... prisons do not reduce recidivism more than noncustodial sanctions.”¹¹ In fact, research has shown that it is the certainty of punishment, as opposed to its severity, that is more likely to produce deterrent benefits.¹² Thus, “[a] criminal justice system that [makes] less use of incarceration might better achieve its aims than a harsher, more punitive system.”¹³

Again, the efforts discussed above to reduce mass incarceration and establish a fairer criminal justice system at the federal level are steps in the right direction. The proposed legislation should be enacted without undue delay, and the initiatives by the Justice Department applied uniformly in practice. Local jurisdictions should also review their policies to attempt to reduce the number of incarcerated people. The ultimate goal is a system that provides just punishment, incapacitation, and deterrence for those who deserve it, while reducing incarceration and improving on the conditions of confinement for nonviolent offenders. As suggested by extensive research, these goals are accomplished if jurisdictions begin to give more emphasis to programs such as parole, probation, prisoner re-entry support, diversion of prosecution, and other community-based programs.¹⁴

As Attorney General Holder recognized in his recent statement before the U.S. Sentencing Commission, “Certain types of cases result in too many Americans going to prison for too long, and at times for no truly good public safety reason.”¹⁵ Simply put, to reduce the mass incarceration crisis and create a more just criminal justice system that minimizes both the financial and societal costs of imprisonment, we can always do more. ☉

Endnotes

¹*The Growth of Incarceration in the United States, Exploring Causes and Consequences* (2014). This report was commissioned by the National Institute of Justice and the McArthur Foundation.

²Currently, only defendants with one criminal history point are eligible for safety valve relief.

³News Release, *U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences*, (April 10, 2014) available at www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

⁴*Id.*

⁵Smart on Crime, Reforming the Criminal Justice System for the 21st Century, available at www.justice.gov/ag/smart-on-crime.pdf.

⁶Memorandum to the U.S. Attorneys and Assistant Attorney General for the Criminal Division, Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases available at www.justice.gov/ag/smart-on-crime/ag-memo-drug-guidance.pdf.

⁷*Id.*

⁸*Id.*

⁹News Release, *Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harsh Penalties for Most Serious Drug Traffickers* (March 13, 2014) available at www.justice.gov/opa/pr/2014/March/14-ag-263.html.

¹⁰News Release, *Attorney General Holder: Justice Department Set to Expand Clemency Criteria, Will Prepare for Wave of Applications from Drug Offenders in Federal Prison* (April 21, 2014), available at www.justice.gov/opa/pr/2014/April/14-ag-409.html.

¹¹Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Prison J.* 48S, 50S-51S (2011)

¹²Valerie Wright, Ph.D, *Deterrence in Criminal Justice, Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project Research and Advocacy for Reform (November 2010).

¹³*The Growth of Incarceration in the United States*, *supra*, note 1 at 9.

¹⁴*Id.*

¹⁵News release, *supra* note 9.

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