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SEEKING CLEMENCY FOR INMATES SERVING OUTDATED SENTENCES

BY JANEANNE MURRAY

“We thought they were typos,” a long-time case manager in a federal prison said to me recently. He was referring to the sentences that began to appear on judgments after the passage of the Anti-Drug Abuse Act of 1986¹ and the effective date of the federal sentencing guidelines in 1987.² That extra zero in sentences of 240 months, 300 months, 360 months (not to mention the word “life”) was surely a mistake. Until the reality set in that it was not. It was the new frontier in the law and order complex. Lengthy sentences – far too often imposed on young, non-violent, non-white, drug-addicted offenders – would stem the flow of drugs through deterrence and incapacitation.³ This thinking long since discredited,⁴ we still live with one of the stark consequences of these harsh sentencing regimes: since 1987, the federal prison population has more than quadrupled,⁵ and fully one-half of the current federal inmate

1 Pub. L. No. 99-570, 100 Stat. 3207 (1986) (mandating minimum sentences of 5, 10, 20 and life, depending on the type and weight of the drug involved, and the defendant’s criminal history).

2 See *Kimbrough v. United States*, 552 U.S. 85, 96 n.7 (2007) (Sentencing Guidelines effective November 1987).

3 See generally *United States v. Dossie*, 851 F.Supp. 2d 478, 479-80 (E.D.N.Y. 2012) (describing the origins of mandatory minimum penalties).

4 National Research Council of the National Academies, *THE GROWTH OF INCARCERATION IN THE UNITED STATES, EXPLORING CAUSES AND CONSEQUENCES*, 8 (Jeremy Travis et al., eds. 2014), available at <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

5 From 49,378 inmates in 1987 to 214,149 in 2014. See Federal Bureau of Prisons, *Statistics*, Department of Justice, available at https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.

population has served ten years or more.⁶

People like MACDL member Robert Richman’s client, Jacob Colbert. Colbert sold a few rocks of crack here and there to support his own addiction – never serving any significant time in custody. Convicted in federal court for transporting less than 150 grams of crack on a Greyhound bus, he was sentenced to almost 20 years under a now obsolete crack trafficking statute, in an era when the Sentencing Guidelines were still essentially mandatory in the Eighth Circuit.⁷ His son, two months old at the time of his arrest, is now 12, and but for clemency, would have graduated high school without knowing what it was like to have a father outside prison. Or like Teresa Griffin,⁸ arrested at age 26 almost 25 years ago, leaving behind four young children, including a six-month old. She was sentenced under mandatory guidelines to life imprisonment for her non-violent, supportive role in a crack conspiracy run by her husband.⁹ A model inmate, she says the most devastating aspect of her incarceration was seeing her children grow up through sporadic prison visits.¹⁰ Stories like these are legion among our federal inmate population.

6 U.S. Sent’g Comm’n, *Quick Facts – Federal Offenders in Prison* (January 2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP.pdf.

7 Commuted on May 5, 2016.

8 Commuted on June 3, 2016 (represented by the author).

9 A.C.L.U., *A Living Death: Life Without Parole for Non-Violent Offenses*, at 51-54 (2013), available at <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf>.

10 *Id.* at 53-54.

It has taken decades for the insights of social scientists,¹¹ practitioners,¹² and the inmates themselves,¹³ to impact sentencing policy. The notion that these sentences were too numerous, too long and just plain immoral,¹⁴ now informs a variety of sentencing reform efforts in all sectors of government. They include (at the federal level), the revolutionary *Booker* jurisprudence that the guidelines are just that – *guides*;¹⁵ the increasingly generous variances below the guidelines granted by

11 See e.g., Michael Tonry, *Federal Sentencing “Reform” Since 1984: The Awful As Enemy of the Good*, 44 CRIME & JUST. 99 (2015).

12 See, e.g., *United States v. Diaz*, 2013 WL 322243, at *1, *18 (E.D.N.Y. Jan. 28, 2013) (J. Gleeson critiquing guidelines in drug cases); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1021, 1029 (N.D. Iowa 2013) (J. Bennett critiquing quantity-based approach adopted by Sentencing Commission in drug cases); *United States v. Bannister*, 786 F. Supp. 2d 617, 649-70 (E.D.N.Y. 2011) (J. Weinstein discussing the role of the Sentencing Guidelines in mass incarceration); *United States v. Hodges*, 2009 WL 366231, at *8-9 (E.D.N.Y. Feb. 12, 2009) (J. Sifton noting “[t]he Guidelines do not take into account the inverse relationship between age and recidivism.”); Walter Dellinger, *Supreme Court Breakfast Table*, *Slate.com*, Jun. 25, 2014, available at http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_roundup_does_today_s_cellphone_decision_mean_the_court_like.html (“mass incarceration that resulted from the misguided war on drugs has been the great unappreciated civil rights issue of our time”).

13 See, e.g., Michael Santos, EARNING FREEDOM: CONQUERING A 45-YEAR PRISON SENTENCE (2013).

14 Department of Justice, Office of Public Affairs: *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates*, Aug. 12, 2013, available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

15 See *United States v. Booker*, 543 U.S. 220 (2005) (“Guidelines [are] effectively advisory”); see also *Spears v. United States*, 555 U.S. 261, 265-66 (2009) (district courts are “entitled to reject and vary categorically” based on founded policy disagreement with Guidelines); *Gall v. United States*, 552 U.S. 38, 51 (2007) (“significant procedural error” to treat the Guidelines as mandatory); *Kimbrough*, 552 U.S. at 91 (2007) (“the cocaine Guidelines, like all other Guidelines, are advisory only”).

sentencing judges;¹⁶ the adjustments from the United States Sentencing Commission to ease the guidelines’ harshness, particularly in drug cases;¹⁷ bi-partisan – albeit so far unsuccessful – bills in Congress to reverse previous sentencing statutes;¹⁸ former Attorney General Holder’s changes to charging policies that drove disproportionate sentences;¹⁹ and President Obama’s grand application of his clemency power to federal inmates serving long sentences, announced in January 2014.²⁰

16 U.S. Sent’g Comm’n, *2015 Sourcebook of Federal Sentencing Statistics*, Figure G, available at <http://www.ussc.gov/research/sourcebook-2015> (indicating that variances below the Guideline have become the norm).

17 U.S. Sent’g Comm’n, *Amendments to the Sentencing Guidelines* (“crack minus two”), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20080501_RF_Amendments.pdf; U.S. Sent’g Comm’n, *Amendments to the Sentencing Guidelines* (“drugs minus two”), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.

18 See generally, Families Against Mandatory Minimums, *S.502 / H.R. 920, The Smarter Sentencing Act*, available at <http://fammm.org/s-502-the-smarter-sentencing-act>; see also Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, *NEW YORK TIMES*, Feb. 18, 2015, at A1, available at <http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html>.

19 See Memorandum from Attorney General Eric Holder, Jr. on Department Policy on Charging and Sentencing to All Federal Prosecutors at *1 (May 19, 2010), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> (requiring individualized assessment of each defendant’s history and circumstances in charging decisions); Memorandum from Attorney General Eric Holder, Jr. on Charging Mandatory Minimum Sentences and Recidivist Enhancement in Certain Drug Cases to United States Attorneys and Assistant Attorney General for the Criminal Division at *1 (Aug. 12, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> (specifically addressing the charging of statutes with mandatory minimum sentences).

20 Department of Justice: Office of Public Affairs, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, Apr. 23, 2014, available at <https://>

Launched in early 2014, President Obama's clemency initiative focused on those non-violent, low-level offenders, who have served 10 years with good prison conduct and whose sentences would be lower today by operation of law or policy.²¹ In other words, its beneficiaries would be the casualties of those sentencing policies from the 1980s and 1990s who, for one reason or another, failed to meet the eligibility criteria of the reform measures adopted after they were sentenced – the forgotten ones, like Jacob Colbert and Teresa Griffin, who have fallen through the cracks of punitiveness and enlightenment, and for whom life in prison has become their lives. In truth, “clemency” for these inmates is a misnomer. This program is not about mercy. It's about delayed justice. Our first president to visit a federal prison²² has been the first to say that inmates' lives matter.

The president's announcement sparked an unprecedented volunteer effort. Four non-profit organizations (the ABA, the National Association of Criminal Defense Lawyers, the ACLU, and Families Against Mandatory Minimums), along with representatives of the Federal Public and Community Defenders, formed Clemency Project 2014, a working group to recruit and train volunteer lawyers to review the cases of what turned out to be more than 35,000 applicants for the program. Experienced federal defense lawyers drafted hundreds of pages of memos distilling three decades of developments in federal sentencing law,²³ and volunteered to act as

www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new.

21 *See id.*

22 Halimah Abdullah, *Obama Visits Prison in Push for Reform*, NBC NEWS, Jul. 16, 2015, available at <http://www.nbcnews.com/news/us-news/obama-visit-oklahoma-prison-push-criminal-justice-reform-n393056>.

23 Most were prepared by the Sentencing Resource Counsel of the Federal Defenders. They can be accessed here: <https://www.fd.org/navigation/select-topics-in-criminal-defense/sentencing-resources/subsections/clemency>.

expert advisers. Most remarkably, in what is the biggest single mobilization of volunteer lawyers in U.S. history, thousands of lawyers volunteered to draft the actual petitions for eligible inmates. They came from all sectors – senior partners at big law firms to solo practitioners (including many from MACDL's ranks) – and all fields.²⁴ For many, this was their first time encountering directly the impact of mass incarceration on the lives of real human beings.²⁵

Beyond the volunteer response (over 1500 petitions submitted through Clemency Project so far, countless more submitted outside the Project), another notable aspect of the initiative was the number of prosecutors, judges, and Bureau of Prisons personnel who stepped up in support of inmates, despite (or because of) their roles in securing, imposing or implementing tough sentences. One judge wrote a letter of support for a client of mine in which he said he “deeply regret[s]” the sentence he had imposed. Florida NACDL member Katherine Yanes, who has represented over 100 clemency applicants *pro bono*, told me of a prosecutor who had agreed to give a letter of support in one her cases, and then brought to her attention two lifers he had prosecuted whose sentences he viewed as unduly harsh.²⁶ BOP wardens and staff have actively helped inmates file their pro se petitions; some have written letters of recommendation, or added positive statements in the inmate's official BOP progress report. The case manager referred to in my opening paragraph had contacted me to make sure that one of the inmates he supervised, recently diagnosed with cancer, was on Clemency Project's radar.²⁷ We forget,

24 Josh Stashenko, *New York Lawyers Flock to Campaign for Clemency in Drug Cases*, NEW YORK LAW JOURNAL, Jun. 1, 2016, available at <http://www.newyorklawjournal.com/id=1202758935124/NY-Lawyers-Flock-to-Campaign-for-Clemency-in-Drug-Cases?slreturn=20160622021648>.

25 *Id.*

26 As a result of this call, she submitted applications on behalf of these additional two as well.

27 As a result of this call, this inmate's case was as-

as Adam Gopnik writes in his eloquent New Yorker piece “The Caging of America,” that in a sense, “the guards are doing time, too.”²⁸

Brooklyn District Judge Jack Weinstein once said that sentencing is the moment that most clearly reveals the human face of the law.²⁹ He was referring to the sentencing proceeding itself, but for inmates, that moment lasts for years and decades. And for those serving sentences for non-violent crimes measured in decades, that face is sorely lacking in humanity. Time is something they serve, not something that serves them with the first-hand experience of relationships, marriages, births, graduations, deaths.³⁰ In a soon to be released documentary by Rudy Valdez, the brother of a long-term inmate, he wonders what is worse – missing their family’s joyful moments or not being there for the sorrows.³¹ The cultural shift in our attitudes to incarceration, epitomized in the president’s clemency initiative, has given reign to that human face at all levels and all stages.

Hopes are high among inmates who have submitted clemency applications that they will see the outside world soon. Many of them will likely be disappointed – past violence, prior gang membership, poor adjustment in prison, can all operate to close this current clemency opportunity. But none of those facts change the fundamental injustice of their serving a sentence that would not be imposed today. Some have advocated an institutionalization of the clemency process, separate from the Department of Justice, with a panel of independent, diverse experts to make clemency recommendations.³² Indeed,

signed to a volunteer lawyer and the petition submitted.

28 Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, at 2 (“The Caging of America”).

29 Jack B. Weinstein, *The Role of Judges in a Government Of, By and For the People: Notes for the 58th Cardozo Lecture*, 30 CARDOZO L. REV. 1, 178 (2008).

30 Cf., *The Caging of America* at 2 (“time becomes in every sense this thing you serve”).

31 See Bio-Rudy Valdez, RUDY VALDEZ, [HTTP://WWW.RUDYVALDEZ.COM/ABOUT](http://www.rudyvaldez.com/about).

32 See Barkow and Osler, *The President’s Idle Ex-*

the clemency route has gained traction. States across the country (the source of most of the country’s more than 2 million inmates³³) have begun exploring their own clemency initiatives.³⁴ But while the critique that the federal Pardon Office should not sit in the department that prosecuted the clemency applicants is well-taken, executive clemency cannot be the answer to the tens of thousands of federal and state prisoners serving prisons sentences that would not be imposed today. Clemency, as Austin Sarat has written, is fundamentally lawless – it is discretionary, secret, beyond review.³⁵ It is too political a mechanism to redress systematically overruled or unduly harsh sentencing practices.

Another option is to reintroduce parole³⁶ – itself a process typically lacking in transparency or representation,³⁷ but at least subject to rules, with a review process.³⁸ Yet another option – the most promising, in my view – is the “second look” movement –

Executive Power: Pardoning, WASHINGTON POST, Nov. 26, 2014, available at https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-af-aa1e3a33ef_story.html.

33 See Bureau of Justice Statistics, Kaebler et al., *Correctional Populations in the United States, 2014* (revised Jan. 21, 2016), at *22 Appendix Table 5, available at <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> (state prison and jail population approximately 2 million people in 2014).

34 See Maura Ewing, *Restoring a Life After Clemency*, THE ATLANTIC, Dec. 18, 2015, available at <http://www.theatlantic.com/politics/archive/2015/12/restoring-a-life-after-clemency/433671> (describing Governor Cuomo’s initiative in New York).

35 See Austin Sarat, *MERCY ON TRIAL*, Chapter 3 (“The Jurisprudence of Clemency”) (2007).

36 See Donald Reynolds, *Attorney General Eric Holder Urges Discussion on Reinstating Federal Parole*, SF BAYVIEW, November 6, 2013, available at <http://sfbayview.com/2013/11/attorney-general-eric-holder-urges-discussion-on-reinstating-federal-parole/>

37 Beth Schwartzapfel, *Parole Boards: Problems and Promise*, 28 FED. SENT. R. 79 (Dec. 2015); cf. Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT. R. 96 (Dec. 2015).

38 See *id.* (the parole process is an institutionalized process with substantial potential for systematic reform).

essentially, a statutory mechanism that ensures judges will automatically revisit sentences after a certain period of time.³⁹ The drafters of the Model Penal Code's revised sentencing provisions propose a second look after 15 years.⁴⁰ President Obama's clemency initiative sets the review date at 10 years in non-violent cases. U.S. Sentencing Commission data on the retroactive implementation of changes in certain guidelines illustrate that our court and probation system is actually well-equipped to handle second-look provisions with broad application.⁴¹ The bipartisan, but sadly stalled, Smarter Sentencing Act would have permitted a second look to a large number of federal inmates serving lengthy sentences for crack distribution.⁴²

Defense lawyers reading this essay may ask what can they do to assist those inmates serving sentences that would never be meted out today.⁴³ Well, there is still time to volunteer to file a clemency case.⁴⁴ And collectively we can advocate for statutory and regulatory changes that make progressive new sentencing laws retroactive, or permit judicial second looks for long-term inmates.

39 Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT. R. 194 (Feb. 2009).

40 *Id.* at 195.

41 See U.S. Sent'g Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 1, 2014) at 3; available at <http://www.ussc.gov/research/research-publications/recidivism-among-offenders-receiving-retroactive-sentence-reductions-2007-crack-cocaine-amendment>.

42 See generally, *The Smarter Sentencing Act FAQ* (FAMM, Apr. 9, 2015), available at <http://famm.org/s-502-the-smarter-sentencing-act/>.

43 Not only has there been a sea-change on incarceration issues in all branches of government, as discussed above, the public does not support these excessive sentences. See Christopher Ingraham, *Here's How Much Americans Hate Mandatory Minimum Sentences*, WASHINGTON POST, 10/1/2015, available at, <https://www.washingtonpost.com/news/wonk/wp/2015/10/01/heres-how-much-americans-hate-mandatory-minimum-sentences/>.

44 Register for a case at www.clemencyproject2014.org.

But nothing beats not being sentenced to heavy sentences at all. If there is anything that was crystallized for me in my work with Clemency Project 2014, it's the power of sentencing advocacy – the defense lawyer's capacity to flesh out that cold presentence report, which so often consists of 10 or 20 pages about the offense, several pages about the inmate's prior criminal history, and then a lame, telegraphic few paragraphs about his or her childhood, family and struggles in the world. The offense and the criminal history, however, take on a different hue when viewed in the context of a fleshed out portrait of the inmate's whole life: the fatherless young man who found a father figure in a gang leader who inducted him into a structured street drug distribution scheme; the mother in her thirties with three young children going through a divorce, precipitating a debilitating meth addiction; the coal miner in a family of coal miners disabled in a workplace incident, who started selling some of his prescription oxycontin, to which he had become addicted to alleviate not only his chronic pain but also his loss of self-worth.⁴⁵ We try about 5% of our cases.⁴⁶ That means it is a defense obligation to do smart, empathetic, creative sentencing advocacy (sometimes pre-plea) on the other 95%.

Teresa Griffin's sentence was commuted this past June and she sent me a copy of the signed letter she received from President Obama. His words speak to her, but they also speak to me – reminding me that if I make the effort to delve truly into my clients' lives and embrace their humanity, I can impact not just their potential sentences, but the way other actors in the criminal justice system view them, and the way my colleagues represent their clients:

45 These descriptions are all from real clemency cases.

46 See *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (observing the centrality of plea bargaining to our criminal justice system, and that 97 percent of our federal convictions and 94 percent of our state convictions end in guilty pleas).

“[R]emember that you have the capacity to make good choices. By doing so, you will affect not only your own life, but those close to you. You will also influence, through your example, the possibility that others in your circumstances get their own second chance in the future ... I believe in your ability to prove the doubters wrong and change your life for the better. So good luck, and Godspeed.”⁴⁷

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⁴⁷ Reprinted with the permission of Teresa Mechell Griffin.