

Posted October 27, 2010, "To the Point"

"If you had to be a prisoner in the United States, this is certainly the time. Because of the severe economic downturn in the United States, the government will not be able to keep prisoners incarcerated as long as they have. Sentences will need to be lower, "good time" credit will have to increase and "alternative sentencing" will have to be enacted. "Tough on crime" initiatives will be toned down or completely eliminated and mandatory sentencing will be given a second look."

*David Zapp,
October 27, 2010*

Attorney General Endorses Proposal to Reduce Drug Sentences

By Matt Apuzzo

*Posted on March 13, 2014,
The New York Times*

Attorney General Eric H. Holder Jr. is endorsing a proposal that would reduce prison sentences for dealing drugs, the latest sign of the Obama administration's retrenchment in the war on drugs.

In January, the United States Sentencing Commission proposed changing federal guidelines to lessen the average sentence for drug dealers by about one year, to 51 months from 62 months. Mr. Holder is scheduled to testify before the commission on Thursday in support of the plan.

With the support of several Republicans in Congress, the attorney general is separately pushing for the elimination of mandatory minimum

sentences for nonviolent drug crimes. In January, the Justice Department issued a call encouraging low-level criminals serving lengthy sentences on crack cocaine charges to apply for clemency.

Since the late 1970s, the nation's prison population has ballooned into the world's largest. About one in every 100 adults is locked up.

In the federal prison system, the one that would be affected by the proposed changes, half of the 215,000 inmates are serving time for drug crimes. Under the changes being considered, the federal prison population would decrease by about 6,550 inmates over the next five years, according to government estimates.

"This overreliance on incarceration is not just financially unsustainable," Mr. Holder said in remarks prepared for delivery on Thursday. "It comes with human and moral costs that are impossible to calculate."

About a third of the Justice Department's budget goes toward the prison system, a fact that has helped Mr. Holder win conservative allies for sentencing changes.

The Sentencing Commission writes the guidelines that judges must consider. It is soliciting comments on the proposed sentencing reductions and will vote, probably in April, on whether to carry them out. Unless Congress voted to reject the proposals, **the commission's changes would go into effect in November.**

Until then, the Justice Department said Mr. Holder would tell federal prosecutors not to oppose any sentence that would fall under the more lenient guidelines.

"This straightforward adjustment . . . would help to rein in federal prison spending while focusing limited resources on the most serious threats to public safety."

Commentary: Happy days are here again. Like they say in money

laundering cases: Follow the money. Moral shmoral. It's about the money. You think they would be talking about this if the government wasn't financially strapped?

— David Zapp

G.O.P. Moving to Ease Its Stance on Sentencing

*By Jeremy W. Peters, March 13, 2014,
The New York Times*

"We built so many prisons people began to ask the question: 'Can we afford this?'"

Conservative Republican senators have joined philosophically with some of the most liberal Democrats on policies that would reduce prison populations. Fiscal conservatives say now that proposals along these lines would shave billions off the federal budget.

WASHINGTON — Leading Republicans are saying that mandatory minimum sentences in the federal system have failed — too costly, overly punitive and ineffective. So they are embracing a range of ideas from Republican-controlled states that have reduced prison populations and brought down the cost of incarceration.

Religious conservatives see these efforts as offering compassion and the hope of reuniting broken families. Fiscal conservatives say the proposals would shave billions off the federal budget.

The Obama administration is engaged and supportive of the efforts as was evident on Thursday when the Attorney General that would reduce prison sentences for people convicted of dealing drugs, the latest sign that the White House is making criminal justice a priority of President Obama's second term.

Republicans and Democrats are in early discussions about combining two bills that the Senate Judiciary Committee approved overwhelmingly this year. The first would give judges more discretion to depart from mandatory minimum

sentences in lower-level drug cases, cut down mandatory sentences for other drug offenses, and make retroactive the 2010 law that shrunk the disparity between cocaine and crack-cocaine sentences.

The second bill seeks to tackle establish a skills-training and early-release system for those who already are incarcerated but are considered at low risk of committing another crime. The majority leader, has signaled to both parties in the chamber that he will bring a criminal justice bill to the floor this year.

“I’d like to say that people wanted to keep hope on the idea that people, once they committed crimes, could be rehabilitated and become productive citizens,” Senator Cornyn added. “Actually, what I think happened, the more likely explanation, was that we built so many prisons people began to ask the question: ‘Can we afford this?’”

Many of the lawmakers involved in drafting the legislation has experience as a prosecutor or judge, and was seeing firsthand the inflexible nature of the federal sentencing system. “As an assistant U.S. attorney, I saw from time to time instances in which a judge would say, ‘I’m not sure this sentence makes sense, in fact I have real reservations about it. But I have to,’” Mr. Lee said. “Those memories have stayed with me.”

Rampant Prosecutorial Misconduct

By The Editorial Board,
The New York Times, Jan. 4, 2014

In the justice system, prosecutors have the power to decide what criminal charges to bring, and since 97 percent of cases are resolved without a trial, those decisions are almost always the most important factor in the outcome. That is why it is so important for prosecutors to play fair, not just to win. This obligation is embodied in the Supreme Court’s 1963 holding in *Brady v. Maryland*, which required prosecutors to provide the defense with any exculpatory

evidence that could materially affect a verdict or sentence.

Yet far too often, state and federal prosecutors fail to fulfill that constitutional duty, and far too rarely do courts hold them accountable. Last month, Alex Kozinski, the chief judge of the United States Court of Appeals for the Ninth Circuit, issued the most stinging indictment of this systemic failure in recent memory. “There is an epidemic of Brady violations abroad in the land,” Judge Kozinski wrote in dissent from a ruling against a man who argued that prosecutors had withheld crucial evidence in his case. “Only judges can put a stop to it.”

The defendant, Kenneth Olsen, was convicted of producing ricin, a toxic poison, for use as a weapon. Federal prosecutors knew — but did not tell his lawyers or the court — that an investigation of the government’s forensic scientist, whose lab tests were critical to the case, had revealed multiple instances of sloppy work that had led to wrongful convictions in earlier cases. A state court found the scientist was “incompetent and committed gross misconduct.”

Yet the majority of the federal appeals court panel ruled that the overall evidence of Mr. Olsen’s guilt — including websites he visited and books he bought — was so overwhelming that the failure to disclose the scientist’s firing would not have changed the outcome.

This is the all-too-common response by courts confronted with Brady violations. Judge Kozinski was right to castigate the majority for letting the prosecution refuse to turn over evidence “so long as it’s possible the defendant would’ve been convicted anyway,” as the judge wrote. This creates a “serious moral hazard,” he added, particularly since prosecutors are virtually never punished for misconduct. According to the Center for Prosecutor Integrity, multiple studies over the past 50 years show that courts punished prosecutorial misconduct in less than 2 percent of cases where it occurred. And that rarely amounted to more than a slap on the wrist, such as making the prosecutor pay for the cost of the disciplinary hearing.

Brady violations are, by their nature, hard to detect, but Judge Kozinski had

no trouble coming up with more than two dozen examples from federal and state courts just in the last few years, and those are surely the tip of the iceberg. According to the National Registry of Exonerations, 43 percent of wrongful convictions are the result of official misconduct.

The Brady problem is in many ways structural. Prosecutors have the task of deciding when a piece of evidence would be helpful to the defense. But since it is their job to believe in the defendant’s guilt, they have little incentive to turn over, say, a single piece of exculpatory evidence when they are sitting on what they see as a mountain of evidence proving guilt. The lack of professional consequences for failing to disclose exculpatory evidence only makes the breach of duty more likely. As Judge Kozinski wrote, “Some prosecutors don’t care about Brady because courts don’t *make* them care.”

Courts should heed Judge Kozinski’s call, but it will take more than judges to fix the problem. Prosecutors’ offices should adopt a standard “open file” policy, which would involve turning over all exculpatory evidence as a rule, thus reducing the potential for error.

Fighting prosecutorial misconduct is not only about protecting the innocent. It is, as Judge Kozinski wrote, about preserving “the public’s trust in our justice system,” and the foundation of the rule of law.

David Zapp and Johanna Zapp articles are available on the web at <http://davidzapp.com>

Mr. Zapp and Ms. Zapp (daughter) are criminal defense lawyers specializing in narcotics, extradition and money laundering cases.

Mr. Zapp can be contacted at 917-414-4651 or davidzapp@aol.com.

Ms. Zapp can be contacted at 917-742-4953 or jszapp@aol.com

Write to us:
Legal Publications in Spanish
P. O. Box 5024
ATTN: David Zapp, Johanna Zapp
Montauk, NY 11954

