

Serving the cause from both sides

After sentencing policy changes, time to revisit old sentences

For 11 years until this past February, I was proud to work for the U.S. Department of Justice. It was an honor to say in court, on a weekly if not daily basis, “on behalf of the United States.”

As described in the oft-quoted statement of U.S. Supreme Court Justice George Sutherland in 1935, the interest of a prosecutor representing the United States is “not that it shall win a case, but that justice shall be done.”

The American Bar Association Standards for Prosecutors states it succinctly: “The duty of the prosecutor is to seek justice, not merely to convict.”

Because of the good work of federal investigative agencies, including the DEA, FBI, ATF, Homeland Security and others, I was fortunate in my career never to be confronted with a case of actual innocence.

By the time an indictment was returned, we generally had an array of evidence — phone intercepts, cooperating defendants, surveillance, video, documents, seizures — that established a defendant was guilty beyond a reasonable doubt.

As a result, the federal conviction rate in Chicago and around the country, whether through a guilty plea or a conviction at trial, is very high.

In evaluating what is “justice,” however, establishing guilt or innocence is often only half of the equation. In many cases, the guilt of the defendant has been largely established. The next question can become equally or more complicated: What is the appropriate sentence?

For most of the past 30 years, those sentences have been determinate and often severe, especially in drug cases. Indeed, personally, I investigated and prosecuted hundreds of defendants in a wide array of criminal cases. By far the largest proportion of my cases, however, were drug offenses. Those cases ranged from the top of the drug trafficking pyramid, Mexican drug trafficking cartels (including Chapo Guzman and the Sinaloa Cartel), to the lower end of the spectrum, defendants who would more appropriately be classified as low-level, run-of-the-mill drug dealers.

For several decades, the United States sought and often received lengthy sentences for drug offenders. In seeking those sentences, prosecutors and judges were following the law and, in good conscience, “seeking justice.”

In one of my early cases involving a defendant with a substantial retail crack cocaine distribution business, but with no evidence of violence or gang affiliation, the government sought and the court imposed a sentence of 360 months — 30 years — imprisonment. I felt the prosecution team had done a good job in presenting the evidence and obtaining the lengthy sentence. Upon leaving the courtroom, the



Closing Argument

Tom Shakeshaft is a partner in DLA Piper's litigation practice. He focuses his practice on providing defense in global investigations and large-scale, high stakes litigation.

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defense lawyer congratulated me and then hesitated. He said, “but man, that is a lot of Saturdays.”

Over the past five years, a growing bipartisan consensus has emerged in favor of criminal justice reform and questioning, in particular, lengthy sentences for non-violent drug offenders.

Citing a number of philosophies, including the cost of incarceration, racial disparities, mental health and addiction issues, and others, unlikely bedfellows including former attorney general Eric Holder, Sen. Rand Paul and the Koch brothers have expressed agreement that federal drug sentences are too long. In 2010, Congress passed the Fair Sentencing Act, which reduced most federal narcotics sentences. The net result is that there are thousands of federal inmates serving sentences that exceed the sentence they would have received if they were sentenced today.

When I returned to private practice earlier this year, I was pleased to find my new firm participating in the Clemency Project 2014. Announced by then-deputy attorney general James Cole early last year, the Clemency Project 2014 is an independent effort involving more than 1,500 volunteer lawyers from 50 of the nation's largest law firms clinics, not-for-profit organizations and the criminal-defense bar to help identify eligible prisoners and assist them in the preparation of clemency petitions.

To be eligible, inmates must be non-violent offenders who had received prison sentences and who would, were they sentenced today, likely have received significantly lower sentences under current sentencing law and policy.

The Justice Department released six criteria to consider in evaluating an offender's eligibility for clemency. As Cole put it, “For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. Older, stringent punishments that are out of line with sentences imposed today under today's laws erode people's confidence in our criminal justice system.”

For me, participation in the Clemency Project is an extension of my service as a prosecutor, seeking to serve the cause of justice. Reasonable minds may differ about what an appropriate sentence is for a particular crime and whether justice has been served. But when public opinion and public policy have resulted in a change in the law that benefits a criminal defendant, such that the offender is serving far more time than he or she would receive if sentenced today, few can argue that justice is served by requiring the offender to serve the original sentence.

Put differently, in the words of that defense lawyer, in this country, no defendant should spend one more Saturday in jail than is required by current law. ■

thomas.shakeshaft@dlapiper.com