October 12, 2012

VIA EMAIL

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Re: *The Department of Justice's Response to United States v. Simmons*

Dear Mr. Jarrett:

This letter addresses the Department of Justice's recent decision to assist only some of the many federal inmates whose convictions or sentences are improper under the Fourth Circuit's decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). We write to urge the Department to deliver complete rather than partial justice.

In a letter to the American Civil Liberties Union (ACLU) dated September 14, 2012, you wrote that the Department has now taken "concrete steps" to facilitate collateral relief for "persons whose convictions or sentences entitle them to relief under *Simmons*." But your letter does not specify the Department's approach.

We have therefore undertaken our own investigation of current practices at the three United States Attorney's Offices in North Carolina, and we have found two serious problems.

First, by failing to respond in a timely manner to motions for post-conviction relief, one of those three U.S. Attorney's Offices is still prolonging the incarceration of innocent people.

Second, in all three U.S. Attorney's Offices, the Department continues to oppose post-conviction relief for the vast majority of improperly sentenced inmates. If the Department's opposition prevails, inmates will serve out unjust sentences as long as life imprisonment.

These problems with the Department's response to *Simmons* raise fundamental questions about its commitment to ensuring "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, the ACLU urges the Department to further revise its approach to *Simmons*.

Discussion

Simmons held, in effect, that thousands of federal defendants had been wrongly convicted or sentenced. Their incarceration hinges on rulings that they had prior felony convictions in North Carolina, but *Simmons* confirms that their North Carolina convictions were *not* felonies. The Department has conceded that this is no mere procedural defect; rather, each inmate is either innocent of his federal crime or instead serving a sentence based on a false premise.

For nearly one year, the Department prolonged the incarceration of those inmates. When the inmates filed motions for post-conviction relief, the Department asserted defenses that it easily could have waived. Consequently, in June 2012, *USA Today* ran a front-page story on innocent people who were languishing in prison due to the Department's position. Then, in August 2012, the ACLU and the ACLU of North Carolina Legal Foundation requested that the Department identify and assist all inmates whose convictions and sentences are implicated by *Simmons*.

Your recent letter states that the Department has now adequately addressed the problem. But the reality in North Carolina proves otherwise.

I. Wrongly Convicted Inmates

The Department has evidently abandoned its prior decision to assert procedural bars to post-conviction relief for innocent inmates. In two of the three federal districts in North Carolina—the Middle District and the Eastern District—the Department is supporting relief for inmates who, in light of *Simmons*, were improperly convicted of being felons in possession of firearms. This is welcome news.

But in the Western District inmates who are eligible for immediate release from prison are still encountering roadblocks. There, federal defenders have filed 17 motions for post-conviction relief on behalf of innocent inmates. As of October 10, prosecutors have filed responses supporting relief only in five of them. In those five cases, prosecutors faced a court hearing or order that forced the response. In 11 other cases, the government has filed no response whatsoever.[1] In the final case, the government actually filed a seven-page *opposition* to relief, suggesting that the Western District's approach to these cases can only be described as deeply dysfunctional.[2]

The tragedy of this approach is that it prolongs the unjust incarceration of innocent people. Unfortunately, this is not the first time that prosecutorial inaction has hindered justice in the wake of *Simmons*. Although federal prosecutors could have notified the inmates whose convictions or sentences were implicated by *Simmons*, they never did so. Consequently, the burden of identifying wrongly incarcerated inmates has fallen entirely on defense attorneys. That

[1] *See, e.g.*, *United States v. Hughes*, No. 1:05-cr-273 (W.D.N.C.).
[2] *United States v. Bennett*, Nos. 3:10-cr-84 and 3:12-cv-524 (W.D.N.C.).

burden is especially heavy in the Western District, where federal defenders still have not received all of the files they need to identify inmates affected by *Simmons*.

In contrast, the Department appears to be taking a more cooperative approach in Massachusetts, where federal prosecutors are grappling with the revelation that numerous federal and state drug convictions rest on the certification of a state chemist who is accused of grave misconduct. To its credit, the U.S. Attorney's Office for the District of Massachusetts has instructed its prosecutors to identify and notify inmates whose federal convictions rest on certifications from the lab where the chemist worked. In North Carolina, that never happened.

Because notifying or assisting wrongfully convicted inmates has apparently not been a priority for federal prosecutors, innocent people prosecuted in the Western District are still imprisoned.

II. Wrongly Sentenced Inmates

The Department has retreated only slightly from its longstanding opposition to post-conviction sentencing relief in the wake of *Simmons*. It now appears that the Department will waive procedural defenses for a narrow class of inmates: those who were wrongly sentenced under the Armed Career Criminal Act. But the Department still asserts procedural bars in nearly all other post- *Simmons* sentencing cases. That stance is intolerable.

Most importantly, the Department still asserts procedural bars against inmates who unduly received mandatory-minimum and career-offender sentences. Under federal law, mandatory minimum sentences of 10 years, 20 years, or life can be imposed on federal drug offenders who have prior felony drug convictions. And under the U.S. Sentencing Guidelines, "career offender" sentences—often equaling 20 or 30 years' imprisonment—can be imposed on federal offenders who have certain prior felony convictions.[3]

Before *Simmons*, many federal defendants received those enhanced sentences based on the *erroneous* view that they had prior North Carolina felony convictions. Moreover, many of the career-offender sentences operated like mandatory minimums because they were imposed under the unconstitutional mandatory Guideline scheme that was in effect until *United States v. Booker*, 543 U.S. 220 (2005).

Simmons held that those federal sentences were improper because the defendants' prior North Carolina convictions were not punishable by more than a year of imprisonment. In *Simmons* itself, the *en banc* Fourth Circuit ruled that that Mr. Simmons's 10-year mandatory minimum was improper because his prior North Carolina conviction was punishable only by eight months of "community punishment." It was not, therefore, a prior felony conviction.

Countless inmates are serving mandatory minimum and career offender sentences just as erroneous as—and sometimes more severe than—the sentence Mr. Simmons received. Yet federal prosecutors in North Carolina are now saying that the Justice Department has instructed them to assert procedural bars to the relief sought by those inmates.

[3] *See* 21 U.S.C. §§ 841, 851; USSG §§ 4B1.1, 4B1.2; *id.* ch. 5, pt. A (sentencing table).

That instruction is surpassingly unfair.

For example, we understand that the Department is likely to oppose resentencing for Alphonso Morrison, who is serving an unjust mandatory minimum sentence of *life imprisonment*. The government secured that sentence in 2001 by arguing that Mr. Morrison had two prior felony drug convictions. In fact, Mr. Morrison had no such convictions. But, constrained by pre-*Simmons* law, the district court was required to impose a life sentence despite believing that it was an "atrocious result."[4] The court explained:

> [I]f the taxpayers knew they were going to support this gentleman for his entire life in prison based on the facts of this case, they would be outraged . . . .
>
> Now, it also goes without saying that if I had a way to depart or otherwise adjust the sentence, I would do it in the interest of applying the sentencing factors of rehabilitation, punishment, deterrence, and incapacitation fairly.[5]

Rather than seize the opportunity to correct this injustice, the Department now seems poised to exacerbate it. If that view prevails, Mr. Morrison will die in prison.

Your letters do not acknowledge this harsh approach, let alone defend it. Instead, you assert a willingness to "accelerate relief" for inmates sentenced "without legislative authorization."

That stated position is contrary to the Department's actual practice of opposing relief for inmates who improperly received mandatory-minimum and career-offender sentences. To be sure, many of those inmates received sentences falling at or below the statutory maximum sentences for their federal offenses. But they were sentenced "without legislative authorization" because Congress did not authorize (either directly or through the Sentencing Commission) the mandatory-minimum or career-offender sentences they received.

The Department's position is also difficult to reconcile with the fact that federal prisons are operating at 39 percent over capacity.[6] The Department has acknowledged that "[t]his level of crowding puts correctional officers and inmates alike at greater risk of harm and makes recidivism reduction far more difficult," and that the cost of this level of incarceration is unsustainable.[7] One obvious remedy would be to support relief for unjustly sentenced inmates.

Conclusion

Facts on the ground in North Carolina confirm our view that the Department's response to *Simmons* has been, and continues to be, inadequate. The Department should therefore take immediate steps to remedy its present response to *Simmons*:

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[4] Sentencing Hearing Tr. at 17, *United States v. Morrison*, No. 5:99-cr-70 (W.D.N.C. May 7, 2001).
[5] *Id.* at 15-16.
[6] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (Sept. 2012).
[7] Letter from Lanny A. Breuer, Assistant Attorney General, and Jonathan J. Wroblewski, Director, Office of Policy and Legislation, to The Honorable Patti B. Saris, Chair, U.S. Sentencing Commission (July 23, 2012).

1. The Department should make the release of innocent inmates a priority. In the Western District of North Carolina, prosecutors should respond to all now-pending post-conviction relief motions within 15 days of this letter. The Department should respond to all subsequent motions within 20 days after they are filed. If prosecutors need extra resources to meet those deadlines, then the Department should provide them.

2. The Department should waive all available defenses to post-conviction relief sought by inmates whose sentences are implicated by *Simmons*. These waivers are especially urgent in cases involving mandatory-minimum or career-offender sentences.

It is unfortunate that, more than a year after *Simmons*, there is still so much justice left to be done. But we are hopeful that the Department will take corrective action now.

Thank you for your attention to this matter. We will follow up to discuss the possibility of an in-person meeting on these issues.

Respectfully submitted,

Michael Macleod-Ball
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Christopher A. Brook
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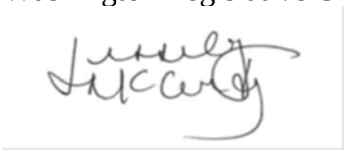

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