



AMERICAN BAR ASSOCIATION

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TESTIMONY

OF

MARGARET COLGATE LOVE

on behalf of the

AMERICAN BAR ASSOCIATION

before the

JOINT COMMITTEE ON THE JUDICIARY

of the

MASSACHUSETTS GENERAL COURT

on the subject of

“Alternative Sentencing and Offender Reentry”

SEPTEMBER 18, 2007

Good afternoon. My name is Margaret Colgate Love, and I welcome the opportunity to testify before you on behalf of the American Bar Association on sentencing reform and offender reentry. I serve as the director of the ABA Commission on Effective Criminal Sanctions, which studies an array of criminal justice issues relating to alternatives to incarceration and the collateral consequences of a criminal conviction. I appear today on behalf of the American Bar Association (ABA). The ABA is the world's largest voluntary professional association, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students. The Association continuously works to improve the American system of justice and to advance the rule of law in the world.

The ABA Commission on Effective Criminal Sanctions is the successor entity to the ABA Justice Kennedy Commission, which was created in response to a speech delivered by U.S. Supreme Court Justice Anthony M. Kennedy at the ABA Annual Meeting in August 2003.¹ Justice Kennedy challenged the legal profession to pay attention to what happens to people after they are convicted and sent to prison. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities, and that returns them to their communities in no better shape – most would say worse shape – than they left it. He pointed out that most states now spend more on prisons than on schools, concluding that “our resources are misspent, our punishments too severe, our sentences too long.” He asked the ABA to help start a new public discussion about American sentencing and corrections policies

¹ Justice Anthony Kennedy Speech to ABA, August, 9, 2003, *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf

and practices. ABA President Dennis W. Archer responded by establishing the Justice Kennedy Commission, whose report to the 2004 Annual Meeting contains a series of policy recommendations that have been hailed as providing a blueprint for sentencing and corrections reform. The recommendations covered an array of issues, including alternatives to incarceration and sentencing, racial and ethnic disparity in the criminal justice system, clemency and restoration of rights, prison conditions and prisoner reentry.²

The Commission on Effective Criminal Sanctions has continued the important work of the Justice Kennedy Commission. Composed of a distinguished group of judges, prosecutors, defenders, corrections officials and academics, this new Commission has worked to develop a broad consensus within the criminal justice community about what can and should be done to reduce reliance on incarceration and to reduce recidivism. The ABA Commission also works with jurisdictions to promote the actual implementation of the policy recommendations. So, today we are honored to have the opportunity to share our recommendations with the Massachusetts Legislature.

The issues facing our criminal justice system are vast. The population of our prisons and jails continues to grow and is now approaching 2.2 million people, or 25% of the world's prison population. Systemic racial disparity remains a significant concern. Every year 650,000 people are released from our nation's prisons, and are making the

² ABA Justice Kennedy Report, August 2004, *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf

difficult transition from prison to the community. Two-thirds of them will fail and will return to prison within three years.³

Recently there has been a new bipartisan interest in many states, driven in the first instance by fiscal constraints, in developing alternative sentencing strategies to avoid further prison expansion, and in finding what works to reduce recidivism. There is a new appreciation of the importance of prisoner reentry, and the federal government is providing funding for state and local programs to provide support services to returning prisoners. Currently, Congress is considering the “Second Chance Act”, which will provide much needed funding to states and local programs that assist with reentry.

Our commission is particularly interested in learning how the legal system in each jurisdiction either supports or discourages innovative approaches to facilitating offender reentry and reintegration. Our focus was initially on the following areas:

- Alternative sentencing strategies that offer minor offenders a chance to avoid prison and a conviction record;
- Innovative community-based interventions for drug-related crimes that work to reduce recidivism;
- Laws and policies aimed at neutralizing the effect of a conviction through executive and judicial relief mechanisms, and at encouraging employment of people with criminal records.

The Commission held public hearings in Washington and Chicago and heard from top criminal justice officials from Arkansas, Connecticut, Illinois, Kansas, Maryland,

³ Patrick A. Langan and David J. Levin, Recidivism of Prisoners Released in 1994 Report, Bureau of Justice Statistics, June 2002, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>

Michigan, New York and Oregon about programs that were working to reduce recidivism rates in their jurisdictions.

Witnesses provided detailed information about programs and policies that steer less serious offenders into community corrections programs rather than prison, and reentry initiatives that help offenders gain job skills and secure housing, and neutralize the effect of a criminal record for employment and other purposes. The Commission was particularly impressed by alternative sanctioning programs developed by prosecutors' offices, and by collaborative efforts among justice stakeholders under the auspices of the courts. In addition, the Commission met with people with criminal records to discuss their views on how to improve the system. After gathering information from the hearings and other research, the Commission developed a series of six policy recommendations on (1) alternatives to incarceration, (2) improvements in probation and parole supervision, (3) employment and licensure for persons with a criminal record, (4) access to and use of criminal history information, (5) collateral consequences of conviction and (6) training in the exercise of discretion.

One of the most remarkable things about the Commission's recommendations is that, for the first time ever, the National District Attorneys Association joined in co-sponsoring ABA policy recommendations. These recommendations were approved by the ABA House of Delegates, our policy-making body, in February 2007.

I would like to take a few minutes to discuss each recommendation in further detail.

1) Alternatives to Incarceration and Conviction for Less Serious Offenders⁴:

- *Community-Based Sentencing Alternative.* The Commission urges prosecutors to develop and take full advantage of diversion and deferred adjudication programs that would allow all but the most serious offenders to avoid incarceration and a conviction record.
- *Eligibility for Community-based Treatment Programs.* Offenders who have more than one conviction or a history of minor violence ought not be excluded from community-based substance abuse and mental health treatment programs, provided they meet other qualifications for community supervision.
- *Criminal Justice Working Groups.* Prosecutors, defenders and courts should form working groups to review, monitor, and improve systemic alternatives to incarceration and conviction.

2) Improvements in Probation and Parole Supervision⁵:

- *Graduated Sanctions.* Jurisdictions should develop meaningful graduated sanctions for violations of probation or parole (including brief periods of community detention where appropriate).
- *Reduced Reliance on Incarceration.* Imprisonment should be reserved for individuals who engage in repeated non-criminal violations, and imposed only after lesser sanctions have proven ineffective in deterring the behavior. In such cases, the length of incarceration should be limited to a period

⁴ ABA Commission on Effective Criminal Sanctions Report I: Alternatives to Incarceration, Feb. 2007, available at

<http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>

⁵ ABA Commission on Effective Criminal Sanctions Report II: Improvements in Probation and Parole Supervision, Feb. 2007, available at

<http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportII121306.pdf>

reasonably necessary to modify the individual's behavior and deter future violations.

- *Improvements in Supervision.* Jurisdictions should also distinguish between offenders who would benefit from community supervision and those who would not, and should reduce probation and parole caseloads to improve the quality and intensity of supervision in appropriate cases.
- *Evaluation of Probation/Parole Officials.* Consideration should be given to the number of individuals under an officer's supervision who successfully complete supervision when judging the performance of a probation and parole officer.

3) Employment and Licensure of Persons with a Criminal Record⁶:

- *Government Policy Encouraging Employment of Persons with a Criminal Record.* Government agencies and licensing boards should develop and enforce policy encouraging the employment of people with convictions, and these policies should also be applied to contractors and vendors who do business with the state. A criminal record should be considered disqualifying only if the offense conduct substantially relates to the particular employment or license, or presents a present threat to public safety.
- *Inventory and Repeal of Statutory Disqualifications.* Government agencies should also inventory applicable employment restrictions and disqualifications; repeal or modify those that are not substantially related to the particular employment or that are not designed to protect the public safety;

⁶ ABA Commission on Effective Criminal Sanctions Report III: Employment and Licensure of Persons with a Criminal Record, Feb. 2007, available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.III.PDF.121306.pdf>

provide for an exemption process and a statement of reasons in the event a person is turned down for employment because of their criminal record; and provide judicial or administrative review of a decision to deny employment based upon conviction.

- *Judicial or Administrative Relief from Collateral Consequences.* Jurisdictions should make available a judicial or administrative process for mitigating or relieving collateral penalties and disabilities, and establish standards for certifying an offender's good conduct or good character.
- *Hiring Incentives for Private Employers and Liability Waivers.* Hiring incentives for private employers should be created to encourage job opportunities for people with a criminal record, and liability waivers against lawsuits should be available to an employer that relied upon a judicial or administrative order relieving disabilities or certifying rehabilitation when making the hiring decision.

4) Access to and Use of Criminal History Information for Non-Law Enforcement Purposes⁷:

- *Balanced Criminal Record Policies.* Jurisdictions should develop policies limiting access to and use of criminal history records for non-law enforcement purposes, which balance the public's right of access to information against the government's interest in encouraging successful offender reentry and reintegration.

⁷ ABA Commission on Effective Criminal Sanctions Report IV: Access to and Use of Criminal History Information for Non-Law Enforcement Purposes, Feb. 2007, *available at* [http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report103Drev3307\(2\).pdf](http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report103Drev3307(2).pdf)

- *Accuracy of Criminal Records.* Standards to maximize reliability and integrity of records in reporting systems should be established, and individuals and the government should be provided a mechanism to challenge the accuracy and completeness of those records.
- *Regulation of Reporting Agencies.* Jurisdictions should establish standards for and controls over records reporting systems, and private screening companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged.

5) Legal Representation Relating to Collateral Consequences⁸:

- *Defenders.* Jurisdictions should assist defenders in advising their clients of the collateral consequences of conviction.
- *Prosecutors.* Prosecutors should also be informed of collateral consequences that may apply in a particular case and factor them into the decision-making process.
- *Correction, Probation and Parole Officials.* Prison, probation and parole officials should be required to advise offenders about how they may obtain relief from collateral consequences prior to their release or during supervision.
- *Additional Funding.* Jurisdictions should provide additional funds to public defender and legal aid offices to enable them to assist offenders in removing or neutralizing the collateral consequences of conviction.

6) Training in the Exercise of Discretion⁹:

⁸ ABA Commission on Effective Criminal Sanctions Report V: Legal Representation Relating to Collateral Consequences, Feb. 2007, *available at* <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.V.PDF.121306.pdf>

- *Training Programs.* Prosecutors and all criminal justice professionals who exercise discretion in the justice system – including judges, prosecutors, defense counsel, probation and parole officers, and correctional officials - should participate in training that will give them greater understanding of what elements should be considered in the exercise of their discretion.
- *CLE credits.* Such training should be credited towards continuing education program requirements.

That the Commission reached a consensus on these recommendations was no small feat, given the diversity of personal and institutional perspectives represented by its members. Even more remarkable was the endorsement and co-sponsorship of the National District Attorneys Association previously alluded to. The recommendations were also co-sponsored by the National Legal Aid and Defender Association and the National Association of Criminal Defense Attorneys. With the support from these national organizations representing both the prosecutor and defender communities, the Commission hopes that its recommendations will shortly become the basis for a reform agenda in jurisdictions across the country that are attempting to come to grips with the problem of recidivism.

In May 2007, the Commission began work on a policy recommendation on access to criminal history information. Based on testimony from employers, criminal background screeners, persons with criminal records, media attorneys and civil legal aid attorneys during our Spring Conference, the Commission is considering whether there are any circumstances under which records should be closed or sealed from general public

⁹ ABA Commission on Effective Criminal Sanctions Report VI: Training in the Exercise of Discretion, Feb. 2007, available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.VI.PDF.121306.pdf>

access and whether credit reporting agencies and others should be prohibited from disclosing records. The Commission is seeking to balance the values of open access and individual privacy that underlie criminal records policy, and the important public safety goals of successful offender reentry and reintegration. The Commission has not yet formally presented any recommendation to the ABA House, in light of concerns expressed by the press and business community.

The ABA Commission has received overwhelming support from the legal community to its policy recommendations relating to removal of the legal barriers to reentry. All across this country there is a growing recognition that the criminal justice community can no longer afford to focus exclusively on front-end issues such as sentencing without acknowledging its responsibility on the back end to assist people returning to the community with successful reintegration. Particularly since 9/11, a criminal record has become a Mark of Cain where jobs and housing and other opportunities are concerned. Most people would agree that a person should be entitled to a second chance after they have completed their court-imposed sentence, though most jurisdictions have not figured out exactly how to accomplish this.

We are very pleased today that the Commonwealth of Massachusetts is considering legislation that would assist people with criminal records in realizing the dream of reestablishing themselves as full and productive members of the community.

Again, thank you for the opportunity to present the views of the American Bar Association.