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CLEMENCY PUSH CREATES HUGE DEMAND FOR PRO BONO LAWYERS

Thousands of nonviolent drug offenders will be petitioning for shortened sentences under Obama's new clemency initiative. All need lawyers. **BY ROSS TODD**

IN AN UNUSUAL MOVE, the federal government is asking the private bar for help in getting inmates out of its prisons. To take advantage of the Obama administration's offer of executive clemency to qualified federal prisoners, inmates will need legal counsel to prove that they meet a range of requirements for release. It's a task that will require thousands of pro bono lawyers.

At the administration's request, lawyers from five legal nonprofits have organized Clemency Project 2014, an unprecedented marshaling of pro bono resources. "My hope for the project is that a substantial number of individuals that have had excessive mandatory minimum sentences will have a second chance at life," says Crowell & Moring public service partner Susan Hoffman, who serves on the project's pro bono committee.

The project began with a January 2014 speech by Deputy U.S. Attorney General James Cole in which he said the nation's "crushing prison population"

had become a crisis. The U.S. Department of Justice spent about \$6.5 billion last year on a federal prison system operating at 33 percent above capacity. Cole cited President Barack Obama's decision in December to commute the sentences of eight men and women who had all served more than 15 years for crack cocaine offenses. Since their convictions, U.S. Supreme Court decisions had undermined the mandatory minimum sentences they were serving while legislation brought the punishments for crack cocaine offenses more in line with those for powder cocaine. (Crack offenses were punished on a weight ratio as high as 100-to-1 compared with powder cocaine prior to the passage of the Fair Sentencing Act of 2010.)

"There are more low-level, nonviolent drug offenders who remain in prison, and who would likely have received a substantially lower sentence if convicted of precisely the same offenses today," Cole said. "This is not fair, and it harms our criminal justice system."

In February, Cole brought together representatives from Federal Defenders, the American

Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association



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and the National Association of Criminal Defense Lawyers for a meeting in Washington, D.C., appealing to them to screen and represent thousands of potential candidates.

NACDL executive director Norman Reimer says, “As a professional, when you hear a call like that for volunteerism, you rise to the occasion.”

Since the first meeting with Cole, the clemency project groups have been sprinting to develop training materials, create a technical infrastructure to manage the potential caseload and build a volunteer network. While the NACDL, Federal Defenders and the ABA’s Criminal Justice Section have spread the word to their own members, the project has tapped the Lawyers’ Committee for Civil Rights to organize large law firm volunteers.

One of the first firms to sign on was Crowell & Moring. For more than a decade, partner Thomas Means, who usually handles regulatory matters for mining companies, has been taking referrals to do pro bono clemency work from FAMM. Among his clients: Stephanie George, a Florida woman who served 17 years in federal prison for a non-violent drug offense before Obama commuted her life sentence last December. Bolstering her clemency petition was the fact that the judge who sentenced her in 1997 voiced regret that a defendant who was a “girlfriend and bag holder and money holder” faced life without parole under the mandatory

minimum sentencing laws then in effect.

Means, who has helped win clemency for three other clients, says the challenge in these cases is getting the attention of the DOJ’s Office of the Pardon Attorney, which reviews thousands of clemency requests per year. The DOJ has promised that won’t be an issue for this wave of clemency cases. In April, Cole announced that the DOJ will detail federal

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prosecutors to staff the office to handle the anticipated influx of petitions, even bringing in federal defenders to help.

At the same time, the deputy AG announced specific eligibility criteria for the program: It will be open to nonviolent, low-level offenders without ties to gangs or organized crime. Prisoners must have served at least 10 years, have no significant history of crime or violence and have shown good conduct in prison. And in the toughest legal question facing Clemency Project 2014 volunteers, inmates must show that they likely would have received a substantially lower sentence if convicted today.

The Bureau of Prisons sent surveys to all 216,000 federal inmates in early May as a first screen of eligibility. Within the first two days, 4,000 prisoners had responded, and another 4,000 had begun filling out the survey. Steering committee members estimate that between 20,000 and 40,000 inmates will pass the DOJ’s initial screen and need further vetting from the project.

The Lawyers’ Committee’s Nancy Anderson, who has helped organize other large-scale pro bono projects, including LCCR’s national election day call center program, has been working with representatives from FAMM and NACDL to develop a process for identifying qualified candidates for clemency. First, a lawyer—or a paralegal or legal assistant under lawyer supervision—will look at the survey data

and publicly available docket material to confirm the prisoner’s eligibility, a process that Anderson estimates could take 10 to 30 minutes. If an inmate appears qualified, a project lawyer will take on a limited representation to request access to the inmate’s presentencing report, Bureau of Prisons records, and other relevant nonpublic information. If an inmate passes the second screening, the project will make sure he or she has representation to draft a petition geared toward meeting the DOJ’s criteria. Clemency project lawyers say that the DOJ has told them there will be a six-month window to submit applications once the process is up and running, but the project lawyers hope the administration will consider worthy candidates until the president leaves office in January 2017.

Although Means and his colleagues spent nearly 300 hours on George’s clemency petition, Crowell’s Hoffman thinks that Clemency Project 2014 lawyers will take between 50 and 60 hours for each case. “Because

the criteria are enumerated, my sense is that these petitions will be much more direct,” she says. (Even at 50 hours per case, if there are 10,000 eligible prisoners, that would translate to about 500,000 hours, equivalent to about 10 percent of all pro bono hours worked by The Am Law 200 in 2012.)

Hoffman says that the Clemency Project 2014 process is so different from traditional

clemency work that even lawyers with prior clemency experience such as Means will be required to go through the program’s Web-based training. As of early May, the Lawyers’ Committee’s Nancy Anderson says, 50 firms have expressed interest in participating.

NACDL executive director Reimer says the organizers of the project are thrilled with the potential of the program. However, it’s not a total fix to “overly severe sentencing,” he says. He and others on the steering committee point to legislation introduced by U.S. Sens. Dick Durbin and Mike Lee that would give judges more discretion in sentencing drug crimes and create a mechanism for some individuals sentenced under old guidelines to petition for sentence reductions.

“I think we are hopeful that this marks the beginning of the end of mass incarceration,” Reimer says. “We have to make sure we never need clemency on this scale ever again.”

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Law firms interested in volunteering for Clemency Project 2014 can contact LCCR’s Nancy Anderson at nanderson@lawyerscommittee.org.