UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **LUIS ANTHONY RIVERA,** **Defendant.**	**Case Nos. 83-00096-01-CR** **83-000138-02-CR**

DEFENDANT'S CORRECTED MOTION TO VACATE COUNT 7 IN CASE NO. 83-00096-01-CR

Defendant Luis Anthony Rivera respectfully requests that this Court vacate Count 7 of his conviction in Case No. 83-00096-01-CR, reduce his sentences in each of Case Nos. 83-00096-01-CR and 83-00138-02-CR to 30 years, and run the two 30-year sentences *concurrently* with each other—thereby resulting in his immediate release from prison.

Summary of Motion

In 2014, United States District Judge John Gleeson of the Eastern District of New York—himself a former federal prosecutor—saw the opportunity to mitigate the effects of what, with the benefit of hindsight, was an unduly harsh sentence and sought, and ultimately received, the consent of then-U.S. Attorney (and now Attorney General) Loretta Lynch to the vacation of certain convictions entered in the case of Francois Holloway—thus creating the *Holloway* doctrine. *See United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).[1] The *Holloway* doctrine recognizes that district courts have the discretion, inherent in our American system of justice, to

[1] For the Court's convenience, a true and correct copy of the *Holloway* decision is attached hereto as Exhibit 1.

subsequently reduce a defendant's sentence in the interests of fairness—"even after all appeals and collateral attacks have been exhausted and there is neither a claim of innocence nor any defect in the conviction or sentence"—when it has clearly been demonstrated that the original sentence sought by the United States and imposed by the court (even when mandated by law) is revealed to be disproportionately severe.

Here, this Court imposed the *maximum* sentence of "life without parole" plus a *concurrent* 140 years following Luis Anthony Rivera's ("Rivera") convictions for cocaine distribution offenses in two related indictments in 1985. Rivera will *never* be released from prison unless this motion is granted.

During the past 30 years, despite the fact that he had no realistic hope of being released from prison, Rivera has been an exemplary inmate. He has never received any disciplinary infractions and, as will be shown, has accomplished many great things in prison. For this reason, a Bureau of Prisons ("BOP") psychologist recently wrote a letter supporting Rivera's release from prison. Additionally, before his convictions in 1985, Rivera had no prior criminal record and was a veteran of the United States Army National Guard.

Rivera respectfully requests the Court follow the *Holloway* doctrine by vacating Count 7 in 83-00096-01-CR and reducing his sentence to 30 years in each indictment (83-00096-01-CR and 83-00138-02-CR). Rivera also respectfully requests that the Court order that the two 30-year sentences run *concurrently* with each other. Such relief would result in his immediate release from prison.

Factual and Procedural Background

Rivera no longer contests his guilt and takes full responsibility for his criminal behavior that occurred over 32 years ago. He deeply regrets his involvement in a conspiracy to distribute

cocaine and his decision to go to trial instead of pleading guilty. Rivera's impeccable behavior and significant positive accomplishments during the past 30 years he has spent in prison clearly show that he is not the same person who made these terrible decisions and that he merits a second chance to show that he can be a law-abiding and productive citizen.

Rivera was the youngest of three children and was raised in a close-knit family in Miami, Florida. Presentence Report ("PSR") at 6.[2] He began working at age 13 and continued working through junior high and high school. *Id.* at 7. After graduating from high school, Rivera briefly attended Miami-Dade Community College before enlisting in the United States Army National Guard in 1978. *Id.* at 6. Rivera was honorably discharged from active status in 1981. *Id.* at 7-8.

In 1982, Rivera, then approximately 25 years old, became involved in a conspiracy to distribute cocaine. In July 1983, after a plane delivered approximately 465 pounds of cocaine to an airstrip located near Talihina, Oklahoma, it was then allowed to take off and land in Dallas, Texas. *Id.* at 1. Following the plane's arrival in Dallas, several individuals were arrested in connection with the earlier delivery of cocaine in Oklahoma. *Id.* Many of these individuals cooperated with the FBI. *Id.* These cooperators provided information that Rivera was a participant in a conspiracy to distribute cocaine that began in 1982. *Id.*

Rivera helped plan the importation and then transportation of large amounts of cocaine throughout the United States. *Id.* at 2-3. Specifically, his role was to arrange the necessary aircraft and trucks needed for the importation and transportation of cocaine. *Id.* Besides the importation of cocaine that occurred in July 1983, other importations of cocaine also occurred, including shipments in July 1982 and May 1983. *Id.*

[2] A true and correct copy of Rivera's PSR is attached hereto as Exhibit 2, but will be filed under seal.

Rivera and six co-defendants were subsequently indicted on July 27, 1983 in the Eastern District of Oklahoma (Case No. 83-00096-01-CR). This indictment pertained to the May and July 1983 importations of cocaine. Rivera was charged in all seven counts of the indictment: count 1, conspiracy to import cocaine; count 2, importing cocaine; count 3, conspiracy to possess with the intent to distribute cocaine; count 4, possession with the intent to distribute cocaine; count 5, conspiracy to travel to promote importation of cocaine; count 6, traveling to promote importation of cocaine; and, count 7, continuing criminal enterprise.

Rivera and one co-defendant were then indicted in a second case on November 10, 1983 in the Eastern District of Oklahoma (Case No. 83-00138-02-CR). This indictment pertained to the cocaine importations that occurred before 1983. Rivera was charged in all six counts of the indictment. The six counts were identical to counts 1 through 6 in the first indictment. The second indictment did not charge a seventh count for continuing criminal enterprise.

There was also a third indictment in the Eastern District of Oklahoma (Case No. 83-00119-CR). Rivera was charged with two counts: conspiracy to import cocaine and conspiracy to possess with the intent to distribute cocaine. This third indictment, however, was later dismissed.

Rivera was a fugitive until he was arrested on January 17, 1985 in Colorado. On March 25, 1985, a jury found him guilty on all counts charged in the two indictments. At sentencing, Rivera did not express remorse and this Court imposed the maximum sentence allowable under both indictments. In Case No. 83-00096-01-CR, Rivera received the following sentence: 15 years each on counts 1, 2, 3, and 4, to run consecutively, totaling 60 years; 5 years each on counts 5 and 6, to run consecutively, totaling 10 years; and "life without parole" on count 7, to run concurrently with the sentences for counts 1-6. Therefore, for the first indictment, Rivera received "life without parole" plus a concurrent 70-year sentence.

For the second indictment, in Case No. 83-00138-02-CR, Rivera received the following sentence: 15 years each on counts 1, 2, 3, and 4, to run consecutively, totaling 60 years; and 5 years each on counts 5 and 6, to run consecutively, totaling 10 years. Therefore, for the second indictment, Rivera received a 70-year sentence.

Finally, this Court ordered that the 70-year sentences imposed in the two indictments run *consecutively* to each other and *concurrently* with the "life without parole." In sum, Rivera received a total sentence of "life without parole" plus a concurrent 140 years.

On August 11, 1993, this Court, following the mandate of the United States Court of Appeals for the Tenth Circuit, vacated Rivera's convictions on counts 1 and 3 in both indictments. An amended Judgment and Commitment ("J&C") correcting Rivera's sentence was never issued. There is no dispute, however, that Rivera's present sentence is "life without parole" plus a concurrent 80 years.

This Court Should Apply the *Holloway* Doctrine to Reduce Rivera's Sentence

A. The *Holloway* Doctrine Permits Courts to Reduce Disproportionately Severe Sentences

In 1995, Francois Holloway, then age 38, was convicted of carjacking three cars at gunpoint. *Holloway*, 68 F. Supp. 3d at 312. He was sentenced to a mandatory 57 years in prison by Judge Gleeson based on the requirement that each count be stacked and served consecutively. *Id*. at 312-13. Eighteen years later, in February 2013, Judge Gleeson[3] asked then-U.S. Attorney Lynch to agree to an order vacating two or more of Holloway's convictions, thereby making him immediately eligible for release. *Id*. at 314. As Judge Gleeson noted, "[Holloway] would likely

[3] Notably, Judge Gleeson could hardly be described as "soft on crime." Before becoming a district judge, Judge Gleeson served as an Assistant United States Attorney ("AUSA") for the Eastern District of New York. While serving as an AUSA, Judge Gleeson successfully prosecuted many organized crime members, including John Gotti, the head of the Gambino crime family.

have fared better if he had committed murder. The average sentence in federal court for murder in fiscal year 2013 was 268 months; the median was 240 months. If Holloway had gotten 268 months, he'd already be out of prison." *Id.* at 313. Additionally, Judge Gleeson observed that Holloway had bettered himself in prison and had only incurred five minor disciplinary infractions during his almost twenty years in prison. *Id.* at 314.

U.S. Attorney Lynch initially rejected Judge Gleeson's request on the basis that Holloway should apply for a commutation of his sentence. *Holloway*, 68 F. Supp. 3d at 314. After a new clemency initiative made clear that it was unlikely Holloway would ever receive a commutation from the President because of the violent nature of his crimes, Judge Gleeson asked U.S. Attorney Lynch to reconsider her request. *Id.* Upon reconsideration, U.S. Attorney Lynch agreed to a dismissal of two counts of Holloway's conviction, ultimately resulting in Holloway's release from prison. *Id.* at 315. Judge Gleeson stated in his July 2014 decision granting the motion to dismiss:

> This is a significant case, and not just for Francois Holloway. It demonstrates the difference between a Department of Prosecutions and a Department of *Justice*. It shows how the Department of Justice, as the government's representative in every federal criminal case, has the power to walk into courtrooms and ask judges to remedy injustices.
>
> The use of this power poses no threat to the rule of finality, which serves important purposes in our system of justice. There are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly. But the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences, including many serving multiple decades and even life without parole for narcotics offenses that involved no physical injury to others. Even seasoned federal prosecutors will agree that many of those sentences were (and remain) unjustly severe.
>
> The United States Attorney has shown here that justice is possible in those cases. A prosecutor who says nothing can be done about an

> unjust sentence because all appeals and collateral challenges have been exhausted is actually *choosing* to do nothing about the unjust sentence. Some will make a different choice, as Ms. Lynch did here.
>
> Numerous lawyers have been joining *pro bono* movements to prepare clemency petitions for federal prisoners, and indeed the Department of Justice has encouraged the bar to locate and try to help deserving inmates. Those lawyers will find many inmates even more deserving of belated justice than Holloway. Some will satisfy the criteria for Department of Justice support, while others will not. In any event, there's no good reason why all of them must end up in the clemency bottleneck. Some inmates will ask United States Attorneys for the kind of justice made possible in this case, that is, justice administered not by the President but by a judge, on the consent of the Department of Justice, in the same courtroom in which the inmate was sentenced. Whatever the outcome of those requests, I respectfully suggest that they should get the same careful consideration that Ms. Lynch and her assistants gave to Francois Holloway.

Id. at 316 (emphasis in the original).

B. Rivera's Exemplary Prison Behavior During the Past 30 Years Warrants Application of the *Holloway* Doctrine

During his 30 years of incarceration, Rivera has never received *any* disciplinary infractions.[4] This is truly a remarkable feat because, generally speaking, inmates serving "life without parole" sentences are management problems because they have no expectation of ever being released from prison and therefore show little regard for prison rules. Additionally, not only has Rivera not incurred any disciplinary infractions, but he has been a positive role model for other inmates. BOP psychologist, Dr. Javier Mouriz recently stated that:

> …I am a psychologist at the Federal Correctional Complex in Coleman, Florida. I am writing this letter on behalf of Luis Rivera, … who is seeking a release from his sentence or a reduction to his sentence.

[4] A true and correct copy of a blank printout reflecting a clean disciplinary record from the BOP is attached hereto as Exhibit 3.

> I first came to know Inmate Rivera in 2005 when he was assigned to USP-1 Coleman. Soon after his arrival, he sought admittance to the Challenge Program. The Challenge Program is a voluntary, year-long, residential program designed to help offenders improve their rational thinking skills and correct criminal thinking. As the coordinator, I supervised his treatment in the program.
>
> … He was an active participant in his treatment and genuinely worked to improve his character. He acknowledged the errors in the thinking patterns which led to his incarceration and demonstrated during the treatment how he had changed. Since the completion of his treatment …, Inmate Rivera has resided in the treatment unit as a mentor/instructor. He has been placed in that role due to the assessment by staff that he is a positive role model for other inmates. In addition, Inmate Rivera has unique and valuable skills in the areas of electronics, printing, and arts and has frequently used these technical skills to help the program.
>
> Inmate Rivera has an impeccable institutional record. He has no disciplinary history in the approximately 30 years while incarcerated. This lengthy period of good conduct demonstrates a steady focus on doing the right things over a long period of time. It also shows he is truly committed to following rules and living in harmony with others. This long period of good conduct stands out in that **this author has worked in the prison system for over 23 years and has never seen such a lengthy record of good conduct**.
>
> In addition to good conduct, Inmate Rivera has a very steady work history. He has worked in the same job assignment since his arrival at this facility in 2005 and receives excellent work reports.
>
> I am in support of any consideration regarding a reduction in sentence or release from sentence for Inmate Rivera. As noted above, Inmate Rivera has demonstrated over a long period of time he is capable and willing to live within established rules and to improve himself. He has worked to change the character defects which led to his incarceration and has prepared for a reentry to society.[5]

(Emphasis added.)

[5] A true and correct copy of BOP psychologist Dr. Javier Mouriz's letter is attached hereto as Exhibit 4.

Rivera has shown that he is even more deserving of the benefit of the *Holloway* doctrine than Holloway himself. First, unlike Holloway, there were no outward acts of violence or any guns involved in Rivera's crimes. Second, at the time of his criminal behavior, Rivera was approximately 25 years old, a veteran of the United States Army National Guard, and had no prior criminal record. Third, Rivera has already served over 30 years in prison, has been a model inmate, and has never incurred any disciplinary infractions. Finally, Rivera has already served eight years *more* than the average murder sentence of 22 years noted by Judge Gleeson in *Holloway*—even though Rivera's crimes did not involve violence or guns.

C. Rivera's Sentence is Disproportionately Severe Compared to Sentences Imposed on Leaders of Major Drug Trafficking Organizations and His Co-Defendants

There is no dispute that Rivera committed serious crimes and deserved a substantial prison sentence. In retrospect, however, it is clear that the punishment presently imposed on him, "life without parole" plus a concurrent 80 years, is disproportionately severe compared to the sentences received by leaders of major drug trafficking organizations. The following examples illustrate this argument:

- The Arellano-Felix Drug Organization ("AFO") was "once among the world's most violent and powerful multi-national drug trafficking organizations." *See, e.g.*, FBI, "Last of the Arellano-Felix Brothers Sentenced" (Aug. 19, 2013), *available at* https://www.fbi.gov/sandiego/press-releases/2013/last-of-the-arellano-felix-brothers-sentenced (last accessed Aug. 4, 2015). The AFO was responsible for moving hundreds of tons of cocaine and marijuana from Mexico and Colombia into the United States. *Id.* The organization terrorized the southwest United States border with executions, torture, beheadings, kidnappings, and bribes to law enforcement. *Id.* In 2013, Eduardo Arellano-Felix, who acted as the chief financial

officer of the organization was sentenced to 15 years in federal prison. *Id.* His brother Benjamin, also an organization leader, was previously sentenced to 25 years in federal prison. The third brother and primary leader of the organization, Javier, was sentenced to life in prison. *Id.*

- Osiel Cardenas-Guillen was the former head of the Gulf Cartel. The Gulf Cartel was responsible for importing thousands of kilograms of cocaine into the United States from Mexico and using violence and intimidation to further the goals of the criminal enterprise. In 2010, Cardenas-Guillen was sentenced to 25 years in federal prison. *See, e.g.*, FBI, "Osiel Cardenas-Guillen, Former Head of the Gulf Cartel, Sentenced to 25 Years' Imprisonment" (Feb. 24, 2010), *available at* https://www.fbi.gov/houston/press-releases/2010/ho022410b.htm (last accessed Aug. 4, 2015).
- George Jung was responsible for 85% of the cocaine smuggled into the United States in the 1970s and 1980s and was released from federal prison in 2014 after serving approximately 20 years. *See, e.g.*, CBS, "Notorious Ex-Cocaine Kingpin George Jung Out of Prison, Living in San Francisco" (June 3, 2014), *available at* http://sanfrancisco.cbslocal.com/2014/06/03/notorious-ex-cocaine-kingpin-george-jung-out-of-prison-living-in-san-francisco/ (last accessed Aug. 4, 2015). He was originally sentenced to 60 years but received a reduction based on cooperation. *Id.*
- Finally, Griselda Blanco, known as the Cocaine Godmother and the Queen of Cocaine, was a drug lord of the Medellín Cartel and a pioneer in the Miami-based cocaine drug trade and underworld during the 1970s and early 1980s. *See, e.g.*,

CBS, "The Hunt for the 'Cocaine Godmother'" (Sept. 27, 2012), *available at* http://miami.cbslocal.com/2012/09/27/the-hunt-for-the-cocaine-godmother/ (last accessed Aug. 4, 2015). In addition to moving tons of cocaine into the United States, Blanco was responsible for ordering several drug-related murders. *Id.*; *see also* Biography.com, "Griselda Blanco Biography," *available at* http://www.biography.com/people/griselda-blanco-2096540 (last accessed Aug. 4 2015) (noting that Blanco was a named suspect in more than 200 murders). In 1988, she was sentenced to 15 years in federal prison. *Id.*

Not only has Rivera's sentence proven disproportionately severe when compared with the sentences received by these notorious and violent drug kingpins, it is also starkly disproportionate to the sentences received by Rivera's co-defendants, all of whom were released at least 24 years ago. A search of the BOP website, http://www.bop.gov/inmateloc/, shows that all of Rivera's co-defendants were released from federal prison no later than 1991. In Case No. 83-00096-01-CR, there were six co-defendants charged with Rivera: Cecil Debbs Ford (released in 1989); William A. Sebolt (released in 1985); Charles Timberlake (released in 1991); Eduardo Sanabria (released in 1988); Mitchell Skiff Engelhart (released in 1991); and Roger Ariza (not found on BOP website, but he was sentenced to five years and therefore was released well before 1991). In Case No. 83-00138-02-CR, there was one co-defendant charged with Rivera: Alan Kaye (released in 1988).

Conclusion

Luis Rivera, now almost 59 years old, has served over half his life in prison. When he was arrested in 1985, his close-knit family was still intact, but during the past 30 years both his parents and one brother have passed away. Rivera, however, has remained close with his other brother and, if released from prison, will reside with him.

There is nothing left to be gained by Rivera spending the rest of his life in prison. He poses no meaningful risk to public safety. Spending tens of thousands of dollars per year to keep him locked up for the rest of his life is a waste of resources, both human and financial, and no longer serves any just purpose.

Accordingly, Rivera respectfully requests that the Court grant this motion to vacate Count 7 in Case No. 83-00096-01-CR and then re-sentence him in both Case No. 83-00096-01-CR and Case No. 83-00138-02-CR. In Case No. 83-00096-01-CR, Rivera should be sentenced to 15 years each on counts 2 and 4, to run consecutively to total 30 years (as previously discussed, in 1993, this Court dismissed counts 1 and 3) and sentenced to 5 years each on counts 5 and 6, to run consecutively to total 10 years, but *concurrently* to counts 2 and 4. Therefore, for the first indictment, Rivera should receive a total sentence of 30 years. In Case No. 83-00138-02-CR, Rivera should be sentenced to 15 years each on counts 2 and 4, to run consecutively to each other totaling 30 years (as previously discussed, in 1993, this Court dismissed counts 1 and 3) and sentenced to 5 years each on counts 5 and 6, to run consecutively to each other totaling 10 years, but *concurrently* to counts 2 and 4. Therefore, for the second indictment, Rivera should receive a total sentence of 30 years. Finally, the two 30-year sentences imposed should run *concurrently* to each other resulting in Rivera's immediate release from prison.

Dated: August 13, 2015

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By:_____

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CERTIFICATE OF CONFERENCE

On July 30, 2015, the United States Attorney's Office informed me that they would review the motion and file a response.

Sam S. Sheldon

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2015, I emailed the foregoing motion and proposed order to Assistant United States Attorney Doug Horn.

Sam S. Sheldon

EXHIBIT "1"

68 F.Supp.3d 310
United States District Court,
E.D. New York.

UNITED STATES of America,
v.
Francois HOLLOWAY, Defendant.
Francois Holloway, Petitioner,
v.
United States of America, Respondent.

Nos. 95–CR–78 (JG), 01–CV–1017 (JG). | Signed July 25, 2014. | As Amended July 28, 2014.

Synopsis
Background: Prisoner moved to reopen proceedings on his prior motion to vacate, set aside, or correct his sentence of 57 years and 7 months for his conviction, by jury, of three carjacking counts that were "stacked" under statute criminalizing use of firearm during crime of violence, after he declined to accept government's offer of plea bargain that would have dropped two carjacking counts and resulted in sentencing range of only 130-147 months.

Holding: The District Court, John Gleeson, J., held that United States Attorney agreed to order vacating two stacked counts of conviction and resentencing.

Motion granted.

West Headnotes (1)

[1] Sentencing and Punishment
Excessive punishment

After defendant had served 20 years in prison on his excessive sentence of 57 years and 7 months imposed for his convictions on three counts of carjacking that were "stacked," under statute criminalizing use of firearm during crime of violence, United States Attorney agreed to order vacating two of defendant's carjacking counts in order to permit resentencing, where defendant's record while in custody was extraordinary in that he had only five minor disciplinary infractions during two decades in prison, he took advantage of educational and other opportunities provided by prison, and his victims all were either unopposed to or affirmatively supported his early release. 18 U.S.C.A. § 924(c).

1 Cases that cite this headnote

Attorneys and Law Firms

*311 Harlan J. Protass, Clayman & Rosenberg LLP, New York, NY, for Petitioner.

Samuel P. Nitze, Susan Corkery, United States Attorneys Office Eastern District of New York, Brooklyn, NY, for Respondent.

MEMORANDUM REGARDING THE VACATUR OF TWO CONVICTIONS UNDER 18 U.S.C. § 924(c)

JOHN GLEESON, District Judge:

A. *Preliminary Statement*

There are injustices in our criminal justice system, including in this district, and they often result from the misuse of prosecutorial power. I have pointed some out in recent years in the hope that doing so might help eradicate or reduce the number of such abuses. [1] But prosecutors also use their powers to *remedy* injustices. In the spirit of fairness—and with the hope of inspiring other United States Attorneys to show similar wisdom and courage—I write to applaud the admirable use of prosecutorial power in this case.

The power United States Attorney Loretta Lynch has put to use in Francois Holloway's case inheres in our adversarial system. It is the power to seek justice even after all appeals and collateral attacks have been exhausted and there is neither a claim of innocence nor any defect in the conviction or sentence. Even in those circumstances, a prosecutor can do justice by the simple act of going back into court and agreeing that justice should be done. After careful consideration of Holloway's crimes, the views of his victims, and his conduct during the two decades he has been imprisoned as a result of this case, the government has decided that it need not stand by silently while Holloway serves three more decades

of an unjust sentence. Specifically, it has agreed to an order vacating two of Holloway's counts of conviction and to a resentencing of him on the remaining counts. Even people who are indisputably guilty of violent crimes deserve justice, and now Holloway will get it. [2]

312 B. *Holloway's Offenses and Sentence

Along with an accomplice, Holloway stole three cars at gunpoint during a two-day span in October 1994. The government brought separate counts for each carjacking, and each carjacking count was accompanied by its own so-called "§ 924(c) count." The latter counts were brought under 18 U.S.C. § 924(c), which makes it a crime to, among other things, use a firearm during a crime of violence.

Shortly before trial in 1995, the government offered Holloway a plea bargain. In exchange for Holloway's plea of guilty to the carjackings, it would drop two of the three § 924(c) counts, resulting in a sentencing range of 130–147 months. A sentence at the bottom of that range would have required Holloway to spend about nine years in prison.

Holloway insisted on a trial. He got one, but making that choice required him to face all three § 924(c) counts. Section 924(c) counts are a triple threat. First, they carry mandatory sentences, which by definition take a degree of judging out of sentencing. Second, they result in onerous enhancements for "second or subsequent [§ 924(c)] conviction[s]." [3] That sounds like a typical recidivism enhancement until you consider that the "second or subsequent" convictions can occur in the same trial as the first one, as they did here. Third, the mandatory sentences required by § 924(c) are also mandatorily *consecutive*, to one another and to all other sentences in the case. As a result, cases like Holloway's produce sentences that would be laughable if only there weren't real people on the receiving end of them. The United States Sentencing Commission has wisely asked Congress to reform § 924(c) to blunt the harsh impact it mandates in many cases. [4]

After Holloway was found guilty of the charges, I sentenced him. Under the then-mandatory Sentencing Guidelines, I imposed a 151–month prison term for the three carjackings. Then the § 924(c) sentences kicked in: a mandatory 5 years for the first one; a mandatory 20 for the second; another mandatory 20 for the third. The statutory requirement that those terms be consecutive to each other and to the 151 months for the carjackings ***313** produced a total prison term of 57 years and 7 months.

The difference between the sentencing outcome if a defendant accepts the government's offer of a plea bargain and the outcome if he insists on his right to trial by jury is sometimes referred to as the "trial penalty." Holloway likely would have been released in 2003 if he had pled guilty under the agreement offered by the government. But he went to trial instead, and now his projected release date is March 10, 2045. Thus, his trial penalty was 42 years in prison. To put his sentence in context, consider that in fiscal year 2013, the average sentence for defendants convicted of robbery in the federal courts was 77 months; the median sentence was 63 months. [5] Holloway got 691 months. He would likely have fared better if he had committed murder. The average sentence in federal court for murder in fiscal year 2013 was 268 months; the median was 240 months. [6] If Holloway had gotten 268 months, he'd already be out of prison. Finally, consider the sentence of Holloway's codefendant, who engaged in the same conduct as Holloway but pled guilty and testified for the government at Holloway's trial. He was sentenced by another judge to 27 months in prison and was released in 1997. [7]

Black defendants like Holloway have been disproportionately subjected to the "stacking" of § 924(c) counts that occurred here. [8] The Sentencing Commission's Fifteen–Year Report in 2004 stated that black defendants accounted for 48% of offenders who qualified for a charge under § 924(c), but they represented 56% of those actually charged under the statute and 64% of those convicted under it. [9]

C. *The Proceedings After Holloway's Sentencing*

Holloway's conviction and sentence were affirmed by the Second Circuit in 1997 [10] and the Supreme Court in 1999. [11] I denied his collateral attack pursuant to 28 U.S.C. § 2255 in 2002, [12] and the Second Circuit refused to issue a certificate of appealability. [13] An effort to file a successive ***314** petition was denied by the Second Circuit in 2010. [14]

D. *Holloway Now*

Holloway is 57 years old. He has five children between the ages of 23 and 37 and eight grandchildren. His family is fully supportive; they filled the courtroom during two recent court appearances.

Even though he was a facing a half-century prison term, Holloway tried to better himself throughout his two decades of incarceration. He completed a Basic Wellness program in 2000, was recognized for his performance as a Unit Aide in 2002, completed a Parenting Program in 2002, completed a Stress Management class in 2006, completed a Parenting Skills Program Level 1 in 2007, received a Certificate of Achievement for officiating basketball in 2008, received a Certificate of Achievement for Song Writing instructing in 2009, completed a Preparation for Release program in 2009, received a Certification in Food Protection Management in 2010, received a Career Diploma in Catering in 2010, completed a Culinary Arts program in 2011, completed a Basketball Officiating class in 2012, and completed all the requirements for the Challenge Program run by the facility's Psychological Services program last year.

Holloway's disciplinary record reveals five infractions. The most serious occurred in 1995, at the outset of his sentence, when he was placed in disciplinary segregation for 30 days for engaging in a group demonstration and failing to obey an order. The other four arose from minor rules violations that resulted in brief losses of commissary or telephone privileges. Only two occurred within the past 14 years, and there have been none in the past four years.

E. *The United States Attorney's Decision to Do Justice*

In late 2012, Holloway filed a motion to reopen his § 2255 proceeding under Fed.R.Civ.P. 60(b). Recognizing that there were good reasons to revisit Holloway's excessive sentence but no legal avenues or bases for vacating it, I issued an order on February 25, 2013, stating as follows: "I respectfully request that the United States Attorney consider exercising her discretion to agree to an order vacating two or more of Holloway's 18 U.S.C. § 924(c) convictions." [15]

In a letter dated July 24, 2013, the United States Attorney declined to agree to an order vacating two or more of Holloway's § 924(c) convictions. She observed that Holloway might be eligible for relief from the President through the exercise of his clemency power. [16] However, subsequent to that suggestion, the Department of Justice announced a new clemency initiative, and the criteria it set forth in describing the clemency applications it would support and prioritize made it likely that Holloway's crimes of violence would disqualify him. [17] Thus, on May 14, 2014, I asked the United States Attorney to reconsider exercising her discretion to agree to an order vacating two or more of Holloway's § 924(c) convictions so he could face a more just resentencing. [18]

*315 At a court appearance on July 10, 2014, Assistant United States Attorney Sam Nitze stated as follows:

> Let me say formally, the U.S. Attorney has given long and careful consideration to your Honor's ... earlier request.... She did carefully consider it and that was the office's recommendation—that Mr. Holloway seek clemency or commutation of sentence. And she further reconsidered, in light of your Honor's recent order, and has agreed to proceed along the lines similar to those that you proposed. I would say that's based on several considerations, and in part based on the office's view and her view that this is both a unique case and a unique defendant in many ways. And I say unique for a number of reasons, but I will state two of them.
>
> First, this defendant's record while he's been in the custody of the Bureau of Prisons for the last two decades is extraordinary. He has the mildest of disciplinary records. There are a few infractions, but none of them are violent or involve drugs. They were minor, I believe five total in two decades. And it's also clear—we pulled the reports, and I know your Honor summarized some of this in your most recent order—but it's clear that he took advantage to better himself and to take advantage of the educational and other opportunities that the BOP provides. So, the way he has handled himself during this period of incarceration is extraordinary.
>
> Second, as your Honor mentioned, we have made an effort to be in touch with the victims in this case.... [W]e were able to reach three victims, and every one of them said first that they were terrified by the experience—one in fact still wrestles with the fallout from that—but also that in their view, 20 years is an awfully long time, and people deserve another chance, and to a person they all supported—well, I think one would have framed it unopposed to an earlier release, and others were more affirmatively supportive of it. That is significant to us as well. Those are two among other aspects of this case that make it, I think, more than unusual, probably unique.
>
> I want to be clear on this point—that the United States Attorney's position in this case shouldn't be interpreted as reflecting a broader view of Section 924(c) generally or its application to other cases.

> In terms of how to proceed, we would propose to withdraw our opposition to the pending Rule 60(b) motion, and also to state on the record that we wouldn't oppose the granting of the underlying 2255 motion for the purpose of vesting the court with authority to vacate two of the 924(c) convictions, and to proceed to resentence, all of that without taking a position on the merits of either the Rule 60 motion or the habeas petition. [19]

After that statement, Holloway's lawyer moved to vacate his convictions on two of the three § 924(c) convictions, and the convictions on Counts Ten and Twelve were vacated without opposition from the government. I will resentence Holloway on the remaining counts on July 29, 2014.

There is important work to be done in preparation for resentencing, [20] but the significance of the government's agreement is ***316** already clear: it has authorized me to give Holloway back more than 30 years of his life.

F. *Conclusion*

It is easy to be a tough prosecutor. Prosecutors are almost never criticized for being aggressive, or for fighting hard to obtain the maximum sentence, or for saying "there's nothing we can do" about an excessive sentence after all avenues of judicial relief have been exhausted. Doing justice can be much harder. It takes time and involves work, including careful consideration of the circumstances of particular crimes, defendants, and victims—and often the relevant events occurred in the distant past. It requires a willingness to make hard decisions, including some that will be criticized.

This case is a perfect example. Holloway was convicted of three armed robberies. He deserved serious punishment. The judgment of conviction in his case was affirmed on direct review by the Supreme Court, and his collateral attack on that judgment failed long ago. His sentence was far more severe than necessary to reflect the seriousness of his crimes and to adequately protect the community from him, but no one would criticize the United States Attorney if she allowed it to stand by doing nothing.

By contrast, the decision she has made required considerable work. Assistant United States Attorney Nitze had to retrieve and examine a very old case file. He had to track down and interview the victims of Holloway's crimes, which were committed 20 years ago. His office no doubt considered the racial disparity in the use of § 924(c), and especially in the "stacking" of § 924(c) counts. He requested and obtained an adjournment so his office could have the time necessary to make an extremely important decision. [21] United States Attorneys' offices work with limited resources. The effort that went into deciding whether to agree to vacate a couple of Holloway's convictions could have been devoted to other cases.

Finally, the easy route—that is, the "there's nothing we can do about your sentence" response—would have eliminated any concern that Holloway might squander the opportunity to make something of the rest of his life. The United States Attorney's decision here will be criticized if Holloway commits another crime upon his early release from prison. She could have extinguished that risk by doing nothing. But she has the wisdom and courage to confront it the right way—by asking me to ensure that Holloway gets the re-entry assistance a prisoner who has spent decades in prison will need. [22]

This is a significant case, and not just for Francois Holloway. It demonstrates the difference between a Department of Prosecutions and a Department of *Justice*. It shows how the Department of Justice, as the government's representative in every federal criminal case, has the power to walk into courtrooms and ask judges to remedy injustices.

The use of this power poses no threat to the rule of finality, which serves important purposes in our system of justice. There are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly. But the misuse of ***317** prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences, including many serving multiple decades and even life without parole for narcotics offenses that involved no physical injury to others. Even seasoned federal prosecutors will agree that many of those sentences were (and remain) unjustly severe.

The United States Attorney has shown here that justice is possible in those cases. A prosecutor who says nothing can be done about an unjust sentence because all appeals and collateral challenges have been exhausted is actually *choosing* to do nothing about the unjust sentence. Some will make a different choice, as Ms. Lynch did here.

Numerous lawyers have been joining *pro bono* movements to prepare clemency petitions for federal prisoners,[23] and indeed the Department of Justice has encouraged the bar to locate and try to help deserving inmates.[24] Those lawyers will find many inmates even more deserving of belated justice than Holloway. Some will satisfy the criteria for Department of Justice support, while others will not. In any event, there's no good reason why all of them must end up in the clemency bottleneck. Some inmates will ask United States Attorneys for the kind of justice made possible in this case, that is, justice administered not by the President but by a judge, on the consent of the Department of Justice, in the same courtroom in which the inmate was sentenced. Whatever the outcome of those requests, I respectfully suggest that they should get the same careful consideration that Ms. Lynch and her assistants gave to Francois Holloway.

All Citations

68 F.Supp.3d 310

Footnotes

1 *See United States v. Kupa*, 976 F.Supp.2d 417 (E.D.N.Y.2013) (criticizing the use of recidivism-based enhancements of the drug offense mandatory minimum sentences to coerce guilty pleas and to punish those who refuse to plead guilty); *United States v. Dossie*, 851 F.Supp.2d 478 (E.D.N.Y.2012) (criticizing the routine use of drug offense mandatory minimums, which Congress intended for leaders and managers of drug trafficking operations, against low-level drug traffickers); *United States v. Vasquez*, No. 09–CR–259, 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010) (same); *see also United States v. Diaz*, No. 11–CR–821–2, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (calling on the United States Sentencing Commission to "de-link" the drug trafficking ranges set forth in its Guidelines Manual from the mandatory minimums); *United States v. Ovid*, No. 09–CR–216, 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010) (responding to the Justice Department's criticism of judges who sentence below the Guidelines ranges in fraud cases).

2 The prosecutorial power at issue here has been exercised in other cases. For example, in *United States v. Mayo*, the government agreed to an order vacating the sentence of a defendant whom no one (not even the defendant herself) knew was pregnant at the original sentencing. The government's agreement allowed me to resentence the defendant to a shorter prison term so the baby would not be placed in foster care. *United States v. Mayo*, No. 05–CR–43 (E.D.N.Y.), Order, April 11, 2007, at 1, ECF No. 304 ("The government ... may wish to consider joining in an application to vacate sentence under 28 U.S.C. § 2255 so a new sentencing proceeding can occur."); Letter dated May 21, 2007 from AUSA Lee J. Freedman to the Court, ECF No. 309 ("[T]he government consents to the application envisioned by the Court's Order."). More recently, and again based solely on the consent of the government, I vacated the sentence of a defendant who had cooperated with the government. Modest adjustments in the prison term and fine on resentencing mitigated the immigration consequences of the conviction on the defendant. *United States v. Anandani*, No. 11–CR–763 (E.D.N.Y.), Tr. October 25, 2013, at 2–3. In both of those cases, the government refused to allow procedural impediments it had the authority to waive stand in the way of a more just sentencing.

3 18 U.S.C. § 924(c)(1)(C).

4 *See U.S. SENTENCING COMM'N, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System ("Mandatory Minimum Report")*, at 368 (Oct.2011) (recommending that Congress lower the mandatory prison sentences in the section, make the recidivism enhancements applicable only when the first offense was the result of a prior conviction, and allow for concurrent sentences on "stacked" § 924(c) counts), available at http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

5 U.S. SENTENCING COMM'N, *2013 Sourcebook of Federal Sentencing Statistics*, Table 13 (2013), *available at* http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

6 *Id.*

7 *United States v. Arnold*, No. 95–CR–78–1 (E.D.N.Y.), Judgment as to Teddy Arnold, July 25, 1996, ECF No. 140; FED. BUREAU OF PRISONS, *Inmate Locator*, http://www.bop.gov/inmateloc/ (indicating that Teddy Arnold was released on December 5, 1997).

8 *See* U.S. SENTENCING COMM'N, *Mandatory Minimum Report*, at 363 (stating that black offenders are disproportionately convicted under § 924(c), subject to mandatory minimums at sentencing, and convicted of multiple § 924(c) counts).

9 U.S. SENTENCING COMM'N, *Fifteen Years of Guidelines Sentencing*, at 90 (Nov.2004), available at http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/fifteen-years-

guidelines-sentencing; *see also* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 1, 28–29 (2013) (even after controlling for, *inter alia,* arrest offense, district, age, criminal history category, and education level, black men are nearly twice as likely as white defendants to be charged with an offense carrying a mandatory minimum sentence).

10 *United States v. Holloway,* 126 F.3d 82 (2d Cir.1997).

11 *Holloway v. United States,* 526 U.S. 1, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999).

12 *Holloway v. United States,* No. 01–CV–1017 (E.D.N.Y.), Order Denying § 2255 Petition, Mar. 21, 2002, ECF No. 17.

13 *Id.,* USCA Mandate Denying Cert. of Appealability, Feb. 5, 2003, ECF No. 23.

14 *Id.,* USCA Mandate Denying Successive Petition, Jan. 5, 2010, ECF No. 28.

15 *Id.,* Order, Feb. 25, 2013, ECF No. 36.

16 *Id.,* Letter Response, July 24, 2013, ECF No. 42.

17 *See* U.S. DEP'T OF JUSTICE, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants* (April 23, 2014) http://www.justice.gov/opa/pr/2014/April/14–dag–419.html (last visited July 24, 2014).

18 *Holloway v. United States,* No. 01–CV–1017, 2014 WL 1942923 (E.D.N.Y.), Order, May 14, 2014, ECF No. 54.

19 *Id.,* Tr. of Proceedings, July 10, 2014, at 6–8.

20 I have directed the Probation Department to conduct an investigation into, among other things, the appropriateness of halfway house placement at the conclusion of Holloway's prison term. I must keep in mind, among many other factors, the safety of the community. After 20 years in prison, Holloway will require assistance if he is to successfully re-enter that community.

21 *See Holloway v. United States,* No. 01–cv–1017 (E.D.N.Y.), Minute Entry, June 20, 2014.

22 *Id.,* Tr. of Proceedings, July 10, 2014, at 8 (Mr. Nitze: "[R]eentry planning is obviously important in every case, and probably particularly so in a circumstance like this. So we are here to help in any way we can, but we wanted to put on the record that we hope the reentry plan will be thorough.").

23 *See, e.g.,* The Mercy Project (an initiative of the Center on the Administration of Criminal Law at New York University School of Law), http://www.law.nyu.edu/centers/adminofcriminallaw/mercyproject (last visited July 25, 2014); Clemency Project 2014 (a working group composed of Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers), https://www.aclu.org/criminal–law–reform/clemency–project–2014–praises-justice–department–breathing–new–life–clemency (last visited July 25, 2014).

24 *See, e.g.,* U.S. DEP'T OF JUSTICE, *Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting,* at 1, January 30, 2014 ("This is where you can help. We are looking to the New York State Bar Association and other bar associations to assist potential candidates for executive clemency."), *available at* http://www.justice.gov/iso/opa/dag/speeches/2014/dag–speech–140130.html.

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EXHIBIT "2"

FILED UNDER SEAL

EXHIBIT “3”

COME1 * INMATE DISCIPLINE DATA * 04-14-2015
PAGE 001 OF 001 * CHRONOLOGICAL DISCIPLINARY RECORD * 15:59:34

REGISTER NO: 18731-013 NAME...: RIVERA, LUIS ANTHONY
FUNCTION...: PRT FORMAT: CHRONO LIMIT TO ___ MOS PRIOR TO 04-14-2015

G5463 NO ENTRIES EXIST IN CHRONOLOGICAL LOG FOR TIME PERIOD REQUESTED

EXHIBIT “4”

APR 10 2015

U. S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Complex

United States Penitentiary
P. O. Box 1023
Coleman, Florida 33521-1023

June 13, 2014

To whom it may concern.

My name is Dr. Javier Mouriz and I am a psychologist at the Federal Correctional Complex in Coleman, Florida. I am writing this letter on behalf of inmate Luis Rivera, Register Number 18731-013, who is seeking a release from his sentence or a reduction to his sentence. Please feel free to share this letter with whomever you believe is in a position to make a decision regarding his case.

I first came to know Inmate Rivera in 2005 when he was assigned to USP-1 Coleman. Soon after his arrival, he sought admittance to the Challenge Program. The Challenge Program is a voluntary, year-long, residential treatment program designed to help offenders improve their rational thinking skills and correct criminal thinking. As the coordinator, I supervised his treatment in the program.

Inmate Rivera completed the Challenge Program in 2009. He was an active participant in his treatment and genuinely worked to improve his character. He acknowledged the errors in the thinking patterns which led to his incarceration and demonstrated during treatment how he had changed. Since the completion of his treatment in 2009, inmate Rivera has resided in the treatment unit as a mentor/instructor. He has been placed in that role due to the assessment by staff he is a positive role model for other inmates. In addition, Inmate Rivera has unique and valuable skills in the areas of electronics, printing, and arts and has frequently used these technical skills to help the program.

Inmate Rivera has an impeccable institutional record. He has no disciplinary history in the approximately 30 years while incarcerated. This lengthy period of good conduct demonstrates a steady focus on doing the right things over a long period of time. It also shows he is truly committed to following rules and living in harmony with others. This long period of good conduct stands out in that this author has worked in the prison system for over 23 years and has never seen such a lengthy record of good conduct.

In addition to good conduct, Inmate Rivera has a very steady work history. He has worked in the same job assignment since his arrival at this facility in 2005 and receives excellent work reports. He has availed himself of learning opportunities and has received a Professional Soldering Certification and has acquired computer skills to the extent he served as a computer class instructor for three years. He also served as a suicide companion, a position of trust where he monitored inmates who were placed on suicide watch. He has remained in close contact with his family members via phone, mail, and e-mail contact.

I am in support of any consideration regarding a reduction in sentence or a release from

sentence for inmate Rivera. As noted above, inmate Rivera has demonstrated over a long period of time he is capable and willing to live within established rules and to improve himself. He has worked to change the character defects which led to his incarceration and has prepared for reentry to society. He has marketable skills, a good work ethic, good family relations, and the financial means to support a successful return to society. Inmate Rivera still maintains possession of his own residence and will not be dependent on others to secure housing.

Sincerely,

Javier Mouriz, Phd
Challenge Program Coordinator