A Review of the Pardon Attorney's Reconsideration of Clarence Aaron's Petition for Clemency

Office of the Inspector General
Oversight and Review Division
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I. Introduction

This report describes the investigation by the Office of the Inspector General (OIG), Oversight and Review Division, into an allegation that Pardon Attorney Ronald Rodgers withheld from, or misrepresented to, the President of the United States material information pertaining to the clemency application of Clarence Aaron. We undertook this investigation following a request from Representative Chaka Fattah in the wake of reports issued by *Pro Publica* and *The Washington Post* on May 13, 2012.[1]

In 1993, Clarence Aaron – then 24 years old – was convicted of several criminal charges relating to a large cocaine deal. Pursuant to the then-mandatory sentencing guidelines, Aaron was sentenced to three concurrent life terms in prison. In 2001, Aaron submitted a clemency petition to the Department of Justice's Office of the Pardon Attorney. The Department of Justice (the "Department") recommended in 2004 that the President deny the petition, but the President took no action. In 2007, however, the White House requested that the Department of Justice reconsider Aaron's still-pending commutation petition.

Pro Publica and *The Washington Post* reported that the White House denied Aaron's request for clemency in December 2008 even though Aaron "seemed especially deserving of a federal commutation" because of his youth at the time of the offense and because he was not the buyer, seller, or supplier of the drugs. The articles asserted that both the sentencing judge and the prosecutor's office supported an "immediate commutation" for Aaron, but that the White House "never knew the full extent of their views" because Pardon Attorney Rodgers "left out critical information," failed to accurately convey the judge's and prosecutor's office's views, and "did not disclose that [the judge and the U.S. Attorney] had advocated for Aaron's immediate commutation." Dafna Linzer, Pro Publica, *Clarence Aaron was Denied Commutation, but Bush Team Wasn't Told All the Facts*, Washington Post, May 13, 2012, available at http://www.washingtonpost.com/investigations/clarence-aaron-was-denied-commutation-but-bush-team-wasnt-told-all-the-facts/2012/05/13/gIQAEZLRNU_story.html and Dafna Linzer, *Pardon Attorney Torpedoes Plea for Presidential Mercy*, Pro Publica, May 13, 2012, available at http://www.propublica.org/article/pardon-attorney-torpedoes-plea-for-presidential-mercy.

[1] According to its website, *Pro Publica* is an independent, non-profit newsroom that produces investigative journalism in the public interest. http://www.propublica.org/about/.

As detailed below, the OIG determined that, rather than prepare a new recommendation memorandum for the White House regarding Aaron's petition (which would have resulted in review by either the Deputy Attorney General or one of the senior officials on his staff to whom he had delegated authority to review such memorandum), Rodgers asked for and received approval from the Office of the Deputy Attorney General to send an e-mail directly to the White House that would serve to supplement the Department's 2004 denial recommendation. In that e-mail to the White House Counsel's Office in December 2008, which indicated that the Office of the Deputy Attorney General believed Aaron's petition should be denied, Rodgers did not accurately represent the U.S Attorney's views regarding Aaron's commutation petition. We further found that, in that same e-mail, Rodgers also used ambiguous language that risked misleading the White House Counsel's Office about the sentencing judge's position on Aaron's petition. The text of Rodgers's e-mail had been reviewed and approved by a relatively inexperienced Counsel to then-Deputy Attorney General Mark Filip ("the Counsel") but not by any of the senior officials who had been delegated authority to make or approve recommendations to deny clemency petitions.

We concluded that the Counsel should have done a better job of editing Rodgers's proposed e-mail. We also believe, as detailed below, that in the particular circumstances of this case, either a new memorandum should have been prepared or the Deputy Attorney General or one of the senior officials in the Office of the Deputy Attorney General who had been delegated the authority to approve clemency denial recommendations should have carefully reviewed Rhodes's letter and approved the content of Rodgers's draft e-mail prior to it being sent to the White House.

II. Background

A. Pardon Attorney Ronald Rodgers

Pardon Attorney Ronald Rodgers graduated from the U.S. Naval Academy in 1977. Upon graduation he entered the U.S. Marine Corps as a second lieutenant. While in the Marine Corps, Rodgers attended the University of Dayton School of Law and graduated in 1983.

After graduating from law school, Rodgers was assigned to the Marine Corps Judge Advocate General Corps where he was a defense attorney for three years. In 1986 he was assigned to the faculty of the Naval Justice School for three years. From 1990 to 1991 he was a civil law officer for the Marine Corps. In 1991, he was named the chief prosecutor for the Marine Corps base in Quantico, Virginia. In 1995, he was Deputy Chief Judge and Circuit Military Judge for the Navy-Marine Corps Trial Judiciary.

Rodgers retired from the Marine Corps in 1999 and immediately joined the Criminal Division of the Department of Justice. He was assigned to the Narcotics and Dangerous Drugs Section as a Trial Attorney and rose to the position of Deputy Chief. Rodgers remained in this section until April 28, 2008, when he was appointed as Pardon Attorney.

B. The Office of the Pardon Attorney and the Clemency Process

Article II, Section 2 of the U.S. Constitution gives the President the "power to grant reprieves and pardons for offenses against the United States." Executive clemency is a discretionary act taken by the President and he may consider a wide range of factors not considered by earlier judicial proceedings and sentencing determinations. *Ohio Adult Parole Auth.* v. *Woodward*, 523 U.S. 272, 280-281 (1998). Petitioners have no protected interests in the clemency process because the President retains complete discretion to make the final decision. *See Ohio Adult Parole Auth.* at 278. *See also Conn. Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981).

Federal regulations governing clemency are minimal. The applicable regulations require the Attorney General to conduct "such investigation . . . as he or she may deem necessary and appropriate." 28 C.F.R. § 1.6 (a). The Attorney General is obligated to "review each petition and all pertinent information developed by the investigation" and "determine whether the request for clemency is of sufficient merit to warrant favorable action by the President. The Attorney General shall report in writing his or her recommendation to the President . . . ." 28 C.F.R. § 1.6 (c). Pursuant to regulation, the Attorney General has delegated the authority to conduct such investigations and make recommendations to the Office of the Pardon Attorney, under the direction of the Deputy Attorney General.[2] 28 C.F.R. § 1.9; U.S. Attorneys' Manual 1-2.110 (U.S.A.M.) 1997. The Office of the Pardon Attorney has 14 employees. In addition to the Pardon Attorney, the office has a Deputy Pardon Attorney, 5 attorney advisors, and 7 clerical staffers. The Office had similar staffing levels during the events addressed in this report. This small staff has been responsible for processing more

[2] 28 C.F.R. § 1.9 permits the Attorney General to delegate his or her duties and responsibilities relating to pardons to "any officer of the Department of Justice." The Attorney General has delegated that authority to the Pardon Attorney, "under the direction of the Deputy Attorney General." U.S.A.M. 1-2.110. In addition, 28 C.F.R. § 0.15 states: "The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally." While 28 C.F.R. §§ 0.35 and 0.36 provide that the Pardon Attorney shall be under the direction of the Associate Attorney General and "shall submit all recommendations in clemency cases through the Associate Attorney General," in practice and pursuant to the Department's organizational chart, the Pardon Attorney reports directly to the Deputy Attorney General.

than 1500 clemency petitions annually during the past two Presidential administrations.

Further guidance existed in a memorandum prepared by White House Counsel Alberto Gonzales on May 2, 2001, stating the White House's policy on executive clemency.[3] Among other things, the policy stated that "the President believes there are some offenses for which clemency should very rarely be granted" and "there should be a strong presumption against granting a clemency request with respect to . . . convictions involving trafficking in illegal drugs, including the manufacture, import, export, distribution or sale of controlled substances." However, the policy also stated that an instance where a "crime was committed long ago when the person was very young or a case in which the person has turned his or her life around by making sustained and significant contributions to the community since a conviction may merit the remedy of executive clemency."

An offender seeking clemency initiates the process by filing an application addressed to the President of the United States and that is sent to the Pardon Attorney for review and possible investigation. A commutation of sentence, which is what Aaron sought, reduces the period of incarceration. It does not imply forgiveness of the underlying act, but simply reduces a portion of the punishment.

"Commutation of sentence is an extraordinary remedy that is rarely granted." U.S.A.M. 1-2.113. As outlined in the U.S. Attorney's Manual, the President "may commute a sentence to time served or he may reduce a sentence, either merely for the purpose of advancing an inmate's parole eligibility or to achieve the inmate's release after a specified period of time." U.S.A.M. 1-2.113. Thus, a Presidential commutation does not necessarily mean the incarcerated individual will be immediately released from prison.

The U.S. Attorney's Manual provides that "[t]he views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President." U.S.A.M. 1-2.111. Additionally, the U.S. Attorney's Manual states that "[a]ppropriate grounds for considering commutation have traditionally included" the following factors: (1) disparity or undue severity of sentence; (2) critical illness or old age; (3) meritorious service rendered to the government by the petitioner (*e.g.*, cooperation with investigative or prosecutive efforts that has not been adequately rewarded by official action); (4) the amount of time already served; and (5) the availability of other remedies. U.S.A.M. 1-2.113. The Pardon Attorney may consider a combination of these or other equitable

[3] The May 2, 2001, White House Counsel's Office guidance regarding clemency was superseded by guidance provided by the White House Counsel's Office on July 13, 2010.

factors when making a commutation recommendation to the President. U.S.A.M. 1-2.113. Rodgers told us that a significant factor, in addition to the factors identified above, is a petitioner's acceptance of responsibility for his or her criminal conduct.

After considering the factors, the Pardon Attorney drafts a recommendation to the President for almost every clemency petition. These recommendation memoranda are called "letters of advice." Typically, each recommendation is written in one of three ways: (1) a one-page "summary denial"; (2) a multi-page "full denial"; or (3) a multi-page "favorable". The Pardon Attorney writes a summary denial when the facts appearing in the clemency application itself make it clear that the application should not be granted. A full denial is written when the Pardon Attorney has decided that the application should be turned down for reasons that are not as clear-cut and simple as those that would justify a summary denial or the petitioner or case have some notoriety. The Pardon Attorney writes a favorable when the Pardon Attorney believes that an application should be granted.

Full denials and recommendations for commutations (favorables) are drafted after the Pardon Attorney reviews the file, which may include recommendations from the local U.S. Attorney who prosecuted the defendant, the judge who sentenced the defendant, and other interested parties. Rodgers told us that the U.S. Attorney's input is significant, whether positive or not, but the Department's recommendation ultimately comes from the Deputy Attorney General, not the U.S. Attorney or the Pardon Attorney.

Once the Pardon Attorney completes the draft letter of advice, it is submitted to the President through the Deputy Attorney General. According to Rodgers, the Pardon Attorney is not authorized to independently advise White House personnel on the merits of executive clemency applications. *See also* 28 C.F.R. 0.36 and 28 C.F.R. 1.9. Rodgers told us that the Deputy Attorney General's Office determines what advice is shared with the White House and what form that advice takes. *See also* U.S.A.M. 1-2.110.

On June 23, 2008, Deputy Attorney General Mark Filip executed a Delegation of Authority that delegated to Associate Deputy Attorney General David Margolis and four other senior officials in the Office of the Deputy Attorney General the authority to take final action in matters pertaining to, among other things, "memoranda prepared for the Deputy Attorney General's signature by the Pardon Attorney wherein denial of the relief sought is recommended."[4]

[4] Coincidentally, one of the five officials to whom the Deputy Attorney General's authority was delegated was Deborah Rhodes, who at that time was acting both as U.S.
(Cont'd.)

Each clemency petition is presented for action to the President in a letter of advice. The recommendation made by the U.S. Attorney, if any, is described in the letter of advice. U.S.A.M. 1-2.111. Kenneth Lee, who served as Associate Counsel to President George W. Bush during the review of Clarence Aaron's clemency petition in 2008, told us that the White House receives only the recommendation memorandum from the Department of Justice and none of the underlying documents, such as letters of support. He explained that this is because of the volume of clemency petitions and the fact that the White House does not have the resources to examine the voluminous exhibits. Lee told us that he could recall no instances in which the White House requested to see the underlying documents supporting a pardon petition during his tenure at the White House.

Rodgers told us that in the last year of President Bush's second term in office, the number of clemency applications doubled and that in November and December of 2008 alone, his office received 757 clemency applications. The Pardon Attorney's Office at that time had only 11 employees.

III. OIG Findings

In August 1993, Clarence Aaron and two co-defendants were named in a four-count superseding indictment accusing them of conspiracy to possess with intent to distribute more than 23 kilograms of cocaine and crack cocaine, possessing 9 kilograms of cocaine with the intent to distribute it, and attempting to possess 15 kilograms of cocaine with the intent to distribute it. The last count involved the forfeiture of property derived from the proceeds of the illegal activity.

On September 30, 1993, a jury found Aaron guilty on all counts and returned a special verdict requiring Aaron to forfeit $1,500 to the government. Aaron testified at trial and denied having any involvement in or knowledge of a narcotics conspiracy. The evidence elicited at trial, though, established that Aaron, contrary to his testimony at trial, played a major role in the narcotics conspiracy. In particular, the United States presented evidence of the following facts sufficient to convict Aaron:

- Aaron travelled from Mobile, Alabama to Houston, Texas with $200,000 to purchase cocaine;

Attorney for the Southern District of Alabama and as Senior Associate Deputy Attorney General. As detailed below, Rhodes wrote a letter about Aaron's petition to the Pardon Attorney in her capacity as U.S. Attorney. We found no evidence that Rhodes exercised any authority under the Delegation of Authority with respect to the matter.

- Aaron was present when a co-conspirator purchased 9 kilograms of cocaine;
- Aaron arranged the transportation of the 9 kilograms of cocaine to Mobile;
- Aaron provided the scale to weigh cocaine that was converted to crack cocaine;
- Aaron drove 1 co-conspirator around Mobile to sell 1 kilogram of crack cocaine;
- Aaron set up a 15 kilogram cocaine purchase;
- Aaron transported $250,000 from Mobile to Texas to purchase the 15 kilograms of cocaine; and
- Aaron provided a co-conspirator with 1/2 kilogram of cocaine, which he then helped convert into crack cocaine.

On December 10, 1993, Judge Charles S. Butler, pursuant to the then-mandatory sentencing guidelines, sentenced Aaron to three concurrent life terms in prison. In determining Aaron's sentence, Judge Butler found that Aaron did not accept responsibility for his actions, obstructed justice by committing perjury at two trials, and acted as a manager in the conspiracy.[5] Aaron began serving his sentence immediately.

In 1999, Aaron was featured in the PBS documentary series *Frontline* in an episode entitled "Snitches." The episode featured interviews of Aaron's parents, attorneys, and Aaron himself. In the episode, Aaron and others claimed that Aaron only introduced men he grew up with who were drug dealers to other men he knew from Baton Rouge, Louisiana, who were also drug dealers, and that he was paid $1,500 to drive one group to meet with the other. Aaron told *Frontline* in his interview – still available online – that he was "not directly" involved in drug trafficking and that "the only thing [he could] see [that he] was involved in was introducing the two parties." He also stated that he had no knowledge of the two parties engaging in a narcotics transaction. When Aaron was asked if the nine kilos of cocaine existed, he replied that he "never had it" and he did not know how the government came up with determination that he was involved with nine kilograms of cocaine.

In January 2001, Aaron submitted his commutation petition to the Office of the Pardon Attorney seeking a commutation of his life sentence. In it, Aaron echoed the claims made in the *Frontline* episode and classified

[5] Aaron was tried twice for the narcotics conspiracy and testified in both trials. The first trial ended in a mistrial.

himself as a "low level" and non-active participant in the narcotics conspiracy. He claimed that he only introduced the two groups of drug dealers and that he had no knowledge what the parties intended to do with the cocaine. Aaron later amended this petition and included with it a sworn affidavit. In the affidavit, Aaron "acknowledge[d] full responsibility" for his role in the conspiracy, but continued to downplay his part in it. Aaron also claimed that he observed the FBI questioning another drug dealer through a two-way mirror and was told that they wanted him to provide information about that individual's narcotics activities. According to Aaron, because he "had no information to offer the government" prosecutors would not allow him to plead guilty, which forced him to go to trial.

The U.S. Attorney for the Southern District of Alabama at the time was David York. In a letter to the Pardon Attorney, York stated that "nothing in the record or in the petition establish[ed] that [Aaron] deserve[d] consideration for clemency." York also stated that Aaron's assertions that he viewed another drug dealer through a two-way mirror and his plea offer was contingent on cooperation were false and that Aaron continued to downplay his role in the conspiracy by claiming he "merely participated in a cocaine sale." Judge Butler was also asked his view regarding Aaron's clemency petition. The judge responded with a note stating that he felt it was inappropriate for him to provide comments regarding clemency because it was outside of the responsibility of the judicial branch of government to do so.

After considering both Aaron's petition and supporting documentation and the U.S. Attorney's views, Rodgers's predecessor as Pardon Attorney, Roger Adams, recommended that Aaron's petition be denied. On August 2, 2004, then-Deputy Attorney General James Comey forwarded to the White House the Department's letter of advice recommending that Aaron's petition for clemency be denied. We found no evidence that the President took any action regarding Aaron's petition in response to the Department's letter of advice in 2004.

In the summer of 2007, the White House requested the Department reconsider Aaron's still-pending commutation petition. Adams complied with the White House's request and in July 2007 requested updated comments from York's successor as U.S. Attorney for the Southern District of Alabama, Deborah Rhodes.[6] In January 2008, Adams resigned his position as Pardon Attorney and he was replaced by the current Pardon Attorney, Ronald Rodgers, on April 28, 2008. Rodgers told us that two

[6] Deborah Rhodes is no longer an employee of the Department of Justice. She declined our request for an interview, but did provide us with a letter stating her recollection of the Aaron clemency petition.

weeks after he started as Pardon Attorney, he received an e-mail from Associate White House Counsel Lee asking him to look into, among other petitions, the Aaron matter. As noted above, Aaron's petition was originally considered by Rodgers's predecessor when it was filed in 2001.

In late May 2008, Aaron filed a motion for resentencing in Judge Butler's court. His attorneys notified the Pardon Attorney's Office of the filing and requested that the Department suspend consideration of Aaron's clemency petition until the Court made a determination on the motion. The Pardon Attorney's Office agreed to do so.

Judge Butler denied Aaron's motion for resentencing on September 29, 2008. In the order denying the motion, Judge Butler stated:

> In sum, it is clear that § 3582(c)(2) cannot be invoked because defendant's sentencing range has not been lowered by the recent amendment to the United States Sentencing Guidelines. Looking through the prism of hindsight, and considering the many factors argued by the defendant that were not present at the time of his initial sentencing, one can argue that a less harsh sentence might have been more equitable; however, this Court is powerless to act in a pardon capacity. As a matter of law, the sentence the court was required to impose in 1993 must stand.

Aaron's counsel provided the Court's Order to the Pardon Attorney's Office on October 27, 2008. In a cover letter accompanying the Court's Order, Aaron's attorney requested the Pardon Attorney's Office to reactivate Aaron's clemency petition. It did.

On November 25, 2008, Rhodes responded to the Pardon Attorney's July 2007 request with a 5-page letter. The Assistant U.S. Attorney who prosecuted Aaron in 1993 (the "AUSA"), told us that she wrote the factual contents describing Aaron's conduct and a rough draft of the equitable factors described in the U.S. Attorney's Manual in the letter. The final letter, though, was completed by Rhodes. A copy of Rhodes's letter is provided as Attachment A to this report.

At the outset of her letter, Rhodes "agree[d] that Aaron should receive a commutation of his life sentence." The letter then compared Aaron's expressed remorse, rehabilitation in prison, the support of his family, and his desire to help others avoid the destructive decisions he had made against Aaron's continued minimization of his role in the narcotics conspiracy, Aaron's refusal to accept responsibility for his actions, and his perjury at both of his trials, which enhanced his sentence and undermined his usefulness as a cooperating witness. After doing so, Rhodes stated that

she "recommend[ed] that Aaron be resentenced to a term of 25 years rather than the time served sentence he [was] seek[ing]." At the close of her letter, Rhodes stated:

> As Aaron's counsel acknowledges, Aaron should 'be resentenced to a substantial term of incarceration but not to a life sentence….' While I believe Aaron should receive some reduction, I respectfully recommend against the granting of his request for time served and recommend a 25 year sentence. This fairly balances his rehabilitation against the seriousness of the offense, his minimization, and the sentences of other defendants in this district. Finally, since Aaron has already served time equal to a sentence of close to 18 years, it will also allow for a structured transition from incarceration to release.

The AUSA told us that Rhodes did not want Aaron's sentence commuted to "time served" and that she had no expectation as to when that commutation, if granted, would occur, whether immediately or in the future. Rodgers told us that he understood Rhodes's recommendation to be that Aaron's sentence be commuted to a 25-year prison term. The effect of such a commutation, had it been granted, would have been to enable Aaron to leave prison because of "good time" credit as early as March 2014, 21 years after his conviction.

The morning of December 2, 2008, Pardon Attorney Rodgers sent an e-mail to the Counsel requesting guidance on how to proceed with the Aaron petition.[7] In the e-mail Rodgers provided a brief background on Aaron and wrote:

> I am a little concerned about the Aaron case, that they (White House) would grant him clemency presently. Given the time constraints, I would like to augment what we have over there presently ([the 2004 denial recommendation]) by sending them (directly from me) an e-mail which summarizes [USA Rhodes's] recommendations (we normally don't send them the 'raw stuff' from the US attorneys or judges) so that they hopefully conclude that while clemency someday may be appropriate, that day has not yet come. I will copy you on that e-mail. Would there be any objection to me doing so?

Rodgers told us that this was the first time he suggested supplementing an existing letter of advice, rather than drafting a new letter.

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[7] The Counsel graduated from law school in 2006. In April 2008, he joined then-Deputy Attorney General Filip as a Counsel to the Deputy Attorney General.

The Counsel told us that to the best of his recollection he had never before faced the situation presented in the Aaron matter – an existing denial recommendation where new information was available – and there was no policy in place advising him on how to proceed. Before responding to Rodgers's e-mail, the Counsel forwarded it to Associate Deputy Attorney General David Margolis together with the attachments, including Rhodes's letter and the DAG's 2004 denial memorandum. The Counsel's cover e-mail to Margolis asked Margolis whether he saw any problems with Rodgers's suggested approach. Margolis told us that he had no recollection of receiving the Counsel's e-mail, but stated that he "obviously did" receive it.

The Counsel told us that he had no recollection of speaking with Margolis regarding Rodgers's proposal to supplement the existing recommendation memorandum. However, he told us that he does not believe he would have approved of Rodgers's proposal without speaking to Margolis first, especially since he had sent the e-mail requesting Margolis's guidance. We found no e-mail response from Margolis to the Counsel's inquiry. Margolis told us that he could not recall speaking with the Counsel about this matter, but stated that he would have responded to the Counsel in some manner. Margolis also told us that in his opinion "there was no way [the Counsel] would have let Rodgers send any e-mail to the White House as [Rodgers] proposed without" Margolis's approval. He further stated that it was his opinion at the time of our interview that because Rodgers was not changing the Department's recommendation and was only adding facts, it was not unreasonable to proceed with Rodgers's suggested supplemental e-mail. In light of Margolis's and the Counsel's testimony, we concluded that Margolis most likely did approve the idea of Rodgers sending an e-mail directly to the White House.

On December 2, 2008, half an hour after sending his e-mail to Margolis, the Counsel wrote an e-mail back to Rodgers, stating that he did not see a problem with Rodgers's suggested approach, but could not access the Rhodes's letter and the 2004 denial recommendation – which were attached to Rodgers's original e-mail – because he was travelling. However, the Counsel told us that he read the documents that afternoon after he had Rodgers's e-mail and attachments printed at the U.S. Attorney's Office he was visiting.

The Counsel told us that he did not view the Aaron situation as an "original recommendation by the [Deputy Attorney General] whether clemency should be approved or denied," but as a revisit of the original recommendation and transmittal of the current U.S. Attorney's views on the matter. As a result, he said he concluded that Rodgers's e-mail to the White House did not need to be reviewed or approved by the Deputy Attorney General.

Rodgers stated to us that he suggested this approach because he doubted his office's ability to draft a new recommendation memorandum and have the Deputy Attorney General's Office review and approve the application in a timely manner. He stated that he was concerned about his office's ability to complete the review process because of the short amount of time left to the Bush administration, the hectic environment regarding clemency matters, and the large number of commutation petitions pending at that time.

On December 2, 2008, an attorney advisor in the Office of the Pardon Attorney spoke with Judge Butler regarding Aaron's clemency application. Shortly after the call, the attorney advisor informed Rodgers in an e-mail that Judge Butler "does not think it would be at all unfair to release [Aaron] at this time" and that the judge "would have no objection to commuting the sentence to time-served." Judge Butler told the OIG that he informed the attorney advisor that he believed Aaron should be granted relief and that he would have no objection if the President commuted Aaron's sentence to time served.

Later that day, Rodgers sent a draft e-mail to the Counsel containing his proposed message to Associate White House Counsel Lee regarding Aaron's petition. In the draft, Rodgers included the following statements:

- "[w]e solicited, and received, a slightly revised recommendation as to disposition in the case from the current United States Attorney";
- the U.S. Attorney's recommendation "largely dovetails with the comments in the final paragraph of the DAG's recommendation [of denial] in the case from August 2004";
- "[t]he U.S. Attorney recommends that at some point Mr. Aaron's sentence be commuted to a term of 25 years";
- "[a]s noted previously, [Rhodes] would support commutation of the sentence after Aaron serves 25 years of his life sentence"; and
- the "U.S. Attorney believes Aaron a poor candidate for 'time served' release presently."

Rodgers included a synopsis of Rhodes's reasons for her recommendation. Additionally, Rodgers proposed telling the White House that a member of his staff had spoken with Judge Butler and that Judge Butler "had no objection to commuting the sentence presently." He closed the proposed e-mail by stating:

> As you know, in the final paragraph of the 2004 DAG recommendation, support for a commutation of Aaron's sentence at some point in the future was not foreclosed. I have shared this e-mail with [the Office of the Deputy Attorney General] before sending it to you and they believe, as does the U.S. Attorney, that Mr. Aaron's commutation request is about 10 years premature.

On December 3, 2008, the Counsel approved Rodgers's proposed e-mail message to the White House, but provided two specific edits to be included in the e-mail. First, the Counsel added the statement "[t]o date, Aaron has served approximately 15 years in prison," prior to Rodgers's sentence discussing the U.S. Attorney's recommendation of commuting Aaron's sentence to 25 years. Then, he replaced the statement claiming that Rhodes would support a commutation of Aaron's sentence after he served 25 years with "the U.S. Attorney believes that 25 years is an appropriate sentence." The Counsel told us that he made the first change because he wanted it to be clear to the White House that Aaron had served 15 years of his sentence. He told us that he made the second change because he did not believe that Rodgers's proposed sentence accurately reflected Rhodes's views because Rhodes did not make any statements in her letter relating to the timing of Aaron's commutation. Rodgers told us that his sentence was a mistake and was inartfully worded and he was thankful the Counsel changed the language.

We also asked Rodgers about his inclusion of the sentence stating that the U.S. Attorney thought Aaron's commutation request was 10 years premature. Rodgers told us that the point he was trying to make with this sentence was that Aaron had, at that point, served 15 years and that a commutation to 25 years would leave 10 years on Aaron's sentence. He told us that he could understand why people might see his statement as being inconsistent, but he did not believe the statement was misleading.

The Counsel also told us that after reviewing Rhodes's letter and Pardon Attorney Rodgers's e-mail again that he did not believe that the final sentence of the e-mail was accurate. He told us that Rhodes never made any comments in her letter regarding the timing of Aaron's commutation and that stating that the U.S. Attorney believed that Aaron's commutation request was 10 years premature was wrong. The Counsel told us that he should have changed this statement in Rodgers's proposed e-mail like he did the other one, and that he missed the issue at the time.

Rodgers and the Counsel told us that they did not believe that Aaron's petition presented a good case for clemency. Rodgers stated that Rhodes's letter recommended a sentence reduction to 25 years, but did not express a view as to when the President should effectuate that commutation. Rodgers

added that when taking into account Aaron's credit for good behavior, Aaron would be eligible for release in 2014 if his sentence were commuted to 25 years.[8] He stated that such a commutation could cause administrative problems in the future. Rodgers told us that the Bureau of Prisons would be unable to change that release date without presidential action in the event Aaron engaged in misconduct in the 5-year period between the sentence's commutation and release. Rodgers told us that he included the language "at some point" when he summarized Rhodes's letter in the e-mail because he wanted Lee to understand that a future President could commute Aaron's sentence if the White House declined to commute at that time.

On December 3, 2008, Rodgers sent the e-mail as edited by the Counsel to Lee, along with the Department's 2004 recommendation approved by then-Deputy Attorney General Comey to deny Aaron's clemency petition. A copy of Rodgers's e-mail is provided as Attachment B to this report. Rodgers's e-mail was not provided to or reviewed by Deputy Attorney General Filip or anyone else in the Office of the Deputy Attorney General beside the Counsel before it was sent to the White House. Neither the Deputy Attorney General nor the five senior officials to whom he had delegated his authority had been made aware that both the U.S. Attorney and the sentencing judge had changed their positions on Aaron's commutation petition since the 2004 recommendation by the Department. As a result, neither Deputy Attorney General Filip nor any of the five senior officials were provided with an opportunity to consider whether to change the Department's 2004 recommendation in light of this new information. On December 23, 2008, the White House denied Aaron's request for commutation of his life sentence.

Former Associate White House Counsel Lee told us that he was the primary person responsible for communicating with the Department regarding pardon applications. He said he recalled receiving the December 3, 2008, e-mail from Rodgers recommending denial of Aaron's petition and that the White House followed the Department's recommendation. Lee told us that, as was typical at the time, he did not see Rhodes's November 25, 2008, letter to the Pardon Attorney, nor the internal Department e-mail discussing Judge Butler's views, but that he was recently shown them during a meeting with a newspaper reporter. He told us that in his view, the Department took the least favorable view of what U.S. Attorney Rhodes and

[8] Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. Credit is fixed at a maximum of 54 days per year for a sentence greater than one year, but less than life. 18 U.S.C. § 3624(b). The Bureau of Prisons may reduce the time to be served by up to an additional year if a prisoner serving imprisonment for a nonviolent offense completes a substance-abuse treatment program. 18 U.S.C. § 3621(e)(2).

Judge Butler said when conveying their views to the White House. However, he stressed that he did not believe that Rodgers's e-mail to him was "factually untrue" and did not believe that Rodgers deliberately withheld information. Lee told us that had the e-mail been clearer, the likely outcome would have been that he would have sent the clemency request back to the Department and asked them to reconsider their recommendation that clemency be denied.

IV. OIG Analysis

We found that U.S. Attorney Rhodes supported Aaron's commutation petition, in that she recommended that Aaron's sentence be commuted to 25 years, and that Rodgers did not represent Rhodes's views accurately to the White House in his e-mail on December 3, 2008. We believe that Rodgers's characterization of Rhodes's position was colored by his concern, expressed in his e-mail to the Counsel of December 2, 2008, that the White House might grant Aaron "clemency presently" and his desire that this not happen. Rodgers, however, attached Rhodes's letter to his December 2 e-mail to the Counsel (which the Counsel then forwarded to Margolis), which suggests that Rodgers did not intend to mislead the Office of the Deputy Attorney General about its contents.

Rodgers's e-mail to the White House, approved by the Counsel, downplayed the significance of U.S. Attorney Rhodes's views when compared with former U.S. Attorney York's position. In the e-mail, Rodgers stated that Rhodes's position was a "slightly revised" recommendation from the U.S. Attorney. In fact, the change was dramatic. Where York had opposed any clemency, Rhodes was recommending a commutation of Aaron's life sentence to 25 years in prison, with possible additional credit for "good time" served.

In the e-mail, Rodgers also stated that Rhodes believed that Aaron's commutation request was 10 years premature. This was not an accurate characterization of what Rhodes wrote. In doing so, Rodgers told the White House – inaccurately – that Rhodes was opposed to President Bush commuting Aaron's sentence.

Although Rhodes's letter did not explicitly state *when* she believed this commutation should be granted, it should by no means have been interpreted to suggest that Aaron's pending application should have been denied and that he should be required to wait 10 years before receiving further consideration for clemency. For one thing, Rhodes wrote the letter on November 25, 2008, in the waning days of an outgoing administration of which she was a member. Given that timing, we believe that she understood that her recommendation would be considered in the context of

an immediate decision by the departing administration whether or not to grant clemency to Clarence Aaron. Moreover, at the outset of her letter, Rhodes stated that she "agree[d] that Aaron should receive a commutation of his life sentence." At no point in her letter did Rhodes discuss resentencing "at some point" or "in the future." Instead, she wrote in the present tense. Thus the most reasonable interpretation of Rhodes's recommendation is that Aaron's sentence should be reduced to 25 years by *granting* his petition for clemency to that extent, not denying it with the understanding that it might be renewed in a decade.

There is an important difference between an immediate commutation of Aaron's sentence to 25 years (as we believe Rhodes was supporting) and a denial of Aaron's petition on the basis that it should only be granted, if at all, after he had completed 25 years of imprisonment (as Rodgers told the White House). Had the Bush and subsequent administrations relied upon Rodgers's supplemental e-mail and its assertion that Aaron's request was 10 years premature, Aaron would not be released from prison until 2018 at the earliest. However, had Aaron's petition been granted and his sentence commuted to 25 years, Aaron could have received "good time" credit and could have been released as early as March 2014. Rhodes's letter acknowledged that Aaron had served 15 years but that this was the equivalent of 18 years with credit for good time served. Rhodes thus clearly contemplated that Aaron would serve less than 25 years if his sentence was commuted to that length. Rodgers's e-mail completely omitted this important aspect of Rhodes's recommendation, which was consistent with immediate commutation to a sentence of 25 years.

Even if Rhodes's letter could have been considered ambiguous regarding whether Aaron's petition should be approved at a later date rather than presently – which we do not believe to be the case – Rodgers should not have characterized it as he did. He should have acknowledged the ambiguity in his e-mail and relied on his own arguments, instead of indicating inaccurately that Rhodes agreed with him that the petition was "about 10 years premature" and should be denied.

We also were not persuaded by Rodgers's explanation that he added the words "at some point" to describe Rhodes's recommendation out of concern that an immediate commutation to 25 years would create "administrative problems." Rhodes's letter makes no mention of the "administrative problems" that concerned Rodgers. The proper way for Rodgers to proceed was to describe Rhodes's position accurately and then explain why he disagreed rather than to inaccurately characterize Rhodes's position as being identical to his own.

Furthermore, Rodgers never conveyed this concern about "administrative problems" to the White House, nor did he make any record

of it in December 2008. The U.S. Attorney's Manual (U.S.A.M. § 1-2.113) clearly states that the President "may reduce a sentence, either merely for the purpose of advancing an inmate's parole eligibility or to achieve the inmate's release after a specified period of time." The President's power to commute a sentence is unequivocal and the President has absolute authority to grant commutations regardless of whether the decision to do so would cause "administrative problems." The appropriate way for Rodgers to have proceeded was to inform the White House of his concerns about "administrative problems," which would have allowed the White House to consider the potential "administrative problems" as it decided Aaron's commutation petition.

Rodgers's inaccurate description of Rhodes's letter in his e-mail to the White House would have been even worse but for the editing provided by the Counsel. Rodgers's draft of the e-mail included the statement that Rhodes "would support commutation of the sentence after Aaron serves 25 years of his life sentence." The Counsel changed this to "the U.S. Attorney believes that 25 years is an appropriate sentence." The difference between these formulations is significant. An immediate commutation to a term of 25 years could result in Aaron's release in 2014 due to a credit for good behavior, whereas commutation "after Aaron serves 25 years" would result in his release no earlier than 2018.

We also believe that Rodgers's choice of words in the e-mail to describe Judge Butler's position ran the risk of misleading the White House about the sentencing judge's position. Judge Butler told the OIG that he told an attorney advisor in Rodgers's office that he would have "no objection to commutation to *time served*." (Emphasis added.) The attorney advisor's contemporaneous account of his conversation with Butler likewise quoted the judge as saying that he "would have no objection to commuting the sentence to time-served." Rodgers's e-mail to the White House stated that Judge Butler "had no objection to commuting the sentence presently." This language was ambiguous, in that it could encompass not only an immediate commutation to time served, but possibly also an immediate commutation to a term of years that would require Aaron to serve more time. The better approach would have been to make clear that Judge Butler did not object to a commutation to "time served."

We concluded that the primary responsibility for the inaccuracies and ambiguity contained in the e-mail that was sent to the White House ultimately lies with Rodgers, the author and the person to whom the Department's regulations and policies provide primary responsibility for preparing such materials. Nevertheless, we believe that the Office of the Deputy Attorney General shares some responsibility for this error because the Office of the Deputy Attorney General had ultimate responsibility and authority for making the recommendation to the White House on the

clemency petition. We found that the Counsel should have done a better job of editing Rodgers's proposed e-mail, and that the Deputy Attorney General or one of the officials to whom the Deputy Attorney General had delegated his authority with respect to the denial of pardon petitions should have reviewed the contents of the e-mail before it was sent.[9]

The Counsel, a relatively inexperienced attorney, was the only person in the Office of the Deputy Attorney General who reviewed the draft e-mail from Rodgers to the White House. The Counsel admitted to the OIG that he also should have edited Rodgers's statement that Rhodes agreed that the clemency petition was "10 years premature" just as he edited the other statement in the draft e-mail.

While Rodgers's draft substantive e-mail was not reviewed by anyone else in the Office of the Deputy Attorney General, on December 2, 2008, the Counsel did forward to Margolis a copy of the e-mail that Rodgers had sent to the Counsel earlier that day, as well as the attachments including Rhodes's letter and the Deputy Attorney General's 2004 denial memorandum. Rodgers's e-mail proposed that he would send an e-mail directly to the White House summarizing Rhodes's recommendation, "so that they hopefully conclude that while clemency someday may be appropriate, that day has not yet come." The Counsel's e-mail to Margolis asked "I don't see any problem with Ron [Rodgers] proceeding as he has outlined here, do you?" We have no record of Margolis replying to this e-mail, and Margolis and the Counsel both told us that they could not recall any response from Margolis. However, both Margolis and the Counsel told us they did not think the Counsel would have told Rodgers to send the e-mail without Margolis's approval. Therefore, we concluded that Margolis most likely gave his approval to Rodgers's proposal, including Rodgers's recommendation that the Aaron's petition be denied.

In his OIG interview, Margolis stated that it was not necessary for any of the officials designated in the Delegation of Authority to review the contents of Rodgers's e-mail to the White House. He stated that because Rodgers was not proposing any change to the previous decision of the Deputy Attorney General to recommend against clemency for Aaron, and was only providing new information, he did not need to review the draft e-mail and it was appropriate to allow the Pardon Attorney to send the renewed recommendation of denial directly to the White House.

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[9] We believe it was reasonable for Rodgers to have assumed that the Counsel was authorized to speak on behalf of the Office of the Deputy Attorney General, and that it was not Rodgers's responsibility to ensure that his e-mail had been reviewed by an official within that Office to whom the Deputy Attorney General's authority had been delegated. In observing that the Counsel was relatively inexperienced, we are not suggesting that Rodgers took advantage of him.

We believe that under the particular circumstances of this case the far better procedure would have been for one of the officials listed in the Delegation of Authority, or the Deputy Attorney General himself, to review the new information that had been learned by the Pardon Attorney as well as Rodgers's draft e-mail to the White House before authorizing Rodgers to send an e-mail to the White House that reaffirmed the Department's 2004 recommendation of denial. We reached this conclusion for two primary reasons.

First, the facts underlying the Department's 2004 recommendation had changed materially in two significant ways, particularly with regard to the position of the U.S. Attorney, whose views under the Department's procedures "are given considerable weight in determining what recommendations the Department should make to the President." This was not a situation where the Pardon Attorney was merely restating or expanding on facts that had been considered by the Department in its 2004 recommendation, but rather involved substantial new information that required careful review and evaluation to determine whether it affected the Department's 2004 position and required a new recommendation. The Department's regulations, the U.S. Attorney's Manual, and the Delegation of Authority provide authorization to a handful of senior officials in the Department to make a recommendation to the President on a clemency petition. In this case, none of the individuals with that authority were fully informed of the changed circumstances before the Rodgers e-mail was sent to the White House in December 2008 outlining the continued opposition of the Office of the Deputy Attorney General to the clemency petition.

Second, this was a situation where the White House Counsel's Office, on behalf of the President, asked the Department to reconsider Aaron's petition. Given the nature of the request, and the fact that the Department learned during the course of its reconsideration that the facts underlying its 2004 recommendation had materially changed, we believe Deputy Attorney General Filip or one of his designees should have been advised of those changes and considered them carefully in deciding whether to change the Department's prior recommendation to the President.[10]

Associate Deputy Attorney General Margolis likely did not know about these significant changed circumstances on December 2, 2008, when he approved Rodgers's proposal to send an e-mail directly to the White House. Rodgers's first December 2 e-mail to the Counsel (which was forwarded to

[10] If this review had resulted in a recommendation to *grant* Aaron's petition in some form, this would have taken the matter out of the terms of the Delegation of Authority, which was limited to matters "wherein denial of the relief sought is recommended." In that case, we believe review and approval of the decision by the Deputy Attorney General (or the Attorney General or Associate Attorney General) would have been required.

Margolis) did not indicate what position Rhodes had taken, or that her position was a significant change from the position of the U.S. Attorney in 2004, or that Judge Butler had changed his position (which happened later that day).[11] Rodgers informed the Counsel of the judge's change of position in his second December 2 e-mail, but that e-mail was not forwarded to Margolis. Therefore, it seems unlikely that Margolis was aware of the significant changed circumstances when he approved the idea of the Pardon Attorney sending an e-mail directly to the White House.

Even after reviewing the relevant materials in connection with his OIG interview, Margolis told us that he did not have a concern about the procedure that was followed, particularly in light of the fact that "time was of the essence" in responding to the White House's request for reconsideration of Aaron's petition. We remain concerned about the process that was followed for the reasons stated above. The Department's policies required that the Pardon Attorney's recommendations be sent through the Deputy Attorney General, who had delegated this authority to a select group of senior officials. The process that Margolis apparently approved effectively precluded any review of the merits of the Pardon Attorney's recommendation by the Deputy Attorney General or his delegates, including any consideration of the significant changed circumstances.

Lastly, we found that even if this review by senior officials in the Office of the Deputy Attorney General had not resulted in a different recommendation to the President, following the regular review and recommendation process might have resulted in someone catching and correcting the inaccuracy in Rodgers's description of Rhodes's letter. Such a correction would not have been trivial given that the Associate White Counsel told us that had Rodgers's e-mail been clearer, the likely outcome would have been that he would have sent the clemency request back to the Department and asked them to reconsider their recommendation that clemency be denied. Instead, in the name of providing the President with a recommendation in a timely manner, the Department truncated its review process and the result was that an inaccurate e-mail was vetted by a relatively inexperienced attorney in the Office of the Deputy Attorney General and was sent directly to the White House.

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[11] Rodgers did attach a copy of Rhodes's letter to Rodgers's first December 2 e-mail, which Margolis may or may not have read. We believe it is unlikely that Margolis conducted any significant review of the materials attached to that e-mail. To begin with Margolis told us he had no current recollection of having any role in the Aaron matter at all, much less having reviewed the attachments to the e-mail. Additionally, the Counsel gave the go-ahead to Rodgers just a half an hour after the Counsel forwarded the e-mail to Margolis. Assuming that the Counsel would not have done so without Margolis's approval, this timing suggests that the maximum amount of time Margolis could have considered the matter before giving the go-ahead to the Counsel was half an hour.

In sum, we concluded that Pardon Attorney Rodgers did not accurately represent the views of U.S. Attorney Deborah Rhodes in his e-mail to the White House recommending against a commutation of Aaron's sentence. Rodgers told the White House that Rhodes thought Aaron's petition for commutation was "about 10 years premature." In fact, Rhodes recommended that Aaron's sentence be commuted to a term of 25 years, and her discussion of the credit Aaron would get for "good time" made it clear that she did not intend that he wait until the full 25 years had been served before his petition should be granted. Rodgers did not represent Rhodes's position accurately, and his conduct fell substantially short of the high standards to be expected of Department of Justice employees and of the duty that he owed to the President of the United States. We also believe that the language Rodgers chose to describe Judge Butler's views was ambiguous and risked causing confusion or a misunderstanding. We are referring our findings regarding Rodgers's conduct to the Office of the Deputy Attorney General for a determination as to whether administrative action is appropriate.

Additionally, while not involving issues of conduct warranting referral, we believe that the Counsel should have done a better job of editing Rodgers's proposed e-mail. We also believe that in the particular circumstances of this case, there either should have been a new recommendation prepared for the President or one of the other officials listed in the Delegation of Authority should have reviewed Rhodes's letter and approved the content of Rodgers's draft e-mail prior to it being sent to the White House.[12]

Finally, we recommend that the Office of the Pardon Attorney review its files to locate any other instances where its office relied upon a supplementary e-mail to the White House Counsel's Office, rather than a new "letter of advice." In the event that situations similar to Aaron are located, those files should be reviewed to ensure that the information provided to the White House accurately reflects the information contained in any communications from interested parties to those particular clemency applications.

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[12] As we outline in footnote 2, the relevant provisions of the CFR provide that the Attorney General's authority is delegated to the Pardon Attorney acting under the direction of the Associate Attorney General. We believe the Department should consider whether to revise these provisions to reflect its current applicable policies and practice. The Department has informed us that it Department concurs in our recommendation and has initiated a process to amend the relevant provisions to reflect its current applicable policies and practice.

ATTACHMENT

A

U.S. Department of Justice

United States Attorney
Southern District of Alabama

Riverview Plaza
63 So. Royal Street, Suite 600
Mobile, Alabama 36602

Phone: 251/441-5845
Fax: 251/441-5277

November 25, 2008

Ronald L. Rodgers, Pardon Attorney
Office of the Pardon Attorney
1425 New York Avenue, NW, Suite 11000
Washington, D.C. 20530

In re: Clarence Aaron, Docket No. 93-00008

Dear Mr. Rodgers:

I have reviewed various documents submitted by Clarence Aaron in support of his Petition for Commutation of Sentence and agree that Aaron should receive a commutation of his life sentence. At the same time that Aaron has expressed remorse and submitted evidence of rehabilitation in prison – which is commendable – he also continues to minimize his own role in the offense and ignores the fact that his life sentence is directly due to his own refusal to accept responsibility for his actions and, instead, to perjure himself at both of his trials, a choice that enhanced his sentence and undermined his usefulness as a cooperating witness. Consequently, I recommend that Aaron be resentenced to a term of 25 years rather than the time served sentence that he seeks.[1] A lesser sentence would result in undue disparity with similarly situated defendants who are more deserving because they have fully acknowledged their own culpability, do not blame others for their own choices, are less culpable, or have chosen timely cooperation, as several of Aaron's co-defendants did.

Procedural History

Aaron was tried twice. The first trial resulted in a mistrial and the second in his conviction. At Aaron's first sentencing, the district court found that he was an organizer or manager of criminal activity that involved more than five individuals,

[1] To date, Aaron has served approximately 15 years which, with credit for good behavior, is approaching a sentence of 18 years.

that he was responsible for at least 9 kilograms of crack cocaine and 15 kilograms of cocaine and that Aaron perjured himself on the stand. Aaron was sentenced to life without parole.

The Eleventh Circuit Court of Appeals upheld Aaron's conviction and vacated the case for re-sentencing, directing the district court to determine the conversion ratio for cocaine to crack cocaine. The Court further found that, although Aaron was responsible for converting the cocaine to crack cocaine, his co-defendant, Chisholm, was not. *United States v. Chisholm,* 73 F.3d 304 (11th Cir. 1996). On appeal, Aaron did not contest his upward role enhancements nor the finding by the district court that he perjured himself at trial. Aaron was resentenced to life without parole in July of 1996 and the Eleventh Circuit affirmed his re-sentencing in April of 1998.

In May of 2008, Aaron filed a motion for reduction of sentence, based upon 18 U.S.C. § 3582(c)(2), which permits the sentencing court to reduce a previously imposed sentence based upon a retroactive amendment to the United States Sentencing Guidelines. Aaron relied on Amendment 706, which reduced the base offense level for offenses involving less than 4.5 kilograms of crack cocaine. The Amendment, by limiting a guideline reduction for higher quantities of crack cocaine acknowledges the danger and seriousness dealers of larger quantities of crack cocaine, such as Aaron, pose to society. Because Aaron was involved with twice that amount of crack cocaine, he was ineligible for a sentence reduction. The district court denied his motion in September of 2008.

Equitable Factors

None of the traditional grounds identified in the U.S. Attorney's Manual for considering commutation apply here: "disparity or undue severity of sentence, critical illness or old age, [or] meritorious service rendered to the government." USAM §1-2.113. Instead, Aaron's Petition is supported by other equitable factors: evidence of remorse, rehabilitation in prison, the support of his family, and a desire to help others avoid the destructive decisions that he made. All of this is to his credit.

These equitable factors, however, must be balanced against his continuing effort to downplay his criminal activity. Aaron has repeatedly and publicly

minimized his role in the conspiracy and continues to do so even now by characterizing his role as "introducing its kingpin . . . to a drug supplier." Motion for Resentencing at 2. In 1999, Aaron told Frontline that he was "not directly" involved in drug trafficking and that "the only thing I can see I was involved in was introducing the two parties. As far as them making some type of transaction, whatever they wanted to get from each other, I don't know, but I did introduce the two parties." When asked by Frontline if the nine kilograms of cocaine ever existed, Mr. Aaron replied "No. I never had it." These statements conflict with the evidence at trial and the district court's finding that Aaron had a leadership role in organizing two large cocaine deals, converting 9 pounds of cocaine to crack, and then selling it.

Aaron's claim that he merely introduced a "kingpin" to a "drug supplier" is disingenuous. It is significant that Watts, a drug kingpin, went to Aaron when Watts' source of cocaine dried up. Watts went to Aaron for a reason: Months earlier, in May 1992, Watts asked co-conspirator Hines what Aaron had been "doing," which Hines understood to be a question about drug activity. Hines told Watts that Aaron had bought 18 ounces of crack cocaine from him in January 1992. Consequently, Watts and Hines went to Aaron for cocaine and they got what they were looking for. Aaron had ready connections to coconspirator Chisholm, in Baton Rouge, and ordered up 9 kilograms of cocaine. Aaron's involvement did not stop there. Aaron traveled from Mobile to Baton Rouge with $200,000 cash, arranged for someone to transport the $200,000 the remainder of the way from Baton Rouge to Houston, personally contacted the source in Houston, and arranged for someone to deliver the 9 pounds of cocaine back to Mobile. After the powder cocaine was converted to crack, Aaron provided the scale to weigh the crack cocaine and drove a coconspirator around to sell it.

Similarly, Aaron set up another 15 kilogram cocaine purchase and hired someone to transport the $250,000 in cash from Mobile to Texas. Trial testimony established that Aaron flew to Texas, arranged for the delivery of cocaine to take place in a hotel room, and left the hotel room shortly before two masked, armed robbers appeared at precisely the right time and hotel room and stole the $250,000 in cash. One of the conspirators testified that he saw Chisholm wink at the robbers, raising the inference that the robbery was an inside job. Notably, Aaron retained two defense lawyers for trial, although his Petition claims he comes from a humble background and committed the crime because he was in a desperate

financial position after his grandfather died and he gave up his inheritance.

In short, the facts presented at Aaron's trials demonstrate that he went well beyond making an introduction. He was instrumental in organizing a 9 and 15 kilogram cocaine deal for a "drug kingpin" who needed an alternate source. These deals – substantial by any measure – are not consistent with a first-timer's foray into the cocaine world. The trial testimony, the experience of the veteran prosecutor in this case, and common sense belie the notion that an individual can readily set up a 9 and 15 kilogram cocaine deal for a drug kingpin without having the experience and a background in drug activity. There is no reason to question Aaron's actions or guilt. His minimization shows a genuine reluctance to come to terms with the scope of the conspiracy and his own role in it and undermines the weight to be accorded to his acceptance of responsibility and expressions of contrition.

Aaron also argues for clemency based upon the claim that he was convicted of a "nonviolent" drug conspiracy. (Aaron's Supplemental Memorandum in Support of Amended Petition, Page 1, November 21, 2007). The armed robbery of the $250,000 in cash – inside job or not – is a testament to the violence that accompanies drug trafficking. Aaron's crime was not nonviolent.

Aaron claims that he wanted to enter a guilty plea but was not given the opportunity to do so. Aaron was given ample opportunity to enter a guilty plea, with or without cooperation; either way he would have avoided a life without parole sentence. Despite Aaron's claims to the contrary, his plea offer was not contingent upon cooperation. Had Aaron entered a guilty plea, he would have received a reduction in his guideline range for acceptance of responsibility and would not have received an enhancement for obstruction of justice for testifying falsely at trial.

Aaron has also repeatedly claimed that he could not reduce his sentence by cooperation because he had no one to provide information about. This is not true. Prior to his second sentencing in 1996, Aaron was debriefed by the FBI and provided drug information on two individuals in Baton Rouge. That information was not used by the Baton Rouge U.S. Attorney's Office because Aaron had twice committed perjury under oath when he testified falsely at his two trials. Aaron's decision to perjure himself diminished his ability to cooperate. Further, for some

unknown known reason, Aaron alleges that he was taken by defense attorney Bob Clark to a "police station" where he and Clark viewed codefendant Chisholm, via a two-way mirror, being interviewed by the FBI. The FBI did not interview Chisholm and Attorney Clark told the prosecutor who tried Aaron that this did not happen.

Aaron argues that his sentence is disproportionate to the sentence of his codefendants. He fails to note that, unlike himself, some of these codefendants had a lesser role in the conspiracy, pled guilty, did not perjure themselves at trial or provided substantial assistance in this case and against other individuals as well.

Aaron's failure to accept full responsibility for his crimes weighs heavily against commutation to a time-served sentence. The commutation of Aaron's sentence to time served while he continues to claim that he was minimally involved, despite clear and overwhelming evidence to the contrary, would not only send the wrong message to society at large, it would reward an individual who has downplayed his own criminal behavior.

As Aaron's counsel acknowledges, Aaron should "be resentenced to a substantial term of incarceration but not to a life sentence." Motion for Resentencing at 13. While I believe Aaron should receive some reduction, I respectfully recommend against the granting of his request for time served and recommend a 25 year sentence. This fairly balances his rehabilitation against the seriousness of the offense, his minimization, and the sentences of other defendants in this district.[2] Finally, since Aaron has already served time equal to a sentence of close to 18 years, it will also allow for a structured transition from incarceration to release.

Very truly yours,

DEBORAH J. RHODES
UNITED STATES ATTORNEY

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[2] Codefendant Chisholm, who was not held responsible for the conversion of cocaine to crack cocaine, is serving a sentence of 24 years and 4 months.

ATTACHMENT

B

Rodgers, Ronald (OPA)

From: Rodgers, Ronald (OPA)
Sent: Wednesday, December 03, 2008 2:57 PM
To: 'Lee, Kenneth K.'
Subject: Clarence Aaron
Attachments: AARON.DEN.wpd

Ken, the commutation case of Clarence Aaron is, I believe, the last of the cases that you requested a second look at. We solicited, and recently received, a slightly revised recommendation as to disposition in the case from the current United States Attorney for the Southern District of Alabama, Deborah Rhodes. As it largely dovetails with the comments in the final paragraph of the DAG's recommendation in the case from August 2004 (and I have attached a copy of that recommendation) and because of the shortage of time before you close the doors on these matters, I thought it best to convey the U.S. Attorney's thoughts and recommendations in a summary format for you.

To date, Aaron has served approximately 15 years in prison. The U.S. Attorney recommends that at some point Mr. Aaron's sentence be commuted to a term of 25 years. Her recommendation is based on the following:

(1) The trial court determined that Aaron was "an organizer or manager" of the criminal activity that involved five other coconspirators, and that he was personally responsible for a least nine kilograms of cocaine base and 15 kilograms of cocaine; this determination was upheld on appeal. Three things are notable in the sentencing process as ultimately affirmed on appeal: (a) Aaron, and not co-defendant Chisholm (who was sentenced to 24 years, 4 months' imprisonment), was held responsible for converting the cocaine to cocaine base; (b) Aaron did not contest his upward role enhancement found by the district court; and (c) nor did Aaron contest the district court conclusion that he perjured himself at trial.

(2) While Aaron has demonstrated remorse, rehabilitation in prison, and a desire to assist others in avoiding destructive decisions, such must be balanced against his repeated and public assertions in which he has grossly minimized his role in the conspiracy. He inaccurately told "Frontline" that he was "not directly" involved in drug trafficking and that he had merely "introduced the two parties" to narcotics transactions - which was directly contradicted by the evidence offered at trial. Indeed, the evidence at trial showed that Aaron personally ordered the nine kilograms of cocaine, arranged for the down payment of $200,000 for the cocaine to be transported to Houston, and arranged for the transportation of the cocaine base to Mobile, Alabama. After he personally converted those nine kilograms of cocaine to base, Aaron personally transported a coconspirator around to various purchasers to sell the narcotics. The same thing is true regarding the 15 kilograms of cocaine - Aaron traveled to Texas to personally pay $250,000 for the cocaine and within minutes of having received delivery of the cocaine at a hotel room (as he had required as part of the transaction) and thereafter departing the room, an armed robbery of the recipient of the $250,000 that Aaron had provided to him occurred, possibly having been planned by Aaron and others in advance (one of the coconspirators testified that Chisholm, who was present at the time of the purported robbery, winked at the robbers). Not only does this also tend to dispel Aaron's dismissal of his involvement in narcotics trafficking as minor, but it similarly casts doubt on his characterization of his offenses as "non-violent."

(3) Aaron's complaint that he was unable to cooperate with law enforcement authorities after his trial in an attempt to achieve a lesser sentence because he knew no one about whom he could provide

information is also not completely accurate. Mr. Aaron could not be used as a witness because he perjured himself in each of his two trials (the first ended in a mistrial).

We also reached out to the sentencing judge, the Honorable Charles R. Butler, Jr. While he chose not to comment when he was approached regarding the Aaron clemency request in 2004, he informed a member of my staff on December 2, 2008 that he had no objection to commuting the sentence presently.

In sum, the U.S. Attorney believes Aaron a poor candidate for "time served" release presently because he has minimized his involvement in the very serious offenses of which he was convicted; because his sentence was upheld on appeal; because he twice committed perjury; and because his co-conspirator Chisholm, who was convicted of the same offenses as Aaron but not found responsible for sentencing purposes for converting the nine kilograms of cocaine into cocaine base, was sentenced to 24 years and 4 months imprisonment. As noted previously, the U.S. Attorney believes that 25 years is an appropriate sentence in the Aaron case.

As you know, in the final paragraph of the 2004 DAG recommendation, support for a commutation of Aaron's sentence at some point in the future was not foreclosed. I have shared this e-mail with ODAG before sending it to you and they believe, as does the U.S. Attorney, that Mr. Aaron's commutation request is about 10 years premature.

Hope this helps, Ken

Ron Rodgers