

CONFERENCE HIGHLIGHT—PANEL: FROM INMATE TO LEGAL ADVOCATE

*Speech by Kemba Smith**

It was only a little over five years ago that I was identified as an inmate number. Today I continue to speak on behalf of those currently incarcerated, those who will be in district court on Monday, and those in the future who are being sentenced under federal mandatory drug sentencing.

Three days before Christmas 2000, President Bill Clinton commuted my sentence of twenty-four and a half years for a drug conspiracy charge. If he had not done so, this afternoon, instead of talking to you, I would still be sitting in federal prison. If my parents had not waged a campaign in the news media, in the churches, and among the criminal justice reform community, I would not have been freed from prison to raise my eleven-year old son.

I grew up as an only child of professional parents in a Richmond, Virginia suburb, leading an advantaged and sheltered childhood. After graduating from high school in 1989, I left the security of my family to continue my education at Hampton University in Hampton, Virginia. I was not a drug trafficker. I was a college student. And at the age of 19, away from the protective watch of my mother and father, and in an attempt to fit in, I met a man while a sophomore in college who I became romantically involved with. Unbeknownst to me at the time, according to the Government, he was the head of a \$4 million violent crack cocaine ring.

He eventually became verbally and physically abusive. I continued to have a relationship with him for over three and a half years in which, during this time, he increasingly drew me into his drug activities. The prosecutor stated that I never handled, used, or sold any of the drugs involved in the conspiracy, yet I was sentenced as a first-time non-violent drug offender to twenty-four and a half years -- one for every year of my life. I remained in prison from the moment I turned myself in September 1994, seven months pregnant with my first child, until Dec 22, 2000. My boyfriend at the time did not do any time because he was killed. After he was murdered, the Government came after me and held me accountable for the total amount of drugs involved in the conspiracy, which was 255 kg of crack cocaine, even though according to the Government's investigation, the drug dealing started two years before I even met him.

I did not traffic in drugs, but I knew my boyfriend did. I knew while living with him that he did not have a job and that we were living off the proceeds of his drug crimes. I never claimed total innocence and this is why I plead guilty. The prosecutor added extra incentive. In negotiating a guilty plea, he would allow me a bond so that I could go home until sentencing to give birth to my son and that I would receive only a two-year sentence. Unfortunately, due to his unethical conduct, after pleading guilty, I remained in jail. Minutes after giving birth in a hospital guarded by two prison officials, the U.S. Marshals Ser-

vice walked into my room and ordered that I be shackled to the bed. And two days later my son was taken away. I was sent back to a cold jail cell with my breasts gorging in extreme pain. If my parents had not been able to take and raise my son, my parental rights would have been terminated.

Since being released from prison in 2000, I graduated from Virginia Union University with a bachelors degree in social work, worked at a law firm in Richmond for over four years, and bought a home. I'm currently a first-year law student at Howard. I have spoken across the country to youth audiences, inspiring them to become educated about the injustices of the U.S. criminal justice system and hoping that they will realize that there are consequences to their life choices. But most importantly, I am raising my only child, who's now eleven years old. Unfortunately, my burden is that I represent the thousands of others still currently incarcerated, some of them my friends that I left behind, that deserve an opportunity to raise their children as well.

Mandatory minimum sentences are sentences, usually of imprisonment, created by legislative bodies that must be imposed by courts upon a finding of guilt based upon a fact or some other fact not withstanding any other factors that are traditionally relevant to just sentences, including the degree of culpability and the accused's role in the offense. U.S. law provides that any person who is an accessory to a crime or who aids and abets the commission of a crime is a principal and is treated and punished as the principal perpetrator in the offense. In the Anti-Drug Abuse Act of 1988, Congress applied the mandatory minimum sentences it enacted in 1986 to the crimes of attempt and conspiracy in the Control Substances Act. The consequence is that most minor participants in the activities of a drug trafficker are charged with all the crimes of the drug trafficker. This means they are facing the equivalent punishment. The threat of imprisonment for over 20 or 30 years or more leads many to plead guilty and seek a departure below the mandatory minimum sentence. In 1986, the U.S. Department of Justice insisted on a provision to the mandatory minimums to permit the Government to move the court to sentence below the statutory minimum if the government found that the defendant had provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

Many women are unwilling to provide the substantial assistance in order to be loyal to the man they love, even if they're not married. This results in what is called the "Girlfriend Problem." The drug trafficker pleads guilty, cooperates in the prosecution of his colleagues and is sentenced below the mandatory minimum. His girlfriend, having no information about the criminal organization other than the acts of the boyfriend, feels morally and emotionally compelled not to testify against him. Therefore, she is unable to qualify for the substantial assistance departure

and receives the full mandatory minimum sentence -- even though, in fact, her culpability is substantially less than that of the principal offender. Aside from mandatory minimum sentencing, various features of drug enforcement in the United States have a racially disparate impact.

The United States Housing Act of 1937 was amended by Section 5101 of the Anti-Drug Abuse Act of 1988 to permit the termination of a lease in a public housing facility if any member of the tenant's household or guest of anyone under the tenant's control engaged in criminal activity including drug-related criminal activity on or near public housing premises while the tenant is a tenant in public housing. This has been implemented as the "One Strike And You're Out" housing provision that has resulted in eviction of public housing tenants. This policy was recently unanimously upheld by the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*. Rucker's daughter was found with cocaine and a crack pipe three blocks away from her apartment, and Rucker was evicted.

A person with a drug conviction has a lifetime ban from food assistance and temporary assistance to needy families. Any student convicted of a drug offense shall be denied federal higher education financial aid.

Fortunately, when I came home, I went to back to school to complete my degree -- but I was tempted not to even go online to fill out the financial aid application because I already had in my mind that I wasn't going to have the opportunity to receive any based on what I'd heard about the Higher Education Act of 1998. But ultimately, I went ahead because I just wanted to see what their response was going to be. How were they going to deny me? What was their language going to be? Luckily, I did receive it, but I believe it was because my conviction came before this actual act went into place.

One of the things, especially when I talk to youth audiences and people in the community, I try to get them to look at is why this provision just target people with a drug offense? A person can commit murder, rape, and incest and still receive financial assistance. And so, it somewhat shows that we're disproportionately impacted within the system, within sentencing and punishment. But even once a person has done their time and paid their debt to society, when they come home to try to make a better life for themselves, they are still penalized with education as well.

A non-U.S. citizen convicted of a drug offense or regulation must be barred from entry from the United States or deported from the United States no matter when the offense took place. And I can recall, a young girl I met while I was incarcerated, who was eighteen. She had been in the country ever since she was a little girl. All of her family members had come over to this country, and pretty much, she knew because of her drug

conviction that she was automatically going to be deported. She was somewhat hopeless. She didn't know who was going to be there to support her there resource-wise because she didn't know anyone there anymore.

It is evident that the people who are disproportionately impacted by these federal drug-sentencing laws are people of color. And I'm not ashamed to say that I represent those who are currently incarcerated people just like me, who are capable of being productive taxpaying citizens. When the Congress created the mandatory minimum sentences and the collateral consequences of the drug offenses, they may not have been acting with intent

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to inflict special punishment on people of color, but that has unquestionably been the effect. In 2003, Supreme Court Justice Kennedy proclaimed being against this particular policy in a speech at the ABA Annual meeting and challenged the organization to begin a new dialogue. Basically, after Justice Kennedy made this public announcement, the ABA formed the Justice Kennedy Commission that found that since the advent of manda-

tory minimum sentencing policies, the average length of incarceration in the United States has increased three-fold. They found that mandatory minimum sentencing was one of an array of policy changes which, in the aggregate, produced steady, dramatic and unprecedented increase in the population of the nation's prisons and jails—in spite of a decrease in the number of crimes committed in the past several years.

With mandatory minimum sentences, there are a lot of disastrous social consequences that go along with having an over-reliance on punitive sentencing policies. Basically, there are excessively severe sentences. When I speak before people, I try to emphasize that it's bigger than just me and my story, that there are hundreds and thousands of other Kemba Smiths that are still currently incarcerated that have served more time than I had, and their kids are going off to college and they haven't had the opportunity to be there for them. Mandatory minimum sentences lead to arbitrary sentences. They produce the very sentencing disparities that determinate sentencing was intended to eliminate.

Honorable Charles B. Rangle, Congressman, stated that No one can justify the 100:1 ratio. Although there are larger numbers of documented white crack cocaine users, federal drug enforcement and prosecutorial practices have resulted in the so-called War on Drugs being centered on inner-city communities. This has caused an overwhelming number of prosecutions and convictions coming from these communities with African Americans disproportionately subject to the unreasonably harsh crack cocaine penalties. Clearly, we're talking about different neighbor-

hoods, not different crimes. Ironically, crack and cocaine have the same level of high, so the difference is merely cosmetic. Tough on crime rhetoric be damned—this discrepancy is stupid and inconsistent with a civilized country.

Every time when I see or hear things like that, coming from political members, and I realize the risk they are taking in making those particular statements, I just wish that we could have more of them. It's more than likely that political members don't want to make statements like that because it will make them seem as though they are soft on crime. Also, with mandatory minimum sentences, it undermines judicial discretion, where the judge should be the appropriate person to decide on a particular sentence within a designated range, not the legislator or sentencing commission. As judicial discretion relates to these collateral consequences to drug offenses, I don't understand why these policies were put into effect because ultimately, if the judge wants to impose that as part of sentencing, he's clearly able to do that, versus having policy do that automatically.

There are economic implications, where there's a waste of money, as seen in increased expenditures in maintenance and healthcare dependent inmates, lost tax revenue from income that might have been earned. There are intangible harms, such as emotional, economic and developmental damage to children. Disenfranchisement, which is a big issue I'm hoping, in the near future, there will be a lot more success. That's an issue that more people are willing to accept as being unfair; that once a person has done their time, they should be allowed to be a part of the political process, especially because they are taxpaying citizens. With this disenfranchisement, there is consequent political alienation of our communities of color.

Another economic factor with mandatory minimum sentencing, and with the increased population in the prisons, is the fact that while I was incarcerated in 2000, during the U.S. Census, I can remember them locking the entire institution down, and they were telling us that they need to give us U.S. Census paperwork to fill out. When they brought us the paper to fill out, I wondered, "Why are we being counted as part of the prison?" At the time I was in Danberry, Connecticut, and from working with scholars and advocates since I've been home, I've been enlightened to the economic factors that surround these smaller prison industry communities where they are creating jobs and resources by doing the Census and counting us where they would offer more funding and resources to that community.

I believe that those resources should go back to where those people eventually end up going back to.

I guess the fight still continues and I had the opportunity, at the beginning of March, to testify at a hearing with the Inter-American Commission on Human Rights. We all came together to ask them to determine whether the U.S. Government is violating international law and norms protected under the American Declaration of Rights and Duties of Man by the implementation as well as the application of mandatory minimum sentencing in a discriminatory manner. We're saying that in the application of these laws in relation to following human rights norms protected by the American Declaration, the following things should be looked at -- the right to equal protection of the law, the right to a fair trial, and the right to due process.

I'm grateful that you all have this conference in honor of Judge Woods. I was at a conference in Minneapolis at the University of St. Thomas Law School, it's a mostly liberal white institution, but it was very interesting that they were dialoguing on alternatives to incarceration. There were three women of color that were talking about these particular issues, and then directly following, there was a White judge that basically echoed the exact same things we were talking about. One of the things that we all came to the conclusion of was that we need to continue nudging the system.

For me, I question myself as far as why I chose this route. But for me, it's a sense of survivor's guilt. When I do public speaking, I want to give myself a little bit more credibility in the things I talk about. But it's a survivor's guilt that I still have people who are still there that deserve a second chance just like I do. And I'm grateful for what President Clinton did, but like I said, there are just so many others that are still there.

But when you are put in a position where too much is given, too much is required, it can be an overwhelming experience. You have this mentality starting off that you want to save the world, but I hope we all recognize that we have the fight from the past and when I think of our fight from the past, and our ancestors, how tough their battle was, it motivates me more and makes me want to remain committed and not lose hope—because their fight was tougher than what we're experiencing now. It's up to us to continue the legacy of our ancestors, and despite whether you're going into corporate law, or entertainment law, criminal law, we still need to understand that we have a responsibility to our community.

* Kemba Smith was a featured panelist at the 10th Annual Sylvania Woods Conference for "The African American Woman in Law and Legal History: An Important, Individual Moment in Law and History." This is an edited transcript of her panel presentation.

Ms. Smith's case drew support from across the nation and the world. Her story has been featured on Nightline, Court TV, and the Early Morning Show, the Washington Post, the New York Times, Glamour, People, and Essence.

As an advocate and public speaker, Ms. Smith has received numerous awards and recognitions for her courage and determination to educate the public about the devastating social, economic and political consequences of current drug policies. Her advocacy led to the creation of the Kemba Smith Foundation, a 501(c)(3) non-profit organization.

For more information about the Kemba Smith Foundation or to contact Ms. Smith, please visit its website at <http://www.kembasmithfoundation.org>.