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October 8, 2010

The Honorable William K. Sessions
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs

Dear Judge Sessions:

Thank you for the Sentencing Commission's leadership in calling for Congress to reduce the sentencing disparity between crack and powder cocaine. Your views helped persuade Congress to pass the Fair Sentencing Act of 2010 (P.L. 111-220) earlier this year. As the lead sponsor of the Fair Sentencing Act, I write in response to the Sentencing Commission's request for comment on the Proposed Emergency Amendment to the Sentencing Guidelines, which is required by Section 8 of this legislation.

First, I strongly believe that the statutory mandatory minimum penalties for crack cocaine should continue to correspond to base offense levels 24 and 30 because this "level 24 option" more accurately reflects Congressional intent than the "level 26 option." Since well before enactment of the Fair Sentencing Act, the statutory minimum penalties for crack cocaine have corresponded to levels 24 and 30. In 2007, the Sentencing Commission revised the Sentencing Guidelines to reduce by two levels the base offense levels assigned to various quantities of crack cocaine. Congress permitted this amendment to become effective with virtually no debate. In debating and passing the Fair Sentencing Act, Congress did not intend for the base offense levels for crack cocaine to change, and nothing in the text or legislative history suggests otherwise.

It would be counterintuitive for the Sentencing Commission, which has called for a reduction in the sentencing disparity since 1995, to respond to Congress finally lowering the penalties for crack cocaine by significantly increasing the base offense levels assigned to crack cocaine. Indeed, under the level 26 option, some low-level offenders would receive the same sentences they would have received prior to the passage of the Fair Sentencing Act. The level 24 option is more consistent with Congress's clearly stated goals in passing the Fair Sentencing Act, including reducing racial disparities in drug sentencing; increasing trust in the criminal justice system, especially in minority communities; reducing over-incarceration of nonviolent drug offenders; and shifting the focus of federal drug enforcement from low-level offenders to drug kingpins.

Moreover, I strongly believe that the sentencing guideline ranges should include, rather than exceed, the statutory minimum penalties. A judge should be able to sentence a defendant to the mandatory minimum sentence without deviating from the Sentencing Guidelines. As the Sentencing Commission explains in the Proposed Emergency Amendment, under the level 26

option a judge could not sentence a defendant to a mandatory minimum sentence and remain within the guideline range. For example, at level 26, the guideline range of 63 to 78 months for a defendant in Criminal History Category I exceeds the 5-year statutory minimum by three months. On the other hand, as the Commission states, “Base offense levels 24 and 30 each correspond to a guideline range for a defendant in Criminal History Category I that includes the statutory mandatory minimum penalty.”

It has been suggested that Congress was aware that the Sentencing Commission only planned to reduce the base offense levels assigned to crack on a temporary basis, until Congress reduced the sentencing disparity. I am not aware that the Sentencing Commission has ever indicated to Congress that it planned to revert to levels 26 and 32 if and when Congress reduced the crack-powder disparity. In fact, it has been my understanding from the Commission that the base offense levels would not change.

It has also been suggested that Section 8 of the Fair Sentencing Act, which says the Sentencing Commission should amend the sentencing guidelines “to achieve consistency with other guideline provisions and applicable law,” supports the level 26 option, because this option would make the base offense levels for crack consistent with those for other drugs. It would be a mistake to read any substantive meaning into this language. The Sentencing Commission provided this boilerplate language to the Judiciary Committee simply to ensure that Congress authorized the Commission to promulgate an emergency amendment. In fact, identical language has been included in legislation dealing with the crack-powder disparity since 2001, long before the Sentencing Commission’s 2007 crack cocaine amendment.

It has also been suggested that in passing the Fair Sentencing Act Congress was primarily concerned with establishing an 18:1 crack-powder sentencing ratio and that therefore the level 26 option may be appropriate because the ratio at the bottom of each base offense level would be closer to 18:1 under the level 26 option than under the level 24 option. However, the plain language and legislative history of the Fair Sentencing Act contradict this view. The text of the Fair Sentencing Act does not refer to an 18:1 ratio, but rather changes the quantity of crack cocaine that triggers the mandatory minimum. While some members referred to sentencing ratios as a short hand while debating the Fair Sentencing Act, they were referring to the statutory penalty ratio, not the base offense level ratio, and Congress was clearly most concerned with raising the thresholds for crack mandatory minimum sentences. Congress selected 28 grams as the trigger for the five-year mandatory minimum because the Sentencing Commission and other experts have concluded that less than one ounce is a retail/user-level quantity, while more than one ounce is the quantity sold by wholesalers. See, e.g., p. 18, Report to the Congress: Cocaine and Federal Sentencing Policy, United States Sentencing Commission, May 2007. There is no similar policy rationale for the 18:1 ratio; it simply reflects the difference between the statutory penalties for powder and crack cocaine.

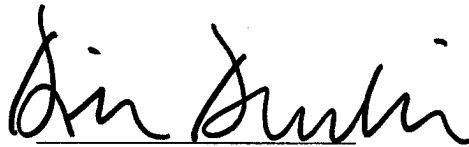
The importance Congress attached to quantity thresholds is reflected in members’ statements. For example, Senator Sessions said: “Through this change in the thresholds for mandatory minimum sentences, we will be able to achieve needed fairness without impeding our ability to combat drug violence and protect victims” (emphasis added). During the floor debate on the Fair Sentencing Act, Representative Dan Lungren said:

I must say that from a law enforcement standpoint, perhaps the most important factor here is the amount of the substance that is covered. According to narcotics officers I have spoken with, you want to reach the wholesale and mid-level traffickers who often trafficked in 1-ounce quantities. That is why S. 1789 would raise the amount of crack cocaine necessary to trigger a mandatory 5-year sentence from 5 grams to 28 grams, which is close to the 1 ounce (emphasis added).

Finally, I strongly believe that the enhancements in the Fair Sentencing Act should not apply cumulatively. Simply put, there is no justification in the text or legislative history of the Fair Sentencing Act for double counting these enhancements. Congress clearly intended to punish drug offenders who engage in certain aggravating conduct, but there is no support for penalizing offenders twice for the same conduct.

Thank you again for the Sentencing Commission's leadership on this important issue, and for considering my views.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick Durbin", written in a cursive style.

Richard J. Durbin