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United States Senate

COMMITTEE ON THE JUDICIARY

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April 5, 2011

The Honorable Patti B. Saris
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs

Dear Chair Saris:

As the lead sponsors of the Fair Sentencing Act of 2010, we write in response to the Sentencing Commission's request for comment on its proposed permanent amendment to the Sentencing Guidelines. Thank you for taking the time to meet with Senator Durbin last week.

In short, we believe the Commission should (1) amend the Drug Quantity Table for crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, correspond to the Fair Sentencing Act's new mandatory minimum penalties; (2) provide that the changes to the Drug Quantity Table be applied retroactively; and (3) adjust the Drug Quantity Table so that base offense levels 24 and 30 correspond with the mandatory minimums for all drugs.

"Level 24 Option" for Crack Cocaine

Prior to the promulgation of the emergency amendment, Senator Durbin submitted a comment explaining that in passing the Fair Sentencing Act, Congress intended that the statutory mandatory minimum penalties for crack cocaine should continue to correspond to base offense levels 24 and 30. This clear expression of Congressional intent was not contradicted by a single member of Congress. In fact, the then-Chairman of the House Committee on the Judiciary and the then-Chairman of the House Subcommittee on Crime wrote to express the same view. Under traditional canons of statutory construction, the views of key supporters of the Fair Sentencing Act are entitled to significant weight in determining Congressional intent, unlike the views of legislators who led the opposition to the bill.

At the Commission's meeting of October 15, 2010, the Commissioners acknowledged their obligation to follow Congressional intent regarding the Fair Sentencing Act. Yet in promulgating its emergency amendment and adopting the "level 26 option," the Commission overlooked the Congressional comments it had received. Indeed, the level 26 option undermines our goals in passing the Fair Sentencing Act – to reduce racial disparities in drug sentencing, increase trust in the justice system, and reduce over-incarceration of nonviolent drug offenders.

The unfortunate result of the emergency amendment and its increase in base offense levels is that, contrary to Congress' intent, many low-level nonviolent offenders would be unaffected by the Fair Sentencing Act and would receive the same disproportionate sentences as prior to the legislation's enactment. Moreover, according to the Commission's retroactivity analysis of January 28, 2011, if the guideline amendment were applied retroactively using the level 26 option, the guideline ranges of 2,198 offenders would remain unchanged by the Fair Sentencing Act. By contrast, using the level 24 option, only 92 offenders would have a guideline range that would remain unchanged.

When Congress passed the Fair Sentencing Act, we were aware that the Commission had lowered the relevant base offense levels for crack to levels 24 and 30 in 2007. Indeed, we allowed the amendments to become effective. We had no indication that the base offense levels would again be changed, and we relied upon them for our own calculations and negotiations with respect to the Fair Sentencing Act. In fact, Senator Durbin's staff was told orally and in writing by Commission staff that we could safely assume that the new quantity triggers for the crack mandatory minimums would be pegged at levels 24 and 30. To be sure, Congress can direct the Commission to increase offense levels, but we did not do so in enacting the Fair Sentencing Act.

It has been suggested that in passing the Fair Sentencing Act Congress was primarily concerned with establishing an 18:1 crack-powder sentencing ratio. Therefore, it is argued, 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. While we referred to sentencing ratios as a short hand while debating the Fair Sentencing Act, we clearly were referring to the statutory penalty ratio, not the base offense level ratio. Moreover, we were most concerned with raising the thresholds for crack mandatory minimum sentences. This is evidenced by the fact that Congress would not have passed legislation that achieved an 18:1 sentencing ratio by, for example, maintaining a 5-gram threshold for a 5-year crack mandatory minimum and lowering the threshold for a 5-year powder cocaine mandatory minimum to 90 grams. Rather, Congress selected 28 grams as the trigger for the five-year mandatory minimum because the Sentencing Commission and other experts have concluded that more than one ounce is the quantity sold by wholesalers. 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.

One argument that has been raised since Senator Durbin submitted his comment is that the level 26 option would encourage plea agreements and government cooperation by criminal defendants because the sentencing guidelines would always exceed the statutory minimum penalties. However, this claim is without merit. First, the Commission's statistics demonstrate that there has been no drop in the plea rate for crack cocaine offenses after the 2007 amendment lowered the relevant base offense levels. *See* Sourcebook of Federal Sentencing Statistics. Second, defendants who cooperate with the government may always be sentenced below a mandatory minimum pursuant to 18 U.S.C. § 3553, § 5K1.1, and Rule 35 of the Federal Rules of Criminal Procedure.

For all of these reasons, when the Commission re-promulgates its temporary amendment as a permanent amendment, it should amend the Drug Quantity Table for crack cocaine so that base offense levels 24 and 30 correspond to the mandatory minimum penalties.

Retroactivity

The Commission also sought comment on whether the permanent amendment should be applied retroactively to previously sentenced defendants. It is our understanding that there will be a future opportunity to comment on this question. However, we will briefly summarize our view that the guideline amendment should be applied retroactively to all categories of defendants.

First, in the absence of retroactive application, defendants will continue to serve pre-Fair Sentencing Act sentences that Congress has already determined are unfair and disproportionately punitive to African-Americans. This result is unjust, unnecessary, and inconsistent with the purposes of the Fair Sentencing Act.

Second, while the Act does not explicitly address statutory retroactivity, it was our belief that all resulting changes to the guidelines would apply retroactively. This assumption was based on the Commission's handling of the 2007 amendments. After the Commission revised the Guidelines in 2007 to reduce by two levels the base offense levels assigned to various quantities of crack cocaine, it applied those changes retroactively to all incarcerated defendants. In enacting the Fair Sentencing Act, we assumed that the Commission would similarly apply retroactively the guideline amendments made pursuant to this legislation.

"Level 24 Option" for All Drugs

Finally, the Commission sought comment on whether the entire Drug Quantity Table should be amended so that base offense levels 24 and 30, rather than levels 26 and 32, correspond with the statutory mandatory minimum penalties. We believe that it should.

First, the relevant sentencing guidelines ranges should include, rather than exceed, the statutory mandatory minimum penalties. In every drug case, the sentencing judge should be able to sentence a defendant to the statutory mandatory minimum sentence without deviating from the guidelines. If levels 26 and 32 were to correspond with the statutory mandatory minimums, a judge could not sentence a defendant to the mandatory minimum and remain within the guidelines. For example, at level 26, the guideline range of 63 to 78 months for a crack offender in Criminal History Category I exceeds the 5-year statutory minimum by three months. On the other hand, the level 24 option would allow a judge to sentence the offender to the 60-month mandatory-minimum sentence while remaining within the guidelines. Such a scheme encourages adherence to the guidelines, while at the same time allowing for flexibility based on a defendant's individual circumstances. This logic extends to all drugs, not just crack cocaine, and warrants an across-the-board change to the Drug Quantity Table.

Moreover, one of the purposes of the Fair Sentencing Act was to shift the focus of federal resources from low-level offenders to drug kingpins. As Federal Bureau of Prisons (BOP) Director Harley Lappin has stated in testimony to the Commission, "most" of the BOP's inmates are serving sentences for drug offenses. Studies have repeatedly shown that our prisons are overcrowded with low-level, nonviolent drug offenders with little criminal history. As Mr. Lappin testified, the BOP is currently operating at 35 percent over capacity, and overcrowding has led to the double and triple bunking of inmates. A substantial increase in the number of

inmates per year is expected for the next two years. A level 24 approach for all drugs would help address this crisis without jeopardizing public safety by giving federal judges discretion to sentence those defendants that pose the least risk to society at, and not above, the mandatory minimums. We ask the Commission to consider these circumstances, particularly given its obligation under 28 U.S.C. § 994 to promulgate guidelines in such a way as to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

There is also the important issue of cost. The exorbitant daily costs of housing a federal inmate are especially striking in today's troubled economy. According to BOP statistics, the average annual cost to house a federal prisoner in FY 2010 was $25,627. In the crack cocaine context alone, the level 24 option would save taxpayers tens of millions of dollars more than the level 26 option – even if it did not apply retroactively. This is a fraction of the savings taxpayers would see if the base offense levels for all drugs were lowered.

It is also important to remember that base offense levels are just that – a starting point for sentencing. The Fair Sentencing Act did not simply reduce sentences for crack offenders. It also called for increased punishments in many circumstances by including new sentencing enhancements that can apply across the board to all drug offenders. These new enhancements, when coupled with the abundance of enhancements already in the guidelines, ensure that the most serious drug offenders will continue to receive lengthy prison sentences.

A two-level reduction in the Drug Quantity Table for all drug offenses strikes the right balance by allowing judges to sentence low-level offenders to the mandatory minimum sentences, but also to apply a range of enhancements to more serious offenders. This is the kind of flexibility and individualized role-based sentencing that the Fair Sentencing Act envisioned. As Commissioner Wroblewski of the Department of Justice stated at the October 15 meeting: "[T]he intent of the Act is to increase penalties on the wors[t] drug offenders, high-level, violent offenders, who prey on vulnerable people, and to lower penalties on low-level, mitigating offenders, and to do this across all drug types." A level 24 option for all drugs is consistent with this intent.

Thank you for considering our views.

Sincerely,

Richard J. Durbin

Patrick J. Leahy