

May 25, 2011

Judge Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**RE: Public Comment on Retroactivity of Permanent Amendment:
Fair Sentencing Act of 2010**

Dear Judge Saris,

The Drug Policy Alliance, the nation's leading organization advocating alternatives to the failed war on drugs, appreciates this opportunity to comment on whether the amendment promulgated in response to Section 8 of the Fair Sentencing Act of 2010, Pub. L. 111-120 ("Fair Sentencing Act" or "FSA") should be given retroactive effect. Our organization recently submitted comments urging the Commission to restore the application of base offense levels 24 and 30 to quantities of crack cocaine that trigger the statutory minimums when adopting the FSA permanently. We now write to express our support for the retroactive application of the guideline adopted on April 5, 2011, in response to the FSA.

The Commission is statutorily authorized under 28 U.S.C. § 994(u) to determine whether a guideline amendment that reduces the sentencing range applicable to a particular offense may be retroactively applied.ⁱ In addition, the retroactivity factors enumerated in the U.S.S.G. § 1B1.10 policy guidance set forth excellent reasons why the amendment should be made retroactive upon its permanent adoption. Importantly, because the problems the FSA was designed to remedy are currently present in the sentencing system, a retroactive application is necessary in order to best effect the clearly stated goals of the Act, namely, to reduce the racial disparities in drug sentencing; increase trust in the criminal justice system, especially in minority communities; reduce the over-incarceration of nonviolent drug offenders; and shift the focus of federal drug enforcement from low-level offenders to drug kingpins.ⁱⁱ Lastly, a retroactivity policy can be implemented without any negative impact on public safety.

I. The factors enumerated in U.S.S.G. § 1B1.10 weigh in favor of a retroactive application

The background notes of U.S.S.G. § 1B1.10 state that in selecting an amendment for retroactivity, the Commission should consider such factors as (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range. These measures all support making the permanent amendment promulgated in response to the FSA retroactive.

First. The purpose of the Amendment weighs in favor of a retroactive application. Over the past twenty years, in four separate reports, the Commission has repeatedly requested that Congress raise the threshold quantities of crack that trigger application of five- and ten-year mandatory minimums in order to ease the unconscionable racial disparities in sentencing, mitigate the harsh treatment of



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lower-level crack offenders on the periphery of the drug trade, and better focus on the prosecution of serious drug traffickers.ⁱⁱⁱ In its May 2007 Report to Congress, the Commission explicitly found that the crack sentencing structure overstated the harmfulness of the drug, especially when compared to sentences imposed for powder cocaine offenses; that the quantity-based penalties swept too broadly, applied most often to low-level offenders, overstated the seriousness of most offenses, failed to achieve proportionality in sentencing, and resulted in the incarceration of thousands of primarily African-American defendants.^{iv} As a result, countless federal resources have been wasted on arresting, prosecuting, and incarcerating huge numbers of low-level, minority offenders for whom lengthy prison sentences are grossly unfair and unjust.

The FSA was enacted into law, and the Commission specifically adopted new guidelines, in response to these concerns. Because the problems designed to be remedied by the Act continue to persist, namely excessive and racially disparate sentencing, declining to make this amendment retroactive would limit the effectiveness of the FSA in achieving its stated goals, and would perpetuate the problems that necessitated the passage of the Act in the first place. For example, failing to provide retroactive effect to this amendment would frustrate the intent of the FSA to reduce the over-incarceration of low-level drug offenders. The Commission's own analysis of the impact of its amendment found that 3,109 individuals serving time for crack offenses would be eligible for release within the first year, compared to only 1,046 if the amendment is not made retroactive.^v

Moreover, in passing the FSA, Congress explicitly recognized that the sentences handed down under the previous regime were manifestly unfair and had egregious side-effects. It is significant that the vast majority of people who would be affected by a retroactivity policy have been sentenced since 1995, the year the Commission first recommended the reform of the cocaine sentencing scheme.^{vi} Since then, the Commission has released three of its four separate reports condemning the crack cocaine sentencing policy as being excessively strict, inappropriately targeting low-level offenders, overstating the seriousness of most offenses, failing to provide adequate proportionality, and largely targeting minorities.^{vii} The Sentencing Commission should uphold its own standards of justice by realizing retroactive application of the FSA in order to affect the very people referenced in the 1995 statement.

Failing to make the amendment retroactive would arbitrarily deny relief to more than ten thousand individuals whom Congress and the Commission have acknowledged should not have been sentenced so harshly in the first place. Perhaps most importantly, denying a retroactive application would exacerbate the racial disparities associated with crack cocaine sentencing policy, since 85 percent of offenders who would be eligible for a reduction are African-American.^{viii} The passage of the FSA signified recognition of unfairness and inequality—to deny a retroactive application is to perpetuate the very injustice that it was intended to correct. The mass incarceration of the African-American community, in which the crack sentencing structure plays a central role, has become so pronounced that many academics, civil rights leaders, policy-makers, lawyers, and entire communities claim the drug war functions as the new Jim Crow -- an institutionalized system of social control in communities of color, tantamount to the Jim Crow era.^{ix}

Second. The amendment is a good candidate for retroactive application because it will have a significant impact on prisoners. The Commission has estimated that if the changes in the amendment were applied to currently incarcerated individuals, it would reduce the average sentence for 12,040 eligible crack cocaine defendants by 37 months.^x This would considerably benefit the Bureau of Prisons (“BoP”), which is currently operating at 37 percent over its rated capacity.^{xi}

It is significant to note that drug offenders make up nearly two-thirds of all those incarcerated in BoP facilities,^{xii} at an annual per-person cost of around \$25,000 per year.^{xiii} Rather than continuing to expand the BoP, at a massive cost to taxpayers, in order to accommodate the overcrowding that inevitably results from the current sentencing scheme, our policies should strive to remove individuals from the prison system who no longer need to be there. This is especially important in light of the recent Supreme Court decision that found prison overcrowding in California is so severe that it has been deemed a violation of the Eighth Amendment’s prescription against cruel and unusual punishment.^{xiv} Lengthy prison sentences should not continue to remain in effect for vast numbers of nonviolent, low-level crack cocaine defendants who do not pose demonstrable threats to society, and who would be better served in a treatment program or on community supervision. Reaching the maximum operating capacity for the BoP should be the ceiling, not the floor, and greater care should be taken to ensure that prison beds are occupied by those who truly do compromise public safety. A retroactive application of this amendment would be a commendable and pragmatic step towards achieving these objectives.

Retroactivity would not result in the mass and chaotic release of all eligible offenders at the same time. The most significant impact of the amendment would be seen in the first year after it becomes effective, when 34 percent of those serving time for crack cocaine offenses would be eligible for release under the Commission’s recently adoption of base offense level 26.^{xv} The remainder of those who are eligible for reduced sentences would be released gradually over a period of more than 30 years.^{xvi} The geographic distribution of these individuals and their staggered release dates will reduce the impact of early release on communities.^{xvii}

Third. A retroactive application of the amendment will not be difficult to administer. In applying the amended guidelines, district courts would simply be able to use the modified Drug Quantity Table to derive new sentences using the same quantity as previously determined in the record. In addition to the simplicity of implementation, retroactive application would not pose an undue burden on the court system. Only three district courts, the Eastern District of Virginia, the Western District of Texas, and the Middle District of Florida, would be presented with 100 or more eligible defendants in the first year of implementation.^{xviii} Moreover, the 2007 Guideline Amendment change for crack cocaine offenses was implemented retroactively without notable burdens to the judicial system. In the 28 months after the Commission voted to make the 2007 Guideline Amendment retroactive, about 24,000 applications were processed, of which 16,000 individuals benefited from a sentence reduction.^{xix}

Because the individual facts of each case are already developed in the record, there will be no need for courts to reconsider any of the aggravating or mitigating factors laid out in the guidelines. Instead, judges will be able to rely solely

on the modified Drug Quantity Table to determine the appropriate sentence reduction, further simplifying the process. Over the years, the Commission has promulgated amendments that have had the effect of lowering sentences for particular drug offenses, and in each instance, has made the amendment retroactive. For example, in November 1993, the Commission seamlessly implemented the retroactive application of an amendment that changed the method of calculating the weight of LSD for purposes of determining the applicable base offense level.^{xx} In November 1995, the Commission promulgated an amendment that changed the weight calculation applicable to marijuana plants, from 1,000 grams per plant to 100 grams per plant, and retroactively applied the lower standard in order to “enhance fairness and consistency.”^{xxi} And in November 2003, the Commission modified the way in which oxycodone is measured for purposes of calculating base offense levels, and made the amendment retroactive.^{xxii} The successful retroactive implementation of these amendments, in addition to the 2007 Guideline Amendment for crack cocaine, is strong evidence upon which to conclude that a retroactive application of the Fair Sentencing Act guideline amendment can be effected without undue difficulty or expenditure of resources.

Making the current amendment retroactive is further necessary given the racially disparate impact of the 100:1 sentencing disparity between crack and powder cocaine, and the public perception that our drug sentencing laws are racially discriminatory. The Commission itself stated in 2004 that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.” This assertion applies whether the system discussed is the system in place in 1995, 2004, or 2011.

II. Applying the amendment to currently incarcerated individuals will not negatively impact public safety.

Criminological research on recidivism has not found any major differences in the degree of re-offending by time served in prison and major studies, including one by the Department of Justice, suggest that longer prison terms do not reduce recidivism and may even be counterproductive.^{xxiii} In fact, evidence is beginning to surface that imprisonment may actually worsen rates of recidivism among drug offenders, especially when compared to probation and other alternative interventions.^{xxiv} And scholarly research generally concludes that increased penalties for drug crimes has had little, if any, effect on criminal behavior.^{xxv}

Moreover, the Commission’s own data demonstrates that persons convicted of drug trafficking offenses display the lowest or second lowest rate of recidivism of all offenders for Criminal History Categories II and higher.^{xxvi} In fact, the largest proportion of recidivating events across all criminal history categories are supervised release revocations.^{xxvii} Drug crimes actually account for a little as 4 percent of all recidivating events for all offenders.^{xxviii}

The existence of an age-crime curve, in which criminal activity peaks among individuals in their teenage years and then markedly decreases, is a well-accepted phenomenon within the field of criminology.^{xxix} Many of those who become eligible for sentence reductions will have served, or continue to serve, lengthy prison terms and will therefore have aged out of the major crime-prone years by the time they are released.^{xxx} And, of course, no individual will qualify for early release

without judicial approval. In cases where there are concerns about individual eligibility and public safety, judges will have the opportunity to take that into consideration and let the original sentence stand, if appropriate.

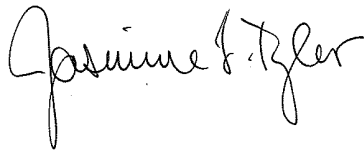
III. Conclusion.

The retroactive application of the guidelines amendment passed in response to the FSA is absolutely necessary in order to facilitate a just application of the Act. Making this amendment retroactive will best mitigate the problems of over-incarceration and racial disparity in sentencing that were created, maintained, and continue to persist under the decades old crack-cocaine sentencing regime. At the same time, a retroactive application will improve safety and order in the Bureau of Prisons by significantly reducing the inmate population, which will in turn impose a substantially lesser burden on taxpayers.

In addition, the amendment markedly changes the length of sentence for individuals convicted of crack cocaine offenses; its application should not be arbitrarily restricted to those who are fortunate enough to be arrested and sentenced after the enactment of the FSA. It makes no sense to deny relief to the thousands of defendants whose sentences the Commission has consistently condemned for the past seventeen years. Instead, the Commission should seize this opportunity to undo some of the harm that has been wrought by more than two-decades of an unduly harsh sentencing structure for crack cocaine.

Furthermore implementing a retroactive application would also not be difficult to administer because district courts would be able to use the modified Drug Quantity Tables in order to determine the appropriate sentence reduction from facts that are already on the record. And, lastly, a retroactivity policy will not negatively impact public safety. For these reasons, the Drug Policy Alliance, the nation's leading organization promoting new drug policies grounded in science, compassion, health, and human rights, strongly urges the Commission to adopt full retroactivity of its promulgated FSA amendment.

Respectfully,



Jasmine L. Tyler | Deputy Director, National Affairs

ⁱ 28 U.S.C. § 994(u). (“If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”).

ⁱⁱ Senator Richard J. Durbin, letter to United States Sentencing Commission, October 8, 2010, available at http://www.uscc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/SenDurbin_comment_100810.pdf

ⁱⁱⁱ USSC, *1995 Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) [hereinafter “1995 Commission Report”]; USSC, *1997 Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997) [hereinafter “1997 Commission Report”]; USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) [hereinafter “2002 Commission Report”]; USSC, *2007 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) [hereinafter “2007 Commission Report”]

^{iv} 2007 Commission Report, at 8.

^v United States Sentencing Commission, *Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses Made by the Fair Sentencing Act of 2010 and Corresponding Proposed Permanent Guideline Amendment if the Guideline Were Applied Retroactively* (May 20, 2011), at 30 [hereinafter “*Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*”].

^{vi} *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, at 10, 36 (finding that 12,835 offenders sentenced between October 1, 1991 and September 30, 2009 would be eligible to receive a reduced sentence under the level 26 option and 15,227 offenders sentenced between those same dates would be eligible under the level 24 option).

^{vii} See 1997 Commission Report, 2002 Commission Report, and 2007 Commission Report.

^{viii} *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, at 19.

^{ix} Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press: New York, New York 2010).

^x *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, at 13, 28

^{xi} Testimony of Harley G. Lappin, Director of the Federal Bureau of Prisons before the United States Sentencing Commission (March 17, 2011).

^{xii} West, Heather C.; Sabol, William J.; and Greenman, Sarah J., “Prisoners in 2009,” Bureau of Justice Statistics, (Washington, DC: US Department of Justice, December 2010), NCJ 231675, Appendix Table 18, p. 33.

^{xiii} Bureau of Justice Statistics, *Expenditures/Employment*, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16#data_collections (accessed January 18, 2011).

^{xiv} *Brown v. Plata*, --- S.Ct ----, 2011 WL 1936074.

^{xv} *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, at 29-30.

^{xvi} *Ibid.*

^{xvii} *Ibid.*, at 31-34.

^{xviii} *Ibid.*, at 31, 32, 34.

^{xix} See United States Sentencing Commission, Preliminary Crack Cocaine Retroactivity Data Report (July 2010), Table 2.

^{xx} U.S.S.G., app. C., Vol. I, Amend. 488; U.S.S.G. § 1B1.10(c).

^{xxi} U.S.S.G., app. C., Vol. I, Amend. 516; U.S.S.G. § 1B1.10(c).

^{xxii} U.S.S.G., app. C, Vol. II, Amend. 657; U.S.S.G. § 1B1.10(c).

^{xxiii} See, e.g. U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (Washington, D.C.: June 2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (finding that short prison sentences are just as likely as long sentences to deter low-level drug offenders with minimal criminal histories from future offending); Cassia Spohn and David Holleran, “The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders,” *Criminology*, vol. 40 (2002): 329 (comparing recidivism rates of felony offenders sentenced in Kansas City and finding that offenders sentenced to prison have higher recidivism rates than those sentenced to probation); Don M. Gottfredson, *Effects of Judges’ Sentencing Decisions on Criminal Careers*, National Institute of Justice, U.S. Department of Justice (1999) (concluding based on an examination of criminal careers of felony offenders sentenced in New Jersey that sentence length had little effect on recidivism).

^{xxiv} Cassia Spohn and David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* vol. 40, no. 2 (2002): 329-357, 351.

^{xxv} *Ibid.*, at 331.

^{xxvi} United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), at 13 (finding a 21 percent recidivism rate among those convicted of drug trafficking under § 2D1.1, compared with a 41 and 42 percent recidivism rate for robbery and firearms offenders, respectively).

^{xxvii} *Ibid.* at 4, 5 & Exs. 2, 3, 13.

^{xxviii} *Ibid.* at Ex. 13.

^{xxix} David P. Farrington, "Age and Crime," 7 *Crime & Just.* 189 (1986).

^{xxx} *Ibid.*