Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment

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Thank you for affording me the opportunity to appear before you today on behalf of the Criminal Law Committee of the Judicial Conference of the United States. Less than four years ago, I appeared before you to express the Committee's support for the retroactive application of the 2007 amendment to the drug quantity table.[1] It was widely acknowledged at that time that the two-level reduction in crack cocaine sentences was a small but important step in bringing about necessary reforms to our sentencing system, and the retroactive application of that amendment was a matter of fundamental fairness. With the enactment of the Fair Sentencing Act of 2010,[2] and the promulgation of guideline amendments mandated by the Act,[3] we have made further progress towards correcting these inequitable sentences. Today, I recommend that the Sentencing Commission take the next logical step and give retroactive effect to its recently promulgated amendments lowering sentences for crack offenses.

As I noted in my 2007 testimony, my personal interest in this matter traces back to the late 1980s, when I served as the White House's Associate Director of the Office of National Drug Control Policy. At that time, I advocated for different sentences because of the greater potential for addiction from the use of crack, and the level of violence associated with the crack trade that existed. Even today, as a sentencing judge regularly called upon to sentence drug

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[1] Testimony of Judge Reggie B. Walton to the United States Sentencing Commission on November 13, 2007, on the Retroactivity of the Crack-Powder Cocaine Guideline Amendment, available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20071113/Walton_testimony.pdf.

[2] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

[3] 76 FR 24960-24974.

offenders, I firmly believe that people who distribute illegal drugs that plague our communities should be punished for their conduct. But what seemed unconscionable to me was the scale of the difference that existed between crack and powder penalties – a difference that had a corrosive effect on citizens' confidence in the courts.

Of course, the crack-powder disparity has also been an issue of ongoing interest to the Criminal Law Committee and the Judicial Conference of the United States. In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack penalties that are 1.3 to 8.3 times longer than powder sentences. The Committee concluded that the disparity between sentences was unsupportable, and undermined public confidence in the courts. Upon the Committee's recommendation, on September 19, 2006, the Judicial Conference voted "to oppose the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference."[4]

The Committee's decision to support the retroactivity of the 2007 amendment was the result of careful deliberation and consideration of the profound consequences for the criminal justice system. On one side of the matter, there were considerations of fundamental fairness and an opportunity to undo a little of the harm that had been wrought by two decades of too-severe crack guidelines; on the other, there were serious concerns about community safety and practical implications for the workload of the federal judiciary. In the end, the Committee agreed that the burden on the courts, attorneys, and probation officers associated with retroactivity was not a sufficiently countervailing consideration, although the Committee did make several suggestions to the Commission on steps that could be taken to minimize these burdens.

[4] JCUS-SEP 06, p. 18.

While the concerns about the workload associated with considering sentencing reductions for nearly 20,000 inmates were real and justified, this workload was managed surprisingly well. This would not have been the case without the tremendous efforts of our judges, attorneys, probation officers, and court staff. In the months leading up to the March 2008 effective date of the amendment, two national summits were hosted, new national forms were created, information technology systems were updated, and local policies and procedures were developed – all of which allowed for the smooth implementation of the amendment. Should the Commission decide to give retroactive effect to its recent amendments, the court will already have this foundation to build upon.

That is not to say that everything is as it was in 2007. In the upcoming fiscal year, the federal judiciary faces significant budgetary challenges – unlike anything that we have faced in recent years. In order to reduce the deficit, the Congress seems poised to impose steep reductions to discretionary spending, which include funding for the judiciary. These cuts will place a great deal of strain on the courts, including federal defenders, probation officers, and court staff. The thought of assuming the workload associated with sentence reductions for more than 12,000[5] inmates may be seem daunting under these circumstances; nonetheless, the Committee continues to believe that an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively. At this time, the Committee does not believe that an extremely serious problem exists.

Moreover, there continues to be strong support throughout the judiciary to remedy the injustices related to crack sentencing. While the Fair Sentencing Act addresses these concerns

[5] *See* U.S. Sentencing Commission, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively*, May 10, 2011, available at: http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf.

for the defendants who will appear in our courtrooms in the years ahead, there remains a great deal of frustration concerning those who have already been sentenced and still remain in prison. The disdain among federal judges for previous crack-cocaine sentencing legislation, as well as for the ongoing disparity, is extensive.[6] One judge describes it as "now formally condemned as racially tainted and…explicitly rejected as not only unjust but mistaken from the outset."[7] The Sentencing Commission now has an opportunity to partially correct this wrong.

In its report accompanying the 2007 amendment, the Commission explained that the amendment was based on its long-held position that "the 100-to-1 drug quantity ratio [for crack cocaine] significantly undermines the various congressional objectives set forth in the Sentencing Reform Act."[8] Given this rationale, amendments that reduce that disparity should equally apply to offenders who were sentenced in the past as well as offenders who will be sentenced in the future. Regardless of the date on which they were sentenced, they were sentenced under a guideline that "undermined" Congress' sentencing objectives. If the guideline is faulty and has been fixed for future cases, then we also need to undo past errors as well. Put another way, a crack offender's sentence should not turn on the happenstance of the date on which he or she was sentenced. Equity and fundamental fairness suggest that a crack offender

[6] *See, e.g., United States v. Acoff,* 634 F.3d 200, 203 (2nd Cir. 2011) (J. Calabresi, concurring) (criticizing the 100-to-1 ratio for its "grossly different treatment of chemically identical drugs – the rock and powder forms of cocaine – [which] has been criticized and questioned, particularly on grounds of racial injustice"), *Id* at 205 (J. Lynch, concurring) (commenting on "the harsh terms of the prior law, now recognized by virtually everyone, including Congress, to have imposed unnecessarily and unfairly severe mandatory sentences"), *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011) (lamenting that, because of its lack of retroactive effect, the FSA "might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010"), *United States v. Douglas*, 746 F.Supp.2d 220, 231 (D.Me, 2010) ("although retroactivity [of the FSA] to those previously imprisoned might not be contemplated, the Fair Sentencing Act of 2010 permits no further federal crack sentencings that are not 'fair'"), *United States v. Holland*, No. 8:10-CR-48, 2011 WL 98313, at *10 (D.Neb. Jan. 10, 2011) (describing the 100-to-1 ratio as "discredited and repudiated").

[7] *U.S. v. Watts*, No. 09-CR-30030-MAP, 2011 WL 1282542, at 1 (D.Mass. Apr 5, 2011).

[8] *See* U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 8 (2007).

who committed a crime in 2009 should be treated the same under the guidelines as a crack offender who committed exactly the same crime in 2011.

The Committee's recommendation in favor of the retroactivity is limited to Parts A and C of the amendment (Amendment 2). Part A changes the Drug Quantity Table in §2D1.1 for offenses involving crack cocaine. Part C deletes the cross reference in §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1. This has the effect of lowering guideline ranges for certain defendants for offenses involving simple possession of crack cocaine. Both of these amendments are consistent with the Judicial Conference's position opposing the sentencing differences between crack and powder cocaine and agreeing to support the reduction of those differences.

The Commission has also requested comments as to whether Part B of Amendment 2 should be applied retroactively. Part B contains both mitigating and aggravating provisions for offenses involving drugs, regardless of drug type. The mitigating provisions have the effect of lowering guideline ranges for certain defendants in drug cases, and the aggravating provisions have the effect of raising guideline ranges for certain defendants in drug cases. The Committee understands that if Part B were applied retroactively (in isolation, or in combination with Parts A and/or C), the court would determine not only whether any mitigating provisions in Part B applied, but also whether any aggravating provisions in Part B applied. To the extent any aggravating provisions applied, the aggravating effect of those provisions would act to offset the mitigating effect of changes made by Parts A, B, and C, to the extent they apply, but in no event could the net effect result in the defendant receiving a sentence higher than the sentence previously imposed.[9]

[9] *See*, 18 U.S.C. § 3582(c)(2) (authorizing the court to "reduce", but not increase, the defendant's term of imprisonment).

After considering the Conference's prior positions on these matters, and considering the issues surrounding Part B of the amendment, the Committee has declined to offer a specific recommendation on that part. As I have noted before, the Conference's prior positions have been limited to correcting the injustices surrounding crack sentences, whereas amendments in Part B would apply to any drug offense. In addition, the Committee believes that unlike sentence reductions that are limited to recalculating the offense level under the drug quantity table and are typically straightforward, the factors included in Part B may require the court to conduct a more extensive review of the facts to identify whether the aggravating or mitigating conduct is present in the case.

I would like to thank you for the opportunity to testify before you today. The matter of whether the amendment should be made retroactive is an important issue with great penological consequences. The Committee appreciates the gravity of the concerns by those who may oppose making the amendment retroactive, but believes that the federal judiciary can process the volume of offenders emerging from prison, in need of re-entry services, and can do so without compromising public safety. Given that belief, the Committee has determined that fundamental fairness and faithful implementation of the Sentencing Reform Act compel the retroactive application of the amendment.

I would be happy to answer any questions that you might have.