WASHINGTON
LEGISLATIVE OFFICE

March 21, 2011

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: ACLU Comments on Proposed Amendments to the Sentencing Guidelines

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Dear Judge Saris:

With this letter the American Civil Liberties Union ("ACLU") provides commentary on the Amendments to the U.S. Sentencing Guidelines ("Guidelines") proposed by the Commission on January 19, 2011. The American Civil Liberties Union is a non-partisan organization with more than half a million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty, equality, and justice embodied in our Constitution and our civil rights laws.

These comments address several of the issues outlined by the Commission where the ACLU believes the Commission can take substantial steps toward improving the fairness and proportionality of the Guidelines, promoting individualized consideration of specific offense conduct, and mitigating excessively punitive provisions that have promoted not only racial disparities in sentencing but also a sustained and costly explosion in the number of individuals in the federal penal system. Our comments are focused just on specific areas of interest to our organization.

Issue for Comment: Base Offense Levels for Crack Cocaine (Changes to Temporary Amendment in Response to Fair Sentencing Act)

The Fair Sentencing Act of 2010 ("FSA") represents the culmination of a decades-long campaign to eliminate the stark racial disparities caused by crack cocaine sentencing laws and the concomitant over-incarceration of low level, non-violent drug offenders. More importantly, the FSA also represents Congress's efforts to restore much-needed confidence in the criminal justice system, especially in communities of color, and to reserve scarce law enforcement dollars for the most serious criminal offenders. Correcting the racial disparities inherent in the federal crack cocaine sentencing scheme and reducing overly-harsh punishment for low level offenders are the motivating goals behind the FSA. This is clear from the

legislative history of the Act and the bipartisan consensus reflected in the floor statements made during debate. For example, Representative Daniel Lungren (R-CA) made this statement during the House floor debate:

> Certainly, one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue. When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes.

Similarly, Majority Whip James Clyburn (D-SC) made the following statement on the House floor the day the Act was passed:

> Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans. This is unjust and runs contrary to our fundamental principles of equal protection under the law.
>
> . . . The American drug epidemic is a serious problem, and we must address that problem. But our drug laws must be smart, fair, and rational. The legislation to be considered today takes a significant step towards striking that balance.

In order to implement the clear intent of Congress under the FSA, the ACLU urges the Commission to restore the base offense levels (BOLs) for crack cocaine to the levels in effect at the time the FSA was enacted by adopting the level 24 and 30 options for the five and ten year mandatory minimum sentences respectively. Minutes from the October 2010 public meeting indicate that Commissioners believed that it was Congress's intent to have the Commission increase the base offense levels for crack cocaine when it passed the FSA to 26 and 32.[1] But there is nothing in the Act itself or its legislative history to support this assumption. Indeed, the law's chief sponsor in the Senate, Senator Richard J. Durbin, has stated this fact to the Commission previously.[2]

The Commission's initial adoption of levels 24 and 30 in 2007 recognized that using the higher BOL placed too great an emphasis on drug quantity as a proxy for culpability and as a result swept too many low level offenders into federal prison for far too long. In many ways, the FSA is both a culmination and ratification of the Commission's own change in sentencing practices. By increasing the quantity thresholds necessary to trigger mandatory minimums and directing the Commission to amend the Guidelines to focus on an offender's action and role in the offense instead of mere drug quantity possessed, Congress recognized that drug sentences should be more closely tied to an individual's roles and the harms he or she causes and not simply the amount of drugs involved. For this reason, the Commission's adoption of the 26/32

[1] U.S. Sentencing Commission Public Meeting Minutes, at 5 (Oct. 15, 2010).
[2] Letter from Sen. Richard J. Durbin to Hon. William K. Sessions (Oct. 8, 2010).

BOLs in its emergency amendment is a backward step and contrary to the intended purpose of the FSA. In this permanent amendment cycle, the Commission should follow Congress's lead by minimizing the role of drug quantity as the driving factor in sentencing.

The temporary adoption of the BOLs of 26/32 thwarted the purpose of the FSA by denying the full benefit of the law to too many low-level offenders and by re-establishing Guideline ranges that actually exceed mandatory minimum penalties. For example, offenders with quantities of 28 to 35 grams of crack will receive the same Guideline range under the Commission's BOL 26 option as they did before passage of the FSA. At the same time, some of these offenders may qualify for the additional FSA sentencing enhancements, the consequence of which is that the Commission's implementation of the Act will actually lead in some cases to longer sentences for crack cocaine offenders — effectively gutting a chief purpose of the law. Should the Commission choose to adopt the levels 26/32 option in the permanent amendment cycle, it will once again force judges to deviate from the Sentencing Guidelines and rely on their sentencing discretion and authority to vary from the advisory Guidelines to achieve just sentencing outcomes.[3]

The Commission's own data demonstrate that adopting the level 24/30 option better suits the purposes of the Act. It estimates that over ten years 2,000 fewer federal prison beds would be needed if the crack cocaine offenses are at levels 24 and 30.[4] Further, the impact on the racial disparities in drug sentencing will be profound. The Office of Research and Data's analysis of racial impact of retroactive application of the FSA indicates that over 85% of the offenders whose sentences will be reduced under the law are African American.[5] The alternative approach of adopting the level 26/32 option limits the Act's intended impact because fewer defendants benefit from the reform, and among those who still benefit the average sentence reduction is only 23% compared with the average 29% sentence reduction estimated for offenders under base offense levels 24 and 30.[6]

The Commission should return to the BOLs that existed at the time of the FSA's passage in order to ensure compliance with that Act and with the clear directives of 18 U.S.C § 3553(a), most especially its requirement that any sentence imposed needs "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The Commission's adoption of the BOLs of 26 and 32 in the temporary amendments may have been motivated by either a concern that quantity ratios for different drugs be consistent across all the levels of the Drug Quantity Table or the belief that levels 26 and 32 more closely adhere to an 18:1 ratio between base and powder cocaine. But the 18:1 ratio is not named in the FSA or referenced in the BOLs. Rather, it is a shorthand description of the statutory penalty ratio. An overly mechanistic application of this ratio would subvert both the purposes and substance of the law. The Commission should not substitute a preoccupation with ratios for its larger mission of

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[3] *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007); *United States v. Booker*, 543 U.S. 220 (2005).
[4] Memo. from U.S. Sentencing Comm'n, Office of Research and Data, to Hon. Patti B. Saris, Re: *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 Amendment Were Applied Retroactively 36 and* 45 (Jan. 28, 2011), *available at* http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110128_Crack_Retroactivity_Analysis.pdf. (hereinafter "ORD Report").
[5] *Id* at 45.
[6] *See id.* at 28, 54.

effectuating the directives of 18 U.S.C § 3553(a). During this permanent amendment cycle, the Commission has the authority to deal successfully with any structural anomalies created in the Drug Quantity Table by full implementation of the FSA. The Commission should therefore adopt the 24/30 base levels to promote the objectives of the FSA — i.e., correcting the racial disparity and overly punitive sentences generated under the previous system of penalties— and to continue the Commission's own laudable work to reduce racial disparities in sentencing.

Issue for Comment: Retroactivity of FSA Guideline Amendments

Retroactive application of the Guideline amendments promulgated in response to the Fair Sentencing Act is necessary to achieve the Act's self-proclaimed objective "[t]o restore fairness to Federal cocaine sentencing." The underlying concerns with racial equality and proportionality that gave rise to Congress's enactment of fairer crack sentences going forward apply with equal force to sentences formulated under the earlier, flawed Guidelines. It is insufficient and, indeed, inconsistent for the Commission to avoid future inequity by acknowledging past unfairness and yet simultaneously leaving defendants whose sentences are already tainted by such unfairness without a remedy. Therefore, the Commission should ensure that defendants who were sentenced under the Guidelines prior to the enactment of the FSA have the opportunity to petition courts for sentence modifications in light of FSA's equitable changes in crack-cocaine sentencing.

Under U.S.S.G. § 1B1.10(c), there are three enumerated factors that the Commission considers in deciding whether an Amendment should be listed under § 1B1.10(c) to reflect a policy determination by the Commission that a reduced Guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The three factors are (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.[7]

(1) *Purpose of the FSA and Emergency Amendments*

"To restore fairness to Federal cocaine sentencing," Congress changed the quantity thresholds required to trigger the mandatory minimums for crack cocaine, bringing them closer to the thresholds for powder cocaine. In light of Congress's recognition of the unfairness of the prior scheme, continued application of that scheme and its associated Guidelines to offenders sentenced prior to the FSA would fundamentally undermine Congress's goal of promoting fairness and reducing penalties.

Moreover, in 2007, the Commission adjusted downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in §2D1.1, and then gave this amendment retroactive effect.[8] Many of the same concerns that prompted retroactive application of the 2007 Amendment apply with equal force regarding retroactivity of the FSA. Just as with the 2007 Amendments, so too here

[7] U.S.S.G. § 1B1.10 comment (backg'd).
[8] *See* U.S.S.G. § 1B1.10(c); U.S.S.G. App. C, Amdts. 706 & 713.

the FSA's pillars of fairness and rationality should extend its ameliorative reach to both past and future sentences.

As demonstrated by the retroactive application of the 2007 Amendments, along with, for example, the retroactivity of LSD, marijuana, and oxycodone amendments in 1993, 1995, and 2003, respectively, this Commission has seen fit to render amendments retroactive when they reduce sentences. Departing from this pattern of retroactive application would be particularly inappropriate given the well-documented and extreme racial disparities inherent in crack-cocaine sentencing under the pre-FSA regime. As explained below, 85% offenders who appear to be eligible for retroactive application of the Amendments are African-American.[9] Given the racially disparate impact of the 100:1 ratio between crack and powder cocaine, the widespread public perception that our drug laws are racially discriminatory, and the Commission's past approach with respect to drug sentencing Guidelines, the only equitable and principled course of action is to make this Amendment retroactive.

Simply put, the FSA was designed to mitigate the consequences of an unfounded and racially biased legislative mistake. As such, it would be profoundly unjust to limit the Guideline Amendments implementing the FSA to prospective application only. Such a restriction would perpetuate the evisceration of the "parsimony" provision that requires courts to impose sentences that are "sufficient, but no greater than necessary."[10]

(2) *Magnitude of Change*

The statutory changes created by the FSA were, in the words of the Commission chair, "momentous."[11] Likewise, the impact on numerous excessive sentences if the Commission's temporary, emergency amendments to the Guidelines were to be applied retroactively would be of major consequence. If, for example, the Commission adopts and applies retroactively a base offense level of 24, the Office of Research and Data (ORD) projects that 15,227 offenders sentenced between October 1, 1991, and September 30, 2009 (fiscal years 1992 through 2009) would be eligible to receive a reduced sentence.[12] Of these eligible offenders, 85% would be black.[13] The average sentence would be reduced 28.6 percent, or 48 months, from 168 months to 120 months.[14] If the Commission adopts the base offense level of 26, and this Amendment were to be applied retroactively, ORD projects that 12,835 offenders sentenced between October 1, 1991,

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[9] *See* ORD Report at 19, 45.
[10] 18 U.S.C. § 3553(a).
[11] News Release from U.S. Sentencing Commission, *United States Sentencing Commission Promulgates Amendment to Implement Fair Sentencing Act of 2010*, Oct. 15, 2010, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/ Press_Releases/20101015_Press_Release.pdf.
[12] U.S. 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 Amendment Were Applied Retroactively*, Jan. 28, 2011, at 36, available at http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110128_Crack_Retroactivity_Analysis.pdf.
[13] *Id*. at 45.
[14] *Id*. at 54.

and September 30, 2009 would be eligible to receive a reduced sentence.[15] Of these eligible offenders, again, 85% would be African-American.[16] The average sentence would be reduced by nearly one quarter, or 37 months, from 163 months to 126 months.[17] In other words, the Guideline modifications significantly alter penalties across the crack-cocaine landscape, and if applied retroactively would impact a wide range of offenders. Conversely, if not applied retroactively, thousands of offenders sentenced under the flawed Guidelines would be left behind.

(3) *Difficulty of Applying the Amendment Retroactively*

The decision of the Commission to apply the 2007 Amendments retroactively, and its results, provide a valuable example of both the necessity of applying the FSA retroactively as well as the ease of retroactive implementation. The relatively smooth application by courts of the two-level reduction over 2007-08 demonstrates that retroactivity, in addition to being just, can be implemented practically. The factors of U.S.S.G. § 1B1.10 thus unanimously favor retroactive application of the ameliorative amendments.

Assuming retroactive application, the Committee has asked for comments regarding the applicability of retroactivity for specific categories of defendants. However, none of these potential limitations on retroactive application are warranted, since the starting point for all of these defendants — regardless of whether they were sentenced within the Guideline range, whether they received departures under Part K of Chapter 5, their criminal history category, or whether they were sentenced before or after *United States v. Booker*,[18] *United States v. Kimbrough*,[19] or *United States v. Spears*[20] — was the grossly unfair pre-FSA 100:1 ratio. The FSA's overarching and unrestricted emphasis on fairness cannot be reconciled with a compartmentalized retroactivity approach that would offer some offenders the benefit of fairer sentencing outcomes while denying it to others despite the fact that all offenders were sentenced under the old, unjust regime. Fairness should not be parsed in this manner. The Fair Sentencing Act was a clear indication of Congress's intent to end immediately sentences calculated according to the discriminatory 100-to-1 ratio for *all* offenders; by the same logic, the Commission should endorse universal (i.e., any offender affected by the pre-FSA disparity, regardless of the other factors that may have applied to their case) retroactive application of any new ameliorative amendments.

In addition, this Commission has labored to establish a carefully calibrated system involving many factors which, when applying § 2D1.1, results in a penalty consistent with the parsimony principle of 18 U.S.C. § 3553(a). Denying retroactive relief to categories of defendants would undermine this system. For example, if a defendant were denied retroactive relief because she falls in a high criminal history category, that would undermine the careful calibration of the horizontal axis of the table by effectively double-counting criminal history.

[15] *Id*. at 10.
[16] *Id*. at 19.
[17] *Id.* at 28.
[18] 543 U.S. 220 (2005).
[19] 552 U.S. 85 (2007).
[20] 555 U.S. 261 (2009).

The intent of Chapter 1's direction on sentencing process is to ensure that each basis for reduction or enhancement is separately calculated.[21] Additionally, the Commission should assume that a defendant who received a § 5Kl.1 departure was sentenced on the basis of her substantial assistance, not that the court used 5K as a vehicle for a policy disagreement; the latter assumption is tantamount to an announcement that the Commission believes courts not to have been doing their jobs. Lastly, limiting retroactivity based on whether the court granted or could have considered a variance is inappropriate. Any limitation based on whether the Guidelines were advisory (*Booker*), whether a policy disagreement could have applied (*Kimbrough*), or whether an alternate ratio could have been imposed (*Spears*), would be premised on the false assumption that *every* defendant received a benefit equivalent to the FSA through judicial action at sentencing. This is clearly not the case: circuit courts have specifically instructed that no court is required to vary on policy grounds from a Guideline.[22] As a result, some defendants have received variances and others have not. If individual courts that imposed variances at initial sentencing believe that denying or limiting retroactive relief at re-sentencing is appropriate to avoid a sentencing windfall to a defendant who has already received a variance, the courts can so limit relief in a § 3582 proceeding. But for the vast numbers of defendants who did not benefit from policy-based variances at the outset, the Commission should not restrict the opportunity to benefit from Congress's blanket recognition that the old law was unfair to everyone.

The Commission has also sought comment regarding what conforming changes, if any, it should make to § 1B1.10. As the Department of Justice itself conceded, a sentencing court is not precluded from imposing a non-Guidelines sentence based on a policy disagreement with the career offender Guideline.[23] The driving force behind the FSA was enhanced fairness in sentencing and recognition that the earlier Guidelines were fundamentally and inherently flawed. The 100:1 ratio was not deemed flawed only as to a limited group of offenders. Therefore, in furtherance of the underlying purpose of the FSA, the 2010 Amendments should apply to all offenders regardless of their criminal history category.

Just as important as making fair changes is avoiding unfair ones. The Commission should not restrict retroactive application of amendments to offenders below a certain quantity threshold, as the Commission did with the 2007 Amendment. If the Commission were to adopt such a rule here, defendants who are classified as "large traffickers" but who in fact were merely minor players in a much larger conspiracy, would be unfairly turned away from the FSA's gates based solely on the quantity of crack-cocaine involved in the conspiracy. Take the case of Hamedah Hasan, a first-time, non-violent crack cocaine offender prosecuted as part of a conspiracy in which she was no more than an errand-runner in her cousin's vast drug operation.[24] She is presently serving the 18th year of her 27-year prison sentence, having been ineligible for a reduction under the Commission's retroactive 2007 Amendment because of the amount of drugs attributed to the entire conspiracy. Excluding offenders from the benefits of retroactivity based

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[21] *See generally* U.S.S.G. § 1B1.1.

[22] *See, e.g., United States v. Brewer*, 624 F.3d 900, 909 (8th Cir. 2010); *United States v. Corner,* 598 F.3d 411, 416 (7th Cir. 2010).

[23] *See* Letter from Joseph R. Wilson, Assistant United States Attorney, to the clerk of the United States Courts of Appeals for the Sixth Circuit (March 14, 2008) (correcting supplemental brief filed in the Sixth Circuit in *U.S. v. Funk*, 534 F.3d 522 (6th Cir.2008)).

[24] Hamedah's story told in her own words, as well as her commutation petition, can be found at http://www.dearmrpresidentyesyoucan.org/.

on crack-cocaine quantity would consign low-level offenders like Ms. Hasan to more time behind bars than Congress now believes they deserve. It is understandable, perhaps, that in 2007 the Commission may have wished to limit retroactivity where the Guideline changes were of the Commission's own devising and not in response to congressional mandate. Here, by contrast, where the congressional signal is clear and unmistakable in favor of lower crack sentences, the Commission should not be bashful in implementing that directive fully.

Issue for Comment: Additional Changes to the Drug Quantity Table

The Commission's various proposals to carve out two-level downward adjustments in the Guidelines for defendants in drug trafficking cases represent an important step in improving the fairness of the Guidelines. And the Commission's successful implementation of a 24/30 BOL for crack cocaine in 2007 demonstrates the administrative ease of implementing reductions to the BOLs. But we believe the Commission should lower base offense levels even further to correct two interrelated structural problems in the Drug Quantity Table as a whole: the excessive emphasis on quantity rather than role, and the extension of the 18-to-1 crack-powder ration to every amount of cocaine, even though Congress mandated that ratio at just two specific quantity thresholds.

A significant, across-the-board reduction would, first, mitigate some of the worst harms of the mandatory minimums and their emphasis on quantity rather than actual criminal conduct as a one-size-fits-all proxy for culpability. Under the current Guidelines, quantity-driven minimums and conspiracy liability can lead to saddling defendants with minor to moderate roles in a drug operation with decades of prison time based on quantities of drugs they never handled, saw, or even knew about.[25] As noted above, the ACLU has filed a commutation petition on behalf of Hamedah Hasan, who came to stay with her cousin to flee a violent boyfriend and became caught up in the cousin's drug operation. Her role was not major, she was a first-time offender, and two federal judges have denounced her sentence as unfair, but Hamedah is still in prison serving a 27-year sentence based on the total quantity of drugs involved in the entire conspiracy.[26] Drug sentences should be more closely tied to individuals' roles and the harms they cause, and not simply to the amount of drugs involved.

The Commission should also abandon offense levels that are calibrated to mandatory minimums, in order to eliminate the harsh ripple effects of these minimums throughout the Guideline system.[27] The ACLU recognizes that the Commission perceives itself to be constrained from taking such action by the congressional stipulation that the Guidelines be set "consistent with all pertinent provisions of any Federal statute."[28] We do not read this instruction as mandating proportionality to applicable federal sentencing ranges, but rather as a general admonition to avoid affirmative conflict with other federal statutes. More importantly, the vaguely-expressed preference for proportionality (if indeed it is so understood) should not

[25] *See, e.g.*, Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009) (noting that drug quantity "is not significantly correlated with role in the offense" and suggesting that this "lack of association" shows "unwarranted or excessive uniformity in federal drug sentencing").
[26] *See* http://www.dearmrpresidentyesyoucan.org/
[27] *See, e.g.*, U.S. Sentencing Comm'n, Public Hearing, Tr. at 25-27 (Atlanta, Ga., Feb. 10 & 11, 2009), *at* http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf.
[28] 28 U.S.C. § 994(a).

take precedence over the more compelling and specifically articulated congressional mandate to set offense levels based on the real harms of each offense, its seriousness, its circumstances, and the goal of deterrence.[29] Though proportionality in the abstract is a laudable principle, it is necessary to consider what sentences should be proportional to. Too often, because mandatory minimums are based on drug quantities, the sentences they prescribe are not proportional to the seriousness of the offense conduct, the harm it causes, or the defendant's culpability.[30]

Linking the drug Guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are overly severe — in effect spreading the *disproportionality* inherent in mandatory minimums to every offender at every quantity level. The result is both unwarranted racial disparities and excessive uniformity among differently-situated offenders.[31] Eliminating "proportionality" as a basis for offense levels would not eliminate all sentencing "cliffs," but it would eliminate some of them. One judge noted that "[i]t is better to have five good sentences and five bad ones than to have ten bad but consistent sentences."[32] The Commission has already moved away from the proportionality principle in amending the crack cocaine Guidelines. We urge the Commission to expand its work across the Drug Quantity Table to minimize the discriminatory effect of the mandatory minimums and the unjustified disparities they create.

Issue for Comment: Safety Valve

While the ACLU applauds the Commission for taking the steps to expand the safety valve as proposed in the three amendments discussed below, all of our comments must be read in relation to our broader position on the flaws of the Drug Quantity Table and the continuation of mandatory minimums. As we urge elsewhere in these comments, and in our cumulative advocacy to the Commission, we would like to see the safety valve become irrelevant as the use of mandatory minimums and quantity-driven sentencing declines. However, as long as mandatory minimums exist and as long as the drug table continues to overemphasize quantity, the safety valve is a necessary mechanism and should be expanded, including the adoption of the proposed amendments as well as other changes.

Proposed Amendment "A" provides for a two level reduction in drug trafficking cases if no aggravating circumstances apply.[33] Limiting this reduction to safety-valve cases is a poor substitute for the more significant proposal to reduce the base offense level for all drugs by two levels. Because drug penalties are overly harsh and driven by quantity, as discussed in the previous section, the current system systematically results in the excessive incarceration of non-

[29] *See* 28 U.S.C. § 994(c)(1)-(7); *see also Gozlon-Peretz v. United States,* 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application.").
[30] *See, e.g., United States v. Hubel*, 625 F. Supp. 2d 845, 853 (D. Neb. 2008).
[31] As the Judicial Conference has said, "the goal of proportionality should not become a one-way ratchet for increasing sentences." Letter from Hon. Sim Lake, Chair of the Judicial Conference Comm. on Criminal Law. to Members of the U.S. Sentencing Comm'n, Mar. 8, 2004.
[32] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 136 (2004).
[33] *See* U.S. Sentencing Commission, Notice of Proposed Amendments and Request for Public Comment, at 15-16 (Jan. 19, 2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110119_Notice_of_Proposed_Amendments.pdf.

violent and low-level offenders; therefore an across-the-board reduction of the base offense level is more appropriate than a limited fix using the safety valve. Achieving even a global reduction in base offense levels through the expanded use of the safety valve applies a very small tool to a very big job. Proposed Amendment "A" appears to be founded in the recognition that mandatory minimums and the base offense levels that are linked to statutory minimums do not serve the purposes of sentencing and should be lowered. Why then use the safety valve as the mechanism? Altering the base offense levels is more direct and efficient. We urge the Commission to adopt the broader and more procedurally appropriate remedy of a global two-level reduction.

Proposed Amendment "B" includes two components, the first permitting offenders with more than one criminal history point to benefit from the safety valve, and the second proposing a downward adjustment for all defendants who provide truthful and complete information concerning the offense.[34] The Commission should enact the first and reject the second.

Opening the safety valve to offenders with more than one point is a long-overdue, straightforward cure for a problem that has deprived low-level, non-violent offenders of relief from mandatory minimum terms. Under the current system, defendants can be — and frequently are — subject to the mandatory minimum based solely on a cumulative set of traffic and other minor infractions, which may number as few as two. The Commission's own data, likewise, suggest that many non-violent, lesser involved participants in drug trafficking crimes are denied the safety valve, whether by virtue of the criminal history category or other limitation.[35] As criminal history is already adequately taken into account both by the horizontal axis of the sentencing table and by recidivist enhancements, it should not serve as a bar to otherwise appropriate relief from the mandatory minimum, and there should be no limitation on relief assuming the present criteria of § 5C1.2 and § 2D1.1(b)(16) remain in place.

While the ACLU supports creative efforts to expand the safety valve and to lower overly punitive drug sentences, the Commission must strike a careful balance between the utility of § 5K1.1 in relieving defendants of the harsh burdens of mandatory minimums, and the documented danger that inaccurate information provided by informants with perverse incentives will lead to baseless prosecutions.[36] The second component of Proposed Amendment "B" would dramatically expand the applicability of the safety valve — so much so that the use of the Guidelines as an incentive to provide inculpatory information against others outweighs the benefits of providing relief from a mandatory minimum. Put simply, mandatory minimums are troubling, but the Commission should not try to solve one problem by contributing to another. The potential for abuses within the informant system should cause the Commission to rethink the present emphasis on providing information to law enforcement and reject an amendment that dramatically expands the informant system.

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[34] *See id.* at 16.
[35] *See* U.S. Sentencing Comm'n, *2009 Sourcebook of Federal Sentencing Statistics*, tbl. 44.
[36] See, e.g., Nw. Univ. Sch. of Law Ctr. on Wrongful Convictions, The Snitch System (Winter 2004-05), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf.

Issue for Comment: Role Adjustment

The Commission has requested comment on the broad question of what changes should be made to §§ 3B1.1 and 3B1.2.

The current limitations on the application of mitigating role adjustments are designed to limit the use of adjustments pursuant to § 3B1.2. The Commission should loosen these restrictions by amending the Application Notes to indicate that this is a permissive section and that courts should recognize that many drug trafficking offenders are low-level participants whose sentences should be reduced by two, four or more levels in light of their lesser involvement. Further, the Commission should either eliminate the present categories of minimal and minor role or expand the definitions of those categories so as to dramatically increase the number of eligible defendants.

The primary example of the injustice surrounding the application of § 3B1.2 is the sentencing of drug couriers. A number of factors in the present Guideline combine to deprive these low-level participants of a role reduction. The requirement that the defendant be "substantially less culpable than the average participant"[37]is too often an insurmountable obstacle in cases involving drug couriers. These cases frequently involve too few defendants to make a determination of the courier's culpability relative to others involved in the drug transaction. Additionally, Note 3(C) discourages courts from accepting the defendant's own statement regarding other participants. Courts should be not only permitted, but encouraged, to acknowledge the nature of the drug trafficking trade and the reality that the least culpable offenders will often be those whose limited role may not be apparent from a comparison with co-defendants or through other evidence.

Application Note 4's indication that a minimal role adjustment should "be used infrequently" is too stingy given the importance of sentencing individuals in accordance with their respective roles and based on their actual conduct. The Commission should adopt broad language urging courts to apply both minor and minimal roles frequently and construe any limitations on role adjustments loosely so as to encourage adjustment for lesser involved participants. This would apply not only to couriers but also to any offender the court recognizes as having been employed at great risk for little benefit to themselves. Some non-exclusive examples of helpful reforms the Commission might adopt:

1) If the defendant is a courier whose only role is transportation and delivery of narcotics or money in a drug trafficking conspiracy, reduce by four levels.

2) Eliminate the language of Application Note 3 requiring that an offender be "substantially less culpable than the average participant."

3) Remove any limitation on a court's reliance on a defendant's statement as proof of a role adjustment, leaving capable courts to determine credibility.

[37] U.S.S.G. § 3B1.2 App. Note 3.

4) Remove the language form Application Note 4 indicating the Commission's intent that the minimal participant adjustment be used "infrequently."

5) Add to the Application Notes a broad recognition that most drug trafficking conspiracies involve less culpable participants for whom a quantity driven Guideline sentence will be excessive and will not serve the purposes of sentencing pursuant to 18 U.S.C. § 3553. A new Note along these lines should recognize that previous efforts to categorize and define these lesser participants have not been adequate to provide relief. The Note should provide that where the Guideline provides insufficient direction with respect to a particular case, the court should err on the side of lenity.

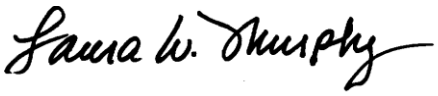
6) Add the complete absence of *any* § 3B1.1 aggravating factor as a consideration in support of a mitigating role. If the conditions described in § 3B1.1 are in fact indicators of increased involvement, then their complete absence should be considered in weighing mitigating evidence.

7) Permit additional reductions beyond four levels in extraordinary cases and provide examples of the most minimally involved offenders who should be granted these larger reductions.

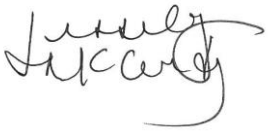
Conclusion

The ACLU appreciates the opportunity to comment on the proposed amendments. We urge the Commission to seize on this historic opportunity to enhance the fairness of the Guidelines and correct the injustices of the past. Comments and questions should be directed to Senior Legislative Counsel Jesselyn McCurdy at (202)675-2307 or jmccurdy@dcaclu.org.

Respectfully submitted,



Laura W. Murphy
Director
Washington Legislative Office



Jesselyn McCurdy,
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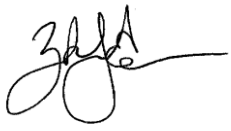

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