

Congress of the United States
House of Representatives
Washington, DC 20515

April 4, 2011

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

Dear Judge Saris:

We thank the Sentencing Commission for its work on federal cocaine sentencing policy over the past fifteen years. In 2007, the Commission took a modest, but courageous, step to address the disparity in crack and powder cocaine sentencing by reducing the base offense levels for crack cocaine by two levels. In 2010, Congress took the next step with the Fair Sentencing Act of 2010, Pub. L. No. 111-220. In response to the Commission's request for comment, we oppose the emergency temporary amendment as adopted in October 2010, and encourage the Commission to restore the base offense levels to 24 and 30 for crack offenses, and to reduce the base offense levels by two levels for all drugs.

On October 8, 2010, Congressman Conyers and Congressman Scott wrote to the Commission in support of maintaining the base offense levels in the sentencing guidelines for crack cocaine offenses at levels 24 and 30. However, on October 15, the Commission reversed its own 2007 amendment and voted to set the base offense levels at 26 and 32, stating that the amendment "conforms the guideline penalties for crack cocaine offenses to the approach followed for other drugs in the Drug Quantity Table at §2D1.1." U.S. Sentencing Commission, Public Meeting Minutes at 2 (Oct. 15, 2010). This approach of setting the guidelines two levels higher than necessary to include mandatory minimums, however, was never required by Congress, nor was it necessary to effectuate the Commission's policy of making the drug guidelines proportional to mandatory minimums, and it inconsistent with the goals of the Sentencing Reform Act.

The Commission itself has made this clear. The Commission has explained that it set the base offense levels for drug offenses two levels "higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 148 (1995). In 2007, the Commission found that this approach undermined the goals of the Sentencing Reform Act:

Current data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere. . . . [T]he problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems. *The Commission has concluded that the manner in which the Drug Quantity Table in § 2D1.1 . . . was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine offenses is an area in which the Federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio. . . .* The drug quantity thresholds in the Drug Quantity Table are set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties.

Fed. Reg. 28,558, 28,573 (May 21, 2007).

We agree that the practice of artificially setting base offense levels higher than mandatory minimums for the purpose of inducing defendants to plead guilty or cooperate does not advance the goals of the Sentencing Reform Act and instead exacerbates the problems in drug sentencing. Moreover, as the Commission's statistics show, guilty pleas by defendants convicted of crack cocaine offenses have risen since the 2007 amendments setting base offense levels at 24 and 30. *See* U.S. Sentencing Commission, 2005-2009 Sourcebook of Federal Sentencing Statistics, Table 38 (91.8% of defendants in crack cases pled guilty in 2005, 93.7% in 2006, 93% in 2007, 95.1% in 2008, 93.9% in 2009). The rationale for this approach is thus not supported by empirical data on its own terms.

Nor does the text or legislative history of the Fair Sentencing Act of 2010 require or suggest that the Commission increase base offense levels for crack cocaine offenses to 26 and 32. The intent of the legislation is to reduce racial disparities and excessive sentences for non-violent drug offenders, to increase the impact of mitigating and aggravating factors relative to drug quantity for all drugs, and to increase public confidence in the federal criminal justice system. If base offense levels are set at 26 and 32 permanently, hundreds of defendants every year would be subject to the same guideline range as before the Fair Sentencing Act, a result contrary to Congressional intent.

There has been some misunderstanding that Congress's intent was to require an 18:1 powder to crack ratio. The Act, however, contains no reference to an 18:1 ratio, and the legislative history does not support interpreting it in that manner. Much of the debate in the House involved whether to accept the Senate compromise bill or move forward with H.R. 3245, the Fairness in Cocaine Sentencing Act of 2009. H.R. 3245 would have eliminated the disparity in sentencing crack and powder cocaine offenders by equalizing the penalties for crack and powder cocaine to the lower powder level, and it passed out of the House Judiciary Committee. During the Senate Judiciary Committee's consideration of the Fair Sentencing Act, the compromise was reached because 28 grams is equivalent to one ounce, not because it would

result in an 18:1 ratio.¹ As Senator Durbin has explained, Congress's concern was to raise the quantity thresholds for crack cocaine, not to set a particular ratio. Some members referred to ratios "as a shorthand" during the debates, and "they were referring to the statutory penalty ratio, not the base offense level ratio."

Members of both parties in the House and Senate were primarily concerned with addressing an unfair and racially disparate sentencing policy, which the Commission had been recommending for years. Former House Majority Whip James Clyburn (D-SC) spoke to this point in his floor statement when the bill was passed in the House:

Although I'm disappointed that this measure does not entirely eliminate the disparity, I want to commend Senators Durbin, Sessions, and Coburn for crafting a very significant compromise. The Fair Sentencing Act of [2010] will significantly reduce the disparity in sentencing for crack and powder cocaine and help to correct an enormous disparity in our criminal justice system.

And as the Chair of the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, Congressman Scott (D-VA) made a similar point in his floor statement:

The legislation moves the threshold amount for the 5-year mandatory minimum from five grams to one ounce, reducing the disparity from 100-to-1 to 18-to-1. The legislation does not fully eliminate the 100-to-1 disparity in sentencing for crack and powder, but it does make good progress in addressing what is widely recognized as unfair treatment of like offenders based simply on the form of cocaine they possessed.

Representative Daniel Lungren (R-CA) made the following statement on the floor when S. 1789 was debated by the House:

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

¹ The 28 gram quantity was chosen for the five-year mandatory minimum based on the Commission's definition of a "wholesaler" as an offender who sells "[s]ells more than retail/user level quantities (more than one ounce) in a single transaction, or possesses two ounces or more on a single occasion." United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007). Thus, Congress intended that the five-year mandatory minimum would apply to a defendant convicted of one count of possessing with intent to distribute at least 28 grams of crack cocaine on a single occasion.

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.

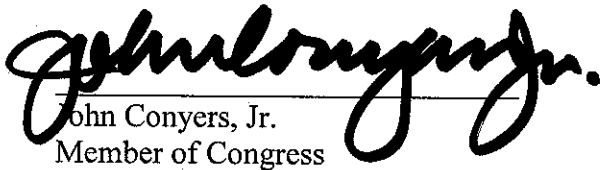
If the Commission wishes to have an 18:1 ratio in the guidelines, though not required by Congress, the best way to accomplish it would be to reduce by two levels the base offense levels for all drugs. This approach would be consistent with the Fair Sentencing Act's emphasis on culpability relative to drug quantity, and it would be consistent with empirical evidence and sound policy. Congress enacted mandatory sentences for drug offenses in the belief that they would apply to "major traffickers" and "serious traffickers." The Commission later found that Congress was mistaken, and that in fact large percentages of low-level drug offenders involved with both crack and powder cocaine were subject to punishment intended for major and serious traffickers. U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007). Congress's mistake with respect to mandatory minimum penalties and the incorporation of this mistake in the guidelines has resulted in massive prison overcrowding and unjustified cost to the taxpayers. Setting the base offense levels two levels higher than necessary to include the statutory mandatory minimums has only exacerbated the problem. We urge the Commission to begin to address these problems by reducing base offense levels for all drugs by two levels.


Finally, as you are well aware, if base offense levels are set at 24 and 30, this would not and could not permit or suggest that offenders be sentenced below the statutory mandatory minimum. Instead, it will allow a judge, when imposing a mandatory minimum sentence, to sentence *within* the guideline range, rather than below it as base offense levels 26 and 32 require judges to do. Moreover, in many cases, drug quantity alone produces guideline ranges above mandatory minimum levels. In addition, the new aggravating factors will produce higher guideline ranges in some cases, and judges are free to vary upward if warranted. But, as the sentencing data shows, upward variances are rare and downward variances are warranted more frequently. The Commission should promulgate guidelines that reduce the need for downward variances rather than increase that need.

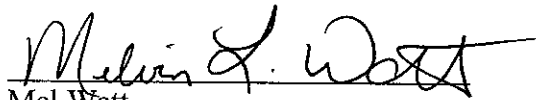
In sum, we urge the Commission to restore the base offense levels to 24 and 30 for crack cocaine offenses and to reduce base offense levels by two for all drugs. We also hope that the Commission is planning to consider retroactive application of the crack cocaine amendments to address disparities between those sentenced before passage of the Fair Sentencing Act and those sentenced after its passage for offenses occurring prior to the passage.

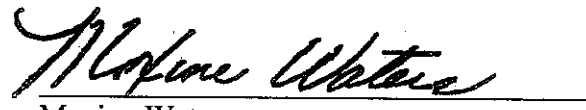
Thank you once again for your efforts and for your consideration of these comments.


Sincerely,

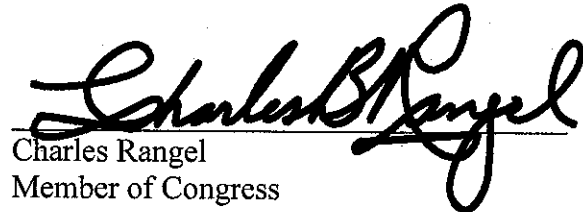

John Conyers, Jr.
Member of Congress

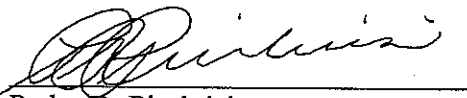

Robert C. "Bobby" Scott
Member of Congress

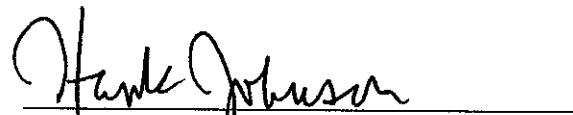

Mel Watt
Member of Congress



Maxine Waters
Member of Congress

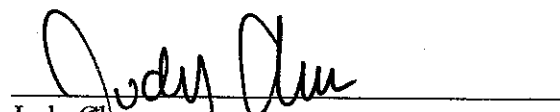

Sheila Jackson Lee
Member of Congress


Charles Rangel
Member of Congress


Pedro R. Pierluisi
Member of Congress


Henry C. "Hank" Johnson, Jr.
Member of Congress


Zoe Lofgren
Member of Congress


Judy Chu
Chair, Congressional Asian Pacific
American Caucus (CAPAC)