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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

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June 1, 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:

We write in response to the Commission's request for comment on whether its amendment ("the 2011 Amendment") to the Sentencing Guidelines implementing the Fair Sentencing Act should be applied retroactively to previously sentenced defendants. We believe that it should. Equity, feasibility, and the state of our overcrowded prisons all dictate in favor of retroactivity. We also respond to the Commission's more specific questions about how, and to whom, the 2011 Amendment should be applied. We believe that judges should have discretion to apply changes to the Drug Quantity Table to all eligible defendants.

Retroactivity promotes the purposes of the 2011 Amendment and the Fair Sentencing Act

In the absence of retroactive application of the 2011 Amendment, too many criminal 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 would be entirely inconsistent with the primary purposes of the 2011 Amendment and the Fair Sentencing Act – reducing racial disparities in drug sentencing, increasing trust in the justice system, and focusing limited resources on serious offenders.

The Commission now has the opportunity to redress some of the injustices associated with the last two decades of crack sentencing. Without Commission action, thousands of individuals sentenced before November 1, 2010 will remain subject to a sentencing disparity Congress has determined to be unjust. Yet those fortunate enough to have sentencing dates on or after November 1, 2010 will have the opportunity to benefit from significantly reduced guidelines, even after engaging in identical conduct. The Commission should act in its independent and expert authority to give the greatest possible effect to its changes to the guidelines – and to help ensure that individuals in our federal prisons are not serving disproportionate and racially disparate sentences because of the date of their sentencing.

Moreover, Congress expected that the changes to the guidelines resulting from the Fair Sentencing Act would apply retroactively. In 2007, the Commission revised the guidelines to reduce by two levels the base offense levels assigned to various quantities of crack cocaine (the

"2007 Amendment"). After promulgating the 2007 Amendment, the Commission voted unanimously to make it retroactive to all incarcerated defendants. Congress did not object. Therefore, we assumed a similar process of retroactive application would take place after the 2011 Amendment. In fact, virtually every time the Commission has amended the guidelines to reduce drug sentences, it has made the amendment retroactive. The Commission's 1993 revisions pertaining to LSD were applied retroactively. The Commission's 1995 revisions pertaining to certain marijuana plants were applied retroactively. The Commission's 2003 revision regarding oxycodone was applied retroactively. In passing the Fair Sentencing Act, we assumed that the Commission would do as it has long done: apply retroactively the resulting guideline amendment.

Retroactive application makes practical and economic sense

Retroactive application also makes practical and economic sense, given the state of our overcrowded prison system and today's troubled economy. As Federal Bureau of Prisons ("BOP") Director Harley Lappin stated in testimony to the Commission, "most" of the BOP's inmates are serving sentences for drug offenses. Our prisons are overcrowded with low-level, nonviolent drug offenders. As Mr. Lappin testified, the BOP is currently operating at approximately 35 percent over capacity – and a substantial increase in the number of inmates per year is expected for the next two years. We ask the Commission to consider the dire circumstances of our federal prisons, 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."

Retroactive application also would lead to significant cost savings, a particularly critical consideration in the current fiscal environment. According to the BOP, the average annual cost to house a federal prisoner in FY 2010 was $28,284. According to Commission data, approximately 12,040 individuals would be eligible to receive a reduced sentence if the 2011 Amendment were made retroactive, and the average sentence reduction would be 37 months. Therefore, the cost savings per inmate would be approximately $87,000 – more than ten times the average cost of a year's tuition at a public university. In total, retroactive application would result in a more than $1 billion savings for taxpayers.

Retroactive application would not be difficult

We know that our courts can aptly handle retroactive application of the 2011 Amendment. The retroactive application of the Commission's 2007 Amendment demonstrated that these motions for a reduction in sentence under 18 U.S.C. § 3582(c)(2) can be handled efficiently, without undue administrative burdens on our courts. Approximately 20,000 defendants were eligible to seek a hearing for a reduced sentence pursuant to the 2007 Amendment. Yet the process has been, from all accounts, smooth and productive. If the guidelines resulting from the Fair Sentencing Act were made retroactive, substantially fewer defendants – approximately 12,040 – would be eligible to seek a hearing. Given these reduced numbers, and the fact that the courts already have experience executing the retroactive application of the 2007 Amendment, we can expect the process to be an even more streamlined and efficient one.

The changes to the Drug Quantity Table should be applied retroactively, and all defendants should be eligible

We believe that the Commission should adopt "Option 1," under which the changes to the Drug Quantity Table in § 2D1.1 would be applied retroactively. We further believe that the changes should be applicable to all defendants. Such a scheme mirrors the one employed by the Commission in 2007.

By making the changes to the Drug Quantity Table retroactive, the Commission can ensure that hearings pursuant to 18 U.S.C. § 3582(c)(2) will be efficient and will not vary widely from case to case. Because sentencing courts will already have determined drug quantity, no additional fact-finding would be necessary for a reduction. That would not be the case if the mitigating and aggravating provisions of the 2011 Amendment were applied retroactively. The parties would often have to re-litigate the facts of the case, demanding additional findings from judges.

We also strongly believe that, as with the 2007 Amendment, judges should have the discretion to apply the changes to any eligible defendant. Each of these defendants was subject to a sentencing scheme that Congress has determined was unjust and racially disparate. Importantly, as the Commission has explained, the retroactive application of a guideline amendment "does not entitle a defendant to a reduced term of imprisonment as a matter of right." *See* § 1B1.10. Rather, federal judges would use their superior knowledge of each case and defendant before them to decide whether a sentence reduction is appropriate. As then-Vice Chair Sessions stated in concluding that it was "ultimately fair and just" to apply the 2007 Amendment to those already sentenced: "[F]ederal judges will decide based on individualized facts who will benefit from the retroactive application of the crack cocaine sentencing reduction." Leaving discretion with sentencing judges who know these cases best helps ensure that those who deserve sentence reductions will get them, and those who do not deserve sentence reductions will not.

Perhaps most important, we know that all judges will consider public safety as a paramount concern when determining whether a sentence reduction is appropriate. All judges are required, through statute and the Commission's incorporated policy statement, to "consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment." *See* § 1B1.10, Application Note 1(B); 18 U.S.C. § 3582(c)(2). As then-Vice Chair Steer explained after determining that "equitable considerations argue strongly for retroactivity" of the 2007 Amendment: "[S]afety concerns were addressed by placing the decision concerning who will benefit from retroactive application in the hands of federal judges." Given decades of inequity in crack sentencing, the ability of judges to discern on an individualized case-by-case basis who should benefit from a sentence reduction, and the requirement that public safety must be considered, we strongly believe that no particular category of defendant should be excluded from retroactive application. There is no reason to deviate from the Commission's 2007 approach of allowing judges to apply the changes to all eligible defendants.

In short, we believe that the Commission should use the discretion Congress has granted it to apply the changes to the Drug Quantity Table retroactively to all defendants. In the end, a federal judge will have the final word on reducing any sentence, taking into account the individual

defendant and the safety of the public. In voting unanimously to make the 2007 Amendment retroactive, commissioners explained that retroactive application would "bolster respect for the fairness of our criminal justice system," that the 100:1 ratio "lacked scientific support," and that retroactive application "will help to correct the unfairness produced by th[e] unwarranted ratio." These same factors, as well as the feasibility of retroactive application and the state of our overcrowded prisons, support the same decision here.

Thank you for considering our views.

Sincerely,

Richard J. Durbin

Patrick J. Leahy

Al Franken

Christopher A. Coons