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June 2, 2011

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attention: Public Affairs

RE: Support for Retroactive Application of New Guidelines to the Fair Sentencing Act of 2010

The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, writes to urge the U.S. Sentencing Commission ("Commission") to apply the new amendment to the crack cocaine sentencing guidelines retroactively.

The Leadership Conference considers the passage of the Fair Sentencing Act of 2010 (the "Act" or "FSA") (Pub. L. No. 111-220) a significant step towards greater fairness in our criminal justice system and a more rational approach to dealing with our nation's drug laws. Its passage represents the culmination of years of tireless advocacy by affected families, criminal justice reform organizations, civil rights and law enforcement groups, and members of Congress. Imposing harsh penalties on low-level drug dealers has led to a profound disruption in family life, diminished job prospects, loss of voting rights, and lack of confidence in the criminal justice system. By applying the permanent crack amendment retroactively, the Commission has the opportunity to provide relief to those currently serving unfair sentences.

Under the Sentencing Act of 1987, the Commission has the authority to apply the permanent amendment to the FSA guidelines, adopted on April 5, 2011, retroactively.<sup>1</sup> When weighing the merits of retroactivity, the Commission is required to consider three things 1) the purpose of the amendment, 2) the magnitude of its impact on the average sentence, and 3) the ease of its implementation. Given its

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<sup>1</sup> USSG §1B1.10(c)

history of encouraging reform of federal cocaine sentencing laws and its prior success in applying drug-related guideline changes retroactively, the Commission should continue those efforts by applying the new crack amendment to those currently incarcerated.

Applying the law retroactively would address the injustice imposed on those convicted under an unfair and unwarranted disparity. Prior to the passage of the FSA, the Commission repeatedly urged Congress to reform the 100 to 1 ratio. In 1995, the Commission recommended eliminating the sentencing disparity altogether, in part because it punished “low-level (retail) crack dealers far more severely than their high-level (wholesale)” counterparts.<sup>2</sup> When that proposal was rejected, the Commission recommended a 5:1 ratio in 1997, only to return again in 2002 to ask Congress to “at least” support a 20:1 penalty scheme, in order to provide “more appropriate and proportionate sentencing.”<sup>3</sup>

In its 2002 report to Congress, the Commission found “even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system. Moreover, to the extent that the 100-to-1 drug quantity ratio is shown to result in unduly severe penalties for most crack cocaine offenders, the impact of that severity falls primarily upon black offenders.” To its credit, the Commission’s repeated calls for reform helped lay the groundwork for passage of the FSA. But there are still thousands of people, predominately African American, who are currently serving inordinately long sentences under the previous penalty structure.

Retroactivity will better effectuate the aims of the FSA to address ongoing concerns about the nation’s prison population. A number of Congressional floor statements during debate on the FSA expressed deep concern about the overall rate of incarceration and the racial makeup of those currently serving time behind bars. In a floor speech, Representative James Clyburn (D-S.C.) said, “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.”<sup>4</sup> Those same concerns about stark racial inequality within the criminal justice system were echoed by Senate Judiciary Committee

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<sup>2</sup> United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb 1995) (“1995 Cocaine Report”) available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm)

<sup>3</sup> United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (April 1997) and United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (April 2002)

<sup>4</sup> 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (Statement of Rep. James Clyburn) and The Pew Center on the States, *One in 31: The Long Reach of American Corrections*, (March 2009).



Chairman Patrick Leahy (D-VT) who stated, “I hope that this legislation will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity, as well as to make our drug laws more fair, more rational, and more consistent with core values of justice.”<sup>5</sup> The retroactive application of the amendment will have a significant impact on African Americans, since they will make up 85 percent of the potential beneficiaries.<sup>6</sup>

The Department of Justice, a champion of the FSA, recently endorsed retroactivity as a means of fulfilling a promise of fair treatment under the law. Testifying before the Commission, Attorney General Eric Holder said, “Although the Fair Sentencing Act is being successfully implemented nationwide, achieving its central goals of promoting public safety and public trust – and ensuring a fair and effective criminal justice system – requires the retroactive application of its guideline amendment.”<sup>7</sup>

Secondly, thousands of crack offenders currently in prison would receive a significant reduction in their sentences if the new guidelines are applied retroactively. Of the more than 12,000 who are eligible, 7,152 offenders (78.1%) would receive a sentence reduction of 48 months or less, and 280 offenders (3.1%) of more than 10 years. The average sentence reduction for all impacted offenders could be as high as 22.6 percent (or 37 months, from 164 months to 127 months).

The federal prison system is currently operating at 35 percent above capacity, according to the Federal Bureau of Prisons (BOP).<sup>8</sup> As evidenced by the recent U.S. Supreme Court ruling in *Brown v. Plata*, prison overcrowding can affect everything from the physical and mental health of individual prisoners to the security of other inmates and prison staff.<sup>9</sup> As outgoing Director of the BOP Harley G. Lappin noted in his testimony before the Commission in March 2011 “almost 82 percent of low security inmates were triple bunked or housed in space not originally designed for inmate housing.” Lappin recommended that the number of inmates and length of time prisoners remain in prison be reduced to get the population down to a more manageable size.

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<sup>5</sup> 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>6</sup> 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) available at [http://www.ussc.gov/Research/Retroactivity\\_Analyses/Fair\\_Sentencing\\_Act/20110520\\_Crack\\_Retroactivity\\_Analysis.pdf](http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf)

<sup>7</sup> Statement of Attorney General Eric H. Holder Jr. United States, United States Sentencing Commission (June 1, 2011). Hearing on “Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010” available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20110601/Testimony\\_AG\\_Eric\\_Holder.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_AG_Eric_Holder.pdf)

<sup>8</sup> Lappin, Harley G., Director, US Bureau of Prisons, Statement to the House, Subcommittee on Commerce, Justice, Science and Related Agencies of Committee on Appropriations, Budget Hearing, March 15, 2011.

<sup>9</sup> 563 U. S. \_\_\_\_ (2011), *Brown, Governor of California, et al. v. Plata et al.*



Since most of the inmates in BOP facilities are serving sentences for drug trafficking offenses, making the amendment retroactive would help relieve some of the burdens and potential problems posed by an overcrowded prison system, such as higher incidents of violence.

Thirdly, not only is there precedent for retroactive application of changes to the drug sentencing guidelines generally, but even prior crack guideline changes have been implemented retroactively. In 1993, the Commission made its changes to LSD sentencing guideline offense levels retroactive.<sup>10</sup> It did the same for marijuana in 1995, and oxycodone in 2003.<sup>11</sup> In 2007, when the Commission lowered the crack guidelines by two levels, it applied the amendment retroactively. This application did not prove difficult to implement. District court judges consulted a Drug Quantity Table, the facts contained in the record, and other factors related to public safety to determine if an individual warranted a reduced sentence. Out of the 25,515 prisoners who were eligible for a sentence reduction in 2007, 16,433 (or 64.5 percent) benefited from retroactive application, according to the Commission's own figures. About 86 percent of those who benefited from the retroactive change of the guidelines were African American. A recent assessment by the Commission confirms that this approach worked. Data comparing recidivism rates showed those who benefited from the 2007 amendment were less likely to reoffend than those who did not.

The Commission rightfully decided to pursue retroactivity in 2007 because it recognized that a basic principle of fairness was at stake. As the Commission explained at the time, retroactive application "was intended as a step toward reducing some of the unwarranted disparity currently existing between Federal crack cocaine and powder cocaine sentences."<sup>12</sup> By applying the amended guidelines retroactively, the Commission corrected an injustice for those serving unduly harsh sentences. It now has the opportunity to follow its own precedent.

The Leadership Conference continues to believe that crafting fair and rational drug sentencing laws and policies is an ongoing civil rights challenge affecting families, communities and our basic notions of fairness and equality. In remedying the effects of a decades old disparity, the Commission should recall its own history and leadership in encouraging reform of federal cocaine and other drug laws. Those efforts ultimately found expression in the FSA, but many continue to suffer the effects of the previous unfair law and are serving unnecessarily long sentences. The Commission should not lose sight of the remedial aims of the Act, including

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<sup>10</sup> U.S.S.G., app. C., Vol. I, Amend. 488; U.S.S.G. § 1B1.10(c).

<sup>11</sup> U.S.S.G., app. C., Vol. I, Amend. 516; U.S.S.G. § 1B1.10(c) and U.S.S.G., app. C, Vol. II, Amend. 657; U.S.S.G. § 1B1.10(c).

<sup>12</sup> United States Sentencing Commission. (December 11, 2007) Press Release. "U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses." available at [http://www.usc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20071211\\_Press\\_Release.htm](http://www.usc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20071211_Press_Release.htm)



relieving the problem of over-incarceration of low-level drug offenders, creating greater equity within and restoring confidence to the criminal justice system. The Commission has repeatedly recognized the discriminatory and unwarranted impact of the disparity. It would be unconscionable to adopt new guidelines that would benefit future crack offenders but not those currently serving excessively long sentences.

Thank you for your attention to our concerns. If you have any questions, please contact Lisa Bornstein, Senior Counsel, at [Bornstein@civilrights.org](mailto:Bornstein@civilrights.org) or (202) 263-2856.

Sincerely,

Wade Henderson  
President & CEO

Nancy Zirkin  
Executive Vice President