



National Association of Assistant United States Attorneys

12427 Hedges Run Dr. • Ste 104 • Lake Ridge, VA 22192-1715

Tel: (800) 455-5661 • Fax: (800) 528-3492

Web: www.naausa.org

June 2, 2011

Judge Patti B. Saris
Chair
United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chair Saris,

On behalf of career federal prosecutors across the country, we would like to express our strong opposition to retroactive application of the Fair Sentencing Act guideline amendments (“crack sentencing amendments”). At the outset, we note our wholehearted agreement with the comments advanced by the Fraternal Order of Police through the testimony of National Vice President David Hiller. By the Sentencing Commission’s conservative estimates, retroactive application of the crack sentencing amendments would reduce the sentences of over 12,000 convicted crack dealers—crack dealers who local, state, and federal law enforcement officials worked tirelessly to identify, investigate, and pursue through prosecution. Early release of those offenders would do a gross disservice to the American people and would be a slap in the face to the law enforcement officers who literally risked their lives in order to bring those criminals to justice. To be clear, we are talking about drug dealers who chose to peddle, for personal gain, an extremely addictive illegal substance and, by doing so, have destroyed untold lives and caused immeasurable pain and suffering to many families and communities.

Beyond the immeasurable crime impact occasioned by the earlier release of thousands of drug dealers, retroactive application would erode the confidence of the law enforcement community, and, in fact, the American people, in the federal criminal justice system. Every one of the convicted crack dealers who would benefit from the retroactive application of the crack sentencing amendments received a full measure of due process. Every one of the crack dealers at issue was either found guilty following a jury trial or pled guilty. Every one of the convicted crack dealers at issue had a full and fair sentencing hearing before a federal judge. And, every one of the convicted crack dealers who would benefit from retroactive application of the crack sentencing amendments was sentenced under laws passed by Congress and signed by of the President of the United States -- laws that were in place for well over two decades. Moreover, every one of the convicted crack dealers has either had their case reviewed by the appropriate

President:
Steven H. Cook
ED of Tennessee

Vice President for Policy:
Robert E. Mydans
District of Colorado

**Vice President for
Operations and Membership:**
John E. Nordin II
CD of California

Treasurer:
Robert Gay Guthrie
ED of Oklahoma

Secretary:
Rita R. Valdrini
ND of West Virginia

Court of Appeals or elected not to pursue such an appeal. Finally, every one of the convicted crack dealers had the ability to attack their conviction through 28 U.S.C. §2255 for years after the crime was completed. In short, they have been provided the full protection of our painstakingly careful criminal justice system.

The United States Supreme Court has long, and repeatedly, recognized that finality is essential to the “operation of the criminal justice system.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). In fact, the Supreme Court has said that “without finality, the criminal law is deprived of much of its deterrent effect.” *Id.* The retroactive application of the crack sentencing amendments would, of course, undercut this finality and throw thousands of cases back into litigation. In fact, in the May 20, 2011, memorandum addressing the potential impact of retroactive application of the crack sentencing amendments (Commission Study), the Sentencing Commission Office of Research and Data noted that retroactive application would reopen convictions finalized twenty years ago. (See http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf.) Even beyond the age of the convictions that would be reopened, the number of cases which could be thrown back into litigation is also staggering. The Commission Study has estimated that 405,968 offenders currently in custody were sentenced under the drug guidelines, and 91,659 of these were for crack offenses. Although the Commission Study estimates that only 12,040 would be eligible for a sentence reduction, sorting through the avalanche of motions filed pursuant to 18 U.S.C. §3582 seeking a reduction would fall to the United States Attorneys’ offices and the federal courts. As for the United States Attorneys’ offices, recent budget cuts have already stretched those resources to the breaking point. The same is true for the federal courts, which are currently experiencing heavy dockets and a well-publicized shortage of federal judges.

Moreover, throwing of thousands of cases back into litigation will undermine confidence in the federal criminal justice system at another level. In all fifty states distribution of crack cocaine is a felony offense prosecutable under state law. State and federal law enforcement officials nearly always review cases to determine the most appropriate forum for prosecution. The most serious often are referred to federal court. Undoubtedly, the vast majority of the cases which would be reopened for litigation if the crack sentencing amendments were made retroactive, were brought into the federal system after a review of, and in reliance on, the applicable federal penalties. State drug distribution prosecutions (and sometimes many other offenses) were dismissed or not pursued in reliance on enforcement and prosecution under the law and penalties in place at the time. Changing those penalties retroactively, after evidence has been destroyed, memories have faded and in many cases statute of limitations have run, and after state law enforcement and prosecutorial authorities have relied on the federal penalties would unavoidably undermine confidence in the system.

In summary, the convicted crack dealers who stand to benefit from retroactive application of the crack sentencing amendments were all sentenced fairly under the law of the land in place at the time they committed their crimes. The penalties were clear as was their guilt. Retroactive application of reduced penalties now in place would be a windfall. On the other hand, reopening thousands of cases litigated over the last two decades would come at great cost to the federal criminal justice system and the American people. Every time an amendment is made retroactive and cases reopened for litigation, the stability of the system is eroded and the confidence of the public is undermined. Accordingly, we strongly urge the sentencing Commission not to apply the crack sentencing amendments retroactively.

Sincerely,

A handwritten signature in black ink, appearing to read "S H Cook". The signature is stylized with a large, sweeping initial "S" and "H".

Steven H. Cook
President