

STATEMENT ON WHETHER THE UNITED STATES SENTENCING COMMISSION
SHOULD MAKE THE CRACK COCAINE AMENDMENTS PROMULGATED PURSUANT
TO *THE FAIR SENTENCING ACT OF 2010* RETROACTIVE

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On my last day of my first year of law school, one of my professors gave us some parting advice: “Remember as you go out into the world...these are PEOPLE you’re dealing with – not cases.” I’ve often thought back to her words. I’d like to think that I always remember that I’m representing PEOPLE. But I often find that the “system” in which I work forgets that these are people. One of the bedrocks of the Federal Criminal Justice system is the concept of “finality.” We have a long line of cases which proclaim that society has an interest in “finality.” That “society” won’t sleep at night unless it knows that a criminal conviction and a criminal sentence is “final.” It doesn’t matter that someone may be wrongly convicted...or that someone received an outrageously long sentence...or that time has enlightened us. We have a system where finality often wins over justice. We have forgotten that we’re dealing with PEOPLE.

When I had only three years of experience as a lawyer, I took on the job of representing a client in a multi-defendant drug conspiracy case in Federal Court. This man had originally been charged with making one \$100 cocaine sale in State Court. Then the Federal system took over and he was indicted by a Federal Grand Jury for Conspiracy to distribute over 50 grams of crack cocaine. I had never tried a federal jury case, but had been on the CJA panel for about a year doing things like supervised release revocation hearings. I consulted two attorneys – one who was a Federal Defender and another who did a combination of State and Federal work. Both attorneys told me they thought I was competent enough to do the case.

The trial was incredible. All the people my client had protected testified against him. He was convicted and was ultimately held accountable for all the bad deeds of the cooperating witnesses. Although the Government recovered less than 5 grams of crack, my client and his co-defendants (the ones who didn’t testify) were sentenced to the drug weight the cooperating witness claimed they sold. I felt like I had stepped into the short story “The Lottery” and that the

stoning would begin soon. What started off as a \$100 sale turned into a finding of 150 grams and a sentence of almost 20 years. During the sentencing hearing, the judge made it clear that he was meting out a sentence that he felt compelled to hand down. At that time the guidelines were mandatory and the judge followed the guidelines.

After the client's sentence was "final" the U.S. Supreme Court first decided Blakely and then Booker. My client cited both of these cases in his §2255 motion. The District Court denied the motion because the U.S. Supreme Court didn't make Booker retroactive. This made no sense to the client and it made no sense to me. At that point, I was pretty disillusioned with the system and pulled back from it...as many other lawyers have. I thought about doing something else – but I had invested so much money and so much of my life into becoming a lawyer. I scaled back on my Federal practice and did mostly State work. At least with the State work, there's less emphasis on "finality" and more recognition that defendants are people.

In 2007, the U.S. Sentencing Commission took charge and amended the crack cocaine guidelines. I had stayed in contact with my client so I told him about this change. By that time, he had lost his appeal, the U.S. Supreme Court had denied certiorari, and the District Court told him Blakely and Booker would not help him because it was too late. When I told him about this change in the guidelines, he laughed at me. "It won't be retroactive, he said." "No-one wants to let us out of prison." I disagreed with him and promised him I would help his voice to be heard. This was probably the first time I felt that I could help put a little justice back into our criminal justice system. The 2007 Amendment was made retroactive and my client received a 47 month reduction in his sentence. This was the first time I saw him show any optimism.

For years, we have known that crack cocaine and powder cocaine are essentially the same chemically. Yet, our Courts have been forced to sentence people with crack cocaine convictions

must harsher than they sentence people with powder cocaine convictions. When *The Fair Sentencing Act of 2010* was passed, crack cocaine sentences became less unfair. But Congress didn't make this law retroactive. *The Fair Sentencing Act of 2010* was a political compromise. Although we have known for decades now that the crack cocaine laws were unfair, Congress did nothing to help the people who are currently serving archaic sentences. Once again, politics trumped people. For reasons that are apparently political and not equitable, Congress decided not to affirmatively make *The Fair Sentencing Act of 2010* retroactive.

While Congress is obviously motivated by political grounds, the U.S. Sentencing Commission has the opportunity to do what is right and what is equitable. When considering whether to make an amendment retroactive the Commission considers the purpose of the change, the magnitude of the change in the guideline range and the difficulty in applying the amendment retroactively. I will address each of these areas.

The "purpose of the change" has a simple answer and a more thoughtful answer. The simple answer is that the Commission responded to a directive by Congress to promulgate new sentencing guidelines to correspond with the new drug level thresholds addressed in *The Fair Sentencing Act of 2010*. But the real answer goes deeper than just addressing a directive. The real purpose of the amendment is to address a long standing inequity. For decades now, people with crack convictions have received harsh archaic sentences that do not comply with our goals of sentencing. Under 18 U.S.C. §3553, a sentence should not be greater than necessary to promote the goals of sentencing. Someone who was convicted of distributing 50 grams or more of crack cocaine received a minimum sentence of ten years. Many people have received significantly more time than ten years for their convictions. A sentence of ten years or more is greater than necessary to deter someone who distributed approximately a fistful of drugs. A

sentence of ten years or more is greater than necessary to reflect the seriousness of the crime. Most people who are serving time for crack offenses are non-violent offenders. Sending them to prison for more than ten years exceeds the need to “protect society” from them. Harsh sentences don’t promote a respect for the law. How can someone respect a law that is devoid of compassion and forgiveness? Harsh sentences are unjust sentences and unjust punishment. A much lighter sentence would probably deter most people from committing this offense again. As for rehabilitation, archaic sentences like the ones imposed on crack cocaine offenders are probably counterproductive. When someone receives a short prison sentence, he or she often receives a “wake up call” that his or her behavior needs to change. After a short stint in prison, someone can re-enter society and become a productive member of society. But people who serve very long sentences have so many obstacles in their way when they’re released. They have difficulty acclimating to their new environment and often have fewer resources available to help them succeed. They aren’t equipped to become productive members of a changed society.

The magnitude of the change of this amendment is significant. According to the research published by the Commission on its web-site, the average sentence reduction would be 37 months. This reduction would make a positive difference in the lives of the people sentenced. It would also make a positive difference in the lives of their family members and friends. On a global level, it would indirectly affect society as a whole. It would be a first step in reducing an expanding prison population – one which we as a society cannot afford financially or emotionally.

This amendment could easily be implemented retroactively. The people who would be affected have already been identified both by the Commission and by the Courts. In 2007, the Courts established procedures to deal with the retroactive crack amendments at that time. Many

of the people who were eligible in 2007, are still eligible. The ORD estimates that approximately 12,040 people would be eligible for a sentence reduction. Spread out among all the District Courts, this is a manageable number. In addition, these people would be released gradually. For example, in New Hampshire (the district in which I practice) only 11 people would be eligible for immediate release if this amendment were retroactive on November 1, 2011.

Statistics published on the Bureau of Prison's web-site show an exponential explosion in our Federal incarceration rate. In 1930, there were 13,000 Federal inmates. In 1980, there were 24,000 inmates. As of May 26, 2011, there were 216,095 people in federal prison. Just a week earlier the figure was 215,700. More than 50% of these inmates are incarcerated for drug offenses and less than 11% of these inmates are classified as "high security" inmates.

A review of our incarcerated population is enlightening. Most people who are incarcerated aren't the violent, dangerous people our media likes to portray on television. Most of the people incarcerated in our Federal system are non-violent offenders. We are spending billions of dollars incarcerating people who would be better served on probation or in treatment programs. This money could be better spent educating our children, providing shelter to our homeless, providing health care to our citizens, or reducing our federal debt.

Making the crack cocaine amendments retroactive won't solve all our problems. There will still be too many people in prisons. We will still have people who are uneducated or homeless. We will still have a huge federal debt. But this is a start. It is a good start and maybe it will encourage our country to make more positive changes.

I encourage the U.S Sentencing Commission to make the crack cocaine amendments promulgated pursuant to *The Fair Sentencing Act of 2010* retroactive.