July 7, 2014

By email
Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Retroactivity of the drug sentencing guideline amendment

Dear Judge Saris and commissioners,

Thank you for inviting FAMM's testimony on June 10. As I said that day, FAMM wholeheartedly favors making the drug sentencing guideline reduction retroactive. My submitted statement sets forth the reasons the guideline should be made retroactive.[1] I write to supplement my testimony in light of that given by Sally Quillian Yates on behalf of the Department of Justice. The Department encourages the Commission to adopt retroactivity but to categorically limit it in the interest of public safety and efficiency. You should reject this counsel. It is based on flawed assumptions about the ability of the exclusions to meet those objectives. It would lead to unfair outcomes. Adopting the exclusions would do violence to the rationales that gave rise to the amendment, and double-punish excluded prisoners, thus undermining community confidence and support. Were the Commission to adopt this proposal, it would take a step it has roundly rejected in the past when making an amendment retroactive: using flawed proxies for dangerousness as stand-ins for judges.

1. Fundamental fairness and the perception of unfairness.

On March 13, Attorney General Eric Holder appeared before the Commission to underscore the Department's strong support for the amendment. Chief among the reasons he cited was fairness. "This straightforward adjustment to sentencing ranges – while measured in scope – would nonetheless send a strong message about the fairness of our criminal justice system. . . . [A]s this Commission has recognized – certain types of cases result in too many Americans going to prison for too long, and at times for no truly good public safety reasons."[2]

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[1] See Written Statement of Mary Price, General Counsel, Families Against Mandatory Minimums to the United States Sentencing Commission Public Hearing on Retroactive Application of the 2014 Drug Guidelines Amendment (June 10, 2014) ("Price Statement), *available at*: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Price.pdf.

[2] U.S. Dep't of Justice, Press Release, "Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers" (March 13, 2014), *available at*: http://www.justice.gov/opa/pr/2014/March/14-ag-263.html.

This simple rationale was echoed on June 10 by the Department witness Sally Quillian Yates who pointed out that "sentences imposed for some drug defendants under the current sentencing guidelines are longer than necessary, and this creates a negative impact upon . . . the public's confidence in our criminal justice system . . . ."[3]

Fairness and the perception of fairness was a theme echoed by other witnesses at both hearings; most notably by the Chair of the Criminal Law Committee, Judge Irene M. Keeley testifying in support of retroactivity. She cited "fundamental fairness" as the "driving factor" of the Committee's decision to support retroactivity.[4]

It is within the Commission's power to permit adjustments of sentences based on a guideline it is poised to lower. It has done so in the past and cited, among other reasons for doing so, fairness. In the most recent case, when the Commission made the guidelines adopted pursuant to the Fair Sentencing Act retroactive, several commissioners underscored that the Commission would not insist a prisoner continue to serve a sentence based on a now-repudiated guideline.[5]

The Commission's proposal to reduce the guidelines' reliance on drug quantity means that it now believes that the current guidelines do not serve the purposes of sentencing. That insight is based on the Commission's study of sentences already imposed and being served. It is not a stretch from the recognition that the guidelines are currently too long to the recognition that requiring prisoners to serve now-discarded terms of imprisonment would be, as Judge Keeley and others pointed out, fundamentally unfair. And it would appear unfair as well to the thousands of prisoners and their loved ones who would be excluded from any consideration of sentencing relief based on crudely drawn, one-size-fits-all carve-outs.

2. The proposed carve outs are not necessary to protect public safety.

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[3] Statement of Sally Quillian Yates, U.S. Attorney for the Northern District of Georgia, Before the U. S. Sentencing Comm'n Hearing on Retroactive Application of the Pending Drug Guideline Amendment to the Federal Sentencing Guidelines at 2 (June 10, 2014), *available at*: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf.

[4] Testimony of Hon. Irene M. Keeley, Chair, Criminal Law Committee, Judicial Conference of the United States, Presented to the United States Sentencing Comm'n, on the Retroactivity of the Drug Guideline Amendment at 1 (June 10, 2014), *available at:* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Keeley.pdf.

[5] See, e.g., Transcript, Before the U.S. Sentencing Comm'n Public Meeting, Thursday, June 30 2011 at 16-17 ("2011 Transcript")(Hon. Ketanji Brown Jackson pointing out that "insisting that those serving excessive sentences under the long-disputed and now discredited prior guideline must carry on as though none of this ever happened . . . would harm not only those serving sentences pursuant to the prior guideline penalty, but all who believe in equal application of the laws and the fundamental fairness of our criminal justice system.")

The last time the Commission considered proposals from the Department of Justice[6] to exempt certain prisoners from retroactivity, it rejected the proposals for a number of reasons.[7] It should do so now.

To the extent that the carve outs proposed by the Department are intended to promote public safety, they are -- as a Commissioner noted at the June 30, 2011 meeting where it voted for retroactivity of the Fair Sentencing Act amendments -- "imperfect proxies for dangerousness" especially "when an actual judge with an actual case can make that call."[8] They are no less imperfect today.

For example, judges routinely depart downward from criminal history categories pursuant to U.S.S.G. § 4A1.3(b)(1) because the calculated criminal history category "substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes . . . ."[9] Criminal history issues are and have been the leading reason for departures from the guideline range, making up nearly 30% of downward departures in 2013, and leading the way as well for departures with *Booker*. In other words, judges have found in many cases that criminal history is a poor proxy for evaluating a prisoner's dangerousness. Retroactivity however would be denied to prisoners based on their calculated criminal history category rather than the appropriate category.[10]

The other exemptions are no less troubling. For example, denying retroactivity to everyone who was enhanced for obstruction of justice will automatically exclude prisoners who misrepresented facts while testifying, for example to their innocence at trial or who provided false information of any kind to a probation officer preparing a pre-sentencing report, or perjuring oneself in a civil proceeding.[11]

Relevant conduct leads to enhancements for possession of a weapon even when the defendant neither possessed nor was even aware of a co-defendant's weapon. Whether or not that prisoner poses a danger to the community should she be released early would be taken out a judge's power entirely. When asked about this at the June 10 hearing, the Department's witness asserted that sorting out the dangerous weapons' possessors from the constructive possessors, would not be "an

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[6] *See* Price Statement at 7 for the FAMM position on the limitations suggested in the Issue for Comment on retroactivity.
[7] *See* 2011 Transcript at 15, 33-35, 42-43.
[8] 2011 Transcript at 15 (Hon. Ketanji Brown Jackson statement).
[9] *See* U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, Tables. 25, 25A and 25B, *available at:*. http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.
[10] *See* U.S.S.G. § 1B1.10, cmt. 1.(A) (stating "Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range (1.e., the guideline range that corresponds to the offense level and criminal history category . . . which is determined *before consideration of any departure provision* in the Guidelines Manual or any variance." (emphasis supplied).
[11] *See* U.S.S.G. §31.1, cmt. 4(B), (F) and (H).

appropriate use of resources."[12] That position says more than anything else about why a judge rather than a category should make the decision to deny a prisoner early release.

This kind of one-size-fits-all approach is ill suited for the task; that of assessing who is and is not worthy of a sentence reduction. It will sweep too broadly in the name of public safety and efficiency. As the Commission discovered following the 2008 retroactivity decision, judges were well suited for the task of sorting the deserving from the undeserving.[13]

The Department's proposal might make sense if past experience with retroactivity had borne out the public safety fears the Department had expressed. But it did not, as Pat Nolan testified on behalf of the American Conservative Union.[14] Recidivism rates for prisoners released early pursuant to the 2007 crack cocaine reductions continue to be comparable to, if somewhat lower than, those for their full-term cohorts. In fact, recidivism rates for prisoners with gun enhancements and criminal history are also comparable.[15] Given that, there seems little reason to exclude prisoners serving sentencing enhancements or who were found to be in Criminal History Categories III through VI.

When voting for retroactivity in 2011, the Commission cited earlier recidivism findings as a significant factor in assessing the public safety impact of its decision. One commissioner who found comfort in the research also noted that the way recidivism is measured is itself a poor proxy for dangerousness. He noted that recidivism rates often include arrests that never turn into convictions and technical violations that would not rise to the level of a conviction.[16] Those features of measuring recidivism remain unchanged.

Another fact that resonated with the Commission when it rejected carve-outs in 2011 is that retroactivity will not prevent prisoners from serving sentences based on the conduct that led to the enhancements or increased sentences for criminal history. "Any reduction in sentence that these offenders may receive as a result [of retroactivity] will in no way negate the extra prison time they are required to serve as a result of such aggravating factors. Regardless of [retroactivity], offenders in these categories will continue to serve longer prison terms . . . ."[17]

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[12] Transcript, Public Hearing on Retroactivity of 2014 Drug Amendment at 132-33 (June 10, 2014) (2014 Transcript), *available at:* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.

[13] 2011 Transcript at 14-15, 32, 38-39, and 54-55.

[14] Testimony of Pat Nolan, Director of the Center on Criminal Justice Reform at the American Conservative Union Foundation Before the U.S. Sentencing Comm'n at 4 (June 10,2014), *available at:* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Nolan.pdf.

[15] *See* U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* at 6-7 (May 2014), *available at*: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[16] 2011 Transcript at 39-40 (statement of Hon. Ricardo H. Hinojosa).

[17] 2011 Transcript at 34 (statement of Commissioner Dabney Friedrich); *see also* Transcript at 42-43 (statement of Hon. Ricardo H. Hinojosa noting that "[i]ndividuals with higher criminal history category

That remains the case with the present retroactivity decision. Judges are forbidden from adjusting anything other than the drug guideline range that has been lowered. All prisoners must serve the unaltered enhanced portion of their sentence.

To exclude such prisoners out of hand would double count the punishment imposed by the enhancement, saying in effect for these prisoners that the enhancements did not punish them enough and ought to have been two levels higher. That introduces a disparity in treatment of such prisoners who have already seen their sentences increased. When bypassed per the carve-outs, it will, in practical terms, be increased again. It has never been suggested that these enhancements are insufficient or that their impact should be magnified. That, however, would be the net effect of these categorical exclusions.

The Sentencing Commission and the Department of Justice did not raise the possibility of excluding defendants using proxies for dangerousness for the underlying amendment, nor is their support for retroactivity of the Fair Sentencing Act in the Smarter Sentencing Act contingent on exemptions of any kind.[18] We cannot understand why the Department would assume judges are considered capable of making such assessments going forward and not in looking back. In fact, hindsight is informed by a prisoner's conduct while incarcerated and thus provides important information bearing on dangerousness and recidivism risks.

3. Conclusion

We urge you to adopt retroactivity and to do so without exception. There is no principled reason for them. There are sound reasons to reject them. I offer three stories of FAMM members who benefitted from the crack retroactivity votes in 2008 and 2010. I heard about the events and memories that have filled the years they got back that they would have missed if still incarcerated.

Stephanie lives in Mobile. She was sentenced to 30 years at age 23. She spent 21 years and one month in prison before her release in November 2011. Here is what she has done with the years she got back: She picks up some of her 6 grandchildren (8 years old and under) from day care every day, she keeps the grandkids when they are sick, and marvels at how they attached to her so instantly, as though she had been there all their short lives instead of not at all. Her return home knit up the torn fabric of her family; people who had not spoken for years rebuilt relationships in her orbit. She has celebrated 27 birthdays of children and grandchildren and of course all the holidays and family reunions. She wanted the Commission to know that it didn't take 21 years to get the point across. She would still be in prison today but for retroactivity.

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scores have been sentenced to higher sentences. Individuals where a firearm may have been involved have been sentenced to higher sentences. All of these aggravating factors have already been considered with regards to the sentences that have been handed down.")

[18] So enthusiastic is the Department about the two level reduction that it is stipulating to it before it goes into effect and as we understand it, without caveats or carve outs.

Stephanie, however, received a leadership enhancement. Had you adopted such an exclusion in 2011, she *would* still be in prison today.

Some of you will remember **Natasha** who testified in front of the Commission in 2011. Two months after her release in March 2008, she entered college, when she testified, she was a rising junior. She wanted me to tell you that the day I testified, she received her Master's Degree in Business Administration. In the four years the Commission gave back to her, besides rocking her own education, she attend the graduations from college of two of her children, was there to welcome two of her three grandchildren into the world, and say goodbye to her grandmother and her beloved uncle. Today she helps potty train the babies, teach them to walk, and volunteers in the 6th grade classroom of her teacher's aide daughter, coaching reading.

Natasha would also have been ineligible because she received a gun bump for "firearms connected with the offense."

Lawrence came home to Washington, D.C. four years early in Jan. 2009 from a fifteen-year sentence. He came home just in time to be with his Aunt Rosie who had grown too ill to visit him before she passed away. He quickly earned his real estate license but struggled to get on his feet due to the financial crisis. He drew courage and strength outside as he had inside, from his devoted mother and grandmother. They had never given up his cause. It took him 3 years but he has gotten "back to normal." The best thing of all was being there to welcome his twin brother, **Lamont** home in October 2011 and show him the ropes. **Lamont** returned home from his 19-year sentence in time to, with Lawrence, care for and say goodbye to his beloved grandmother, Angel, and Uncle Junior. They were deeply involved in the twins' upbringing and losing them has been hard; being with them in their final years was a gift. Were it not for retroactivity, Lamont would not have been released until later this year.

Lamont would still be in prison today had you elected to deny him the benefit of retroactivity because his sentenced was enhanced when he testified at trial.

These good people and many, many like them have remade their lives after too many years in prison. Their lives no longer revolve around the things they missed but the events they take part in. Each of them spoke to me of the men and women they left behind who are no less deserving of relief. Retroactivity presents the criminal justice system with challenges. But it is hard to imagine forcing someone like Lamont or Stephanie or Natasha to serve a day longer, much less 23 months longer, than you've deemed sufficient for punishment's sake, if it were within one's power to avoid that outcome.

Thank you for considering my supplemented testimony.

Sincerely,

Mary Price