

United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

July 7th, 2014

**Re: Lawyers' Committee for Civil Rights Under Law Comment Supporting
Retroactive Application of 2014 Amendment to the Drug Quantity Table**

To Whom It May Concern,

The Lawyers' Committee for Civil Rights Under Law writes to submit our comments in strong support of retroactive application of the amendment to the Drug Quantity Table unanimously adopted by the United States Sentencing Commission ("USSC" or "Commission") and submitted to Congress on April 30, 2014. The Lawyers' Committee, which was formed over 50 years ago at the request of President John F. Kennedy to enlist the private bar's leaders and resources in combating racial discrimination, is involved in the fight for a fair and equitable criminal justice system.

We commend the Commission for addressing guideline sentences for drug offenses and strongly supported the amendment lowering the base offense level triggered by drug quantities. We similarly commend the Commission for its careful consideration of the retroactive application of this amendment to federal prisoners sentenced for the same federal drug offense, but sentenced before the amendment to the guidelines goes into effect. Retroactive application of the amendment to the Drug Quantity Table would help ameliorate unwarranted racial disparities in federal sentencing practice, which is a central purpose of the Commission.

**Retroactive Application of the Proposed Rule Furthers the Commission's
Purpose in Addressing Sentencing Disparities**

Congress created the Commission in part to respond to reports of widespread disparities in sentencing practices across the country, including racial disparities. According to the Sentencing Reform Act of the Comprehensive Crime Control Act of 1984, which created the Commission, the Commission must ensure that the guidelines are "entirely neutral as to the race, sex, national origin,

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creed, and socioeconomic status of offenders.”¹ Furthermore, an express purpose of the Commission is to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”²

While facially race-neutral, the Sentencing Guidelines promulgated by the Commission have not eliminated racial disparities in federal sentencing practice or in the federal prison population. African Americans and Hispanics are disproportionately arrested, charged, convicted, and sentenced to longer lengths of imprisonment than their white counterparts.

This trend is rooted in large part by long lengths of imprisonment and high enforcement and prosecution rates for federal drug crimes. Retroactive application of the amendment to the Drug Quantity Table adopted unanimously by the Commission in April would contribute to ameliorating the effects of this era of disproportionate enforcement and harsh sentencing.

Retroactive Application of the Adopted Amendment would Address Overrepresentation of African Americans and Hispanics in Federal Prison

Racial disparities persist at nearly every stage of the federal criminal justice system, leading to a prison population in which African Americans and Hispanics are grossly over-represented. In 2010, 37 percent of the federal prison population was Black, 32 percent was Hispanic, and 28 percent was white.³ Today, African Americans and Hispanics continue to be prosecuted at a disproportionate rate to their share of the general population. In 2013, the Bureau of Justice Statistics (BJS) reported that Blacks and Hispanics represent over 75 percent of federal defendants charged in federal district courts.⁴

This number cannot be accounted for solely on the basis of disproportionate involvement with criminal conduct. A recent study evaluated the effect of prosecutors' initial charging decisions to large observed black-white disparities in

¹ 28 U.S.C. § 994(d).

² 28 U.S.C. § 991(b)(1)(B).

³ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics, 2010* at 25 (Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf>. In comparison, African Americans comprise 13.1 percent, Hispanics 16.9 percent, and Whites 63.0 percent of the general population.

⁴ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics, 2010* at 18 (Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf>.

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sentence length.⁵ Pre-charge factors, such as arrest offense and criminal history, can explain about 80 percent of these disparities, but substantial gaps remain. On average, blacks receive almost 10 percent longer sentences than comparable whites arrested for the same crimes.⁶ At least half this gap can be explained by initial charging choices, particularly the filing of charges carrying mandatory minimum sentences. Prosecutors are almost twice as likely to file such charges against blacks.⁷

African Americans and Hispanics also comprise a vast majority of those convicted of federal drug offenses, having 25.9 percent and 46.2 percent of the convictions respectively.⁸ This disparity cannot be explained by greater use of illicit drugs. Blacks, Whites and Hispanics use illicit drugs at similar rates, at 10.7, 9.1, and 8.1 percent respectively.⁹ As a result, the share of the federal prison population represented by African Americans and Hispanics has burgeoned over the past several years to unsustainable levels.

Commensurate with their over-representation in the group of federal drug offenders, over 74 percent of the federal prisoners who stand to benefit from retroactivity are African American or Hispanic.¹⁰ Adoption of full retroactive application of the amendment to the Drug Quantity Table as unanimously adopted by the Commission in April would help ameliorate the effect of disproportionate arrest, charging and conviction of African Americans and Hispanics for drug offenses.

The Department of Justice's Recommended Limitations on Retroactivity Would Disproportionately Exclude Black and Hispanic Offenders

⁵ Starr, Sonja B. and M. Marit Rehavi, *Racial Disparities in Federal Criminal Charging and Its Sentencing Consequences*, Univ. of Mich. Law School Program in Law & Economics Working Paper Series, Working Paper No. 12-002 (May 2012).

⁶ See *id.*, at 9 (controlling for district, age, marital status, per capital income, unemployment rate, poverty rate, and education level).

⁷ *Id.* at 1.

⁸ U.S. Sentencing Commission, *Interactive Sourcebook: Race of Drug Offenders in Each Drug Type*, available at http://isb.usc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table34.

⁹ Substance Abuse and Mental Health Services Administration, *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*, NSDUH Series H-41, HHS Publication No. (SMA) 11-4658. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2011, Figure 2.10.

¹⁰ U.S. Sentencing Commission, *Analysis of the Impact of the 2014 Guidelines Amendment if Made Retroactive*, at 11 (May 27, 2014).

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At the Commission's public hearing on retroactive application of the 2014 Drug Guideline Amendment on June 10th, the U.S. Department of Justice recommended massive limitations on offender eligibility for retroactive application consideration. Among the carveouts the DOJ proposed are exclusion of all offenders having a criminal history category higher than II, and all those receiving a mandatory minimum sentence for a firearms offense pursuant to 18 U.S.C. § 924(c). The limitations proposed by the DOJ are significant. Almost 47 percent of otherwise eligible prisoners would be excluded for having a criminal history greater than Category II.¹¹ In addition, the proposed limitations would disproportionately exclude minority defendants. Put together, the DOJ's proposed carveouts would limit eligibility for retroactivity to a mere 18 percent of African American defendants. In comparison, the limitations would allow 34 percent of white defendants and 52 percent of Hispanic defendants to apply for retroactive application of the drug guideline amendment.

As an initial matter, it belies common sense for the Department of Justice to argue that the prospective amendment to the drug guidelines ensures public safety, while at the same time arguing that the same amendment applied retroactively to prisoners who committed the same crime is a public safety threat. During the June 10th hearing, Sally Quillian Yates speaking for the Department, argued that the inherent dangerousness of the offense was not the linchpin of the justification for this seeming contradictory position. Instead, she emphasized that in administering the retroactive application of the amendment, the Department would be forced to divert resources away from prosecuting new crimes, at the expense of public safety. Even assuming the Department is correct in the public safety implications, it is unfair to deny the benefits of retroactivity on certain arbitrary categories of federal prisoners in order to avoid this result. More important is the fact that these carveouts would disproportionately exclude African American and Hispanic prisoners from benefiting from retroactivity.

The Department of Justice's recommended carveout based on criminal history categories would disproportionately exclude African American and Hispanic federal prisoners from having their applications considered for retroactive applicability of the amendment. Due to empirically-proven factors such as over-policing of African American communities and greater criminal prosecution, as well as other socioeconomic factors that are difficult to capture empirically, African Americans tend to have more extensive criminal backgrounds.¹²

¹¹ U.S. Sentencing Commission, *Analysis of the Impact of the 2014 Guidelines Amendment if Made Retroactive*, at 13 (May 27, 2014).

¹² See e.g., National Academy of Sciences National Resource Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 149 (2014) ("poor inner-

According to an analysis conducted by the Federal Defenders, 48 percent of white defendants are excluded by the DOJ's criminal history carveout, but 66 percent of Black defendants are excluded.¹³

This is unsurprising given data previously made available by the U.S. Sentencing Commission. For instance, African Americans make up the vast majority (82.6%) of crack cocaine offenders,¹⁴ who have, on average, a more serious criminal history than any other category of drug offender.¹⁵ Thus, crack cocaine offenders would be excluded at a higher rate from consideration under the DOJ's recommendations, the vast majority of whom are African American.

Exclusion of a large portion of crack offenders from consideration for retroactivity would serve only to "double down" on the existing harsh sentencing scheme for crack offenses. Even after Congress passed the Fair Sentencing Act in 2010, there continues to be a 1-to-18 sentencing disparity between crack and powder cocaine sentences going forward. Refusal to apply the Drug Guideline Amendment to most crack cocaine offenders would constitute a doubling down of penalties for an offense that Congress has already punished more harshly through the sentencing scheme. Moreover, neither the Fair Sentencing Act nor previous amendments to the guidelines have fully addressed these disparities: about 83 percent of crack cocaine offenders eligible to seek a reduced sentence under the amendment have never received a reduced sentence pursuant to retroactive

city neighborhoods were increasingly plagued by higher rates of unemployment among young men, crime, and other social problems. These same neighborhoods were the focal points of debates over crime and social policy, and the places where incarceration became pervasive.").

¹³ Federal Public Defenders, *Fact Sheet: Impact Analysis of DOJ's Proposed Limitations on Retroactive Application of 2014 Drug Guidelines Amendment*, 2 (July 27, 2014) (analysis prepared by the Sentencing Resource Counsel Project of the Federal Public and Community Defenders on June 27, 2014, the Fact Sheet is intended primarily to provide an estimate of the impact of the DOJ's proposed exclusions to the retroactivity of the 2014 drug guidelines amendment. The Federal Defenders constructed a proxy population for the analysis because data that the Commission used for its impact analysis was unavailable.)

¹⁴ U.S. Sentencing Commission, *Interactive Sourcebook: Race of Drug Offenders in Each Drug Type*, available at http://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table34.

¹⁵ U.S. Sentencing Commission, *Overview of Federal Criminal Cases 2012*, at 12, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf (only 21.5% of crack cocaine offenders were assigned to Criminal History Category I, compared over 58% of power cocaine offenders; 26.8% of crack cocaine offenders were assigned to Criminal History Category VI, the highest level, compared to only 8.8% of powder cocaine cases).

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application of the 2007 crack cocaine amendment or the 2011 Fair Sentencing Act guideline amendment.¹⁶

For the foregoing reasons, the Lawyer's Committee urges the Commission to apply the amendment to drug guidelines retroactively and without limitations. The retroactive application of the amendment would address unwarranted racial disparities in federal sentencing due to the over-representation of African Americans and Hispanics in federal drug prosecutions.

Respectfully submitted,

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¹⁶ U.S. Sentencing Commission, *Analysis of the Impact of the 2014 Guidelines Amendment if Made Retroactive*, at 12 (May 27, 2014).