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July 7, 2014

Honorable Patti B. Saris, Chair  
U. S. Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

Dear Judge Saris,

On behalf of 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, we write to provide comments on the retroactivity of the amendment to the U.S. Sentencing Guidelines promulgated by the U. S. Sentencing Commission on April 30, 2014, which would revise the guidelines applicable to drug trafficking offenses by lowering the base offense levels ("BOLs") in the Drug Quantity Table in Section 2D1.1.

These comments focus on the specific areas where The Leadership Conference believes the commission can improve the fairness and proportionality of the guidelines; promote individualized review of specific offense conduct; and mitigate excessively punitive provisions that have not only promoted racial disparities in sentencing, but also have sustained a costly explosion in the number of individuals in the federal penal system.

We strongly support the following proposed amendment to the Sentencing Guidelines:

*Amendment 3, pertaining to drug offenses, has the effect of lowering guideline ranges.*

Pursuant to 28 U.S.C. § 994(u), "[i]f the commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoner serving terms of imprisonment for the offense may be reduced." Under U.S. Sentencing Guidelines Manual § 1B1.10(c), the Commission considers three factors in deciding whether an amendment should be made retroactive: (1) the purpose of the amendment; (2) the magnitude of the change in the Guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended Guideline range.<sup>1</sup> All three of these factors support applying the amendment retroactively, without limitation.

Our detailed comments are set forth below.

## **1. Purpose of the Amendment**

The Leadership Conference commends the Commission for its continued efforts to promote proportionality and fairness in federal sentencing. The adoption of the amendment – a comprehensive two-level reduction in Guideline sentencing for defendants in drug trafficking cases – represents an important step. It is crucial that the next step be the retroactive application of the amendment without condition or limitations.

Congress's decision to have drug type and quantity, rather than role and culpability, trigger harsh mandatory minimum sentences, has opened the door to an epidemic of over-incarceration and disparities in sentencing. The unnecessary harshness of the Guidelines has driven the federal prison population to grow at a rate of almost 800 percent since 1980.<sup>ii</sup> The federal Bureau of Prisons is currently operating at 35 percent above capacity, at a cost of 80 billion dollars per year.<sup>iii</sup> Allocating precious resources to maintain our overpopulated prisons has resulted in the underfunding of the Department of Justice's (DOJ's) crime prevention, detection, and prosecution components. It has also diverted funds away from alternatives to incarceration, such as drug treatment, victims services and reentry programs, making it all the more difficult to ensure public safety. The Attorney General observed that this level of incarceration is not financially unsustainable, but comes with "human and moral costs that are impossible to calculate."<sup>iv</sup> If left unchecked, overpopulation will threaten public safety as more and more funds are diverted to maintain prisoners in the Bureau of Prisons.<sup>v</sup> By reducing overcrowding in our federal prison system, we would be freeing up resources for prison staff to do their jobs more effectively and in a safer and healthier environment.

Further, these harsh mandatory minimums tied to drug quantity have also led to increased racial disparities in federal sentencing. While people of color make up about 30 percent of the U.S. population, they account for 60 percent of those imprisoned.<sup>vi</sup> Currently, one-third (34.4 percent) of the federal prison population are first-time non-violent offenders and more than half of federal prisoners are serving time for a drug offense.<sup>vii</sup> African American drug offenders have a 20 percent greater chance of being sentenced to prison than White drug offenders, and Hispanics a 40 percent greater chance.<sup>viii</sup> This racial disparity is unacceptable and must be addressed as it has led to a terrible cycle of mass incarceration that has had a disproportionate impact on minority communities.

By applying the amendment retroactively, the Commission has the opportunity to address the persistent problem of unfair sentencing in the U.S. justice system and to spearhead the movement towards a more just and equal society.

## **2. Magnitude of the Change of the Guideline Range Made by the Amendment**

The Commission's Office of Research and Data estimates that, over the course of over thirty years, 51,131 offenders sentenced between October 1, 1991 and October 31, 2014 would be

eligible to have their current sentence reduced if the Commission were to make the 2014 drug guidelines amendment retroactive.<sup>ix</sup> Of these people, 4,571 would gain immediate release if the amendment were made retroactive. Such a large number presently languishing under unfair sentencing guidelines is deplorable and must be addressed.

A study using data from the National Longitudinal Study of Adolescent Health explored the relationship between family structure and risk of violent acts in neighborhoods. The results revealed that if the number of fathers is low in a neighborhood, there is also an increase in acts of teen violence. The statistical data showed that a 1 percent increase in the proportion of single-parent families in a neighborhood is associated with a 3 percent increase in an adolescent's level of violence.<sup>x</sup> In 2007, the nation's prisons held approximately 744,200 fathers who reported having 1,559,200 children.<sup>xi</sup> By applying the amendment retroactively and returning fathers to their children, the Sentencing Commission will be assisting in the reunification of families, which will strengthen and enhance the health and safety of communities of color.

Furthermore the retroactive application will have an enormous impact on improving racial disparities in the system. Each year, Blacks comprise nearly 30 percent of all drug offenders sentenced in federal court. The Office of Research and Data's analysis of racial impact of retroactive application of the two-level reduction indicates that more than 74 percent of the offenders whose sentences will be reduced under the law are Black or Hispanic.<sup>xii</sup> Shorter, fairer drug sentences will not only reunite families, they will also increase respect for the justice system in communities that have been disproportionately impacted by excessive drug sentences for nearly 30 years.

DOJ has asked the Commission to place eligibility restrictions on retroactivity of the fix based on factors such as a person's criminal record and role in the offense. Such restrictions, however, would have a grave impact on minority communities. In fact, preliminary review by the Federal Public Defender's office of the Commission's data suggests that 82 percent of eligible Black prisoners and 48 percent of eligible Hispanic prisoners would be unable to seek fairer sentences. This racially disparate impact is unacceptable and does not comport with the Commission's longstanding commitment to eliminating racial disparities in federal sentencing.

In addition to the positive impact that retroactivity would have on families and addressing racial disparities, the Commission's own data demonstrate that adopting the levels 24 and 30 across the board better serves the Federal Bureau of Prisons. Assuming an average bed-year cost of \$28,948, total savings is projected to be 83,525 bed years, or nearly \$2.4 billion.<sup>xiii</sup> These savings will be realized in full over the next 30 years. And in the short-term alone, with 56.2 percent of eligible offenders (28,220 inmates) projected to be released within the first three years, there will be a savings of more than \$1.3 billion.<sup>xiv</sup> These savings can be used to improve prison facilities and probation services aimed at reducing recidivism as well as providing law enforcement with the resources they need to keep the public safe.

Simply put, by making the amendment retroactive, families will be reunited, future crime will be reduced, racial inequalities will be addressed, and billions of dollars will be saved. Beyond these

important incentives, the Commission can give 23 months of life back to thousands of men and women in our nation's federal prisons. Such liberation cannot only be measured in dollars and cents but is without doubt the fair and just thing to do.

### **3. Difficulty of Applying the Amendment Retroactively**

Opponents of the full and unconditional retroactive application of the amendment have claimed that it would put a strain on scarce judicial resources. Some parties claim that the diversion of resources within the criminal justice system would have a substantially negative impact on public safety. These parties fail to recognize that the Commission has, on several occasions, amended the drug guidelines with the effect of lowering sentences and in each instance has made the amendments retroactive, without incident.

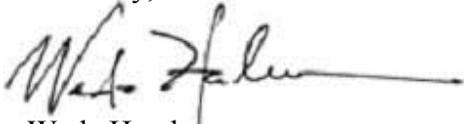
For example, the Commission passed guideline amendments for LSD, marijuana, and oxycodone that were made retroactive in 1993, 1995, and 2003, respectively, without incident.<sup>xv</sup> More recently, the Commission elected to apply the 2007 crack-cocaine amendment as well as the 2011 amendment to implement the Fair Sentencing Act of 2010 ("FSA") retroactively, again without difficulty.<sup>xvi</sup> In December 2008, the Commission voted to authorize courts to apply the 2008 crack cocaine amendment retroactively. No more than six percent of all motions were denied for reasons that may be related to public safety.<sup>xvii</sup> In the Commission's May 2014 report, the Commission's data demonstrated that the recidivism rate of those released pursuant to retroactive application of the 2007 crack amendment was actually lower than the recidivism rate for those required to complete their full sentenced originally imposed.<sup>xviii</sup> The Commission's superb track record gives us confidence that the retroactive implementation of the 2014 drug amendment can be done both safely and efficiently.

Finally, opponents of retroactivity have raised concerns that reducing the overpopulation of our federal prison population through full retroactivity would result in the release of violent criminals who pose a threat to public safety. While the concern for public safety is well noted, we must acknowledge the fact that each imprisoned person who would be eligible for a sentence reduction would have to come before a judge and prove that he or she poses no threat to public safety. Further, many people who receive reductions will have many years left to serve on their sentences, since people receiving reductions will serve, on average, 102 months in prison. According to the Criminal Law Committee of the Judicial Conference of the United States, the date a sentence was imposed should not dictate the length of imprisonment; rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible. We are confident that judges are capable of determining, as they have in the past, the potential danger of releasing any given prisoner early.

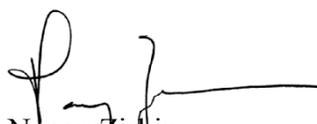
In sum, the Commission is well within its power and authority to grant significant relief to incarcerated individuals without an impact on public safety, while improving the administration of justice. We urge the Commission to support full retroactivity.

Thank you for your attention to our concerns. If you have any questions, please contact Sakira Cook, Counsel, at [cook@civilrights.org](mailto:cook@civilrights.org) or (202) 263-2894.

Sincerely,



Wade Henderson  
President & CEO



Nancy Zirkin  
Executive Vice President

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<sup>i</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. Background (2013).

<sup>ii</sup> James, Nathan. "The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options ." *Congressional Research Service* . Federation of American Scientists, n.d. Web. 28 June 2014. <http://fas.org/sgp/crs/misc/R42937.pdf>

<sup>iii</sup> *Id.*

<sup>iv</sup> Eisen, Lauren-Brooke. "Attorney General Holder Combats 'Tough on Crime' Legacy | Brennan Center for Justice." *Brennan Center for Justice*. N.p., n.d. Web. 2 July 2014. <http://www.brennancenter.org/blog/attorney-general-holder-combats-tough-crime-legacy>

<sup>v</sup> See Michael E. Horowitz, Inspector General, U.S. Dep't. of Justice, Top Management and Performance Challenges Facing the Department of Justice—2013 (Dec. 11, 2013, reissued Dec. 23, 2013) (citing the statement of the Deputy Attorney General that the "unsustainable" cost of federal prison spending represents a "crisis that . . . has the potential to swallow up so many important efforts in the fight against crime.") available at:

<http://www.justice.gov/oig/challenges/2013.htm#1>

<sup>vi</sup> Kerby, Sophia. "The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System: A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System." *Center for American Progress*. N.p., n.d. Web. 3 July 2014. <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

<sup>vii</sup> See Federal Bureau of Prisons Inmate Statistics available at [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp).

<sup>viii</sup> U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011. Retrieved September 17, 2013, available

at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Executive\\_Summary.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf)

<sup>ix</sup> Memorandum from U.S. Sentencing Comm'n, Office of Research and Data, to Hon. Patti B. Saris, Re: Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive 7 (May 27, 2014) [hereinafter ORD Report] available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527\\_Drug\\_Retro\\_Analysis.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf). The appearance of eligibility, of course, does not guarantee sentence reduction. As the Commission's Report, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment notes, of the 25,736 motions for retroactive application of the amendment, thirty - six percent (36%) were denied, and fifteen percent (15%) of those were rejected as an exercise of courts' discretion. U.S. Sentencing Comm'n, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment 2 (2014), available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>x</sup> Source: Knoester, C., & Hayne, D. A. (2005). *Community context, social integration into family, and youth violence. Journal of Marriage and Family*, 67, 767-780.

<sup>xi</sup> Glaze, Lauren E., and Laura M. Maruschak. "Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children." *U.S. Department of Justice*. N.p., n.d. Web. 28 June 2014. <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

<sup>xii</sup> ORD Report, at 11 tbl.3.

<sup>xiii</sup> *Id.* at 8.

<sup>xiv</sup> *Id.* at 9, tbl.1; 15.

<sup>xv</sup> See U.S. Sentencing Commission Reports available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600\\_USSC\\_Crack\\_Cocaine\\_Retroactivity\\_Data\\_Report.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf)

<sup>xvi</sup> U.S. SENTENCING. COMM 'N., PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2011), available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600\\_USSC\\_Crack\\_Cocaine\\_Retroactivity\\_Data\\_Report.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf)

<sup>xvii</sup> *Id.* at tbl.9.

<sup>xviii</sup> U.S. Sentencing Commission, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment, supra note 20, at 1-2.