Hon. D. Lowell Jensen (Ret.)
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San Jose, CA 95112

December 15, 2014

Hon. Patti B. Saris
Chair, U.S. Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002

Dear Judge Saris,

This letter is to urge the Sentencing Commission to take steps to permit a crack cocaine offender sentenced under the pre-FSA law, and who is a Career Offender under 4B1.1, to be able to seek a sentence reduction under 3582(c). By way of background, I have recently retired from service as a U.S. District Judge in the Northern District of California. In the recent past, following passage of the FSA by Congress and promulgation of Amendments 750 and 759 by the Sentencing Commission, I have heard and denied several motions for reduction of sentences by crack cocaine offenders whose criminal history puts them in the status of Career Offenders. I believe that post-FSA law precludes them from being eligible for such a reduction because the Guidelines calculated and used for their sentence was based on 4B1.1, rather than 2D1.1 and 759 provides that retroactivity can only be applied to cases where the pre-FSA sentence was based on 2D1.1. This is the area of the law that I believe should be changed.

The Preliminary Report of the Sentencing Commission as to Retroactivity shows that during the time period from the effective date of 759 on November 1, 2011 through June 30, 2013 there were 7313 sentence reductions granted in crack cocaine cases across the country. In 85% of these cases the defendant was an African-American. The average reduction was for 29 months. This is a remarkable record, showing that the FSA and Amendments 750 and 759 were sorely needed and are being successfully applied. However, the sentence reduction total could have been higher. The same Retroactivity Report also shows that the motions of 961 defendants were denied because the offender was "not eligible under 1B1.10." In essence this data shows that if you were a crack cocaine offender sentenced under 2D1.1, your reduction could be granted; if you were sentenced under 4B1.1, however, your motion must be denied.

By increasing the quantity of crack cocaine necessary to trigger the mandatory minimums in 21 U.S.C. § 841(b), the FSA lowered the applicable sentencing ranges in both 2B1.1 and 4B1.1. The 2D1.1 change was apparent as it was accompanied by a complete re-write of the crack cocaine Drug Quantity

Table in 2D1.1 to conform with the statutory changes of the FSA. The 4B1.1 change is not so obvious, as there was no need to change the text of 4B1.1. A Sentencing Court, post-FSA, will continue to use the unchanged table of 4B1.1, which directs the Court to use the statutory maximum for the offense to determine the BOL for the sentencing. But the meaning of the language and the sentence outcome has been changed, because the statutory maximum for the offense has been changed by the FSA. Pre-FSA a quantity of crack cocaine over 5 grams and less than 28 grams (and there were many cases in this category) would fall within 841(b)(1)(B) with a statutory maximum of 40 years and a BOL of 34. Post-FSA the same amount of crack cocaine would fall under 841(b)(1)(C) with a statutory maximum of 20 years and a BOL of 32.

There are only two guidelines that can be used by a Court to determine the correct BOL to be used in sentencing a crack cocaine offender-- 2D1.1 and 4B1.1. The FSA lowered both of those guidelines. Under these circumstances it would appear that both guidelines fall within the sentencing reduction provisions of 3582(c), but the Sentencing Commission decided to include only 2D1.1 sentences in the retroactivity promulgated by Amendment 759. As far as I can determine there does not appear to be any legal impediment to including 4B1.1 as a "Covered Amendment" in the change to 1B1.10 made in Amendment 759. Excluding 4B1.1 sentences from eligibility for sentence reduction, then, seems to be simply a policy choice. Given the fact that all crack cocaine 4B1.1 sentences are of Career Offenders it is a possibility that such a policy has been chosen to exclude Career Offenders from sentence reductions. If that is the policy chosen, to my mind, it is a mistaken policy. The purpose of the FSA and of the accompanying Amendments is to stop an unfair, unjust sentencing system for crack cocaine in the future, and to ameliorate unjust, excessive and discriminatory sentences now being served. That purpose should extend to all the criminal defendants affected whatever their criminal history may be. This is not to say that a Career Offender ought not to, and will in fact, receive an enhanced sentence because of that criminal history status. Once a drug trafficking offender is found to be a Career Offender, the applicable BOL changes from a 2D1.1 BOL to a higher 4B1.1 BOL. That was the case in pre-FSA sentencing and will be the same post-FSA. But the pre-FSA sentence was subject to an unfair excessive sentence, from the infamous 100 to 1 crack cocaine sentencing regime, because of the incredibly small amount -- 5 grams-- which was sufficient to move the defendant into the 5 to 40 mandatory minimum range of 841(b)(1)(B). In the typical case, the effect was to increase a BOL of 32 in 841 (b)(1)(C) to a BOL of 34 in 841(B)(1)(B). In the real world this is not a minimal increase; it serves to increase the sentencing range by 3 years. BOL 32, reduced by 3 for acceptance, to 29, at Category VI, is 151 to 182 months. BOL 34, less 3 levels to 31, at Category VI, has a sentence of 188 to 235 months.

The heart of the FSA is the increase of the quantity of crack cocaine necessary to trigger the mandatory minimum provisions of 841(b)(1)(A) and 841 (b)(1)(B), and it is this statutory change that lowers the sentencing ranges of both 2D1.1 and 4B1.1. It seems to me that a decision to limit the sentence reductions to 2D1.1 alone, and to exclude 4B1.1 sentences, leaves concededly unfair sentences in place, and thwarts the essential purpose of the FSA to restore fairness to crack cocaine sentencing.

And then there is the matter of what I think of as a crack cocaine sentencing quirk. The highest BOL in 4B1.1 is 37. For crack cocaine there is a BOL of 38 in 2D1.1. For this 2D1.1 level the quantity required pre-FSA was 1.5 kilograms, after 750 it was 8.4 kilograms. This means that the correct guideline for sentencing a crack cocaine career offender, sentenced pre-FSA using the 2D1.1 guideline would be BOL 38. Such an offender would be eligible for a sentence reduction under 759. This means that the crack cocaine Career Offender would be eligible for a sentence reduction under 759 as long as he or she was at the highest level of the Guidelines but would be excluded from eligibility for sentence reduction at any lesser level. That sentencing system does not make sense.

I would like to offer one further comment on the overall subject matter of the Career Offender. To my mind, the present definition of who is and who is not a Career Offender in 4B1.1 is over inclusive. It defines as Career Offenders defendants who do not fall within that classification as it has been historically defined. Here is a recent example from my docket. A young woman, 20 years of age, is stopped by the local police and found to be in the possession of a small amount of methamphetamine. She is arrested and then charged in State court with possession for sale of methamphetamine, a felony under State law. About a month later, while she is on bail awaiting trial on this charge, history repeats itself. She is again arrested, found to be in possession of methamphetamine and thereafter charged with the state felony of possession of methamphetamine for sale. Subsequently she enters pleas of guilty to both offenses and, in a single sentencing session, is sentenced to 180 days in county jail for each of the offenses, to be served concurrently. About a year later she is again arrested and charged with possession of methamphetamine with intent to distribute, this time in Federal Court. She now faces a sentence at BOL 31, criminal history category VI, a sentencing range of 188 to 235 months, as a Career Offender - which is remarkably high for her first appearance in Federal Court and when she has never served any prison time. The parties entered into an 11(c)(1)(c) plea agreement at a sentencing range significantly lower than that 4B1.1 range. I believe that your sentencing data will show that there are a large number of sentences like this one which are below the sentencing ranges contemplated by a Career Offender status. And, it is my further belief that many of the Judges, faced with this sentencing situation, believe that application of the Career Offender status to the case at hand creates an excessive sentencing issue. To my mind, there are a number of ways to deal with this situation, but I believe you should consider an amendment to the Guidelines that would raise the criminal history threshold for the Career Offender status in the Federal criminal sentencing system.

Thank you for your consideration of these thoughts. Best wishes for your continued success in your important work.

Sincerely,

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