



AMERICAN BAR ASSOCIATION

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Testimony of
JAMES E. FELMAN
on behalf of the
AMERICAN BAR ASSOCIATION
before the
UNITED STATES SENTENCING COMMISSION
for the hearing regarding
RETROACTIVITY OF AMENDMENTS
IMPLEMENTING THE FAIR SENTENCING ACT OF 2010

Washington, D.C.
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Chair Saris, and distinguished members of the United States Sentencing Commission:

Good morning. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am a former Co-Chair of your Practitioners' Advisory Group, and am appearing today on behalf of the American Bar Association for which I serve as Liaison to the Sentencing Commission and as a Co-Chair of the Criminal Justice Section Committee on Sentencing.

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Stephen Zack to present to the Sentencing Commission the ABA's position on the retroactivity of the amendments promulgated pursuant to the Fair Sentencing Act. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates.

1. The ABA Supports Retroactive Application of the Amendments Implementing the Fair Sentencing Act of 2010

The retroactive application of the amendments to the drug quantity tables implementing the Fair Sentencing Act of 2010 ("FSA") is a moral imperative. The 100 to 1 crack/powder ratio stands as one of the gross inequities of our generation. After decades of effort, a partial reform of that inequity has been enacted. It should be extended to the greatest number of people possible to

remedy, to the greatest degree possible, the extreme and undeniable unfairness of the prior crack sentencing regime.

ABA policy on crack cocaine sentencing has consistently followed that of the Commission. In 1995, the Commission issued the first of four reports to Congress stating that the sentencing disparity between crack and powder cocaine offenses had led to draconian sentences for a population of offenders who were overwhelmingly “low-level” offenders rather than “serious and major” drug traffickers. The sentencing disparity was also associated with highly disproportionate concentration of African-American individuals sentenced for crack offenses – 93% as of 1995. In response to this report, the ABA House of Delegates adopted a resolution supporting the Commission report and advocating similar treatment for crack and powder cocaine offenders. The 1995 ABA policy recognized that the sentencing disparity between crack and powder cocaine offenses has a “clearly discriminatory effect on minority defendants convicted of crack offenses.”

This discriminatory effect has also been recognized by the Commission in each of its subsequent reports, including a 2007 report finding that African Americans constituted 82% of offenders sentenced under federal crack cocaine laws, even though 66% of those who used crack cocaine are Caucasian or Hispanic. This discriminatory effect was the driving force behind the FSA. According to the FSA’s author, Senator Richard Durbin, “reducing racial disparities in drug sentencing” and “increasing trust in the criminal justice system, especially in minority communities” were part of “Congress’s clearly stated goals in passing the Fair Sentencing Act.”

The ABA strongly supports retroactive application of the amendment to the drug quantity tables made pursuant to the FSA.¹ The Commission has previously selected twenty-eight

¹The ABA also supports retroactive application of Part C of the FSA amendments deleting the cross reference in

amendments for retroactive application. *See* U.S.S.G. § 1B1.10(c). In selecting amendments for retroactive application, the Commission typically considers (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. *See id.* cmt. background. Retroactive application of the amendment to the drug quantity table satisfies each of these factors.

The amendment's purpose – to remedy sentencing disparities and remove low level offenders from the federal prison system – supports retroactive application. The Commission has for years advocated legislation to raise the quantity thresholds that trigger five- and ten-year statutory minimums. ABA policy, since 1995, has also supported this position. Imposition of sentences at pre-FSA threshold levels, as noted above, led to drastic racial sentencing disparities, severe sentences for low level offenders, and an overburdened federal prison system. Simply stated, the purpose of the amendment was to rectify a long-standing and glaring inequity in the sentencing of crack cocaine offenders. This purpose can more fully be achieved through retroactive application to those already visited with sentences now uniformly understood to be unfair. Perhaps no amendment in the history of the Commission presents a greater imperative for retroactive application.

The impact of the amendment also supports retroactive application. The Commission estimates that the average reduction in sentence for those eligible for retroactive application would be 37 months. This degree of reduction cries out for retroactive implementation. Too many people will be serving sentences that are both unjust and unfair if the fruits of the 100 to 1 ratio are left uncorrected. The reductions called for by retroactive application of the FSA amendments would

U.S.S.G. § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under 2D1.1.

provide tremendous relief to an already overburdened federal prison system and further advance the goals of the FSA.

Finally, there can be no serious question that retroactive application of the changes to the base offense level will not be difficult to apply. The change to each and every affected case will be the same. There will be no need for full sentencing hearings, contested evidentiary issues, or consideration of new or different guidelines. It will be a simple matter of plugging an established quantity into a new quantity table. We know this can be done for the obvious and inescapable reason that we just finished doing roughly the same thing following the Commission's retroactive application its prior "minus two" crack amendment in 2007. Indeed, this round of corrections may well be simpler than the 2007 amendment for several reasons. First, there are far fewer cases. In implementing the retroactive application of the 2007 amendment, the courts considered and disposed of more than 25,000 petitions for relief. The Commission estimates that roughly one-half of that number – only 12,040 prisoners – would be eligible for relief this time around.²

Second, the federal judiciary now has the experience and wisdom gained from its successful implementation of the 2007 retroactive crack cocaine amendment. In the Middle District of Florida where I have my office, for example, the Court, its probation officers, and the offices of the United States Attorney and the Federal Public Defender worked collaboratively and effectively to identify and process the vast majority of the cases at issue. Although our district ranked second in the nation in number of cases, it was able to process the applications and achieve retroactive application of the

²This assumes that the Commission leaves the drug quantity tables as they exist today, although ABA would support the further two-level reduction in the base offense levels for all drugs under consideration by the Commission.

2007 amendments in a highly efficient manner with limited impact on the Court's other ongoing business. I have no doubt that the professionals in my and other districts stand ready, willing, and able to do this again, especially for a significantly smaller number of cases. The additional resources required by retroactive application of the amendments to the base offense levels would be a small price to pay for the more important goal of achieving justice and fairness within the federal sentencing system. In addition, of course, substantial resources would be saved by the anticipated reduction in the federal prison population.

2. The Commission's Prior Retroactivity Determinations Support FSA Retroactivity

In addition to the moral imperative of making the FSA amendments retroactive and the fact that such retroactivity satisfies each of the criteria considered by the Commission in these determinations, the Commission's prior retroactivity determinations virtually compel retroactive application here. The Commission has amended the drug guideline with the effect of lowering drug sentences on several occasions in the past and has in each and every instance made those changes retroactive. For example, in 1993, the Commission revised the method of calculating the weight of LSD for purposes of determining the guidelines offense level, instructing courts to calculate the amount of LSD by using as constructive weight of .4 milligrams per dose rather than weighing the carrier medium. U.S.S.G. app. C, Vol. I, Amend.488. The Commission designated the revised guideline as retroactive. U.S.S.G. § 1B1.10(c).

In 1995, the Commission changed the weight calculation applicable to marijuana plants in cases involving more than 50 plants from 1,000 grams per plant to 100 grams per plant for purposes of determining the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend.516. This amendment also was made retroactive. U.S.S.G. § 1B1.10(c). The Commission explained that studies indicated

that a marijuana plant does not actually yield 1 kilogram of usable marijuana, and that not every plant will produce any usable quantity of marijuana. U.S.S.G. app. C, Vol. I, Amend.516. To “enhance fairness and consistency,” the Commission adopted the lower equivalency for all cases involving marijuana plants, and directed retroactive application of the change to correct prior instances of injustice under the previous guideline.

In 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend. 657. As a result of the amendment, sentencing courts are directed to use the actual weight of the oxycodone contained within the tablet in calculating the drug quantity. The Commission explained that the amendment “responds to proportionality issues in the sentencing of oxycodone trafficking offenses.” *See id.*, Reason for Amend. The amendment was necessary because tablets sold as prescription pain relievers contain varying amounts of oxycodone, and the change to the drug equivalency tables was necessary to “remedy these proportionality issues.” *Id.* As the amendment effectively reduced some oxycodone sentences by remedying a prior proportionality injustice, the Commission made the amendment retroactive. U.S.S.G. § 1B1.10(c).

Most recently in 2007, as noted above, the Commission made its “minus two” amendment to the crack guideline retroactive. *Id.* The Commission did so after a careful consideration of each of the relevant considerations set forth above. Simply stated, there is no compelling reason to treat the FSA mitigating amendment designed to correct among the most glaring inequities of our time in any different fashion than the manner in which the Commission has treated every other mitigating amendment to the drug offense guidelines. It, too, should be applied retroactively.

3. The Various New Mitigating and Aggravating Specific Offense Characteristics Need Not Be Made Retroactive

While ABA supports the retroactive application of the changes to the drug quantity table (and the deletion of the § 2D2.1(b)(1) cross reference), we do not believe it is necessary to apply the new mitigating and aggravating specific offense characteristics retroactively. There are two principal reasons for this position. First, retroactivity of new factually unique specific offense characteristics will present significant difficulties in application. In contrast with the changes to the drug quantity tables, many of the new mitigating and aggravating factors will require factual findings on matters not considered at the defendant's initial sentencing hearing.³ This would presumably require new sentencing hearings at which new factual disputes would require adjudication. Given the logistical difficulties of potentially stale evidence, transportation of prisoners for hearings, the appointment of counsel, and other similar considerations, retroactive application of these new and fact-intensive adjustments would seem likely to present considerable difficulties in application. Second, it appears likely that the new factors would apply in a fairly small percentage of the cases eligible for relief. Thus, the added complexity and logistical difficulties occasioned by retroactive application of these factors would outweigh the minor differences in actual sentencing outcomes. Finally, the new factors, while included in the FSA legislation, do not present the same moral imperative for retroactive application as the changes to the drug quantity tables. As noted, the latter reflect a correction of one of the most pervasive and

³One exception to this is the amended "mitigating role cap," which could be readily evaluated based on the existing record of the initial sentencing hearing. Thus, to the extent the Commission considers splitting the new offense characteristics to make only some of them retroactive, this adjustment could readily be made retroactive without undue burden on the courts.

harmful sentencing disparities of the guidelines era. The handful of new mitigating and aggravating factors are, in contrast, more akin to the sort of amendment “tinkering” that has not traditionally been followed by retroactive application.

4. No Limitations Should Be Placed on the Retroactivity of the FSA Amendments

The Commission has requested comment on an array of ways in which the retroactive application of the FSA amendments could be limited. The ABA does not support any of these limitations, and believes that the new changes to the drug quantity tables should be broadly applied to all who are serving sentences influenced in any way by the uniformly discredited 100 to 1 ratio.

The possible limitations on retroactivity appear to fall into two general categories. First, the Commission asks whether certain aggravating factors should disqualify a defendant from retroactive application of the new drug quantity tables. These include circumstances such as criminal history, protected locations, aggravating role, use of a minor or a firearm, or career offender status. The short answer to this question is that the defendant was presumably already punished for these circumstances in the setting of the original sentence. Retroactive application of the drug quantity tables would not change these additional and appropriate punishments. It would, instead, simply eliminate the impact on those sentences from the disparate 100 to 1 ratio. All defendants who suffered an injustice from the ratio should obtain relief from that injustice – nothing more or less would be just. The 100 to 1 ratio was equally unjust to all impacted by it, and no distinctions should be drawn in affording a remedy for this identical injustice.

The second category of potential retroactivity limitations is referenced to whether the original sentence was either before *United States v. Booker*, 543 U.S. 220 (2005), or before *Kimbrough v. United States*, 552 U.S. 85 (2007), or perhaps before *Spears v. United States*, 555 U.S.

261 (2009). The ABA does not support limiting retroactivity by reference to any of these decisions because even if these cases gave district courts increasing discretion to vary from the 100 to 1 ratio, that does not mean that they felt free to exercise that discretion or that they did so. This is a matter that each district court can readily determine upon its consideration of each petition for relief. This, in turn, suggests a need to amend the language of U.S.S.G. § 1B1.10 stating that further reductions are generally inappropriate where an original sentence was a non-guideline sentence. Some courts may have imposed a non-guideline sentence based on a disagreement with the 100 to 1 ratio but did not vary to the degree now dictated by the new drug quantity tables. Section 1B1.10 should be clarified to provide that further reductions below an original non-guidelines sentence should be governed by the statutory purposes of sentencing in 18 U.S.C. § 3553(a), and that each court should consider those purposes anew in considering a reduction pursuant to the new drug quantity tables. The district courts which imposed these sentences in the first instance are best equipped to consider petitions for reduced sentences, and that consideration by the district courts should not be artificially cabined by Commission commentary.

In closing, we appreciate the Sentencing Commission's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you all this morning.