



RESEARCH AND ADVOCACY FOR REFORM



**Testimony of Marc Mauer
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**Before the
United States Sentencing Commission**

**Regarding
Retroactivity of Crack Cocaine Guidelines
Amendment**

June 1, 2011

Thank you for inviting me to testify about the Commission's proposed retroactive application of Amendment 2 regarding the federal drug sentencing guidelines. I am Marc Mauer, Executive Director of The Sentencing Project, a 25-year-old national research and advocacy organization dedicated to improving the nation's criminal justice system. I have been extensively engaged on issues of drug policy and federal drug sentencing laws for many years and have previously had the pleasure of testifying before the Commission on crack cocaine sentencing and federal mandatory minimums.

I am here today to urge the Commission to make retroactive Parts A and C of Amendment 2, as well as the provision in Part B that caps the level of punishment for offenders who were determined to have played a minimal role in the underlying offense ("minimal role cap"). The purpose of both the Fair Sentencing Act ("FSA") and Amendment 2, in addition to reducing excessive penalties imposed on lower level offenders, was to rectify in significant part the disparate and inequitable treatment of crack cocaine and powder cocaine in the Sentencing Guidelines. Doing so would help to reduce the substantial and growing racial disparity in cocaine-related incarceration rates and improve public confidence in the fairness and integrity of the criminal justice system. If, however, Amendment 2 is not made retroactive, these goals will be frustrated. Rather than ameliorating decades of unfair sentencing policy, the Amendment instead would perpetuate such unfairness, by forcing thousands of individuals convicted of crack cocaine offenses to serve excessively long sentences mandated by guidelines that both Congress and this Commission now recognize are unjust.

Furthermore, retroactively applying Parts A and C of Amendment 2, as well as the minimal role cap, will impose no significant administrative burden on the court system. Under each of these provisions, a judge can resentence a current prisoner without making any new

findings or determinations—the judge will simply apply the Amendment’s new standard to the determinations made in the prisoner’s original sentencing proceeding. In practice, this process will be similar to the one required by the Commission’s decision to apply its 2007 Amendments to the crack cocaine guidelines retroactively. The relative ease with which courts implemented that decision suggests that the administrative burden of implementation would be similarly minimal here.

In light of these considerations, retroactive application of Parts A and C of Amendment 2, as well as the minimal role cap, clearly would allow the Commission to further the Amendment’s goals of minimizing disparate treatment and sentencing of crack and powder cocaine without incurring significant administrative cost. I therefore urge the Commission to make such provisions retroactive.

THE AMENDMENT SATISFIES THE COMMISSION’S STANDARD FOR RETROACTIVE APPLICATION

The Commission considers three factors when deciding to make an Amendment to the guidelines retroactive: (i) would retroactivity advance the purpose of the Amendment; (ii) would retroactivity have a significant impact on pre-Amendment sentences; and (iii) would retroactivity be achieved with relative administrative ease. Consideration of each of these factors with respect to Amendment 2 indicates that retroactive application of Parts A and C and the minimal role cap is warranted.

First, retroactive application would advance the primary purpose of both the FSA and Amendment 2, which is to promote fundamental fairness in the criminal justice system. As the Supreme Court has recognized, the central purpose of the guidelines is to “ensur[e] similar sentences for those who have committed similar crimes in similar ways.”¹ In crafting the FSA and the Amendment, both Congress and the Commission recognized that the previous

framework imposed unfair, disproportionate, and racially disparate sentences on relatively low-level offenders. The FSA and the Amendment will relieve this problem prospectively, but only retroactive application can address the damage caused by the past decades of drug policy.

Before the passage of the FSA, the criminal justice system sentenced crack and powder cocaine offenders to widely disparate terms, even though there is no meaningful pharmacological difference between the two drugs. Indeed, as the Sentencing Commission reported to Congress in 2007, prior to the enactment of the FSA, large percentages of low-level crack cocaine offenders were serving long terms intended for serious traffickers—for example, nearly three-quarters of low-level sellers were subject to mandatory minimum penalties.² The crack-powder disparity disproportionately affected African Americans, who made up about 30% of crack users but 82% of those convicted for federal crack offenses.³ For many African Americans, this fundamental unfairness of the crack-powder disparity has undermined the legitimacy of the criminal justice system. As Judge Reggie Walton testified in the Senate hearing on the FSA, “jurors would tell me after the fact, when they refused to convict, that even though they thought the evidence was overwhelming, they were not prepared to put another young black man in prison knowing the disparity that existed between crack and powder. . . .”⁴

The FSA and Amendment 2 were aimed at reducing the crack-powder disparity and will increase the system’s fairness and reduce its racial imbalances moving forward. Yet in developing the FSA and the Amendment, both Congress and the Commission have recognized that the old framework has imposed unfair, disproportionate, and racially disparate sentences on relatively low-level offenders for decades. Only retroactive application can begin to mend the damage these decades of unjust drug policy have caused.

The present prison population embodies the problems Congress sought to fix by enacting

the FSA—high incarceration rates, long sentences for low-level offenders, and rampant racial disparities.⁵ Failing to apply the Amendment retroactively would be fundamentally unfair—defendants sentenced under the old, flawed ranges would continue serving excessively long sentences, while new offenders would receive substantially shorter terms for identical offenses.

Moreover, if the Amendment is not made retroactive, African Americans will continue to bear the crushing burden that decades of the crack-powder disparity have imposed, an injustice that transcends prison walls and has contributed to the harm experienced by families and communities. For example, an African American child is nine times more likely to have an incarcerated parent than a white child.⁶ The FSA was intended to help ameliorate this injustice. As Representative Dan Lungren said, “When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don’t think we can simply close our eyes.”⁷ And Senator Patrick Leahy observed, “The racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution’s promise of equal treatment for all Americans.”⁸ Without retroactive application, the past quarter-century of unjust, disparate sentencing would continue largely unaffected. Fortunately, retroactive application offers a powerful step toward righting this wrong—85% of eligible offenders are African American.⁹

Retroactive application would also aid in rebuilding the legitimacy of the criminal justice system in African-American communities. By reducing sentences for prisoners who have already served their time—as measured by the amended guidelines—and sentencing defendants to more appropriate sentences, the Commission can make a contribution toward reassuring Americans, especially African Americans, that the legal system is both legitimate and fair.

Finally, the fact that the FSA remains silent on retroactivity affects neither the Commission’s authority to make Amendment 2 retroactive nor its moral imperative to do so.

Congress passed the *Fair Sentencing Act* to reduce disparities in sentencing and intended for the Commission to be able to apply related Amendments retroactively to perfect these critical changes. As a general matter, it is assumed that Congress knows the statutory backdrop on which it legislates, so Congressional silence on retroactivity in the FSA on its face indicates that Congress meant to preserve the Commission's full authority to make the Amendment retroactive. But more importantly, the legislative history of the FSA clearly demonstrates that Congress was well aware of the Commission's ability to make sentence reductions retroactive and intended the Commission to use such power. Senator Durbin, the sponsor of the FSA, and Senators Feinstein and Klobuchar explicitly considered the merits of retroactivity with Judge Walton and others at a Senate hearing on the bill.¹⁰ Furthermore, the FSA was debated and enacted in the shadow of the Commission's revisions to the Guidelines in 2007, which reduced the base offense levels for crack cocaine, and those Amendments were part of Congress's decision-making process. At the Senate hearing on the FSA, Judges Reggie Walton and Ricardo Hinojosa explained that retroactivity was working well for the 2007 Amendments, while Asa Hutchinson, the head of the Drug Enforcement Administration under President George W. Bush, told the Subcommittee that future changes should be "applied retroactively" and "applaud[ed] Congress" for upholding the Commission's retroactive application of the 2007 Amendments.¹¹

Precursors to the FSA, introduced in previous Congresses, explicitly barred retroactivity for mandatory minimums, which demonstrates that Congress understood how to prohibit retroactivity if it chose to do so.¹² But after considering the opinions of Commission members, the Obama administration, and drug policy experts, Congress made an informed and deliberate decision in the FSA to remain silent on retroactivity, maintaining the Commission's authority. Finally, the leading Congressional figure claiming that Congressional silence on retroactivity is

akin to disapproval is Representative Lamar Smith—who, not coincidentally, was also the only Member of Congress to speak, in either House, against the FSA.¹³ As the staunchest opponent of the FSA, Representative Smith’s call for maintaining a fundamentally unfair sentencing regime should be taken in context.

Second, the Amendment produces a significant change in the guideline range for crack cocaine offenses. The impact on currently incarcerated offenders would also be significant. The Amendment will reduce the average sentence for all impacted offenders by 22.6% or 37 months.¹⁴ Because the Commission has only declined to make Amendments retroactive when they “generally reduce the maximum of the guideline range by less than six months,” the sheer scale of the change triggered by the Amendment favors its retroactive application.¹⁵

Third, Parts A and C of the Amendment and the minimal role cap from Part B will not be difficult to implement retroactively. There is a fundamental distinction between amendments rooted in new *facts* and amendments rooted in new *ranges*. In the former, Congress or the Commission recognizes a new piece of evidence or type of conduct that bears on what a fair sentence would be. By definition, retroactive application of amendments in these cases would involve a significant administrative burden, because courts would need to consider facts—and make related determinations—during resentencing that had not been relevant in the original sentencing proceeding. New offense levels or ranges, however, simply recognize that a given course of conduct—as determined by findings the court has already made—warrants a reduced sentence than previously believed. Retroactive application of these changes requires no individualized determinations; it requires only a mechanical application of new numbers to pre-established facts.

Parts A, C, and the minimal role cap all amend the guidelines in ways which will require no new factual findings at resentencing. Part A changes the Drug Quantity Table for crack cocaine offenses, requiring the court merely to recall the drug quantity for which the offender has been sentenced and identify the new range appropriate to that quantity. Part C lowers the guideline ranges for certain defendants convicted of simple possession of crack cocaine, for whom a court has already determined the relevant facts—quantity and lack of intent to distribute. And the minimal role cap simply limits the base offense level that any offender who has received an adjustment under facts already determined by the court can receive, based solely on drug quantity. Thus, to implement all three of these provisions, courts will not need to look beyond their existing findings—they will merely need to apply the new guideline requirements to those findings.

The Commission’s decision to list its 2007 Amendments for retroactive application—and the courts’ success in implementing them—counsels similar action here. The 2007 Amendments, like Part A of the present Amendment, changed the Drug Quantity Table for crack cocaine and required the same kinds of adjustments—without additional findings—that retroactive implementation of the drug quantity table, the simple possession guideline, and minimal role cap changes would require here. To apply these parts retroactively, courts would merely need to engage in the same type of review process they have established and executed for the 2007 Amendments. Because this framework is already in place and has been used successfully for several years, asking the courts to use it here would not impose any significant burden.

By contrast, implementing the provisions of Part B other than the minimal role cap would be substantially more challenging. Applying the aggravating and mitigating factors set out in

Part B retroactively would require courts to reopen cases to make new determinations on facts related to, among others, violence, bribery, maintaining a premises, playing a managing or leading role, using other people (including particularly vulnerable people, such as the elderly, minors, or pregnant women), compensation, and motivation. Retroactive application of these complex and varied factors would require substantial judicial resources not needed for the provisions of the Amendment based in findings and adjustments the courts have already made. Moreover, while the mitigating and aggravating factors reflect efforts to hone fair sentencing moving forward, they—unlike the provisions which bear directly on the crack-powder disparity—do not offer solutions to the crack-powder disparity targeted by the FSA.

Accordingly, retroactive application is appropriate for the quantity table, simple possession guideline, and minimal role cap portions of the Amendment, because such application would advance compelling interests in fairness and judicial legitimacy and generate significant changes in sentences for incarcerated offenders, all with a minimal burden on federal courts. Retroactive application of additional portions—which are not as intimately tied to erasing the crack-powder disparity’s assault on fundamental fairness, racial equality, and judicial integrity goals of the Amendment and which would be more taxing for the courts—is neither necessary nor warranted.

RETROACTIVE APPLICATION WOULD PROMOTE SOUND SENTENCING POLICY

Finally, I want to conclude by addressing the Commission’s question about whether individuals sentenced after the Supreme Court’s decisions in *Booker*, *Kimbrough* and *Spears*,¹⁶ or defendants who received an enhancement for playing an aggravating role in the underlying offense should be excluded from the retroactive application of Amendment 2. I will also discuss

the recent remarks of the Director of the Federal Bureau of Prisons on the increasingly severe problem of overcrowding in federal prisons.

First, there is no reason to exclude individuals sentenced after *Booker*, *Kimbrough*, and *Spears* from the retroactive application of Amendment 2. Although those cases gave judges discretion to deviate from the 100:1 crack to powder ratio in sentencing, they did not require judges to do so, and many defendants did not receive the benefit of a downward adjustment. Therefore, if the Commission limits retroactivity to individuals sentenced prior to these decisions, thousands of individuals who received no benefit from the *Booker*, *Kimbrough*, and *Spears* line of cases will nonetheless be excluded from the relief provided by the FSA and Amendment 2. Requiring some defendants to remain in prison long after others convicted of similar crimes, solely because those defendants appeared before judges who chose not to depart from the previous guidelines, would only perpetuate injustice.

Nor should the Commission exempt from retroactive application of Amendment 2 those individuals who received non-guidelines sentences under *Booker* or *Kimbrough*. For many of these individuals, non-guidelines sentences reflected mitigating factors, not a departure based on the crack-powder disparity. It would be unfair to deny application of Amendment 2 to such individuals—they should not be denied the benefit of Congress’s decision to reduce the penalties associated with crack cocaine simply because their sentencing judges determined that they merited below-guidelines sentences for other reasons.

Moreover, even persons whose sentences were reduced because of a belief in the injustice of the pre-FSA crack cocaine penalties—if they can be identified—should receive the benefit of retroactive application of Amendment 2, if doing so results in a further sentence reduction. Psychologists and social scientists have found that requiring even expert decision-makers, like

federal judges, to consider baseline numbers, or “anchors,” artificially skews their ultimate decisions toward those numbers.¹⁷ Because the Supreme Court has always commanded judges to calculate and consider the Guidelines ranges, downward departures from the Guidelines have not fully mitigated the injustice inherent in the previous ranges. Put simply, anchored by the old guidelines ranges—now recognized as excessive and unfair—judges imposed harsher sentences than they would under the new ranges. Accordingly, even individuals who received below-guidelines sentences prior to the enactment of the FSA often did not receive a sentence that Amendment 2 would recognize as fair.

Further, because such individuals can be resentenced without the need for any new factual determinations—just like individuals sentenced pre-*Booker*—a previous non-guidelines sentence will not dramatically change the resentencing judge’s task.

Likewise, defendants whose offenses involved aggravating conduct should not be excluded from retroactive application of Amendment 2. Adjusting a defendant’s sentence to comply with the new guideline ranges will not ignore the aggravating factors identified at the previous sentencing proceeding. It will simply apply the appropriate enhancements, along with criminal history category, to the appropriate drug quantity offense level under the new guidelines, resulting in a fairer sentence that accounts for the defendant’s true conduct—including any aggravating or mitigating factors previously determined by the court. Additionally, judges already consider public safety concerns and institutional disciplinary records when they determine a defendant’s eligibility for a sentence reduction. Because sentences reached in this manner will account for the nature of the defendant’s past conduct and the present risk to the public, such an exclusion is neither necessary nor appropriate. And

because the relevant enhancements have already been determined, there is no significant administrative barrier to offering all defendants a fairer sentence.

Second, the Director of the Federal Bureau of Prisons testified before the Commission in March about the growing size of the federal prison population, the significant overcrowding that it has created, and the Bureau's desire to take steps to address these issues.¹⁸ Making the Amendments retroactive would be an important first step. And doing so would both reduce costs and make the prison system safer.

As the Director testified, the number of individuals incarcerated in the federal prison system will grow by 5,000-6,000 inmates per year in 2011 and 2012.¹⁹ The federal prison system is already overcrowded, operating at 35 percent over its rated capacity.²⁰ Overcrowding is particularly problematic in high-security facilities, which are operating at 50 percent over capacity.²¹ Growing prison populations have resulted in 94 percent of high-security inmates being double-bunked, and 82 percent of low-security inmates are *triple*-bunked or housed in space not originally designed for inmate housing.²²

Retroactive application of Amendment 2 would help alleviate this problem. According to the Commission's estimates, 12,040 people would be eligible for a sentence reduction of an average of 37 months, with 3,109 offenders to be released within a year.²³ Thus, retroactive application of Amendment 2 would significantly reduce the federal prison population, generating three significant ancillary benefits.

The first benefit would be substantial savings for the federal government. Reducing prison sentences for 12,040 individuals by an average of 37 months could save the government over \$1 billion in operating costs.²⁴ It would also reduce the need for expensive new facilities. To accommodate the growing prison population, the Federal Bureau of Prisons built 30 new

facilities between 1998 and 2008, accruing over \$3.6 billion in construction costs.²⁵ Ever-growing prison populations will require additional facilities in the coming years, unless concrete steps—like this one—are taken to reduce the size of the prison population.

The second benefit is that reducing overcrowding in federal prisons would significantly improve prison safety. Disorder and tension are inherent in overcrowded facilities, and confining inmates to spaces occupied by too many people decreases their opportunities to retreat to personal space.²⁶ Overcrowding also strains administrative resources, making classification and assignment of prisoners—including identification of the dangerously mentally ill—difficult and impairing officers' ability to rely on less forceful means of control.²⁷ In short, overcrowding in prison facilities contributes to violence among prisoners and against guards.²⁸ By releasing individuals who have already served a fair sentence for their conduct, retroactive application of Amendment 2 would help to relieve this current overcrowding and the dangers it creates.

The third benefit is that reducing overcrowding would facilitate programs that contribute to rehabilitation and successful reintegration after prison. Overcrowding severely limits or eliminates prisoners' ability to be productive. In particular, funding for education, vocational training, and rehabilitative programming—which are the key to reducing recidivism—has not kept pace with growing populations. Nor has the number of substantive prison jobs. Without these programs, it remains exceedingly difficult to reduce unnecessarily high rates of recidivism.

CONCLUSION

In conclusion, we believe that all defendants have a right to fair sentences that are proportionate to their conduct and consistent with sentences of similar offenders. We also believe that society benefits when the people have faith in the legal system, when safe prisons offer genuine opportunities for rehabilitation, and when federal dollars are redirected from

building new prisons to meeting other needs. Congress enacted the FSA to remedy the wrongs of the 100:1 ratio, and the drug quantity, simple possession, and minimal role cap provisions of the Amendment easily satisfy the Commission’s standard for retroactive application.

Accordingly, the Commission now has an opportunity not only to advance Congress’s specific goals but also to promote a fair, safe, and sound approach to sentencing. The Commission should seize that opportunity by listing Parts A and C of Amendment 2, as well as the minimal role cap in Part B, for retroactive application.

Thank you for the opportunity to testify before the Commission and to address these serious matters affecting the federal sentencing system.

¹ *United States v. Booker*, 543 U.S. 220, 252 (2005).

² United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, at 29-30 (May 2007).

³ 155 CONG. REC. S10,491 (daily ed. Oct. 15, 2009) (statement of Senator Dick Durbin).

⁴ *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Subcomm. on Crime and Drugs*, 111th Cong., at 8 (2009).

⁵ “This policy is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources.” 156 CONG. REC. S1683 (Mar. 17, 2010) (Statement of Sen. Patrick Leahy (D-VT)); “During these difficult economic times, it is also important to note that the crack/powder disparity has placed an enormous burden on taxpayers and the prison system.” 155 CONG. REC. S10491 (Oct. 15, 2009) (Statement of Sen. Dick Durbin (D-IL)); “I definitely believe the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today.” 155 CONG. REC. S10492 (Oct. 15, 2009) (Statement of Sen. Jeff Sessions (R-AL)); “Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust.” 156 CONG. REC. S1681 (Mar. 17, 2010) (Statement of Sen. Dick Durbin (D-IL)).

⁶ Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 247 (2009)

⁷ 155 CONG. REC. S10492 (Oct. 15, 2009) (Statement of Rep. Dan Lungren (R-CA)).

⁸ 156 CONG. REC. S1682 (Mar. 17, 2010) (Statement of Sen. Patrick Leahy (D-VT)).

⁹ U.S. SENTENCING COMMISSION, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 19 (May 20, 2011).

¹⁰ *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Subcomm. on Crime and Drugs*, 111th Cong. at 11-22 (2009).

¹¹ *Id.* at 12-13 & 27.

¹² S. 1711, 110th Cong. § 1 (2007) & S. 1383, 110th Cong. § 1 (2007).

¹³ 156 CONG. REC. H6198 (July 28, 2010) (Statement of Representative Lamar Smith).

¹⁴ U.S. SENTENCING COMMISSION, ANALYSIS at 28.

¹⁵ See 18 U.S.C. app. § 1B1.10 cmt. background.

¹⁶ *United States v. Booker*, 543 U.S. 220 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009).

¹⁷ See, e.g., Birte Englich, *Blind or Biased? Justitia’s Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 LAW & POL’Y 4 (2006); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115 (2008-2009). This effect

occurs even when a decision-maker knows that a number is randomly generated and may be stronger when the decision-maker believes that the number comes from an authoritative source. The guidelines, which were created based on the Commission's expertise and which were mandatory for decades, carry an air of authority particularly likely to trigger this anchoring effect.

¹⁸ Testimony of Harley G. Lappin, Dir. of Federal Bureau of Prisons, before the U.S. Sentencing Commission (March 17, 2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ U.S. SENTENCING COMMISSION, ANALYSIS at 10 & 28.

²⁴ Federal Bureau of Prisons, *Per Capita Costs FY 2010*, available online at

http://www.bop.gov/foia/fy10_per_capita_costs.pdf.

²⁵ Government Accountability Office Report: *Prison Construction: Clear Communication on the Accuracy of Cost Estimates and Project Changes is Needed* (May 2008), <http://www.gao.gov/new.items/d08634.pdf>.

²⁶ *Id.*; Testimony of Professor Craig Haney, *Prison Overcrowding: Harmful Consequences and Dysfunctional Reactions*, before the Commission on Safety and Abuse in America's Prisons (June 2006).

²⁷ John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement*, Commission on Safety and Abuse in America's Prisons (June 2006).

²⁸ *Id.*



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