TESTIMONY

Of

NKECHI TAIFA
Senior Policy Analyst
Open Society Policy Center

And

Convener
Justice Roundtable

Regarding

Whether Amendment 2 of the Fair Sentencing Act of 2010
Should be Applied Retroactively

Before the

UNITED STATES SENTENCING COMMISSION

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I. Introduction

Judge Saris and distinguished members of this esteemed Commission: Thank you for the opportunity to testify at this public hearing in support of the retroactive application of Amendment 2 of the Fair Sentencing Act of 2010 (hereinafter FSA Guideline Amendment). My name is Nkechi Taifa, and I serve as senior policy analyst for the Open Society Policy Center, a non-partisan organization that advocates on U.S. and international issues. Also, I convene the Washington-based policy network, the Justice Roundtable, a coalition of over 50 advocacy organizations working to reform federal criminal justice policy.

For many years we have battled unjust sentencing laws that have led to dramatic increases in the federal prison system's population and spending. For example, the Bureau of Prisons currently incarcerates over 200,000 people with a price tag of $6 billion – a 700% increase in population over the past 30 years and a 1700% increase in spending.[1] With the entire nation focused on the economy, one area with clear savings is the criminal justice system, in particular, sentencing reform. These astronomical costs to taxpayers can be curbed through retroactivity of the FSA Guideline Amendment.

Since the 20th anniversary of the Anti-Drug Abuse Act of 1986, the Justice Roundtable has been at the epicenter of advocacy efforts to completely eliminate the 100-to-1 quantity ratio in sentencing between crack and powder cocaine, and in support of justice for those who have been incarcerated under that now-discredited sentencing regime. As an advocate supporting crack cocaine sentencing reform since 1993 when the Sentencing Commission (hereinafter

[1] *See* Letter to Congress, "Diverse National and State Organizations Call for Revision of Costly, Ineffective Federal Criminal Justice Policies" (May 2, 2011).

Commission) first began to reach out to the public for comment on the issue, I am honored to testify before the Commission once again, this time in support of the retroactive application of the FSA Guideline Amendment.

This testimony first provides background to the issue, describing in brief the events which led to passage of the Fair Sentencing Act. It next examines the rationale in favor of retroactivity, using the Commission's three-factor analysis for retroactive consideration of a guideline amendment. The testimony then highlights an additional factor and possibly the most important consideration of all – the human factor -- providing the perspectives of two former victims of the 100-to-1 sentencing scheme who have since been released from incarceration, Ms. Kemba Smith and Mr. Roderick Piggee. Finally, the testimony concludes by showing that retroactivity is the only fair, just, and humane means of righting the historic wrong which has resulted in egregiously severe, racially discriminatory, and fiscally unsound sentences for first time and low-level offenses.

On behalf of the Justice Roundtable, I applaud this Commission for its tenacity for nearly twenty years -- through different Commissioners, Administrations, and Congresses -- in doing everything within its statutory power to end the irrational, unwarranted, and racially discriminatory disparity between crack and powder cocaine. We hope at the conclusion of this hearing that the Commission will once again act within its power and make the Fair Sentencing Act Guideline Amendment retroactive.

II. Overview

In 1986 Congress enacted The Anti-Drug Abuse Act,[2] which established the basic framework of statutory mandatory minimum penalties applicable to federal drug trafficking offenses. This Act differentiated between two forms of cocaine -- cocaine base (hereinafter referred to as crack cocaine) and cocaine hydrochloride (hereinafter referred to as powder cocaine), and singled out crack cocaine for dramatically harsher punishment.[3] In what is commonly referred to as the 100-to-1 ratio, the 1986 Act required 100 times the quantity of powder cocaine to receive the same mandatory minimum penalty imposed for crack cocaine sentences. One who possessed or distributed just five grams of crack cocaine – the weight of a couple of sugar packets - received the same five-year sentence as one who distributed 500 grams of powder cocaine. Similarly, one who distributed 50 grams of crack – the weight of an ordinary candy bar – received the same ten-year sentence as one who distributed 5000 grams of powder cocaine. This draconian sentencing scheme severely undermined the integrity of the criminal justice system.

Since the early 1990's, copious documentation and analyses by the Commission, criminologists, and medical researchers exposed that many of the claims which undergirded the crack cocaine sentencing scheme were not supported by sound data, were exaggerated, or simply incorrect.[4] Studies revealed that the disparity in punishment of crack cocaine offenses had a

[2] Pub. L. 99–570, 100 Stat. 3207 (1986) (hereinafter "1986 Act").

[3] *See* 21 U.S.C. ξ841(b) (1) (A) (iii) & B (iii) (2003).

[4] *See* U.S.S.C. (2002) Special Report to Congress at 90-112.

negative racially discriminatory impact.[5] Furthermore, it was uncovered that despite congressional intent to levy harsh penalties on major and serious traffickers, the 1986 Act resulted in severe sentences meted out to low-level participants.[6]

There was advocacy for reform of the harsh sentencing laws from the Justice Roundtable, the progressive community, and family members, in addition to support for reform from law enforcement and conservative groups. There were four critical reports from the Commission to Congress,[7] along with a two-level reduction in the Sentencing Guidelines in crack cocaine cases (hereinafter "Crack Minus Two").[8] There were several reform bills introduced in both the House and the Senate, some bipartisan. There were letters from the federal judiciary and former prosecutors, favorable Supreme Court decisions, and support from the Obama Administration. Finally, after 24 long years, the growing momentum resulted in definitive congressional action.

A bipartisan coalition, led by Senators Richard Durbin and Jeff Sessions, proposed the complete elimination of the disparity for simple possession of crack cocaine and a reduction in

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[5] *See* U.S.S.C. (1995), at 38, citing National Institute on Drug Abuse, Overview of the 1991 National Household Survey on Drug Abuse (1991) NIDA Capsules).

[6] *See* Drug Briefing Presentation, Figure 18, http://www.ussc.gov/agendas/drugbrief/sld006.html.

[7] U.S.S.C., *1995 Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) [hereinafter "1995 Commission Report"]; USSC, *1997 Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997) [hereinafter "1997 Commission Report"]; USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) [hereinafter "2002 Commission Report"]; U.S.S.C., *2007 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) [hereinafter "2007 Commission Report"].

[8] *See* U.S.S.G. app. C, Amendment 706 and 711 (effective Nov. 1, 2007). "Crack Minus Two" refers to a change in the Federal Sentencing Guidelines by the U.S. Sentencing Commission, which reduced the guideline sentence for crack cocaine by two levels – as low as the guideline could go and still be consistent with the mandatory minimum statute.

the disparity for distribution from 100-to-1 to 18-to-1. In other words, 28 grams of crack cocaine would trigger the five-year mandatory sentence, and 280 grams of crack would trigger ten years.

This bill, The Fair Sentencing Act, passed via unanimous consent and was signed into law on August 3, 2010.[9] While the legislation did not completely eliminate the 100-to-1 disparity, there was overwhelming consensus from everyone that the original 100-to-1 ratio was categorically unfair, baseless, and in serious need of overhaul. Pursuant to the Fair Sentencing Act, the Commission was granted emergency authority to amend the Federal Sentencing Guidelines for crack cocaine to ensure guideline consistency with the new law. The Commission acted accordingly, promulgating the FSA Guideline Amendment which will become law November 1, 2011, unless objected to by Congress.

Even though the new law will apply to persons whose crimes were committed after August 3, 2010, it will not impact anyone whose conduct occurred prior to that date. This includes those already incarcerated, as well as those who may have engaged in unlawful conduct before August 3, 2010, but have not yet been arrested, charged or even sentenced. Egregiously, these individuals in the "pipeline" could face penalties under the old sentencing scheme for the next five years. It is unimaginable that a law deemed unjust years, months, and weeks or even days after someone commits a crime would bar that person from receiving justice. Such policy would make determining the extent to which one is held responsible for culpability dependent on sheer luck rather than on what is fair. Unquestionably, the FSA Guideline Amendment should be applied retroactively.

[9] *See* Pub. L. No. 111-220, 124 Stat. 2372.

III. Retroactive Application of the FSA Guideline Amendment

A. The Commission's Three-Factor Analysis Supports Retroactivity

It is within the Commission's authority to determine whether the guideline amendment that reduces the sentencing range applicable to a particular offense may be retroactively applied.[10] Additionally, the Commission's three-factor analysis, as enumerated in the Sentencing Guidelines' policy guidance, establishes the standard for consideration of retroactive application. The background notes to the policy guidance explain that when considering an amendment for retroactive application, the Commission must consider the following factors: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range by the amendment, and; (3) the difficulty of applying the amendment retroactively to determine an amended guideline range.[11] All three factors as applied in this instance overwhelmingly favor retroactive application of the Fair Sentencing Act Guideline Amendment.

1. The Purpose of the FSA Guideline Amendment Favors Retroactivity

First, the purpose of the Fair Sentencing Act (FSA) was to correct a flawed, unjust, and unwarranted sentencing scheme, and lessen its racially discriminatory impact. The FSA Guideline Amendment heavily favors retroactive application and was the result of the

[10] 28 U.S.C. § 994(u) provides that "[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 prisoners serving terms of imprisonment for the offense may be reduced." *See also* U.S.S.G., App. C, and Amendment 713 (March 3, 2008).

[11] *See* U.S.S.G. §1B1.10 comment (Backg'd).

Commission's long-standing recommendations to Congress for legislative action.[12] African Americans continue to comprise the majority of defendants in federal crack cocaine cases. Indeed, the overwhelming majority of those who would be impacted by the retroactive application of the FSA Guideline Amendment are black. According to the Commission's Office of Research and Data, 10,232 African Americans (85.1%) would be impacted, as compared to 1,021 Hispanics (8.5%) and 665 whites (5.5%).[13] From these numbers, it is clear that retroactive application of the FSA Guideline Amendment has the potential to begin to ameliorate the egregious racial impact caused by the crack cocaine sentencing scheme.

Additionally, although not explicit, the congressional intent behind the FSA arguably supports retroactive application. In a letter to the Commission, lead sponsors of the FSA - Senators Leahy and Durbin - expressed their clear intent and support for retroactivity. On April 11, 2011 they wrote, "in the absence of retroactive application, defendants will continue to serve pre-Fair Sentencing Act sentences that Congress has already determined are unfair and disproportionately punitive to African Americans. This result is unjust, unnecessary, and inconsistent with the purposes of the Fair Sentencing Act."[14] Senators Leahy and Durbin further

[12] *See*, 1995 Commission Report; 1997 Commission Report; 2002 Commission Report; and 2007 Commission Report.

[13] *See* United States Sentencing Commission, Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively," (May 20, 2011), Table 4, U.S.S.C. Office of Research and Data.

[14] *See* Senators Richard J. Durbin and Patrick J. Leahy, letter to United States Sentencing Commission, April 5, 2011, available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110321/SenDurbin_Leahy_Comment.pdf

note it was their assumption that the Commission would act according to past practice and apply the FSA Guideline Amendment retroactively.[15]

2. The Magnitude of the Change is Significant and Supports Retroactivity

Second, the extreme change in the guideline range further provides strong support for retroactive application. After accounting for a myriad of assumptions, the Commission's Office of Research and Data estimates that 12,040 people would be eligible to receive a reduced sentence if the FSA Guideline Amendment were made retroactive.[16] In addition, the Office of Research and Data calculated that the average sentence reduction for all impacted persons would be 37 months, roughly three years off of sentences.[17] Given that the Commission has declined to make retroactive only "those amendments that generally reduce the maximum of the guideline range by less than six months,"[18] the reductions pursuant to the FSA Guideline Amendment are far greater than six months and favor the past practice the Commission has utilized when determining retroactivity.

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[15] "While the act does not explicitly address statutory retroactivity, it was our belief that all resulting changes to the guidelines would apply retroactively. This assumption was based on the Commission's handling of the 2007 amendments. After the Commission revised the Guidelines in 2007 to reduce by two levels the base offense levels assigned to various quantities of crack cocaine, it applied those changes retroactively to all incarcerated defendants. In enacting the Fair Sentencing Act, we assumed that the Commission would similarly apply retroactively the guideline amendments made pursuant to this legislation." Id.

[16] "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively." (May 20, 2011), USSC Office of Research and Data. (These are persons who were sentenced between October 1, 1991 and September 30, 2010, and remain incarcerated as of November 1, 2011).

[17] Id., at 28.

[18] *See* U.S.S.G. § 1B1.10, comment. (Backg'd).

Opponents argue that retroactivity would allow the automatic release en masse of thousands of criminals. This assertion is without merit. Making the FSA Guideline Amendment retroactive would not lead to the immediate release of large numbers of eligible people. According to the Office of Research and Data's "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively," while the largest number of prisoners will be released during the first year of implementation, there will be a gradual release of prisoners across the country over a 30-year span of time.[19] Such staggered release over several decades in different states would reduce the impact returning persons may have on individual communities.[20] Moreover, the courts will systematically review all applications for sentence adjustment.

The magnitude of the change is also significant in that retroactive application would increase confidence in the criminal justice system, as opposed to perpetrating the distrust many harbor. Retroactivity would, indeed, promote integrity in the system. In addition, not extending the benefits of the Fair Sentencing Act to those persons currently incarcerated under the previous 100-to-1 regime would further sustain the magnitude of the racial inequality associated with crack cocaine sentencing policy, since 85% of the defendants who would be eligible for retroactive application are African American.[21] Further, statistics reveal drug offenders represent

[19] *See* "Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive," at 28, 30.

[20] Id., at 42-44.

[21] *See* United States Sentencing Commission, Office of Research and Data, "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively" (May 20, 2011) Table 4 [hereinafter "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively"].

the most significant source of prison growth and spending, constituting 51% of the overall federal prison population.[22] With retroactive application, the cost savings in the first year of implementation would total $77 million.[23]

3. Retroactive Application is Not Unduly Burdensome on the System

Finally, evidence of past precedent by the Commission makes clear that retroactive application of the FSA Guideline Amendment would not be unduly burdensome on judicial resources. Throughout the years the Commission has promulgated amendments adjusting the guidelines for particular drug offenses and in each case has made those amendments retroactive, without undue burden on the system. For example, retroactivity was successfully applied by the Commission in 1993 with LSD,[24] in 1995 with Marijuana,[25] in 2003 with Oxycodone[26] and in 2007 with the "Crack Minus Two" amendment.[27]

History has demonstrated that the federal judiciary is fully capable of managing a temporary inflow of cases requiring a similar type of review. The relatively smooth process that accompanied the retroactive application of the "Crack Minus Two" reduction to the Sentencing Guidelines likewise favors retroactive application of the current FSA Guideline Amendment, and

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[22] *See* "Quick Facts About the Bureau of Prisons" available at http://www.bop.gov/news.

[23] This figure was derived from the calculation of the estimated number of released individuals during the first year of retroactive implementation (3,109), by the cost of imprisonment per year ($25,000).

[24] U.S.S.G., app. C., Vol. I, Amend. 488; U.S.S.G. § 1B1.10(c).

[25] U.S.S.G., app. C., Vol. I, Amend. 516; U.S.S.G. § 1B1.10(c).

[26] U.S.S.G., app. C, Vol. II, Amend. 657; U.S.S.G. § 1B1.10(c).

[27] U.S.S.G., app. C, Amend. 715; (effective May 1, 2008).

will not involve a difficult calculation. A recent report by the Commission preliminarily detailing the results of the 2007 "Crack Minus Two" amendment explains that of the 24,000 persons eligible, roughly 16,000 were granted a reduction in sentence, and 8,000 were denied. [28] With regard to the retroactive application of the FSA Guideline Amendment, the process would be even less burdensome, because only 12,042 people would be eligible to receive a reduced sentence, [29] contrasted with the 24,000 pursuant to "Crack Minus Two."

Moreover, the argument that violent offenders will pose a threat to society is unfounded. Retroactivity is not a "get out of jail free card." Retroactive implementation of the FSA Guideline Amendment would follow a tried and true process designed to safeguard against the possible release of violent offenders, allowing the sentencing court to consider a possible reduction of imprisonment for those meeting certain criteria set by the statute and the guidelines. Specifically, the following is considered by courts to determine the possible extent of reduction: 1) whether a reduction is warranted and the extent of such reduction; 2) the nature and seriousness of the danger to any person or the community, and 3) the conduct of the defendant after imposition of the original term of imprisonment.[30] In the Public Commission Meeting Minutes of December 11, 2007 discussing retroactive application of the "Crack Minus Two" amendment, Commissioner Friedrich commented that she "supported retroactivity despite her concerns about the impact it could have on the safety of communities because reductions in

[28] *See* United States Sentencing Commission, Preliminary Crack Cocaine Retroactivity Data Report (July 2010), Table 2.

[29] *See* "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively."

[30] *See* U.S.S.G. § 1B1.10 (b) (i), comment. (Backg'd). Consistent with 18 U.S.C 3582(c) (2), the court shall consider the factors set forth in 18 U.S.C 3553(a).

sentences would not be automatic but would be left to the discretion of federal judges in individual cases."[31]

Commissioner Friedrich also stated that by amending Section 1B1.10 of the guidelines, the Commission had directed federal judges to consider in each case "the nature and circumstances of the danger to any person or the community that may be posed by a reduction in the defendant's term."[32] These parameters for retroactivity ensure that the early release of eligible persons would not pose an unreasonable burden on the judiciary or a threat to the greater community.

B. The Human Factor: Voices of Kemba Smith & Roderick Piggee

In addition to the factors already discussed, the Commission should consider possibly the most important of all – the human factor. The voices of Kemba Smith and Roderick Piggee are poignant and add real life testimony to these deliberations. Neither are strangers to the Commission. Parents of both have testified before the Commission during past years seeking justice and relief for their children's sentences under the 100-to-1 quantity ratio.

Kemba Smith became involved in an abusive relationship with a major figure in a crack cocaine ring while she was a college student. Sentenced to a mandatory 24.5 year federal sentence for conspiracy, she served 6.5 years before being granted clemency in December 2000. As a first time, non-violent victim of the 100-to-1 sentencing law, her case drew national and

[31] *See* U.S.S.C. Public Meeting Minutes (December 11, 2007), as adopted April 16, 2008, and amended August 28, 2008. http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20071211/20071211Minutes.

[32] *Id.*

international attention and today she speaks across the country about the devastating consequences of current drug policies.

Roderick Piggee was sentenced to a mandatory 17.5 year federal sentence for conspiracy. While in prison he co-founded the first organization to focus on eliminating the crack cocaine disparity, whose representatives flew to Washington to testify before the Commission on several occasions prior to adoption of the 1995 Report and Recommendations to Congress. He served his entire sentence and remains a diligent advocate in support of the complete elimination of the 100-to-1 ratio.

Kemba Smith's Statement

It is imperative that the U.S. Sentencing Commission applies the Fair Sentencing Act of 2010 retroactively. I was sentenced to 24.5 years in the Fourth Circuit and my case was a crack case. I was held accountable for 255 kilograms of crack cocaine even though the prosecutor stated that I didn't handle, use or sell any of the drugs involved. There was even documentation that was submitted with my application for commutation that demonstrated that the fourth circuit should not have sentenced me as a crack offender. This is why it isn't surprising that the Eastern District of Virginia has the highest number of offenders who would be eligible for a sentence reduction if this amendment is made retroactive.

I realize that if I was still incarcerated and the Fair Sentencing Act was retroactive that it wouldn't have affected my sentence. Knowing how long it has taken to get to this point of justice for unusually harsh penalties that were and still are affecting mostly African Americans, I pray that the Commission can look past the numbers of how many offenders will be released. Instead, look at how unfair this crack cocaine disparity has been and what it has done to families. It would continue to be a grave injustice for offenders who would be affected and their families to know that we have been fighting for them to gain relief only for them to not benefit from the change at all.

Roderick Piggee's Statement

I am the co-founder of Families Against Discriminatory Crack Laws, and have worked diligently to do all that we could in our efforts to try and have the unjust crack laws changed. Despite many years of hard work, I myself never received any personal relief, but I'm grateful to know that the Sentencing Commission has had an open mind and finally got a change started regarding

Crack Cocaine Guidelines. Cocaine is cocaine is cocaine. Without powder - you can never get to crack.

As a former victim of what appeared to be a racially motivated law, the time has come for the Sentencing Commission to amend the guidelines once again and make the amended changes retroactive. Retroactivity would not only right some wrongs, it would also save the country tons of money by giving individuals relief from unjust, lengthy prison terms that we all know weren't fair in the first place. According to the guidelines that are now in place, many individuals have already served the prison term(s) that Congress felt were appropriate with the most recent changes. From a standpoint of a prisoner, long and unjust prison terms only make one bitter. The amended crack cocaine guidelines should receive the same fairness and attention that other amendments have seen in the past. As Americans, we must be fair and do what's right. If you (lawmakers) are aware that a wrong has taken place against a certain group of people, you should step in and correct the wrong if it's within your power to do so. You must remember that it was "the people" that put you in your current positions as lawmakers, so with that in mind, let's now do the right thing and correct that wrong that was grossly committed to a certain racial group of people.

IV. Conclusion

Many people serving sentences for non-violent drug offenses are spending the majority of their adult lives behind bars for the commission, in many instances, of victimless crimes. They have incurred lengthy sentences now agreed by lawmakers to be unjust, inconsistent, unfair, and biased. These incarcerated individuals cheered the Commission's 1995 "Special Report to Congress," which recommended the complete elimination of the 100-to-1 ratio. The ensuing 1997, 2002, and 2007 reports, which consistently called for reform, provided additional hope for change. Prisoners were ecstatic by the Commission's study, "Fifteen Years of Guidelines Sentencing," which recognized that "revising the sentencing disparity between crack and powder cocaine would better reduce the gap [in sentencing between blacks and whites] than any other single policy change, and … dramatically improve the fairness of the federal sentencing

system."[33] Some enjoyed relief with the 2007 "Crack Minus Two" guideline reduction with its retroactive application. Finally, prisoners saw a light at the end of the tunnel with the passage of the Fair Sentencing Act of 2010 because, while not completely eliminating the disparity, the Act narrowed the gap between the severe crack sentences imposed predominantly on young African American men, and the far less severe penalties for powder cocaine offenses more often associated with white and Hispanic offenders.

It is important to note that the Commission has never denied retroactive application of drug guideline amendments. Based on this past practice, for the people currently incarcerated not to benefit from the changes in the law which, ironically, were inspired by the egregiousness of their own sentences, would be cruel and unusual. Therefore, it is only right that the Commission apply the FSA Guideline Amendment retroactively, eliminating any disparate sentencing treatment between current prisoners and those newly sentenced. Sentences should not be based on whether or not an individual was "lucky" enough to commit a drug crime after August 3, 2010, the effective date of the FSA, as opposed to the day before. Such policy does not effectuate justice -- which should be consistent, fair, and impartial -- but injustice, which is inconsistent, unfair, and biased.

In sum, the Commission's three-pronged analysis supports retroactivity: 1) the purpose of the FSA Guideline Amendment favors retroactivity; 2) the change in the guidelines is significant and supports retroactivity, and; 3) retroactive application of the FSA Guideline Amendment would not be unduly burdensome on the system. In order to fully realize the true purpose of the FSA Guideline Amendment, the Commission must follow its established practice

[33] U.S.S.C., "Fifteen years of Guidelines Sentencing" 132 (2003).

and apply the new guideline retroactively, giving those whose unfair sentences were the very reason the law was enacted, the benefit of today's better judgment. If the disparity is wrong today, it was wrong yesterday.

Thank you for this opportunity to testify today.