STATEMENT OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

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HEARING ON

RETROACTIVE APPLICATION OF THE PROPOSED

AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES

IMPLEMENTING THE FAIR SENTENCING ACT OF 2010

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WASHINGTON, D.C.

June 1, 2011

I. Introduction

Madam Chair and members of the Sentencing Commission:

In 2007, when the Commission amended the sentencing guidelines to reduce by two levels the base offense level associated with trafficking of various quantities of crack cocaine, it characterized its action as an interim solution to the unwarranted 100-to-1 sentencing disparity between crack and powder cocaine offenses. The Commission suggested that "[a]ny comprehensive solution" would require legislative action by Congress and the President. That legislative action culminated on August 3, 2010, when President Obama signed into law the Fair Sentencing Act of 2010 (FSA), which was both historic and bi-partisan legislation. The President and the Attorney General have hailed the FSA's enactment as an important step in achieving more just sentencing laws and policy.

We very much appreciate the steps the Commission has taken to date to implement the FSA, including the promulgation of a permanent amendment to the guidelines this past April. We are pleased now to have the opportunity to testify before you – on behalf of the Department of Justice and federal prosecutors across the country – regarding the extent to which the recently promulgated amendment should be given retroactive effect. In sum, our position is that the quantity-based component of the FSA amendment should be applied retroactively, except as to offenders with high criminal history scores or who possessed or used a weapon as part of their offense.

II. Federal Cocaine Sentencing Policy

In April 2009, the Department testified in Congress, on behalf of the Obama Administration, on the urgency of eliminating the 100-to-1 quantity ratio that has existed in federal cocaine sentencing policy since 1986. We stated that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities. Ensuring fairness in the criminal justice system is critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

Since the United States Sentencing Commission first reported 16 years ago on the differences in sentencing between crack and powder cocaine, a consensus developed that the federal cocaine sentencing laws needed to change. Indeed, over that time, our understanding of crack and powder cocaine, their effects on the community, and the public safety imperatives surrounding all drug trafficking has evolved. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitated a change to federal law.

It has been the position of this Administration that the 100-to-1 quantity ratio embodied in federal cocaine sentencing structure for most of the last 25 years failed to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each

form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We believe the structure has been especially problematic because citizens view it as fundamentally unfair. Congress took a big step in rectifying this sense of unfairness with the passage of the FSA. The Commission took another big step by promulgating the recently passed sentencing guideline amendment. We think one other step is needed this year: to apply the guideline retroactively.

III. Finality

We think it is also important, at this time, not only for the Commission to review whether the pending FSA guideline amendment should apply retroactively, but also for the Commission to review its retroactivity policy generally. Especially in light of the Supreme Court's *Booker* decision rendering the sentencing guidelines advisory, we believe retroactive application of guideline amendments should be rare and reserved only for amendments that rectify serious fairness issues in the guidelines, like the FSA amendment. We believe Commission policy should include a general presumption against retroactive application of guideline amendments.

Both the Congress and the United States Supreme Court have repeatedly recognized the importance of the finality of criminal judgments. As the Court has said time and again in various contexts, finality is "essential to the operation of our criminal justice system."[1] Consistent with this principle, Congress has provided, in 18 U.S.C. § 3582, that a court generally "may not modify a term of imprisonment once it has been imposed" except in very limited circumstances. S*ee also, Dillon v. United States*, ___ U.S. ___, 130 S. Ct. 2683, 2687 (2010). Similarly, the Savings Statute, 1 U.S.C. § 109, presumes that if a statutory penalty is reduced and even if a

[1] *Teague*; *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government, no less than states, has an interest in the finality of criminal judgments).

crime is completely repealed, neither will have retroactive effect. According to the statute, such changes "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."[2]

In the context of criminal procedure, the Supreme Court in *Teague v. Lane* held that when a new rule of procedure is announced, it is generally inapplicable to decisions that are final;[3] or in other words, it will generally not have retroactive application. The Court has identified only two exceptions to this general rule: (1) when the new rule, "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'";[4] and (2) when the rule is, "implicit in the concept of ordered liberty" and affects the "truth-finding" function of the criminal process.[5] The exceptions have been operationalized rarely, as the Court has shown a clear preference for not resorting to retroactive applications of its rulings. The primary reason given by the Court for its preference for prospective application only is the interest in finality. The Court has explained, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[6] This interest in finality and deterrence is just as relevant – if not more so – in the context of the sentencing guidelines. In fact, sentencing is the primary element of the criminal justice process that serves to deter potential offenders. If

[2] 1 U.S.C. § 109 (2010).

[3] 489 U.S. 288, 308 (1988).

[4] *Id.*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

[5] *Id.*, 489 U.S. at 311–13.

[6] *Id.*, 489 U.S. at 309.

sentences are changing and being applied retroactively, the deterrent effect of sentences is reduced.

IV. Retroactivity, the Sentencing Reform Act, and *Booker*

In considering retroactivity policy, we also believe it is important to recognize the origins of the Commission's power to apply its amendments retroactively and how the Supreme Court altered the original intent of the Sentencing Reform Act, and also to consider that authority within today's changed federal sentencing system subsequent to the Court's decisions in *Booker*,[7] *Kimbrough*,[8] and *Spears*.[9]

Section 3582(c)(2) gives a sentencing court discretion to reduce the defendant's sentence "in the case of a defendant who has been sentenced to a term of imprisonment *based on a sentencing range* that has subsequently been lowered by the Sentencing Commission[,]"(emphasis added) after considering the statutory sentencing factors set out in 18 U.S.C. § 3553(a). The court has this discretion only if the amendment has been identified by the Commission for retroactive application and only "if such reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); *see* 28 U.S.C. § 994(a)(2)(C).

When section 3582(c) was written, the guidelines were intended to be presumptive and to carry the force of law. The exercise of discretion under 3582(c) assumed that a court did not have discretion at the time of the original sentencing to issue a sentence below the guidelines in

[7] *Booker v. United* States, 543 U.S. 220 (2005).

[8] *Kimbrough v. United States*, 552 U.S. 85 (2007).

[9] *Spears v. United States*, 129 S. Ct. 840 (2009).

the absence of extraordinary circumstances. However, as a result of *Booker* (which rendered the guidelines advisory), *Spears* and *Pepper* (which held that district judges have discretion to reject the policies underlying any of the federal sentencing guidelines), district judges have been given substantially greater discretion to impose what they believe is a fair sentence in all cases, regardless of what the guidelines recommend. Though the properly calculated guideline range is to be considered a starting point for the sentencing process,[10] it is not presumed reasonable at the district court level and the appellate court reviews only for a district court's abuse of discretion. As the panel of appellate judges at the recent annual Commission training conference stated, it is rare for an appellate court to reverse a district judge based on the substantive reasonableness of the sentence imposed.

Thus, the concerns that animated the need for retroactive application of guideline amendments pre-*Booker* have been significantly reduced by the post-*Booker-Kimbrough-Spears-Pepper* legal framework. This reality, we believe, must inform the Commission's approach to retroactivity going forward. If district courts have the authority to reject the guidelines at the original sentencing and choose not to do so after considering the factors set out in 18 U.S.C. § 3553(a), we think it becomes increasingly unnecessary to give these same judges a second opportunity to sentence the defendant through retroactive application of a guideline amendment – admittedly with different advice from the Commission but with the same authority and mandate to impose the sentence the court feels is warranted after considering the very same § 3553(a) factors.

Indeed, in informing our position on the extent to which the Commission should make its amendments implementing the Fair Sentencing Act retroactive, the Department has considered

[10] *Gall v.United States*, 552 U.S. 38, 39 (2007).

the language of section 3582(c), the realities of the current sentencing landscape as shaped by Supreme Court jurisprudence, as well as the Commission's current policy statement in section 1B1.10(a) of the guidelines. That policy statement sets important bounds within which retroactive sentence reductions may be made. No reduction is permitted if, among other things, "[the] amendment listed in subsection (c) does not have the effect of lowering the defendant's *applicable guideline range*" (emphasis added). Additionally, to calculate the amended guideline range, the court is instructed that it "shall substitute only the amendments listed in subsection (c) for the corresponding *guideline provisions* that were *applied* when the defendant was sentenced and shall leave all other guideline application decisions unaffected." *Id.* §1B1.10(b)(1), p.s. (emphasis added).[11] The guideline also indicates that an original sentence that was not based on the guidelines but rather on the court's authority under *Booker* ordinarily should not be reduced further. And finally, the Commission's policy statement requires courts to keep front and center the public's safety and to exclude from retroactivity those offenders who pose a significant risk to public safety.

V. Retroactivity and the Sentencing Guidelines Implementing The Fair Sentencing Act of 2010

In reaching our position on retroactivity of the Fair Sentencing Act guideline amendment, we are driven first and foremost by the intent of the Act and the Administration's goal to remedy the unwarranted disparity created by the 100-to-1 quantity ratio. We believe the presumption against retroactive application of guideline amendments we suggest above is

[11] In *Dillon*, the Supreme Court concluded that a sentencing modification proceeding under Section 3582(c) is "fundamental[ly] differen[t]" from a "sentencing" proceeding. 130 S.Ct. at 2693. Thus, while the federal sentencing guidelines generally were rendered advisory by *United States v. Booker*, 543 U.S. 220 (2005), a court may grant a reduction under Section 3582(c) only "within the narrow bounds established by the Commission" in its policy statement in USSG §1B1.10. 130 S.Ct. at 2694.

overcome when an amendment is promulgated to rectify an unfairness that is widely recognized in the Judiciary, the Congress, and the public. We believe the FSA amendment is just this kind of an amendment that ought to be applied retroactively.

However, there is another interest that we believe must shape *how* the Commission applies the FSA amendment retroactively. Public safety must be at the heart the Commission's retroactivity decision. We believe retroactivity of the FSA amendment should be limited to minimize the safety risks to the community. It is our position that release dates should not be pushed up for those offenders who pose a significant danger to the community. We believe this limitation should be articulated more clearly in section 1B1.10 and that certain dangerous offenders should be categorically prohibited from receiving the benefits of retroactivity, a step beyond the current Commission policy. We think this approach to retroactivity of the FSA amendment also recognizes congressional intent in the FSA to differentiate the dangerous drug offenders and sentence them no less than current policy and in some cases more severely.

Thus, while the Department supports the Commission's retroactive application of its recent amendment implementing the Fair Sentencing Act to rectify the sentences meted out based on the unwarranted 100-to-1 crack-powder penalty disparity, we urge the Commission to act consistently with public safety and congressional intent and limit the reach of retroactive application of the amendment. The Commission has the authority to direct limited retroactivity under both 18 U.S.C. § 3582(c) and *Dillon*. We believe the Commission should limit retroactive application to just the quantity-based sentencing reduction in the amended guideline (and not give retroactive effect to the new aggravating or mitigating factors) and only to crack offenders who did not receive a weapon enhancement (either under the guidelines or a statutory

enhancement) and who had a Criminal History Category of I, II or III, as determined in the original sentencing.

With these limitations, all of which should have been determined in prior court action and should be documented in the court file in most cases, courts will be able to determine eligibility for retroactivity based solely on the existing record and without the need for transporting the defendant back to court or holding any extensive fact finding. Retroactivity would be available to a class of non-violent offenders who have limited criminal history and did not possess or use a weapon, and thus to offenders who pose the least risk of danger to public safety. While these factors are not a perfect proxy for dangerousness or for the limits Congress intended in the statute, they are a reasonable proxy based on the Commission's own research and that will not require new hearings.

As the Attorney General has reiterated, the Fair Sentencing Act of 2010 is a substantial step toward alleviating sentences for those to whom the 100-to-1 quantity ratio was applied. In light of the consensus for change to federal cocaine sentencing policy and the reasons behind it, retroactive application is appropriate. Nevertheless, to ensure public safety, efficient administration of justice, and application consistent with the intent of the Act, retroactive application should be tailored. We believe our recommended approach achieves this important balance and we urge the Commission to adopt it.

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Thank you for the opportunity to share the views of the Department of Justice on this important topic. We look forward to working with the Commission on this issue and to working with all in the criminal justice system to achieve equity and fairness under the law.