



RESEARCH AND ADVOCACY FOR REFORM



**Testimony of Marc Mauer  
Executive Director  
The Sentencing Project**

*Before the*  
**United States Sentencing Commission**

*Regarding*  
**Proposed Amendments to the Federal  
Sentencing Guidelines for Drug Offenses**

**March 17, 2011**

**T**hank you for inviting me to testify about the Commission's recent proposed amendments and request for comments 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 the 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.

My written comments to the Commission will address (1) the proposed permanent amendment to implement the Fair Sentencing Act of 2010; (2) the Commission's consideration of applying a permanent amendment retroactively; and (3) overall revision of the drug trafficking guidelines.

## **OVERVIEW**

In 2009, more than half (51%) of the federal prison population was serving time for a drug offense. These 95,205 sentenced prisoners represented a nearly 20-fold increase from the 4,749 incarcerated drug offenders in 1980. The increased imprisonment of drug offenders constitutes the most significant source of the 700% growth in the federal prison system during this time. Even while state incarceration levels have begun to stabilize in recent years, the federal prison population has continued to rise.

Moreover, the swelling of the federal prison population and the heavy proportion of drug law offenders has contributed to significant racial and ethnic disparity within the federal criminal justice system. According to the Commission's 2009 data on federal criminal cases, 70% of all drug defendants were either Black (30.6%) or Hispanic (39.7%). For cases involving powder cocaine, crack cocaine or heroin, which comprised 53% of all drug cases, at least 80% of the defendants were either Black or Hispanic. Crack cocaine cases had the highest proportion of racial and ethnic disparity, with 89% of defendants being either Black or Hispanic.

I am pleased that the issues now before the Commission hold the potential to directly confront these disturbing trends of unprecedented growth and racial disparity in the federal prison system. The decisions of this body will have a significant impact on the lives of thousands of men and women entangled in the federal criminal justice system and facing lengthy imprisonment, many for low-level and nonviolent drug offenses.

## **IMPLEMENTATION OF THE FAIR SENTENCING ACT**

The Sentencing Project and others were dismayed by the Commission's October 2010 vote promulgating an emergency, temporary amendment to implement the Fair Sentencing Act of 2010 (FSA). The much celebrated and universally endorsed legislation was incorporated into the sentencing guidelines by raising the base offense levels for crack cocaine, thereby reducing the number of defendants eligible for relief under the reform and lessening the size of the sentence reduction for those who qualify.

We find this decision problematic for two reasons. First, according to the Commission's estimates, the decision to rescind the base offense levels of 24 and 30 set by the Commission in 2007, and raise them to 26 and 32 forfeited a 2,000 bed

reduction over 10 years. Coming at a time when federal facilities are 36% above rated capacity and the federal prison system is seeking a significant budget increase to build new prisons, this action unnecessarily compounds ongoing crowding problems within the Bureau of Prisons. In addition, there is no evidence to suggest that the increased time served in prison resulting from this decision will provide any additional public safety benefits, yet will come at great expense.

We were also concerned about the stated rationale for the decision. While minutes from the October 2010 public meeting indicate that Commissioners believed that it was Congress's intent to have the Commission increase the base offense levels for crack cocaine when it passed the Fair Sentencing Act, there is no documented evidence to support this claim. Indeed, comments submitted by Members of Congress on this very issue contradict this claim and urged the Commission to maintain base offense levels for crack cocaine at 24 and 30. Senator Richard Durbin, champion and author of the Fair Sentencing Act, wrote:

*The level 24 option is more consistent with Congress's clearly stated goals in passing the Fair Sentencing Act, including reducing racial disparities in drug sentencing; increasing trust in the criminal justice system, especially in minority communities; reducing over-incarceration of nonviolent drug offenders; and shifting the focus of federal drug enforcement from low-level offenders to drug kingpins.*

Finally, because the level 26 option fails to even incorporate the mandatory minimums within the recommended guideline range, the intent of Congress is subverted if the emergency amendment is made permanent. Congress reformed the sentencing structure for crack cocaine offenses because of the growing consensus that the penalties for low-level offenses were too high. The new trigger quantities for the five- and ten-year mandatory minimums were carefully selected because the conduct associated with 28 grams was considered sufficiently serious. Logic would suggest

that the sentence associated with the most serious offenses would hover at the top of the recommended guideline range, not below it. Setting base offense levels at 24 and 30 would better incorporate the punishments Congress deemed appropriate for the serious and major drug offenses and not over-punish where Congress does not believe it is warranted.

## **RETROACTIVE APPLICATION OF PERMANENT AMENDMENT GOVERNING CRACK COCAINE CASES**

Passage and implementation of the Fair Sentencing Act was a milestone in advancing more proportional and fairer sentences in the federal criminal justice system. The universal agreement to reform the old crack cocaine sentencing structure is a testament to the excessive nature and unfairness associated with the law. I applaud the Commission for its commitment to addressing the 100 to 1 crack cocaine disparity through thoughtful and well-researched arguments to Congress over the years. The lessons learned since 1986 and the impact on people incarcerated under the law weighed heavy on the debate. It is unthinkable that this legislative victory, which was influenced by a long history of injustice, would not apply to the many thousands currently incarcerated for a crack cocaine offense under the old sentencing structure. I urge the Commission to apply its changes retroactively to the Drug Quantity Table, as outlined in its permanent amendment implementing the Fair Sentencing Act.

In comments submitted to the Commission last fall, The Sentencing Project and allied organizations provided arguments for why the Amendment to the crack cocaine sentencing guidelines should be applied retroactively. We believe those points still hold. The background notes of U.S.S.G. § 1B1.10 state that in selecting an amendment for retroactivity, the Commission should consider such factors as (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 to determine an amended guideline range.

First, the purpose of the Amendment certainly weighs in favor of retroactivity given that the Commission has for many years stressed the importance of Congressional action to increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses. A primary goal of such change was to ease the harsh treatment of lower-level crack offenders and focus the penalties more closely on serious and major traffickers. The FSA was enacted in response to these concerns. Since the problems targeted by the legislation are still present in the system, refusing to make the Amendment retroactive would reduce its ability to address the concerns circumscribed by the legislation. For instance, failing to make the Amendment retroactive would exacerbate the problem of over-incarceration. According to the Commission's estimates, 15,227 people would be eligible for a sentence reduction under the level 24 option and 12,835 under the level 26 option. Moreover, failing to make the Amendment retroactive would sustain the racial inequalities associated with crack cocaine sentencing policy since 85% of the offenders eligible for retroactive application of the Amendment are African American.

Second, the Amendment is likely to have a significant effect because it is expected to reduce the average sentence for currently imprisoned eligible crack cocaine defendants by 48 months under the level 24 option and by 37 months under the level 26 option. Given that the Commission has only declined to make retroactive those amendments that "generally reduce the maximum of the guideline range by less than six months" based on this factor, the magnitude of the change produced by the Amendment also weighs in favor of retroactivity.

Third, retroactive application of the Amendment would not be difficult to administer if only the changes to the Drug Quantity Table are applied retroactively without exclusion. Including the enhancements incorporated in the Amendment as retroactive would make judicial calculations more complicated by relying on old evidence to make new determinations and therefore slow down the process of retroactive consideration. Also, judges will already consider public safety concerns and institutional disciplinary records in determining eligibility for sentence reduction, so no additional exclusion for applicants' criminal history category is necessary or appropriate. Setting those parameters for retroactivity would not pose an unreasonable burden on judicial resources.

## **REVISIONS TO THE DRUG TRAFFICKING GUIDELINES**

The Sentencing Project supports Commission interest in revising the drug sentencing guidelines and expanding eligibility for the "safety valve." As mentioned earlier, the disproportionate growth in the imprisonment of drug offenders is largely responsible for the ballooning federal prison population, and the racial and ethnic disparity among those serving time for drug offenses is staggering. As of FY 2009, nearly two-thirds of federal drug defendants received either five-year (27.2%) or ten-year (37.2%) mandatory prison terms. There is little evidence to suggest that such harsh punishments for drug offenders, most of whom are not the "kingpins" of the drug trade, provide a cost-effective strategy for dealing with substance abuse.

The excessive length of federal drug sentences brought about by the mandatory minimum sentences established by Congress also interferes with appropriate judicial consideration of sentencing factors. Since the mandatory sentences are determined by the quantity of drugs possessed by a defendant, judges are not permitted to consider factors that would otherwise be relevant at sentencing, such as the offender's role in the offense or background histories of family dysfunction or abuse. Many

judges believe that mandatory minimums are set too high and Commission survey results found that 76% of judges believed that the safety valve should be expanded for drug trafficking offenses. The Sentencing Project agrees and believes that defendants who are non-violent and low-level should benefit from the safety valve.

In addition, the rationale for lowering the sentencing guidelines for crack cocaine cases applies as well to guideline levels for all drug cases. Congress set sufficient, if not excessive, mandatory sentences for drug offenses. Those mandatory minimum sentences should be reflected in the recommended guideline range, and not be set below it. The current guideline framework exacerbates the problem of inordinate sentence length for drug offenses and ignores Congress's intent by excluding the statutory minimum sentence out of the relevant range. Fixing this disconnect will allow for more proportional sentences.

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



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