



**Written Statement of
Jim E. Lavine, NACDL President**

**on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**before the
United States Sentencing Commission**

Re: Retroactivity of Fair Sentencing Act Amendments

June 1, 2011

Judge Saris and Distinguished Members of the Commission: Thank you for inviting me to testify today, on behalf of the National Association of Criminal Defense Lawyers, to present our views on retroactivity of the Sentencing Guidelines amendments implementing the Fair Sentencing Act of 2010.

My name is Jim E. Lavine, and I am the President of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am also a practicing criminal defense attorney in Houston, Texas, with extensive trial and appellate level experience in federal and state courts. I specialize in criminal law and spend approximately ninety-percent of my time on federal cases. Before moving to private practice, I was a prosecutor for over eleven years. I appreciate the opportunity to testify on behalf of NACDL today.

Background

In October 2010, the Commission promulgated a temporary, Emergency Amendment to implement the emergency directive in section 8 of the Fair Sentencing Act of 2010¹ (the “Act”). Prior to this promulgation, the Commission requested public comment with respect to implementation of the Act and Congressional directives to review and amend the Guidelines to “decrease penalties involving cocaine base (“crack cocaine”)” and to “account for certain aggravating and mitigating circumstances in drug trafficking cases.” On April 6, 2011, the Commission re-promulgated the temporary Emergency Amendment as a permanent amendment without change and voted to seek public comment and hold a hearing on the issue of retroactivity.

Statutory and Guideline Framework

District courts are empowered by statute to reduce a term of imprisonment “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 pursuant to 28 U.S.C. 994(o).” 18 U.S.C. § 3582(c)(2). The court may exercise this power “upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion.” *Id.* In determining whether to reduce the term of imprisonment based upon a subsequent amendment, the court must consider any applicable factors set forth in section 3553(a) as well as whether “reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Id.*

The Commission has set forth its policy statement regarding retroactive application of amendments in § 1B1.10 of the Guidelines and has specifically identified twenty-eight

¹ Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010).

amendments that may be applied retroactively. *See* U.S.S.G. § 1B1.10(c). The Commission has explained that in selecting these particular amendments, the Commission considered, among other factors, “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).” *See id.* cmt. background. Examination of the permanent amendment through the lens of these factors unequivocally establishes the just conclusion that it be applied retroactively.

Retroactivity of the Fair Sentencing Act Amendment

NACDL strongly supports the retroactive application of the permanent amendment. The Fair Sentencing Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses. It is hard to overstate the negative social and economic impact of this uniquely severe sentencing scheme. “Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth.”² Over-incarceration within black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities and a second chance. Drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for important public benefits including student loans and public housing, and significantly diminished economic opportunity. As a result, many of these persons become outsiders for a lifetime, and their families suffer incalculable damage and suffering. Excessive sentences undeniably exacerbate all of these harms.

While NACDL believes the Act and implementing guidelines amendment did not go far enough in reducing the disparity and the harms of excessive crack sentences, there is overwhelming consensus, from all sides, that the 100:1 ratio was unfair, unjustified, and in need of remedy. There is no question that the Congressional intent behind the Act was to fix a part of this notoriously flawed scheme. And the impetus for action was undoubtedly those sentences *already* handed down and the disparate impact on individuals *already* sentenced. Principles of fairness, consistency, and practicality instruct the Commission to include this amendment in the list of amendments eligible for reduction under § 3582(c)(2).

Fairness

Since 1995, the Sentencing Commission has consistently taken the position that the 100:1 ratio was unwarranted from its inception, and has a racially disparate impact. Commission staff estimates that 85.1% of the offenders eligible for retroactive application of the FSA Guideline Amendment are African-American. The average sentence reduction for all impacted offenders would be 22.6% (37 months, from 164 months to 127 months). Given this dramatic impact, in

² Stuart Taylor Jr., *Courage, Cowardice on Drug Sentencing*, *Legal Times*, April 24, 1995, at 27.

terms of race and relief from unconscionably long sentences, failure to apply the amendment retroactively would directly undercut the primary objectives of the Fair Sentencing Act.

The Commission has recognized that reducing crack cocaine sentences is key to reducing the sentencing gap between blacks and whites. In passing the Fair Sentencing Act, Congress reached the same conclusion. The Fair Sentencing Act amendment directly contributes to that goal and there is no reason to give it purely prospective application. Ignoring racial disparities among sentences currently being served will significantly stifle the Act's ameliorative effect, increase the distance to the goal post, and promote continued disparity based not only on race, but among similarly situated individuals.

On the issue of fairness, one further point warrants mention. The Department of Justice, in a memorandum dated August 5, 2010, directed federal prosecutors, in "developing sentencing recommendations in individual cases," to "consider what the guidelines sentence would be consistent with the 18:1 ratio reflected in the new law as well as the enhancements and mitigating factors." In this respect, the 18:1 ratio has retroactively influenced prosecutors' sentencing recommendations—but only for cases sentenced after August 5, 2010. The timing of the sentencing has no bearing on the underlying rationale supporting the need for change and the Act's recognition that the sentences, as a whole, were flawed. Fairness requires that this limited window of putative guidelines retroactivity be expanded to include all cases.

Consistency

Not only is retroactive application within the Commission's authority, but history dictates that it is unquestionably the right thing to do. While past amendments reducing sentences in drug trafficking cases are few, the Commission has made those amendments retroactive, including the "crack minus 2" amendment that resulted in reduction eligibility for approximately 20,000 offenders, nearly 8,000 more offenders than would become eligible under this amendment. To deviate from this past practice for the proposed permanent amendment would be patently unfair and further undermine confidence in our criminal justice system.

Perhaps the most compelling reason for retroactivity is the Commission's precedent in this area. Over the years, the Commission has amended the drug guideline with the effect of lowering sentences in particular drug cases, and in each instance, has made the amendment retroactive by including it in the list of amendments eligible for reduction under § 3582(c)(2). For example, in November 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 a 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. *See* U.S.S.G. § 1B1.10(c).

In November 1, 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 was also made retroactive. *See* 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 marijuana. *See* 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 in November 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level. *See* U.S.S.G. app. C, Vol. II, 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 had the effect of lowering sentences for the drug Percocet. Because tablets sold as prescription pain relievers contain varying amounts of oxycodone, tablets of the same weight may contain vastly varying amounts of oxycodone. With amendment 657, the Commission remedied the proportionality issue, and made the amendment retroactive. *See* U.S.S.G. § 1B1.10(c)(2).

All of the preceding amendments that were made retroactive—dealing with LSD, marijuana, and oxycodone—generally benefitted white defendants. The statistics demonstrate, however, that retroactive application of the Fair Sentencing Act amendment will generally benefit black defendants. As previously noted, Commission staff estimates that 85.1% of the offenders eligible for retroactive application of the FSA Guideline amendment are African-American. The crack cocaine sentencing scheme is perhaps the most publicized and controversial aspect of the federal sentencing system. The racially disparate impact of the 100:1 ratio is well-known and the public perception that our drug laws are racially discriminatory is well-established. A decision to deny retroactivity would likely undermine public confidence in the Sentencing Commission and the federal criminal justice system as a whole, and cement an understanding that justice is distributed on the basis of skin color. The Commission cannot ignore these negative consequences. Making this amendment retroactive is the only fair and principled course.

Implementation

The difficulty in implementing retroactive application for this amendment will be minimal. Just like the “crack minus 2” amendment, the Fair Sentencing Act amendment merely recalibrates the guidelines’ levels and would not be unduly difficult for judges to apply

retroactively. While the number of 3582 motions would admittedly be large, history shows that the federal courts are fully capable of managing a temporary influx of cases requiring a similar type of review.

Commission staff estimates that 12,040 offenders at most would be eligible to receive a reduced sentence if the amendment was made retroactive. In comparison, approximately 20,000 offenders were eligible for a reduction following the “crack minus 2” amendment. This is a difference of nearly 8,000 offenders. In fact, the system has already disposed of over 25,000 such motions since the “crack minus 2” amendment was made retroactive. As the Federal Defenders point out, the process for handling that amendment has been described as “seamless” by Judge Antoon of the Middle District of Florida, which handled the second largest number of 3582(c)(2) motions related to that amendment, and applauded as the “greatest untold success story” in federal sentencing by Commissioner and Judge Castillo.

Working together, the courts, probation officers, defense lawyers, and prosecutors handled the retroactive application of the “crack minus 2” amendment efficiently and without disruption to the system. The amendment at issue not only results in nearly 8,000 fewer eligible offenders than that amendment, but its timing of eligibility will further ease any burden. Although 34% of the impacted offenders would be eligible for release within the first year, 27% would not be eligible for release within the first five years. Consequently, the courts’ consideration of the 12,040 sentence reduction motions would not be compressed within the first year but could be spread out over several years. The statistics and past experiences demonstrate that retroactive application will not be difficult and produce, at most, a minimal and temporary burden.

Even if practical concerns about the courts’ ability to respond to a retroactive amendment could overcome the need to right a longstanding wrong, such concerns are unfounded. No additional fact finding would be necessary, and prior decisions interpreting and applying section 3582(c) have provided sentencing judges with sufficient flexibility and discretion to avoid an undue burden.

Past instances of sentencing amendment retroactivity demonstrate that the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires. Regardless, we firmly believe that any temporary burden is vastly outweighed by the reasons for retroactivity.³ As the Commission acknowledged, Amendment 2 corrects a long-

³ Another purpose served by retroactivity is the alleviation of severe federal prison overcrowding. As BOP Director Harley Lappin testified before the Commission in March, the federal prison system is 35% over its capacity and likely to grow by 5000 to 6000 inmates in 2010 and 2011. He added that federal prison construction does not keep pace with the yearly net population increases.

standing error in setting the guidelines levels unnecessarily high. This change was overdue, and it should be used to achieve greater fairness for those currently serving sentences.

Further Limitations

NACDL urges the Commission to make the proposed permanent amendment retroactive without further limitations regarding the circumstances in which, and the amount by which, sentences may be reduced. Disqualification based on the dates of certain ameliorative Supreme Court decisions would sweep far too broadly, unjustly penalizing inmates who never benefitted from those decisions. This is precisely the type of case-specific determination that should be left to the discretion of the sentencing court.

The other suggested limitation—disqualification based on criminal history category or other aggravating sentencing factor—would serve no rational purpose. Crack sentences already reflect such factors, and retroactive application of the Fair Sentencing Act amendment would do nothing to negate their proportional impact on the ultimate sentence. Moreover, such a limitation would be unprecedented, inciting concerns about racial disparity in the way the Commission implements retroactivity for guideline amendments.

Retroactivity of Other Portions of Amendment 2

Retroactivity is also warranted for the mitigating adjustments, which address overreliance on drug quantity for less culpable participants by capping the guidelines and implementing a new reduction based on offender characteristics neglected by the Guidelines. Retroactive application of these amendments would be consistent with the intent of the Fair Sentencing Act and the language and remedial purpose of 28 U.S.C. § 994(u) (“If the Commission *reduces* the term of imprisonment . . .”). Given the relatively small number of defendants eligible for release under these two amendment provisions (273 and 88 respectively), the costs to the justice system are minimal—especially when compared to the costs of continuing to incarcerate these low-level participants. The Commission has the authority to allow sentence reductions for the least culpable drug defendants residing in our prisons. It should exercise that authority.

On the other hand, NACDL does not support retroactive application of the enhancements contained in the proposed permanent amendment. While this may appear inconsistent, there is ample justification for treating the enhancements differently from the mitigating adjustments. These enhancements address factors likely to have been considered in determining the initial sentencing under the advisory Guidelines. Moreover, even when the amended guideline range does not exceed the original term of imprisonment, retroactive application of the enhancements would, at the very least, result in unnecessary and burdensome litigation regarding Commission authority and Ex Post Facto limitations.

Conclusion

NACDL applauds both Congress and the Commission for this critical extension of sentencing reform. Elimination of the 100:1 ratio and implementation of the Act by the Commission is a milestone on the path to fairer drug sentencing. Still, it is not enough. The need for retroactivity now is manifest.

I am grateful for the opportunity to testify on behalf of our membership and welcome any questions.