ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

March 15, 2011

The Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Saris,

We write to express our strong opposition to the Commission's proposed Re-Promulgation of the Fair Sentencing Act. The Fair Sentencing Act of 2010 eliminated the mandatory minimum sentence for simple possession of cocaine base ("crack" cocaine), reduced statutory penalties for crack cocaine offenses, and directed the Commission to review and amend the Sentencing Guidelines to account for specified aggravating and mitigating circumstances in certain cases.

As required by the law, the Sentencing Commission instituted an emergency amendment in Appendix C, Amendment 748. This emergency amendment immediately raised the offender levels 2 points, from 24 and 30; to 26 and 32. By doing this, the Sentencing Commission returned the cocaine offense levels to their original status, and satisfied the will of Congress by setting the sentencing disparity at 18 to 1. Now, however, without any legislative impetus, the Commission proposes lowering the levels for cocaine use yet again – a proposal that directly violates Congressional intent.

It pains us to remind the Commission how we reached this position. In 2007, the Commission stated:

> In order to partially address some of the problems that are unique to crack cocaine offenses because of the 100-to-1 drug quantity ratio, crack cocaine quantities above and below the mandatory minimum threshold quantities will be adjusted downward by two levels.

> Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative. The Commission, therefore, tailored the amendment to fit within the existing statutory penalty scheme by assigning base offense levels that provide guideline ranges that include the statutory mandatory minimum penalties for crack cocaine offenses.
>
> The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.[1]

In essence, the Commission itself decided in 2007 to lower crack/powder sentencing guidelines as a way of forcing "prompt congressional action."

Now, despite the fact that Congress reduced the crack/powder discrepancy, the Commission seeks to lower the Sentencing Guidelines even further. This will result in a crack/powder discrepancy from 4 to 1 to 14 to 1, depending on where the offender conduct is located on the drug quantity table. No justification is provided by the Commission as to why it proposes this change to drug offense levels, nor does the Commission explain why it believes its judgment on sentencing levels controls over that of the United States Congress.

Furthermore, the Commission proposes making these changes retroactive. The Commission's decision to retroactively apply the amendments would have the effect of allowing a category of convicted criminals to reduce their judicially-imposed sentences. Each had their day in court and a judge specifically found that their sentence was deserved. Retroactive application of the amendments would not change that finding, but rather serve to make it meaningless. It would result in the release of many drug offenders from prison.

The Fair Sentencing Act makes no mention of retroactivity. That is by design. The Act was carefully negotiated and debated over months. In the floor statements on the bill, not one Senator, from either party, mentioned retroactivity. Had the Act included retroactivity, we believe it would not have passed. However, the law is specific regarding the role of the Commission: It is only authorized to promulgate the changes and to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act."[2] It is our position that since there is no provision in the Fair Sentencing Act of 2010 regarding retroactivity; it is beyond the role of the Sentencing Commission to impose that change without

---

[1] See, USSC 2007 Report to Congress at pg.10.

[2] See, Fair Sentencing Act of 2010, §10

direction or guidance from the legislative branch. Should the Commission amend the Guidelines to make these changes retroactive, it will usurp legislative prerogatives, and bring into serious question the scope of its authority.

In addition, the Commission proposes dropping the offense level of the Drug Quantity Table (§2D1.1). As currently structured, the Drug Quantity Table is keyed to the base offense levels of 26 and 32, where the lower limits of the sentence are close to the mandatory minimum. If the Drug Quantity Table was to be lowered, mandatory minimum sentences would be located higher in the sentencing guideline range. The result would be a reduction in the apparent discretion of Federal judges to sentence defendants to terms of imprisonment in excess of the mandatory minimum for drug offenses. We oppose any lowering of the Drug Quantity Table, for it will reduce room in the Guidelines for such sentences greater than the mandatory minimum, where appropriate.

We also oppose the proposed amendments concerning the immigration Guidelines that decrease the punishment available to illegal immigrants who have felony records. The proposed amendment to §2L1.2 (Unlawfully Entering or Remaining in the United States) would provide a limitation on the use of convictions under §2L1.2 (b)(1)(A) and (B) in certain circumstances. As it stands, prior convictions can enhance the base level offense in question, even where the convictions are too stale to add points for criminal history. This two-level approach makes sense in assessing the severity of conduct when someone is caught entering the country illegally. As the Commission quoted, "It is reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful entry into the country."[3]

The changes sought by the Commission would reduce the impact of a prior felony on an illegal immigrant caught entering the country in violation of the law, by cutting the base level enhancement in half. Prosecutors are already reluctant to pursue immigration cases and the Commission's proposed amendment further exacerbates this reluctance to pursue Title 8 cases. For example, an alien transportation case, with adjustments for reckless endangerment, transporting, 6 to 24 aliens, and with financial gain, may net a defendant 10 to 16 months of incarceration. If the proposed amendment is allowed to stand, the 16 level adjustments would not be applicable, and the defendant would only merit a 2 to 8 month sentence per the Guidelines. If prosecutors do not see the merit of prosecuting § 1326 (illegal reentry) cases when a defendant does merit a 16 level adjustment, they certainly will refuse to try cases that further lessen penalties for illegal immigrant defendants.

Note that on November 1, 2010, the Commission amended the Guidelines to eliminate criminal history points due to the recency of prior conviction. (Where courts used to add 1 to 2 points to the criminal history category if less than 2 years had elapsed between the last conviction and the case before a court). What factor has occurred between

---

[3] United States v. Amerzcua v.Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009).

November of last year and January of this year to necessitate yet another reduction of enhanced sentences for repeat felons?

We note with increasing dismay the tendency of the Sentencing Commission to make unilateral changes to the Sentencing Guidelines in one direction only: downward. This downward sentencing spiral does not reflect the will of Congress, nor does it reflect the will of the American people. In addition, we believe that the Commission is jeopardizing the recent gains in crime reduction achieved through the use of mandatory minimums and longer sentences for drug-related and immigration crimes.

We therefore urge you not to apply these amendments.

Sincerely,

Lamar Smith
Chairman

F. James Sensenbrenner

Elton Gallegly

Daniel E. Lungren

Tom Marino

J. Randy Forbes

Trey Gowdy

Dennis Ross

cc: The Hon. John Conyers, Jr.
The Hon. William B. Carr, Jr.
The Hon. Ketanji Brown Jackson
The Hon. Ricardo H. Hinojosa
The Hon. Beryl A. Howell
The Hon. Dabney Abney Friedrich
The Hon. Isaac Fulwood, Jr.
Jonathan J. Wroblewski