Written Testimony of the
American Civil Liberties Union

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Hearing on Retroactivity of the Fair Sentencing Act of 2010 Amendments

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I would like to thank Judge Saris and the other Commissioners for inviting the American Civil Liberties Union ("ACLU") to testify today on whether Amendment 2 (hereinafter "Amendment 2") to the U.S. Sentencing Guidelines promulgated on April 28, 2011 in response to the Fair Sentencing Act of 2010 should be applied retroactively. The ACLU is a nationwide, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws.

As explained by the Commission, Amendment 2 has three parts. Part A changes the drug quantity table by lowering base offense levels for certain amounts of crack cocaine. Part B adds both mitigating and aggravating factors for drug offenses. Part C removes the cross-reference implementing the now-defunct five-year mandatory minimum for simple possession of crack cocaine.

For the reasons that follow, the ACLU urges the Commission to make Parts A and C of Amendment 2 retroactive, along with the "mitigating role cap" provision of Part B.[1] These Parts implement the heart of the congressional objective behind the passage of the Fair Sentencing Act: to increase the fairness of federal sentencing by reducing the disparity in treatment between crack and powder cocaine. Additionally, these Parts can be implemented easily, almost mechanically, without the complicated calculus and additional fact-finding required by most of the role-adjustment factors in Part B. Regarding the remainder of the Commission's questions about limitations or adjustments to retroactivity, we believe that a straightforward retroactive application to all implicated defendants would best balance the goals of actualizing congressional intent and the Commission's findings over the years while avoiding significant complications in the resentencing process.

Make Parts A and C of Amendment 2, Along With The Mitigating Role Cap, Retroactive.

The Fair Sentencing Act of 2010 ("FSA") represents the culmination of a decades-long battle to reduce the stark racial disparities caused by crack cocaine sentencing laws. Furthermore, the FSA also represents Congress's efforts to restore much-needed confidence in the criminal justice system, especially in communities of color, and to reserve scarce law enforcement dollars for the most serious criminal offenders.

Correcting the racial disparities inherent in the federal crack cocaine sentencing scheme and reducing overly harsh punishment for these offenders are the goals of the FSA. This is clear from the legislative history of the Act and the bipartisan consensus reflected in the floor statements made during debate. Representative Daniel Lungren (R-CA) noted that

> one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue. When African Americans, low-level crack defendants,

[1] The "mitigating role cap" refers to the provision, required by Section 7(1) of the FSA and codified by Amendment 2 at the last sentence of U.S.S.G. § 2D1.1(a)(5), that caps the offense level at 32 for an offender who is a "minimal participant" in the crime.

> represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes.[2]

Similarly, Majority Whip James Clyburn (D-SC) made the following statement on the House floor the day the Act was passed:

> Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans. This is unjust and runs contrary to our fundamental principles of equal protection under the law.
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> . . . The American drug epidemic is a serious problem, and we must address that problem. But our drug laws must be smart, fair, and rational. The legislation to be considered today takes a significant step towards striking that balance.[3]

In service of these laudable goals, along with its stated objective "[t]o restore fairness to Federal cocaine sentencing,"[4] the FSA made two major changes to federal sentencing law: first, it decreased the disparity between the mandatory minimum sentences for certain quantities of crack and powder cocaine, by lowering crack sentences;[5] and second, it eliminated the mandatory minimum for simple possession of crack cocaine.[6] To implement these changes, among others, the Commission promulgated Amendment 2 on April 28, 2011, with Parts A and C of Amendment 2, respectively, addressing the two significant changes identified. Part B of Amendment 2 implemented provisions of the Fair Sentencing Act discussing aggravating and mitigating factors;[7] many of these were heavily fact-dependent and not directly connected to the Act's stated purpose "[t]o restore fairness to Federal *cocaine* sentencing,"[8] since they did not address cocaine sentences in particular.[9]

The underlying concerns with racial equality and proportionality that motivated Congress's two significant changes to crack cocaine sentences — that is, changing the mandatory minimum thresholds, and eliminating the mandatory minimum for simple possession — apply with equal force to old sentences as to new ones. It would be anomalous for the Commission, having just promulgated Parts A and C of Amendment 2 to implement the Fair Sentencing Act and avoid future inequity, now to leave defendants whose sentences are already tainted by the extreme racial disparity of the prior crack-cocaine sentencing regime without a

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[2] 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).
[3] 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn).
[4] Fair Sentencing Act, Pub. L. No. 111-220, preamble, 124 Stat. 2372 (2010).
[5] *Id.* § 2.
[6] *Id.* § 3.
[7] *Id.* §§ 5-7.
[8] *Id.* preamble (emphasis added).
[9] The Commission so noted in its request for comment on the issue of retroactivity, *see* 76 FR 24960, 24973 (May 3, 2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110503_RF_FedReg_RFC_Retroactivity.pdf ("Part B contains both mitigating and aggravating provisions for offenses involving drugs, regardless of drug type.").

remedy. Indeed, it was this Commission's courageous work on the crack-cocaine disparity that encouraged Congress to pass the Fair Sentencing Act.[10] Additionally, Congress's enactment of the mitigating role cap builds on the Commission's recognition that drug quantity is not always the best proxy for offender culpability and that sole reliance on quantity often results in gross injustice. Therefore, the Commission should ensure that offenders who were sentenced under the Guidelines prior to Amendment 2 have the opportunity to petition courts for sentence modifications in light of Amendment 2's equitable changes in crack-cocaine sentencing.

Under U.S.S.G. § 1B1.10(c), the Commission considers three factors in deciding whether an amendment should be made retroactive: (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.[11] All three of these factors counsel in favor of applying Parts A and C of Amendment 2, along with the mitigating role cap, retroactively.

(1) *Purpose of the FSA and Amendment 2*

Congress's purpose in passing the FSA was to rectify the unfairness inherent in the prior regime of cocaine sentencing (i.e., "[t]o restore fairness to Federal cocaine sentencing"[12]). Simply stated, continued application of that discredited regime and its associated Guidelines to previously-sentenced offenders would undermine Congress's goal of promoting fairness and reducing penalties. The only difference between an offender sentenced one year ago and an offender sentenced today is the date of sentencing relative to Congress's moment of recognition that a "restor[ation]" of "fairness" was in order. Subjecting these two offenders to two different sentencing levels, one of which has now been recognized by Congress as unfair, would not only be arbitrary but would perpetuate the unfairness of the prior system.

Congress itself did not express an intent regarding retroactivity — neither *pre*scribing nor *pro*scribing retroactivity in the FSA itself — and thus left the retroactivity decision in the hands of this Commission, as has been done many times in the past. The Commission's own historical practice, no less than the purpose of the FSA itself, strongly favors retroactivity here.

Denying retroactivity for base-offense level reductions such as those explicitly required in Part A and those effectively applied by Part C of Amendment 2 would be inconsistent with the Commission's previous retroactivity decisions. In 2007, the Commission adjusted downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in § 2D1.1, and then gave this amendment retroactive effect.[13] As demonstrated by the retroactive application of the 2007 Amendments, along with, for example, the retroactivity of LSD, marijuana, and

[10] *See generally Kimbrough v. United States*, 552 U.S. 85 (2007) (recounting the history of the Commission's reports on the flaws with crack-cocaine sentencing and attempts to amend the Guidelines).
[11] U.S.S.G. § 1B1.10 cmt. (backg'd).
[12] Fair Sentencing Act, Pub. L. No. 111-220, preamble, 124 Stat. 2372 (2010).
[13] *See* U.S.S.G. § 1B1.10(c); U.S.S.G. App. C, Amdts. 706 & 713.

oxycodone amendments in 1993, 1995, and 2003, respectively, this Commission has rendered amendments retroactive when they serve to correct Congressional and Commission errors related to harms of drugs or the inflated penalties that result from a poorly reasoned sentencing mechanism such as the inclusion of all carrier weight.

The exact same concerns that prompted retroactive application of the 2007 Amendment apply with equal force regarding retroactivity of Amendment 2. In a series of reports beginning in the mid-1990s, the Commission determined that the 100:1 crack-powder disparity was flawed in several respects.[14] First, it rested on unsupportable assumptions about the harmfulness of crack and the seriousness of most crack cocaine offenses.[15] Second, it led to the "anomalous" result that "retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced."[16] Finally, it "foster[ed] disrespect for and lack of confidence in the criminal justice system" because of the "widely-held perception" that it "promote[ed] unwarranted disparity based on race."[17] These concerns were the motivating force behind both the 2007 Amendments and Amendment 2. The effect in ameliorating racial disparity is dramatically illustrated by the fact that 85% of the offenders who would be eligible for relief if Amendment 2 were retroactive are African-American.[18]

For all of these reasons, the FSA's purpose strongly supports making the Amendment retroactive consistent with the Commission's actions in connection with the 2007 Amendments when it lowered offense levels for crack cocaine retroactively.

(2) *Magnitude of Change*

The Office of Research and Data reports that for offenders sentenced between October 1, 1991, and September 30, 2010 (fiscal years 1992 through 2010), the effect of the new base offense levels would be to cut the average crack-cocaine sentence by nearly one-fourth, or about 37 months out of the average 164-month sentence.[19] For a small group of offenders, the sentence reduction would exceed ten years.[20] In all, if the new base offense levels were applied retroactively, 12,040 offenders sentenced between October 1,

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[14] *See* U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy, at 8 (May 2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter "2007 Report"]; U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf [hereinafter "2002 Report"]; U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb.1995), *available at* http://www.ussc.gov/crack/exec.htm [hereinafter "1995 Report"].

[15] *See* 2007 Report 8; 2002 Report 91, 94, 96, 100.

[16] 1995 Report 174.

[17] 2002 Report 103.

[18] *See* U.S. Sentencing Comm'n, Office of Research & Data, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 If the Amendment Were Applied Retroactively*, May 20, 2011 [hereinafter "Retroactivity Analysis"], at 19, *available at* http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf.

[19] *See id.* at 28.

[20] *Id.*

1991, and September 30, 2010 would be eligible to receive a reduced sentence.[21] Of these eligible offenders, 85% would be African-American.[22] In other words, the Guideline modifications significantly alter penalties across the crack-cocaine landscape, and if applied retroactively would impact a wide range of offenders to a significant extent. Conversely, if not applied retroactively, thousands of offenders sentenced under the flawed Guidelines would be left behind to serve an average of three years more than Congress now believes is fair.

Applying the mitigating role cap retroactively would affect 88 additional offenders.[23]

(3) *Difficulty of Applying the Amendment Retroactively*

The decision of the Commission to apply the 2007 Amendments retroactively, and its results, provide a valuable example regarding the ease of retroactive implementation. The relatively smooth application by courts of the two-level reduction in 2007 and 2008 demonstrates that retroactivity, in addition to being just, can be implemented practically. In fact, the courts granted a significantly *greater* number of reductions in response to the 2007 Amendments (16,433) than the number of individuals estimated to be eligible for a reduction if Amendment 2 were made retroactive (12,040).[24]

Like the 2007 Amendments, Parts A and C can be implemented easily, because they involve no more than a change to the base offense levels.[25] Moreover, the individuals affected by retroactivity in this instance would be well-distributed across the nation's judicial districts, with no more than 500 offenders in any district qualifying for a resentencing. Thus, retroactivity would not be a great burden on individual district courts.[26] Likewise, the mitigating role cap only involves a change in offense levels and therefore could also be implemented easily.

By contrast, the reminder of Part B of Amendment 2 would involve complicated, fact-specific inquiries at the district court level to determine the applicability of various aggravating and mitigating factors. It is chiefly for this reason that we do not recommend retroactive application of Part B generally — with the exception of the mitigating role cap, as noted.[27]

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[21] *Id*. at 10.
[22] *Id*. at 19.
[23] *Id*. at 35-36.
[24] *Compare* U.S. Sentencing Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, at tbl. 1 (Apr. 2011), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20110502_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf, *with* Retroactivity Analysis 10.
[25] Part A changes base offense levels directly; Part C has the effect of changing base offense levels by striking out a cross-reference that pegs base offense levels for simple possession of 5 grams or more of crack cocaine to offense levels for crack cocaine traffickers.
[26] *See* Retroactivity Analysis 17.
[27] There is a principled as well as a practical reason not to apply most of Part B retroactively: as noted above, the provisions of the FSA that Part B implements apply to all drug types and are therefore not tied to the key objective of the FSA, which is to improve the fairness of *cocaine* sentencing.

Although it is not an explicit factor in the analysis, the Commission should take additional comfort from the fact that the recidivism rate for beneficiaries of the 2007 Amendments did not materially differ from the recidivism rate for offenders who did not benefit from those Amendments.[28]

For these reasons, the three factors of U.S.S.G. § 1B1.10 and simple fairness all support retroactive application of Parts A and C of Amendment 2 as well as the mitigating role cap.

No Further Limitations on Retroactivity Are Necessary or Appropriate.

Assuming retroactive application, the Commission has asked for comment regarding the advisability of retroactivity limitations for specific categories of defendants. In our view, none of the potential limitations on retroactive application are warranted. The starting point for all crack-cocaine defendants — regardless of whether they were sentenced within the Guideline range, received departures or variances, had criminal history points or aggravating factors, or were sentenced before or after *United States v. Booker*,[29] *Kimbrough v. United States*,[30] or *Spears v. United States*[31] — was a Guideline range driven by an unfair ratio. The FSA's overarching and unqualified emphasis on fairness cannot be reconciled with a compartmentalized approach that would offer some offenders the benefit of fairer sentencing outcomes while denying it to others despite the fact that all offenders were sentenced under the old, unjust regime. The Fair Sentencing Act was a clear indication of Congress's intent to end *all* sentences calculated according to the discriminatory 100-to-1 ratio. By the same logic, the Commission should endorse universal retroactive application of the new, fairer base offense levels set forth in Part A and available by application of Part C.

Notably, the Commission has never created exceptions to retroactivity based on any of the distinctions suggested in its May 3 solicitation for comment.[32] Where the underlying legislation was aimed at rectifying past racial injustice and (as the Commission has urged) ameliorating public concern about racial bias in the justice system, piecemeal retroactivity would open precisely the same wounds that the FSA was designed to address.

In addition, the Commission has historically labored to establish a carefully calibrated system that amalgamates a variety of factors in calculating a sentence. The intent of Chapter 1's direction on sentencing process is to ensure that each basis for reduction or enhancement is separately calculated.[33] Denying retroactive relief to categories of defendants would undermine this system. For example, if a defendant were denied retroactive relief because she falls in a high criminal history category, that would undermine the careful calibration of the horizontal axis of the table by effectively double-counting criminal history — i.e., using criminal history both as a basis to enhance penalties at the outset and then subsequently as a basis to deny retroactive relief.

[28] This fact is drawn from forthcoming Commission data, discussed by Commission staff and panelists at the 2011 Annual National Seminar on the Federal Sentencing Guidelines held in San Diego, California, May 18-20, 2011.
[29] 543 U.S. 220 (2005).
[30] 552 U.S. 85 (2007).
[31] 555 U.S. 261 (2009).
[32] *See* 76 FR 24960, 24973-74 (May 3, 2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110503_RF_FedReg_RFC_Retroactivity.pdf.
[33] *See generally* U.S.S.G. § 1B1.1.

Nor should the fact that certain defendants have received one type of deserved benefit — for example, reductions under chapter 5, part K — bar those individuals from receiving a different kind of benefit (i.e., a lower offense level) that Congress thinks is necessary to enhance fairness.

Limiting retroactivity based on whether the court granted or could have considered a variance would be likewise inappropriate. Any limitation based on whether the Guidelines were advisory (*Booker*), whether a policy disagreement could have applied (*Kimbrough*), or whether an alternate ratio could have been imposed (*Spears*), would be premised on the false assumption that *every* defendant sentenced after these cases received, for policy reasons alone, a benefit equivalent to what would be provided under Amendment 2. This is clearly not the case. Circuit courts have specifically instructed that no court is required to vary on policy grounds from a Guideline,[34] and the courts have been slow to recognize their authority to do so. Moreover, many variances that courts do grant are based on individualized circumstances under 18 U.S.C. § 3553(a), rather than the unfairness Congress sought to rectify. Even after *Booker*, *Kimbrough*, and *Spears*, while some defendants have received variances, many others have not. If individual courts that imposed variances at initial sentencing believe that denying or limiting retroactive relief at re-sentencing is appropriate to avoid a sentencing windfall to a defendant who already received a variance, the courts can accordingly limit relief in a § 3582 proceeding. But for the vast numbers of defendants who did not benefit from policy-based variances at the outset or where such variances were not sufficient to reflect the change in the Guideline range, the Commission should not restrict the opportunity to benefit from Congress's recognition that the old law was unfair to everyone.

Finally, the Commission should not restrict retroactive application of amendments to offenders below a certain quantity threshold, as the Commission did with the 2007 Amendments. If the Commission were to adopt such a rule here, defendants who are classified as "large traffickers" but who in fact were merely minor players in a much larger conspiracy, would be unfairly denied relief solely based on the quantity of crack-cocaine involved in the conspiracy. Excluding offenders from the benefits of retroactivity based on crack-cocaine quantity would consign low-level offenders to more time behind bars than Congress now believes they deserve. Such a result would be inconsistent with the admirable premise behind the mitigating role cap: that drug quantity is not always a good proxy for offender culpability. It is understandable, perhaps, that in 2007 the Commission may have wished to limit retroactivity where the Guideline changes were not directed by Congress. In 2011, by contrast, when the congressional signal is clear and unmistakable in favor of lower crack sentences, the Commission should not be bashful in implementing that directive fully

No Changes To Section 1B1.10 Are Necessary or Appropriate.

For the same reasons the Commission should not limit the scope of retroactivity based on the potential applicability of *Booker*, *Kimbrough*, or *Spears*, no changes to § 1B1.10 are required. That section currently discourages judges from applying a sentence reduction to offenders who already received the benefit of a non-Guideline sentence under 18 U.S.C. §

[34] *See, e.g., United States v. Brewer*, 624 F.3d 900, 909 (8th Cir. 2010); *United States v. Corner*, 598 F.3d 411, 416 (7th Cir. 2010).

3553(a) and *United States v. Booker*.[35] That is the appropriate amount of guidance for district judges: it reminds courts not to give defendants a windfall, but does not completely constrain their discretion to give a reduction where appropriate (as, for example, where the non-Guideline sentence was an above-Guideline sentence).

Conclusion

The ACLU appreciates the opportunity to comment on the proposed amendments. We urge the Commission to seize this historic opportunity to correct the injustices of the past by making Parts A and C of Amendment 2, along with the mitigating role cap, retroactive.

[35] 543 U.S. 220 (2005).