

Calendar No. 316

111TH CONGRESS
2^D SESSION**S. 1789**

To restore fairness to Federal cocaine sentencing.

IN THE SENATE OF THE UNITED STATES

OCTOBER 15, 2009

Mr. DURBIN (for himself, Mr. LEAHY, Mr. SPECTER, Mr. FEINGOLD, Mr. CARDIN, Mr. WHITEHOUSE, Mr. KAUFMAN, Mr. FRANKEN, Mr. DODD, Mr. KERRY, Mr. LEVIN, Mr. BROWN of Ohio, Mr. SANDERS, Mr. BURRIS, Mr. HARKIN, Mr. WEBB, Mr. GRASSLEY, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MARCH 15, 2010

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To restore fairness to Federal cocaine sentencing.

1 *Be it enacted by the Senate and House of Representa-*2 *tives of the United States of America in Congress assembled,*3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Sentencing Act

5 of 2009”.

1 **SEC. 2. COCAINE SENTENCING DISPARITY ELIMINATION.**

2 (a) CSA.—Section 401(b)(1) of the Controlled Sub-
 3 stances Act (21 U.S.C. 841(b)(1)) is amended—

4 (1) in subparagraph (A)(iii), by striking “50
 5 grams” and inserting “5 kilograms”; and

6 (2) in subparagraph (B)(iii), by striking “5
 7 grams” and inserting “500 grams”.

8 (b) IMPORT AND EXPORT ACT.—Section 1010(b) of
 9 the Controlled Substances Import and Export Act (21
 10 U.S.C. 960(b)) is amended—

11 (1) in paragraph (1)(C), by striking “50
 12 grams” and inserting “5 kilograms”; and

13 (2) in paragraph (2)(C), by striking “5 grams”
 14 and inserting “500 grams”.

15 **SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE**
 16 **FOR SIMPLE POSSESSION.**

17 Section 404(a) of the Controlled Substances Act (21
 18 U.S.C. 844(a)) is amended by striking the sentence begin-
 19 ning “Notwithstanding the preceding sentence,”.

20 **SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAF-**
 21 **FICKERS.**

22 (a) INCREASED PENALTIES FOR MANUFACTURE,
 23 DISTRIBUTION, DISPENSATION, OR POSSESSION WITH IN-
 24 TENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.—

25 Section 401(b)(1) of the Controlled Substances Act (21
 26 U.S.C. 841(b)) is amended—

1 (1) in subparagraph (A), by striking
 2 “\$4,000,000”, “\$10,000,000”, “\$8,000,000”, and
 3 “\$20,000,000” and inserting “\$10,000,000”,
 4 “\$50,000,000”, “\$20,000,000”, and “\$75,000,000”,
 5 respectively; and

6 (2) in subparagraph (B), by striking
 7 “\$2,000,000”, “\$5,000,000”, “\$4,000,000”, and
 8 “\$10,000,000” and inserting “\$5,000,000”,
 9 “\$25,000,000”, “\$8,000,000”, and “\$50,000,000”,
 10 respectively.

11 (b) INCREASED PENALTIES FOR IMPORTATION AND
 12 EXPORTATION.—Section 1010(b) of the Controlled Sub-
 13 stances Import and Export Act (21 U.S.C. 960(b)) is
 14 amended—

15 (1) in paragraph (1), by striking “\$4,000,000”,
 16 “\$10,000,000”, “\$8,000,000”, and “\$20,000,000”
 17 and inserting “\$10,000,000”, “\$50,000,000”,
 18 “\$20,000,000”, and “\$75,000,000”, respectively,
 19 and

20 (2) in paragraph (2), by striking “\$2,000,000”,
 21 “\$5,000,000”, “\$4,000,000”, and “\$10,000,000”
 22 and inserting “\$5,000,000”, “\$25,000,000”,
 23 “\$8,000,000”, and “\$50,000,000”, respectively.

1 **SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING**
 2 **THE COURSE OF A DRUG TRAFFICKING OF-**
 3 **FENSE.**

4 Pursuant to its authority under section 994 of title
 5 28, United States Code, the United States Sentencing
 6 Commission shall review and, if appropriate, amend the
 7 sentencing guidelines to ensure that the penalties for an
 8 offense involving trafficking of a controlled substance pro-
 9 vide tiered enhancements for the involvement of a dan-
 10 gerous weapon or violence, including, if appropriate—

11 (1) an enhancement for the use or brandishing
 12 of a firearm or other dangerous weapon;

13 (2) an enhancement for the use, or threatened
 14 use, of violence; and

15 (3) any other enhancement in this respect that
 16 the Commission considers necessary.

17 **SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND**
 18 **CERTAIN AGGRAVATING FACTORS.**

19 Pursuant to its authority under section 994 of title
 20 28, United States Code, the United States Sentencing
 21 Commission shall review and, if appropriate, amend the
 22 sentencing guidelines to ensure that the penalties for an
 23 offense involving trafficking of a controlled substance ade-
 24 quately take into account the culpability of the defendant
 25 and the role of the defendant in the offense, including con-
 26 sideration of whether enhancements should be added, or

1 existing enhancements should be increased, for the fol-
2 lowing aggravating factors associated with the offense:

3 ~~(1) The defendant committed the offense as~~
4 ~~part of a pattern of criminal conduct engaged in as~~
5 ~~a livelihood.~~

6 ~~(2) The defendant is an organizer, manager, su-~~
7 ~~pervisor, or leader of drug trafficking activities.~~

8 ~~(3) The defendant maintained an establishment~~
9 ~~for the manufacture or distribution of the controlled~~
10 ~~substance.~~

11 ~~(4) The defendant distributed a controlled sub-~~
12 ~~stance to an individual under the age of 21 years or~~
13 ~~over the age of 64 years, or to a pregnant individual.~~

14 ~~(5) The defendant involved an individual under~~
15 ~~the age of 21 years or over the age of 64 years, or~~
16 ~~a pregnant individual, in the offense.~~

17 ~~(6) The defendant distributed a controlled sub-~~
18 ~~stance to an individual who was unusually vulnerable~~
19 ~~due to physical or mental condition, or who was par-~~
20 ~~ticularly susceptible to criminal conduct.~~

21 ~~(7) The defendant involved an individual who~~
22 ~~was unusually vulnerable due to physical or mental~~
23 ~~condition, or who was particularly susceptible to~~
24 ~~criminal conduct.~~

1 (8) The defendant used threats, coercion, or in-
2 timidation to involve an individual in the offense.

3 (9) The defendant manufactured or distributed
4 the controlled substance in a location described in
5 section 416(a) or section 419(a) of the Controlled
6 Substances Act (21 U.S.C. 856(a) or 860(a)).

7 (10) The defendant bribed, or attempted to
8 bribe, a Federal, State, or local law enforcement of-
9 ficer in connection with the offense.

10 (11) The defendant was involved in importation
11 into the United States of a controlled substance.

12 (12) Bodily injury or death occurred in connec-
13 tion with the offense.

14 (13) The defendant used another person to pur-
15 chase, sell, transport, or store controlled substances
16 and used impulse, fear, friendship, affection, or
17 some combination thereof to involve such person in
18 the offense when such person had a minimum knowl-
19 edge of the illegal enterprise and was to receive little
20 or no compensation from the illegal transaction.

21 (14) The defendant engaged in witness intimi-
22 dation, tampered, or destroyed evidence, or other-
23 wise obstructed justice in conjunction with the inves-
24 tigation or prosecution of the offense.

1 ~~(15) Any other factor the Commission considers~~
 2 ~~necessary.~~

3 **SEC. 7. INCREASED EMPHASIS ON CERTAIN MITIGATING**
 4 **FACTORS.**

5 Pursuant to its authority under section 994 of title
 6 28, United States Code, the United States Sentencing
 7 Commission shall review and, if appropriate, amend the
 8 sentencing guidelines to ensure that the penalties for an
 9 offense involving trafficking of a controlled substance ade-
 10 quately take into account mitigating factors associated
 11 with the offense, including—

12 ~~(1) whether the defendant had minimum knowl-~~
 13 ~~edge of the illegal enterprise;~~

14 ~~(2) whether the defendant received little or no~~
 15 ~~compensation in connection with the offense;~~

16 ~~(3) whether the defendant acted on impulse,~~
 17 ~~fear, friendship, or affection when the defendant was~~
 18 ~~otherwise unlikely to commit such an offense; and~~

19 ~~(4) whether any maximum base offense level~~
 20 ~~should be established for a defendant who qualifies~~
 21 ~~for a mitigating role adjustment.~~

22 **SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SEN-**
 23 **TENCING COMMISSION.**

24 ~~(a) IN GENERAL.—The United States Sentencing~~
 25 ~~Commission, in its discretion, may—~~

1 (1) promulgate amendments pursuant to the di-
 2 rectives in this Act in accordance with the procedure
 3 set forth in section 21(a) of the Sentencing Act of
 4 1987 (Public Law 100–182), as though the author-
 5 ity under that Act had not expired; and

6 (2) pursuant to the emergency authority pro-
 7 vided in paragraph (1), make such conforming
 8 amendments to the Sentencing Guidelines as the
 9 Commission determines necessary to achieve consist-
 10 ency with other guideline provisions and applicable
 11 law.

12 (b) PROMULGATION.—The Commission shall promul-
 13 gate any amendments under subsection (a) promptly so
 14 that the amendments take effect on the same date as the
 15 amendments made by this Act.

16 **SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.**

17 (a) IN GENERAL.—Not later than 1 year after the
 18 date of enactment of this Act, the Comptroller General
 19 of the United States shall prepare a report analyzing the
 20 effectiveness of drug court programs receiving funds from
 21 the Drug Court Discretionary Grant Program of the
 22 United States Department of Justice’s Office of Justice
 23 Programs.

24 (b) FOCUS.—The report required by subsection (a)
 25 shall—

1 (1) assess the Department of Justice’s efforts
2 to collect data on the performance of federally fund-
3 ed drug courts;

4 (2) address the effect of drug courts on recidi-
5 vism and substance abuse rates;

6 (3) address any cost benefits resulting from the
7 use of drug courts as alternatives to incarceration;

8 (4) assess the Department of Justice’s response
9 to previous recommendations made by the Comp-
10 troller General regarding drug court programs; and

11 (5) make recommendations concerning the per-
12 formance, impact, and cost-effectiveness of federally
13 funded drug court programs.

14 **SECTION 1. SHORT TITLE.**

15 *This Act may be cited as the “Fair Sentencing Act*
16 *of 2010”.*

17 **SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.**

18 (a) *CSA.*—Section 401(b)(1) of the Controlled Sub-
19 stances Act (21 U.S.C. 841(b)(1)) is amended—

20 (1) in subparagraph (A)(iii), by striking “50
21 grams” and inserting “280 grams”; and

22 (2) in subparagraph (B)(iii), by striking “5
23 grams” and inserting “28 grams”.

1 (b) *IMPORT AND EXPORT ACT.*—Section 1010(b) of the
 2 *Controlled Substances Import and Export Act* (21 U.S.C.
 3 960(b)) is amended—

4 (1) in paragraph (1)(C), by striking “50 grams”
 5 and inserting “280 grams”; and

6 (2) in paragraph (2)(C), by striking “5 grams”
 7 and inserting “28 grams”.

8 **SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE**
 9 **FOR SIMPLE POSSESSION.**

10 Section 404(a) of the *Controlled Substances Act* (21
 11 U.S.C. 844(a)) is amended by striking the sentence begin-
 12 ning “Notwithstanding the preceding sentence,”.

13 **SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAF-**
 14 **FICKERS.**

15 (a) *INCREASED PENALTIES FOR MANUFACTURE, DIS-*
 16 *TRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT*
 17 *TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.*—Section
 18 401(b)(1) of the *Controlled Substances Act* (21 U.S.C.
 19 841(b)) is amended—

20 (1) in subparagraph (A), by striking
 21 “\$4,000,000”, “\$10,000,000”, “\$8,000,000”, and
 22 “\$20,000,000” and inserting “\$10,000,000”,
 23 “\$50,000,000”, “\$20,000,000”, and “\$75,000,000”, re-
 24 spectively; and

1 (2) in subparagraph (B), by striking
 2 “\$2,000,000”, “\$5,000,000”, “\$4,000,000”, and
 3 “\$10,000,000” and inserting “\$5,000,000”,
 4 “\$25,000,000”, “\$8,000,000”, and “\$50,000,000”, re-
 5 spectively.

6 (b) *INCREASED PENALTIES FOR IMPORTATION AND*
 7 *EXPORTATION.*—Section 1010(b) of the Controlled Sub-
 8 stances Import and Export Act (21 U.S.C. 960(b)) is
 9 amended—

10 (1) in paragraph (1), by striking “\$4,000,000”,
 11 “\$10,000,000”, “\$8,000,000”, and “\$20,000,000” and
 12 inserting “\$10,000,000”, “\$50,000,000”,
 13 “\$20,000,000”, and “\$75,000,000”, respectively; and

14 (2) in paragraph (2), by striking “\$2,000,000”,
 15 “\$5,000,000”, “\$4,000,000”, and “\$10,000,000” and
 16 inserting “\$5,000,000”, “\$25,000,000”, “\$8,000,000”,
 17 and “\$50,000,000”, respectively.

18 **SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING**
 19 **THE COURSE OF A DRUG TRAFFICKING OF-**
 20 **FENSE.**

21 Pursuant to its authority under section 994 of title
 22 28, United States Code, the United States Sentencing Com-
 23 mission shall review and amend the Federal sentencing
 24 guidelines to ensure that the guidelines provide an addi-
 25 tional penalty increase of at least 2 offense levels if the de-

1 *defendant used violence, made a credible threat to use violence,*
 2 *or directed the use of violence during a drug trafficking of-*
 3 *fense.*

4 **SEC. 6. INCREASED EMPHASIS ON DEFENDANT’S ROLE AND**
 5 **CERTAIN AGGRAVATING FACTORS.**

6 *Pursuant to its authority under section 994 of title*
 7 *28, United States Code, the United States Sentencing Com-*
 8 *mission shall review and amend the Federal sentencing*
 9 *guidelines to ensure an additional increase of at least 2 of-*
 10 *fense levels if—*

11 *(1) the defendant bribed, or attempted to bribe,*
 12 *a Federal, State, or local law enforcement official in*
 13 *connection with a drug trafficking offense;*

14 *(2) the defendant maintained an establishment*
 15 *for the manufacture or distribution of a controlled*
 16 *substance, as generally described in section 416 of the*
 17 *Controlled Substances Act (21 U.S.C. 856); or*

18 *(3)(A) the defendant is an organizer, leader,*
 19 *manager, or supervisor of drug trafficking activity*
 20 *subject to an aggravating role enhancement under the*
 21 *guidelines; and*

22 *(B) the offense involved 1 or more of the fol-*
 23 *lowing super-aggravating factors:*

24 *(i) The defendant—*

1 (I) used another person to purchase,
2 sell, transport, or store controlled sub-
3 stances;

4 (II) used impulse, fear, friendship, af-
5 fection, or some combination thereof to in-
6 volve such person in the offense; and

7 (III) such person had a minimum
8 knowledge of the illegal enterprise and was
9 to receive little or no compensation from the
10 illegal transaction.

11 (ii) The defendant—

12 (I) knowingly distributed a controlled
13 substance to a person under the age of 18
14 years, a person over the age of 64 years, or
15 a pregnant individual;

16 (II) knowingly involved a person under
17 the age of 18 years, a person over the age
18 of 64 years, or a pregnant individual in
19 drug trafficking;

20 (III) knowingly distributed a con-
21 trolled substance to an individual who was
22 unusually vulnerable due to physical or
23 mental condition, or who was particularly
24 susceptible to criminal conduct; or

1 (IV) knowingly involved an individual
 2 who was unusually vulnerable due to phys-
 3 ical or mental condition, or who was par-
 4 ticularly susceptible to criminal conduct, in
 5 the offense.

6 (iii) The defendant was involved in the im-
 7 portation into the United States of a controlled
 8 substance.

9 (iv) The defendant engaged in witness in-
 10 timidation, tampered with or destroyed evidence,
 11 or otherwise obstructed justice in connection with
 12 the investigation or prosecution of the offense.

13 (v) The defendant committed the drug traf-
 14 ficking offense as part of a pattern of criminal
 15 conduct engaged in as a livelihood.

16 **SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND**
 17 **CERTAIN MITIGATING FACTORS.**

18 Pursuant to its authority under section 994 of title
 19 28, United States Code, the United States Sentencing Com-
 20 mission shall review and amend the Federal sentencing
 21 guidelines and policy statements to ensure that—

22 (1) if the defendant is subject to a minimal role
 23 adjustment under the guidelines, the base offense level
 24 for the defendant based solely on drug quantity shall
 25 not exceed level 32; and

1 (2) *there is an additional reduction of 2 offense*
 2 *levels if the defendant—*

3 (A) *otherwise qualifies for a minimal role*
 4 *adjustment under the guidelines and had a min-*
 5 *imum knowledge of the illegal enterprise;*

6 (B) *was to receive no monetary compensa-*
 7 *tion from the illegal transaction; and*

8 (C) *was motivated by an intimate or famil-*
 9 *ial relationship or by threats or fear when the*
 10 *defendant was otherwise unlikely to commit such*
 11 *an offense.*

12 **SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SEN-**
 13 **TENCING COMMISSION.**

14 *The United States Sentencing Commission shall—*

15 (1) *promulgate the guidelines, policy statements,*
 16 *or amendments provided for in this Act as soon as*
 17 *practicable, and in any event not later than 90 days*
 18 *after the date of enactment of this Act, in accordance*
 19 *with the procedure set forth in section 21(a) of the*
 20 *Sentencing Act of 1987 (28 U.S.C. 994 note), as*
 21 *though the authority under that Act had not expired;*
 22 *and*

23 (2) *pursuant to the emergency authority pro-*
 24 *vided under paragraph (1), make such conforming*
 25 *amendments to the Federal sentencing guidelines as*

1 *the Commission determines necessary to achieve con-*
 2 *sistency with other guideline provisions and applica-*
 3 *ble law.*

4 **SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.**

5 *(a) IN GENERAL.—Not later than 1 year after the date*
 6 *of enactment of this Act, the Comptroller General of the*
 7 *United States shall submit to Congress a report analyzing*
 8 *the effectiveness of drug court programs receiving funds*
 9 *under the drug court grant program under part EE of title*
 10 *I of the Omnibus Crime Control and Safe Streets Act of*
 11 *1968 (42 U.S.C. 3797–u et seq.).*

12 *(b) CONTENTS.—The report submitted under sub-*
 13 *section (a) shall—*

14 *(1) assess the efforts of the Department of Justice*
 15 *to collect data on the performance of federally funded*
 16 *drug courts;*

17 *(2) address the effect of drug courts on recidi-*
 18 *vism and substance abuse rates;*

19 *(3) address any cost benefits resulting from the*
 20 *use of drug courts as alternatives to incarceration;*

21 *(4) assess the response of the Department of Jus-*
 22 *tice to previous recommendations made by the Comp-*
 23 *troller General regarding drug court programs; and*

1 (5) *make recommendations concerning the per-*
2 *formance, impact, and cost-effectiveness of federally*
3 *funded drug court programs.*

4 **SEC. 10. UNITED STATES SENTENCING COMMISSION RE-**
5 **PORT ON IMPACT OF CHANGES TO FEDERAL**
6 **COCAINE SENTENCING LAW.**

7 *Not later than 5 years after the date of enactment of*
8 *this Act, the United States Sentencing Commission, pursu-*
9 *ant to the authority under sections 994 and 995 of title*
10 *28, United States Code, and the responsibility of the United*
11 *States Sentencing Commission to advise Congress on sen-*
12 *tencing policy under section 995(a)(20) of title 28, United*
13 *States Code, shall study and submit to Congress a report*
14 *regarding the impact of the changes in Federal sentencing*
15 *law under this Act and the amendments made by this Act.*

Calendar No. 316

11TH CONGRESS
2^D Session

S. 1789

A BILL

To restore fairness to Federal cocaine sentencing.

MARCH 15, 2010

Reported with an amendment