COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
2167 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3309

Honorable Lance M. Africk
Honorable Robert Holmes Bell
Honorable José A. Fusté
Honorable Judith C. Herrera
Honorable Cindy K. Jorgenson
Honorable Irene M. Keeley
Honorable Theodore A. McKee
Honorable Norman A. Mordue
Honorable Charles R. Norgle, Sr.
Honorable William J. Riley
Honorable Thomas J. Rueter
Honorable Reggie B. Walton

Honorable Julie E. Carnes, Chair

TELEPHONE
(404) 215-1510

FACSIMILE
(404) 215-1517

September 13, 2010

Honorable William K. Sessions
Chairman
United States Sentencing Commission
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E., Room 2-500
Washington, DC 20002-8002

Dear Judge Sessions:

I am writing again on behalf of the Criminal Law Committee in response to the United States Sentencing Commission's request for comments regarding whether Amendment 5 should be applied retroactively to previously sentenced defendants. Amendment 5 abolishes USSG §4A1.1(e) (the "recency enhancement"), which provides for an increase of 1-2 criminal history points whenever the offense conduct has occurred within two years after release from a prison sentence of sixty days or more.

I previously wrote to you on August 23, 2010, expressing some substantial preliminary concerns that the Committee had about making this amendment retroactive and requesting additional information in order that the Committee could determine whether to formally take a position on this matter. We appreciate Commission Staff Director Judy Sheon's response to that inquiry on September 1. Following receipt of Ms. Sheon's letter, the Committee has conferred and, after careful consideration, we unanimously recommend that the Commission not make Amendment 5 retroactive.

In summarizing our position, I incorporate the more expansive discussion of some of these concerns that was set out in our August 23 letter. As that letter indicated, the Committee questions the need for retroactivity of this particular amendment. As noted, even prior to the Supreme Court's decision in *United States v. Booker,*[1] calculation of a defendant's criminal history was one of the relatively few areas in which the Guidelines explicitly invited a downward departure. Specifically, a sentencing court was permitted to downwardly depart if it deemed the criminal history calculation to have over-represented the seriousness of the defendant's criminal history or the likelihood that the defendant would commit future crimes.[2] Accordingly, if a district court had concluded that the addition of recency points would elevate a defendant's criminal history calculation beyond what was warranted, the court was expressly permitted to consider a downward departure. Of course, after *Booker,* a sentencing court would have perceived even greater discretion to

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[1] 543 U.S. 220 (2005).

[2] *See* USSG §4A1.3(b). On October 27, 2003, as a result of a statutory directive, §4A1.3(b) was amended to disallow a downward departure based on over-representation of criminal history for armed career criminals and repeat and dangerous sex offenders. *See* USSG §4A1.3(b)(2)(B).

eliminate recency points in making its decision as to what a reasonable sentence would be, under 18 U.S.C. § 3553.

The data contained in your September 1 letter heightens the above concern. Your letter indicates that 80% of the defendants whose sentencing ranges would be reduced by a retroactive application of Amendment 5 were sentenced after promulgation of the *Booker* decision. Moreover, even among the 20% of affected defendants who were sentenced before *Booker*, about 1/3 of these defendants received a downward departure for a variety of reasons, including an over-represented criminal history score. In deciding the level of the departure, the sentencing courts in these cases presumably took into account any concerns about the enhancement triggered by the addition of recency points.

The September 1 letter also indicates that very few defendants who received an enhancement for recency would even be subject to a lower sentencing range as a result of the elimination of the recency enhancement. The letter indicates that there are approximately 43,000 defendants still in prison who received a recency enhancement. Yet, only about 8,000 of those defendants would see their sentencing range lowered by elimination of the recency enhancement.

While this data indicates that retroactivity would provide only a *de minimus* benefit for the population of defendants who received a recency enhancement, it also suggests that retroactivity could create substantial burdens for district courts required to address the thousands of motions that would presumably be filed by prisoners seeking relief. That is, while only about 8,000 inmates would be eligible for consideration of a reduction, it is reasonable to assume that a large number of the 43,000 inmates who received a recency enhancement would nonetheless pursue a reduction. While 35,000 of those defendants would ultimately not be eligible for a

reduction, district courts and probation officers would nevertheless be required to expend a great amount of their scarce time dealing with these requests.

Finally, in examining the burdens that retroactivity would impose, nation-wide, it is also important to emphasize that your data indicates that these burdens would fall disproportionately on Southwest border districts, whose judges and probation officers already struggle to handle their burgeoning caseload. According to the Commission's data, four of the five districts that would be most impacted by retroactivity are border courts (Texas Southern, Texas Western, Arizona, and California Southern). Collectively, almost 25% of all eligible defendants come from these four districts.

In opposing retroactivity for this particular amendment, we are aware that there will be occasions in which retroactivity will be warranted for an amendment. Indeed, the Commission will recall that in 2007 the Committee recommended that the Commission make retroactive the two-level reduction for crack cocaine offenses. While the Committee was aware that there would be significant workload implications for judges and court staff as a result of retroactivity, the other concerns expressed in this letter as to retroactivity for the recency amendment did not exist for the crack cocaine amendment. Most importantly, the amendment reducing the disparity between penalties for powder cocaine and crack cocaine addressed a disparity that had been almost universally criticized and that had undermined public confidence in the federal criminal justice system.[3] Retroactive application of that amendment helped to mend somewhat this damaged public confidence. In contrast, the Committee is unaware of any comparable level of criticism of the recency enhancement.

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[3] JCUS-SEP 06, p. 18.

The Criminal Law Committee fully understands that the decision whether to make this amendment retroactive rests with the Sentencing Commission. Therefore, we are very appreciative of this opportunity to present our assessment. If the Committee can provide any further additional information, please feel free to contact me at (404) 215-1510.

Sincerely,

Julie E. Carnes
Chair, Criminal Law Committee

cc: Judy Sheon
John Hughes