U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

September 13, 2010

The Honorable William K. Sessions III
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Response to the Commission's Request for Comment on
Possible Retroactive Application of Amendment 5 ("Recency" Points)

Dear Chief Judge Sessions:

This letter responds to the Commission's request for comment on whether Amendment 5, submitted to Congress in April, and pertaining to the use of "recency" as a factor in the calculation of the criminal history score, should be applied retroactively to previously sentenced defendants. The Department of Justice strongly opposes retroactive application of the amendment.

Pursuant to 28 U.S.C. § 994, on April 29, 2010, the Commission submitted to Congress a package of amendments to the sentencing guidelines. Included in that package was Amendment 5 which, absent congressional action, will delete §4A1.1(e), known as the "recency" provision, from the calculation of the criminal history score. Since the advent of the guidelines, this provision has added up to two points to an offender's criminal history score if the offender committed the instant offense less than two years after being released from criminal justice supervision. Amendment 5 would have the effect of lowering the applicable guideline range for certain offenders. The Department opposed the amendment back in the spring for reasons we previously articulated. The Commission has now requested comment as to whether the amendment should be included in subsection (c) of USSG §1B1.10, which provides for retroactive application of certain amendments that lower an offender's guideline range.

We oppose retroactive application of Amendment 5 for several reasons. First, we think retroactive application of the "recency" amendment would be inconsistent with the Commission's stated policy regarding which amendments should be applied retroactively. Among the factors the Commission has said it considers in selecting amendments for retroactivity are "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 . . . ." *Guidelines Manual* at 41. These considerations point against retroactive application of the "recency" amendment.

In its submission to Congress, the Commission indicated that a primary purpose underlying Amendment 5 was "Commission data [that] indicated that many of the cases in which recency points apply are sentenced under Chapter Two guidelines that have provisions [that already take into account] criminal history" and that "[t]he amendment responds to suggestions that recency points are not necessary to adequately account for criminal history in such cases."[1] Examples of such Chapter Two guidelines are USSG §§2L1.2 (Unlawfully Entering or Remaining in the United States) and 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The Commission's Impact Analysis[2] indicates, however, that if the "recency" amendment is applied retroactively, the offenders who would most benefit would not be those who were sentenced pursuant to USSG §§2L1.2 or 2K2.1, but rather drug trafficking offenders sentenced pursuant to §2D1.1 (where the applicable Chapter Two guidelines generally do *not* take into account criminal history). *See* Commission Impact Analysis at 13, Table 5. On the other hand, the Commission's coding analysis indicates that, as contemplated by the Commission, far greater numbers of §§2L1.2 and 2K2.1 offenders will benefit from prospective application of the amendment. *See* Computation Report at 15-18.[3] Thus, retroactive application of the amendment would not achieve one of the prime articulated purposes that the Commission cited in promulgating the amendment; and as a result such application would be inconsistent with Commission policy in selecting amendments for inclusion in USSG §1B1.10(c).

Moreover, the Commission estimates that over 42,000 federal prisoners currently in the custody of the Bureau of Prisons received "recency" points as part of their guideline calculation. While the Commission also estimates that if the "recency" amendment is applied retroactively, *only* about 8,000 prisoners legitimately[4] will be eligible for a sentence reduction, *see*

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[1] *See* U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary* (April 30, 2010), www.ussc.gov/2010guidfinalamend10.pdf, at 14.

[2] U.S. Sentencing Commission, *Analysis of the Impact of Amendment to Section 4A1.1 of the Sentencing Guidelines if the Amendment Were Applied Retroactively* (Sept. 1, 2010), www.ussc.gov/general/20100901_Recency_Retro.pdf ("Commission Impact Analysis").

[3] U.S. Sentencing Commission, *Computation of "Recency" Criminal History Points under §USSG 4A1.1(e)* (Aug. 2010), www.ussc.gov/general/USSC_Recency_Report_2010818w.pdf ("Computation Report").

[4] In contrast to the situation presented by retroactive application of 2007 guideline amendments related to

Commission Impact Analysis at 5-6, 8, we think it is very likely that tens of thousands of offenders will file motions requesting sentence reductions. As the Chief Judge of the District of Arizona indicated recently in a letter to the Commission, applying Amendment 5 retroactively "would trigger a totally unmanageable number of post-conviction resentencing motions made pursuant to 18 U.S.C. § 3582(c)(2). Such a development could not come at a worse time for the 5 district courts with the highest criminal caseloads in the nation [the southwest border districts]." John M. Roll, *Letter to Judith W. Sheon, Staff Director, U.S. Sentencing Commission,* Sept. 3, 2010.

Retroactive application of the amendment would require collecting, reviewing, and analyzing not only a Pre-Sentence Investigation Report ("PSR"), but the applicable Statement of Reasons ("SOR") and perhaps the sentencing transcript as well, as a determination must be made not only as to whether the PSR *recommended* inclusion of "recency" points in the calculation of the offender's criminal history score, but also if the district court actually *applied* such "recency" points in calculating the offender's sentence. The Commission's data confirms what Judge Roll suggested: the burden would fall disproportionately on district courts, prosecutors, and probation officers in border districts. *See* Commission Impact Study at 10-11. Because that burden would come without reaching the Commission's primary goal in promulgating the amendment, retroactive application of the "recency" amendment is inappropriate. In addition, retroactive application could result in a large number of defendants becoming eligible for immediate release, further burdening an already overburdened system of post-incarceration supervision.

Second, it is important to note that the criminal history provisions of the guidelines have always authorized a court to sentence outside the guidelines if that court believed that the criminal history score "over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." USSG §4A1.3. As you know, the Commission's statistics show that courts have not been shy in exercising this authority over the years. We do not think it is sound public policy to send thousands of cases back to court for a second look at whether the criminal history score "over-represented" the seriousness of the defendant's criminal history. This is the essence of what applying Amendment 5 retroactively would mean. Given the small magnitude of the reduction from the amendment and the significant burden on the courts of retroactive application of the amendment, we feel strongly that applying Amendment 5 retroactively is inappropriate under circumstances where a mechanism for courts to address criminal history over-representation has always existed and where courts have always felt free to avail themselves of that mechanism.

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crack cocaine (where it was simple to determine whether a defendant's sentence was based on an offense involving crack cocaine), in the "recency" context, because all offenders have criminal history scores that ultimately determined their applicable guideline range and because the notions of status and recency are understandably similar to lay persons, there is great opportunity not only for abuse of the system but for legitimate confusion as to whether an offender truly is eligible for consideration for a sentence reduction.

We appreciate the opportunity to provide the Commission with our views concerning the application of Amendment 5 to previously sentenced defendants. We hope in the coming years, the Commission will take a closer look at the issue of retroactive application of the guidelines generally. We think it is instructive that the default rule in Congress is that changes to substantive criminal laws, including sentencing laws, are to be applied prospectively only (*see*, 1 U.S.C. § 109); and the default rule in the courts is that changes to criminal procedure rules are to be applied prospectively only (*see Teague v. Lane*, 489 U.S. 288, 301 (1989)). Given the legislative history of the Sentencing Reform Act, the current advisory nature of the guidelines, and the default rules on retroactivity in Congress and the courts, we think the time is ripe for a reexamination of the Commission's policy towards retroactive application of guideline amendments, generally.

We look forward to continued work with you and the other commissioners as the Commission reviews the operation of federal sentencing and implements its policy agenda for the 2010-11 amendment cycle.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Judy Sheon, Staff Director
Ken Cohen, General Counsel