

United States Sentencing Commission
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Public Affairs
Retroactivity Public Comment

**Public Comment on Sentencing Guidelines for United States Courts:
Amendment 3 Retroactivity**

The National Gay and Lesbian Task Force (Task Force) and the undersigned organizations are pleased to have the opportunity to comment on the Sentencing Guidelines for United States Courts: Amendment 3 Retroactivity because we believe fair and effective sentencing guidelines are of vital importance to our community and to the American public at large.

The United States Sentencing Commission (Commission) has done extraordinary work to improve the strength and integrity of the federal sentencing system, including reducing base offense levels for crack sentences by two levels, applying that reduction retroactively, and repeatedly recommending amendment of the 100-to-1 sentencing disparity between crack and powder cocaine offenses. We encourage the Commission to continue this important work by applying Amendment 3 reduced sentencing guidelines retroactively to all previously sentenced defendants.

Reducing Applicable Sentences Will Result in Significant Net Benefit to Society

Amendment 3 revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in Section 2D1.1 incorporate the statutory mandatory minimum penalties for such offenses. Specifically, the Amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties.

Congress intended the Commission to establish sentencing guidelines that would reconcile multiple purposes of punishment while promoting the goals of uniformity and proportionality. As the Commission makes clear in its notice, setting guidelines above mandatory minimums is no longer necessary to secure or reward cooperation of defendants, and has little to no effect on rates of guilty pleas. Similarly, recent studies have shown that mandatory minimums and guidelines that exceed them have little impact on public safety or recidivism. The reduction of offense levels pursuant to Amendment 3, then, will help to reduce mass incarceration, lessen the strain on capacity in prisons and jails, and relieve financial burdens on the Bureau of Prisons (BOP) without having a significant negative impact on society.

Setting Guidelines Above Mandatory Minimum Penalties Is No Longer Necessary

Setting base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve the stated purpose of permitting downward adjustment for defendants who

plead guilty or otherwise cooperate with authorities. Based on changes in the law and recent experience with similar reductions in base level sentences for crack cocaine offenses, Amendment 3 should not negatively affect the rates at which offenders otherwise cooperate with authorities.

Advocates of mandatory minimums believe they are an important law enforcement tool, supplying the police and prosecutors with the leverage necessary to secure the cooperation and testimony of low-level offenders against their more senior confederates.ⁱ Commission data indicates, however, that defendants are actually more likely to plead guilty if they qualify for a reduced sentence below the mandatory minimum than if they do not. In 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for a reduced “safety valve” sentence, and a rate of 93.9 percent if they did not. According to the Commission, sentencing guidelines should reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. Therefore, Amendment 3 is essential to ensure sentencing guidelines are fair, efficient, and commensurate with the best available data.

Public Safety and Recidivism

The Department of Justice (DOJ) has indicated that Amendment 3 will not undermine public safety or law enforcement initiatives. Several stakeholders have also noted that the Amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety. The Commission itself carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that Amendment 3 should not jeopardize public safety. Commission studies compared the recidivism rates for offenders who were released early as a result of the 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This suggests that modest reductions in drug penalties such as those provided by this Amendment will not increase the risk of recidivism.

Substantial evidence demonstrates that additional severity has a relatively small deterrent effect. Put simply, criminals respond more strongly to the chance of getting caught than to the consequences that might occur if they get caught. Interviews with convicted felons found that a mere 2 percent had even an inkling about potential punishments for the crimes they committed. Another 18 percent knew nothing at all about potential punishments, and more than a third reported that they had not thought about punishment at all at the time of the crime.

Furthermore, existing statutory enhancements ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. The Drug Quantity Table as amended provides an unchanged base offense level of 38 for offenders who traffic the greatest quantities of most drugs. Therefore, sentences for these offenders will not be reduced. Contrary to opponents’ claims, studies within prison populations demonstrate that the vast majority of offenders commit few crimes; a core group of serious offenders commits a comparatively large portion of crimes.ⁱⁱ Society is not particularly well served when those offenders who commit less

serious crimes are incarcerated for long periods: few crimes are avoided, and offenders who have served long sentences have more difficulty successfully reentering their communities.

The Amendment also maintains minimum base offense levels that preclude sentences of only probation for drug trafficking offenders with even small quantities of most drugs. Attorney General Eric Holder believes this adjustment to sentencing ranges will send a strong message about the fairness of our criminal justice system, and will help rein in federal prison spending while focusing limited resources on the most serious threats to public safety. This Amendment would permit resources for housing prisoners to be used to reduce overcrowding, to enhance programming designed to reduce risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Overcapacity and Cost

Amendment 3 was motivated in part by the significant overcapacity of the Federal Bureau of Prisons (BOP) and the concomitant costs of housing prisoners. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are formulated to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons. According to the Commission, Federal prisons are now 32 percent over capacity, and drug trafficking offenders account for 50 percent of the federal prison population.

In 1984, when the Sentencing Reform Act was passed, the federal prison population was 34,263.ⁱⁱⁱ By 1994, it was 95,034;^{iv} by 2004, it was 180,328.^v As of July 3, 2014, there are 216,746 prisoners in the custody of the federal government.^{vi} The severity of the current guidelines has contributed to the crisis of mass incarceration in the United States, which exacts alarming human and economic tolls on our society. The federal government cannot maintain a federal prison system that, since 1980, has grown at the astonishing rate of almost 800 percent.

The Commission considers the Amendment an appropriate step toward alleviating the overcapacity of the federal prisons. The Commission estimates that it will affect the sentences of 17,457 (69.9 percent) of drug trafficking offenders sentenced under Section 2D1.1 and their average sentence will be reduced by 11 months (17.6 percent) from 62 months to 51 months. These sentence reductions will correspond to an estimated reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date. A two-level reduction in guideline sentencing would still incorporate mandatory minimum sentences, while lowering existing penalties and reducing cost and population in Bureau of Prisons facilities.

Reducing the prison population is essential to reducing the untenable cost of the prison system. In 2012, on the federal, state, and local levels it cost \$80 billion to incarcerate 2.3 million people in this country. Spending on federal prisons alone exceeds \$6 billion a year, or more than 25 percent of the entire budget for the DOJ. As indicated above, the certainty of arrest, prosecution, conviction, and punishment has greater effect than severity of punishment in decreasing crime. If, for example, a one-year sentence for a crime has the same deterrent effect as a five-year sentence, an additional four years of imprisonment inflicts unnecessary pain on the offender being incarcerated and imposes an additional monetary burden on society. Unnecessarily high guideline sentences, therefore, waste scarce criminal justice resources. The DOJ has indicated

that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, crime victim services, and crime prevention programs, all of which promote public safety. Reducing this overcapacity and cost should be an urgent consideration of the Commission, and applying Amendment 3 retroactively will help to address this dire need.

Amendment 3 Should be Applied Retroactively to All Previously Sentenced Defendants

To achieve the central goals of promoting public safety and public trust, and to ensure a fair and effective criminal justice system, Amendment 3 must be applied retroactively. In response to the passage of the Sentencing Reform Act, Attorney General Eric Holder and other stakeholders have consistently emphasized the need for continued sentencing reform in the American criminal justice system.^{vii} Retroactive applications of the Amendment is both essential to reduce prison populations and unlikely to negatively impact overall crime rates. Perhaps more importantly, retroactive application is consistent with Congress's intent under 28 U.S.C. §994(u).

Congress Intended That Amendments Be Applied Retroactively Where Amendment is Non-Trivial

In his dissent in Dillon v. United States, 560 U.S. 817 (2010), Justice Stevens gave a short, pointed description of Congress's mandate to the Commission regarding review and amendment of sentencing guidelines. Where the Commission determines that an amendment is appropriate, he explains, it must specify under what circumstances it is retroactive. He clarifies that under 28 U.S.C. §994(u), Congress "indicat[es] that most, if not all, substantial amendments are to receive some type of retroactivity." Id. at 847.

The Amendment under consideration here is clearly a substantial one. Clarifying amendments, in contrast, tend to be of the sort that interpret terms or add mild nuance to prior commentary. Amendment 3 fundamentally changes the application of the guidelines to sentences that fall under its relevant provisions. Under its Congressional mandate, then, the Commission should apply the Amendment retroactively. In Justice Stevens's words: "[W]hile Congress has left the retroactivity decision to the Commission's discretion, it has done so with the presumption that some form of retroactive relief is appropriate when a Guidelines amendment is nontrivial." Id.

Applying Amendment 3 retroactively is of Critical Importance

While the adoption of Amendment 3 will aid in the goal of reducing the level of mass incarceration in future years, retroactive application of sentencing guidelines will have an immediate ameliorative effect on prison populations, with little to no impact on criminal behavior. In fact, retroactive application of sentencing guidelines has proven successful in the past. When the base offense level for crack cocaine offenses was reduced by two levels in 2007, and that amendment was applied retroactively in 2008, some opponents of the change predicted it would cause a rise in crime. A Commission study, however, detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. In fact, recidivism rates were actually *lower* among offenders whose sentences were reduced. When the reduced sentences were applied retroactively to offenders, 43.3 percent re-offended within five years. In the comparison group, whose sentences were not reduced, 47.8

percent re-offended within five years. Therefore, when retroactivity was applied, offenders were actually 4.5 percent *less* likely to re-offend. Offenders whose sentences were reduced because of retroactive application were also less likely to experience a new arrest (33.9 percent) or a revocation without an arrest (9.4 percent) than those in the comparison group (37.3 percent and 10.6 percent, respectively).

Applying Amendment 3 retroactively will also address the current overcapacity and excessive costs of the Federal Bureau of Prisons, both immediately and in the future. Offenders will be released earlier and will be less likely to re-offend and return to prison. At the same time, retroactively applying Amendment 3 will increase public trust in the fairness of the American criminal justice system, and will allow resources currently spent on incapacitation to be allotted to improving public safety.

Given the data on recidivism, there is no rational reason not to apply Amendment 3 retroactively. When coupled with the benefits to the economic sustainability of the federal incarceration system and the increase to public safety programs, applying the amendment to all previously sentenced defendants is the only appropriate course of action. Moreover, absent explicit direction from the Commission that an amendment is to be applied retroactively, courts are robbed of the discretion to so apply an amendment. See, e.g., *United States v. Cabrera-Polo*, 376 F.3d 29, 33 (1st Cir. 2004); *United States v. Gill*, 68 Fed.Appx. 354, 355 (3rd Cir. 2003). We therefore strongly urge the Commission to apply Amendment 3 retroactively to all defendants.

Retroactive Application is of Critical Importance to the LGBT Community

Although retroactive application of Amendment 3 will apply equally to all previously sentenced offenders, regardless of sexual orientation or gender identity, the fact that LGBT people are disproportionately represented in the criminal justice system makes this issue one of particular importance to the undersigned direct service and advocacy organizations.

Discrimination against LGBT people not only follows them into the criminal justice system, but also helps to put them there.^{viii} Outside the criminal justice system, poverty, homophobia, and transphobia often push LGBT people into the criminal justice system.

LGBT youth and youth questioning their sexual orientation or gender identity (LGBTQ) face increased rates of family rejection,^{ix} victimization in schools,^x and criminalization.^{xi} They are disproportionately represented in child welfare and juvenile justice systems,^{xii} and lack protections against employment discrimination in a majority of states. Surveys of LGB youth suggest that they are more likely to smoke cigarettes, drink alcohol, smoke marijuana, use cocaine, use inhalants, use ecstasy, use heroin, and use methamphetamines than their heterosexual peers.^{xiii} All of these inequities may be even more pronounced for LGBT people who are also members of other groups that are disadvantaged on the basis of factors such as race, ethnicity, geography, or disability.

LGBT homeless youth also have a higher tendency to engage in survival sex (exchange of sex for basic needs such as food, clothing, shelter, money, or protection^{xiv}).^{xv} These issues are compounded for youth who have been rejected from their homes after coming out as LGBT. In one study, lesbian, gay, and bisexual youth who reported higher levels of family rejection during

adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared with peers from families with no or low levels of family rejection.^{xvi}

In part as a result of these systemic factors, LGBT people experience disproportionately high rates of profiling, arrest, and incarceration. One study found that as many as 73 percent of LGBT people have had run-ins with the police in the past five years.^{xvii} For many members of the LGBT community, police interactions have results that are directly in opposition to their purpose. For example, in 2012, only 16.5 percent of LGBTQ survivors of intimate partner violence (IPV) interacted with the police. Of those who interacted with police, only half ended up reporting IPV incidents. Following nearly one-third of those reports, the survivor was arrested instead of the abusive partner.^{xviii} Not surprisingly, 19 percent of survivors describe police attitudes as “hostile,” another 25 percent reported indifferent attitudes from police. Their descriptions reflect their experience: 48 percent of LGBTQ survivors of intimate partner violence report experiences of police misconduct, with 31.3 percent reporting verbal abuse, 10.9 percent reporting slurs or bias language, 14.1 percent reporting physical violence, and 1.6 percent reporting sexual violence.^{xix} While we lack data on LGBT interactions with police that result from drug-related incidents, we can extrapolate from these studies that discriminatory policing of LGBT people is far from isolated.

Homophobia within the criminal justice system is compounded by racism, misogyny, and class bias that are endemic to the system. Race, ethnicity, culture, economics, gender, gender identity, sexuality, and age all play a role in determining who enters the criminal justice system, and how harsh their sentence will be. Racial disparities in drug offense incarceration are staggering: while whites engage in drug offenses at a higher rate, African-Americans are incarcerated at a rate that is ten times greater than that of whites.

Discrimination in sentencing also works against many LGBT people. Prosecutors may use homophobic arguments to encourage harsher sentences for LGBT defendants. Incarcerated LGBT people are often subjected to harassment and abuse, both from other prisoners and from guards and other staff. Sexual assault and rape are rampant in many correctional facilities. A study cited in the National Prison Rape Elimination Commission’s Report found that the rate of sexual abuse was significantly higher among gay prisoners than heterosexual prisoners – 41 percent compared to 9 percent, respectively.^{xx} Transgender women are especially at risk, though gay men, lesbians, and bisexual women are also frequent targets.^{xxi} The National Gay and Lesbian Task Force and National Center for Transgender Equality’s National Transgender Discrimination Study reported similarly stark statistics: 16 percent of transgender people who had been in prison were physically assaulted, and 15 percent were sexually assaulted.^{xxii} The status of being a prisoner does not diminish an individual’s need for supportive services. In fact, the NPREC report found that readjustment after release from jail or prison was particularly hard for former inmates who had experienced sexual assault while incarcerated.^{xxiii}

These cycles of criminalization and discriminatory treatment of LGBT people can trigger a lifetime of economic and social instability that is bad for LGBT people and for the community at large.^{xxiv} Unfortunately, this translates into higher substance use, and presumably higher rates of

arrest and incarceration on drug-related offenses. Retroactive application of Amendment 3 would help to reduce the harsh sentences that members of our community are serving. We strongly urge the Commission to use its discretion to apply Amendment 3 to all previously sentenced defendants.

Conclusion

We appreciate the Commission's commitment to ensuring fair and effective sentencing guidelines, and we encourage the Commission to build on this leadership by applying Amendment 3 retroactively. This is important to the LGBT community and to the American criminal justice system and population at large. If the Commission has any questions about the content of this comment, please contact Meghan Maury, Policy Counsel at the National Gay and Lesbian Task Force, at (202) 639-6322, or by email at mmaury@thetaskforce.org.

Sincerely,

The Center for HIV Law and Policy
Gay & Lesbian Advocates & Defenders (GLAD)
Immigration Equality
League of United Latin American Citizens
Los Angeles LGBT Center
National Center for Lesbian Rights
National Center for Transgender Equality
National Gay and Lesbian Task Force
National Latina Institute for Reproductive Health (NLIRH)

ⁱBernick, Evan and Paul Larkin. "Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms." The Heritage Foundation. <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>

ⁱⁱ Michael A. Simons, "Departing Ways: Uniformity, Disparity, and Cooperation in Federal Drug Sentences," *Villanova Law Review*, Vol. 47, Issue 2, 2002, 935. <http://www.wv.idebate.org/debatabase/debates/law-crime/house-supports-mandatory-sentencing>

ⁱⁱⁱ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984 12 tbl. 1 (1987).

^{iv} U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 66 tbl. 5.1 (1996).

^v U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 3 tbl. 3 (2005).

^{vi} Federal Bureau of Prison, Population Statistics, (July 3, 2014), http://www.bop.gov/about/statistics/population_statistics.jsp

^{vii} Attorney General Eric Holder Speaks Before the U.S. Sentencing Commission, June 1, 2011, Washington, D.C. Wednesday. The United States Department of Justice. <http://www.justice.gov/iso/opa/ag/testimony/2011/ag-testimony-110601.html>

^{viii} *Corrupting Justice: A Primer for LGBT Communities on Racism, Violence, Human Degradation & The Prison Industrial Complex*. American Friends Service Committee. <http://www.prisonpolicy.org/scans/corrupting-justice.pdf>

^{ix} Ryan, C., Russell, S.T., Huebner, D, Diaz, R. Sanchez, J. (2009). *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*. Journal of the American Academy of Pediatrics, 123, 346-352. (Finding that LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared with peers from families with no or low levels of family rejection.) Available at <http://pediatrics.aappublications.org/content/123/1/346.full.pdf+html>

^x Kosciw, J. G., Greytak, E. A., Bartkiewicz, M. J., Boesen, M. J., & Palmer, N. A. (2012). *The 2011 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation's schools*. New York: GLSEN. (Finding that 63.5% of LGBTQ youth surveyed felt unsafe because of their sexual orientation, and 43.9% because of their gender expression.)

^{xi} Katayoon Majd et al. (2009) *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*. (Finding that although LGBTQ youth only comprise about 5 to 7% of the nation's youth, 13 to 15% of youth in the juvenile justice system are LGBTQ).

^{xii} *Id.*

^{xiii} Kann, L, et al. 2011. *Sexual identity, sex of sexual contacts, and health-risk behaviors among students in grades 9-12 – Youth Risk Behavior Surveillance, selected sites, United States, 2001-2009*. MMWR 60(SS07): n. vi. Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6007a1.htm>

^{xiv} *Runaway and Homeless Youth and Relationship Violence Toolkit*, Glossary of Terms, National Resource Center on Domestic Violence (2009), <http://www.nrcdv.org/rhydvtoolkit/terms-definitions/glossary.html#SurvivalSex>, last visited June 16, 2012.

^{xv} Nico Sifra Quinta, Josh Rosenthal, and Jeff Krehely, *On the Streets: The Federal Response to Gay and Transgender Homeless Youth*, 19 (June, 2010), <http://www.americanprogress.org/issues/2010/06/pdf/lgbtyouthhomelessness.pdf>.

^{xvi} Ryan, C., Russell, S.T., Huebner, D, Diaz, R. Sanchez, J. (2009). *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, Journal of the American Academy of Pediatrics, 123, 346-352.

^{xvii} Moodie-Mills, Aisha C. (2014). *Infographic: Why Are So Many LGBT People and People Living with HIV Behind Bars?* Center for American Progress. <http://americanprogress.org/issues/lgbt/news/2014/05/07/88950/infographic-why-are-so-many-lgbt-people-and-people-living-with-hiv-behind-bars/>

^{xviii} National Coalition of Anti-Violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2012*, 10 (2013), available at http://www.avp.org/storage/documents/ncavp_2012_ipvreport.final.pdf.

^{xix} *Id.* at 21.

^{xx} National Institute of Corrections, *National Prison Rape Elimination Commission Report*, 7-8 (June 2009), available at

http://cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF

^{xxi} *Id.*

^{xxii} Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 76 (2011), available at http://www.thetaskforce.org/reports_and_research/ntds.

^{xxiii} National Institute of Corrections, *National Prison Rape Elimination Commission Report*, 7-8 (June 2009), available at

http://cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF

^{xxiv} Moodie-Mills, Aisha C. (2014). *Infographic: Why Are So Many LGBT People and People Living with HIV Behind Bars?* Center for American Progress. <http://americanprogress.org/issues/lgbt/news/2014/05/07/88950/infographic-why-are-so-many-lgbt-people-and-people-living-with-hiv-behind-bars/>