Written Testimony of Jesselyn McCurdy on behalf of the American Civil Liberties Union Before the United States Sentencing Commission

Hearing on

"Retroactive application of the Recent U.S. Sentencing Commission Amendment to the Drug Quantity Table"

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Submitted by the
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The American Civil Liberties Union ("ACLU") is pleased to submit this testimony on the retroactivity of the amendment to the U.S. Sentencing Guidelines promulgated by the Commission on April 30, 2014, that would revise the guidelines applicable to drug trafficking offenses by lowering the base offense levels ("BOLs") in the Drug Quantity Table in Section 2D1.1. The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. For years, we have been at the forefront of the fight against over-incarceration and its devastating impact on the people, families, and communities that become ensnared in the criminal justice system, its failure to produce a proportional increase in public safety, its waste of precious resources, and its disproportionate harm on poor communities of color.

The ACLU believes the Commission should apply its amendment to the Drug Quantity Table retroactively because it would be a substantial step toward improving the fairness and proportionality of the Guidelines, promoting individualized consideration of specific offense conduct, and mitigating excessively punitive provisions that have promoted not only racial disparities in sentencing but also a sustained and costly explosion in the number of individuals in the federal penal system.

I. The Two-Level Adjustment to the Base Offense Levels for All Drugs Should be Applied Retroactively

Under U.S. Sentencing Guidelines Manual § 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.[1] All three of these factors support applying the entire amendment retroactively.

a. Purpose of the Drug Quantity Table Amendment

The Commission's amendment making an across-the-board two-level reduction in Guideline sentencing for defendants in drug trafficking cases represents an important step in improving the fairness of the Guidelines. Problematically, the previous BOLs of 26 and 32 established Guideline ranges that actually – and unnecessarily – exceeded mandatory minimum penalties and forced judges to rely on their sentencing discretion and authority to vary from the advisory Guidelines to achieve just sentencing outcomes.[2] The Commission's recent two-level reduction to the BOLs – which still incorporate mandatory minimum sentences – mitigates some

[1] U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background (2013).
[2] *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

of the worst harms of the mandatory minimums and their emphasis on quantity rather than actual criminal conduct. Specifically, rather than the drug quantity thresholds in the Drug Quantity Table corresponding to a Guideline range above the mandatory minimum penalty, the amendment establishes guideline ranges with a lower limit below the statutory minimum (and an upper limit above).

While the ACLU welcomes this amendment, we are troubled that even this approach remains embedded in a larger flawed sentencing structure in which the Guidelines are firmly tethered to statutory penalties. As is now well known, Congress made the unfortunate mistake of having drug type and quantity, rather than role and culpability, trigger these harsh mandatory minimums. Judge John Gleeson of the U.S. District Court in the Eastern District of New York recently detailed the "deep[] and structural[] flaw[s]"[3] of the drug trafficking guidelines for heroin, cocaine, and crack offenses in his decision in *United States v. Diaz*.[4] As Judge Gleeson points out, the quantity-driven mandatory minimums:

> created a problem for the original Commission. Those sentences were far more severe than the average sentences previously meted out to drug trafficking offenders. . . . The problem for the Commission was that it might not look right for a defendant to have a Guidelines range significantly lower than the minimum sentences mandated by Congress in the ADAA.[5]

Judge Gleeson lamented that in response, the Commission "jettisoned its data entirely and made the quantity-based sentences in the ADAA [Anti-Drug Abuse Act of 1986] proportionately applicable to *every* drug trafficking offense."[6] The Guidelines are therefore based neither on empirical data nor national experience. Judge Gleeson further noted that the Commission's mistake was compounded by Congress's error: "the Commission's linkage of the Guidelines ranges for drug trafficking offenses to the ADAA's weight-driven [mandatory minimum] regime has resulted in a significantly more punitive sentencing grid than Congress intended."[7]

The ACLU therefore continues to urge the Commission to "use its resources, knowledge, and expertise to fashion fair sentencing ranges for drug trafficking offenses"[8] by "de-link[ing] the drug trafficking Guidelines ranges from the ADAA's weight-driven mandatory minimum sentences" and reducing the Guidelines ranges for these offenses.[9]

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[3] United States v. Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013).
[4] *Id.*
[5] *Id.* at *5.
[6] *Id.* at *6.
[7] *Id.*
[8] *Id.* at *9.
[9] *Id.* at *11.

In the meantime, however, since the Guidelines remain linked to statutory weight determinative mandatory minimum sentences, the ACLU supports the Commission's across-the-board two-level reduction in Guideline sentencing for defendants in drug trafficking cases as it enhances proportionality and fairness in sentencing. When the Commission initially adopted the base levels of 24 and 30 in 2007 in the context of guidelines for crack-cocaine sentencing, the Commission rightly recognized that using the higher BOL placed too great an emphasis on drug quantity as a proxy for culpability and resultantly swept too many low-level offenders into federal prison for far too long. The same is true for such BOLs in drug cases across the spectrum. Therefore, by reducing the BOLs across the board, the Commission's amendment to the Guidelines appropriately shifts greater focus on an offender's action and role in the offense instead of on the mere drug quantity possessed.

The two-level reduction in Guideline sentencing is consistent with sentencing reform being advanced by Attorney General Eric Holder. On August 12, 2013, Attorney General Holder gave a historic and long overdue speech to the American Bar Association announcing significant changes to the manner in which the Department of Justice prosecutes drug crimes.[10] Attorney General Holder's recognition of the pressing need to "rethink[] the notion of mandatory minimum sentences for drug-related crimes" comes as a welcome alternative to the decades-long status quo under which it was the Department's regular practice to ask for longer and harsher sentences than were appropriate or necessary.[11] Attorney General Holder's modification of the Department's charging policies "so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences" is a critical and logical step toward creating a fairer and more just federal criminal justice system.[12]

Indeed, in testimony delivered to the Sentencing Commission on March 13th, the Attorney General endorsed the Commission's proposed changes to the Sentencing Guidelines Drug Quantity Table. The Attorney General testified that "[t]his straightforward adjustment to sentencing ranges – while measured in scope – would nonetheless send a strong message about the fairness of our criminal justice system."[13] The Attorney General also asserted that "it would help to rein in federal prison spending while focusing limited resources on the most serious threats to public safety."[14] Although the Department of Justice has not publicly indicated whether it will support retroactive application of the amendment to the drug quantity table, the Commission's own data indicates that BOP would save over 83,000 bed years if the amendment were applied retroactively.

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[10] *See* Eric Holder, Att'y Gen., Remarks at Annual Meeting of the Am. Bar Ass'n House of Delegates (Aug. 12, 2013).
[11] *Id.* at 5.
[12] *Id.*
[13] *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n* 13 (Mar. 13, 2014) (statement of Eric Holder, Att'y Gen.).
[14] *Id.*

Furthermore, the amendment will significantly reduce the Federal Bureau of Prison's ("BOP") costs and inmate population. Currently, fifty percent (50%) of the federal prison population is comprised of drug offenders. In the more than twenty-five years since the enactment of the Federal Sentencing Guidelines, one of the most important indications that the Guidelines ranges for drug trafficking offenses are excessive is the dramatic impact they have had on the federal prison population. In 1984, when the Sentencing Reform Act was passed, the federal prison population was 34,263.[15] By 1994, it was 95,034;[16] by 2004, it was 180,328.[17] As of May 29, 2014, there are 217,001 prisoners in the custody of the federal government.[18] The Guidelines' excessive severity has been a driving cause of a federal prison population that has grown at an astonishing rate of almost 800% since 1980, to the point where it is currently operating at thirty-five percent (35%) above capacity, and is part of a mass incarceration crisis in the United States in which we spend $80 billion dollars to incarcerate 2.3 million people.

While the amendment lowering the BOLs in the drug quantity table is a critical step forward, it would be an unfortunate step backwards and a drastic dilution of its potential impact if the Commission were to decide not to apply the amendment retroactively. This is particularly true in light of the fact that the underlying concerns with ensuring fairness, proportionality, and rationality in federal sentencing that motivated the Sentencing Commission to promulgate the two-level adjustment to the BOLs apply with equal force to old sentences as to new ones. As the Commission recognizes:

> the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established … [and] provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity … [and] reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability."[19]

There is no sound reason why these adjustments should differentiate among people more effectively going forward while ignoring similarly situated people who were sentenced under earlier, less appropriately tailored guideline punishments. In principle, such a distinction would be without a difference, but practically, it would result in varying before-and-after sentencing ranges in which one group of defendants would be unjustifiably treated less fairly.

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[15] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984, at 12 tbl.1 (1987).
[16] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994, at 66 tbl.5.1 (1996).
[17] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2004, at 3 tbl.3 (2005).
[18] *Statistics*, FED. BUREAU OF PRISONS (last updated May 29, 2014), http://www.bop.gov/about/statistics/population_statistics.jsp.
[19] AMENDMENTS TO THE U.S. SENTENCING GUIDELINES 24 (2014).

b. Magnitude of Change

The Commission's Office of Research and Data estimates that, over the course of over thirty years, 51,141 offenders sentenced between October 1, 1991 and October 31, 2014, would be eligible to see reduction in their current sentence if the Commission were to make the 2014 drug guidelines amendment retroactive.[20] Of these people, 4,571 would gain immediate release if the amendment were made retroactive. Relatedly, while twenty-five percent (25%) of prisoners who appear to be eligible for sentence reductions are projected to be released over the first year of retroactive implementation, another almost twenty-five percent (25%) would remain incarcerated for the first five years after implementation.[21] The average sentence for offenders who would be eligible for retroactive application of the amendment is ten years, five months; were full reduction granted in each case, such sentences would be reduced twenty-three months to eight years, six months.[22] Indeed, over one-third of eligible prisoners would receive a sentence reduction of less than one year, while sixty-nine percent (69%) of eligible offenders would receive a sentence reduction of less than two years. Only three percent (3%) of prisoners would be eligible for a sentence reduction of more than five years.[23]

The average age of offenders who appear eligible for retroactive application of the amendment is thirty-eight, and almost 400 prisoners would eventually be released who would otherwise die in prison.[24] Forty percent (40%) of eligible offenders fall into the lowest criminal history category.[25] Further, the impact on the racial disparities in drug sentencing will be profound. The Office of Research and Data's analysis of racial impact of retroactive application of the two-level reduction indicates that over seventy-four percent (74%) of the offenders whose sentences will be reduced under the law are Black or Hispanic.[26] This effort, like retroactive application of the crack cocaine amendments and the amendment in response to the passage of the FSA, are important to restore much-needed confidence in the criminal justice system, especially in communities of color.

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[20] Memorandum from U.S. Sentencing Comm'n, Office of Research and Data, to Hon. Patti B. Saris, Re: *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 7 (May 27, 2014) [hereinafter ORD Report] *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf. The appearance of eligibility, of course, does not guarantee sentence reduction. As the Commission's Report, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* notes, of the 25,736 motions for retroactive application of the amendment, thirty-six percent (36%) were denied, and fifteen percent (15%) of those were rejected as an exercise of courts' discretion. U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 2 (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[21] ORD Report, *supra* note 20, at 15.

[22] *Id.* at 7.

[23] *Id.* at 15 tbl.6.

[24] *Id.* at 11 tbl.3.

[25] *Id.* at 14 tbl.4B.

[26] *Id.* at 11 tbl.3.

In addition to concerns about equity and racial justice, the Commission's own data demonstrate that adopting the levels 24 and 30 across the board better serves the Federal Bureau of Prisons. The Commission estimates that retroactive application of the 2014 drug guidelines amendment would save the BOP 83,525 bed years.[27]

c. Difficulty of Applying the Amendment Retroactively

The Commission has amended the drug guidelines with the effect of lowering sentences several times before, and in each instance has made the amendments retroactive. For example, LSD, marijuana, and oxycodone amendments have been made retroactive in 1993, 1995, and 2003, respectively, without incident. More recently, the Commission elected to apply the 2007 crack-cocaine amendment as well as the 2011 amendment to implement the Fair Sentencing Act of 2010 ("FSA") retroactively, again without difficulty.

In December 2007, the Commission voted to authorize courts to apply the 2007 Crack Cocaine Amendment retroactively.[28] As of June 2011, the courts had decided 25,736 motions for retroactive application of the amendment.[29] Of those motions, 16,511 (64.2%) were granted, and 9,225 (35.8%) were denied.[30] Among the motions denied, 7,795 (77.2%) were filed on behalf of offenders who were legally ineligible for any sentence reduction.[31] The courts denied 14.8% of motions on the merits as an exercise of the court's discretion, and no more than six percent (6%) of all motions were denied for reasons that may be related to public safety.[32] Between 2008 and 2011, courts across the country reviewed and were able to decide half as many resentencing motions as the Commission estimates are eligible under the recent drug quantity table amendment. This proves that courts are more than able to review the potential number of motions that may be filed as a result of the current amendment. Furthermore, the release dates for people eligible for retroactive application of the amendment would be staggered such that courts could prioritize the motions of prisoners who are eligible for release within the first two years.

Many of the same concerns that prompted retroactive application of the 2007 amendment and retroactivity of the FSA apply with equal force regarding the across-the-board two-level reduction in BOLs. Indeed, the relatively smooth application by courts of the two-level reduction

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[27] *Id.* at 8.
[28] U.S. SENTENCING COMM'N, SUPP. TO THE 2007 GUIDELINES MANNUAL, , App. C, Amend. 713 (effective Mar. 3, 2008) (adding Amendment 706 as amended by 711 to the amendments listed in subsection (c) of United States Sentencing Guidelines §1B1.10 that apply retroactively).
[29] U.S. SENTENCING. COMM'N., PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2011), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf.
[30] *Id.* at tbl.2.
[31] *Id*. at tbl.9.
[32] *Id.*

over 2007-08 demonstrates that retroactivity of sentence-reducing amendments, in addition to being just, can be implemented practically.

In the Commission's Report updated in May, titled *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, in which the Commission compared rates of recidivism among prisoners who received a reduced sentence pursuant to the 2007 amendment to the drug quantity table for crack cocaine offenses and similarly situated people who did not receive a reduced sentence, the Commission concluded that "there is no evidence that offenders whose sentence lengths were reduced … had higher recidivism rates than a comparison group … released before the effective date of the 2007 Crack Cocaine Amendment …."[33] Indeed, recidivism rates were higher for the comparison group,[34] both for men and women,[35] and across all criminal history categories.[36] Simply put, the Commission's successful implementation of the 24/30 BOL reduction for crack cocaine in 2007, and of its retroactive application in 2011 of the permanent guideline amendment implementing the FSA, demonstrates not only the administrative ease of implementing reductions to the Sentencing Guidelines, but also the fact that it does not cause any greater jeopardy to public safety.

In order to give the two-level adjustment to the BOLs the full effect and impact that fairness and proportionality demand, the amendment should be applied retroactively. Retroactive application would avoid the unfair incongruity of fixing shortcomings in the BOLs for defendants in future sentencing proceedings yet simultaneously ignoring the same shortcomings for defendants sentenced prior to the amendment. Just as the statutory changes created by the FSA were, in the words of the Commission chair, "momentous,"[37] likewise the impact on numerous excessive sentences if the Commission's "all drugs minus 2" amendment were to be applied retroactively would be of major consequence. If not applied retroactively, on the other hand, thousands of people sentenced under the harsher, less proportionate Guidelines would be left languishing longer behind bars.

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[33] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, *supra* note 20, at 1-2.
[34] *Id.* at 3.
[35] *Id*. at 5.
[36] *Id.* at 6.
[37] Press Release, U.S. Sentencing Comm'n, United States Sentencing Commission Promulgates Amendment to Implement Fair Sentencing Act of 2010 (Oct. 15, 2010), *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20101015_Press_Release.pdf.

II. Conclusion

Retroactive application of the Commission's proposal to amend the Guidelines for drug offenses will be an important, even if incremental, step forward to address the unwarranted length of sentences for non-violent crimes while easing the overcrowding in federal prisons. Just as the time was right for the Commission to amend the Drug Quantity Table in § 2D1.1 of the Sentencing Guidelines across drug types to partly ameliorate the devastating mistake of linking the Guidelines ranges for drug trafficking offenses to the ADAA's weight-driven mandatory minimum regime (and making the ranges more severe), the time is right for the Commission to retroactively apply this amendment. Retroactive application will lessen many people's suffering and provide much needed economic relief from the costs of decades of sentences under excessive Guidelines ranges.

Addendum to Written Testimony of the American Civil Liberties Union
Before the United States Sentencing Commission

Hearing on

"Retroactive application of the Recent U.S. Sentencing Commission Amendment to the Drug Quantity Table"

Submitted on
Monday July 7, 2014
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The American Civil Liberties Union ("ACLU") submits this addendum to its testimony for the June 10, 2014 U.S. Sentencing Commission hearing on the retroactivity of the

Amendment to the U.S. Sentencing Guidelines promulgated by the Commission on April 30, 2014. The Amendment would revise the Guidelines applicable to drug trafficking offenses by lowering the base offense levels ("BOLs") in the Drug Quantity Table in Section 2D1.1. This additional information is offered in response to the Department of Justice's (DOJ) proposal that would deny retroactive sentencing reductions to individuals who have criminal histories in Categories III to VI, or with sentence increases for possession and use of a weapon, using or threatening violence, obstructing justice, and playing an aggravating role in an offense.

The ACLU believes the Commission should apply its Amendment to the Drug Quantity Table retroactively to all individuals with federal drug sentences because it would be a substantial step toward improving the fairness and proportionality of the Guidelines, promoting individualized consideration of specific offense conduct, and mitigating excessively punitive provisions that have promoted not only racial disparities in sentencing but also a sustained and costly explosion in the number of individuals in the Federal Bureau of Prisons (BOP) system.

Judges Should Decide Who Receives a Reduced Sentence if the Amendment is Applied Retroactively.

In December 2007, the Commission voted to authorize courts to apply the 2007 Crack Cocaine Amendment retroactively for all criminal history categories.[1] As of June 2011, the courts had decided 25,736 motions for retroactive application of the 2007 Amendment.[2] In the Commission's Report updated in May, titled "*Recidivism among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment"*, the Commission compared rates of recidivism among prisoners who received a reduced sentence pursuant to the 2007 Amendment to the Drug Quantity Table for crack cocaine offenses and similarly situated people who did not receive a reduced sentence. The Commission's own research concludes "there is no evidence that offenders whose sentence lengths were reduced … had higher recidivism rates than a comparison group … released before the effective date of the 2007 Crack Cocaine Amendment …."[3]

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[1] U.S. SENTENCING COMM'N, SUPP. TO THE 2007 GUIDELINES MANUAL, App. C, Amend. 713 (effective Mar. 3, 2008) (adding Amendment 706 as amended by 711 to the amendments listed in subsection (c) of United States Sentencing Guidelines §1B1.10 that apply retroactively).

[2] U.S. SENTENCING. COMM'N., PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2011), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf. *The 2007 Crack Cocaine Amendment Report* notes, of the 25,736 motions for retroactive application of the amendment, thirty-six percent (36%) were denied, and fifteen percent (15%) of those were rejected as an exercise of courts' discretion.

[3] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 2 (2014) at 1-2, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf .

In 2011, courts, prosecutors, defenders, and probation officers processed sentence reduction requests of 17,000 applicants for retroactivity, when the Commission changed crack cocaine sentencing Guidelines after the enactment of the Fair Sentencing Act (FSA). When the Commission was considering applying the FSA Guidelines retroactively, DOJ proposed that retroactivity should not apply to "certain dangerous offenders –including those who have possessed or used weapons in committing their crimes and those who have significant criminal histories – should be categorically prohibited from receiving the benefits of retroactivity, a step beyond current Commission policy."[4] Currently, we are faced with a similar proposal from DOJ and the ACLU strongly to urges the Sentencing Commission to take the same position it did in 2011 and apply the reduction in the Drug Quantity Table retroactively to individuals in all criminal history categories because judges, and not DOJ by categorical exclusions, should determine who deserves a sentence reduction. Based on the fact that crack cocaine recidivism rates did not increase, judges were clearly successfully in determining the individuals appropriate for resentencing after the 2007 and 2011 Amendments were applied retroactively. Therefore, judges should make these same decisions in 2014 for individuals in all criminal history categories, if the Commission applies the changes to the Drug Quantity Table retroactively.

DOJs Proposal Would Potentially Disqualify Most African Americans from Retroactivity

If applied retroactively, this Amendment would have a profound impact on the racial disparities in federal drug sentencing. The Commission's data indicates that over seventy-four percent (74%) of the individuals, whose sentences could be reduced under the new Drug Quantity Table Amendment, if applied retroactively, are Black or Hispanic.[5] Recently, the Federal Public Defenders conducted an impact analysis of DOJ's proposed limitations on retroactive application of Drug Quantity Table Amendment. It estimates that if DOJ's proposal is accepted by the Commission "only 18% of otherwise eligible black defendants continue to qualify for retroactive application of the guideline amendment,[6]" while 34% of white defendants and 52% of Hispanic defendants would qualify. This is blatantly unfair and does little to address the harsh lengthy sentences that have resulted in an out of control federal prison population and consistent racial disparities in the federal criminal justice system.

Conclusion

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[4] Testimony of Attorney General Holder before the U.S. Sentencing Commission, *Hearing On Retroactive Application Of The Proposed Amendment To The Federal Sentencing Guidelines Implementing The Fair Sentencing Act Of 2010 at 2-3 (June 1, 2011)*

[5] Memorandum from U.S. Sentencing Comm'n, Office of Research and Data, to Hon. Patti B. Saris, Re: *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 7 (May 27, 2014) [hereinafter ORD Report] *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf. The appearance of eligibility, of course, does not guarantee sentence reduction. at 11 tbl.3.

[6] *Fact Sheet: Impact Analysis of DOJ's Proposed Limitations on Retroactive Application of 2014 Drug Guidelines Amendment*, Federal Defenders (June 27, 2014)

Retroactive application of the Commission's proposal to amend the Guidelines for drug offenses is an incremental, but important, step toward addressing the unwarranted length of sentences for non-violent crimes while easing the overcrowding in federal prisons. After the 2007 and 2011 Crack Cocaine Amendments, judges were able to make individualized determinations about people who deserved resentencing and there was no increase in the rate of recidivism among those who were released as a result of the resentencing. If DOJ's current proposal of limited retroactivity is accepted by the Commission, even the incremental steps to improve fairness in federal sentencing as a result of the Drug Quantity Table Amendment will mean very little and affect a minimal number of people. Furthermore, very few African Americans, who are already severing disproportionately long and harsh sentences for drug crimes, will benefit from this policy change. For all these reasons, the ACLU urges the Commission to make Drug Quantity Amendment fully retroactive, without limitation or restrictions.