

November 1, 2007

Public Comment to the United States Sentencing Commission on
Retroactivity of the Proposed Crack Cocaine Guideline Amendment

On May 1, 2007 the U.S. Sentencing Commission promulgated an amendment to the federal sentencing guidelines which corrects an inconsistency made over 20 years ago when it set guideline ranges for crack cocaine above the mandatory minimum statute. The Commission's corrective action reduces sentences by two levels for those convicted of crack cocaine offenses, bringing them in line with current mandatory minimum penalties. The amendment will, on average, trim 16 months from current crack sentences. The adjustment of this two-decade old defect is long overdue, and became law on November 1, 2007.

The Commission is statutorily authorized to determine whether a guideline amendment that reduces a sentencing range can be applied retroactively. The Commission has requested public comment as to whether its crack amendment should be made retroactive. We, the undersigned, wholeheartedly support the retroactive application of this guideline amendment. There is a growing chorus of public opinion for parity and justice in cocaine sentencing. Retroactive application of this amendment is a step along that path.

There are three factors the Commission commonly examines when determining the retroactivity of a particular guideline amendment to previously sentenced defendants: 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. Each of these factors supports the retroactivity of the Commission's amendment to harmonize the crack guideline levels with current statutory penalties.

First, in four separate reports to Congress, the Commission has stressed that the 100:1 quantity ratio between crack and powder cocaine is unwarranted. The Commission's purpose in promulgating the guideline amendment is to address, as an interim measure, the long-standing need to reform the disparity by rectifying a decades old guidelines inconsistency which exacerbates the problem with the crack mandatory minimum statute by lengthening sentences even further.

Second, retroactive application of the change in guideline levels will impact a significant number of defendants who, because of the inconsistency caused by the sentencing guidelines, received sentences higher than the statutory mandatory minimum. Analysis prepared by the Commission's Office of Research and Data estimates that 19,500 offenders sentenced between October 1, 1991 and June 30, 2007 would be eligible for a modification in their sentence if the crack cocaine amendment were made retroactive.

Third, retroactive application of the amendment would not be burdensome. The Office of Research and Data emphasizes that the estimated 19,500 people impacted would

receive staggered released dates over a period spanning more than three decades. As such, any concern that the courts, or communities, would be "flooded" is alleviated.

Finally, fairness and consistency dictate that this amendment be retroactive. There is a historic perception, particularly in African American communities, that the criminal justice system is administered in a racially biased fashion. Drug guideline amendments involving LSD, marijuana, and oxycodone have been made retroactive by the Commission in the past. In light of the fact that those retroactive amendments have benefited other racial groups to a greater extent than blacks, to not make a crack cocaine amendment retroactive would lend further credence to the perception of bias.

In conclusion, it is important to note that neither the guideline amendment nor its retroactivity will impact the statutory 100-to-1 quantity disparity between crack and powder cocaine, which has been identified by the Commission as the "single most important difference" accounting for longer sentences imposed on African Americans, relative to other racial groups. The ball is in Congress's court to make the statutory fix, and the Commission has expressed its firm desire "for prompt congressional action." As an interim measure, however, the Commission's guideline amendment must be made retroactive as a step towards ameliorating over two decades of injustice in cocaine sentencing.

Sincerely,

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