Families Against Mandatory Minimums

September 13, 2010

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

Attn: Public Affairs—Retroactivity Public Comment

Re: Request for Public Comment on Amendment 5

Dear Judge Sessions:

FAMM lauds the United States Sentencing Commission's proposed amendment to eliminate the addition of recency points under U.S.S.G. § 4A1.1(e). We urge the Commission to make the amendment retroactive, and we appreciate the opportunity to explain why.

The elimination of recency points is a judicious amendment that promotes the guidelines' aim of proportionate sentencing. Criminal histories are already calculated in U.S.S.G. Chapter 2,[1] making recency points under § 4A1.1(e) effectively a second count of an offender's record. Further, recent research and public comment reviewed by the Commission undermine popular and long-held beliefs that recency predicts the likelihood of recidivism and reflects increased culpability.[2] Those who reoffend under the circumstances described in § 4A1.1(e) may reflect, in some measure, the failure of the criminal justice to provide the tools and environment for successful and offense free reentry.[3] Given the fact that the triggering offenses are already accounted for in criminal history, the Commission also pointed to comments that recency is not essential to "adequately account for criminal history in such cases."[4]

In declining to penalize people for the struggles commonly experienced with reentry and ending the practice of double-counting criminal histories, the Commission has made a remarkable step toward a fairer and more accurate sentencing structure. Furthermore, given that criminal history in general and recency in particular are frequently cited reasons by judges for guideline variance, this amendment brings the criminal history guideline more closely in line with the assessment of the judiciary of appropriate sentences for people who reoffend.[5]

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[1] *See e.g.*, U.S. SENTENCING GUIDELINES MANUAL. §§ 2L1.2, 2K2.1 (2009).
[2] Sentencing Guidelines for United States Courts, 75 Fed. Reg. 27388-01 (May 14, 2010).
[3] *Id.*
[4] *Id.*
[5] U. S. SENTENCING COMM'N., COMPUTATION OF "RECENCY" CRIMINAL HISTORY POINTS UNDER USSG §4A1.1(E) at 18 (August 2010).

If made retroactive, the amendment will benefit thousands of federal prisoners sentenced prior to November 1, 2010 whose sentences were increased due to § 4A1.1(e) and, absent retroactivity, will continue to serve sentences enhanced by a now-repudiated guideline. Making the amendment retroactive is the right thing to do for people still serving sentences that are too long by the Commission's own analysis—and the power to make this change rests wholly with the Commission.[6]

This sentence reducing amendment is well suited for retroactivity when evaluated using the Commission's standards. In determining whether to make an amendment retroactive, the Commission considers the purpose of the amendment, the magnitude of its impact on the guideline range, and the ease of its retroactive application.[7] Consideration of these factors illustrates how correct and uncomplicated the retroactive application of this amendment really is.

Purpose: The amendment is intended to correct a duplicate counting of criminal history that, besides being redundant, bears little relation to recidivism.[8] Obviously, offenders sentenced prior to November 1, 2010 are no less worthy of relief from the now repudiated effect of double counting than are defendants sentenced on or after November 1. In fact, the purpose of the amendment, to shorten recommended sentences based on new evidence gained in part from the experience of people sentenced under the amendment, is furthered by making those prisoners still serving longer sentences eligible for its relief.

Magnitude: The impact is both modest and meaningful. The Commission identified 7,977 prisoners who should be eligible for consideration should the guideline amendment be made retroactive.[9] The average sentence reduction, based on a set of assumptions, would be 13 months with more than half the prisoners receiving reductions of less than 12 months and 90% receiving reductions less than 24 months.[10] The bulk of the eligible prisoners would fall into Criminal History Categories IV (2,363 or 31.3% would change category), V (2,477 or 32.8 %) and VI (1,966 or 26%).[11] Therefore, those 6,806 people would potentially benefit by receiving reductions lower than two years. This modest impact on the guideline range is further reflected in the fact that the prisoners will see their Criminal History shift by one category.[12] The muted but still important impact supports the Commission's favorable vote for retroactivity.

Ease: Applying the amendment retroactively will be uncomplicated, due to the relatively small number of potentially eligible offenders, the simplicity of the calculation, and the limited nature of resentencing. While more than a third of the offenders would be eligible for release in

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[6] 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2).
[7] U.S. SENTENCING GUIDELINES MANUAL. § 1B1.10, cut. background (2009).
[8] Sentencing Guidelines for United States Courts, 75 Fed. Reg. 27388-01 (May 14, 2010).
[9] *See* Memorandum From the Office of Research and Data, United States Sentencing Commission to Chair Sessions *et al.*, at 9 (Sept. 1, 2010) ("2010 Memorandum") .
[10] *Id.* at 20.
[11] *Id.* at 16 tbl. 8.
[12] *Id.*

year one, there are fewer than 3,000 of them.[13] This compares favorably with the then-projected more than 4,000 crack cocaine prisoners eligible to apply for a sentence modification in the first year of retroactivity starting in March 2008 projected in October 2007.[14] Of course, the experience gained in preparing for and the teamwork demonstrated in implementing crack retroactivity will be useful in carrying out the administrative tasks of sentence modifications for recency retroactivity. Additionally, the United States Supreme Court's recent decision in *Dillon v. United States* clarifies that full resentencing will not occur in § 3582(c)(2) sentence modifications.[15] In short, retroactivity will apply to a relatively small number of people, require relatively straightforward calculations, and be limited to the reduction at hand.

The public safety effects of retroactivity will be negligible. As we witnessed with the Commission's amendments regarding the two-level guideline reduction for crack cocaine sentences in 2007, early releases did not have an adverse impact on public safety. In this case, a much smaller number of people are implicated by the retroactivity, the Commission has determined that there are not recidivism concerns with the population that justify the amendment, and early prisoner release would be spread out over years.

Retroactivity sends a strong signal that equal justice is alive and well in the United States. We urge the Commission to apply the amendment to all prisoners impacted by the formerly unjust calculation.

Sincerely,

Julie Stewart
President

Mary Price
Vice President

cc:

Hon. Ruben Castillo, Vice Chair
Commissioner William B. Carr, Vice Chair
Commissioner Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa
Beryl A. Howell
Dabney L. Friedrich
Isaac Fulwood, Jr.
Jonathan J. Wroblewski
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

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[13] *See* 2010 Memorandum at 21 tbl. 10.

[14] *See* Memorandum from Glenn Schmitt, *et al.* to Chair Hinojosa, *et al.* (Oct. 3, 2007) at 25 tbl.7.

[15] *See Dillon v. United States*, 130 S. Ct. 2683 (2010).