

**FEDERAL PUBLIC DEFENDER**

***Southern District of Texas***

Lyric Office Centre  
440 Louisiana Street, Suite 1350  
Houston, Texas 77002-1634

**FEDERAL PUBLIC DEFENDER:  
MARJORIE A. MEYERS**

**Telephone:  
713.718.4600**

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**First Assistant:  
H. MICHAEL SOKOLOW**

**Fax:  
713.718.4610**

Hon. William K. Sessions III, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

Attention: Public Affairs – Retroactivity Public Comment

**Re: Comments on Retroactivity of the Proposed Amendment Eliminating  
Recency Points under USSG §4A1.1(e)**

Dear Judge Sessions:

Thank you for the opportunity to provide public comment from the Federal Public and Community Defenders on whether the Commission should make retroactively applicable the pending amendment eliminating the consideration of recency points under USSG §4A1.1(e) (“recency amendment”).

The factors that the Commission looks to when deciding which amendments to make retroactive under USSG §1B1.10(c) – the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty of applying the amendment retroactively – all support making the recency amendment retroactive. USSG §1B1.10 comment. (backg’d).

The “recency amendment” resulted from the Commission’s study of criminal history issues and its conclusion that the addition of recency points to the criminal history score does not adequately predict the defendant’s risk of recidivism, does not “necessarily reflect increased culpability,” and is not necessary to adequately account for criminal history, particularly in cases where the Chapter Two guidelines contain provisions based on criminal history. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2010. In essence, the amendment reflects the Commission’s considered judgment that offenders

who have committed an offense <sup>1</sup> less than two years after release from imprisonment should not receive lengthier terms of imprisonment as a result.

In the past, the Commission has given retroactive effect to amendments, like the recency amendment, that were designed to better differentiate offense seriousness or offender culpability. Listed below are just a few examples:

- Amendment 433 clarified that application of §4B1.2 is determined by the offense of conviction and that unlawful possession of a weapon is not a crime of violence. It also clarified the definitions of prior adult conviction.
- Amendment 461 conformed the definition of “sustaining a conviction” in §4B1.2 and ratified amendment 433.
- Amendment 505 set the upper limit of the drug quantity table at level 38, finding a higher level unnecessary to “ensure adequate punishment.”
- Amendment 176 modified the offense levels for impersonating a federal officer, agent, or employee according to the motivating factor behind the impersonation.
- Amendment 341 provided greater differentiation in offense levels for conduct covered under USSG §2P1.1 (escape).
- Amendment 380 provided for a lower offense level for harboring a fugitive as compared to other forms of accessory after the fact.

Just as it did with the recency amendment, the Commission designed each of these amendments to avoid unnecessarily harsh sentences by better calibrating the guidelines. The Commission gave each retroactive effect. *See* USSG §1B1.10(c). It should do the same here.

The magnitude of the change in the guideline range further supports retroactivity. The Commission’s retroactivity analysis projects an average sentence reduction of thirteen months for those defendants to whom the recency amendment would apply. Over a third of offenders eligible for retroactive application would receive a reduction of thirteen to twenty-four months. *See* USSC, Office of Research and Data, Office of General Counsel, Memorandum: *Analysis of the Impact of Amendment to Section 4A1.1 of the Sentencing Guidelines if the Amendment were Applied Retroactively*, 20 (Sept. 1, 2010) (“Retroactivity Analysis”). Such reductions are not merely “minor downward” adjustments in a sentence and are far greater than the six-month criterion for retroactive application. *See* USSG § 1B1.10, comment. (backg’d).

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<sup>1</sup> Of course, the “continuing offense” rule ensures that an illegal reentry defendant may well have his or her criminal history score increased under §4A1.1(e) even though he or she was last released from imprisonment some years before law enforcement authorities discovered the defendant’s unlawful reentry. *See e.g.*, *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *United States v. Jimenez*, 605 F.3d 415, 422-23 (6th Cir. 2010); *United States v. Arellano-Sandoval*, 4 Fed. Appx. 538, 539 (9th Cir. 2001); *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1330 (10th Cir. 2009).

The Retroactivity Analysis also makes clear that it would not be unduly burdensome for the courts to apply the recency amendment. The amendment does not involve a difficult calculation. In fact, only two facts determine the defendant's eligibility for a reduction: 1) did the defendant's criminal history score increase under §4A1.1(e); and (2) if so, did that increase change the overall criminal history score? Both of those calculations are readily available in the defendant's presentence report and require no additional fact-finding. Moreover, defender offices, who represent the bulk of these defendants stand ready to reach out to those defendants who the Commission has identified as eligible for a reduction and to work with the Court and U.S. Probation in screening those defendants who file for sentencing reductions to determine if they are eligible.

Such screening processes worked well with the Commissions' crack amendments. Indeed, considering that the federal system processed over 20,000 motions for a reduced sentence based on the crack amendments in just one year, *see* U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 1 (May 2009), the system should be fully capable of handling the comparatively small number of motions that would be based on retroactive application of the recency amendment.

In sum, the purpose of the recency amendment, the magnitude of its impact on the guideline range, and the ease with which it can be applied retroactively all support making the recency amendment retroactive.

The purposes of sentencing and the need to avoid unwarranted disparity also favor making the amendment retroactive. According to the Commission's data, close to 8000 offenders are serving longer periods of imprisonment than necessary because of a guideline provision that bears little, if any relationship, to their risk of recidivism or personal culpability. Retroactive application of the amendment would reduce their risk of recidivism by mitigating the negative effects of lengthy terms of imprisonment -- reduced prospects of future employment, weakened family ties, and exposure to more serious offenders.<sup>2</sup>

Retroactive application would promote respect for the law by demonstrating that the system is unwilling to accept known flaws that result in over-incarceration. Leaving longer than necessary sentences in place is unacceptable, particularly when such a decision would perpetuate

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<sup>2</sup> See Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, at 6 *Criminology & Pub. Pol'y* 589, 591-93 (2007) (stating that "imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (imprisonment has criminogenic effects including "contact with more serious offenders, disruption of legal employment, and weakening of family ties"), available at <http://www.ussc.gov/SIMPLE/sentopt.htm>; Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 *Fed. Sent. Rep.* 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.").

existing racial disparities.<sup>3</sup> *Retroactivity Analysis*, at 12 (vast majority of defendants eligible for retroactive application of the recency amendment are either black [40.8%] or Hispanic [35.4%]).

For these reasons, the Federal Public and Community Defenders urge the Commission to make the recency amendment retroactive.

As always, we very much appreciate the opportunity to submit comments on this and all of the Commission's proposed guideline amendments.

Very truly yours,

Marjorie Meyers  
Marjorie Meyers  
Federal Defender  
Chair, Federal Defender Sentencing Guideline  
Committee

cc: Hon. Ruben Castillo, Vice Chair  
Commissioner William B. Carr, Jr., Vice Chair  
Commissioner Ketanji Brown Jackson, Vice Chair  
Hon. Ricardo H. Hinjosa, Commissioner  
Commissioner Beryl A. Howell  
Commissioner Dabney Friedrich  
Commissioner *Ex Officio* Isaac Fulwood, Jr.  
Commissioner *Ex Officio* Jonathan Wroblewski  
Kenneth Cohen, General Counsel  
Judith M. Sheon, Staff Director  
Michael Courlander, Public Affairs Officer

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<sup>3</sup> Retroactive application of the recency amendment would also help to correct the disparity that has arisen since the Commission promulgated the amendment. Some judges, looking to the guidelines for advice and recognizing the Commission's recent analysis of recency points have already given effect to the proposed guideline by granting variances to those defendants who would otherwise receive an increase in their criminal history score. Other judges refuse to do so, rigidly adhering to the guideline calculation. Defendants in these latter cases would at least be eligible to receive the benefit of the reduction in the guidelines if the amendment were made retroactive.