



September 1, 2010

The Honorable William K. Sessions III, Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chairman Sessions:

The Sentencing Project is pleased to submit comments to the United States Sentencing Commission (USSC) regarding Amendment No. 5 that will eliminate the consideration of recency points used to calculate criminal history points under USSG §4A1.1(e). We wish to applaud this change and the expected impact it will have on shortening sentences and reducing the number of federal prisoners.

As the Commission's analysis has documented, in 2009 the recency provision was considered in 38,850 criminal cases involving defendants in criminal history category II or higher. After determination of applicability, 37% of cases had recency points applied and among those cases, 68% of offenders also had status points applied. Yet among all of the cases considered for recency, the criminal history category was only affected for 11% of the 38,850 offenders. Recency points are applied less frequently than either status points alone or in combination with status points. Thus, the utility of the recency points is minimal and only impacts a small percentage of offenders serving federal prison sentences.

More importantly, adding the recency points component to the criminal history score fails to predict recidivism in offenders and does not add any predictive power in determining which offenders are more or less culpable in their offending behavior. Consequently, many offenders have moved into a higher criminal history category despite being very similar to offenders who either did not receive recency points or whose recency points did not propel them into a higher criminal history category.

The challenge of ensuring fairness with regard to applying recency points is that the date of the instant offense could substantially impact sentence length. One of the goals of the USSC is to promote fairness in sentencing and the date offenses are committed should not differentially impact sentences for offenders convicted of similar offenses. A research study conducted by the USSC indicated that for some offenders one prior offense can be counted up to four times when a sentencing range is being determined.

Without the consideration of recency points, nearly one-third of offenders who fall under criminal history category II or higher would see at least a one category reduction in their

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classification. Moreover, a decrease in criminal history category would result, on average, in an eight-month reduction in sentences for those impacted. Thus, defendants who committed their offense before November 1, 2010, will be subject to an average sentence of 49 months while offenders who commit their offense after the implementation of the amendment will serve an average sentence of 41 months.

In an effort to promote fairness, The Sentencing Project urges the Commission to act to make these amendments retroactive and applicable to persons sentenced prior to November 1, 2010 when the amendment becomes effective. The Commission has conducted analyses and concluded that the recency provisions are unwarranted. Undoubtedly, the evidence presented by the Commission supporting the amendment change applies equally to those individual cases impacted prior to the anticipated implementation date. Moreover, the benefits of retroactive application are significant particularly when considering the high rate of over-crowding within the Bureau of Prisons. Indeed, analyses estimate that the federal prison system would need 1,391 fewer beds over the next five years once the recency amendment is implemented. Even greater sentence reductions in the prison population would be inevitable if this change is made retroactive.

The Commission's recent experience with retroactivity of crack cocaine and previous amendments is valuable and should serve as a guide for this current amendment. That success should encourage the Commission to continue on its path towards increased sentencing fairness by applying the changes to the computation of recency points to persons sentenced before the amendment. Thank you in advance for your consideration of these comments.

Sincerely,



Marc Mauer
Executive Director