



San Francisco Sentencing Commission City and County of San Francisco

July 3, 2014

Honorable Patti B. Saris, Chair
US Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

Dear Judge Saris:

In response to the US Sentencing Commission's (the commission) request for comment, The San Francisco Sentencing Commission strongly supports retroactivity of Amendment 3. The following comments are limited to whether the commission should retroactively apply the amendment to the drug quantity tables in U.S.S.G. §§ 2D1.1 and 2D1.11, in which base offense levels assigned to all quantities are decreased by a factor of two.

Diverse arrays of supporters have recognized that lowering base offense levels by two across all drug types is a modest but important step in addressing prison overcapacity without harming public safety. Amendment 3 addresses prison overcrowding, corrects sentencing guidelines that are now moot, has no negative effect on public safety, reduces the significant social harm caused by incarceration, and better serves sentencing purposes set out in 17 U.S.C. § 3553(a). The amendment is an important step toward fairer sentencing; however, we firmly believe that in consideration of the same arguments for the amendment, the amendment's benefits can only be fully realized if applied retroactively, allowing those prisoners currently serving drug sentences to request resentencing.

The commission will use three main factors in deciding whether to add an amendment to the list of retroactive amendments in § 1B1.10(c): "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."¹ Overall, an amendment's inclusion in the retroactivity list "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction of the term of imprisonment may be appropriate for previously sentenced, qualified defendants."² The San Francisco Sentencing Commission believes the amendment's stated purposes cannot be properly addressed without making it retroactive.

¹ U.S.S.G. § 1B1.10, Reduction in term of imprisonment as a result of amended guideline range (policy statement), comment (backg'd) (2013).

² *Ibid.*

Prison overcrowding is not a prospective problem—it currently affects more than 219,000 inmates in the federal prison system. This fiscal and humanitarian crisis requires more than the projected 6,550-inmate reduction over five years that would result from a prospective application of the amendment. While prospective application would reduce prison population growth, the change will fail to create the degree of impact necessary to effectively address the problem. By decreasing the lengths of many sentences, retroactive application would dramatically increase the amendment’s impact on the prison population. Retroactivity saves money by freeing up money, bed space, and program slots and decreases inmate-to-staff ratios, making prisons safer for both and helping to reduce recidivism through evidence-based services and treatment for a greater portion of the inmate population. The San Francisco Sentencing Commission recommends that future savings from these changes be used to support justice reinvestment, including community-based alternatives to incarceration.

Considering the magnitude of change the amendment effects on the target guideline, we believe the magnitude of the amendment is modest and the administrative burdens of retroactivity are manageable. For each inmate, the change mirrors the reductions for crack cocaine promulgated in 2007 by Amendment 713. Like Amendment 713, two characteristics are present: the large number of cases involved and the ease of applying a change of two levels to individual cases.³ The projected Federal Bureau of Prisons (BOP) population reduction, roughly comparable to the Urban Institute’s proposed 20% across-the-board analysis, would still leave BOP operating at worse overcapacity than it faces now.⁴ Applying the amendment retroactively would substantially increase the magnitude of the change. As the commission noted, the amendment is likely applicable to 70% of drug offenders, who already make up about 50% of the prison population.⁵ Presumably, then, around 35% of the prison population (roughly 75,840 of 216,687 inmates) would be eligible to apply for reductions. Despite the large number of potentially eligible prisoners, the judiciary has proven adept at accepting large influxes of sentence reductions in the past. Given the gravity of need, the administrative burden would not be prohibitive for these reductions either.

The commission has acknowledged that the original reasoning behind the current guideline levels is no longer valid. Correcting this problem for future defendants is important, as the current ranges cause the courts to impose greater-than-necessary sentences across the board. But if the commission recognizes the injustice of sentencing *future* defendants under the current benchmarks, it must necessarily recognize that thousands of already-sentenced defendants are *currently* serving unjust and excessive sentences. In 2012 alone, 24,299 defendants were sentenced with § 2D1.1 as their primary guideline—the guideline that the commission now recognizes as greater-than-necessary guideline ranges. Only through retroactivity can these prisoners and thousands more receive appropriate sentences.

Scholarly research affirms that retroactive amendment application will not harm public safety. The commission has recognized that offense levels (the primary determination of sentence length) have no

³ U.S.S.C., *Notice of final action regarding amendments to Policy Statement §1B1.10, effective March 3, 2008*, at 17.

⁴ Samuels, J., La Vigne, N., & Taxy, S. (2013). *Stemming the tide: Strategies to reduce the growth and cut the cost of the federal prison system* (p. 22). Washington, DC: Urban Institute.

⁵ BOP. (Updated Feb. 22, 2014). *Statistics: Offenses*.

predictive relationship to the likelihood of recidivism.⁶ The same principles apply to retroactive reductions as to prospective. Prisoners released early pursuant to the similar 2007 crack reduction were no more recidivist than those who served their “full” pre-amendment term.⁷ In fact, lengthy prison sentences may increase an offender’s likelihood of recidivism. It is also important to underscore that no prisoner is eligible for release under the retroactive application of the amendment without judicial approval. The commission’s policy statement at § 1B1.10 directs judges to consider the sentencing factors in 18 U.S.C. § 3553(a), the offense’s nature and seriousness, danger that the offender might pose to any person or the community, and the offender’s post-sentencing conduct. We are confident judges will make individualized determinations in the exercise of their discretion.

The countless social harms resulting from the current drug sentencing scheme as a whole are virtually indistinguishable from those the commission has long recognized as being associated with crack cocaine sentencing. Racial disparity persists across drug types, and limiting the discussion to the crack/powder ratio, while an important issue, may have framed the debate too narrowly. Across drug types in 2013, 47.9% of offenders were Hispanic, with strong majorities in powder cocaine (58.1%), marijuana (63.4%), and methamphetamine (55.7%, up from 44.7% the previous year).⁸ Overall, 77.5% of all drug offenders were nonwhite, 74.4% being Black or Hispanic. This effect is devastating to Black and Latino communities, of whom 1 in 15 Black and 1 in 41 Hispanic children have at least one incarcerated parent. This high proportion of incarcerated parents is not only associated with a greater risk of “material hardship and family instability” for these children, but also harms public safety, increasing the likelihood of intergenerational incarceration.⁹ Achieving the goals of the amendment, including reducing the social harms of unfair sentencing policies and ensuring a fair and effective criminal justice system, requires retroactive application.

Finally, retroactive application is necessary for the amendment to conform to the commission’s statutory responsibilities to meet the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2),¹⁰ provide fairness and avoid unwarranted disparity,¹¹ and minimize the guidelines’ contribution to overcrowding in the federal penal system.¹² When the commission or Congress amend sentencing laws, this reflects a changed understanding of how much punishment is adequate to comply with sentencing purposes, but not excessive. Applying this new understanding only to prospective sentences undermines the amendment’s purposes of upholding justice and promoting respect for the law. The recognized effects of lengthy prison sentences on families and communities—along with the lack of respect the disparate treatment between offenders who offended before the amendment is operative and those who offended from that day forward would promote—in turn undermines the goal of specific and general

⁶ US Sentencing Commission. (2004). *Measuring recidivism: The criminal history computation of the federal sentencing guidelines* (p.13). Washington, DC: Author.

⁷ Office of Research and Data, US Sentencing Commission. (2011, May 31). *Recidivism among offenders with sentence modifications made pursuant to retroactive application of 2007 crack cocaine amendment*.

⁸ US Sentencing Commission. (2013). *2013 sourcebook of federal sentencing statistics* (Table 34).

⁹ Testimony of Molly Roth on behalf of Federal Public and Community Defenders, U.S.S.C. (March 13, 2014), at 9.

¹⁰ 28 U.S.C. § 991(b)(1)(A).

¹¹ *Ibid*, at (b)(1)(B).

¹² 28 U.S.C. § 994(g).

deterrence. Lastly, the federal prison population is currently 32% over capacity. With prospective-only application, that overcapacity will reach 41% by 2023. Retrospective application is necessary for the commission to fulfill its duty to ameliorate the crisis of prison overcrowding.

We thank the commission for the opportunity to comment on the amendment. We believe the amendment cannot fulfill its stated purposes if it is applied only prospectively and strongly urge the commission to make this amendment retroactive, allowing already-sentenced defendants and inmates to request sentence reductions down to the amended levels. We look forward to further discussion on our country's efforts to combat drugs and crime effectively, efficiently, and humanely.

Sincerely,

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Jeff Adachi, Public Defender, City and County of San Francisco
Wendy Still, Chief Adult Probation Officer, City and County of San Francisco
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