



**Testimony of Marc Mauer  
Executive Director  
The Sentencing Project**

**Before the United States  
Sentencing Commission**

**Hearing on Retroactivity of the Crack  
Cocaine Guideline Amendment**

November 13, 2007

**T**hank you for the opportunity to testify before the Commission on the issue of whether the Commission's crack cocaine guideline amendment should be made retroactive. I am Marc Mauer, Executive Director of The Sentencing Project, and I have been engaged on the issue of crack cocaine sentencing policy for many years. Within the past year, my organization has submitted comments and presented testimony to the Commission in preparation for its 2007 report and guideline amendment. We have also submitted amicus briefs to the U.S. Supreme Court in the *Claiborne* and *Kimbrough* cases regarding sentencing for crack cocaine offenses. I am here today to urge the Commission to make the guideline amendment retroactive.

We have previously submitted a letter to the Commission providing an analysis of why we believe the amendment should be made retroactive. That letter argues that doing so would be consistent with the mandate of the Commission and previous amendments that have been made retroactive. We contend that: the amendment has an important purpose; it would be significant for the prisoners who would be affected; retroactive application would not be administratively difficult; and, retroactivity would address longstanding problems of racial disparity. In my testimony today, I will expand on some of these and related issues, as well as respond to some of the recent contentions made by the Department of Justice in regard to retroactivity.

## **RETROACTIVITY AND PUBLIC SAFETY**

As the Commission has documented, applying the amendment retroactively would reduce average sentences by 27 months, although nearly two-thirds (63.5%) of offenders would receive a reduction of 24 months or less. Because of this sentence reduction, a concern that the Commission may address in consideration of retroactivity is whether applying the amendment to current offenders will have consequences for public safety. In this regard, there is no reason to believe that doing so will cause any undue negative consequences that cannot be adequately addressed.

The absence of any significant negative effect on public safety stems from several factors. First, with the exception of the first year after implementation, the number of crack offenders being released under a retroactivity policy would be essentially the same as under current practice. Therefore, there may be some issues of supervision for an expanded pool of offenders being released in year one, but after that there are no additional administrative issues involving offender supervision. Also, with the exception of a few districts such as the Eastern District of Virginia and the District of South Carolina, which would potentially have as many as 130-150 additional persons released during the first year, the vast majority of districts would experience an increase of well under 100 offenders during that period.

Second, criminological research on recidivism has generally not found any major differences in the degree of reoffending by time served in prison. That is, keeping offenders in prison for a longer period of time does not necessarily contribute significantly to reducing recidivism. A study by the federal Bureau of Prisons documented the fiscal and public safety issues involved in assessing the value of time served in prison in the context of the advent of mandatory sentencing. Looking at a sample of drug sellers sentenced to prison in 1992 researchers concluded that 62% were considered low-risk as measured by their criminal histories. The researchers then analyzed recidivism rates for a comparable group of 236 offenders released from prison in 1987 (prior to the adoption of guidelines and mandatory minimums) and found that only 19% of the low-risk offenders were rearrested within three years of release, and none for a violent offense. In contrast, as a result of sentencing changes, the low-risk traffickers sentenced to prison in 1992 were expected to serve about three years longer than the 1987 release group, at an estimated additional cost of \$515 million.

These data apply to low-level offenders, but as the Department of Justice notes in its November 1<sup>st</sup> letter to the Commission, more serious offenders would also benefit from the sentence reductions. The Department notes that a recidivism study published by the Commission shows that “guideline offenders in higher CHCs are more likely to re-offend within two years of release from prison or upon entering probation status,” and that “offenders in CHC 1 have a substantially lower risk of recidivating within two years (13.8%) than do offenders in CHC VI (55.2%).”

The Department's concern, though, seriously overstates the extent of the problem involved. First, the Department fails to note from the Commission's prior research that two findings suggest the potential problem is not as great as argued. One is that many of these offenders will be well into their 40s and 50s, a period when recidivism rates typically decline sharply. For example, recidivism rates for persons over 40 in CHC VI are 41%, but are nonetheless one-third lower than for a comparable group in the age range of 26-35. The Commission data also demonstrate that persons convicted of drug trafficking offenses display a lower rate of recidivism than any other offense category, about 20% lower than for fraud and larceny, and 38% lower than for robbery.

The Department also argues that offenders sentenced from 1993-1995 are on average more likely than offenders sentenced in recent years to have a weapon involved in their offense or to have received an enhancement for obstruction of justice, and will also receive the greatest reductions in sentence under a retroactivity policy. These data are correct, but fail to note that this group of offenders will have served a minimum of 13-15 years by the time they are released, and in many cases, considerably longer periods of time. Thus, the Department's contention that the proposal "would result in the unexpected early return of serious drug dealers...back into the community with the possibility of little or no re-entry preparation" points to the wrong problem. If the Department is concerned that after 15 years of incarceration they have not been able to prepare offenders for release to the community, how much time in fact would be required to do so? Further, few of these long-term offenders would be released immediately. For the vast majority there will be a period of at least 6-12 months, and in many cases five years or more, before the expiration of sentence. Surely this should allow sufficient time to implement whatever pre-release programming is normally provided to federal prison inmates prior to release.

Finally, it is important to note that under the proposal judges would not be obligated to reduce the prison term of any given offender. In cases where there may be concerns for public safety there will be ample opportunity to take these into consideration, and to let the original sentence stand if appropriate.

## **CONSISTENCY IN SENTENCING**

The vast majority of people who would be affected by a retroactivity policy have been sentenced since 1995, the year that the Sentencing Commission first reported on cocaine sentencing policy and recommended sentencing reform. Therefore, the Commission, as well as many legal groups and others, has been on record for this full period as supporting policies that are essentially consistent with a policy of retroactivity. It is therefore difficult to imagine a compelling rationale for not extending this long-awaited reform to the very group of offenders who would have benefited from any of the proposals recommended by the Commission in 1995 and subsequently.

## **RACIAL DISPARITY**

As has been well documented, crack cocaine law enforcement and sentencing policies and practices have had a highly disproportionate effect on African Americans. Currently, more than 80% of the people prosecuted under the federal statutes are black. Whether or not this is evidence of bias in policy or practice, it clearly demonstrates that a retroactivity change would disproportionately benefit African Americans, with the Commission estimating the figure at 85%. Given that previous drug amendment changes adopted by the Commission benefited higher proportions of Hispanics and non-Hispanic whites, if the Commission did not apply the current proposal retroactively this would raise serious concerns about bias in public policy.

## **COST OF IMPLEMENTATION**

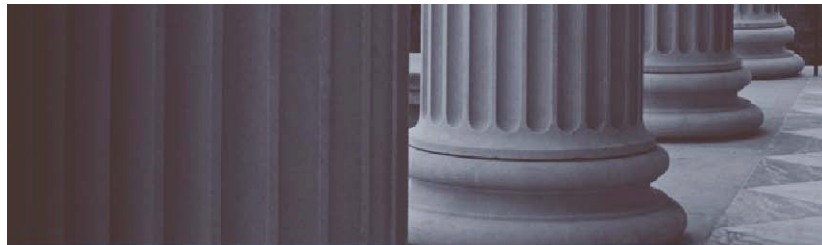
In its submission to the Commission, the Department of Justice raises concerns regarding the cost of implementing the retroactivity policy, ranging from transportation and housing by the U.S. Marshal's Service to panel attorneys to represent petitioners. While the Department provides no cost estimates for these functions aside from a figure of about \$9 million for district court consideration of the cases, it is surprising that no mention is made

of the fiscal impact on the Bureau of Prisons. Given that the Sentencing Commission's analysis shows that the average crack offender would receive a reduction of 27 months in prison, we can use a conservative annual figure of \$23,000 for the cost of incarceration to project a potential savings of about \$52,000 per prisoner. If in fact 19,000 prisoners received such reductions over a period of 30 years that would translate into a potential savings of about \$1 billion.

I recognize, of course, that calculating cost savings in regard to incarceration involves an assessment of both fixed institutional costs and marginal costs per prisoner and is therefore a complex calculation. Nonetheless, the dramatic scale of potential savings suggests that long-term costs to the federal government for courts and corrections would be significantly reduced under the retroactivity proposal.

It is important to note as well that while it is not inappropriate to consider the fiscal costs of various sentencing policies, there are certain functions of the criminal justice system that are both expensive but necessary. For example, providing attorneys to indigent defendants is quite expensive, yet we do so because it is required by the Constitution. Similarly, when considering a policy of retroactivity, we should evaluate it on the merits of justice and public safety, and place a presumption in favor of an appropriate policy unless fiscal considerations are completely unreasonable.

As we have indicated in our letter to the Commission, we believe that the crack cocaine amendment can be applied retroactively in a way that does not present a substantial administrative burden. We recognize, of course, that there will be an increased workload on the courts and Bureau of Prisons to a certain extent, but we also note that depriving persons of their liberty when there is no compelling state interest is a step that should not be taken lightly. We hope that the Commission can work with the courts and prison officials to implement a policy of retroactivity in a way that does not cause any undue burdens on these institutions. By doing so, the Commission will ensure that an important step toward enhancing equal justice is achieved.



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