United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

October 31, 2007

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: RESPONSE TO REQUEST FOR PUBLIC COMMENT REGARDING WHETHER CERTAIN AMENDMENTS SHOULD BE INCLUDED IN U.S.S.G. § 1B1.10(C)

Dear Judge Hinojosa:

We write on behalf of the Practitioners Advisory Group ("PAG") in response to a Commission request for public comment. The issue is whether two recently-promulgated amendments to the Sentencing Guidelines should be added to the list of those on which a judge may rely as a basis for reducing a previously-imposed sentence under 18 U.S.C. § 3582(c)(2). As we indicated in our "priorities" letter dated July 10, 2007 the PAG believes the recent amendments relating to cocaine base ("crack") and criminal history are appropriate for inclusion in the list of amendments at subsection (c) of U.S.S.G. § 1B1.10 – the policy statement governing reduction in a term of imprisonment as a result of an amended guideline range. This letter further explains our recommendation.

The crack amendment

The first of the two amendments for which the Commission seeks such comment is the change in the quantities of crack that correspond to the various offense levels in the drug quantity table at U.S.S.G. § 2D1.1(c). This amendment has the practical effect of reducing by two levels the total offense level in most drug cases that involve crack cocaine. In the Commission's "reasons for amendment" accompanying the proposed change it noted that, among other things, it has extensively analyzed the data and reviewed the relevant scientific literature for crack and powder cocaine. "Current data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." Amendment 9 (Reason for Amendment). The Commission went on to note that it is therefore recommending congressional action addressing the ratio, adding that its "recommendation and strong desire for prompt legislation notwithstanding, the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of these problems." *Id.*

The "urgent and compelling" problems that warrant such an interim measure apply with equal, if not greater, force to those defendants who have already been sentenced or who will be sentenced before November 1, 2007. And we are aware of no countervailing considerations that would warrant a decision that reduces the crack cocaine penalty only for those defendants who happen to be sentenced after

November 1, 2007.

The relevant factors for assessing whether to make a guideline provision retroactive are: (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range. U.S.S.G. § 1B1.10, comment. (backg'd).

The first factor – the purpose of the amendment – strongly favors retroactivity. As the Commission has already recognized in promulgating the crack amendment, the reasons for changing the 100-to-1 drug quantity ratio have been known for several years. The Commission adopted its partial remedy – an interim measure while statutory changes are considered – because the need for relief is both urgent and compelling. That purpose is well understood by defendants already serving time and by the lawyers who represent them.

The second factor is magnitude of change. As noted in the Background to section 1B1.10, "[t]he Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months." The effect of the crack amendment will be a two-level reduction for most defendants. For any defendant whose offense level at the time of sentencing was at least 15, the maximum of the guideline range will be reduced by six months or more. The Commission's own analysis has determined that the *average* base offense level for those who would benefit from retroactive application of the amendment is more than twice that – level 32. The average predicted sentence reduction is 27 months, assuming a judge reduced the sentence in a manner that most closely approximates the effect of the two-level reduction. Of course, that means a significant number of the 19,500 inmates estimated to be able to benefit from retroactivity could see a much larger reduction to approximate the impact of the two-level decrease. The analysis estimates 1,315 inmates would receive reductions of 49 months or more.

The system could easily handle the number of inmates eligible for a sentence reduction. Admittedly, a small number of districts would face a relatively large number of motions – eleven of them account for 35% of the eligible inmates. In those districts, the courts may decide to implement procedures that expedite the consideration of section 3582(c)(2) motions, with which the defense bar will be prepared to provide assistance. But for the vast majority of districts, the number of motions per judge will be easy to manage. Recent experience demonstrates courts' ability to handle the temporary caseload increases resulting from the need to re-sentence a large number of defendants. The judiciary adeptly managed the thousands of Booker-pipeline cases where resentencing required a defendant's presence and the consideration of a wide array of sentencing issues. *Cf.* Fed. R. Crim. P. 43(b)(4) (defendant's presence not required for reduction of sentence under section 3582(c)(2)).

Finally, there would be no difficulty in applying the amendment retroactively to determine the new range. The drug quantities necessary to determine the new offense level will have already been found in the vast majority of cases. The amendment merely requires the judge to assign a new value to those same quantities. It is possible that in a few cases the court will have left the precise quantity of crack unresolved, on the ground that the finding would not have affected neither the offense level nor the ultimate sentence imposed. For example, a judge might have declined to resolve a dispute about the inclusion of 20 grams of crack in a case where 160 grams was undisputed, because 180 grams and 160 grams produce the same offense level. But because the Commission is merely assigning new values to

pre-existing thresholds, rather than changing the quantities that make a difference between one offense level and the next, this should not require additional fact-finding in more than a few cases. (In other words, the offense level still changes at 2, 3, 4, 5, 20, 35, 50, 150 and 500 grams, and so on. A problem *would* arise if the Commission had picked different drug quantities as the breaks between one offense level and the next.)

Making the crack amendment retroactive would promote consistency in another important way. In instances where the Commission has previously amended the drug guidelines so as to produce a potential reduction in sentence, it has subsequently designated the amendment as retroactive under U.S.S.G. § 1B1.10(c). *See* U.S.S.G., app. C., Amends. 488 (LSD), 516 (marijuana) and 657 (oxycodone). There is no good reason to do otherwise with crack.

The criminal history amendments

We also encourage the Commission to make the criminal history amendments retroactive. Each of the pertinent factors, along with all possible considerations, favors retroactivity. This is true for both the amendment to the counting of prior sentences (related cases/single sentence) at USSG §4A1.2(a)(1), and the amended treatment of minor offenses under USSG §4A1.2(b).

First, the purpose of the amendments favors retroactivity. Both aspects of the criminal history amendment were grounded in making the criminal history calculation process both simpler to undertake, and more consonant with what actually occurred in prior state court sentencings, all in order to achieve a fairer, more appropriate federal sentence that is based on what the prior sentences *actually* indicated about a defendant's criminal history and risk of recidivism. By amending the rules for assessing whether sentences constituted a single sentence or multiple sentences, the Commission has made a common sense change to eliminate the double counting of concurrent, simultaneously imposed state sentences. It hardly needs to be pointed out that such double counting occurred directly in contradiction of a state judge's determination, in those cases, that only a single sentence (served concurrently) was necessary to punish at the time of the prior offenses. The amendment promotes not just fairness in the abstract, but fairness in reality. And by amending the rules for treatment of minor offenses, the Commission has eliminated the unduly harsh impact of prior noncriminal convictions where minor, short probationary or conditional discharge sentences – often not involving supervision of any kind – were imposed.

Both changes are grounded in fundamental fairness, and a recognition that the prior rules were resulting in unduly harsh sentences, particularly in a) resultant Career Offender treatment for persons who had only served one prior state term of imprisonment, and b) the loss of safety valve treatment, a higher offense level, and a higher criminal history category (sometimes two categories higher) for persons with one or two *noncriminal* minor convictions. Given that the task of applying those Guidelines will not be onerous, consistency, fairness and reducing unwarranted disparities can all be easily accomplished by applying the criminal history amendments retroactively.

Second, the magnitude of the change in the Guideline ranges for both the prior sentence and minor offenses amendments strongly supports making both retroactive. A number of offenders are serving much higher sentences as Career Offenders under the now-abandoned definition of "related

cases" than they would under the new approach. Those higher prison terms resulted from counting separately two prior sentences that were imposed at the same time, by the same state judge, and to be served fully concurrently. The difference between Career Offender and non-Career Offender treatment can be on the order of multiple years – much greater than the six-month difference that is used as a benchmark to determine what amendments deserve retroactive treatment.

Third, retroactivity is warranted by the fact that there will no difficulty in applying the amendments retroactively. Presentence investigation reports always include date of arrest and date of sentencing information for all charges, allowing the simplified single/multiple sentence determination to be easily made. The same is true for the minor offense amendments; the task is even simpler there, because only one offense needs to be examined.

A significant number of defendants continue to labor under decades-long Career Offender sentences that would not be imposed today. Those defendants have had what was, for all practical purposes, a single prior sentence treated the same as two separate sentences separated by criminal conduct in between. Making the amendment available retroactively would help to alleviate the unwarranted like treatment of unlike circumstances.

Procedural guidance

The Commission has also sought comment on whether it should amend section 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively. We see no need to do so. First, and perhaps of greatest importance, we are not aware of complaints that the Commission has provided insufficient guidance for the application of this provision. Absent some indication that a provision in the Manual has been creating difficulty in the field, the Commission should leave the provision as it is. Moreover, because retroactive application of the crack amendment would affect caseloads so differently from one district to the next, it would be better to leave the courts with the greatest possible flexibility in applying section 1B1.10. If the Commission does anything in this area, it should be limited to identifying the options available to a court when it is considering such a motion, rather than attempting to impose a one-size-fits-all approach to the provision. Because motions under section 3582(c)(2) are uniquely committed to the discretion of the courts, and because they address a special post-sentencing circumstance, there is no reason to deprive judges of this flexibility. If problems develop, the courts or the Commission could address them at that time.

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We thank the Commission for its consideration of the foregoing and are available should any additional information be required.

Sincerely,

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