

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Chambers of
Lynn Adelman
Judge

364 U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4583

414/297-1285
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July 30, 2007

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

The Sentencing Commission recently took the estimable step of proposing guideline amendments to reduce the sentencing ranges for cases involving crack cocaine. The Commission also produced another detailed report on cocaine and federal sentencing policy, reiterating its consistent position that the 100:1 disparity between crack and powder cocaine is unjustified and undermines the objectives of the Sentencing Reform Act. The amendments will, as you know, go into effect on November 1, 2007, absent congressional disapproval.

The Commission has not yet decided whether to make those amendments retroactive pursuant to U.S.S.G. § 1B1.10. As you know, under 18 U.S.C. § 3582(c), district courts are authorized to reduce previously imposed terms of imprisonment that were based on a sentencing range subsequently lowered by the Commission, but only if the Commission specifically designates the amendment for retroactive application. U.S.S.G. § 1B1.10 cmt. n.1. I urge the Commission to list the crack cocaine amendment as one of those retroactively applicable under § 1B1.10(c).

There is ample precedent for doing so. The Commission has on at least three occasions made retroactive reductions to the drug guidelines. In November 1993, the Commission modified the method of weighing LSD, directing courts not to consider the carrier medium. Amendment 488. In November 1995, the Commission modified the method of weighing marijuana plants, reducing the estimate of 1 kilogram per plant to 100 grams per plant. Amendment 516. Finally, in November 2003, the Commission modified the drug equivalency table for oxycodone offenses. Amendment 657. All of these amendments are included in U.S.S.G. § 1B1.10(c).

The amendments discussed above all responded to fairness and proportionality issues the Commission identified with then-current sentencing practices. Important as these revisions were, I submit that none are comparable to the crack/powder disparity. As the

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Commission has explained in reports dating back to 1995, this ratio is unwarranted,
unjust, and creates
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a racially disproportionate impact. Although the Commission's recent proposed amendment does not eliminate the 100:1 ratio – only Congress can do that – the Commission should acknowledge that the need to correct the disparity is every bit as important as eliminating the weighing of LSD carrier medium.

It may be argued that allowing retroactive application of the crack amendment will open the district courts to a flood of § 3582(c) motions. Such concerns are overstated. Motions under § 3582(c) may be resolved without a hearing, and without the presence of the defendant. See Fed. R. Crim. P. 43(b)(4). Further, since the court will have already determined drug weight, no additional fact-finding will be required. Finally, even if the Commission does not make the crack amendment retroactive, it seems likely that many prisoners sentenced under the old guidelines will nevertheless seek relief via motions under 28 U.S.C. §§ 2255 or 2241, or papers bearing other, more creative labeling. Even if retroactive application does create more work for the courts, it seems well worth it to achieve fairer, more proportionate sentences, which actually promote respect for the law.

I ask the Commission to take my views into account as it makes this important decision.

Very truly yours,

/s
LYNN ADELMAN
District Judge

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