Testimony Before The United States Sentencing Commission

Retroactivity of Fair Sentencing Act Guidelines Amendments

June 1, 2011

David Debold

Chair, Practitioners Advisory Group

David Debold
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8551

Practitioners Advisory Group Comments
Regarding Retroactivity of Fair Sentencing Act Guidelines Amendments

The Practitioners Advisory Group (PAG) is grateful for the opportunity to provide comments regarding retroactivity of the drug amendments pursuant to the Fair Sentencing Act (FSA). The PAG urges the Commission to adopt "Option 1" (*i.e.*, include Part A of the amendments within subsection (c) of §1B1.10); add the provision affecting the cap for those who played a minimal role; and also include Part C (amendment for simple possession). The PAG also urges the Commission to forego limitations and exclusions on retroactivity, because those limitations and exclusions are unnecessary given § 1B1.10 and its Commentary and Application Notes.

The Retroactivity Criteria Favor "Option 1"

The Commission uses three criteria to determine which guideline amendments should be applied retroactively: (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. *See* USSG § 1B1.10, comment, (backg'd.). Each of these factors favors "Option 1"—*i.e.*, retroactive application of Parts A and C of the amendments, but not the enhancements contained within Part B.

(1) Purpose of the Amendment

The purpose of Part A of the proposed amendment is to implement those provisions of the FSA that reflect the Commission's repeated recommendations, for almost two decades, that the powder-crack disparity be reduced because it is unjust and has eroded confidence in federal sentencing. It is a purpose that strongly favors retroactive application. As early as 1995 the Commission criticized the 100-to-1 ratio, noting its unfair disparate impact on young black and Latino males and the resultant perception of unfairness and inconsistency.[1] Every few years, the Commission—consistent with the goal of using empirical evidence to support

[1] *See* United States Sentencing Commission, Special Report to Congress; Cocaine and Federal Sentencing Policy, Chapter 8 (1995) (noting that the powder-versus-crack disparity resulted in sentences that "appear to be harsher and more severe for racial minorities than others" resulting in an "perception of unfairness, inconsistency, and the lack of evenhandedness" and "strongly recommend[ing]" against the crack penalties).

rational punishment—urged Congress to address the crack cocaine-powder cocaine disparity.[2] Fourteen years ago, the Commission warned Congress that the situation was dire and that it should "address the problem as soon as possible, as *hundreds of people will continue to be sentenced each month under the current law*."[3]

In large part, Congress has now heeded the Commission's advice and sought, in Senator Durbin's words, to "fix[] an unjust law that has taken a great human toll."[4] By applying the amendment retroactively, the Commission has the opportunity to alleviate some of the severe consequences from the long delay in making an unjust law more just. Indeed, it would be manifestly unjust to condemn, through inaction, thousands of individuals to serve more prison time than they should—*i.e.*, to complete sentences that all now deem to be "greater than necessary" to serve the statutory purposes of sentencing. 18 U.S.C. § 3553(a). Moreover, were Part A of the amendment to be applied prospectively only, a perception would persist that the system remains unfair and arbitrary. Because the purpose of Part A of the amendment is to right a long-standing wrong and restore public confidence in federal sentencing, justice requires that the amendment be applied retroactively.

That same purpose, however, disfavors making Part B—the new aggravating factors—retroactive. Unlike the lowered offense levels for crack cocaine, the various proposed changes in Part B are not motivated by "issues of fundamental human rights and justice."[5] Rather, these changes represent a fine-tuning or refining of the drug guidelines, more typical of the Commission's amendments and thus less appropriate for inclusion in § 1B1.10(c). They apply broadly to all drug defendants, rather than serving as a tailored offset to the lower crack sentences. Moreover, to the extent there is concern that defendants subject to the new aggravating factors not receive a retroactive sentencing *reduction*, 18 U.S.C. § 3582(c) already instructs courts to consider the § 3553(a) factors in determining whether a reduction is

---

[2] *See generally* United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (1997) (hereinafter "1997 Report"); United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (2002); United States Sentencing Commission, Report to Congress: Federal Cocaine Sentencing Policy (2007).

[3] *See* 1997 Report at 9 (emphasis added).

[4] 155 Cong. Rec. S 10488 (daily ed. Oct. 15, 2009).

[5] *Id.*

warranted and, if so, to what extent. *See also* USSG § 1B1.10, comment. (n.1); *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010) (the court should consider "any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized . . . is warranted in whole or in part under the particular circumstances of the case"). Thus, with retroactive application limited to Part A, courts would still be allowed to take into account individual aspects of the case and of the defendant in deciding whether and to what extent a sentence reduction is warranted.[6]

(2) Magnitude of the Change

Historically, the Commission has declined to render amendments retroactive when the amendment "generally reduced the maximum of the guidelines range by less than six months."[7] That precedent strongly favors "Option 1" and retroactivity.

There are approximately 12,040 people currently imprisoned who might be entitled to relief in the form of a reduced sentence if the amendments are made retroactive.[8] The average anticipated sentence reduction for those impacted offenders is 37 months (at level 26) and 48 months (at level 24). Consequently, both the number of affected persons and the average reduction those affected persons would receive are of a magnitude that strongly favors making the amendment retroactive.

The same cannot be said of the enhancements in Part B. At this stage it is unclear how many offenders those enhancements might affect, and the extent to which application of the enhancements would affect the sentences of otherwise eligible individuals. It does seem likely that only a small fraction of the eligible individuals would be affected if the enhancements were included, further suggesting that the magnitude of the change that would result from retroactive application of the enhancements does not justify retroactivity.

---

[6] *See* § 1B1.10 Commentary & Application Note 1(B).

[7] *See* § 1B1.10 Commentary; 28 U.S.C. § 994(u).

[8] Office of Research and Data & Office of General Counsel, "Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively" at 13 & 14 (May 20, 2011) (hereinafter "May 20, 2011 Retroactivity Analysis").

(3) Difficulty of Retroactive Application

Retroactive application of an amendment is never easy, especially when thousands of incarcerated individuals might be eligible for a reduced sentence. But the courts' experience with retroactive application of Amendment 706 demonstrates that implementation of the Part A amendment will be manageable and orderly. With the amended provisions of USSG § 1B1.10 in place, applying retroactively a two-level reduction in the base offense level for crack cocaine offenses was, in the vast majority of cases, a simple exercise and often done with the consent of the government. Part A of the proposed amendment is, like Amendment 706, also based on drug weight. Accordingly, the experiences with retroactive application of Amendment 706 should serve as a useful roadmap for retroactive application of Part A of the new amendment.

While a small number of cases may require some additional effort, the legal framework for proceedings under § 3582(c)(2) is such that a court has the discretion to lessen or deny the reduction if the defendant got the benefit of a bargain he or she would not have been offered otherwise. Moreover, whatever extra time or attention is needed to identify and decide those cases is, we submit, a small price to pay for granting relief and ensuring justice for the thousands of defendants whose cases do not present such challenges.

The Commission has undertaken comprehensive review of the numbers of potentially eligible offenders and the extent of relief they might receive if the Commission makes the amendment retroactive.[9] The analysis demonstrates that the number of inmates affected is large enough to demand retroactivity yet manageable enough to make it workable.

The same cannot be said, however, for the aggravating factors and some of the mitigating factors in Part B. Adjudicating a large number of the Part B factors would require courts to engage in new fact-finding, and to provide the parties with a full opportunity to litigate whether such factors are warranted. Such a process would be at odds with the current structure of § 1B1.10, and, in many cases, simply impractical.

Section 1B1.10 was drafted with the goal that § 3582 resentencings would be accomplished by first implementing changes to the advisory Guidelines range based on findings already made at the initial sentencing, rather than require proceedings

[9] *See generally* May 20, 2011 Retroactivity Analysis.

for the purpose of new factual determinations. Thus, the policy statement directs courts, when making a determination whether a sentencing reduction is appropriate, to "substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced" and "leave all other guideline application decisions unaffected." USSG § 1B1.10(b)(1).

Here, unlike many of the amendments that have been made retroactive in the past, the aggravating and mitigating factors contained in Part B do not substitute a different adjustment for that in a pre-existing provision; rather, they add to the equation new considerations that may not have been contemplated at the time of the original sentencing. And even in cases where facts bearing on some of these new aggravating or mitigating characteristics made their way into the presentence report, they cannot be treated as the final word on the issue. It is not uncommon for attorneys to leave uncontested questionable factual statements in a presentence report where the facts are unlikely to affect the sentencing range. And the underlying record bearing on such newly promulgated factors is unlikely to be fully and fairly developed in that event.

Even if the legal framework were redrafted to contemplate more plenary § 3582 resentencing proceedings, making factual determinations about offense conduct years after the fact will be difficult, if not impossible. In many cases, the evidence may be lost or take considerable effort and expense to locate, preserve, and present. To the extent hearings are required, witness memories will be impaired, and case files archived, incomplete or, for older cases, destroyed. Finally, to the extent sentence reduction proceedings require factual determinations beyond drug weight, defense counsel, who are often new to the case and assigned for the limited purposes of the motion under § 3582(c)(2), will need to meet with their newly assigned clients to discuss the original pre-sentence report and the facts of the case. A number of extra costs would be added to the process with only marginal benefit.

Such an endeavor is simply unnecessary. As described above, judges reviewing sentence reduction requests are obliged to take into account public safety considerations, post-sentence conduct, and the balance of § 3553(a) factors in determining whether a sentencing reduction is warranted, as well as in deciding the extent of such reduction.[10] Those considerations and factors are broad enough that any conduct or circumstances that would trigger application of an enhancement

[10] *See* § 1B1.10 Commentary & Application Note 1(B).

could nonetheless be taken into account by the court in those few cases where they apply. This would allow courts to consider the aggravating circumstances where applicable, without forcing the parties and the probation department in every case to make an affirmative effort to scour the record or case file to see whether the newly relevant factors apply.

Although the Commission has not requested comment separately on particular mitigating or aggravating factors, there is one factor uniquely applicable without the need for further fact-finding. The amendments include an offense level cap where a minimal role adjustment was applied. That factor could be included in the retroactivity determination without creating the administrative and resource-sensitive problems of the other aggravating and mitigating circumstances. If the Commission decides not to make that mitigating factor apply retroactively, we would recommend language explaining that a judge may nonetheless wish to consider the possible effect of the amendment in determining the extent of the reduction.

The Contemplated Limitations and Exclusions Are Unnecessary

The Commission also seeks comment on the possibility of limiting retroactivity to a particular category of defendants based on their criminal history or "safety valve" eligibility, and whether certain categories of defendants should be excluded from retroactivity based on factors such as an aggravating role, use of a minor, or possession of a dangerous weapon. The Commission also seeks comment whether, given changes in sentencing jurisprudence that has recognized an expansion of discretionary authority for sentencing courts, retroactivity eligibility should be limited to a point along the historical continuum of that evolving increase in discretion.

The PAG respectfully submits that any categorical limitations and exclusions are unnecessary given the current Commentary and Application Notes to § 1B1.10. Sentencing courts already analyze all of the contemplated limitations and exclusions in their consideration of public safety concerns, the danger a defendant may pose to the community, post-sentencing conduct, and the complete range of factors set forth in 18 U.S.C. § 3553(a).[11] We also believe that any categorical limitation of relief in post-*Booker* cases is likely to result in unwarranted disparity

[11] *See* § 1B1.10 Commentary & Application Note 1(B).

given the variety of sentencing practices that were employed in the years immediately following the Supreme Court's decision in that case and in later cases such as *Kimbrough v. United States*, 552 U.S. 85 (2007), or *Spears v. United States*, 555 U.S. 261 (2009). Thus we urge the deletion of the provision in § 1B1.10(b)(2)(B) advising that it "generally would not be appropriate" to grant an additional reduction to a defendant who received a non-guideline sentence post-Booker. Taken together, the Guideline, Commentary, and Application Notes already provide courts with sufficient latitude to include analysis of the contemplated limitations and exclusions in the overall assessment of whether a defendant should receive a reduction.

If the Commission does not make this change, we recommend further guidance on when and why such additional reductions "would not be appropriate." The Commission should clearly explain that the intent is to avoid a second sentence reduction based on the same factor (i.e., the unwarranted disparity between crack and powder cocaine). There are any number of reasons a court may have varied downward in case, whether before or after either the *Kimbrough* or *Spears* decisions. The one person most likely to know whether, and to what extent, the sentence was based on a disagreement with the 100:1 ratio is the judge considering a sentence reduction motion. The language in the commentary should state that the extent of a sentence reduction, if any, should take into account whether the judge previously adjusted the sentence imposed for the reason that the 100:1 ratio overstated the seriousness of the offense.

Conclusion

The PAG respectfully recommends that the Commission adopt "Option 1," list Part A of the amendments within subsection (c) of §1B1.10 (with the addition of the offense-level cap for minimal participants), and forego any additional limitations and exclusions on retroactivity. Keeping thousands of individuals in prison longer than necessary would be completely contrary to the Commission's own two-decade-long effort to rectify a flawed and unjust sentencing scheme. The Commission has a unique opportunity to ameliorate years of unjust sentencing. Given that the lesson from the retroactive application of Amendment 706 is that such an endeavor can be implemented smoothly and with minimal administrative cost, the PAG respectfully urges the Commission to seize that opportunity.