



October 29, 2007

VIA FEDEX

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Attention: Public Affairs – Retroactivity Public Comment

Dear Commissioners:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we submit these comments pursuant to the U.S. Sentencing Commission's request for public comments, as noticed in the Federal Register in July 2007, relating to its proposed amendment to the crack sentencing guidelines. Amendment 9, which pertains to crack offenses, has the effect of lowering the guideline sentencing range for certain categories of offenses and offenders. We write in support of the Commission's proposal that to make Amendment 9 retroactive to sentenced defendants.

On May 1, 2007 the U.S. Sentencing Commission promulgated an amendment to the federal sentencing guidelines which corrects an inconsistency made over 20 years ago when the Commission set guideline ranges for crack cocaine above the mandatory minimum statute. The Commission's proposed corrective action will reduce sentences by two levels of severity for those convicted of crack cocaine offenses, bringing them in line with current mandatory minimum penalties under federal law. Guideline ranges would include, rather than exceed, the statutory mandatory minimum penalties for individuals convicted of crack cocaine offenses. According to the Commission's calculations, for those offenders who are eligible to seek a reduced sentence, the proposed amendment will reduce the average sentence for currently imprisoned crack cocaine defendants by 27 months.¹

¹ U.S. Sentencing Commission, *Analysis of the Impact of Crack Cocaine Amendment if Made Retroactive*, Oct. 3, 2007, at 23, available at http://www.ussc.gov/general/Impact_Analysis_20071003_3b/pdf (hereinafter, USSC Retroactivity Analysis).

The adjustment of this two-decade old defect is long overdue and will go into effect on November 1, 2007. This measure is surely a vital step towards reducing existing disparities in our system. However, as the Commission recognizes, it is not a complete solution to the crack/powder cocaine sentencing disparity.

On four occasions, the Commission has stressed to Congress that the 100:1 quantity ratio between crack and powder cocaine is unwarranted, and has emphasized the racially discriminatory impact of the ratio. The Commission's purpose in promulgating the guideline amendment is to address, as an interim measure, the long-standing need to reform the disparity by correcting an inconsistency in the guidelines, which has only served to exacerbate the problem with the crack mandatory minimum statute by lengthening sentences.

Retroactive application of the proposed change in guideline levels will impact a significant number of defendants who, because of the inconsistency caused by the sentencing guidelines, received sentences higher than the statutory mandatory minimum. Analysis prepared by the Commission's Office of Research and Data (ORD) estimates that 19,500 offenders sentenced between October 1, 1991 and June 30, 2007 would be eligible to seek a reduced sentence if the crack cocaine amendment were made retroactive.² These offenders would receive staggered release dates over a period spanning more than three decades.³ Any impact on the Bureau of Prisons would be minimal because, according to ORD data, in the first year after the amendment goes into effect, only an additional 2,520 persons would be released from custody if the amendment were made retroactive.⁴ By the second year, only an additional 123 people would be eligible for release.⁵ After that, there would be no appreciable differences.⁶ Any concern that the courts, or communities, would be flooded with ex-offenders is unfounded.

Moreover, over the years, the Commission has amended the drug guidelines with the effect of lowering sentences, and in each instance, has made the amendments retroactive. For example, LSD, marijuana, and oxycodone amendments have been made retroactive in 1993, 1995, and 2003, respectively, without incident. It makes little sense to reduce the sentences of future offenders, while not correcting the sentence of those who are currently incarcerated under the earlier, flawed version of the sentencing guidelines. In addition, departing from this pattern of retroactive application would be particularly inappropriate given the racial implications of crack cocaine sentencing. Almost 86% of offenders who appear to be eligible for retroactive application of the amendment are African American.⁷ The amendments to the drug guidelines relating to LSD, marijuana, and oxycodone, which were made retroactive, have to a greater extent benefited non-African American defendants.⁸ Given the racially disparate impact of the 100:1 ratio between crack and powder cocaine, the public perception that our drug laws are racially discriminatory, and the Commission's past approach with respect to drug sentencing guidelines, making this amendment retroactive is the only fair and principled course of action.

² *Id.* at 4-5.

³ *Id.* at 5.

⁴ *Id.* at 25, Table 7.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 16, Table 4.

⁸ *See, e.g.*, Letter from Marc Mauer, Executive Director, The Sentencing Project, to The Honorable Ricardo H. Hinojosa, Chair, United States Sentencing Commission (Oct. 12, 2007).

It is important to note that neither the proposed guideline amendment nor its retroactivity will impact the statutory 100-to-1 quantity disparity between crack and powder cocaine. Mandatory minimums will remain unchanged unless Congress acts. Correcting these sentencing policies would dramatically increase a sense of trust in the criminal justice system in African American communities by removing the harsh penalties that currently disproportionately affect them and severely limit their opportunities. As an interim measure, however, the Commission's proposed guideline amendment must be made retroactive as a step towards ameliorating over two decades of injustice in cocaine sentencing.

Thank you for your consideration of this important matter.

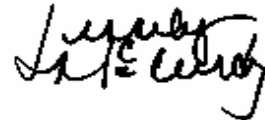
Sincerely,



Caroline Fredrickson,
Director



Deborah J. Vagins
Policy Counsel for
Civil Rights and Civil Liberties



Jesselyn McCurdy
Legislative Counsel