



**Addendum to Written Testimony of the American Civil Liberties
Union
Before the United States Sentencing Commission**

Hearing on

**“Retroactive application of the Recent U.S. Sentencing Commission
Amendment to the Drug Quantity Table”**

**Submitted on
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By the
ACLU Washington Legislative Office**

**For further information contact Jesselyn McCurdy, Senior Legislative
Counsel at jmccurdy@aclu.org**

The American Civil Liberties Union (“ACLU”) submits this addendum to its testimony for the June 10, 2014 U.S. Sentencing Commission hearing on the retroactivity of the

Amendment to the U.S. Sentencing Guidelines promulgated by the Commission on April 30, 2014. The Amendment would revise the Guidelines applicable to drug trafficking offenses by lowering the base offense levels ("BOLs") in the Drug Quantity Table in Section 2D1.1. This additional information is offered in response to the Department of Justice's (DOJ) proposal that would deny retroactive sentencing reductions to individuals who have criminal histories in Categories III to VI, or with sentence increases for possession and use of a weapon, using or threatening violence, obstructing justice, and playing an aggravating role in an offense.

The ACLU believes the Commission should apply its Amendment to the Drug Quantity Table retroactively to all individuals with federal drug sentences because it would be a substantial step toward improving the fairness and proportionality of the Guidelines, promoting individualized consideration of specific offense conduct, and mitigating excessively punitive provisions that have promoted not only racial disparities in sentencing but also a sustained and costly explosion in the number of individuals in the Federal Bureau of Prisons (BOP) system.

Judges Should Decide Who Receives a Reduced Sentence if the Amendment is Applied Retroactively.

In December 2007, the Commission voted to authorize courts to apply the 2007 Crack Cocaine Amendment retroactively for all criminal history categories.¹ As of June 2011, the courts had decided 25,736 motions for retroactive application of the 2007 Amendment.² In the Commission's Report updated in May, titled "*Recidivism among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*", the Commission compared rates of recidivism among prisoners who received a reduced sentence pursuant to the 2007 Amendment to the Drug Quantity Table for crack cocaine offenses and similarly situated people who did not receive a reduced sentence. The Commission's own research concludes "there is no evidence that offenders whose sentence lengths were reduced ... had higher recidivism rates than a comparison group ... released before the effective date of the 2007 Crack Cocaine Amendment"³

¹ U.S. SENTENCING COMM'N, SUPP. TO THE 2007 GUIDELINES MANUAL, App. C, Amend. 713 (effective Mar. 3, 2008) (adding Amendment 706 as amended by 711 to the amendments listed in subsection (c) of United States Sentencing Guidelines §1B1.10 that apply retroactively).

² U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2011), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf. The 2007 Crack Cocaine Amendment Report notes, of the 25,736 motions for retroactive application of the amendment, thirty-six percent (36%) were denied, and fifteen percent (15%) of those were rejected as an exercise of courts' discretion.

³ U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment 2* (2014) at 1-2, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf .

In 2011, courts, prosecutors, defenders, and probation officers processed sentence reduction requests of 17,000 applicants for retroactivity, when the Commission changed crack cocaine sentencing Guidelines after the enactment of the Fair Sentencing Act (FSA). When the Commission was considering applying the FSA Guidelines retroactively, DOJ proposed that retroactivity should not apply to “certain dangerous offenders –including those who have possessed or used weapons in committing their crimes and those who have significant criminal histories – should be categorically prohibited from receiving the benefits of retroactivity, a step beyond current Commission policy.”⁴ Currently, we are faced with a similar proposal from DOJ and the ACLU strongly to urges the Sentencing Commission to take the same position it did in 2011 and apply the reduction in the Drug Quantity Table retroactively to individuals in all criminal history categories because judges, and not DOJ by categorical exclusions, should determine who deserves a sentence reduction. Based on the fact that crack cocaine recidivism rates did not increase, judges were clearly successfully in determining the individuals appropriate for resentencing after the 2007 and 2011 Amendments were applied retroactively. Therefore, judges should make these same decisions in 2014 for individuals in all criminal history categories, if the Commission applies the changes to the Drug Quantity Table retroactively.

DOJs Proposal Would Potentially Disqualify Most African Americans from Retroactivity

If applied retroactively, this Amendment would have a profound impact on the racial disparities in federal drug sentencing. The Commission’s data indicates that over seventy-four percent (74%) of the individuals, whose sentences could be reduced under the new Drug Quantity Table Amendment, if applied retroactively, are Black or Hispanic.⁵ Recently, the Federal Public Defenders conducted an impact analysis of DOJ’s proposed limitations on retroactive application of Drug Quantity Table Amendment. It estimates that if DOJ’s proposal is accepted by the Commission “only 18% of otherwise eligible black defendants continue to qualify for retroactive application of the guideline amendment,⁶” while 34% of white defendants and 52% of Hispanic defendants would qualify. This is blatantly unfair and does little to address the harsh lengthy sentences that have resulted in an out of control federal prison population and consistent racial disparities in the federal criminal justice system.

Conclusion

⁴ Testimony of Attorney General Holder before the U.S. Sentencing Commission, *Hearing On Retroactive Application Of The Proposed Amendment To The Federal Sentencing Guidelines Implementing The Fair Sentencing Act Of 2010* at 2-3 (June 1, 2011)

⁵ Memorandum from U.S. Sentencing Comm’n, Office of Research and Data, to Hon. Patti B. Saris, Re: *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 7 (May 27, 2014) [hereinafter ORD Report] available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf. The appearance of eligibility, of course, does not guarantee sentence reduction. at 11 tbl.3.

⁶ *Fact Sheet: Impact Analysis of DOJ’s Proposed Limitations on Retroactive Application of 2014 Drug Guidelines Amendment*, Federal Defenders (June 27, 2014)

Retroactive application of the Commission's proposal to amend the Guidelines for drug offenses is an incremental, but important, step toward addressing the unwarranted length of sentences for non-violent crimes while easing the overcrowding in federal prisons. After the 2007 and 2011 Crack Cocaine Amendments, judges were able to make individualized determinations about people who deserved resentencing and there was no increase in the rate of recidivism among those who were released as a result of the resentencing. If DOJ's current proposal of limited retroactivity is accepted by the Commission, even the incremental steps to improve fairness in federal sentencing as a result of the Drug Quantity Table Amendment will mean very little and affect a minimal number of people. Furthermore, very few African Americans, who are already serving disproportionately long and harsh sentences for drug crimes, will benefit from this policy change. For all these reasons, the ACLU urges the Commission to make Drug Quantity Amendment fully retroactive, without limitation or restrictions.