



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

Statement

of

Barry Boss

On behalf of the

American Bar Association

Before the

United States Sentencing Commission

Washington, D.C.
November 13, 2007

on

Retroactive Application of Amendment 9 Pertaining to
Offenses Involving Crack Cocaine to
Previously Sentenced Defendants

Good morning. My name is Barry Boss. I am a criminal defense attorney with Cozen O'Connor and a substantial portion of my practice involves federal sentencing issues. Currently, along with Jim Felman, I serve as Co-Chair of the Sentencing Committee of the Criminal Justice Section of the American Bar Association.

On behalf of the American Bar Association, I appear to urge that the Commission give retroactive effect to its amendment that went into effect November 1, 2007, changing federal sentencing guidelines for crack cocaine offenses. The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William Neukom to reiterate to the Commission the ABA's position on sentencing for cocaine offenses.

The ABA strongly supports the amendment adopted this year regarding cocaine sentencing policy and we commend the Commission for its leadership in addressing the issue. Now that it has gone into effect, we urge the Commission to make that amendment retroactive. We think there are sound policy reasons for doing so

The Commission has set forth its policy statement regarding retroactive application of amendments in Section 1B1.10 of the Guidelines and has specifically identified twenty-

four amendments that may be applied retroactively. *See* U.S.S.G. § 1B1.10(c). The Commission has explained that in selecting these particular amendments, the Commission considered, among other factors, “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).” *See id.* cmt. background.

Over the years, the Commission has amended the drug guidelines with the effect of lowering sentences in particular drug cases, and in each instance, has made the amendment retroactive by including it in the list of amendments eligible for reduction under Section 3582(c)(2). For example, in November 1993, the Commission revised the method of calculating the weight of LSD for purposes of determining the guidelines offense level, instructing courts to calculate the amount of LSD by using a constructive weight of .4 milligrams per dose rather than weighing the carrier medium. U.S.S.G., app. C., Vol. I, Amend. 488. The Commission designated the revised Guideline as retroactive. *See* U.S.S.G. § 1B1.10(c).

In November 1, 1995, the Commission changed the weight calculation applicable to marijuana plants in cases involving more than 50 plants from 1,000 grams per plant to 100 grams per plant for purposes of determining the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend. 516. This amendment also was made retroactive. *See* U.S.S.G. § 1B1.10(c). The Commission explained that studies indicated that a marijuana plant does not actually yield 1 kilogram of usable marijuana, and that not every plant will produce

any usable quantity of marijuana. *See* U.S.S.G. app. C, Vol. I, Amend. 516. To “enhance fairness and consistency,” the Commission adopted the lower equivalency for all cases involving marijuana plants.

And in November 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level. *See* U.S.S.G. app. C, Vol. II, Amend. 657. As a result of the amendment, sentencing courts are directed to use the actual weight of the oxycodone contained within the tablet in calculating the drug quantity. The Commission explained that the amendment “responds to proportionality issues in the sentencing of oxycodone trafficking offenses.” *See id.*, Reason for Amend. The amendment had the effect of lowering sentences for the drug Percocet. Because tablets sold as prescription pain relievers contain varying amounts of oxycodone, tablets of the same weight may contain vastly varying amounts of oxycodone. With amendment 657, the Commission remedied the proportionality issue, and made the amendment retroactive. *See* U.S.S.G. § 1B1.10(c)(2).

The Commission’s current amendment to Section 2D1.1, which would modestly reduce offense levels across the board for crack cocaine, is intended as an interim measure to alleviate the “urgent and compelling” problems associated with the 100-to-1 crack-to-powder ratio. At the very least, principles of fairness, consistency, and proportionality should likewise lead the Commission to include this amendment in the list of amendments eligible for reduction under Section 3582(c)(2). The relevant factors strongly weigh in favor of making the amendment retroactive.

Since 1995, the Sentencing Commission has consistently taken the position that the 100:1 ratio was unwarranted from its inception, and has had a racially disparate impact. The Reason for the May 1, 2007 Amendment notes that the Commission set drug quantity thresholds to produce base offense levels corresponding to guideline ranges above the statutory mandatory minimum penalties.

The amendments to the drug guidelines related to LSD, marijuana, and oxycodone that were made retroactive have generally benefited white defendants. Given the racially disparate impact of the 100:1 ratio and the public perception that our drug laws are racially discriminatory, making this amendment retroactive is the only fair and principled course.

Even if questions over the potential burden on the courts to respond to a retroactive amendment could be argued to weigh against the need to right a longstanding wrong, we believe such concerns may be addressed and answered. Because the sentencing court has already determined drug quantity, no additional fact-finding would be necessary. This stands in contrast to, for example, the amendment to the money laundering guideline, which would have required additional fact-finding had it been made retroactive. Indeed, the defendant need not be present for a proceeding involving the correction or reduction of sentence under 18 U.S.C. § 3582(c). *See* Fed. R. Crim. P. 43(b)(4).

If retroactive application of the amendment actually posed a threat of over-burdening the

criminal justice system, one would have expected the Committee on Criminal Law of the Judicial Conference of the United States to oppose retroactivity. However, the Committee, in its letter to the Commission dated November 2, 2007, urges the Commission to make the amendment retroactive. In so doing, the Committee notes that its own advisory group consisting of chief probation officers also has recommended that the amendment be applied retroactively. Thus, neither the judges nor the probation officers view retroactive application of this amendment as imposing an onerous burden upon the federal criminal justice system.

If the amendment is not made retroactive, the courts will likely be inundated with a large number of *pro se* filings using various vehicles, such as 28 U.S.C. §§ 2241, 2255, once the amendment goes into effect. The same number of motions filed under Section 3582(c) would be a far more orderly and effective manner of managing the inevitable requests for relief, creating “cleaner” and more uniform decisions. Indeed, 18 U.S.C. § 3582(c)(2) provides that the court may reduce the term of imprisonment “on its own motion.” Under this provision, a court could enter a blanket order reducing all sentences imposed under the former guideline. Moreover, post-*Booker* practice demonstrates that the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires.

I appreciate the Commission’s consideration of the ABA’s perspective on these important issues and am happy to answer any questions you may have.