Retroactive Guidelines Amendments Must Apply to Individuals Who Receive Below-Guidelines Sentences to Protect the Individualized Sentencing Required by Federal Sentencing Statutes

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Based on retroactive Amendment 821, district court judges are reviewing the sentences of hundreds of individuals who received terms of imprisonment based on what the Sentencing Commission has now concluded were overly harsh determinations of criminal history points.[1] But hundreds more are being excluded from that process due to a 2011 amendment to the U.S.S.G. § 1B1.10 policy statement on retroactive amendments that declares persons who received a below-guidelines sentence for any reason, other than substantial assistance, ineligible for the sentencing judge to even consider a sentence reduction.[2] This exclusion is inconsistent with both the retroactivity statute and the general statutory goals of sentencing:

- Because below-guideline sentences are "based on" the guidelines range within the meaning of 18 U.S.C. § 3582 and *United States v. Hughes*, individuals who received sentences with downward variances or departures should be eligible for retroactive relief.[3]
- By barring the reevaluation of sentences based on a guidelines range subsequently lowered by the Commission, § 1B1.10 collides with 28 U.S.C. § 991(b)(1)(B)'s instruction to maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practice."[4]

Not only is the current policy statement inconsistent with § 3582(c) and § 991(b), it yields arbitrary and irrational results. Take for example two codefendants convicted of the same crime with similar criminal histories and identical guidelines ranges. Assume a retroactive amendment lowers the offense level for both by two levels.

- For Individual A, the original sentencing judge found that, because of unique history and characteristics, a sentence below the guidelines range was sufficient but not greater than necessary to satisfy the purposes of sentencing under 18 U.S.C. § 3553(a). The judge therefore granted that person a two-level downward variance.
- For Individual B, the court found no similar reason for a lower sentence, determined that a sentence within the guidelines range was necessary to carry out the purposes of sentencing under § 3553(a), and granted no variance at all.

The effect of § 1B1.10(b)(2)(A) in its current form is that Individual B—the one with no mitigating personal characteristics—is eligible to receive a full, two-level retroactive sentence reduction, while Individual A is not eligible for any sentence reduction. The two defendants are now likely to serve the same sentence, although one of them was found to be less deserving of a lower sentence than the other, eliminating the warranted disparity in the original sentences and failing to account for individualized mitigating characteristics.

To prevent this ongoing irrationality and injustice, the Commission should return, on an expedited basis, to the original pre-2008 formulation that simply called for modification of the sentence based on the amended guidelines: "In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c), the court should consider the sentence that it would have originally imposed had the guidelines, *as amended*, been in effect at that time."[5] This formulation is consistent with Congress's articulation of the scope for sentence reductions where the original sentence was "based on" the applicable sentencing range. The current policy statement disqualifies defendants with below-guidelines sentences even if, based on the Sentencing Commission's empirical determinations, they received harsher than necessary sentences.

Most recently, through Amendment 821, the Commission made several important changes to the criminal history rules in chapter 4.[6] First, it eliminated status points for people with six or fewer criminal history points.[7] Second, for people with seven or more criminal history points, the Commission reduced the number of status points they receive from two to one. Third, the Commission added a two-level reduction at the new U.S.S.G. § 4C1.1 for certain defendants with zero criminal history points. On August 24, 2023, the Commission voted to make these

Federal Sentencing Reporter, Vol. 36, No. 3, pp. 153–160, ISSN 1053-9867, electronic ISSN 1533-8363.
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changes retroactive. But the approximately 30 percent of defendants who would have otherwise qualified for reduction under Amendment 821, but received below-guidelines sentences,[8] are generally disqualified, even though variances and departures are always based on the guideline range as the anchor for the judge's sentencing discretion.[9]

By returning to the pre-2008 policy statement on eligibility, district judges who sentenced defendants below the guidelines range would once more be able to grant sentence reductions, regardless of whether they imposed a sentence below the applicable guidelines range. With the new retroactive amendment already in effect, the Commission should take immediate action to assure that deserving defendants are not irrationally denied an opportunity for the retroactive amendments to apply to them.

A. Until 2008, the Sentencing Commission's Retroactive Amendments Applied to All Defendants Whose Guidelines Ranges Were Lowered by the Amendment, Regardless of Whether or Not the Sentencing Judge Imposed a Below-Guidelines Sentence

Until 2008, the retroactivity policy statement always permitted sentencing judges to consider sentence reductions, regardless of whether they had imposed sentences below the guidelines range.[10] From the first version of § 1B1.10 under the mandatory guidelines, through several amendments, until 2008, the Commission stated the clear policy that, in deciding whether to grant the sentence reduction, "the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected."[11] In 2008, the policy statement for the first time limited eligibility for sentence reductions based on whether the defendant's original sentence involved a variance or departure.[12]

The change in policy did not occur in a vacuum. The Commission, during the run-up to *Booker*, vigorously defended the mandatory guidelines, filing an amicus curiae brief in support of the government's position that the guidelines should generally be binding.[13] Shortly after the Supreme Court's 2005 decision in *Booker v. United States* that made the guidelines advisory,[14] the Supreme Court held in *Kimbrough v. United States* that sentencing judges had discretion to sentence below guidelines ranges based on empirical evidence, including the Commission's own reports on crack and powder cocaine disparities, in order to avoid a sentence greater than necessary to accomplish the goals of sentencing.[15]

When the Commission finally received congressional ratification of the first retroactive amendment regarding crack cocaine, the Commission also narrowed § 1B1.10 by discouraging sentencing reductions for people granted downward variances under *Booker*: "If the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and [*Booker*], a further reduction generally would not be appropriate."[16] In its Reason for Amendment, the Commission explicitly expressed its hostility toward variances based on *Booker* but still allowed for "comparably less" reductions where the below-guidelines sentence was imposed for non-*Booker* reasons:

> In subsection (b)(2) the amendment provides further clarification that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range, except if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. 3553(a) and [*Booker*], a further reduction generally would not be appropriate.[17]

Three years later, the Commission solidified its treatment of people with received below-guidelines sentences as generally ineligible, with a narrow exception for those who received substantial assistance departures:

> (2) Limitation and Prohibition on Extent of Reduction
>
> (A) Limitation. Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
>
> (B) Exception for Substantial Assistance. If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (l) of this subsection may be appropriate.[18]

Thus, the amended policy statement categorically disqualified individuals who received below-guidelines sentences for any encouraged departure reason other than U.S.S.G. § 5K1.1 (substantial assistance), or for any variances from the advisory guidelines range under *Booker* and § 3553(a), from benefitting from retroactive amendments.[19]

The Commission's rationale for the categorical rule excluding persons with sentences below the amended guidelines range named litigation and avoiding unwarranted sentencing disparities:

> The Commission has determined that, in the specific context of § 1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.[20]

On the contrary, the Commission's deviation from its original rule—to impose the sentence that would have been imposed with the amended guideline—institutionalizes unwarranted disparities and unfairness. The Commission should discard the anti-*Booker* rule with its roots in the mandatory guidelines and rewrite the policy statement to fully embrace variances from the advisory guidelines as a normal part of federal sentencing.

B. The Categorical Exclusion of Defendants with Below-Guidelines Sentences Is Inconsistent with Intervening Supreme Court Authority Recognizing That Below-Guidelines Sentences Are "Based On" the Guidelines Range

The Commission's initial hostility to *Booker* variances no longer provides a tenable rationale for restricting eligibility for retroactive amendments to those who receive sentences within or above the guidelines range. There are two lines of Supreme Court cases confirming that sentences below the guidelines range are "based on" the guidelines under § 3582(c)(2): cases addressing construction of the guidelines generally and those specifically involving retroactive guideline amendments.

Shortly after *Booker*, in *Gall v. United States*, the Court required articulation of the reasons for outside-the-guidelines sentences, explaining that the guidelines range serves as the "starting point and the initial benchmark" for determining the "sufficient, but not greater than necessary," sentence under 18 U.S.C. § 3553(a).[21] Soon thereafter, the Court reiterated the principle that the guidelines range provided the "anchor"[22] and "framework"[23] for guidelines issues ranging from appeals to bases for variance to plain error review. In applying plain error review to guidelines errors, the Court emphasized that the advisory guidelines provided a basis for federal sentencing: "Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.'"[24]

Parallel to these cases, the Supreme Court addressed the retroactive amendment statute based on the pre-2011 policy statements. In *Dillon v. United States*, the Court rejected the contention that a sentence reduction motion led to a plenary resentencing, instead holding that the statute provided only for modification of the sentence commensurate with the amended guideline.[25] Under the policy statement then in effect, persons who received below-guidelines sentences were eligible for further reductions based on retroactive amendments: "Only if the sentencing court originally imposed a term of imprisonment below the Guidelines range does § 1B1.10 authorize a court proceeding under § 3582(c)(2) to impose a term 'comparably' below the amended range."[26]

The Court's next examination of the retroactivity statute in *Freeman v. United States* resulted in a fractured Court, with a plurality holding that an agreed sentence under Rule 11(c)(1)(C) was subject to a motion to reduce because the sentence was based on the guidelines, not the plea agreement.[27] Importantly, the plurality admonished, "Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence."[28]

In *Hughes v. United States*, the Court resolved the issues in *Freeman* and merged with the *Gall* line of cases, holding in the context of § 3582(c) that Rule 11(c)(1)(C) agreed sentences were generally "based on" the guidelines range.[29] The Supreme Court recognized that the guidelines range sets the anchor for the sentence, which then must be imposed based on individualized considerations, warranting a sentence above or below the guidelines range: "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines."[30] With guidance from *Hughes*, the Commission should recognize that the "based on" language of § 3582(c) does not distinguish among below-, within-, and above-guidelines sentences.

The Court explicitly stated in *Hughes* that, in the "usual case," sentences that include downward variances and departures are still "based on" the defendant's guidelines range under § 3582(c).[31] In light of the lack of a controlling principle in *Freeman*, the Court resolved to provide "the necessary guidance to the federal district courts and to the courts of appeals" regarding the correct interpretation of § 3582(c)(2).[32]

In *Hughes*, the parties agreed under Rule 11(c)(1)(C) to a 180-month sentence, eight months below the otherwise applicable guidelines range of 188 to 235 months.[33] Amendment 782 reduced the guidelines range to 151 to 188 months.[34] Mr. Hughes filed a sentence reduction motion, but he was deemed ineligible for a reduced sentence "because his plea agreement did not expressly rely on a Guidelines range."[35] The Court held "that a sentence imposed pursuant to a Type-C agreement is 'based on' the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement."[36]

The Court also specifically stated that § 3582(c)(2) contributes to the "broader purposes" of the Sentencing Reform Act to "'create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences.'"[37] "Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes [is] too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes."[38] In her concurring opinion, Justice Sotomayor further emphasized the need to avoid disparity in sentence reduction proceedings, stressing the need to avoid "inconsistencies and disparities" and to "ensure that similarly situated defendants are subject to a uniform rule."[39]

In addition to referring repeatedly to the purposes of sentencing, the Court in *Hughes*, in the context of retroactive guidelines proceedings, emphasized that the guidelines "remain the foundation of federal sentencing decisions."[40] The Court recognized that this remains true regardless of whether the sentence imposed is outside of the guidelines range.[41] As the Court said, "These cases [*Peugh* and *Molina-Martinez*] confirm that the Guidelines remain a basis for almost all federal sentences."[42] Accordingly, the Court determined that in "the typical sentencing case," and as "the general rule," the guidelines range forms the basis of a defendant's sentence for purposes of § 3582(c)(2).[43]

The Sentencing Commission's limitation of the statute's effect to exclude below-guidelines sentences is inconsistent with the Supreme Court's conceptualization of the retroactivity statute:

- "In general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction in the prisoner's sentence is appropriate."[44]
- "In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines."[45]
- "Accordingly, relief under § 3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the agreement or determine the sentence."[46]
- The eligibility criteria in § 3582(c)(2) was consistent with the portion of § 1B1.10, requiring courts to "substitute only the [retroactive] amendments listed in subsection (d) for the corresponding guidelines provisions that were applied when the defendant was sentenced and . . . leave all other guideline application decisions unaffected."[47]
- "The Commission's policy statement 'seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant's sentence.'"[48]
- Making relief under § 3582(c)(2) available whenever the reduced guidelines range was "a relevant part of the framework the judge used to accept the [plea] agreement or determine the sentence" best advances the purposes of the Sentencing Reform Act.[49]

The current policy statement's exclusion of persons with original below-guidelines sentences is irreconcilable with § 3582(c)(2) and guidance provided by the Supreme Court. Below-guidelines sentences are "based on" the original guideline range that provided the "framework" and "anchor" for the original sentence. Eligibility for persons with below-guidelines sentences achieves the fundamental purposes of the federal sentencing statutes. The Sentencing Commission should act on the post-*Booker* Supreme Court authority to eliminate administrative ineligibility that is inconsistent with the statute and injects disparity and unfairness into the scheme for sentence reductions, resulting in sentences greater than necessary to achieve the purposes of sentencing.

C. The Commission's Retroactive Amendment Should Not Be Restricted to Persons Sentenced within the Original Guidelines Range Because, as Amended in 2011, § 1B1.10 Promotes, Rather than Avoids, Unwarranted Disparity and Washes Out the Individualized Sentencing the Commission Is Required to Preserve

In promulgating Amendment 821, the Commission determined based on empirical study that the computation of criminal history for two classes of defendants over-stated criminal history: certain individuals without criminal history points, and those under a criminal justice sentence at the time of the offense. By categorically excluding from sentence reductions those defendants who received below-guidelines sentences, the Commission bakes unwarranted disparity into federal sentencing and undermines individualized sentencing in almost every case.

The unfairness and irrationality of disqualifying individuals who received mitigated sentences can occur in myriad ways. Under Amendment 821 and the retroactive changes to criminal history points, the current policy statement utterly thwarts the policies favoring individualized sentencing to accomplish the sufficient but not greater than necessary sentence. For example:

- Both Individuals A and B are at Offense Level 36 and in Criminal History Category I, with zero criminal history points, yielding a guidelines range of 188 to 235 months. Individual A presents strong mitigation from personal history and post-offense rehabilitation resulting in a two-level downward variance to 151 months. Individual B has no personal mitigation, has done no rehabilitation work, and receives a sentence to 188 months—the bottom of the guidelines range. Both would receive a two-level reduction under the new U.S.S.G. § 4C1.1 if sentenced today. Although the sentencing judge based both sentences on the same (now-lowered) guidelines range, under the current policy statement, Individual A is categorically disqualified from a sentence reduction, while Individual B is eligible to receive the two-level reduction to the same 151 months Individual A received.
- Both Individuals A and B have an Offense Level of 32 and are placed in Criminal History Category III because they each received two status points (eliminated through Amendment 821). Both A and B have a guidelines range of 151 to 188 months. The parties jointly recommend a downward variance to 135 months for Individual A based on unique factors that are lacking for Individual B. The judge imposes the jointly recommended 135 months for Individual A, while sentencing Individual B at the bottom of the guidelines

range to 151 months. Although the sentencing judge based both sentences on the same (now-lowered) guidelines range, Individual B can seek a sentence reduction down to 135 months, while Individual A is foreclosed from seeking any sentence reduction.

- Both Individuals A and B have an Offense Level of 24 and are in Criminal History Category VI because they have 13 criminal history points, including two status points (reduced to one through Amendment 821), yielding a guidelines range of 100 to 125 months. Because of serious mental illness insufficient to provide a defense, the sentencing judge grants Individual A a variance from the guidelines range and sentences him to 92 months. Individual B does not present mitigating factors. Although the sentencing judge based both sentences on the same (now-lowered) guidelines range, Individual B, with no mitigating mental condition, can seek a reduction from 100 months down to 92, while Individual A is foreclosed from seeking any sentence reduction.

Section 1B1.10 also undermines individualized and proportionate sentencing by foreclosing relief to people who received an "encouraged" downward departure under the Guidelines Manual.[50] Why should a defendant who receives a non-guideline sentence—based on Commission-recognized factors such as victim conduct, lesser harms, coercion and duress, or diminished capacity—be foreclosed from a reduction in a sentence anchored to a guidelines range empirical data shows is overly harsh? Bizarrely, where one codefendant coerces another into participating in an offense, the more culpable coercer may well qualify for the sentence reduction while the victim of coercion, who received an encouraged downward departure for imperfect duress, is categorically barred from seeking relief based on the retroactive amendment.

And for defendants whose plea agreements include agreed variances for whatever reason, why should the plea agreement prevent a potential additional reduction from the stipulated range based on an unduly severe guidelines calculation? In the past five years, in cases not involving substantial assistance, courts have imposed government-sponsored below-guidelines sentences in 29,171 cases, or 8.8 percent of individuals who receive below-guidelines sentences.[51] For the same reasons the *Hughes* court found eligibility under § 3582(c) for sentences imposed under Rule 11(c)(1)(C), the Commission should recognize that agreed sentences recommended under Rule 11(c)(1)(B) are based on the initial determination of the guidelines range and should qualify for sentence reductions.

The Commission should drop its anachronistic post-*Booker* treatment of the guidelines as effectively mandatory in the context of retroactive amendments. Since *Booker*, the Supreme Court has time and again affirmed that variances are normal and integral aspects of federal sentencing that the Commission should not hesitate to recognize.

D. The Commission Should Act Now to Enable All Persons Sentenced to Imprisonment Based on a Subsequently Lowered Guidelines Range the Opportunity to Seek Relief from Overly Harsh Criminal History Calculations

The Commission should exercise the same administrative authority that revised the § 1B1.10 policy statement in 2011 to reinstate eligibility for persons who received below-guidelines sentences. By simply modifying the policy statement, sentencing judges would have discretion to grant sentence reductions for individuals who had received downward departures or variances for reasons consistent with sentencing law. By doing so, the Commission would respond to judicial concerns regarding the irrationality of the policy statement. In the context of Amendment 782's two-level reduction across the Drug Quantity Table, several courts questioned the fairness of the policy decision to exclude persons with unrelated downward variances, such as departures based on over-representative criminal history, from the benefits of the retroactive amendment:

> Some of the circuits that agree that the Guidelines disallow a sentencing court from reapplying a prior criminal history departure have nonetheless agreed with Leatch's critique of that policy decision. See, e.g., [*United States v. Montanez*, 717 F.3d 287, 294 (2d Cir. 2013)] ("We question why a court should not have the discretion to give defendants the benefit of section 4A1.3 departures during the sentencing reduction proceedings. A criminal history category that exaggerates a defendant's past crimes during an initial sentencing will continue to do so at a reduction."); [*United States v. Hogan*, 722 F.3d 55, 63 (1st Cir. 2013)] ("Because the Commission has made clear that a defendant's 'amended guideline range' does not incorporate previously granted departures under § 4A1.3, a defendant's criminal history category that overstates his past crimes during an initial sentencing will continue to do so when that defendant moves for a reduction"). They make some good points. But as it is solely through the Commission's grace that these retroactive reductions come about, it is for that body to decide the wisdom of limits on the scope of such reductions.[52]

Or as another court put it: "Sentences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended [pre-variance and departure] guideline range."[53]

These judicial concerns regarding fairness and rational sentencing should encourage the Commission to reject the post-*Booker* policy change, which was overly solicitous of the guidelines range and imported a mandatory view of the guidelines for the purposes of retroactive amendments. In contrast to Amendment 782, the only bases for reduction that would duplicate considerations in Amendment 821 would be departures under U.S.S.G. § 4A1.3 for over-representative criminal history, which constitute only

a small number of the reasons for below-guidelines range sentencing. Even those departures are often for reasons other than status points or zero criminal history points.

While more people would be eligible for sentence reductions, the Commission's inclusion of all statutorily eligible individuals serves the fundamental parsimony principle underlying federal sentencing.[54] The history of retroactive guidelines amendments establishes that even changes that involve large numbers of sentences do not create administrative burdens that outweigh the value in human freedom and taxpayer money spent on imprisonment. From the time of the retroactive marijuana amendment in 1995, prosecutors, federal defenders, probation offices, and judges have implemented retroactive amendments with efficiency, cooperating on resolution of the vast majority of cases and litigating where necessary.[55] Where a determination has been made that guidelines were overly harsh, the Commission should embrace opportunities to mitigate sentences in pursuit of the goal that no sentence should be "greater than necessary" to comply with the purposes of sentencing.[56] As the Supreme Court said in the context of plain error review: "What reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?"[57]

The Commission should return to the policy statements that did not categorically deny eligibility to the most deserving individuals: those with mitigating factors the sentencing judge determined warranted a reduced sentence. Such reduced sentences were still anchored to an unduly harsh guidelines range. The Commission would appropriately vest sentencing judges with the authority to determine the parameters of any sentence modification resulting from an empirically based reduced guidelines range.

E. Relatedly, the Sentencing Commission Should Also Apply Retroactive Guidelines Amendments to Career Offenders Whose Sentences Are Based on the Non-Career Offender Guideline Range

The remedial intent of the retroactive amendment statute and Supreme Court's interpretation of the guidelines range as a starting point militate in favor of all people whose sentences were based on guideline ranges that have been subsequently lowered being eligible for retroactive relief. The class of eligible people should include those whose guideline ranges were enhanced under the career offender guidelines to the extent that the ultimate sentence was "based on" the non-career offender guideline—that is, the guideline range calculated prior to enhancements. This is because persons designated as career offenders frequently receive sentences below the career offender guideline range, which triggers consideration of the guidelines range that would apply without the enhancements under U.S.S.G. § 4B1.1. This is especially true because the Commission has recognized that the enhancements should not apply to drug-trafficking-only career offenders.

Under the career offender guideline, individuals with two or more prior convictions for drug trafficking or crimes of violence are subject to enhancements of both their criminal history category and offense level.[58] The case law that has developed disqualifying career offenders from retroactive amendments is based on the assumption that retroactive amendments do "not affect a sentence that was imposed pursuant to the Career Offender Guideline."[59] Courts generally concluded that retroactive amendments have "no effect on an applicable career offender guideline."[60]

But "no effect" is a fiction. Defense counsel arguing for sentences below the career offender guidelines often anchor arguments on the harshness of the difference between the non-career offender guidelines range and the enhanced range. The disqualification of drug-trafficking-only career offenders is especially irrational because the Commission in its report to Congress has recommended against applying such enhancements: "Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive."[61] Based on the Commission's report regarding crack-powder cocaine disparities, the Supreme Court explicitly found in *Kimbrough* that the sentencing judge could consider empirically based studies that demonstrate that guidelines punishments are overly harsh.[62] And based on the Commission's career offender study, sentencing judges are heeding the Commission's conclusion that career offender enhancements should not categorically apply where the prior convictions are for drug trafficking.[63] In the absence of career offender enhancements, the non-career offender guideline range provides a basis for the sentencing ultimately imposed.

Under *Gall* and its progeny, career offender sentences of all kinds are often based on the non-career offender guidelines as a consideration for the appropriate sentence if a variance is granted. Even under the mandatory guidelines, courts analogized the career offender provisions to an "on/off switch."[64] Where the predicate offenses were minor and the career offender enhancements were overly harsh, sentencing judges could impose non-career offender sentences, despite the career offender designation, as long as the reasons for the downward departure based on over-representative criminal history were adequately articulated.[65] Historically, sentencing judges frequently depart or vary below the harsh career offender ranges, down to the current rate of only 27.5 percent sentenced within the career offender guidelines range.[66] Those sentences involve consideration of the non-career offender guidelines range in determining the extent of the departure or variance.

The Commission should make the policy statement adjustment to ensure that career offenders who receive

sentences "based on" the non-career offender guideline—either through negation of the enhancement or as a measure for the degree below the career offender guideline—are eligible for consideration of a sentence reduction. This adjustment is especially appropriate given that eligibility for the benefits of retroactive amendments is consistent with the originating federal sentencing statutes and the Supreme Court's concern that administrative agencies adhere closely to statutory language.[67]

Conclusion

Over-incarceration of federal defendants hurts individuals and families, unnecessarily drains the public treasury, and compromises our country's image and identity as a beacon of freedom. The Commission serves well its statutory function when it identifies sentencing factors that set the starting point, or framework, or anchor, of sentencing too high, resulting in sentences harsher than necessary to achieve legitimate sentencing goals. Guidelines amendments should apply retroactively to the maximum extent without irrational exclusion of persons whose sentences were adversely affected by the too-severe starting point. The sentencing judge ultimately decides whether to grant a sentence reduction based on a retroactive amendment and provides the appropriate fail-safe to assure that sentences will not be inappropriately modified. But categorical ineligibility for those most deserving under § 1B1.10 deprives sentencing judges of the opportunity to exercise their discretion. By immediately amending the relevant policy statement, the Sentencing Commission will ensure that judges have the opportunity to review all sentences "based on" empirically unsound guidelines and reduce sentences when warranted.

Notes

1 U.S.S.G. § 1B1.10(d) (2023) (applying Amendment 821 retroactively effective Nov. 1, 2023).

2 U.S.S.G. § 1B1.10(b)(2) (2011). In 2008, the Commission began the process of excluding defendants with below-guidelines sentences, contrary to the pre-2008 policy statements that uniformly permitted sentence reductions for such defendants. U.S.S.G. § 1B1.10(b)(2) (2008). Although persons receiving a small downward variance can conceivably qualify for reductions, variances are generally greater than the difference created by the amended guideline.

3 18 U.S.C. § 3582(c) states: "In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o) . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." In Hughes, the Supreme Court stated in the context of retroactive guidelines amendments that, as a "general rule," the guidelines range provides "a basis for [the] ultimate sentence." 138 S. Ct. 1765, 1770 (2018).

4 The Supreme Court has embraced this formulation on individualized sentencing: "The Booker remedy, 'while not the system Congress enacted,' was designed to 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.'" Peugh v. United States, 569 U.S. 530, 536 (2013) (emphasis added) (quoting Booker v. United States, 543 U.S. 220, 264–65 [2005]); see Rita v. United States, 551 U.S. 338, 348 (2007) (noting that § 991(b) requires the Commission to "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

5 U.S.S.G. § 1B1.10(b) (1997). The Commission's original formulation of the retroactivity guideline simply called for reconsideration of the sentence based on the guideline amendment. U.S.S.G. § 1B1.10(b) (1989). Application Note 1 of the original 1989 commentary emphasized that the retroactive amendment should be applied "as if the defendant was being sentenced under the guidelines currently in effect." U.S.S.G. § 1B1.10, application note 1.

6 U.S.S.G., Retroactive Application of Parts A and B, Subpart 1 of Amendment 821 (Aug. 31, 2023).

7 Prior to 2023, defendants received two points—commonly referred to as "status points"—if they "committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." U.S.S.G. § 4A1.1(d) (2021).

8 U.S.S.G., Quick Facts, at 2 (March 2021).

9 Infra at section B.

10 U.S.S.G. § 1B1.10 (1989). An amendment in 1994 clarified that "in no event may the reduced term of imprisonment be less than the term of imprisonment that the defendant has already served." U.S.S.G. § 1B1.10(b) (1994); see U.S.S.G. App. C (Vol. 1), amendment 536, Reason for 1995 Amendment, at 468–69 (Nov. 1, 1995). An amendment in 1997 clarified that the retroactive guideline only applied to the original term of imprisonment, not supervised release. U.S.S.G. § 1B1.10 (1997), application note 4; see U.S.S.G. App. C (Vol. 1), amendment 548, Reason for 1997 Amendment, at 502–3 (Nov. 1, 1997).

11 U.S.S.G. § 1B1.10, application note 2 (1994); see U.S.S.G. App. C (Vol. 1), Statement of Reasons (Nov. 1, 1993), at 414–15.

12 U.S.S.G. § 1B1.10(b)(2)(B) (2008).

13 Brief Amicus Curiae of the United States Sentencing Commission in Support of Petitioner, United States v. Booker, 2004 WL 1950330 (U.S. Sept. 1, 2004).

14 542 U.S. 220 (2005).

15 552 U.S. 85 (2007).

16 U.S.S.G. § 1B1.10(b)(2)(B) (2008).

17 U.S.S.G. App. C (Vol. III), amendment 712, Reason for 2008 Amendments, at 252–53 (Mar. 3, 2008). Although termed a "further clarification," this change appears to be substantive by disqualifying those who received Booker variances.

18 U.S.S.G. § 1B1.13(b) (2011).

19 If the variance was sufficiently small such that the low end of the amended range was below the original below-guideline sentence, a partial reduction would still be available.

20 U.S.S.G. App. C (Vol. III), amendment 759, Reason for Amendment, at 416–21 (Nov. 1, 2011).

21 552 U.S. 38, 44, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark").

22 Peugh v. United States, 569 U.S. 530, 549 (2013) ("Those Guidelines will anchor both the district court's discretion and the appellate review process in all of the ways we have described").

23 Molina-Martinez v. United States, 578 U.S. 189, 192 (2016) ("The Sentencing Guidelines provide the framework for the

tens of thousands of federal sentencing proceedings that occur each year").

[24] Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904 (2018) (quoting Gall, 569 U.S. at 541); see Peugh, 569 U.S. at 542 ("Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*'" (emphasis in Peugh) (citation omitted); Molina-Martinez v. United States, 578 U.S. 189, 199 (2016) ("'When a Guidelines range moves up or down, offenders' sentences [tend to] move with it.'") (quoting Peugh, 569 U.S. at 544).

[25] 560 U.S. 817, 825 (2010).

[26] Id. at 827 (citing U.S.S.G. § 1B1.10(b)(2)(B)).

[27] 564 U.S. 522, 534 (2011).

[28] Id. at 529.

[29] 138 S. Ct. at 1770.

[30] Id. at 1775 (quoting Peugh, 569 U.S. at 541).

[31] Id. at 1776–77.

[32] Id. at 1772.

[33] 138 S. Ct. at 1774.

[34] Id.

[35] Id.

[36] Id. at 1775.

[37] Id. at 1776 (quoting Freeman, 564 U.S. at 533).

[38] Id.

[39] Id. at 1779–80 (Sotomayor, J., concurring).

[40] Id. at 1775 (citing Peugh, 569 U.S. at 544, and Molina-Martinez, 136 S. Ct. at 1346).

[41] Id. at 1775.

[42] Id. at 1777.

[43] Id. at 1776.

[44] Id. at 1775–76.

[45] Id. at 1776.

[46] Id. at 1778.

[47] Id. at 1777 (quoting § 1B1.10(b)(1)).

[48] Id. at 1778 (quoting Freeman, 564 U.S. at 530).

[49] Id. at 1778.

[50] See Koon v. United States, 518 U.S. 81, 95–96 (1996) (discussing the Commission's treatment of "encouraged" departure factors in chapter 5).

[51] The data supporting these statistics were extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles. www.ussc.gov/research/datafiles/commission-datafiles

[52] United States v. Leatch, 858 F.3d 974, 979 (5th Cir. 2017).

[53] United States v. Padilla-Diaz, 862 F.3d 856, 862 (9th Cir. 2017).

[54] See Dean v. United States, 581 U.S. 62, 67 (2017) ("The list of factors [in 18 U.S.C. § 3553(a)] is preceded by what is known as the parsimony principle, a broad command that instructs courts to 'impose a sentence sufficient, but not greater than necessary, to comply with' the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation").

[55] See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, DC, at 80–100 (June 10, 2014) (South Carolina Deputy Chief Probation Officer Quincy Avinger, Jr.), https://tinyurl.com/5efzadrj; id. at 99–100 (Commission Chair Saris); Statement of Sarah Gannett Before the U.S. Sentencing Comm'n, Washington, D.C., at 14–15 (June 10, 2014), https://tinyurl.com/2v5mp58t; Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington DC, at 65–66; 68–69, 125–26 (June 1, 2011) (then Federal Public Defender Michael Nachmanoff, https://tinyurl.com/4a932s8e); Statement of Stephen Sady Before the U.S. Sentencing Comm'n, Washington D.C. (Nov. 13, 2007), https://tinyurl.com/2p8fezch.

[56] 18 U.S.C. § 3553(a).

[57] Rosales-Mireles, 138 S. Ct. at 1908 (quoting United States v. Sabillon-Umana, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (Gorsuch, J.))

[58] U.S.S.G. § 4B1.1.

[59] United States v. Charles, 749 F.3d 767, 770 (9th Cir. 2014) (citing United States v. Pleasant, 704 F.3d 808, 811–12 (9th Cir2013).

[60] United States v. Hodge, 721 F.3d 1279, 1281 (10th Cir. 2013); accord United States v. Riley, 726 F.3d 756, 759 (6th Cir. 2013); United States v. Reeves, 717 F.3d 647, 650 (8th Cir. 2013); United States v. Griffin, 652 F.3d 793, 803 (7th Cir. 2011).

[61] U.S.S.C., Report to the Congress: Career Offender Sentencing Enhancements, at 3 (August 2016) (emphasis added).

[62] 552 U.S. at 110–11.

[63] See, e.g., United States v. Fairly, No. 1:95-CR-05193-DAD, 2022 WL 3999885, at *5–6 (E.D. Cal. Sept. 1, 2022); United States v. Flowers, No. CR 08–188, 2020 WL 1916616, at *3–4, 6 (E.D. La. Apr. 20, 2020); United States v. Neal, No. 209CR00089JAMKJN1, 2020 WL 4476718, at *4 (E.D. Cal. Aug. 4, 2020); United States v. Henshaw, No. 16-CR-30049-SMY, 2018 WL 3240982, at *6–7 (S.D. Ill. July 3, 2018); United States v. Dixon, No. 2:16CR16-MHT, 2016 WL 4492843, at *4–5 (M.D. Ala. Aug. 5, 2016).

[64] United States v. Faulkner, 934 F.2d 190, 196, as amended, 952 F.2d 1066, 1073 (9th Cir.1991).

[65] United States v. Reyes, 8 F.3d 1379, 1389 (9th Cir. 1993); United States v. Bowser, 941 F.2d 1019, 1026 (10th Cir. 1991).

[66] U.S.S.C., Report to the Congress: Career Offender Sentencing Enhancements, at 22, figure 5 (August 2016).

[67] See United States v. LaBonte, 520 U.S. 751, 757 (1997) ("We assume that in drafting this legislation, Congress said what it meant."); Stinson v. United States, 508 U.S. 36, 38 (1993) ("Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").