

July 7, 2014

The Honorable Patti B. Saris  
Chair, United States Sentencing Commission  
One Columbus Circle, N.E. Suite 2-500, South Lobby  
Washington, DC 20002-8002

Attention: Public Affairs –Retroactivity Public Comment

Dear Judge Saris and Members of the U.S. Sentencing Commission:

The Open Society Foundations<sup>1</sup> strongly support retroactive application of the 2014 Drug Guidelines Amendment, submitted by the U.S. Sentencing Commission to Congress on April 30, 2014. I serve as Senior Policy Analyst for the Foundations, and also convene the Justice Roundtable, a coalition of over 100 advocacy organizations working to reform federal criminal justice policy.

### **Introduction**

For over a quarter of a century, people convicted of drug offenses have received higher than necessary guideline sentences as a result of a flawed calculation that placed minimum guideline sentences above the mandatory minimum prison terms required by Congress. The Commission recently corrected this error by unanimously reducing the federal drug sentencing guidelines by two levels, thereby bringing these sentences into line with the mandatory minimum terms Congress established. This correction, however, applies only prospectively. Fundamental fairness and equitable consideration dictate the need to make this correction retroactive, without restriction or limitation.

The standard for consideration of retroactive application of guideline amendments is found within the Sentencing Guideline's policy guidance, which established a three-factor analysis for review: 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. Each of these considerations supports unencumbered retroactivity for the 2014 Drug Guidelines Amendment.

### **The purpose of the amendment supports retroactivity**

The purpose of the 2014 amendment to the drug sentencing guidelines was to correct a flawed, unjust and unwarranted sentencing calculation that applied to all those convicted of federal drug offenses since 1987.

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<sup>1</sup> The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 100 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

To synchronize the guidelines with Congressionally-mandated mandatory minimums, the Commission reduced all federal drug-sentencing guidelines by two base offense levels. This fix, popularly known as “drugs minus two,” will take effect on November 1, 2014. Those sentenced after that date will have the benefit of corrected sentences. However, there are approximately 51,000 currently incarcerated people who will not benefit from the correction unless the guidelines amendment is made retroactive.

Fundamental fairness dictates that this adjustment should be extended to those currently incarcerated. This will not only help alleviate the disproportionate impact drug sentencing laws have on communities of color, it will also help to relieve overcrowding in prisons and save millions of dollars. According to the Commission’s retroactivity impact analysis, Blacks and Hispanics are sentenced and imprisoned for federal drug offenses at disproportionately higher rates and represent nearly three quarters of the people eligible for consideration should the amendment be retroactively applied. Massive overcrowding plagues the federal system, which currently operates at 132 percent of its capacity and consumes a full quarter of the DOJ’s annual budget. This level of overcrowding and funding is unsustainable and threatens the safety of correctional officers, prisoners, and the public at large. Retroactive application of the 2014 Drug Guidelines Amendment has the potential to ameliorate both the harmful racial and fiscal problems caused by decades of unnecessarily harsh sentencing.

#### **The magnitude of the change is considerable**

The substantial change in the drug guidelines provides strong support for retroactivity. Approximately 51,000 people would be eligible to have their sentences adjusted if the guidelines amendment were made retroactive. The Commission’s Office of Research and Data has calculated that sentences for all impacted persons would be reduced by an average of 23 months. The Commission has consistently recognized that past corrections to flawed drug sentencing guidelines should be applied retroactively, including for crimes related to LSD (1993), marijuana (1995), oxycodone (2003), and crack cocaine (2007, 2011). The same concern for fairness that motivated the Commission to make those guideline adjustments retroactive should likewise apply to the “drugs minus two” amendment today. The magnitude of the change is also significant in that retroactive application would increase confidence and promote integrity in a criminal justice system that has historically been looked at with distrust in communities disproportionately impacted by its policies. Although the magnitude of the change is considerable, its impact on public safety is minimum. Before any retroactivity is granted, a court will first conduct a review to determine each individual’s ability to safely transition back into their communities.

#### **Retroactive application would not be unduly burdensome**

A relatively smooth process accompanied the retroactive application of the “crack minus two” reduction to the Sentencing Guidelines and the retroactive application of the Fair Sentencing Act Guideline Amendment. The Justice Department, U.S. Probation and Pretrial Services (U.S. Probation) and the courts handled large numbers of requests for retroactive guideline sentence reductions in 2007 (25,000+ requests) and in 2011 (17,000+ requests). Although 51,000 people would be potentially eligible pursuant to retroactive consideration of “drugs minus two,” such numbers should not be a significant strain on U.S.

Probation. Twenty-five percent are non-citizens<sup>2</sup> subject to Immigration and Customs Enforcement custody. They would be deported upon receiving a sentence reduction and therefore would not require supervision by the federal system. In addition, the Judicial Conference's Criminal Law Committee has recommended parameters for retroactivity – delaying releases until May 1, 2015 to provide sufficient time for U.S. Probation to coordinate the specifics of supervision.

The Justice Department has proposed to limit retroactive application of the amendment to “lower level, nonviolent drug offenders without significant criminal histories.” These categorical exclusions are overbroad and arbitrary. Judges should be responsible for determining the feasibility of a particular defendant's retroactivity request, as opposed to blanket denials absent individual consideration. The DOJ proposed similar exclusions in 2007 when the Commission was considering retroactive application of the Fair Sentencing Act Guidelines.<sup>3</sup> The prior proposal was rejected by the Commission without adverse consequences. Moreover, if the DOJ's broad exclusions were to be adopted, it would effectively cut the pool of eligible persons by two-thirds, barring 72% of Blacks and 48% of Hispanics from receiving sentence reductions.<sup>4</sup> We strongly recommend that eligibility for retroactive relief be extended to all criminal history categories and that judges are permitted to decide applicability to specific cases.

## Conclusion

We strongly urge the Commission to make the 2014 amendment to the federal drug sentencing guidelines retroactive, without restriction or limitation. It is only fair that the Commission apply the amendment retroactively, eliminating any disparate sentencing treatment between current prisoners and those newly sentenced. Indeed, sentences should not be based on whether an individual was “lucky” enough to commit a drug offense after November 1, 2014, the effective date of the “drugs minus two” amendment, as opposed to the day, week, month, or decade before. Such policies do not effectuate justice. In sum, the Commission's three-pronged analysis supports retroactivity: 1) the purpose of the amendment favors retroactivity; 2) the change in the guidelines is significant and supports retroactivity, and 3) retroactive application of the amendment would not be unduly burdensome on the system.

Thank you for this opportunity to submit public comment on this critical issue.

Sincerely,



Nkechi Taifa

Senior Policy Analyst

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<sup>2</sup> U.S. Sentencing Commission Office of Research and Data, “Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive,” Table 3 Demographic Characteristics of Eligible Offenders (FY 1992 through FY 2015) (May 27, 2014)

<sup>3</sup> 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)

<sup>4</sup> *Fact Sheet: Impact Analysis of DOJ's Proposed Limitations on Retroactive Application of 2014 Drug Guidelines Amendment*, Federal Defenders (June 27, 2014).