Prisology

March 18, 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

Re: January 17, 2014 Federal Register Request for Public Comment

Dear Chief Judge Saris:

On behalf of Prisology, we submit the following comments regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("U.S.S.G.") published January 17, 2014, in the Federal Register.

1. Amendment to U.S.S.G. § 1B1.10

Prisology supports Option 1 of the Commission's proposal to amend U.S.S.G. § 1B1.10. Defendants that receive a sentence below the mandatory minimum because of cooperation with the Government should be permitted to seek a "comparable reduction" in their sentence. Depriving cooperating defendants with the opportunity to seek a comparable reduction disincentivizes cooperation, and ignores the fact that such defendants are no longer subject to a mandatory minimum.

2. Amendment to U.S.S.G. § 2D1.1

We support the Commission's proposal to reduce the drug quantity table in U.S.S.G. § 2D1.1 by two levels across all drug types. As the Department of Justice ("DOJ") noted in its recent comments to the Commission, the proposed amendment will help control "the prison population and ensur[e] just and proportional sentences for all offenders." DOJ Comments at p. 17. We request, however, that the Commission modify the amendment to also include base offense level 38 offenders. Said modification is necessary to ensure proportionality and fairness amongst all drug sentences.

3. Undischarged Terms of Imprisonment

I. Subsection (b) Amendment

Prisology supports the Commission's proposed amendment to U.S.S.G. § 5G1.3(b). Terms of imprisonment should always be fully concurrent with other undischarged sentences that are "relevant conduct" to a federal offense. This is necessary to ensure fairness and proportionality in sentencing.


P.O. Box 103
Montpelier, Vermont 05601


215 W. Franklin St. Ste. 100
Waxahachie, Texas 75165


Tel: 802-323-5550
Fax: 802-735-0321

II. Adjustment for yet to be Imposed Sentence

The Commission proposes the creation of an adjustment that would permit courts to adjust federal sentences on the basis of yet-to-be-imposed sentences.

The DOJ has submitted commentary opposing the proposed amendment, suggesting instead that the new Guideline provision state: ". . . the court shall impose the sentence to run concurrently with any anticipated state term of imprisonment." *See* DOJ Commentary to Proposed Amendments at 28.

While Prisology agrees with the DOJ that qualifying anticipated state terms of imprisonment should run concurrent, an order of concurrency alone will not ensure "true concurrency." The Bureau of Prisons interprets an order of concurrency by a federal court as merely requiring the federal sentence to begin on the date that it was imposed. Any time spent in custody before the date of sentencing would not be credited against the federal sentence unless the prisoner was in primary federal custody at the time of the federal sentencing, the state charges are later dismissed, or the state fails to apply the pre-sentence credit against the defendant's subsequently imposed state sentence. *See* Program Statement 5880.28, *Sentence Computation Manual (CCCA of 1984)*; 18 U.S.C. § 3585(b).

Prisology believes that the Commission's proposal—rather than DOJ's suggested substitute—strikes the appropriate balance in these kinds of situations. Prisology notes DOJ's concern about sentences being based "upon speculation of future events," see DOJ comments at p. 29, n. 48, but many federal sentencing determinations already look to speculative future events such as the likelihood of recidivism by a defendant. 18 U.S.C. § 3553(a). Furthermore, the Supreme Court in *Setser v. United States* recently acknowledged the ability of courts to address issues surrounding yet-to-be-imposed state sentences. *Setser v. United States*, 132 S.Ct. 1463, 1471 n.5 (2012) ("Yet-to-be-imposed sentences are not within the system at all, and we are simply left with the question whether judges or the Bureau of Prisons is responsible for them. For the reasons we have given, *we think it is judges.*")(emphasis added).

Further, ascertaining the amount of adjustment required to ensure "true concurrency" will often be uncomplicated. In most cases, the sentencing court need only determine the date the defendant was taken into custody, and adjust the federal sentence by an amount equal to the time served from the date of arrest until the date of the federal sentencing. Federal courts are already familiar with this process, as similar adjustments are required by U.S.S.G. § 5G1.3(b).

In sum, Prisology supports the Commission's proposed Part B amendment with the removal of the requirement that the offense also serve as the basis for a Chapter Two or Three increase.

4. Retroactive Application of Amendments

The Commission invited public comment on whether any or all of the proposed amendments during this cycle should be designated for retroactive application under U.S.S.G. § 1B1.10.

Prisology believes that each of the proposed amendments addressed herein should be included in § 1B1.10. The Commission's proposed amendments take modest steps to ameliorate the Guidelines in a way that will help reduce the federal prison population without endangering public safety. Pure prospective application of these amendments would have limited effect on reducing the prison population, and create disparity between defendants who have already been sentenced, and those sentenced on or after November 1, 2014. Moreover, with the Commission's two prior rounds of retroactive crack cocaine amendments to the Guidelines, it is clear that the federal courts have the institutional ability to deal with an influx of 18 U.S.C. § 3582(c) motions based on these amendments. Accordingly, Prisology strongly supports inclusion of these amendments in § 1B1.10.

We thank the Commission for its consideration of our comments, and look forward to working with the Commission in the future to identify ways to improve federal sentencing and the fair administration of justice.

Sincerely,

Brandon Sample
Executive Director