

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

July 7, 2014

Re: Retroactivity of § 2D1.1 amendment

Dear Judge Saris,

As academics who teach and study criminal law and sentencing, we write to urge two outcomes. First, we ask that the pending amendment to Guideline § 2D1.1(c), which would reduce narcotics offense levels by two points, be made retroactive. Second, we believe that retroactivity should apply without exceptions or carve-outs.

Basic fairness compels retroactivity of the pending amendment. There is a growing national consensus among both experts and citizens that federal narcotics sentences are too harsh, and that weight of narcotics is a bad proxy for culpability. The pending amendment is consistent with that consensus. It doesn't make sense to give future defendants the benefit of that shift, without giving the same to those sentenced in the past; time of sentencing is not a rational breaking point. Such a differentiation might make sense if retroactivity increased recidivism, but the Commission's analysis of the retroactive crack amendment has shown that the beneficiaries of that amendment did not reoffend at a higher rate than those who served full terms.

Retroactivity, of course, would also increase the cost savings created by the pending amendment. With retroactivity, the savings on imprisonment would probably be over \$1 billion, the cost of 83,000 bed-years. That is money better spent on crime prevention and new tactics in addressing narcotics.

We are aware that the Department of Justice has suggested exceptions to retroactivity under the pending amendment. Specifically, at your hearing on the issue, the Department's spokesperson asked for a carve-out in cases involving a firearm, with an aggravated role in the offense, and with a criminal history in category III or higher. We disagree.

Most importantly, these exceptions destroy the proportionality that the Commission has attempted to craft into the Guidelines, because each of these factors is accounted for independently of the factor that would be adjusted—the specific § 2D1.1(c) offense level based on weight and type of narcotic. For example, a category III criminal history (relative to a category I) uniformly increases a sentence regardless of the drug amount; it is an independent calculation. A carve-out based on these independent enhancements is essentially a double punishment for a single factor. First it increased the sentence, and then it would make the inmate ineligible for retroactive application of the new § 2D1.1(c). Such enhancements will still increase the term on re-sentencing with broad retroactivity, in the proportionate way that the Commission intended.

Moreover, the suggested exceptions are too broad. Those given two points for gun possession under § 2D1.1(b)(1), for example, include both people who personally brandished a gun, and others who were sentenced based on a co-conspirator's concealed possession of a gun. Without the carve-outs, this issue goes to the judge on re-sentencing, who can distinguish among cases in evaluating whether a reduced sentence is warranted.

Retroactivity free of exceptions will not be onerous, as we have learned from the Commission's retroactive crack sentence reductions. The judge-based process of sentence reconsideration will ensure that the benefits of full retroactivity, in terms of cost and freedom, are achieved.

Thank you for your consideration of these views.

Sincerely,

Erwin Chemerinsky
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University of California-Irvine School of Law

Judge Royal Furgeson (Ret.)
Dean, UNT Dallas College of Law

Judge Nancy Gertner (Ret.)
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