ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

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July 7, 2014

Chair Patti Saris
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002

Attn: Public Affairs-Retroactivity Public Comment

Dear Chair Saris:

We write to express our support for amending U.S.S.G. § 1B1.10 to make Amendment 3, the "drugs minus two" amendment submitted by the U.S. Sentencing Commission to Congress on April 30, 2014, retroactive.

The "drugs minus two" amendment should be made retroactive without restriction or limitation, as a matter of equity and fundamental fairness. Retroactive application of the amendment will save billions of dollars, ease overcrowding in federal prisons, and lessen the disproportionate impact that drug sentences have had on tens of thousands of people and communities of color. It will also improve public safety and, as past experience proves, can be handled efficiently by the courts, U.S. Probation ("Probation"), federal public defenders, and the Department of Justice ("DOJ").

As a threshold matter, the "drugs minus two" amendment fixes a flaw in the guidelines that has resulted in excessive sentences for approximately 51,000 currently incarcerated federal drug offenders who have been sentenced since 1987. Since 1987, the "low end" of the calculated guideline drug sentence has actually been ***higher*** than the mandatory minimum prison term. As a direct result, as the Commission has recognized, the drug guidelines have been higher-than-necessary for many years. This amendment would bring federal drug guidelines into line with the mandatory minimums Congress created.

It is commendable that this fix will go into effect on November 1, 2014 and apply automatically to everyone sentenced after that date. Its anticipated benefits are notable: a reduction in the federal prison population by 6,500 inmates in the first five years in addition to federal drug sentences after that date that will be, on average, 11 months shorter than what the current guidelines require.

But the truly critical and significant benefit is in giving this amendment retroactive effect. In order to remedy the excessively harsh sentences that have resulted from this flaw in the guidelines since 1987, the "drugs minus two" amendment should be applied retroactively to those sentenced ***before*** November 1, 2014. Applied retroactively, this amendment would make those 51,000 currently incarcerated federal drug offenders---70% of which are Black and Hispanic---eligible for sentence reductions averaging 23 months.

Fundamental fairness demands that all eligible prisoners receive a chance to seek punishments that hew more closely to the mandatory minimum drug sentences that set the baseline for the drug sentencing guidelines. The Commission has a long and commendable track record of recognizing that corrections to flawed drug sentencing guidelines should, as a matter of fairness, be made retroactively applicable. The Commission has previously applied guideline changes to sentences retroactively for LSD (1993), marijuana (1995), and crack cocaine (2007 and 2011). The same concern for fairness that drove the Commission to make those guideline adjustments retroactive applies to the "drugs minus two" amendment today: justice should not depend on something as arbitrary as the date a person was sentenced, especially when the flaw being corrected has been present since the guidelines' creation in 1987.

Retroactivity of the "drugs minus two" amendment will not harm public safety. First, no currently incarcerated prisoner would receive an automatic sentence reduction. The statute governing sentence modifications, 18 U.S.C. § 3582(c)(2), requires individualized review and specific procedures in each case. If the amendment applied retroactively, the prisoner would need to file a request with the court, the prosecutor and law enforcement agent may oppose it based upon the facts of the case, and the court would make the ultimate highly individualized determination after its consideration of the facts, including any additional ones adduced at a hearing. Of particular importance to the court is the consideration of the prisoner's dangerousness; courts can and will deny sentence reductions if the prisoner poses a threat to public safety. After the 2007 crack cocaine retroactive amendment, courts denied 6% of all sentence reduction requests on public safety grounds. Moreover, under current statutory law, career offenders will not be eligible for sentence reductions.

Both in 2007 and 2011, there were no automatic sentence reductions. Courts reviewed each motion for sentence reduction presented to it and, when merited, denied retroactive sentence reductions to crack cocaine offenders who posed a danger. Experience and the statutory mandate in § 3582(c)(2) demonstrate that courts will continue to employ this highly-individualized review and procedure to ensure our continued public safety when the "drugs minus two" amendment is given retroactive effect. Furthermore, the Commission's previous retroactive crack cocaine guideline fixes did not increase recidivism; in fact, those who received sentence reductions re-offended at a ***lower*** rate (43%) than those who did not receive retroactive reductions (47%) within five years of their release.

For the retroactive crack cocaine guideline amendments in 2007 and 2011, courts, prosecutors, federal defenders, and probation officers all ably handled retroactive sentence reduction requests from over 25,000 and 17,000 applicants, respectively, when the Commission changed crack cocaine sentencing guidelines. For this "drugs minus two" amendment, to be

clear, many of the approximately 51,000 prisoners who would be eligible for retroactive sentence reductions will still have many years left to serve on their sentences before they would be eligible for release. This allows the courts, prosecutors, federal defenders, and probation officers to do what they have always done: employ planning and foresight to prioritize cases based upon amended release dates so as to prevent any disruption to case and docket management.

Furthermore, the impact on Probation would be lower now than in previous reduction years 2007 and 2011. This is because Probation's caseloads are down 5% since FY 2012. It is also due to the fact that many of these federal drug offenders do not have legal status in the United States or their convictions are deportable/removable offenses such that upon their release, would be immediately transferred and placed into U.S. Department of Homeland Security Immigration and Customs Enforcement custody and deported or removed, thus eliminating the need for Probation's involvement.

Our federal prison system is currently at 132% overcapacity---half of all federal prisoners are drug offenders---and consumes more than 25% of the DOJ's budget. This level of overcrowding and funding is unsustainable and threatens the safety of correctional officers, inmates, and the general public.

The Commission's own analysis estimates that making the "drugs minus two" fix retroactive will save 83,525 prison bed years over the period of more than 30 years. Assuming an average sentence reduction of 23 months for those eligible and then applying the current annual cost of federal incarceration of approximately $29,000, making the "drugs minus two" fix retroactive equates to $2.42 billion in savings.

In conclusion, the Commission should apply Amendment 3 retroactively to all those who are eligible, without limitation or restriction. It should reject DOJ's proposal to limit the retroactivity of this amendment to "lower level, nonviolent drug offenders without significant criminal histories." To begin with, criminal history is already included in the guidelines calculation and the judge's consideration and imposition of the sentence, including any enhancement or upward departure or variance. Thus, the sentence the offender is serving is already calibrated to reflect and account for prior criminal records. A retroactive reduction without restriction would be a reduction from a sentence that has already been increased due to criminal history.

Not only does the DOJ's proposal automatically cut the pool of eligible prisoners by almost half---thus halving the beneficial impact on prison overcrowding and costs---but it disproportionately excludes Black offenders, leaving them to serve what the Commission has already determined are excessive, unfair, and empirically-unsound sentences. This is particularly troubling because the federal "war on drugs" and our corresponding drug sentencing laws and guidelines have disproportionately impacted communities of color.

According to the Commission's own retroactivity impact analysis, almost 75% of the people eligible for retroactive application of the "drugs minus two" amendment are Black or Hispanic. While national data show that people of all races use drugs at about the same rate,

Black and Hispanic men and women are sentenced and imprisoned for federal drug offenses at disproportionately high rates, for virtually every kind of drug. For example, in FY 2013, Blacks and Hispanics comprised almost 75 percent of all federal drug offenders and more than 80 percent of offenders sentenced for powder cocaine, crack cocaine, and heroin offenses. Currently, almost 40 percent of all federal inmates are Black; 35 percent are Hispanic.

Making the "drugs minus two" amendment retroactive will not only provide the more proportionate sentences that eligible offenders of color should have received to begin with, but also restore these offenders to their communities and families sooner, strengthening communities of color and increasing the perception – and reality – that the justice in our system applies equally to everyone, irrespective of race or proxies for race. Proposals to categorically exclude certain offenders based on criminal history category and gun enhancements or convictions will disproportionately impact prisoners of color and thus should be rejected. These prisoners of color were not excluded from previous retroactive amendments in 2007 and 2011 nor should they be for this amendment. As noted before, public safety concerns can and must be taken into consideration by reviewing courts as part of their statutory mandate in granting or denying these requests.

For all these reasons, we urge the Commission to make Amendment 3 fully retroactive, without limitation or restriction as it did with other amendments in 2007 and 2011. We thank you for your leadership and commitment to repairing the flaws in our sentencing guidelines. We appreciate your continued commendable record of ensuring that equal justice under the law.

Sincerely,

John Conyers, Jr.
Ranking Member

Robert C. "Bobby" Scott
Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

cc: The Honorable Bob Goodlatte, Chairman, House Committee on the Judiciary