

United States Senate

WASHINGTON, DC 20510

July 10, 2014

The Honorable Patti B. Saris
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs

Dear Chair Saris:

We write in response to the Sentencing Commission's request for comment on whether Amendment Number 3 to the Sentencing Guidelines, submitted to Congress by the Commission on April 30, 2014, should be retroactively applied to previously sentenced defendants. For the reasons outlined below, we urge the Commission to make this Amendment fully retroactive.

We applaud the Commission's vote with respect to the modest two-level reduction in the Drug Quantity Table so that base offense levels appropriately correspond with mandatory minimum penalties. We agree with the Commission that the guideline ranges should not exceed often excessive and flawed mandatory minimums. We also strongly believe that judges should have the discretion to apply these changes to all eligible offenders, not just those sentenced beginning on November 1, 2014.

Retroactivity is consistent with public safety. Studies consistently show that our prisons are overcrowded with many offenders serving sentences for lower-level, nonviolent drug offenses. The modest changes contemplated here would not affect sentences for violent offenses. Moreover, any drug offender who used a weapon, played a larger role in the offense, or has a significant criminal history would still have to serve the full length of the many Guidelines provisions and statutes that impose severe penalties upon more serious offenders.

The Commission is not operating without precedent. We have seen the effects of retroactive application of a Guidelines reduction for a large number of offenders. In 2007, the Commission gave retroactive effect to an amendment to the Drug Quantity Table that lowered sentencing guidelines for offenses involving crack cocaine. Courts received more than 25,000 petitions for retroactive application, 64 percent of which were granted. Five years later, there is no evidence that offenders whose sentence lengths were reduced had higher recidivism rates than those who served their full prison terms. In fact, the offenders who received an earlier release actually recidivated at slightly lower levels. Moreover, crime rates across the country have continued to fall during this time.

Previous experiences demonstrate that judges would, and must, carefully review every motion for a reduced sentence. Retroactive effect, as the Guidelines recognize, would "not entitle a defendant to a reduced term of imprisonment as a matter of right." *See* § 1B1.10. Instead, judges must first consider the nature and circumstances of the offense, the history of the offender, and whether he or she presents a continued safety risk to the public. Judges are trusted

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to make these determinations every day. On several occasions, our Federal courts have efficiently handled a large number of petitions; and the Judicial Conference testified before the Commission that it is confident that judges, with minor accommodations, could do so again here.

This is also an issue of fairness. Without retroactivity, tens of thousands of offenders will continue to be subject to sentences that the Commission has deemed to be unwarranted. Offenders sentenced today, three years ago, or three months from now, all deserve the same treatment as those sentenced beginning on November 1. The inequities impacting past offenders are no less troubling than those impacting future offenders. Sentencing courts should have the opportunity to determine whether past offenders should be treated the same way as next year's offenders. Any other result would create new inequities in our system.

We are confident that retroactivity will improve public safety. Indeed, public safety is most threatened by inaction. The Commission has a statutory duty to formulate the Guidelines to minimize the likelihood of Federal prison overcrowding. Yet today, Federal prisons are more than 30 percent over capacity overall, and high security facilities are 51 percent over capacity. This overcrowding places not only the lives of our prison staff and inmates at risk, but it reduces the availability and effectiveness of prison programming to reduce recidivism. The vast majority of Federal inmates will eventually be released. We owe it to the communities in which they will live, as well as to the inmates themselves, to provide the highest quality recidivism reduction and reentry services upon their release.

Prison overcrowding places immense pressure on our public safety budget. The budget for the Federal Bureau of Prisons (BOP) has swollen to more than \$6.9 billion, or more than one quarter of the budget for the entire Justice Department. According to BOP, the current annual cost to house a Federal prisoner is \$29,291. Every additional inmate strips finite resources from other critical law enforcement priorities. This means fewer Federal agents and prosecutors; less investment in crime prevention, victim services, and recidivism reduction; and less assistance to our partners in state and local law enforcement. We have serious concerns that public safety will be adversely affected if we do not all do our part to responsibly reduce the prison population.

We also urge the Commission to give full retroactive application to the amendment, and not exclude certain classes of offenders from consideration. As with most determinations related to sentencing, we believe judges are in the best position to evaluate individual offenders, including any risk to public safety they may pose, and to determine appropriate sanctions. Exclusions for certain groups are at odds with the notion of individualized sentencing, and would lead to the kinds of inequities the Commission aims to address with this Amendment. For example, if the Commission were to exclude offenders in criminal history categories III-VI, nearly 75 percent of those individuals would be Black or Hispanic, leading to further racial disparity in our drug policies.

Amendment Number 3, even with retroactive effect, will not by itself solve the problems of prison overcrowding and strained budgets. Our burgeoning prison population is largely driven by inflexible drug mandatory minimum sentences. Only Congress, through reforms like the Smarter Sentencing Act (S.1410, H.R.3382), can fix unnecessarily long and unfair statutory minimums. But if made retroactive, this amendment would undoubtedly begin to alleviate

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dangerous prison overcrowding. It would create greater opportunity for investing in public safety efforts that have proven effective. And it would help remedy the lack of judicial discretion that has plagued our sentencing scheme for too long.


For all of these reasons, we encourage the Commission to adopt Amendment Number 3 with full retroactivity.

Thank you for considering our views.

Sincerely,



PATRICK LEAHY
United States Senator



RICHARD DURBIN
United States Senator



SHELDON WHITEHOUSE
United States Senator



RAND PAUL
United States Senator