



July 3, 2014

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

Re: Comment on Retroactivity of the 2014 Drug Guidelines Amendment to Reduce Sentencing Guideline Levels for Federal Drug Trafficking Offenses

Dear Judge Saris:

On behalf of The Sentencing Project, I am writing in response to the Commission's request for comments on whether the 2014 drug guidelines amendment, which would lower by two levels the base offense levels in the Drug Quantity Table across drug types in guideline §2D1.1, should be applied retroactively. We see no sound basis on which to have sentence dates determine sentence lengths, and believe that partial retroactivity would unintentionally exacerbate racial disparities in federal sentencing. Given the Commission's research showing that retroactive reduction of excessive sentences is unlikely to harm public safety, we therefore strongly urge the Commission to make this amendment fully retroactive.

For over 25 years, The Sentencing Project has conducted research and advocacy related to federal and state sentencing. We appreciate the Commission's ongoing commitment to examining and refining federal sentencing policy, and we welcome this opportunity to comment.

Retroactive Application Would Help Ensure Fundamental Fairness in Sentencing

Retroactive application of the amendment would advance one of the central purposes of the guidelines: to promote fundamental fairness in the criminal justice system. As U.S. District Judge Irene Keeley [testified before the Commission](#):

We do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible. The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future.

Failing to apply the amendment retroactively would be fundamentally unfair, as defendants sentenced under the old, overly punitive ranges would continue serving excessively long sentences while new offenders would receive substantially shorter terms for identical offenses. Requiring some individuals to remain in prison long after others convicted of similar crimes, solely because they were sentenced at an earlier date, only perpetuates injustice.

Retroactive Reduction of Federal Drug Penalties Unlikely to Harm Public Safety

There is little reason to believe that retroactive application of the amendment would threaten public safety. The recent [Commission study](#) on this issue shows no higher levels of recidivism for offenders receiving sentence reductions. In 2007, the Commission made retroactive an amendment – similar to the 2014 drug guidelines amendment – to reduce base offense levels for crack cocaine. The Commission found that within five years of release, the recidivism rate for those who received reductions was actually slightly lower than for individuals whose sentences were not reduced, 43.3% compared to 47.8%, although the difference was not statistically significant. This study adds to a mounting body of evidence suggesting that excessive prison terms do not increase public safety.

Retroactivity Should Be Applied Without Restriction

We strongly oppose the Department of Justice’s (DOJ) [proposal](#) to make the revised guidelines retroactive only for “individuals who lack significant criminal histories and whose offenses did not include aggravating factors, such as the possession of a dangerous weapon or the use of violence.” The best estimates suggest that these limitations could exclude more than 30,000 otherwise eligible individuals.

This proposal is problematic for several reasons. First, these offenders are already serving longer prison terms than others convicted of similar offenses since various enhancements have been incorporated in their sentences. Second, while there are differences in rates of recidivism for offenders falling in these categories, delaying their release in the absence of any other intervention would have little impact on their recidivism risk. Given DOJ’s leadership on advocating for strengthened reentry initiatives in recent years, it is disappointing that there is no consideration of how to address those issues in the context of these sentences.

Finally, because African Americans experience more contact with the criminal justice system than other groups – and thus, on average, have more extensive criminal backgrounds – DOJ’s proposed limitations would disproportionately exclude African Americans from receiving the benefit of retroactivity. Given existing racial disparities among federal prisoners serving time for drug offenses, this limitation would be a cruel irony for a community that has suffered the greatest harm under excessive drug penalties.

Retroactive Application Would Reduce Excessive Incarceration and Racial Disparities in the Federal Prison System

In recent decades, the number of people serving time in federal prison for a drug offense has [skyrocketed](#), from approximately 4,700 individuals in 1980 to about 94,600 in 2011 – a 20-fold increase in thirty years. Today half of federal prisoners are incarcerated for a drug offense,

driving the 800% growth in the federal prison population during this time. The growing proportion of drug offenders has contributed to significant racial and ethnic disparities. [In 2012](#), 72.1% of all persons sentenced for federal drug trafficking offenses were either Hispanic (46.2%) or black (25.9%).

Retroactively applying the amendment would help to alleviate the unsustainable burden on the federal prison system by allowing [an additional 51,141](#) federal prisoners to seek a reduction in their current sentence. If full reductions are granted in every case, the average individual's prison term would be reduced 18.4%, or by nearly two years. Retroactive application would thus be an important step toward addressing the growing size of the federal prison population and the significant overcrowding it has created. Moreover, because drug penalties disproportionately affect African Americans and Latinos, reduced drug penalties would help to mitigate the drug war's unfair impact on communities of color.

In unanimously approving the 2014 drug guidelines amendment, the Commission recognized that federal drug penalties are too often excessive. The amendment would relieve this problem prospectively, but only retroactive application can address the damage caused by the drug policies of the past decades. We therefore strongly urge the Commission to make this amendment fully retroactive to promote a fair, safe, and sound approach to sentencing.

Sincerely,

A handwritten signature in black ink that reads "Marc Mauer". The signature is written in a cursive, slightly slanted style.

Marc Mauer
Executive Director