

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Remarks for Public Meeting
July 18, 2014

Thank you all for coming to this public meeting of the United States Sentencing Commission. Once again, your attendance here is a testament to the extraordinary interest in federal sentencing issues right now and specifically in the issue that the Commission is considering today – whether the amendment the Commission approved unanimously in April to reduce the guideline levels applicable to the drug quantity table by two levels should be made retroactive for those eligible offenders currently in prison.

Specifically, we will vote today on whether to grant retroactive application of the drug guideline amendment to all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, or later. Before any offender would be released, a federal judge would have to decide that the offender would not pose a public safety risk and whether release is appropriate. As we always do for retroactivity questions, we considered the purposes of the amendment, the magnitude of the change, and the difficulty of applying the change retroactively.

The massive response to our request for public comment also speaks to the interest in this issue. We received well over 60,000 letters during our public comment period. I want to thank the members of Congress who submitted letters: Senators Leahy, Durbin, Whitehouse, and Paul, and Congressmen Conyers, Scott, Cardenas, Cohen, Johnson, O'Rourke, and Richmond. I also want to thank the Criminal Law Committee of the Judicial Conference, the Department of Justice, the Federal Public and Community Defenders, our advisory groups, and the many advocacy groups, law enforcement organizations, and of course individuals who submitted views. Your input was once again of paramount importance in this process.

After much discussion and consideration, the Commission voted unanimously in April to reduce the guidelines applicable to the drug quantity table by two levels, across all drug types. That amendment to the guidelines is now before Congress. Unless Congress acts to disapprove the amendment, it will become effective on November 1.

Let me review why we adopted the drug amendment in April. The Commission has the statutory duty to ensure that the guidelines minimize the likelihood that the federal prison population will exceed capacity. Reducing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32% overcapacity and 52% overcapacity for the highest security facilities. Federal prison spending exceeds \$6 billion a year, making up more than a quarter of the budget of the entire Department of Justice and reducing the resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs – all of which promote public safety.

Several changes in the guidelines and the law support lowering the drug quantity table by two levels. When the drug quantity tables were set at their current level, above the mandatory minimum penalties, drug quantity was the primary driver of drug sentences. There was only one

other specific offense characteristic in the drug guideline. Now, there are fourteen enhancements for factors like violence, firearms, and aggravating role. Quantity, while still an important proxy for seriousness, no longer needs to be quite as central to the calculation.

Also, originally, drug guideline levels were set above the mandatory minimum penalties so that, even for the lowest level drug offenders with minimal criminal history, there would still be some room for their sentences to move down before hitting the mandatory minimum. That way these offenders would receive some benefit if they accept responsibility. Since then, Congress added the “safety valve,” which provides for sentences below mandatory minimum levels for low-level offenders and gives those offenders a substantial benefit if they accept responsibility. It is no longer necessary to set the guidelines above mandatory minimum penalties to ensure that low-level offenders benefit from accepting responsibility.

Indeed, when the Commission reduced guideline levels for crack offenses by two levels in 2007, the overall rates at which crack cocaine defendants pled guilty and cooperated with the government remained relatively stable. This recent experience indicates that this year’s amendment, which is similar in nature to the 2007 crack cocaine amendment, should not affect the willingness of defendants to plead guilty and cooperate with authorities.

Many of the same factors which led us to vote in April to reduce drug guidelines support making those reductions retroactive. The same changes in the guidelines and laws I mentioned earlier that made the lower guideline levels more appropriate prospectively also make lower guideline levels appropriate for those offenders already in prison, most of whom were convicted after many of these statutory and guideline changes were already in place.

In addition, retroactive application of the amendment would have a significant impact on reducing prison costs and overcapacity, which was an important purpose of the amendment, and the impact would come much more quickly than from a prospective change alone.

With respect to the magnitude of the change, if the Commission votes today to make the amendment retroactive for all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, that would make an estimated 46,290 offenders eligible for reduced sentences. These offenders would be eligible to have their sentences reduced by an average of 25 months or 18.8 percent. They would still serve 108 months, on average. This potential reduction would result over time in a savings of 79,740 prison bed years. The magnitude of the change, both collectively and for individual offenders, is significant. Retroactive application of this change in the guidelines would make a real short-term and long-term difference as we seek to help get the federal prison budget and population under control.

We have heard from many in Congress, as well as federal judges, advocacy organizations, faith organizations, academics, and many thousands of citizens urging us to make the amendment reducing drug guideline levels fully retroactive. They have argued that retroactivity leads to a fair and just result, that it will promote rather than hinder public safety, and that judges are well positioned to determine in which cases sentences should and should not be reduced.

We have also listened very carefully to the law enforcement community and paid close attention to the concerns raised by many in law enforcement and by some judges about the public safety implications of applying this amendment retroactively. Some, like the Major Cities Chiefs Association and the Department of Justice, have been supportive of retroactivity but urged that it be done in a way that safeguards public safety. Others, like the Fraternal Order of Police, the National Association of Assistant United States Attorneys, and the National Narcotics Officers' Associations' Coalition, have opposed retroactivity based on public safety concerns. We take very seriously our duty to promote public safety and appreciate the hard work law enforcement officers do every day to protect all of our safety.

The proposal we vote on today seeks to address these concerns about public safety. It is important to note that the Commission was informed by studies we conducted comparing the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 amendment reducing guideline levels for crack cocaine offenders with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that retroactive application of modest reductions in drug penalties such as those in the amendment we vote on today will not increase the risk of recidivism.

Nonetheless, we recognize the reasonable concerns we have heard that releasing a large number of offenders within a short period of time can create risks. I believe the proposal we vote on today takes steps that will effectively address those risks, as well as reduce the difficulty of applying the change retroactively. Specifically, under the amendment we vote on today, judges will be able to begin considering motions to reduce sentences based on retroactive application of the drug amendment this November. However, any order reducing terms of imprisonment cannot be effective until November 1, 2015, meaning that no offenders will actually be released early until November 2015.

This delayed implementation will address public safety concerns in three ways. First, it will allow judges more time to consider the initial influx of motions for reduced sentences. As we have consistently said, retroactive application of this amendment does not automatically entitle anyone to a reduced sentence. Judges will review every case to determine whether it is appropriate for a given offender's sentence to be reduced. The delayed implementation we vote on today will allow judges time to carefully weigh each case, including considering the public safety implications of releasing any given offender early, and will give courts enough time to obtain and review the information necessary to make an individualized determination. In addition, the government will have adequate time to access information including regarding offenders' conduct in prison and object to sentence reductions when prosecutors believe public safety may be at risk. We heard testimony from the judiciary that additional time would be essential to facilitate the kind of consideration that is required. With an estimated 7,953 offenders eligible for release in November 2015 under retroactive application of this amendment, this added time to consider each case thoroughly will be crucial, particularly in those states, like border states, which have huge caseloads.

Second, the delayed implementation will ensure that the Bureau of Prisons has enough time to give every offender the usual transitional services and opportunities that help increase the chances of successful reentry into society. In the regular course, many offenders transition from prison to halfway houses or home confinement before their ultimate release. Officials from the Bureau of Prisons have emphasized that these transitions help ensure that offenders have the services, support, and skills they need to live productive lives. We heard testimony in June that, without a period of delay when a guideline reduction was applied retroactively in the past, some offenders were released without a reentry plan and services. The special instruction on timing in the proposed amendment we will vote on today will mean that, this time, no offenders will be released without having had the opportunity for this regular transition.

Third, the delay will allow the Office of Probation and Pretrial Services adequate time to prepare so that released offenders can be effectively supervised. This delay will allow probation officers to be transferred or hired and trained and allow them to prepare for supervising additional offenders. With time to prepare, the Office of Probation and Pretrial Services will be able to ensure more effective supervision, which will increase the chance of successful offender reentry and help ensure public safety. We have heard from judges and probation officers that additional time for this step is essential to protecting public safety, and today's proposed amendment directly addresses that concern.

I understand that the special instruction on the effective date of reduced sentences under retroactive application of the drug amendment will reduce somewhat the number of offenders who will benefit. But I believe this limitation is necessary to ease the difficulty in applying the amendment retroactively by enabling appropriate consideration of individual petitions, ensuring sufficient staffing and preparation to effectively supervise offenders upon release, and allowing for effective reentry plans. All of these steps will ultimately help to protect public safety and, we believe, make this delay necessary.

I am convinced that today's proposed amendment is a well-reasoned approach to appropriately reduce prison costs and overcapacity, while safeguarding public safety. That is why I will vote for retroactive application today.

Members of the Commission come from across the country and across the political spectrum. I am proud that we have not only worked hard, listened to each other, and given this important issue the very serious consideration it deserves, but that we have also so often been able to reach consensus. By working together, we have reached results that are balanced and supported by empirical evidence. We voted unanimously in April to reduce guideline levels for drug offenses.

We have worked hard to achieve similar consensus today. This amendment received unanimous support because it is a measured approach to reducing prison costs and populations and responding to statutory and guidelines changes, while reducing the difficulty of application and safeguarding public safety.

We also hope that Congress can work together to pass legislation to address the many problems the Commission has found with the current statutory mandatory minimum penalties. The step the Commission is taking today is an important one, but only Congress can bring about the more

comprehensive reforms needed to reduce disparities, fully address prison costs and populations, and make the federal criminal justice system work better.

I want to again thank all of you for coming and all of the members of Congress, judges, organizations, and members of the public who submitted comments and contributed so much to this process. Thank you also to my fellow Commissioners who considered this important issues so carefully and worked to ensure a thoughtful and appropriate result.

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