

July 7, 2014

VIA ELECTRONIC MAIL

U.S. Sentencing Commission
Attn: Public Affairs
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comment on 2014 Drug Guidelines Amendment Retroactivity

Dear Judge Saris and Commissioners,

In March, many of the undersigned former federal and state prosecutors, judges and law enforcement officials wrote to the Commission in support of the 2014 Drug Guidelines Amendment, which proposed to reduce all drug sentencing guidelines by two levels. We were pleased that the Commission adopted this considered and carefully designed measure to address the exponential growth of the federal prison population and its consequent cost. We write again today to urge the Commission to apply the Amendment retroactively to the thousands of currently incarcerated inmates sentenced under the previous guidelines.

As former prosecutors and judges, we are concerned by the current strain on the federal prison system, which now requires 25 percent of the Department of Justice's operating budget to accommodate unprecedentedly large prison populations. In order to realize the considerable cost savings of the amended guidelines, the thousands of offenders sentenced since 1991 who would be eligible if the Commission made the Amendment retroactive, should be allowed to apply for a reduced sentence. Retroactivity of the amended guidelines would serve as a critical component to the systemic solutions needed to relieve the burden of overpopulation in the federal prison system. The cost of reviewing sentences now is dwarfed by the potential savings, \$2.42 billion over the next thirty years,¹ which the Department of Justice can redirect to critical law enforcement functions.

The 2007 Amendment, adopted to reduce crack cocaine sentencing guidelines by two levels, provides a helpful roadmap for how the current amendment can be implemented retroactively without a decrease in public safety. This Commission's five-year study of those inmates released under the 2007 program showed that there was no increase in recidivism compared to inmates who were released before the program was implemented.² Furthermore, the many safeguards built into the review process will ensure

¹ According to the Commission's estimates, reduced sentences will save an estimated 83,525 bed years. U.S. Sentencing Comm'n, Office of Research and Data, Office of General Counsel Memorandum to Chair Patti Saris, Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive (May 27, 2014) [hereinafter Retroactivity Memo], available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf. At an average cost of \$29,000 per bed year, this measure will save approximately \$2.42 billion. 79 Fed. Reg. 26,996 (May 12, 2014), available at <https://federalregister.gov/a/2014-10859>.

² U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 2 (May 2014), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

that any request for a sentence reduction can be rejected if it would pose a threat to public safety, rendering categorical exceptions to eligibility unnecessary. For the Amendment to achieve its intended goal of reducing costs, the program must be available to the full range of inmates who would otherwise be eligible under the current guidelines.³

We commend the Commission for its leadership in seeking to address the dramatic increase in federal prison populations and costs. The 2014 Drug Guidelines Amendment reducing all drug sentencing guidelines by two levels was a sensible and necessary step towards relieving the burdens of excessive sentences on the federal prison system. Applying the Amendment retroactively and without categorical exceptions would further the Commission’s goals of addressing federal prison populations and costs, while being mindful of the need to maintain public safety. For these reasons, we strongly support applying the new guidelines retroactively and without categorical exceptions.

Thank you for your consideration.

Respectfully,

Richard S. Berne

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William G. Broaddus

Former Attorney General, Virginia

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Bruce J. Einhorn

Former Judge, Los Angeles Immigration Court; Former Chief of Litigation, Office of Special Investigations, Department of Justice

³ If the amendment is made retroactive, an estimated 51,141 offenders sentenced between October 1, 1991, and October 31, 2014, would be eligible to seek a reduction. Retroactivity Memo, *supra* note 1, at 7.

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