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Prof. Doug Berman  
Editor  
Federal Sentencing Reporter  
College of Law  
The Ohio State University  
Drinko Hall, Rm. 310  
55 W. 12<sup>th</sup> Street  
Columbus, OH 43210-1391

Dear Professor Berman:

In the December 2015 issue of the Federal Sentencing Reporter, Frank Bowman, Professor of Law at the University of Missouri, wrote about the state of federal sentencing legislation currently pending in the House and Senate. In his letter he describes analyses that the United States Sentencing Commission provided to Congress estimating the impact of some of those bills. Unfortunately, Mr. Bowman mischaracterized the work we did.

In his article, Mr. Bowman describes section 102 of the Senate bill (S. 2123), which would broaden the current statutory safety valve for drug offenders convicted of an offense carrying a mandatory minimum penalty. Specifically, that provision would extend eligibility for the safety valve to offenders with up to four criminal history points under the criminal history provisions of the federal sentencing guidelines, provided that the offender did not have a prior conviction assigned three points under the guidelines, or any prior conviction assigned two points and involving a drug trafficking or a violent offense. The Commission estimated that as many as 3,314 offenders would benefit from this provision each year. Mr. Bowman states that he had been “advised,” although he did not say by whom, that the Commission’s estimate did not account for offenders excluded by the 3-point or 2-point offense limitations. Mr. Bowman was misinformed. Our estimate did exclude any offender meeting those criteria. The numbers we provided to Congress are the best estimate of the number of offenders who would be affected by this provision annually.

Mr. Bowman also states that the Commission’s estimate did not account for the other exclusionary factors in the current statutory safety valve provision, which would continue to apply under the Senate bill: e.g., that the offender not possess a weapon in connection with the offense, not be an organizer, manager, leader, or supervisor of the others in the offense, not use violence in connection with the offense, and must provide truthful information to authorities.

Again, Mr. Bowman is incorrect. All of these factors were taken into account when we performed our analysis, as we do whenever Congress asks us to assess the impact of proposed changes to the statutory safety valve provision and how it applies under the federal sentencing guidelines.

In his article, Mr. Bowman also describes section 105 of the Senate bill, which would apply retroactively (i.e., to offenders still in prison) the changes made by the Fair Sentencing Act of 2010 (FSA) to the mandatory minimum penalties for crack cocaine trafficking crimes. The Commission incorporated these changes into the federal sentencing guidelines through an amendment to the *Guidelines Manual* in 2011, and made that amendment retroactive, however, the old statutory minimum penalties continue to apply. For many offenders, those statutory provisions “trump” all or, in some cases, part of the newer sentencing guideline range provided by the Commission. The Commission estimated that section 105 of the Senate bill would affect 5,825 offenders convicted before passage of the FSA and still incarcerated by allowing them to seek a reduced sentence under section 3582(c)(2) of title 18 in light of the Commission’s amended drug trafficking guideline.

Mr. Bowman states that our estimate is simply a count of the number of crack offenders still in prison who were convicted before the FSA. This is incorrect. That number is larger than our estimate. Our estimate is the number of offenders who were sentenced at the old mandatory minimum penalties, and so could not seek any further reduction under the amended sentencing guideline, or who were unable to obtain a full reduction in their sentence because the old statutory minimum penalties acted to cabin the court’s authority to reduce the sentence to a point within the new sentencing guideline range. In other words, our estimate is the number of offenders who could benefit under the Senate bill provision – which is exactly what Congress asked of us.

The Commission takes very seriously its statutory authority to consult with and provide advice to Congress, the courts, and Executive Branch agencies. We work diligently to ensure that our estimates account for as many of the provisions of a proposed policy change as is possible.

Sincerely,

A handwritten signature in blue ink, appearing to read "Glenn R. Schmitt", with a small star symbol at the end of the signature.

Glenn R. Schmitt  
Director  
Office of Research and Data