

Written Statement of Sarah Gannett

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

**Public Hearing on Retroactivity of the 2014 Guideline Amendments to
§2D1.1 and §2D1.11**

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My name is Sarah Gannett. I am an Assistant Federal Defender in the Eastern District of Pennsylvania. Thank you for inviting me to participate in this hearing on behalf of the Federal Public and Community Defenders regarding the possible retroactivity of the new guideline amendments to USSG §§ 2D1.1 and §2D1.11.

It is especially meaningful for me to address you because since 2007 I have been involved in implementing the Commission's earlier decisions to make the crack cocaine amendments retroactive, representing clients in my own office, and working with Defenders across the country on the issues surrounding motions for relief under 18 U.S.C. § 3582 and USSG §1B1.10. All Defenders strongly support retroactivity of the new amendments and are excited about the prospect of helping clients receive a limited reduction in sentence so that those clients may be reintegrated into the community, reunited with their families and friends, and begin their lives anew.

We commend the Commission for amending the drug quantity table to modestly reduce sentences for many persons convicted of a drug offense. The next logical and just step is to make the amendment retroactive. To ensure fairness in application and to avoid unnecessary litigation over eligibility for relief, we recommend that the Commission make the entire amendment retroactive and place no additional limitations on the eligibility for relief.

I. The Relevant Factors Weigh in Favor of Making The Drug Guideline Amendment Retroactive.

Among the factors that the Commission considers in deciding whether to make an amendment retroactive are: the purpose of the amendment; the magnitude of the change in the guideline range; and the difficulty of applying the amendment retroactively. USSG §1B1.10, comment. (backg'd.). All of these factors support retroactivity, just as they did when the Commission amended the guidelines for crack cocaine in 2007 and 2010, and amended the guidelines for other drug offenses in years past.¹

¹ See USSG App. C, Amend. 502 (Nov. 1, 1993) (change in the method of calculating the weight of LSD); USSG App. C, Amend. 536 (Nov. 1, 1995) (change in the method of calculating the weight of marijuana plants); USSG App. C, Amend. 662 (Nov. 5, 2003) (change in the method of determining the amount of oxycodone, which reduced the penalties for offenses involving Percocet); USSG App. C, Amend. 713 (2008); USSG App. C, Amend. 759 (2011).

A. The Purposes of the Amendment Support Retroactive Application.

After careful consideration, the Commission unanimously voted to reduce the offense levels in the drug quantity table by two levels. The primary purpose of the amendment was to take a “modest step” toward addressing the urgent need to “reduce costs of incarceration and overcapacity of prisons, without endangering public safety.”² The Commission projected that within five years, the amendment would reduce the federal prison population by more than 6,500 inmates.³ In addition to reducing prison crowding and costs of incarceration, the Commission sought to reduce the impact of drug quantity as the primary driver of sentence length, finding that specific offense characteristics in the drug guideline lessened the centrality of drug quantity in determining offense seriousness.⁴ The same reasons that the Commission gave for amending the drug guidelines support retroactive application of the amendment.

1. Retroactive application of the amendment would reduce prison crowding without endangering public safety.

The Commission’s early decision to link the drug quantity table to mandatory minimum sentencing thresholds has been a primary force behind the increase in the federal prison population.⁵ While the drug guidelines amendment should reduce prison overcrowding by a modest amount in the future, prison crowding and the cost of incarceration are urgent problems in need of a solution now. Valuable prison space and tax dollars should not be wasted on inmates whose continued incarceration serves no public safety interest.

“BOP facilities are overcrowded – 32 percent above rated capacity system-wide as of February 27, 2014.”⁶ Half (49.9%) of the BOP population are inmates convicted of drug offenses.⁷ As of January 2014, about one-third (32.9%) of inmates convicted of drug offenses

² Remarks of Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 1-3 (Apr. 10, 2014) (*April Remarks of Chief Judge Saris*).

³ *Id.*

⁴ *Id.*

⁵ Statement of Molly Roth, Assistant Federal Public Defender for the Western District of Texas, Before the U.S. Sentencing Comm’n, Washington, D.C., 12-15 (Mar. 13, 2014). See also Committee on Causes and Consequences of High Rates of Incarceration, National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 33-68, 152 (2014) (*Growth of Incarceration*), http://nap.edu/catalog.php?record_id=18613.

⁶ U.S. Dep’t of Justice, *FY2015 Performance Budget Congressional Submission: Federal Prison System, Salaries and Expenses* 10 (2014) (*FY2015 Performance Budget*).

⁷ Federal Bureau of Prisons, *Inmate Statistics: Offenses* (last updated Apr. 26, 2014), http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

were housed in medium security facilities⁸ which are 41% overcrowded⁹; 25 percent of them are triple bunked.¹⁰ This level of crowding has a negative effect on inmates and jeopardizes the safety of prison staff.¹¹ By 2019, the prison population is expected to rise to 234,398 with system-wide overcrowding at an all time high of 41 percent.¹² Even with retroactive changes to the crack guidelines in 2007 and 2011, and the anticipated savings of 6,500 beds from future reductions in drug sentences, the crowding problem is significant.¹³

Retroactive application of the amendment will help alleviate the “two interrelated crises in the federal prison system”: (1) “the continually increasing cost of incarceration, which has an impact on the “Department [of Justice]’s other law enforcement priorities,” and (2) “the safety and security of the federal prison system.”¹⁴ The per capita costs of incarceration have been rising steadily, from \$21,603 in FY 2000 to \$29,291 in FY 2013.¹⁵ Based on FY 2013 costs of incarceration, the cumulative savings to the Bureau of Prisons of retroactive application of the drug guidelines amendment could be about 1.5 billion dollars. Overcrowding would be substantially reduced, enabling BOP to house inmates in appropriate facilities with proper programming and staffing.

The cost of community supervision, at \$3,347.41 per person per year,¹⁶ pales in comparison to the cost of incarcerating a single inmate. Unlike prison costs, which could be

⁸ Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (Feb. 24, 2014, 12:37 EST) (on file with National Sentencing Resource Counsel for the Federal Public and Community Defenders) (providing Bureau of Prisons data on Drug Offenders in BOP Custody 1/25/14).

⁹ *FY2015 Performance Budget*, supra note 6, at 11.

¹⁰ *FY2015 Performance Budget*, supra note 6, at 11.

¹¹ *Id.* at 11.

¹² *Id.* at 4

¹³ *Id.*

¹⁴ Memorandum of Michael Horowitz, Inspector General to The Attorney General and Deputy Attorney General, *Top Management and Performance Challenges Facing the Department of Justice – 2013*, Dec. 20, 2013), <http://www.justice.gov/oig/challenges/2013.htm>.

¹⁵ Nathan James, *Congressional Research Service, The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* 15, Table 1 (Apr. 2014), <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

¹⁶ Probation & Pretrial Services, *OPPS Announces New Costs of Incarceration and Supervision* (June 2013), <http://jnet.ao.dcn/court-services/probation-pretrial-services/opps-announces-new-costs-incarceration-and-supervision>.

avoided with early release, the costs of community supervision are unavoidable, whether eligible inmates are released early as a result of a sentence reduction, or released after serving a full term. The only question is whether the taxpayers pay now or pay later. The fiscally responsible action is to make the amendment retroactive, particularly in light of the Commission's statutory obligation to relieve prison crowding and reduce the costs of incarceration. Since all the available evidence shows that the recidivism rates for persons released early is no different than that for those required to serve a full term, the Commission may take this fiscally responsible action consistent with its obligation to protect the public.¹⁷

Retroactive application of the amendment would not endanger public safety: first, empirically, inmates receiving sentence reductions under prior retroactive amendments did not present a greater risk of recidivism or danger to others; second, the majority of inmates who are eligible to receive sentence reductions under this amendment are non-violent; and third, the retroactivity statute and policy statements give courts a means for addressing public safety in any case in which it is a concern.

Commission data and other evidence show that a reduction in the length of incarceration for the average inmate serving time for a drug offense will present no greater risk of recidivism or danger to others than if the person is required to serve his or her full term. The Commission's recent analysis shows that persons who received a reduced sentence under the 2007 crack amendments had no statistically significant different recidivism rate than similarly situated persons who did not receive a reduced sentence.¹⁸ The data show that the majority of the individuals who would benefit from retroactive application of the amendment are non-violent and likely would present a similarly low risk of recidivism and danger to others. As of January 25, 2014, BOP housed 99,444 drug offenders.¹⁹ Of those, over half (52.1%) were housed in administrative, low, or minimum security facilities. About a third (32.9%) were housed in

¹⁷ While we understand that U.S. Probation has endured budget cuts like many agencies, including the Bureau of Prisons, concerns about supervision resources should not drive the Commission's decision. Retroactive application of the 2014 drug amendment is a sound policy decision. If a lack of supervisory resources is of concern, then the appropriate course of action is to inform Congress that it should consider a supplemental budget appropriation rather than deny retroactive relief to defendants who have received harsher terms of imprisonment than necessary and who are occupying valuable prison bed space that should be reserved for those who truly present a danger.

¹⁸ USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment 3* (2014) (*Recidivism 2007 Crack Amendment*). Even those who received a sentence increase for weapon involvement had recidivism rates similar to those in the Comparison Group. *Id.*

¹⁹ Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (Feb. 24, 2014, 12:37 EST) (on file with National Sentencing Resource Counsel for the Federal Public and Community Defenders) (providing Bureau of Prisons data on Drug Offenders in BOP Custody 1/25/14).

medium security facilities. Only 8.5 percent were housed in high security facilities. Only 11.8 percent had been found guilty of a violent prison rule infraction and even fewer (8.5%) were a member, associate or affiliated with a prison gang.

With an average age of 38, many inmates eligible for a sentence reduction are well past their peak age of criminal activity²⁰ and the incapacitation effects of continued incarceration are likely quite small.²¹ As the National Research Council recently summarized: “because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to prevent crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.”²² In fact, a reduction in sentence may decrease the risk of recidivism by removing the destabilizing and criminogenic effects of imprisonment.²³

Most importantly, as the Commission reasoned when it made the 2007 and 2010 crack amendments retroactive, “public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant’s term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.”²⁴ In our experience, courts take this obligation very seriously in individual cases in which there is a suggestion of a threat to public safety.

2. Retroactive application would appropriately reflect the Commission’s policy determination that lower offense levels under the drug quantity table are sufficient to achieve the purposes of sentencing.

When it voted in April to promulgate the drug guidelines amendment, the Commission acknowledged that the amendment would move the guidelines closer to achieving proportionate sentencing, finding that drug quantity should play a lesser role in determining offense seriousness, particularly given the addition of numerous specific offense characteristics that were

²⁰ See *Recidivism 2007 Crack Amendment*, *supra* note 18, at 11 (average age of recidivists in both Retroactivity and Comparison Group was 33). See also USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, Ex. 9 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

²¹ *Growth of Incarceration*, *supra* note 5, at 37.

²² *Id.* at 156.

²³ Statement of Molly Roth, *supra* note 5, at 18-19.

²⁴ USSG, Amend. 759 (Nov. 1, 2011); USSG, Amend. 713 (Mar. 3, 2008).

not included in the guidelines when the Commission first constructed the drug quantity table.²⁵ Several Commissioners also cited the Commission's recidivism study on retroactive application of the 2007 crack amendments, which shows that the pre-amendment guidelines overstated the risk of recidivism and that lengthier sentences were not necessary to protect the public.

The purpose of achieving proportionality and sentences that better reflect empirical research on recidivism supports retroactive application of the amendment. The pre-amendment drug quantity table overstated offense seriousness and the risk of recidivism for thousands of defendants already sentenced.²⁶ Justice demands that judges be permitted to revisit the sentences imposed on those defendants and reduce sentences where appropriate. Far too many individuals in low-level roles like street dealers, couriers, and mules, have been sentenced to long terms of imprisonment that Congress intended for managers or kingpins.²⁷ The time has come to begin to correct that longstanding defect in how the drug quantity table overstates culpability by applying the modest reductions the Commission has adopted prospectively to sentences already imposed, but now acknowledged to have been excessive.

3. Retroactive application would be consistent with other important goals served by the amendment.

Retroactive application of the amendment would be an important step toward mitigating the devastating impact of mass incarceration on racial and ethnic minorities.²⁸ Three-quarters (74.1%) of inmates who would be eligible for a reduction in sentence are Black or Hispanic. This disproportionate ethnic and racial impact of lengthy prison sentences damages family relationships, harms children, and exacerbates poverty in these groups.²⁹ It also undermines

²⁵ USSC, Public Meeting – April 10, 2014 (Remarks of Chair Patti Saris, Commissioner Ketanji Jackson, and Commissioner Rachel Barkow).

²⁶ Statement of Molly Roth, *supra* note 5, at 4-8.

²⁷ *Id.* at 4.

²⁸ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Record* 132 (2004) (“This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination.”).

²⁹ See Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n, *Speech to Georgetown University Law Center: A Generational Shift for Drug Sentences* 3-4 (Mar. 26, 2014) (recognizing how disproportionate correctional control over Black and Hispanic individuals “damages the economy and morale of communities and families as well as the respect of some for the criminal justice system”), http://www.usc.gov/Education_and_Training/Online_Learning_Center/Supporting_Materials/Saris-Georgetown-Law-Center-Speech-20140326.pdf; Statement of Molly Roth, *supra* note 5, at 8-9. See also Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 *Criminology & Pub. Pol’y* 793, 806 (2011) (concluding that mass incarceration

respect for the law. Black and Hispanic men, followed by Black and Hispanic women, have experienced enormous rates of imprisonment under federal drug sentencing policy. “Hispanics are arrested at a rate of approximately three times their proportion in the population for federal drug offenses.”³⁰ The damaging social effects of mass incarceration and long prison terms are concentrated in Black and Hispanic communities.³¹ Some of those effects could be ameliorated if individuals were allowed to return home earlier to their families and communities.³² To keep thousands of inmates in prison, after concluding that a lesser sentence is sufficient to serve the purpose of sentencing, would perpetuate the systemic bias underlying the criminal justice system and would “obliterate[] most Americans’ sense of justice.”³³

Retroactive application of the 2014 drug guideline amendment also would be consistent with the view that mandatory minimum drug laws should be reformed – a view supported by the Commission, the Judicial Conference, and both Republican and Democratic members of

has increased racial disparities in childhood mental health and behavioral problems which in turn are linked to “difficulty in school, trouble finding work, and becoming involved in crime”); *Statement of Bryan Stevenson, Testimony Before House Judiciary Committee’s Over-Criminalization Task Force Hearing on Penalties 2* (May 30, 2014) (discussing the devastating impact of mass incarceration on communities of color and how drug arrests of African American and Latino men are significantly higher than for White individuals even though all groups are as likely to use and sell drugs). *See also Growth of Incarceration, supra* note 5, at 233-301 (discussing numerous consequences of imprisonment on employment, earnings, families, children, and communities).

³⁰ Testimony and Statement of Juan Cartagena, President & General Counsel, Latino Justice PRLDEF, in Support of New Jersey Senate Bill 2586 & Assembly Bill 3837: The Opportunity to Compete Act (June 2013), http://latinojustice.org/briefing_room/Testimony_NJ_Ban_Box.pdf.

³¹ The literature on the collateral consequences of mass incarceration and lengthy prison terms is robust. Here are just a few citations. *See* Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* (2010) (discussing extensive findings on how “incarceration create[s] lasting barriers to economic progress for formerly incarcerated people, their families, and their children”); Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271 - 1305 (2004); Anie Gjelsvik et al., *Incarceration of a Household Member and Hispanic Health Disparities: Childhood Exposure and Adult Chronic Disease Risk Behaviors*, 10 *Preventing Chronic Disease* 1 (2013) (childhood exposure to incarceration of a household member in a Hispanic family is associated with being a smoker, heavy drinker, and multiple risk behaviors), http://www.cdc.gov/pcd/issues/2013/pdf/12_0281.pdf; *Growth of Incarceration, supra* note 5, at 202-317.

³² *See* Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 *Annals of the American Academy of Political and Social Science* 179 (2009) (using data on Texas prisoners, the authors find that a sizable number of Hispanic and African American fathers expect to live with their children upon release from prison, suggesting a need to invest resources supporting reunification and rehabilitation).

³³ Roberts, *supra* note 31, at 1305.

Congress.³⁴ Because the guidelines link the drug quantity to the mandatory minimum amounts, the mandatory minimum sentencing regime affects every drug sentence whether the defendant was exposed to a mandatory minimum or not.

4. The need to relieve prison crowding, save the costs of unnecessary incarceration, and have sentences that more closely reflect the purposes of sentencing should trump any concern about “paying now” rather than “paying later” for community supervision.

As previously discussed, whether or not the amendment is made retroactive, the thousands of persons currently incarcerated who would be eligible for reductions in sentence length will be released to community supervision one day – sooner or later. The costs of community supervision for these individuals are therefore fixed. We understand that some concerns have been expressed about whether it is viable to shift some of those costs forward by retroactive application of the amendment. Notwithstanding budget cuts over the past several years, we are confident that U.S. Probation can manage its resources so that persons in need of more intense supervision will receive it. In any event, such “pay now” versus “pay later” concerns should not stand in the way of implementing a policy that is fair and fiscally-responsible in the long-term.

The impact on Probation from applying the amendment retroactively should not be overstated. From FY 2012 to FY 2013, the number of persons received into post-conviction supervision fell by 5 percent, which should better equip probation to handle an influx of new releases.³⁵ Moreover, a sizable number of eligible inmates will not be released to supervision because they will have detainers placed upon them before they are released.

According to BOP data, 21,350 (21.4%) of the 99,767 persons currently in BOP custody for a drug offense already have a detainer placed upon them. Of those with a detainer, 17,278 (80.9%) are non-citizens, and 4072 (19.1%) are U.S. Citizens.³⁶ While precise information is not

³⁴ USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 349-55 (2011); *Judicial Conference of the United States, Statement of Judge Paul G. Cassell before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, U.S. House of Reps., Mandatory Minimum Sentencing Laws – the Issues* (June 2007); The Smarter Sentencing Act, S. 1410 – 113th Cong. (2013) (bipartisan sponsorship, including Sen. Richard Durbin (D-Il) and Sen. Mike Lee (R-Ut).

³⁵ Judicial Business of the U.S. Courts 2013, *Post-Conviction Supervision*, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/post-conviction-supervision.aspx>.

³⁶ Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (May 27, 2014, 12:50pm EST) (on file with National Sentencing Resource Counsel for the Federal Public and Community Defenders).

available, we think it safe to assume that most, if not all, of the 12,832 non-citizen inmates identified in the Commission's impact analysis will go into ICE custody rather than come onto supervision.³⁷ The number of non-citizen eligible inmates subject to deportation will greatly reduce the supervision caseload in the districts with the greatest number of eligible persons, including the Southern District of Texas and Western District of Texas.³⁸ We understand that the Commission has determined that approximately 35% of eligible defendants in the W.D. Texas and S. D. Texas are non-citizens.³⁹ In that case, then 1,395 of the 3,947 persons eligible for a reduction in the Western District of Texas would be deported⁴⁰ or subject to removal proceedings.⁴¹ And 1,164 of the 3,326 persons eligible for retroactive relief in the Southern District of Texas would be deported⁴² or subject to removal proceedings.⁴³ This means that of

³⁷ USSC, *Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive*, 11, Table 3 (May 2014) (*Retroactivity Impact Analysis*). A smaller number of inmates will have detainees from state and federal jurisdictions, which will lessen even further the number of people coming onto supervision.

³⁸ Even legal permanent residents are likely to be removed because of the broad reach of drug-based deportation laws. See Wilber Barillas, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J. L. & Soc. Just. 1, 11-19 (2014).

³⁹ According to the Commission's data, between 1992 and 2013 approximately 40 percent of persons sentenced primarily under the drug guidelines in the Southern District and Western District of Texas were non-citizens. USSC, *FY1992 – FY2013 Monitoring Dataset* (Citizen variable). We have no explanation as to why the percentage drops when examining the pool of persons eligible for retroactive relief under the amendment to the drug quantity table.

⁴⁰ Of the total number of persons sentenced under §2D1.1 or §2D1.11 between 1992 and 2013, 21.8 percent were illegal aliens who would be subject to administrative deportation without a hearing from an immigration judge. *Id.* See generally 8 U.S.C. § 1226; Immigration Policy Center, *Aggravated Felonies: An Overview*, <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>. Using that same percentage to estimate, about 869 persons eligible for retroactive relief in the Western District of Texas would be subject to administrative deportation.

⁴¹ Of the total number of persons sentenced under §2D1.1 or §2D1.11 between 1992 and 2013, 13.3 percent were lawful permanent residents or legal aliens who would be subject to mandatory detention and deportation for commission of an aggravated felony. USSC, *FY1992 – FY2013 Monitoring Dataset*. See *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (a controlled substance offense under federal drug laws is an aggravated felony). Using that same percentage, about 530 persons eligible for retroactive relief in the Western District of Texas would be subject to mandatory detention and deportation.

⁴² Of the total number of persons sentenced under §2D1.1 or §2D1.11 between 1992 and 2013, 23.4 percent were illegal aliens subject to administrative deportation. USSC, *FY1992 – FY2013 Monitoring Dataset*. Using that same percentage, about 778 persons eligible for retroactive relief in the Southern District of Texas would be subject to administrative deportation.

⁴³ Of the total number of persons sentenced under §2D1.1 or §2D1.22 between FY1992 and 2013, 14.8 percent were lawful permanent residents or legal aliens. USSC, *FY1992 – FY2013 Monitoring Dataset*.

the 7,313 eligible persons in the Southern and Western Districts of Texas, over 2,500 will either be removed from the United States immediately upon release from BOP custody under the Enhanced Institution Removal Program,⁴⁴ or transferred into ICE custody pending deportation.

The number of persons subject to deportation and state or federal detainers for another offense will also greatly reduce the number of people being released to supervision during the first year. In the Southern District of Texas, 992 people are projected to be eligible for immediate release or release within one year. Assuming 35 percent are non-citizens subject to deportation, and 4 percent are subject to a state or federal detainer,⁴⁵ then only 605 persons will be released to supervision within one year (198 of the 605 would be eligible for immediate release). In the Western District of Texas, of the 1305 projected to be eligible for immediate release or release within one year, 796 will be released to supervision within one year (247 of the 796 would be eligible for immediate release).

U.S. Probation also has the option of using early termination of supervision for those already on supervision as a means of containing costs and freeing up resources for those in greater need. The Judicial Conference in 2003 adopted a policy to encourage the use of early termination of supervised release as soon as an individual was statutorily eligible and if the person “satisfied the conditions of supervision, had successfully reintegrated into the community, and did not pose a foreseeable risk to public safety generally or to any individual third party.”⁴⁶ When necessary, probation uses early termination of supervision as a cost-containment measure with no additional risk to public safety. In 2005, early termination accounted for 21.3 percent of successful case closings. The number of early terminations fell from 2007 to 2011, but then increased to 18.7 percent in 2012.⁴⁷ It seems likely that there are individuals – many of whom are already on supervision and others who will be released in the future independent of the Commission’s action here – who could be removed from supervision to reduce Probation caseloads and make room for those released to supervision earlier than they otherwise would as a

Using that same percentage, about 492 persons eligible for retroactive relief in the Southern District of Texas would be subject to mandatory detention and deportation.

⁴⁴ See *FY2015 Performance Budget*, *supra* note 6, at 56 (describing the removal program, which uses televideo capabilities and other processes to allow ICE to “process and complete deportation decisions”).

⁴⁵ The 4 percent is based upon the total number of drug offenders in the Bureau of Prisons (99,767) who are U.S. Citizens with a detainer placed upon them (4,072). See Note 35 and accompanying text.

⁴⁶ Laura Baber & James Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77 Fed. Probation J., No. 2 (2013).

⁴⁷ *Id.* at Table 1.

result of a sentence reduction.⁴⁸ Because districts vary widely in the use of early termination, more districts might be encouraged to use early termination as a means of safely managing caseloads.

Research shows that early termination would present no additional risk to public safety. A recent study of persons terminated from supervision in 2008 shows that “that they were arrested within three years at approximately half the rate of the counterparts who served a full term.”⁴⁹ According to 2013 data, sizable percentages of the population under supervision (37%) posed a “very low risk of committing another offense,” and thus require few resources.⁵⁰ Because they present such a low risk, many of these defendants can be safely removed from supervision.

U.S. Probation recognizes the role early release and community supervision can play in helping to resolve the BOP’s overcrowding problem. Last year, Matthew Rowland, Chief of the Probation and Pretrial Services Office, penned an article about how “the probation system could assume responsibility for inmates released early.”⁵¹ While also acknowledging how the budget has reduced the capacity of the Probation and Pretrial Services Office, the more optimistic outlook “is that the savings from using supervision in lieu of incarceration is substantial, amounting to tens of thousands of dollars per case. Those savings could be drawn upon by Congress and the agencies involved to experiment with greater use of and innovation in community supervision, better protecting the public, reducing costs, and alleviating overcrowding at the BOP.”⁵²

⁴⁸ And as U.S. Probation notes, factors other than offense conduct may warrant early termination, including physical incapacitation and age for persons who no longer present a risk to the community. Stephen Vance & John Fitzgerald, *A Look Back at 2013* (Jan. 6, 2013), <http://jnet.ao.dcn/court-services/probation-pretrial-services/look-back-2013>. See also USSG §1B1.10, comment. (n. 5(B)) (authorizing court to consider as one factor in early termination of supervised release a reduction in the term of imprisonment that it was unable to grant because the defendant already served his or her term)

⁴⁹ Vance & Fitzgerald, *supra* note 48; Baber & Johnson, *supra* note 46 (“only 5.9 percent of early-term offenders were rearrested for a major offense following their release from supervision compared to 12.2 percent of full-term offenders”).

⁵⁰ Memorandum of Nancy Beatty Gregorie, Chief, Program Administration Division, to Chief Probation Officers and Chief Pretrial Officers, *New Policy for Supervision of Low-Risk Offenders* (Immediate Action) (June 27, 2012), <http://jnet.ao.dcn/court-services/probation-pretrial-services/new-policy-supervision-low-risk-offenders>.

⁵¹ Matthew Rowland, *Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding the Federal Bureau of Prisons*, 77 Fed. Probation J., No. 2 (2013).

⁵² *Id.*

Lastly, what Judge Walton told the Commission in 2007 is true today for the courts, U.S. Probation, and all others – including Federal and Community Defenders – who may need to work a little harder to do justice:

I don't believe that the court, as an institution, can take the position that if a change was adopted to address a fundamental unfairness in the sentencing process, that we, as judges, should say that well, we're going to be overloaded or we're going to be worked to a greater extent and because of that, that change should not be made retroactive. I just think that that's a fundamentally unsound position for the court to take because we're in the business of trying to do justice and I think if we're going to do justice, that means not just justice in the future, but rectifying injustices that occurred in the past.⁵³

B. The Magnitude of the Change in the Guideline Range Supports Retroactive Application of the Amendment.

The second factor the Commission has historically considered in selecting an amendment to be included in subsection (c) of §1B1.10 is the magnitude of the change in the guideline range made by the amendment. Citing legislative history that Congress did not expect the Commission to recommend that judges adjust existing sentences where the guideline changes would only result in minor adjustments in isolated cases, §1B1.10 states that the Commission does not make retroactive amendments that “generally reduce the maximum of the guideline range by less than six months.” §1B1.10, comment. (backg'd.).

The change in the drug guideline is unquestionably of sufficient magnitude – both in the size of the adjustment and the number of cases impacted – to support retroactive application. The Commission's analysis contemplates that 51,141 persons sentenced to imprisonment under USSG §2D1.1 or §2D1.11 could be eligible for a sentence reduction averaging 23 months, with 65 percent receiving a reduction of more than 12 months.⁵⁴ To not make the amendment

⁵³ Transcript of Hearing Before the U.S. Sentencing Comm'n, Washington, DC, at 17 (Nov. 13, 2007) (Judge Walton).

⁵⁴ *Retroactivity Impact Analysis*, at 8, Table 6. The Commission's impact analysis also notes that “[a]pproximately 17% of the crack cocaine offenders eligible to seek a reduced sentence under the 2014 amendment previously received reduced sentences pursuant to retroactive application of the 2007 amendment or the 2011 amendment, or both.” *Id.* at 12. As the Commission has recognized in adopting the amendment to the drug quantity table across *all* drug types, the crack guidelines remain disproportionately severe, despite these adjustments. As discussed in Defender testimony in April, Congress mistakenly read a Commission report as finding that 28 grams of crack is typical of wholesalers when the report actually defined a wholesaler as a person who sells more than 28 grams in a *single transaction*. Addendum to Statement of Molly Roth, *supra* note 5, at 2-3.

retroactive would undermine respect for the law and send the wrong message to thousands of incarcerated persons,⁵⁵ their families, and a general public that supports reform of our nation's drug policies.⁵⁶ When it voted in April to change the way the guidelines are calculated in all drug cases – a consistently high percentage of the federal caseload – the Commission unanimously supported an important reform of federal sentencing policy with important social implications, particularly for Hispanic and Black communities that have suffered the devastating consequences of mass incarceration. While a modest first step, the amendment cannot be characterized as minor or as affecting isolated cases.

C. The Ease of Determining the Amended Guideline Range Favors Retroactivity

A third factor the Commission considers in deciding to make an amendment retroactive is the difficulty of applying it to determine an amended guideline range. Just as the Commission found that the two-level change to the crack guidelines would not be “difficult to apply in individual cases,”⁵⁷ this amendment is a straightforward recalculation of the base offense level under the drug quantity table, which should present no difficulty in application. Information on drug quantity is typically available in the presentence report because it was initially used to calculate the guidelines.⁵⁸

The valuable lessons learned from handling motions under the 2007 and 2010 crack amendments will also help facilitate retroactive application of the amendment. Many districts developed efficient processes for identifying persons eligible for relief and filing stipulated motions for reduced sentences. Some had designated persons from U.S. Probation, the U.S. Attorney's Office, and the Defender Office working together to review cases and reach agreements on whether relief was available and by how much the sentence should be reduced.

⁵⁵ For the individual incarcerated, “time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake.” *Barber v. Thomas*, 560 U.S. 474, 504 (Kennedy, J., dissenting, joined by Stevens and Ginsburg, J.J.).

⁵⁶ See Pew Research Center, *Americans New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine* 8 (Apr. 2014) (63 percent of persons surveyed in 2014 supported a move away from mandatory prison sentences for non-violent drug crimes), <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf>. See also *id.* at 1 (67 percent believed that drug policy should focus more on providing treatment); Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 Or. L. Rev. 1097, 1104-06 (2013) (greater support for War on Drugs to focus on public health rather than incarceration).

⁵⁷ USSG App. C, Amend. 713 (Mar. 3, 2008).

⁵⁸ With crack retroactivity, we saw a few cases where insufficient information existed to determine drug quantity, but those cases were typically resolved by agreement upon review of relevant discovery and other evidence. Where the parties did not agree, the court could resolve the issue without an evidentiary hearing. See *United States v. Ford*, 530 F.App'x 77 (2d Cir. 2013).

Model motions and orders were established to ease the burden on the courts.⁵⁹ Standard procedures were developed to send the orders to the Bureau of Prisons so that prison staff could recalculate the term of imprisonment, review custodial classifications, and prepare the inmate for release expeditiously. The willingness and ability of all stakeholders to work together to develop a fair, efficient and effective process, shows that retroactive application can be implemented smoothly.

While there may be a sizable number of motions in a few districts like the Southern District of Texas and Western District of Texas, the number of persons eligible for a sentence reduction in most districts is either similar or much lower than the number of motions in high volume crack retroactivity districts. Between 2008 and the second quarter of 2014, the Eastern District of Virginia closed 2,526 cases under the 2007 and FSA crack retroactivity amendments.⁶⁰ According to the Commission's retroactivity impact analysis of the 2014 amendment, only two districts – the Western District of Texas and the Southern District of Texas – would have a higher number of cases over a similar period of more than six years.⁶¹ Nine districts would handle more than a 1,000 cases⁶² – fewer than the 2,526 cases closed by the Eastern District of Virginia under the 2007 and FSA crack retroactivity amendments. Sixty districts would handle fewer than 500 cases, with the remaining handling 500-1,000 cases.⁶³ Past experience should give the Commission confidence that these amendments can be applied retroactively with the same cooperative effort in the majority of districts as occurred with the 2007 and FSA crack amendments.

II. The Amendment to USSG §2D1.11, which Pertains to Chemical Precursors, Should be Made Retroactive.

The Commission requests comment on whether it should list the entire amendment or only part of it in §1B1.10(c). For the reasons stated above, we believe the entire amendment should be listed in §1B1.10(c). The Commission made a sound policy decision to lower the guideline ranges for offenses involving chemical precursors in §2D1.11 just as it did with all the drug types in §2D1.1. To make one group of defendants eligible for retroactive relief, but not another, would create unwarranted disparity, undermine respect for the law, and serve no legitimate purpose.

⁵⁹ Some model materials are included in the Addendum to this testimony.

⁶⁰ USSC, *Preliminary Crack Cocaine Retroactivity Report*, Table 1 (Apr. 2014 data) (FSA amendment); USSC, *Preliminary Crack Cocaine Retroactivity Report*, Table 1 (June 2011 data) (2007 amendment).

⁶¹ *Retroactivity Impact Analysis*, Table 2.

⁶² *Id.*

⁶³ *Id.*

Section 2D1.11 covers chemical precursors, like pseudoephedrine, which is used to make methamphetamine. Individuals engaged in offenses involving precursors are often less culpable than those who produce and/or sell the end product, yet they are subject to long sentences just the same. Pseudoephedrine, for example, is a harshly punished precursor,⁶⁴ which became subject to criminal penalties after passage of the USA Patriot Improvement and Reauthorization Act of 2006, Pub. L. 109-177. Persons sentenced under §2D1.11 are often addicted to methamphetamine and get involved in purchasing pseudoephedrine for meth manufacturers in exchange for drugs. The sentences imposed on these individuals are often quite severe. In one typical case, for example, a thirty-nine-year-old mother of two suffered from a longstanding addiction to methamphetamine. Despite her addiction, she maintained gainful employment, cared for her children, and served as her grandfather's caretaker. After setting up a purchase of pseudoephedrine that she intended to exchange for methamphetamine, she was arrested in an undercover sting. The court imposed a 70-month term of imprisonment – a within guideline sentence. In another case, a 54-year-old-woman was sentenced to 43 months in prison for purchasing pseudoephedrine at a CVS store with the intent to manufacture methamphetamine. Others involved in such offenses have included a 45-year-old-man sentenced to 78 months imprisonment for purchasing pseudoephedrine on seven separate occasions from a local Walmart. He was involved in “smurfing,” which can be as simple as buying the drug at a local store and providing it to a local meth cook.

Because the amendment to §2D1.11 is as easy to apply as the amendment to §2D1.1, we see no reason to exclude it from §1B1.10(c). And although the number of eligible defendants sentenced under §2D1.11 is smaller (397) than the number eligible under §2D1.1 (48,880),⁶⁵ a reduction for those defendants similarly would fulfill the goals of reintegrating individuals convicted of largely non-violent offenses into the community, reuniting families, and relieving unnecessary prison over-crowding (saving tax dollars that can be better spent elsewhere).

III. Section 1B1.10 Provides Ample Guidance to Courts in Deciding Whether to Reduce a Sentence and the Amount of Any Reduction. The Commission Need Not Provide Further Guidance or Limitations Regarding Retroactive Relief.

The Commission seeks comment on whether it should provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced should it make the drug guidelines amendment retroactive. This is unnecessary since §1B1.10, which was just amended this year, provides ample guidance to courts in considering the circumstances under which a sentence reduction is appropriate, and the extent of any such

⁶⁴ A single box of 10 Sudafed® 24 Hour contains 2400 mg or over 2 grams of pseudoephedrine, which carries a base offense level of 18 under §2D1.11.

⁶⁵ *Retroactivity Impact Analysis*, Table 5.

reduction. For example, the guidelines make clear that a court shall consider public safety issues when ruling on a motion to reduce sentence. USSG §1B1.10, comment. (n.1(B)(ii)). The guideline also puts substantial limitations on the degree of the reduction, confining it to a term no less than the minimum of the amendment guideline range unless the defendant has previously received a departure for substantial assistance. We see no rationale for imposing additional limitations, especially since the Commission made no exceptions to the reduction for defendants who will be sentenced after November 1, 2014. In particular, we think it would be a mistake for the Commission to limit retroactivity to arbitrary categories of defendants, such as those who received a “safety valve” adjustment or those sentenced before *United States v. Booker*, 543 U.S. 220 (2005).

The Commission has never before excluded categories of defendants from the retroactive application of lower guideline ranges. It should not do so now. “Section 3582(c)(2) empowers district judges to correct sentences that depend on frameworks that later prove unjustified. There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range.”⁶⁶ The Commission determined that the drug quantity table was flawed. That drug quantity table is a critical component to the guideline calculation for every single defendant sentenced under the drug guidelines, not just those who received a safety valve adjustment or those sentenced pre-*Booker*. If the Commission also determines, as it should, that sentences that relied on that table ought to be reexamined, then no good reason exists to “extend the benefit of the Commission’s judgment only to an arbitrary subset of defendants” and deprive similarly situated defendants the same benefit.⁶⁷

A. Retroactive application should not be limited to defendants who received a “safety valve adjustment.”

Limiting retroactive application to those defendants who received a safety valve adjustment would exclude 80 percent of the otherwise eligible population.⁶⁸ Such a limitation would be a poor policy choice for a multitude of reasons, ranging from basic fairness, to unwarranted disparity, to inconsistency with the Commission’s past actions. The Commission should reject it, just as it did a similar proposal in 2011.

First, a safety valve limitation would exclude close to half (46%) of the individuals in Criminal History Category I,⁶⁹ some of whom may have been safety valve eligible, but did not

⁶⁶ *Freeman v. United States*, 131 S. Ct. 2685, 2689 (2011) (plurality opinion).

⁶⁷ *Id.* at 2695.

⁶⁸ *Retroactivity Impact Analysis*, Table 4B.

⁶⁹ *Id.*

pursue relief because they were too afraid for their personal safety or the safety of their family and friends to provide the Government all information and evidence concerning their offense of conviction and relevant conduct. Those persons have already received a higher sentence than others who provided information. It would be fundamentally unfair to preclude them from being eligible for a sentencing reduction based upon a change in the drug quantity table.

Second, limiting retroactive application of the amendment to those who received a safety valve adjustment would exclude 6,946 individuals in Criminal History Category II,⁷⁰ even though the Commission has recommended to Congress that safety valve eligibility should be expanded to include at least some individuals within Category II.⁷¹ In recommending expansion of the safety valve, the Commission cited FY 2010 data, which indicated that many Category II defendants were equally deserving of treatment under the safety valve:

1,127 offenders convicted of a drug offense carrying a mandatory minimum penalty would have been eligible for the safety valve if it had included non-violent drug offenders in Criminal History Category II (offenders who receive two or three criminal history points). Of these, 1,127 offenders, 260 (23.1%) offenders received three points pursuant to §4A1.1(a) for a prior sentence of imprisonment exceeding one year and one month, and 190 (16.9%) offenders received two points pursuant to §4A1.1(b) for a prior sentence of imprisonment of at least 60 days. An expansion of the safety valve would mitigate the cumulative impact of criminal history for certain less serious offenders as measured by their criminal history score under the guidelines.⁷²

Just as the Commission has recommended that such individuals should be eligible for safety valve relief, they should be given the opportunity to seek a reduced sentence under the 2014 drug guideline amendments.

Third, since the safety valve and substantial assistance departures are not co-extensive, a safety valve limitation would exclude persons who received a substantial assistance reduction, even though the Commission has carved out an exception under §1B1.10 so that those individuals may receive a reduction comparably less than the amended guideline range. USSG

⁷⁰ *Id.*

⁷¹ USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 368 (Oct. 2011) (*Mandatory Minimum Report*) (recommending that Congress expand the safety valve to include “certain non-violent offenders who receive two, or perhaps three, criminal history points under the guidelines”).

⁷² *Id.* at 355-56.

§1B1.10(b)(2)(B). Just this year, when it amended §1B1.10, the Commission reiterated the importance of fair consideration for cooperators:

The guidelines and relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.⁷³

Limiting retroactive relief to those defendants who received a safety valve reduction is incompatible with that reasoning.⁷⁴

Fourth, by excluding the vast majority (80.5%) of otherwise eligible defendants,⁷⁵ a safety valve limitation is inconsistent with the purposes of the amendment because it would result in a negligible impact on prison crowding and poorly serve the other important purposes discussed earlier.

Fifth, a safety valve limitation on retroactivity would have a disparate impact on Black and male defendants. As the Commission's mandatory minimum report notes, Black and male defendants received safety valve relief less often than female defendants or those of other races.⁷⁶ For Black defendants "[t]his difference is largely attributable to the criminal history" scores.⁷⁷ "Three-quarters (75.6%) of Black drug offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010 were excluded from safety valve eligibility due

⁷³ USSC, "*Reader-Friendly*" *Version of Amendments Submitted to Congress April 30, 2014* (effective Nov. 1, 2014). We recognize that some may argue this same principle applies equally in the safety valve context. This, however, does not justify applying the amendment retroactively only in safety valve cases.

⁷⁴ It would also exacerbate how the form of relief from a mandatory minimum penalty affects the average sentence imposed. Individuals who receive safety valve relief and provide substantial assistance receive the lowest sentences (33 months on average in FY 2010). Those who provide substantial assistance, but do not qualify for safety valve, receive, on average, a sentence almost three times as long (90 months). *Mandatory Minimum Report*, *supra* note 71, at 161.

⁷⁵ *Retroactivity Impact Analysis*, Table 4B.

⁷⁶ *Id.* at 159, 174, 190.

⁷⁷ *Id.* at 159.

to criminal history scores of more than one point.”⁷⁸ For the same reasons that retroactive application of the amendment is necessary to ameliorate racial and ethnic disparity, the Commission should reject any exception that perpetuates disparity.⁷⁹

B. Retroactive application should not be limited to individuals sentenced before *United States v. Booker*, 543 U.S. 220 (2005).

Limiting retroactive application to those sentenced before *Booker* would exclude about 93 percent of the otherwise eligible population without principled justification for doing so.⁸⁰ It cannot be assumed that every defendant sentenced after *Booker* either received a variance equivalent to what would be provided under this amendment or that judges would not impose a lower sentence under the amendment because they previously had an opportunity to adjust the sentence under *Booker*. Just as the Commission rejected the idea of limiting application of the retroactive FSA amendments to defendants sentenced before *Kimbrough v. United States*, 552 U.S. 85, 110 (2007),⁸¹ it should reject this limitation as well.

Post-*Booker*, the guidelines still serve as the “starting point and the initial benchmark”⁸² for sentencing and many judges are not comfortable making their own judgments about the soundness of the guidelines.⁸³ This is reflected in the Commission’s data. From FY 2006 through FY 2013, more than four-fifths (82.4%) of persons sentenced under §2D1.1 or §2D1.11 were sentenced either within the guideline range (47.4%) or below the range at the government’s

⁷⁸ *Id.* at 354.

⁷⁹ A safety valve exception also would result in unwarranted disparity across drug type. Commission data show that from FY 2006 through FY 2012, defendants sentenced for different drug types received a safety valve adjustment at different rates. See *Interactive Sourcebook, Drug Offenders Receiving Safety Valve in Each Drug Type* (FY 2006 through FY 2012) (crack-12.7%; methamphetamine -34.9%; heroin – 40.1%; powder cocaine – 41.1%; marijuana – 56.1%).

⁸⁰ *Retroactivity Impact Analysis*, Table 1.

⁸¹ Notices, U.S. Sentencing Comm’n, Sentencing Guidelines for United States Courts, 76 FR 3193-02, 3196 (Jan. 19, 2011).

⁸² *Gall v. United States*, 552 U.S. 38, 49 (2007).

⁸³ See, e.g., *United States v. Kamper*, 2014 WL 1378192 (6th Cir. 2014) (district court erroneously concluded it lacked the power to reject the MDMA-to-marijuana ratio); *United States v. Brooks*, 628 F.3d 791, 800 (6th Cir. 2011) (“fact that a district court *may* disagree with a Guideline for policy reasons and *may* reject the Guidelines range because of that disagreement does not mean that the court *must* disagree with that Guideline or that it *must* reject the Guidelines range if it disagrees”).

request (35%).⁸⁴ An additional 16.8 % of those sentenced under §2D1.1 or §2D1.11 received a non-government sponsored below range sentence, with less than one percent (.8%) sentenced above the guideline range.⁸⁵ According to the Commission's impact analysis, most defendants eligible for relief were sentenced in 2005 or afterwards.⁸⁶ Of those, only 10.5 percent received a sentence below the guideline range for reasons other than substantial assistance.⁸⁷ Because the guidelines continue to play a central role in sentencing, if the Commission were to limit retroactive application of the amendment to defendants sentenced before *Booker*, it would arbitrarily exclude a significant number of defendants whose sentences were determined using a guideline that has now been lowered.

All defendants, whether sentenced before or after *Booker*, should have the opportunity to have the judge revisit the sentencing decision in light of the Commission's recognition that the pre-amendment guidelines did not result in a sentence that complied with 18 U.S.C. § 3553(a). If the Commission's request for comment means to suggest that no additional reductions should be made because judges already imposed a sentence they think is sufficient, but not greater than necessary, then the Commission overlooks the role that the guideline range plays in sentencing. The court must consider – and the data show courts do consider – the guideline range under 18 U.S.C. § 3553(a).⁸⁸ If the Commission changes the guideline, then the court should be able to reconsider the guidelines and the sentence.

Those sentenced within the guidelines after *Booker* should be entitled to the same consideration as those sentenced before *Booker*. Likewise, defendants who received a government sponsored below range sentence on the basis of cooperation should be entitled to a comparable reduction from the amended guideline range whether they were sentenced before or after *Booker*. For those defendants who received a non-government sponsored below range sentence after *Booker*, §1B1.10 precludes relief if the original sentence was already below the amended guideline range. The only defendants who would have received a non-government sponsored below guideline sentence after *Booker* and who would be entitled to relief are those who received a variance or departure smaller than what the amended guideline would produce.

⁸⁴ This data was derived from the USSC, *Interactive Sourcebook, Sentences Relative to the Guideline Range Over time, Primary Sentencing Guidelines §2D1.1, §2D1.11* (FY 2006 through FY 2012) and USSC, *Quick Facts: Drug Trafficking Offenses* (2013).

⁸⁵ *Id.*

⁸⁶ *Retroactivity Impact Analysis*, Table 1.

⁸⁷ *Id.* at Table 4B.

⁸⁸ *Gall*, 522 U.S. at 49.

Those individuals, like those sentenced within the guidelines, deserve to have the court consider reducing their sentence.

A post-*Booker* limit on retroactivity would also be incompatible with the purposes of the amendment. First, limited retroactivity would have a negligible impact on prison crowding because it would exclude most defendants from eligibility for a sentence reduction. Second, one of the reasons the Commission lowered the offense levels under the drug quantity table is because the guidelines now include “multiple enhancements for violence, firearms, aggravating role, stash houses and a whole host of other factors.”⁸⁹ More of those enhancements exist in the post-*Booker* era than before *Booker*,⁹⁰ so it would make no sense to prohibit persons subject to those enhancements from obtaining the benefit of an amendment designed to lessen the role of drug quantity in determining offense seriousness. Applying the amendment in these cases would result in more appropriately calibrated sentences.

We encourage the Commission to make the drug guideline amendments fully retroactive and without limitation. A failure to permit as many eligible persons as possible to seek relief will create “perceptions of unfairness and unwarranted disparity that cause concern insofar as they may foster disrespect for and lack of confidence in the federal criminal justice system.”⁹¹ When considering motions after the 2007 and 2010 crack amendments, district courts exercised their discretion to grant them in some cases, and deny them in others. Courts considered the relevant information presented in each case. Courts are capable of doing this again without the Commission imposing categorical limitations that would arbitrarily reduce the number of eligible defendants and undermine the purposes of the amendment.

We appreciate the opportunity to provide our views on these important issues. As always, we are happy to provide additional information on any issues raised at the hearing and look forward to working with the Commission in the future.

⁸⁹ Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n, *Speech to Georgetown University Law Center: A Generational Shift for Drug Sentences* 7 (Mar. 26, 2014), http://www.uscc.gov/Education_and_Training/Online_Learning_Center/Supporting_Materials/Saris-Georgetown-Law-Center-Speech-20140326.pdf.

⁹⁰ Section “2D1.1 contains five alternative base offense levels and 16 specific offense characteristics to account for factors such as meeting the statutory safety valve criteria, death or serious bodily injury resulting from the use of a drug, possession of a dangerous weapon, use of certain aircrafts and submersible vessels, distribution in a prison or correctional facility, distribution through mass-marketing, importation and manufacture of amphetamine and methamphetamine, and environmental risks and risks of harm to people created by certain methamphetamine offenses.” *Mandatory Minimum Report, supra* note 71, at 350.

⁹¹ *Id.* at 354.

Addendum

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA

v.

[],

Defendant.

)
)
)
)
)
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**Docket No. 1:xx-cr-xx
The Hon. []**

**DEFENDANT’S UNOPPOSED MOTION TO REDUCE SENTENCE
PURSUANT TO TITLE 18 U.S.C. § 3582(c)**

COMES NOW the Defendant, [], by and through counsel, and respectfully moves this Court pursuant to 18 U.S.C. § 3582(c) for an order reducing his term of imprisonment from ____ months to ____ months.

The undersigned defense counsel has conferred with the government regarding Mr. ____’s request for a sentencing reduction to ____ months. The government does not oppose this motion.

PROCEDURAL BACKGROUND

On ____, 2009, Mr. [] was charged with conspiracy to possess with intent to distribute and distribution of cocaine base, in violation of Title 21, U.S.C. §§ 841(a)(1) and 846. On ____, 2009, Mr. [] entered a guilty plea in accordance with the terms of a written plea agreement, and on ____, 2009, the Court imposed a sentence of 240 months of imprisonment. Pursuant to the recent changes to the crack guideline, the Defendant now requests that the Court reduce his sentence to ____ months.

ARGUMENT

Effective April 28, 2011, the U.S. Sentencing Commission amended U.S.S.G. § 2D1.1 to lower the offense levels and marijuana equivalencies for crack cocaine quantities. *See* U.S.S.G. App. C amend. 750. On June 30, 2011, the Commission unanimously voted to make this amendment retroactive as of November 1, 2011. Under U.S.S.G. § 1B1.10, Mr. [] is eligible for relief under the amended advisory guideline range. Pursuant to 18 U.S.C. § 3582(c), this Court has the authority to reduce Mr. []’s sentence.

A. The Court Has the Authority under 18 U.S.C. § 3582(c) to Reduce Mr. []’s Sentence.

Title 18 U.S.C. § 3582(c)(2) provides that a court may modify a defendant’s term of imprisonment “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). As discussed below, the Sentencing Commission has lowered the range applicable to Mr. []’s sentence. Therefore, the Court has authority pursuant to 18 U.S.C. § 3582(c) to reduce Mr. []’s sentence.

B. The Defendant is Eligible for Relief under U.S.S.G. § 1B1.10.

Newly amended U.S.S.G. § 1B1.10 states that “[i]n a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).” U.S.S.G. § 1B1.10(a)(1). Amendment 750 is listed in subsection (c). *See* U.S.S.G. § 1B1.10(c).

The advisory guideline range applicable to Mr. []’s sentence has been lowered. Specifically, retroactive application of the amendment to the crack cocaine guideline changes the applicable offense level and corresponding advisory guideline range as follows:

Guideline Calculation		
Crack Quantity: ---g (<i>see</i> PSR Worksheet A)		
	Sentencing	Amendment 750
Date:	—,2009	
Base Offense Level:		
Upward Adjustment:		
Downward Adjustment:	-3 (acceptance)	-3 (acceptance)
Adjusted Offense Level:		
Criminal History Category:	Category	Category
Guideline Range:	months	151-188 months

Sentence Imposed:	240 months	<i>Suggested sentence:</i>
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The Court originally imposed a sentence of ___ months, [which fell at the low-end of the guideline range.] Because the advisory guideline range applicable to Mr. [] has been lowered, U.S.S.G. § 1B1.10 provides that he is eligible for another reduction in his term of imprisonment pursuant to 18 U.S.C. § 3582(c). Specifically, Mr. []’s amended guideline range is 151-188 months. A reduction at the same point of the amended guideline range as his original sentence results in a sentence of ___ months a ___-month reduction.

A reduction to Mr. []’s sentence is consistent with the policy statements in U.S.S.G. § 1B1.10. First, the exclusions in §1B1.10(a)(2) prohibiting relief if the amended guideline is not retroactive or does not lower the defendant’s sentence do not apply to Mr. []. As noted above, Amendment 750 has been made retroactive and would lower Mr. []’s sentence. Second, §1B1.10(b)(2)(A) prohibits sentence reductions below the amended advisory guideline range. Mr. [] seeks a sentence reduction from 240 months to ___ months, a reduction well within his amended guideline range. Finally, the application notes to the policy statement direct the Court to consider public safety and post-sentencing conduct when imposing a reduced sentence. *See* U.S.S.G. § 1B1.10, comment. n.1(B)(ii) and (iii). As discussed in more detail below, a sentence reduction to ___ months is consistent with these considerations.

Based upon the foregoing, Mr. [] is eligible for relief under U.S.S.G. § 1B1.10, and a reduction in his sentence is consistent with that policy statement. Therefore, the Court should exercise its authority under 18 U.S.C. § 3582(c) and reduce his sentence to ___ months for the following reasons.

C. The Court Should Reduce the Defendant’s Sentence to ___ months.

The Court should sentence Mr. [] to ___ months because he poses no threat to public safety and because of his post-sentencing rehabilitation efforts. Mr. []’s behavior in prison reflects a determination to turn his life around. *Previously a high-school drop out, Mr. [] diligently pursued his G.E.D. in prison by taking over 800 hours of courses. He is now the proud*

bearer of a high school diploma. Mr. [] has continued to seek out educational opportunities by taking adult classes such as keyboarding, computer software, and Spanish. He has also completed vocational training in telecommunications and masonry.

Prior to his arrest, Mr. []'s work history was limited and his future earning potential was uncertain because of his lack of experience and education. He also had a history of drug use which began at the age of fourteen. Since his incarceration, however, Mr. [] has exhibited a marked increase in maturity. He successfully completed drug education and nutrition courses at his institution. He also participated in self-help courses for responsibility, values enhancement, and money management. Furthermore, he spends his free time participating in healthy activities and recreational programs, such as ab classes and soccer officials training programs. See Attachment 1.

Mr. [] not only poses no threat to public safety, he is utilizing all the resources at his disposal to equip himself with the educational and personal tools that will enable him, upon his release, to be financially independent, productive, and healthy when he re-enters society. Upon release, he plans to live in Virginia with his mother.

D. The Government Does Not Oppose Mr. []'s Request For A Reduction.

The undersigned defense counsel has conferred with the government regarding Mr. []'s request for a sentencing reduction. The government has informed the undersigned defense counsel that it does not object to Mr. []'s motion.

For these reasons, the Defendant respectfully requests that the Court enter the proposed Order attached hereto and reduce his sentence to ____ months.

Respectfully submitted,
[ALL CAPS]

By: _____/s/
ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on [], 2012, I will electronically file the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

NAME
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314

Pursuant to the Electronic Case Filing Policies and Procedures, a courtesy copy of the foregoing pleading will be delivered to Chambers within one business day of the electronic filing.

By: _____/s/_____
ATTORNEY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA



NO. XXXXXX

V.

XXXXXX

AGREED ORDER REDUCING SENTENCE

The Court considers this case pursuant to its authority under 18 U.S.C. § 3582(c)(2) and Federal Rule of Criminal Procedure 43(b)(4). On June 30, 2011, the U.S. Sentencing Commission made the 2010 reduced cocaine base guideline levels retroactively applicable to previously-sentenced defendants. See U.S.S.G. 1B1.10, amendment 750 (providing for retroactive effect on November 1, 2011). The parties agree that a reduction from XXX's current sentence of 235 months is appropriate in this case. The Court has considered the guidelines, and pursuant to the Sentencing Reform Act, the guideline policy statements, and 18 U.S.C. § 3553(a) concurs with the parties. Based on the amended guideline and the reasons previously set forth in the Statement of Reasons included in the judgment and commitment order in this case, the Court finds that a sentence of 188 months is sufficient, but not greater than necessary in light of the sentencing objectives in §3553(a)(2).¹

The Court hereby ORDERS as follows:

- (1) Defendant's sentence is reduced to **ONE HUNDRED AND EIGHTY-EIGHT (188) MONTHS;**

¹ XXX was sentenced at the top of the pre-amendment guideline range of 188-235 months; XXX's amended guideline range is 151-188 months (offense level 29, based on 559 grams of crack and a three level decrease for acceptance of responsibility, and criminal history category VI). A sentence of 188 months, at the top of the new range, is a comparable sentence, factoring in the applicable reduction.

(2) That, if eligible, the defendant participate in the 500-hour Intensive Drug Abuse Education Program;

(3) All other terms and provisions of the original judgment remain in effect.

A copy of this agreed order shall be transmitted to the Bureau of Prisons immediately.

SO ORDERED on this the _____ day of _____, 2012.

FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE

AGREED:

KAREN NORRIS
ASSISTANT UNITED STATES ATTORNEY

KURT G. MAY
ASSISTANT FEDERAL PUBLIC DEFENDER