Statement of Michael Nachmanoff
Federal Public Defender for the Eastern District of Virginia

Public Hearing Before the
United States Sentencing Commission

Retroactive Application of the Guideline Amendments Implementing the Fair Sentencing Act of 2010
June 1, 2011

Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders regarding retroactive application of the guideline amendments responding to the Fair Sentencing Act of 2010. I am particularly pleased to be here because, in the Eastern District of Virginia, more defendants benefited from the retroactive amendment of the 2007 crack cocaine guideline than in any other district in the country. I am delighted to report that more than one thousand defendants had their sentences reduced in my district.

If any district could have been overwhelmed by the process, it would have been the Eastern District of Virginia. But the process did not paralyze the Court and did not slow down the prosecution of other cases. We worked closely, and for the most part collaboratively, with the government, Probation, the Bureau of Prisons, our clients and their families, and the Court to prioritize cases and efficiently accomplish the Commission's goal of partially reducing the unfair disparity for those sentenced before the 2007 amendment. And it was the right thing to do. Some of our clients, after believing for years that they would die in prison or remain until old age, have been given back their lives.

As in most districts, the vast majority of those benefiting from the 2007 amendment in my district are African-American. As in most districts, the vast majority of those who benefited from the 2007 amendment in my district were African-American. But the penalties in crack cases have remained unfairly severe, and continue to disproportionately impact African-Americans. In 2009, 92.6% of defendants sentenced for crack offenses in my district were African-American.[1] The Commission now has the opportunity to build on the success of its decision in 2007, and the Eastern District of Virginia stands ready to carry out the process again. Having learned from that experience, I am confident that we can do it again and that the Commission will be able to look back with pride in having played an instrumental role in substantially ameliorating one of the most damaging injustices in our criminal justice system.

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[1] USSC FY 2009 Monitoring Dataset.

BACKGROUND

When the Commission reduced the base offense levels in crack cases by two levels in 2007, it reiterated its long-held position that the 100-to-1 drug quantity ratio created by the Anti-Drug Abuse Act of 1986 "significantly undermines various congressional objectives in the Sentencing Reform Act and elsewhere."[2] It urged Congress to act promptly to solve the "urgent and compelling" problems caused by the statutory ratio, and to eliminate the mandatory minimum for simple possession of crack cocaine.[3] It asked for emergency amendment authority in any legislation addressing the problems, to enable the Commission "to minimize the lag between any statutory and guideline modifications for cocaine offenders."[4] Meanwhile, the Commission made retroactive the modest two-level reduction in the base offense levels in light of the amendment's purpose to remedy at least some of the unfairness, the substantial number of cases affected, the magnitude of the change, and the ease with which the amendment could be applied. [5]

Over the next several months, judges efficiently and expeditiously exercised their authority under § 3582(c)(2) to release thousands of offenders whose guideline ranges were lowered as a result of the amendment. As Judge Castillo put it, the retroactive application of the 2007 amendment, which has resulted in "very little recidivism problems" for those released, is "one of the greatest untold stories of federal sentencing."[6] We understand that the Commission has determined that the recidivism rate (including both new offenses and less serious supervised release revocations) of those released as a result of a reduction based on the 2007 amendment is, if anything, slightly *lower* than the rate of those who served full terms of imprisonment, including for those in higher criminal history categories or who received enhancements for aggravating factors.

We again thank the Commission for its courage and its continuing commitment to fairness for those convicted of offenses involving crack cocaine. There is no question that the Commission's actions and recommendations were instrumental in convincing Congress to pass the core ameliorative changes of the Fair Sentencing Act of 2010, which increased the quantity thresholds for the five- and ten-year mandatory minimums under 21 U.S.C. §§ 841(b)(1) & 960(b) in crack cases and eliminated the five-year mandatory minimum for simple possession of crack cocaine. Pub. L. No. 111-220, §§ 2, 3 (Aug. 3,

[2] USSG App C, Amend. 706 (Nov. 1, 2007).

[3] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8-9 (2007).

[4] *Id.* at 9.

[5] USSG App. C, Amend. 713 (Mar. 3, 2008).

[6] *See* Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, N.Y., at 204 (July 9, 2009) (remarks of Judge Castillo).

2010). Reflecting a commitment to swift action to implement these changes, Congress gave the Commission emergency authority to amend the guidelines. *Id*. § 8. On November 1, 2010, the Commission promulgated emergency guideline amendments,[7] and has now proposed making these changes permanent.[8]

In ruling for the government in *Dillon v. United States*, 130 S. Ct. 2683 (2010), the Supreme Court alleviated the Commission's concern that if the scope of sentence reductions were not limited in accordance with its amended policy statement, it would be difficult to make amendments retroactive in the future. *See* Brief for U.S. Sent'g Comm'n as *Amicus Curiae* at 21, *Dillon v. United States*, 130 S. Ct. 2683 (2010) (No. 09-6338).[9] The Commission's path is now abundantly clear, both as a matter of administration and justice.[10]

I. RETROACTIVITY OF FAIR SENTENCING ACT AMENDMENTS

We urge the Commission to make retroactive the amendments to the Drug Quantity Table incorporated by reference in § 2D1.1(a)(5), the new minimal role cap at § 2D1.1(a)(5), and the deletion of the cross-reference to § 2D1.1 for simple possession of crack cocaine. The ameliorative changes to guidelines in crack cases reflect the Commission's longstanding goal of better reflecting the seriousness of crack offenses and the culpability of crack offenders, and to reduce the perception of unfairness in federal cocaine sentencing. The minimal role cap reflects the Commission's considered policy judgment, expressed since 2001, that drug quantity overstates culpability in all drug cases in which the defendant's role was minor. Each of these amendments is tied directly to factual findings already made by the district court, so judges will not be required to find new facts to recalculate the applicable guideline range. As proven by experience, these amendments can be applied retroactively with minimal administrative burden.

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[7] USSG App. C, Amend. 748 (Nov. 1, 2010),

[8] Amendment 2, 76 Fed. Reg. 24,960 (May 3, 2011).

[9] *See also* Brief for United States at 37, *Dillon v. United States*, 130 S. Ct. 2683 (2010) (No. 09-6338) ("To forbid the Sentencing Commission from limiting the scope of Section 3582(c)(2) sentence reduction proceedings to the scope of the amendments themselves would inevitably discourage the Sentencing Commission from ever authorizing sentence reductions.").

[10] We understand that some believe that the Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), holding that post-sentencing rehabilitation may be used to impose a sentence below the guideline range *at a resentencing after appeal* somehow affects the holding of *Dillon* that a sentence below the amended guideline range may not be imposed *in a § 3582(c)(2) proceeding* except as provided in USSG § 1B1.10(b)(2)(B). This is plainly incorrect. Both decisions made a clear distinction between the two types of proceedings. *See Pepper*, 131 S. Ct. at 1241; *Dillon*, 130 S. Ct. at 2692.

When Congress enacted § 3582(c)(2) as part of the Sentencing Reform Act of 1984, it expected the Commission would make amendments retroactive "because of a change in the community view of the offense." S. Rep. No. 98-225, at 180 (1983). It intended that the "value" of the "safety valve[]" under § 3582(c)(2) would be "the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the guidelines." *Id.* at 56. As reflected in the Commission's work, Supreme Court decisions, the position of the President and the Attorney General, and now manifested in the Fair Sentencing Act of 2010, the community view of crack offenses has changed and the value of § 3582(c)(2) is fundamentally implicated. Just as it did in 2007, and in keeping with Congress's expectations underlying § 3582(c)(2) and the Commission's delegated authority to make ameliorative changes retroactive, the Commission should take every step within its power to undo the damage caused by laws and guidelines now understood to be unfounded and unfair.

A. The Relevant Factors Weigh in Favor of Making These Ameliorative Changes Retroactive.

In deciding which amendments to include in § 1B.10(c), the Commission considers, among other factors, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)."[11] Just as in 2007, each of the relevant factors weighs in favor of making retroactive the changes to the quantity-driven base offense levels in the Drug Quantity Table, the new minimal role cap, and deletion of the cross-reference to § 2D1.1 in simple possession cases.

Contrary to what some have suggested, the fact that Congress did not expressly make retroactive the new *statutory* penalties has nothing to do with whether the Commission should make these *guideline* amendments retroactive based on these relevant factors. The Commission previously made retroactive an amendment to the drug guideline even though the new guideline range would always conflict with the mandatory minimum. In 1993, the Commission made retroactive its revised method of calculating the weight of LSD for purposes of determining the guidelines offense level,[12] even though it meant that guideline ranges for LSD offenses, both before and after the amendment, would be lower than the statutory mandatory minimums in most cases. Congress took no action disapproving the amendment or the Commission's decision to make it retroactive, and the Supreme Court later upheld the Commission's authority to de-link the guideline from the mandatory minimums, emphasizing that the Commission is "[e]ntrusted within its sphere to make policy judgments, [and] may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities." *Neal v. United States*, 516 U.S. 284, 295 (1996). It is likewise within the Commission's delegated sphere to make the policy judgment whether ameliorative

[11] *See* USSG § 1B1.10(c), comment. (backg'd), p.s.

[12] *See* USSG App. C, Vol. I, Amend. 502 (Nov. 1, 1993).

amendments to the guidelines should be made retroactive. *See* 28 U.S.C. § 994(u). The Commission should not mistakenly infer from congressional silence any "implicit command" in the FSA to deny retroactive application of the more desirable approach to calculating guideline ranges in crack cases.[13] Unlike the LSD guideline, the new crack guidelines do not conflict with current law, and will ultimately coincide with the new mandatory minimums in every case.

1. The purpose of the amendment is to reduce unwarranted disparities, to better reflect the seriousness of crack offenses, and to promote the perception of fairness.

Since 1995, the Commission has urged Congress to revisit the unduly harsh penalties imposed on crack offenders, the vast majority of whom are African-American.[14] In its May 2007 Report to Congress, the Commission reaffirmed that quantity-based penalties for crack cocaine offenses overstate the relative harmfulness of crack cocaine compared to powder cocaine, sweep too broadly, apply most often to lower level offenders, overstate the seriousness of most crack offenses, and disproportionately impact minorities.[15] The Commission found that the majority of crack offenders perform low-level trafficking functions.[16] In fact, the majority of street-level, retail crack dealers were being sentenced as "serious" or "major' traffickers.[17] In addition to urging Congress to increase the drug quantity thresholds triggering the 5- and 10-year mandatory minimum penalties in crack cases, the Commission strongly urged the repeal of the 5-year mandatory minimum for simple possession of crack, noting that simple possession by a first offender of any quantity of nearly every drug, including powder cocaine, is a

[13] *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("[T]he statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence.").

[14] U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, Executive Summary xii-xv & 192 (1995) (repudiating any sentencing distinction between crack and powder cocaine based on findings that the 100-to-1 ratio resulted in disproportionately severe sentences that have a disparate impact on African Americans, are not supported by sufficient policy bases and create "the perception of unfairness, inconsistency, and a lack of evenhandedness"); U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 91 (2002) (the Commission "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress": "[t]he 100-to-1 drug quantity was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.").

[15] *See* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, at 8 (2007).

[16] *Id.* at 11-14.

[17] *Id.* at 29, fig. 2-13.

misdemeanor punishable by a maximum of one year. Although the Commission viewed itself as precluded from effecting comprehensive change through the guidelines, it acted to alleviate at least part of the problem and made that change retroactive. Nearly 87% of those whose sentences were reduced as a result of the Commission's action were African-American.[18]

The Fair Sentencing Act of 2010 effected the change the Commission had long advocated, and was unquestionably founded on concerns regarding defendants *already sentenced*. In passing the Act, members of Congress expressly recognized that since 1986, tens of thousands of federal prisoners had been sentenced under unjust and unfounded laws. Senator Patrick Leahy, a lead sponsor of the Act, stated that the 100-to-1 ratio "is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources. These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under the law." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010). Others expressed similar concerns.[19]

Members of Congress also recognized the total lack of evidentiary basis for the 100-to-1 ratio. Senator Durbin, quoting Vice President Biden, acknowledged that "the myths upon which we based the disparity have since been dispelled or altered." 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009). As described by Representative Daniel E. Lungren:

> The conclusion that there is a basis for treating crack and powder differently is in no way justified for the 100-to-1 sentencing ratio contained in the 1986 drug bill. We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did, thinking we were doing the right thing at the time.
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> Certainly, one of the sad ironies of this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue.

[18] Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 19 tbl.4 (Oct. 3, 2007).

[19] *See* 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. James E. Clyburn) (current law is "unjust and runs contrary to our fundamental principles of equal protection under the law"); 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Steny Hoyer) ("The 100-to-1 disparity is counterproductive and unjust.").

156 Cong. Rec. H6202 (daily ed. July 28, 2010). Other members of Congress made similar comments on the unfounded assumptions underlying the 1986 law.[20] In short, Congress recognized that tens of thousands of federal prisoners were sentenced under unjust and unfounded laws.

Over 85% of those eligible for a sentence reduction are African-American, reflecting the disparate impact of the old law.[21] Making retroactive the change to the Drug Quantity Table for crack offenses and the elimination of the cross-reference to § 2D1.1 for simple possession would serve the core purpose of the Act for those who have already been sentenced, which is to rectify the egregious disparities in federal cocaine sentencing and better reflect the seriousness of crack offenses and the culpability of crack offenders. It would be consistent with the fundamental principle of equal justice under the law, and with the Commission's long-held position, which will in turn promote the perception of fairness in federal sentencing. It would also be consistent with the Commission's treatment of the 2007 amendment, as well as its treatment of past amendments to the drug guideline intended to reduce unwarranted disparity and promote greater fairness.[22] In every instance, the Commission has acted based on empirical data and research in order to remedy unwarranted disparity and to reduce disproportionately severe sentences as compared with other drugs, and made those changes retroactive. Just as the goals of proportionality, consistency, and fairness compelled the Commission to make the previous amendments retroactive, they compel the same result here.

Like those changes, the minimal role cap at § 2D1.1(a)(5) serves to better reflect the seriousness of the offense for defendants whose role was truly minor, but for whom the role reduction under Chapter 3 is inadequate to offset the impact of drug quantity.[23]

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[20] *See also* 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009); 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Robert C. "Bobby" Scott) ("there is no justification for the 100-to-1 ratio"); 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) ("This disparity made no sense when it was initially enacted, and makes absolutely no sense today[.]"); 156 Cong. Rec. H6200 (daily ed. July 28, 2010) (Finding No. 9, H.R. 265) ("Most of the assumptions on which the current penalty structure was based have turned out to be unfounded.").

[21] U.S. Sent'g Comm'n, Office of Research and Data, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively* at 19 tbl.4 (May 20, 2011) [hereinafter *Impact Analysis*].

[22] *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 to the method of determining the amount of oxycodone, which reduced the penalties for offenses involving Percocet).

[23] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 51 (2004) (explaining that the mitigating role cap is intended to "ameliorate the influence of large quantities on sentences for the least culpable offenders") ["*Fifteen Year Review*"]; USSG App. C, Amend. 640 (Nov. 1, 2002) (explaining the purpose of the mitigating role cap); *United States v. Cabrera*,

Indeed, drug offenders who receive the four-level minimal role reduction under Chapter 3 are some of the *least culpable* drug offenders, but are often subject to excessively severe sentences due to the quantity-driven nature of the drug guidelines.[24] The minimal role cap builds on the Commission's earlier implementation of the mitigating role cap, further limiting the impact of drug quantity for the lowest level participants "who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability."[25] Although in no way required for the Commission to exercise its independent authority under 28 U.S.C. § 994(u), by directing the Commission to implement the minimal role cap, Congress expressly endorsed the Commission's previous determination that drug quantity overstates the true culpability of drug offenders whose role was minor. Like the change to the Drug Quantity Table, the minimal role cap furthers the Commission's considered policy objectives.

In short, the purpose of the amendment to the Drug Quantity Table and the elimination of the cross-reference in simple possession cases is to do what the Commission has advocated since 1995, reflecting the universal community view, including the view of Congress, that sentences in crack cases have been unfairly driven by unfounded assumptions about the seriousness of crack offenses and the culpability of crack offenders. Similarly, the minimal role cap reflects the Commission's policy judgment, expressed since 2001 and now specifically endorsed by Congress, regarding the impact of drug quantity on sentences for minor participants in all drug cases.

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567 F. Supp. 2d 271, 272-73 (D. Mass. 2008) ("[D]eductions for a defendant's minor role . . . are limited and do not come close to offsetting the high quantity-driven offense level."); *United States v. Whigham*, 754 F. Supp. 2d 239, 245 (D. Mass. 2010) ("While the Guidelines permit an adjustment for 'role' in the offense, those adjustments . . . hardly offset the substantial impact of quantity in the other direction.").

[24] Although the Commission did not make retroactive the original mitigating role cap, it appears that this was driven not by the Commission's own policy judgment, but by intense political pressure at a time when such interference was reaching its apex. The Commission came under immediate pressure from the Department of Justice and members of Congress to repeal the mitigating role cap in the very next amendment cycle, the same cycle during which the PROTECT Act was passed. *See* Letter from Eric Jaso, Criminal Division, Dep't of Justice, to Hon. Diana Murphy (Mar. 18, 2003), *available at* http://www.src-project.org; Letter from Deborah J. Rhodes, Criminal Division, Dep't of Justice, to the U.S. Sent'g Comm'n at 37-38 (Mar. 1, 2004), *available at* http://www.src-project.org. This led to a compromise amendment reducing the ameliorative effect of the cap, and retroactivity was never considered. USSG App. C, Amend. 668 (2004); U.S. Sent'g Comm'n, *Minutes of Meeting* (Apr. 8, 2004). In contrast, Congress has now expressly endorsed the Commission's policy judgment. We also note that the Commission did make retroactive its 1994 amendment capping the Drug Quantity Table at 38, which was also intended to limit the impact of drug quantity. *See* USSG App. C, Amend. 505 (Nov. 1, 1994); USSG § 1B1.10(c).

[25] USSG App. C, Amend. 640 (Nov. 1, 2002).

2. The number of eligible defendants and magnitude of the change support retroactivity.

According to the Commission's analysis, 12,040 offenders would be eligible to receive a reduced sentence based on the new base offense levels and deletion of the cross reference from the simple possession guideline.[26] While this is a large number, it is significantly less than the approximately 20,000 offenders eligible for a reduction after the 2007 amendment.[27] The potential reduction in the sentence is greater, with an average reduction of 37 months (from an average of 164 months to 127 months), representing 22.6% of the average sentence.[28] Of the over 9,000 cases for which the Commission has sufficient records for analysis, the large majority of eligible offenders (81.7% or 7,482 offenders) would receive a reduction of thirteen months or more, of which 3,203 would receive a reduction of more than three years.[29] Two hundred and eighty offenders would receive a reduction of more than ten years. The average reduction of 37 months is over six times the minimum of six months that the Commission uses as a benchmark for making an amendment retroactive.[30]

The new minimal role cap at § 2D1.1(a)(5) would affect 88 offenders.[31] Although not a large number, the additional reduction in the guideline range under the new cap under § 2D1.1 would be at least one level, which even in Criminal History Category I would reduce the bottom of the guideline range by 13 months. For defendants whose offense level was higher than 33, the reduction in the guideline range would be even greater.

With a total of 12,128 defendants potentially eligible for significant reductions in their sentences as a result of these amendments combined, making them retroactive fully accords with Congress's expectation that the Commission will do so when the community view of the offense has changed, the reduction is not minor, and a significant number of defendants would be eligible for a reduced sentence.[32]

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[26] *Impact Analysis* at 9-10.

[27] Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 23 (Oct. 3, 2007) (predicting that 19,500 defendants would be eligible for a reduction averaging 27 months).

[28] *Impact Analysis* at 28.

[29] *Id.* at 29 tbl.6.

[30] *See* USSG § 1B1.10, comment. (backg'd).

[31] *Impact Analysis* at 35-36.

[32] *See* S. Rep. No. 98-225, at 180 (1983); USSG § 1B1.10, comment. (backg'd.) (quoting legislative history).

3. These amendments will not be difficult to apply.

Retroactive application of these amendments will not be difficult. In every case, the court has already determined drug quantity and has already determined whether the defendant received the minimal role adjustment under § 3B1.2. Recalculating the applicable guideline range in cases involving simple possession would only be a matter of applying the applicable base offense level under § 2D1.2(a)(1). The courts, probation officers, defense lawyers and prosecutors have demonstrated that, with cooperation and planning, the system can handle a large number of § 3582(c)(2) motions in which new guideline ranges are calculated based on amended offense levels in crack cases, having disposed of over 25,000 such motions since the 2007 crack amendment was made retroactive.[33] Courts have already resolved the legal issues that are likely to arise under these amendments and § 1B1.10, p.s., as amended in 2008. From the vantage point of judge and Commissioner, Judge Castillo has often described the process as the "greatest untold success story" in federal sentencing. Judge Antoon of the Middle District of Florida, which handled the second largest number of § 3582(c)(2) motions under the 2007 amendment, recently described the process as "seamless[]" and causing "no disruption."[34]

The 12,040 eligible prisoners are spread throughout the judicial districts, with the Eastern District of Virginia having the largest number at 884,[35] significantly fewer than the 1,641 motions the district has processed since 2007.[36] Other than my district, every district has fewer than 450 potentially eligible offenders, and 80% have fewer than 200.[37] The number of defendants eligible for immediate release in any given district is quite low; the highest number is 98, in the Eastern District of Virginia.[38] Of the remaining cases, courts will hear motions and defendants will be released over the course of thirty years.[39]

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[33] U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report* tbl.1 (Jan. 2011).

[34] Remarks by Hon. John Antoon, II (M.D. Fla.), Twentieth Annual National Seminar on the Federal Sentencing Guidelines, Orlando, Fla. (May 6, 2011).

[35] *Impact Analysis* at 17, tbl.2.

[36] U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, tbl.1 (Jan. 2011).

[37] *Impact Analysis* at 17, tbl.2.

[38] *Id.* at 31-34, tbl. 8.

[39] *Id.* at 29-30 & tbl.7.

4. Making these amendments retroactive will reduce prison overcrowding and save taxpayer dollars.

Prison overcrowding should also be a relevant concern, as with the oxycodone amendment in 2003. Although retroactive application of that amendment had a much smaller potential impact, Vice Chair Castillo moved to make that amendment retroactive because its purpose "was to make the offense more proportionate to other similarly scheduled controlled substance," as well as concerns for "fairness and equity," and "overcrowded conditions in prison."[40] Reducing prison overcrowding weighs heavily in favor of making the crack amendment retroactive. The Bureau of Prisons is now 37% overcapacity, resulting in extreme overcrowding, unsafe conditions, and reduced capacity to provide treatment and training shown to reduce recidivism.[41] Seventy thousand inmates will be triple bunked in three years even if new prisons are opened as projected.[42] This state of affairs caused Harley Lappin, the Director of the Bureau of Prisons, to suggest that in this time of limited resources, the length of time inmates spend in federal prison should be reduced.[43] He noted in particular that 52% of federal inmates are serving time for drug related offenses and that their sentences are "extremely long."[44]

Making these amendments retroactive would alleviate overcrowding and would save taxpayers more than $1 billion.[45]

B. Making Retroactive Only These Easily Applied Amendments Is Both Consistent with the FSA and Fair.

The Commission should not make retroactive any amendment that would require additional factfinding in order to calculate the amended guideline range, whether mitigating or aggravating. The information related to these adjustments is unlikely even to appear in presentence reports, and if it existed at all by the time of a sentence modification proceeding, would be stale and equivocal at best.[46] Requiring courts to

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[40] U.S. Sent'g Comm'n, *Minutes of Public Meeting* (Nov. 5, 2003).

[41] Transcript of Public Hearing Before the U.S. Sent'g Comm'n at 10, 15-16, 49-50, 52 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons).

[42] *Id*. at 28-29, 50-51.

[43] *Id*. at 10-11, 39-40, 52.

[44] *Id*. at 9-10, 55.

[45] *See* Memorandum from Matthew Rowland, Deputy Assistant Director, Administrative Office of the United States Courts, *Cost of Incarceration and Supervision* (Apr. 27, 2010) ($2,270.93 cost of incarceration per prisoner per month).

[46] For example, did the defendant knowingly maintain an "enclosure" for "storage" of a controlled substance, not incidentally or collaterally but primarily? Did the defendant make a "credible" threat to use violence? Did the defendant use "impulse" to involve another person

engage in this new factfinding would be a huge strain, and unlikely to produce reliable or reasonably consistent results. Because of the burden of new factfinding and the litigation it would spawn, the Judicial Conference urged the Commission to amend § 1B1.10 in 1994 to require retroactive application of only the guideline that was amended rather than the entire new guideline manual, as was previously advised.[47] Rather than require courts to recalculate the guideline range based on facts that were unknown or overlooked, and not litigated, at the time of the original sentencing, the Commission should make retroactive only those amendments that are easily calculated.

We understand that some have suggested that it would be inconsistent with the FSA to make retroactive the ameliorating amendments but not the aggravating amendments. We disagree for several reasons. First, some of the aggravating factors are broader than Congress required.[48] Second, Congress did not expect that amendments would be made retroactive if they unduly burdened the courts, as the aggravating factors plainly would. Third, some of the aggravating circumstances would double-count factors arguably taken into account even by the new drug quantity ratio in crack cases, such as use of violence, trafficking function, and distribution to a minor or pregnant woman.[49]

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who had "minimum knowledge" of the illegal enterprise in the offense? Did the defendant distribute to or involve a person who was under 18 or over 64 or "unusually vulnerable"?

[47] *See* Letter from Hon. George P. Kazen, Chair, Subcomm. on Crim. Law of the Judicial Conference Crim. Law Comm., to Hon. William W. Wilkins, Jr., Chair, U.S. Sent'g Comm'n, *Re: Position on Modification of § 1B1.10 Procedure* (Mar. 11, 1994).

[48] For example, the Commission broadened the directive to provide a 2-level enhancement for "maintaining an establishment for the manufacture or distribution of a controlled substance, as generally described in [21 U.S.C. § 856]," to include maintaining a "building, room, or enclosure" for "storage of a controlled substance for the purpose of distribution." Congress specifically carved out for this enhancement (among the prohibited acts described in 21 U.S.C. § 856) only the maintaining of an "establishment" for the "manufacture" or "distribution" of a controlled substance. Pub. L. No. 111-220, § 6(2). Congress did not direct the Commission to enhance sentences for maintaining a premises for "storage . . . for the purpose of distribution."

The Commission broadened the impact of the 2-level increases for use of violence, bribery, maintaining an establishment for the manufacture or distribution of a controlled substance, and the super-aggravators by making them cumulative to already existing enhancements and to each other. Congress did not require that the enhancement for use of violence be cumulative to existing enhancements, or for the other enhancements to be cumulative to each other. *See* Pub. L. No. 111-220, §§ 4-6; *see also* Letter of Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to Hon. William K. Sessions, III, Chair, U.S. Sent'g Comm'n Re: Public Comment on Proposed Amendment: Fair Sentencing Act of 2010, at 12-14 (Oct. 8, 2010).

[49] *See* U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing* xiv (1995) (drug quantity in crack cases was intended to serve as a proxy for the harms associated with crack offenses); *see also Report to the Congress: Cocaine and Federal Sentencing Policy* vi (2002) (recommending that drug quantity not serve as a proxy for these harms and others).

Fourth, the statute authorizes the Commission to make *reductions* in guidelines retroactive, 28 U.S.C. § 994(u), and a retroactive increase in a sentence would of course violate the *Ex Post Facto* Clause. Thus, if any of the 2-level aggravating factors had any effect, it could only be to lessen or prevent a reduction. There is no reason for the Commission to make any express rule with regard to such factors, since the courts regularly exercise their discretion to consider these and other relevant factors under § 3553(a) in deciding whether a reduction is warranted and the extent of such reduction.[50]

We also understand that some think it would be "unfair" if the amended guideline range did not include increases for new aggravating factors, while guideline ranges for some defendants sentenced today do include such aggravating factors. This concern is unfounded. Take, for example, two defendants, one sentenced in 2000 and the other sentenced in 2011, each involved with 50 grams of crack and each of whom received a 2-level increase for aggravating role under § 3B1.1(c). Both distributed a controlled substance to a person over 64 years of age. This fact was irrelevant to the guideline calculation in 2000 (and so not recorded in the presentence report) or even noticed at the time (and so not in any discovery materials), but it was used to add two levels to the sentence imposed in 2011 under the new "super aggravating" role enhancement. Assuming both defendants were in Criminal History Category I, the guideline range for the defendant sentenced in 2000 would be 151-188 months. The guideline range for the defendant sentenced in 2011, even with the two-level increase for super aggravating role, would be only 97-121 months. If the new base offense levels *and* aggravating factors were made retroactive to the defendant sentenced in 2000, the two-level increase for distributing to a person over 64 would not be added because there would be no evidence of this fact. The amended guideline range would thus be 78-97 months. If the new aggravating factors were *not* made retroactive, the amended guideline range would also be 78-97 months.

Would it be fair to deny a retroactive reduction from a range of 151-188 months to a range of 78-97 months to the defendant sentenced in 2000 because the range of the defendant sentenced in 2011 is 97-121 months? We think not. First, each defendant could end up with the very same sentence of 97 months. And this would be true of any of the new two-level enhancements. Whether they were not made retroactive, or were made retroactive but frequently not applied because of lack of evidence, the bottom of the potentially enhanced range would be the same as the top of the unenhanced range. Second, uniform harshness is not required to avoid *unwarranted* disparity. In *Pepper*, the Court considered a similar argument that it would be unfair to allow courts to consider evidence of post-sentencing rehabilitation because courts could not consider such evidence with respect to defendants who were sentenced properly or did not appeal. The Supreme Court rejected this argument because the difference did not "arise from arbitrary or random sentencing practices," but as a result of the "ordinary operation of appellate sentencing review," and differences "that may result because some defendants are inevitably sentenced in error and must be resentenced are not the kinds of 'unwarranted'

[50] USSG § 1B1.10 comment. (n.1(B)), p.s.

sentencing disparities that Congress sought to eliminate." *Pepper v. United States*, 131 S. Ct. 1229, 1248-49 (2011).

II. THE COMMISSION SHOULD NOT EXCLUDE ANY CATEGORY OF OFFENDER FROM RETROACTIVE APPLICATION OF THESE AMENDMENTS.

The Commission also requests comment regarding whether, if it makes any part or parts of Amendment 2 retroactive, it should exclude various categories of defendants from eligibility for retroactive relief. It is unclear what prompted these proposals. They have no basis in history or principle, would intrude on the courts' discretionary decision whether to consider and grant a motion, and would perpetuate the perception and the fact of injustice. We emphatically oppose them.

In testimony before Congress, Assistant Attorney General Lanny Breuer emphasized that when the public perceives unfairness in the criminal justice system, it undermines governmental authority in the criminal justice process,[51] and that disparity in crack sentencing, and especially its resulting racial disparity, "has fueled the belief across the country that Federal cocaine laws are unjust."[52] He stated the Department's view, based on the Commission's research "as well as the need to ensure fundamental fairness in our sentencing laws," that Congress should "completely eliminate the sentencing disparity between crack cocaine and powder cocaine."[53] He also suggested that the way to address questions about retroactivity is not to categorically deny retroactivity for defendants whose cases involve aggravating circumstances, but to "defer to the judges" on a "case by case" basis.[54]

Mr. Breuer was correct. The Commission should not create wholesale exclusions from eligibility for retroactive relief. Doing so would categorically deny sentence reductions for no apparent reason to large portions or the majority of defendants,[55] even though each of their sentences was driven by the unfair and unfounded powder-to-crack

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[51] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Jud. Comm.*, 111th Cong. 1st Sess., at 4 (2009).

[52] *Id.* at 4-5.

[53] *Id.* at 4-6.

[54] *Id.* at 20.

[55] *See Impact Analysis* at 21, tbl.5 (cases involving weapon possession, a firearms mandatory minimum, safety valve, or aggravating role comprise 66.8% of cases); *id*. (defendants in Criminal History Category II-VI comprise 83.4% of cases); *id*. (cases sentenced outside the guideline range comprise 31.6% of eligible offenders); *id*., tbl.1 (cases sentenced after *Booker* comprise 67.7% of eligible offenders, cases sentenced after *Kimbrough* comprise 41.7% of eligible offenders, cases sentenced after *Spears* comprise 29% of eligible offenders).

ratio. Worse, it would confirm that federal crack sentencing, which applies mostly to African-Americans, is unjust.

The Commission has never before carved out categories of defendants to exclude them from the retroactive benefit of lower guideline ranges. It is difficult to conceive of any principled reason why these ameliorative amendments, which would partially remedy the corrosive, unfair, and unfounded effect of the severe quantity-driven penalties in crack cases, should be subject to unprecedented exclusions based on factors completely unrelated to the purpose of the amendment.

A. Criminal History

Offenders in Criminal History Categories II through VI comprise 83.4% of eligible offenders.[56] This proposal would thus exclude *most* eligible offenders, and for no apparent reason. The Commission has found that there is no relationship between criminal history and function in the offense, with 79% of street-level dealers, 50% of couriers, and 51% of those at the very lowest functions falling in Criminal Histories II through VI.[57] And for every one of these offenders, the criminal history score would remain the same if base offense levels were retroactively lowered. Most troubling, this proposed exclusion would disproportionately impact African-Americans for no legitimate reason.

As the Commission has recognized, the criminal history rules themselves can reflect and perpetuate unwarranted racial disparities.[58] African-Americans have a higher risk of arrest and therefore more criminal history points than similarly situated white offenders.[59] As a result, they are more likely to fall in Criminal History Categories II through VI.[60] Commission data confirm that excluding defendants in Criminal History Categories II through VI would disproportionately exclude African-American offenders from retroactive relief.[61] Excluding these defendants would turn on its head the Commission's goal of undoing decades of racial disparity and would continue to fuel perceptions of unfairness.

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[56] *Id*., tbl.5.

[57] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 45-46 (2007)

[58] *See Fifteen Year Review* at 134.

[59] *Id.*

[60] *See* U.S. Sent'g Comm'n, *Recidivism and the First Offender* 7 (2004) (showing that the proportion of black offenders increases with increasing criminal history).

[61] USSC FY 2009 Monitoring Dataset (81.2% of black crack offenders fall in CHC II-VI, while only 66.9% of white crack offenders fall in CHC II-VI).

Likewise, we emphatically oppose any compromise that would exclude *any* class of defendants based on criminal history category, such as those in Criminal History Categories V and VI. Excluding defendants in those two categories would deny any opportunity for relief to 37.6% of otherwise eligible defendants.[62] This would have an extreme racially disparate impact. In FY 2009, 84.4% of crack offenders in Criminal History Category V were African-American, and 87.3% of crack offenders in Criminal History Category VI were African-American, but only 6.5% of crack offenders in each of those Criminal History Categories were white.[63] And this would serve no legitimate purpose. The amended guideline range would still be increased based on the Criminal History Category. Moreover, many defendants in Criminal History Category VI would not even be eligible for consideration because they were sentenced "based on" the career offender guideline. This is unfortunate because the career guideline vastly overstates the risk of recidivism of most offenders subject to it and has a racially disparate impact.[64] As explained in Part II.E.1, *infra*, however, defendants who were initially designated as "career offenders" but were sentenced within the ordinary guideline by virtue of a departure or variance are now, and should remain, eligible for relief.

B. Consecutive Mandatory Minimums for Firearms Offenses

The Commission should not exclude defendants who were sentenced to a consecutive mandatory minimum for a firearms offense under 18 U.S.C. §§ 844(h), 924(c), or 929(a). This alone would exclude 15% of otherwise eligible defendants,[65] again for no reason. The base offense levels for the underlying drug offenses in these cases were based on unfair and unfounded penalties tied to drug quantity. Applying the amended base offense levels would not reduce or eliminate the mandatory enhancement for the firearms conviction; that portion of the amended guideline range would be unchanged. Moreover, African-Americans are disproportionately overrepresented among qualifying offenders who actually receive enhancements under 18 U.S.C. § 924(c),[66] so denying reductions on this basis would disproportionately impact African-American offenders.

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[62] *Impact Analysis* at 21, tbl.5.

[63] USSC FY 2009 Monitoring Dataset.

[64] The Commission's research shows that the career offender guideline has an unjustified racially disparate impact on black drug offenders because they have a higher risk of arrest and conviction than similar white offenders, but their risk of recidivism "more closely resembles the rates for offenders in the lower criminal history categories in which they *would* be placed under the normal criminal history scoring rules." *Fifteen Year Review* at 134.

[65] *Impact Analysis* at 21, tbl.5.

[66] *Fifteen Year Review* at 90.

C. Guideline Enhancements and Upward Adjustments

The Commission should not exclude offenders whose guideline ranges were increased under § 3B1.1 for aggravated role, or under § 2D1.1(b)(1) for possession of a weapon, or under § 2D1.2 for offenses near protected locations or involving underage or pregnant individuals, or under § 3B1.4 for using a minor to commit the offense. The first two categories alone would exclude 45.5% of defendants.[67] There is no conceivable reason for this. As Judge Hinojosa explained to the Senate Subcommittee on Crime and Drugs, these factors will still increase the amended offense level by the same number of levels as in the original sentencing.[68] Moreover, these increases duplicate punishment for harms for which quantity was intended as a proxy.[69] If made retroactive, the amended base offense level will ameliorate the unfair double-counting to which defendants were previously subjected.

D. Safety-Valve Reduction

The Commission asks whether retroactivity should be limited to only those who received the two-level "safety-valve" reduction under § 2D1.1(b)(16). While defendants who meet the stringent requirements for safety-valve relief are some of the least serious drug offenders, limiting retroactivity to only these offenders would exclude 93.6% of eligible offenders,[70] many of whom are non-dangerous, low-level offenders. It would also disproportionately exclude African-Americans. As discussed above in Part II.A, African-American crack offenders have a higher risk of arrest and therefore more criminal history points than similarly situated white offenders, and thus are more likely to be excluded from safety-valve relief.[71]

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[67] *Impact Analysis* at 21, tbl.5. The second two categories are not reported and likely to be small.

[68] *See Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Jud. Comm.* 111th Cong. 1st Sess., at 20 (2009) (remarks of Hon. Ricardo Hinojosa) ("I do want to make it clear that the guidelines themselves do provide some enhancements already with regards to a weapon involvement if you are not convicted under the statute. They also provide enhancements for use of minors, enhancements for roles in the offense, as well as some of the other matters that would be of concern to individuals.").

[69] *See* U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (2007) (quantities for five and ten-year mandatory minimums were intended to reflect a "major" or "serious" role); U.S. Sent'g Comm'n, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 196 (1995) (weapon enhancement subsumed in increased ratio differential, such that defendants "are doubly punished through the interplay of the two structures"); U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 100 (2002) (the 100-to-1 ratio "was designed to account for" violence, weapons possession, protected locations and individuals).

[70] *Impact Analysis* at 21, tbl.5 (showing that 6.4% of eligible offenders received safety-valve relief under § 5C1.2).

[71] USSC, *Fifteen Year Review* at 134.

E. All Defendants Who Received a Departure, or a Variance, or Were Sentenced After *Booker*, or After *Kimbrough*, or After *Spears*

The Commission seeks comment on whether it should categorically exclude (1) all defendants initially designated as "career offenders," (2) all defendants who received a sentence outside the guideline range, (3) all defendants sentenced outside the guideline range for a reason not approved in Chapter 5, Part K of the Guidelines Manual, (4) all defendants sentenced after *Booker*, (5) all defendants sentenced after *Kimbrough*, and/or (5) all defendants sentenced after *Spears*, even if the term of imprisonment was "based on" the subsequently lowered guideline range.

In addition to being unprecedented and based on assumptions that are inconsistent with data and experience, these proposed exclusions would usurp the courts' authority to decide whether they have jurisdiction to consider a motion under 18 U.S.C. § 3582(c)(2).[72] Whether a court has jurisdiction depends on the *court's* determination whether the defendant's term of imprisonment was "based on" the subsequently lowered guideline range.[73] The lower courts have already decided that the sentences of defendants in all of these categories may be "based on" a subsequently lowered guideline range. The Supreme Court will soon define the term "based on" in *Freeman v. United States*, No. 09-10245 (argued Feb. 23, 2011). The Commission should not attempt to interfere with the courts' authority by deciding this question categorically in advance.[74]

1. Defendants initially designated "career offenders" but sentenced "based on" the crack guidelines

The Commission should not create a blanket rule excluding defendants who "are" career offenders. The courts have held that when a defendant is initially designated a "career offender" but granted a departure or variance so that he is ultimately sentenced

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[72] *See, e.g.*, *United States v. Williams*, 607 F.3d 1123, 1126 (6th Cir. 2010) (the question whether a sentence was "based on" a guideline range that has been reduced "is jurisdictional").

[73] *See* 18 U.S.C. § 3582(c)(2).

[74] The Commission's role with respect to sentence modification proceedings consists of three actions authorized by Congress: (1) "to amend the Guidelines" pursuant to 28 U.S.C. § 994(o), (2) "to make the amendment retroactive" pursuant to 28 U.S.C. § 994(u), and (3) to issue policy statements "dictating 'by what amount' the sentence of a prisoner serving a term of imprisonment affected by the amendment 'may be reduced'" pursuant to 28 U.S.C. § 994(u). *Dillon*, 130 S. Ct. at 2691. If the Commission were to issue a policy statement excluding categories of defendants whose sentences were in fact "based on" a subsequently lowered guideline range, the Supreme Court may well find that it was not delegated authority to do so and that such action violates the Separation of Powers. *Cf. Dillon*, 130 S. Ct. at 2700-02 (Stevens, J., dissenting); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (by authorizing an agency to promulgate "*standards*" regarding a right of action under a statute, Congress does not thereby "empower the [agency] to regulate the scope of judicial power vested by the statute") (emphasis in original).

under the guideline range under § 2D1.1, his sentence was "based on" the drug guideline range and he is therefore eligible for consideration of a reduced sentence.[75]

If the idea of excluding even those initially designated as "career offenders" but who were *in fact* sentenced based on the drug guideline is that they are dangerous recidivists, this would be unfounded and unfair. The Commission's research establishes that African-American offenders are disproportionately impacted by the severe punishment under the career offender guideline, that most of these offenders are subject to that guideline based on prior drug offenses for which they are more likely to be arrested and prosecuted than similarly situated white offenders, that the career offender guideline vastly overstates the risk of recidivism in such cases, and that it fails to prevent drug crime.[76]

In short, the career offender guideline has a racially disparate impact that is not justified by the need for deterrence or incapacitation. When courts recognize this fact and sentence within the regular drug guideline, there is no reason the defendant should not be eligible for retroactive relief.

2. Defendants who received a departure or variance

To exclude offenders who were sentenced outside the guideline range would be unprecedented. Beginning in 1997, the Commission explicitly recognized that "[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate."[77] In 2008, the Commission amended the policy statement to continue this recognition with respect to all sentences below the guideline range.[78]

If only those defendants who received a sentence within the guideline range were eligible for relief, 31.6% of otherwise eligible defendants would be excluded.[79] If only those who received a guideline sentence or a "departure" approved in Chapter 5, Part K

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[75] *See United States v. Cardosa*, 606 F.3d 16, 21 (1st Cir. 2010); *United States v. Munn*, 595 F.3d 183, 192 (4th Cir. 2010); *United States v. McGee*, 553 F.3d 225, 225-26 (2d Cir. 2008); *see also United States v. Moore*, 541 F.3d 1323, 1329-30 (11th Cir. 2008) (recognizing this principle in *dicta*).

[76] *See Fifteen Year Review* at 133-34.

[77] *See* USSG § 1B1.10, comment. (n.3) (1997), p.s.; USSG, App. C, Amend. 548 (Nov. 1, 1997).

[78] *See* USSG § 1B1.10(b)(2)(B) & comment. (n.3) (2008), p.s. As discussed in Part III, this policy statement has caused confusion regarding whether courts may impose a sentence "comparably less" than the amended guideline range based on a variance at the first sentencing or any reduction at all, and should thus be deleted.

[79] *Impact* Analysis at 21, tbl. 5.

of the Guideline Manual were eligible for relief, about 15% of otherwise eligible defendants would be excluded.[80]

Most approved "departures" are based on substantial assistance to the government because Chapter 5, Part K generally disapproves downward departures based on mitigating factors. As shown in Table 5C of the Commission's Impact Analysis, from 1998 through 2004, the number of substantial assistance departures dwarfed the number of other departures. After *Booker*, most judges prefer variances, as they find the departure provisions too restrictive and inconsistent with § 3553(a).[81] Thus, from 2006 to 2010, the rate of non-government sponsored departures in crack cases dwindled from 2.4% to 1.4% while the rate of non-government sponsored variances rose from 10.8% to 25.4%.[82]

If eligibility were confined to those receiving departures approved under Chapter 5, Part K, defendants receiving substantial assistance departures could receive a retroactive reduction based on the amended guideline range and a further reduction comparably less than the amended guideline range for substantial assistance, while defendants who received a variance based on factors that are relevant to the purposes of sentencing would be completely ineligible for relief.

This would not be fair or logical, and it may have a racially disparate impact. In 1991, the Commission found that legally irrelevant factors including race are "statistically significant in explaining §5K1.1 departures."[83] A recent study found that "Government-sponsored below-Guideline sentences are a greater site of racial sentencing disparity than judge-initiated departures in the post-*Booker* and post-*Gall* era."[84]

Moreover, including defendants who received "departures" and excluding those who received "variances" would not be so clear cut. The reasons the Commission reports for variances include reasons in the Guidelines Manual for departure (*e.g.*, aberrant behavior), the reasons it reports for departures include reasons that appear to be available

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[80] *Id*.

[81] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13 (2010) (majority of judges find "ordinarily relevant" almost every mitigating factor prohibited or discouraged by the guideline departure provisions); *id.* tbl.14 (majority of judges say they do not rely on departure provisions because they do not adequately reflect reasons for sentencing outside the guideline range and are "too restrictive").

[82] U.S. Sent'g Comm'n, *2006-2010 Sourcebook of Federal Sentencing Statistics* tbl.45.

[83] U.S. Sent'g Comm'n, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

[84] Jeffery Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After Booker and Gall?*, 23 Fed. Sent'g Rep. 333, 333 (Apr. 2011).

only under § 3553(a) (*e.g*, low risk of recidivism), and it has a mixed category, called "downward departures with *Booker*."[85]

As discussed further below, every sentence below the guideline range, whether the result of a departure or a variance, was driven first by calculation and consideration of the guideline range. Courts have thus appropriately concluded that any such sentence may be "based on" the guideline range.[86]

3. Defendants sentenced after Supreme Court decisions

The Commission should not exclude defendants sentenced after *Booker*, *Kimbrough*, or *Spears* from eligibility from relief. This would exclude huge portions of otherwise eligible prisoners with no justification.

If all defendants sentenced after *Booker* was decided on January 12, 2005 were excluded, approximately 68% of defendants would not be entitled to any consideration of a motion for retroactive relief. If all defendants sentenced after *Kimbrough* was decided on December 10, 2007 were excluded, approximately 42% of defendants would have no opportunity for relief. If all defendants sentenced after *Spears* was decided on January 21, 2009 were excluded, approximately 29% would have no opportunity for relief.[87]

We are not aware of any rationale that could support these proposed exclusions. One possible rationale, albeit mistaken, would be an assumption that judges simply disregard the guidelines now that they must sentence in compliance with § 3553(a), or now that they may vary from a guideline that was not based on empirical data or national experience, or now that they may replace the guidelines' ratio with a different ratio.

This would not be correct. Although courts have increasingly varied from the crack guidelines since the Supreme Court's decisions, they have still imposed sentences *within* the guideline range in the majority of crack cases.[88] Surely there can be no rationale for excluding defendants who were sentenced *within* the guideline range. As to

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[85] U.S. Sent'g Comm'n, *2010 Sourcebook of Federal Sentencing Statistics*, tbls.25, 25A, 25B.

[86] *See, e.g*., *United States v. Curry*, 606 F.3d 323, 329 (6th Cir. 2010) (sentencing courts may "reduce a sentence where the original sentence was, in fact, 'based on' a subsequently lowered guideline range . . . whether pursuant to a departure or variance"); *id*. at 325 (variance of one year from bottom of guideline range was "based on" the guideline range); *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010) (approving district court practice in cases involving an agreed sentence under Rule 11(c)(1)(C) that is "based on a guideline calculation, like 20 percent of the low end of the guidelines, then with the new crack amendments, we go down and we recalculate it"); *United States v. Johnson*, 318 Fed. App'x 127, 129 (3d Cir. 2009) (judge who sentenced below the range based on § 3553(a) was not prohibited from granting a further reduction).

[87] *Impact Analysis* at 15, tbl.1.

[88] *Id*. at 24, tbl.5C.

sentences outside the guideline range, judges are required to treat the guideline range as "the starting point and the initial benchmark."[89] They must "first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter."[90] As the Court stated in *Kimbrough*, "district courts must treat the Guidelines as the 'starting point and the initial benchmark,'" even when they ultimately decide that the guideline range is not the product of the Commission's "exercise of its characteristic institutional role."[91] The courts of appeals have reiterated this requirement.[92] In *Spears v. United States*, 129 S. Ct. 840 (2009), the Supreme Court approved the sentencing judge's replacement of the 100-to-1 ratio with a 20-to-1 ratio. Rather than ignoring the guidelines, this variance was numerically tied to the guidelines and the mandatory minimums underlying them. Through this approach, "the sentencing judge chooses to specify his disagreement, and the *degree* of his disagreement, with the 100:1 ratio."[93]

Another possible rationale for these proposed exclusions is that we should assume that in every sentencing after *Booker*, or *Kimbrough*, or *Spears*, the court actually considered the unwarranted severity and disparity of the crack guidelines, and either sentenced outside the guideline range based on its recognition of the unsound policy *and* imposed the same sentence as if the amended guideline range were in effect, *or* sentenced within the guideline range because it agreed with the guideline range and would continue to agree with it even if Congress and the Commission adopted a different policy.

This would ignore several realities. First, courts (and counsel) have been slow to respond to changes in the law. Only a few months ago, the Supreme Court reversed the Eighth Circuit for reasons that should have been clear from its three-year-old decision in *Gall*.[94] Three years after *Kimbrough* was decided, the Sixth Circuit reversed a sentence because the district court incorrectly believed it could not vary from the crack guideline because it thought that sentencing was "not the proper forum" to make such decisions.[95]

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[89] *Gall v. United States*, 552 U.S. 38, 49 (2007).

[90] *Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009).

[91] *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007).

[92] *See, e.g., United States v. Henderson*, __ F.3d __, 2011 WL 1613411 (9th Cir. Apr. 29, 2011) (courts may vary from the child pornography guideline because it is "not the result of the Commission's 'exercise of its characteristic institutional role,'" but "must continue to consider the applicable Guidelines range as 'the starting point and the initial benchmark'").

[93] *Spears*, 129 S. Ct. at 844-45.

[94] *Pepper*, 131 S. Ct. at 1242-43, 1247.

[95] *See, e.g., United States v. Johnson*, No. 09-2173, 2010 WL 5395725 (6th Cir. Dec. 18, 2010).

And just last month, the Ninth Circuit reversed a sentence because the district court did not understand that it was permitted to disagree with the child pornography guideline.[96]

That judges have not fully acted on their authority to disagree with the unsound crack guidelines is demonstrated by the statistics. Although 70% of judges surveyed in 2010 said that guideline ranges in crack cases were "too high,"[97] judges sentenced defendants below the guideline range in only 13.8% of eligible cases in 2005, in only 15% of cases in 2006, 2007, and 2008, in only 21.4% of cases in 2009, and in only 32.9% of cases in 2010.[98] These rates include not only variances based on policy disagreements, but also variances based on individualized circumstances, guideline departures, and departures sponsored by the government other than those under § 5K1.1, or a combination of all three.

Second, not all variances are based on policy disagreements. Many courts of appeals did not permit policy disagreements until *Kimbrough* was decided. And thereafter, the vast majority of sentences below the guidelines are not based on policy disagreements but on individualized mitigating facts about the offense or the offender.[99] In such cases, the courts may well conclude that the mitigating "factors that supported a [variance] are augmented by the subsequent reduction in the disparity in guideline ranges for powder and crack cocaine."[100]

Third, in those cases in which the court did vary based on a policy disagreement, there is no reason to think that every court went as far as the amended guideline or that, if not, they would not wish to reduce the sentence further in light of the amended guideline. *Spears* is just one example. The judge varied by adopting a ratio of 20:1, reaching a sentence that was presumably higher than the amended range would be.

Fourth, it cannot be assumed that judges who sentenced *within* the guideline range would not grant a reduction based on the amended guideline range. In many cases, defense counsel did not challenge the crack guideline as a matter of policy, and courts

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[96] *United States v. Henderson*, __ F.3d __, 2011 WL 1613411 (9th Cir. Apr. 29, 2011).

[97] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.8 (2010).

[98] *Impact Analysis* at 15, tbl.5C; *see also* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl.45 (2006-2010) (showing gradual increase in downward departures and variances not sought by the government in cases involving crack, with the highest rate in 2010 at 26.8%).

[99] *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbls.25, 25A, 25B (2010); *see also, e.g.*, *United States v. Hawthorne*, 2011 U.S. App. LEXIS 7133 (8th Cir. Apr. 5, 2011) (district court varied downward based on defendant's cooperation, but otherwise decided to "adhere to the Guidelines" and did not further vary downward to account for powder-to-crack disparity in the guideline).

[100] *See United States v. Wilkerson*, 2010 WL 5437225, *3 (D. Mass. Dec. 23, 2010) (Wolf, J.).

generally do not raise arguments on their own initiative in our adversary system.[101] And some judges who may well have disagreed with the guideline as a policy matter still sentenced within the guideline range.[102]

The only fair assumption is that every sentence was anchored and informed by the guideline starting point, and that sentences both within and outside the guidelines were imposed for a variety of reasons. The Commission should not impose blanket exclusions based on unproven assumptions regarding whether and how a district court exercised its discretion at the original sentencing. The district courts are perfectly competent to review the cases of every defendant whose sentence was based on a guideline range lowered by these amendments, and to decide whether they already took the policy problem into account, and if so, to the extent represented by the amended guideline.[103]

F. Conclusion

Every defendant eligible for a reduction under § 3582(c)(2) is entitled to have the court determine whether to lower the sentence in light of the amended base offense levels. When considering motions after the 2007 crack amendment, district courts exercised their discretion to grant motions in some cases, and to deny them in others.[104] This was the result of courts properly considering the relevant matters in each case, based on their own knowledge of the case and the evidence and arguments presented by the parties. There is no justification for upsetting this workable system by imposing blanket exclusions.

III. OTHER CHANGES TO § 1B1.10

When the Commission made retroactive the 2007 crack amendment, it amended § 1B1.10 to expressly prohibit courts from reducing a sentence below the amended guideline range, with the longstanding exception that in cases in which the original

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[101] *United States v. Maisonet*, 493 F. Supp. 2d 255, 265 (D.P.R. 2007) (Gertner, J.) ("I cannot exercise my discretion unless I have the evidence to do so. Put otherwise, I am Guidelines-bound, for the most part, when the advocates (and to a lesser degree, Probation) are Guidelines-bound. While I have independent obligations to enforce a just sentence, in the final analysis, this is an adversary system.").

[102] *United States v. Brooks*, 628 F.3d 791, 800 (6th Cir. 2011) ("[T]he 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.").

[103] *See, e.g.*, *United States v. Peralta*, 345 Fed. App'x 794, 795 (3d Cir. 2009) (district court denied reduction after 2007 amendment in part because it had already given the defendant the benefit of amendment before it was made retroactive).

[104] U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, tbl.6 (2011).

sentence was below the guideline range, the court may grant a comparable reduction from the amended guideline range. *See* USSG § 1B1.10(b)(2)(B) & comment. (n.3).

The last sentence of § 1B1.10(b)(2)(B), however, states that "if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, a further reduction generally would not be appropriate." This appears to be designed to discourage comparable further reductions in any case in which a downward variance was granted. At the Crack Summits in Charlotte, North Carolina, and St. Louis, Missouri, the Commission explained that this sentence is intended to apply only if the sentencing judge did not consider the guidelines at all at the original sentencing.[105] But such cases should not exist, as the courts must treat the guideline range as the "starting point" and "initial benchmark" in every case, even if they find that it was not based on empirical data or national experience and discount it on that basis.[106] Failure to calculate and consider the guideline range is reversible error.[107] As a result, the exception should have no practical application.

The government has added to the confusion by claiming that the provision deprives courts of *jurisdiction* to consider a motion under § 3582(c)(2),[108] or that it "establishes a presumption" that *no* reduction is appropriate when the defendant received a downward variance.[109] Some courts have denied reductions based on this provision, even though the sentence imposed was clearly and directly informed by consideration of the guideline.[110] After surveying the confusion surrounding § 1B1.10(b)(2)(B), the Sixth

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[105] *See* Transcriptions of Portions of the Crack Amendment Retroactivity Summit Held January 24, 2008 at The Adams Mark Hotel, St. Louis, Mo, Session 1: United States Sentencing Commission, *available at* http://www.fd.org/pdf_lib/Transcript%20of%201B1.10b2B%20Excerpt%20of%20Crack%20Retroactivity%20Summit.pdf (explanation by Commission staff that the limitation only applies when the guideline range "was not ultimately considered in the first place," which was "probably not" "going to be the normal set of cases").

[106] *See, e.g.*, *Kimbrough*, 552 U.S. at 108-09, *Henderson*, 2011 WL 1613411, *7.

[107] *See Gall v. United States*, 552 U.S. 38, 51 (2007) (significant procedural error includes "failing to calculate (or improperly calculating) the Guidelines range" and "failing to consider the § 3553(a) factors," which includes the guideline range under § 3553(a)(4)); *United States v. Blackie*, 548 F.3d 395, 401-02 (6th Cir. 2008) (reversing sentence as procedurally unreasonable where the district court "did not refer to the applicable Guidelines range"); *United States v. Simone*, 337 Fed. App'x 828, 830 (11th Cir. 2009) (reversing above-guideline sentence because "the district court's failure to consider the Guidelines sentencing range" constituted plain procedural error); *United States v. Kirschner*, 397 Fed. App'x 514, 519 (11th Cir. 2010) ("Where the district court fails to calculate *or consider* the guideline range at all, however, the error cannot be rendered harmless.").

[108] *See United States v. Sipai*, 623 F.3d 908, 910 (9th Cir. 2010).

[109] *United States v. Curry*, 606 F.3d 323, 327, 328 (6th Cir. 2010).

[110] *See, e.g.*, Order, *United States v. Robinson*, Case 1:04-cr-00501-TSE (E.D. Va. June 1, 2009) (denying reduction because defendant was originally sentenced "36 months below the amended

Circuit concluded that district courts "are fully capable" of "determining whether a further reduction is appropriate, regardless of whether the original sentence incorporated a variance or departure from the Guidelines."[111]

We believe that the Commission should remove this sentence. While the Commission may have believed at the time it was promulgated that courts would simply ignore the guidelines when sentencing in compliance with § 3553(a), it is now clear that that is not the case as a matter of law or practice. The sentence has created the impression that courts should not impose a sentence "comparably less" than the amended guideline range based on a variance at the first sentencing regardless of the reason for or extent of that variance. Worse, it has created the impression that if the court applied existing law at the time of the original sentencing, it should not consider the motion at all.

We appreciate the opportunity to provide our input 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.

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guideline range" based on *Booker* and § 3553(a)), *aff'd, United States v. Robinson*, 2011 WL 343946 (4th Cir. Feb. 4, 2011).

[111] *Curry*, 606 F.3d at 329.