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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment on Retroactivity of Amendments to Drug Quantity Table

Dear Judge Saris:

We are writing to follow up on some of the issues that arose at the Commission's June hearing on retroactivity and to address the Department of Justice's proposal to limit retroactive application of the amendments to the drug quantity table, as well as the Criminal Law Committee's proposal to delay release dates until May 1, 2015. After careful consideration of the resource allocation issues and the substantive merits of DOJ's position, we firmly believe that full retroactivity is a fair and manageable approach. We strongly encourage the Commission to reject categorical exclusions that would deprive about two thirds of otherwise eligible people of retroactive relief , that would have a disproportionate impact on African-Americans, and that would exclude a sizable number of people who present no greater risk to public safety than those the DOJ's proposal deems eligible. Instead of carving out arbitrary categorical exceptions that serve no compelling interest, the Commission should make the amendment fully retroactive and leave it in the capable hands of federal judges to decide whether a sentence reduction for any particular eligible individual presents an unacceptable risk to public safety. Past experience shows the federal criminal justice system is capable of fairly and efficiently processing petitions for relief, supervising those released early, and attending to the roughly 25% of eligible people who would likely face deportation.[1]

[1] USSC, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive*, Table 3 (May 27, 2014) (*Retroactivity Impact Analysis*).

I. DOJ's Proposal Would Deny Sentencing Reductions to Two Thirds of Eligible People, Disproportionately Exclude African-Americans, and Exclude Many People Who Do Not Pose a Significant Risk to Public Safety.

The Commission estimates that with full retroactivity of the amendment to the drug quantity table over 50,000 currently incarcerated people would be eligible, with judge approval, for sentence reductions averaging 23 months.[2] Even with a reduction, sentences for these people would average 102 months of imprisonment.[3] The Commission estimates that full retroactive application would reduce demand for prison space by 83,525 "bed-years,"[4] with a cumulative savings going forward of about 2.5 billion dollars.[5]

A. DOJ has proposed denying retroactive relief to about two thirds of otherwise eligible people.

DOJ has proposed categorically denying these retroactive reductions to people in Criminal History Categories III to VI, or whose sentences were increased for possession or use of a weapon by the defendant or someone else involved in the offense, the use or threat of violence, obstruction of justice, or aggravating role.[6] Even though these individuals received longer prison terms because of these factors, and those enhancements would not be affected by application of the retroactive amendment, DOJ proposes that they should be denied a reduction for the portion of their sentence based on drug quantity. An analysis of the impact of the DOJ proposal shows that it would significantly cut the number of people eligible for retroactive relief and diminish the benefits of retroactivity:

- Nearly half (47%), or about 24,000, of otherwise eligible people would be excluded by the DOJ proposal because they fall within Criminal History Categories III-VI.[7]
- Nearly a third (30.7%), or about 15,694, of otherwise eligible people would be excluded because they received an enhancement for a dangerous weapon or firearm.[8]

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[2] *Id*. at 7.

[3] *Id.*

[4] *Id.* at 8.

[5] Cost of incarceration obtained from Administrative Office of the U.S. Courts, *Cost of Incarceration and Supervision* (June 24, 2014).

[6] Statement of Sally Quillen Yates, United States Attorney, Northern District of Georgia, Before the U.S. Sentencing Comm'n, Washington, D.C., 7-8 (June 10, 2014).

[7] *Retroactivity Impact Analysis*, *supra* note 1, at Table 4B.

[8] *Id*.

- About 5%, or approximately 2,500, of otherwise eligible people would be excluded under the DOJ proposal because their sentences were already lengthened under the guidelines' obstruction of justice adjustment at §3C1.1.[9]

- 15.6%, or nearly 8,000, of otherwise eligible people would be excluded because their sentences were already increased under §3B1.1 based on their "aggravating role" in the offense.[10]

In a proxy population that we used to estimate additional impacts of the DOJ's proposal,[11] only about a third of otherwise eligible people survive the joint effect of DOJ's proposed exclusions.[12] Instead of shortening the sentences of over 50,000 people convicted of a drug offense, retroactive application under the DOJ proposal would affect less than 20,000, and would substantially reduce the projected savings, in bed space and cost, of the retroactive amendment.

B. DOJ's proposed limitations would disproportionately exclude African-Americans.

Whether due to law enforcement practices, criminogenic environments, or other unknown factors,[13] African-American defendants have more extensive criminal records than other racial

[9] *Id*.

[10] *Id*.

[11] The Commission's memorandum concerning the impact of retroactive application of the guideline amendment provides data on the number of people who would be excluded by many of DOJ's proposals. *See id.*, at Table 4B. At the time of this writing, the Commission has not released data on the percentage of otherwise eligible people who would be disqualified under the DOJ proposal. Nor has it released the data set from its impact analysis, which would allow us to better compare the impact of the DOJ proposal with the Commission's full retroactivity analysis.

We performed our own impact analysis using a proxy population of people sentenced between 1999 and 2013 who were sentenced under the drug guidelines, with base offense levels greater than 6 but not 43, who were not career offenders or armed career criminals, and whose sentences exceeded any applicable statutory minimum. People were included only if their sentencing year and estimated prison time to be served indicated they were likely still in custody. The demographic characteristics of the proxy population roughly matched those identified by the Commission as eligible for retroactive reductions, suggesting that the proxy sample may reasonably be used to estimate portions (though not absolute numbers) of various characteristics of people in the eligible population.

[12] The criteria are not mutually exclusive, so the number of people excluded by all of them combined is less than the sum of people excluded by each one.

[13] *See, e.g.*, American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 4(2013), https://www.aclu.org/files/assets/aclu-

and ethnic groups.[14] In the proxy population, 48% of white people who would otherwise be eligible for consideration for a sentence reduction are excluded by the criminal history criterion, but 66% of black people are excluded. Only 26% of Hispanic individuals are excluded. When all of DOJ's proposed exclusions are applied together, the disproportionate impact on African-Americans is even more pronounced: only 18% of otherwise eligible black people continue to qualify for retroactive application of the guideline amendment. This compares to 34% of white people and 52% of Hispanic individuals who continue to qualify.

Such disproportionate exclusion is gravely troublesome and should be rejected. The Commission spent many years trying to correct the unwarranted racial disparity caused by an unsound crack to cocaine powder ratio. Adoption of the DOJ's categorical exclusions would create more unwarranted race-based disparity in drug policy because the exclusions overstate the public safety risks of those excluded compared to those included, sweep too broadly by including far too many non-violent individuals, and disproportionately impact African-Americans who otherwise would be eligible for a sentence reduction because their initial sentence put too much weight on drug quantity. While full retroactivity would help mitigate the devastating impact of mass incarceration on racial and ethnic minorities, their families, and communities, DOJ's proposed exclusions, with their disproportionate impact, would have the opposite effect and undermine public confidence in the criminal justice system

C. DOJ's proposed categorical exclusions sweep in many people who pose no significant risk of danger to the community.

DOJ argues that its proposed categorical exclusions are warranted because "[r]elease dates should not be pushed up for those offenders who pose a significant danger to the community."[15] Yet, as discussed exclusion-by-exclusion below, DOJ fails to identify meaningful categorical exclusions that would actually work to carve out the truly dangerous. The vast majority of the individuals who would be excluded by DOJ's proposed limitations pose no such risk. Commission research on recidivism found that people convicted of drug offenses are among the least likely to recidivate, and only a small fraction were re-arrested within the first

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thewaronmarijuana-rel2.pdf ("a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates"); Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States* 3 (2009) (discussing how black men and women are the principal targets of enforcement for drug laws).

[14] In the proxy population, black people comprise only 18% of those in Criminal History Category I and II, but 45% of those in categories III through VI.

[15] *See supra* note 6, at 4.

two years after release from prison for an offense that could be considered violent.[16] Offense level – the part of the guideline sentence calculation most affected by drug quantity – is unrelated to recidivism risk.[17] Recent Commission research has also established that retroactive sentence reductions – similar to those being considered here – for persons convicted of crack cocaine offenses did not increase recidivism risk.[18]

Because DOJ's proposed categorical exclusions do a poor job of identifying persons who would present a significant danger to the community if granted a sentence reduction and include far too many non-dangerous people, the best answer is to make the amendments fully retroactive and rely on judges to identify the truly dangerous. An approach that relies on qualified federal judges makes far more sense than denying reductions to non-dangerous persons for no good reason.

Criminal History. Commission research has shown that violent recidivism is not correlated with criminal history category.[19] Instead, people in CHCs III, V, and VI had lower rates of violent recidivism than those in CHC II.[20] DOJ's position that "repeat offenders" are "by definition more dangerous,"[21] is also belied by the guidelines, which recognize that criminal history can overstate a person's risk of recidivism.[22] "Criminal history issues" is the top reason

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[16] *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 30-32, Exhibits 11 & 13 (2004) (*Measuring Recidivism*) (showing recidivism rates of 21.2% for drug traffickers under the broadest definition of recidivism; and overall "violent" recidivism rates of 11.7% of all recidivism events. Violent recidivism was defined as re-*arrest* for any type of weapon offense, domestic violence, aggravated assault, sexual assault, robbery, kidnapping, or homicide).

[17] *See id.* at 13.

[18] USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 3 (2014) (*2007 Crack Cocaine Amendment Recidivism Report*).

[19] *Measuring Recidivism*, *supra* note 16, at 15, Exhibit 13.

[20] *Id*. (violent recidivism rates for CHC II were 13.5% compared to 12.2%, 10.8%, and 12.5% for CHC III, V, and VI). The rearrest rate for a drug trafficking offense is negatively associated with criminal history category. With the exception of people in CHCs III and IV, which had rates similar to each other, people in higher criminal history categories had lower rearrest rates for drug trafficking than those in lower categories (CHC I – 11.1%; CHC II – 9.3%; CHC III – 7.4%; CHC IV – 7.6%; CHC V – 6.7%; and CHC VI – 4.1%). *Id*.

[21] Transcript of Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 114, 139 (June 10, 2014) (Sally Quillian Yates) (*June Transcript*).

[22] USSG §4A1.3(b)(1). A person may, for example, have a series of minor offenses that increase the criminal history score or their score may have increased as a result of "recency" points, which the Commission has since found had "minimal predictive power." USSC, *Computation of "Recency" Criminal History Points under USSG §4A1.1(3)* 22 (2010).

given by sentencing courts for downward departure from the §2D.1 guideline range,[23] but even if a court had given a person a departure from Criminal History III to II at the original sentencing, DOJ's proposal, as it would be applied under USSG §1B1.10, would make the person ineligible for a sentence reduction.[24]

Courts ruling on petitions under the crack cocaine amendments granted relief to individuals in Criminal History Categories III through VI.[25] Such relief was granted without any overall increase in recidivism rates,[26] and shows that courts can successfully distinguish dangerous repeat offenders from those who are not, without resort to overbroad, categorical exclusions.

Weapon Enhancements. Recidivism also does not correlate with a weapon enhancement. The Commission's recent study of the recidivism of people convicted of a crack cocaine offense who received a retroactive sentence reduction found that weapon involvement was not associated with a higher rate of recidivism.[27]

Two thirds of people affected by DOJ's proposed weapon exclusion received an enhancement under the guideline because "a dangerous weapon (including a firearm) was possessed."[28] But this enhancement can apply even where the defendant did not actually possess the weapon. It applies whenever a weapon is merely present at the scene of an offense or when it is reasonably foreseeable to the defendant that a co-defendant possessed a weapon; the defendant

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[23] USSC, *Interactive Sourcebook, Reasons Given by Sentencing Courts for Downward Departures from the Guideline Range, FY 2006-2012, Primary Sentencing Guideline §2D1.1* (criminal history issues cited in 32.6% of cases involving downward departures); *see also USSC, Interactive Sourcebook, Reasons Given by Sentencing Courts for All Sentences Below the Guideline Range, FY 2006-2012, Primary Sentencing Guideline §2D1.1* (criminal history issues cited as a reason for below guideline sentence in 6,975 cases, or 9.5% of 2.6% of cases involving downward departure).

[24] *See* USSG §1B1.10, comment. (n.1) ("Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or variance.").

[25] USSC, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 6 (June 2011) (*2011 Retroactivity Data Report*); USSC, *Preliminary Crack Cocaine Data Report Fair Sentencing Act*, Table 6 (Apr. 2014) (*2014 Retroactivity Data Report*).

[26] *2007 Crack Cocaine Amendment Recidivism Report*, *supra* note 18, at 3.

[27] *Id*. at 6.

[28] USSG §2D1.1(b)(1).

does not have to use, carry, or actually possess the weapon.[29] Of the remaining people in the proxy population affected by the proposed weapon exclusion because of a conviction under 18 U.S.C. §924(c), fewer than 1% were sentenced for using or brandishing a weapon, or possessing more dangerous types of weapons such as a short-barreled shotgun or semiautomatic assault weapon; nearly all were convicted of the least serious 924(c) charge – merely possessing a weapon in relation to a drug trafficking offense.

The Commission's recidivism analysis of persons who received a reduced sentence under the 2007 crack amendments shows that the Retroactivity Group was more likely to have received a weapon enhancement than the Comparison Group, but the "difference was not associated with a statistically significant difference in recidivism rates."[30]

Use of Violence or Threats of Violence.[31] Commission data show that use of violence or threats of violence is very rare in drug trafficking cases, even among people who possess

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[29] *See, e.g., United States v. Batista*, 684 F.3d 333, 343 (2d Cir. 2012) (defendant need not possess a firearm so long as it is reasonably foreseeable that a coconspirator might – a standard easily met because firearms are considered "tools of the trade"); *United States v. Tatum*, 486 F.App'x 792, 797 (11th Cir. 2012) (once government shows a firearm was present at the site of the charged conduct, the defendant bears the burden of showing that the connection between the offense and the firearm is clearly improbable).

As a result of these loose standards, the weapon enhancement applies to nonviolent individuals who pose no danger to the community. For example, in one Defender case that presents a scenario we frequently see, a client was involved with her boyfriend in a conspiracy to distribute cocaine base. Her boyfriend kept a firearm in the home they shared together, but because she was a co-conspirator and lived in the house, the enhancement applied to her. She was in criminal history category I. Fortunately, the Commission did not categorically exclude her from retroactive relief under the crack amendments. The court reduced her sentence and she is doing just fine.

Willie Mays Aikens – a former Major League baseball player famous for his hitting skills – also would not have been released early had the Commission applied a weapon exclusion when making the 2007 crack amendments retroactive. Aikens had been sentenced to 20 years and 8 months imprisonment after selling crack in his home where he also had a shotgun. He was convicted of drug trafficking and a 924(c) count. After serving 14 years, Aikens was released in June 2008. He put his life back together and is now a hitting coach for the Kansas City Royals minor league team, speaks to youth about the dangers of drug addiction, and is the subject of a book by Gregory Jordan, *Willie Mays Aikens: Safe at Home* (2012).

[30] *2007 Crack Cocaine Amendment Recidivism Report*, *supra* note 18, at 6.

[31] A guideline adjustment for using violence, making credible threats to use violence, or directing the use of violence, was added to the drug trafficking guideline in 2011. The guidelines direct that this adjustment should be applied together with the adjustment for possession of a weapon when, for example, a defendant threatens someone with a gun, unless the defendant is also convicted under 18 U.S.C. §924(c). USSG §2D1.1, comment. (n.11(B)); §2K2.4, comment. (n.4).

weapons. Less than 1% (.63%) of all people sentenced under the drug guideline received the adjustment for use or threats of violence, and just 3% of people who received a guideline firearm adjustment also received the violence adjustment. This "category" is therefore of little help in reducing the overall numbers of petitions to be processed, and review of these cases may be left to the sound discretion of the sentencing judge.

Obstruction of Justice. Contrary to DOJ's suggestion that people who receive obstruction enhancements are those who have gone to trial and lied or tried to get a witness to lie,[32] the Guidelines acknowledge that behavior qualifying for the obstruction of justice adjustment "can vary widely in nature, degree of planning, and seriousness."[33] It includes conduct such as taking full responsibility for criminal activity in an attempt to exculpate a co-defendant,[34] making false statements to probation officers about the level of involvement in the offense, throwing away drugs,[35] or missing a court proceeding. It also does not matter whether the information actually impeded an investigation or whether a judge believed the falsehood.[36] An obstruction enhancement standing alone therefore offers no help in identifying dangerous individuals who should remain in prison longer than necessary.[37]

Aggravating Role. People receiving an aggravating role adjustment are about equally divided between those found to have organized or led criminal activity and those who managed or supervised others. The Commission's impact analysis indicates that 15.6% of eligible defendants received an aggravating role adjustment.[38] This figure is similar to the percentage of crack cases with aggravating role enhancements at issue when the Commission was considering retroactivity in 2010 (16.1%), and in 2007 (11.7%). The Commission's retroactivity data report from the 2007 crack amendment shows that courts undertook an individualized assessment and

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[32] *June Transcript*, *supra* note 21, at 141 (Sally Quillan Yates).

[33] USSG §3C1.1 comment. (n.3).

[34] *See Kimbrough v. United States*, 552 U.S. 85, 92 (2007); *United States v. Flanagan*, 484 F. App'x 973, 974 (5th Cir. 2012) (defendant who pled guilty received obstruction enhancement for testifying that his codefendant was unaware of his unlawful conduct).

[35] *United States v. Arrambide*, 466 F.App'x 545, 546 (7th Cir. 2012) (defendant who received adjustments for safety-valve and minor participant also received obstruction enhancement for flushing drugs down the toilet).

[36] *United States v. Hinojosa*, 749 F.3d 407, 416 (5th Cir. 2014).

[37] Courts did not view obstruction of justice as a reason to deny relief under retroactive application of the 2007 and 2010 crack cocaine amendments. *2014 Retroactivity Data Report*, *supra* note 25, at Table 6; 2*011 Retroactivity Data Report*, *supra* note 25, at Table 6.

[38] *Retroactivity Impact Analysis*, *supra* note 1, at 13.

granted relief to persons who received an aggravating role adjustment.[39] The courts effectively filtered the cases: despite granting relief in a higher percentage of cases involving aggravating role adjustments than safety valve or mitigating role adjustments,[40] early release did not result in increased recidivism rates among the overall group of people who received a sentence reduction under the 2007 amendment.[41]

All of these individuals are already serving longer sentences for their role in the offense, in addition to the excessive punishment based on the quantity of drug involved in their activity. Any 2-level enhancement adds significant time to a person's term of imprisonment. Three and 4-level role enhancements involve huge increases. For example, the guideline range for a person in Criminal History Category I with a quantity-based offense level of 32 who receives a 3-level role enhancement and 3 points for acceptance of responsibility is 121-51 months. The range for a person with the same drug quantity but no role enhancement is 78-97 months. If the latter person is eligible to seek retroactive relief, the amended range would be 63-78 months – nearly half that of the person who may have done nothing more than supervise a single person on one occasion in a criminal activity that involved five or more participants.[42] If the Commission were to make both eligible for retroactive relief of a change to the drug quantity table, then the person who received the aggravating role enhancement would face a range of 97-121 months – over 1 ½ years longer at the low end of the range than the person without the role adjustment.

II. DOJ's Proposal Is Premised upon the False Belief that Judges did not Adequately Screen Petitions Filed under the 2007 Crack Cocaine Amendments.

At the Commission's hearing on retroactivity, DOJ suggested that the Commission's recidivism data on retroactive application of the 2007 amendments shows that judges did not adequately screen the cases and granted relief to too many people. DOJ asserted that had petitions for relief been screened more carefully, then the recidivism rates for those persons released early would have been lower than those who served a full term.[43]

This argument ignores two essential points. First, the recidivism data show that judges did exactly what they were supposed to do in deciding whether a reduction in sentence was

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[39] *2011 Retroactivity Data Report*, *supra* note 25, at Table 6.

[40] *Id*.

[41] *2007 Crack Cocaine Amendment Recidivism Report*, *supra* note 18, at 3.

[42] *See* USSC, *Aggravating and Mitigating Role Adjustments Primer §§3B1.1 & 3B1.2*, at 4(2013). *See United States v. Bewing*, 354 F.3d 731, 738 (8th Cir. 2003) ("enhancement may apply even if the management activity was limited to a single transaction").

[43] *June Transcript*, *supra* note 21, at 249-50, 309 (Ex Officio Commissioner Wroblewski).

warranted. When the Commission decided to make the crack cocaine amendments retroactive, it did not limit retroactive application to those individuals who posed a lower risk of recidivism if released earlier rather than after serving a full term. Instead, the Commission expected courts to consider a different issue: "the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment."[44] And that is precisely what they did. That the recidivism rates for persons released early were slightly lower (albeit not statistically significantly lower) rather than higher than those who served the full term shows that judges did an excellent job of identifying those who would present a greater threat to public safety if released early.

Second, the Commission's data show that judges took seriously the responsibility to review motions for a reduction of sentence both for whether the person was eligible for relief and, if so, whether and to what extent the sentence should be reduced. Petitions for a reduction in sentence pursuant to the changes in the crack cocaine ratios under the 2007 amendment were denied 35.8% of the time.[45] Of the petitions denied, 76.6% were denied because the offense did not involve crack cocaine or the petitioner was not eligible under §1B1.10; 14.8% were denied on the merits.[46] Courts cited a multitude of reasons for denying petitions on the merits, including protection of the public, prior departures of variances, 3553(a) factors, and post-sentencing or post-conviction conduct.[47] Judges provided the same careful consideration when reviewing motions for relief filed under the Fair Sentencing Act amendment. Petitions for a reduction in sentence pursuant to the changes in the crack cocaine ratios under the Fair Sentencing Act were denied 40% of the time.[48] Of those denied, 71% were denied because the offense did not involve crack cocaine or the petitioner was not eligible under USSG §1B1.10.[49] Of the petitions denied on the merits rather than because the person was not eligible for relief, courts cited a variety of reasons for denial, including protection of the public in 13% of the cases, post-sentencing or post-conviction conduct in 9%; and the purposes of sentencing in 20%.[50] In cases where the

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[44] USSG §1B1.10, comment. (n.1(B)(ii)). The Commission noted in its reasons for the retroactive crack amendments that "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.*" USSG Amend. 759 (Nov. 1, 2011); USSG Amend. 713 (Mar. 3, 2008) (emphasis added).

[45] *2011 Retroactivity Data Report*, *supra* note 25, at Table 1.

[46] *Id*. at Table 9.

[47] *Id*.

[48] *2014 Retroactivity Data Report*, *supra* note 25, at Table 1.

[49] *Id*. at Table 9.

court disagreed with the government's objection to a sentence reduction, courts provided appropriate explanation in memorandum orders.[51]

III. DOJ's Fears That Full Retroactivity Will Divert Its Resources Away From Prosecuting New Crimes Are Unfounded As Are Its Exaggerated Concerns About the Resources Needed to Review Cases to Determine Whether A Reduction in Sentence is Warranted.

In its testimony, DOJ stated that resolution of motions filed under 18 U.S.C. § 3582 will "require the input and participation of federal prosecutors, probation offices, BOP counselors, and even federal defenders or appointed counsel, as well as review and ruling by the courts."[52] Past experience with crack retroactivity, however, shows that in districts with efficient processes, the lion's share of the initial screening was done by U.S. Probation and Defender offices with no involvement by prosecutors unless the person was eligible to seek relief.

In the District of Maryland, for example, the Office of the Federal Public Defender reviewed the cases of its own clients and filed motions where appropriate. If pro se motions were filed, the court appointed the Defender Office to determine if the person was eligible for a sentence reduction and to provide a status report to the court within thirty days.[53] U.S. Probation also analyzed the case for eligibility and sent a memo to defense counsel and the Assistant United States Attorney.[54] Prosecutors did not need to get involved in the process until defense counsel and probation either determined that the person was eligible to seek relief or could not

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[50] *Id*.

[51] *See, e.g.*, *United States v. Solomon Jones*, Criminal No. MJG-00-0432 (D. Md. May 22, 2013), Document 328 (memorandum and order explaining why court reduced the defendant's sentence over government objection) (Addendum); *United States v. Mitchell*, 2012 WL 5874479 (E.D. Okla. 2012) (granting sentence reduction of 10 months (near top of amendment a guideline range) to defendant in Criminal History VI); *United States v. Davis*, 2012 WL 4973671 (S.D. Ind. 2012) (reducing sentence over government's objection that relief was unavailable because the offense involved both powder and crack cocaine and a greater amount of powder than reference in the presentence report); *United States v. Dixon*, 2012 WL 1080799 (C.D. Ill. 2012) (after careful consideration of defendant's prior record and prison history, court granted relief over government objection, but reduced sentence by 12 months rather than the 36 months requested by the defense); *United States v. Lucas*, 2008 WL 936850 (W.D. Va. 2008) (rejecting government objection to sentence reduction based upon defendant's offense and criminal history, finding that such information was fully considered at original sentencing and that neither factor "should now prevent the defendant from benefitting from the amended guidelines"). These orders were typically entered without the need for a court hearing.

[52] *June Transcript*, *supra* note 21, at 113 (Sally Quillen Yates).

[53] *See* Addendum (appointment order; status reports).

[54] *See* Addendum (probation memo).

agree on eligibility. At that point, BOP provided disciplinary records and prosecutors reviewed the case. That review was based on readily available information, including the underlying conduct, the nature of the criminal history, gang affiliations, prison security classification,[55] and prison disciplinary record.

With the eligible cases in Maryland, the parties either worked out an agreement on the scope of the sentence reduction, notified the court, and provided the court with relevant information so it could make an independent decision, or the defense filed a motion and the government filed a simple response stating whether it opposed the motion. In cases where the parties disagreed about the appropriate resolution of the case, the parties filed written submissions outlining their respective positions. Those submissions were typically short and to the point.[56] Only after the motion was granted, and the person was nearing a release date, did BOP and U.S. Probation get involved in release planning. The process was so efficient that, since 2007, the overwhelming majority of the motions for relief were handled by one prosecutor, freeing all others prosecutors to proceed with their normal caseload.[57]

Efficient processes also were established elsewhere.[58] As the Commission heard from Quincy Avinger, Deputy Chief U.S. Probation Officer in South Carolina, various stakeholders worked together to establish a streamlined process for reviewing petitions for relief.[59] The Federal Defenders played a critical role in the process, taking responsibly for contacting every inmate sentenced in South Carolina that may have been impacted by the amendment.[60] Since the

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[55] Placement at a high security United States Penitentiary, Florence ADMAX USP, or in a special housing unit was an obvious red flag for potential disciplinary or safety risks. Such placement is rare, providing additional evidence that DOJ's proposed exclusions do not identify dangerous persons. As of January 25, 2014, only 8.5% of BOP inmates convicted of a drug offense were housed in high security facilities. Only 11.8% 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. Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (Feb. 24, 2014, 12:37 EST) (on filed with the National Sentencing Resource Counsel for the Federal Public and Community Defenders).

[56] *See* Addendum (government and defense letters in disputed cases).

[57] In Alexandria, Virginia, a single Assistant United States Attorney handled almost all the motions as well. Defenders also pre-screened many cases for eligibility, which saved resources for both the prosecutors and probation office. Such pre-screening occurred in numerous other districts, as well.

[58] *See* Addendum (unopposed motion from E.D. Va.; motion to dismiss from M.D. Fla.).

[59] *June Transcript*, *supra* note 21, at 8.

[60] *Id*. at 83. Because of the efficiency of the process and the role Defenders played in initial review, the number of granted cases provides no insight into the level of scrutiny the court gave those cases. *See id.* at 98 (question and comment by Ex Officio Commissioner Wroblewski about why different districts granted relief at higher rates than others). In a district where the Federal Defender played an active role in

Commission's June hearing, we have learned more information about what made the process in South Carolina so efficient. The court issued a standing order for the Defender Office to review all cases and gave the probation office authority to provide counsel with the presentence reports for those persons potentially eligible for relief. U.S. Probation also prepared a sheet stating whether a person was eligible to seek relief. Those individuals whom the Defender deemed ineligible to seek relief were notified by counsel and informed of the right to file a pro se motion if they disagreed with counsel's assessment. If the person was eligible to seek relief, a motion for reduction of sentence was filed with the court. The U.S. Attorney's Office reviewed eligible cases and agreed to the reduction unless there was a good reason not to, such as a record of bad prison behavior. The Assistant United States Attorney originally assigned the case was responsible for responding to a motion for relief. Because the various stakeholders organized a systematic review process ahead of time, the cases were processed smoothly and efficiently.

Past experience with crack cocaine retroactivity amendments has taught judges, probation officers, defenders, prosecutors, and BOP staff valuable lessons about how to efficiently and effectively review cases for eligibility, determine whether the individual should receive a sentence reduction, and plan for release. Moving forward, the federal criminal justice system can build on that experience and become even more efficient in reviewing cases while also ensuring that a reduction in sentence for any particular individual does not pose a danger to any person or the community.

IV. Concerns About Available Bed Space in Residential Reentry Centers Should Not Deter the Commission from Making the Amendments Fully Retroactive Effective November 1, 2014.

Questions were raised at the Commission's hearing about whether persons who were immediately released under the crack retroactivity amendments, but were not placed in a halfway house, had higher recidivism rates than others.[61] Director Samuels of the Federal Bureau of Prisons also discussed how the Bureau of Prisons would face challenges in making residential reentry placements because of limited resources.[62]

Concerns about the availability of residential reentry placements should not deter the Commission from making the amendment fully retroactive on November 1, 2014. Electronic monitoring is a viable option for many people who would be eligible for immediate release. A

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pre-screening cases and letting people know they were not eligible, a motion may not have even been filed at all. This would result in a higher percentage of granted motions than in other districts because only the meritorious motions would have been filed.

[61] *June Transcript*, *supra* note 21, at 89 (Vice Chair Jackson).

[62] *June Transcript*, *supra* note 21, at 122 (Charles E. Samuels, Jr.).

study of persons released from the Federal Bureau of Prisons found that those released to home confinement with electronic monitoring had no greater rearrest rate or employment issues than those who completed a halfway house program and in some respects, fare better than those placed in a halfway house.[63] A more recent study from Florida concluded that the use of electronic monitoring for post-prison placement of persons convicted of a felony offense significantly reduced the likelihood of failure under community supervision.[64]

With electronic monitoring as a viable option for people eligible for immediate release or for whom bed space in a residential reentry center is unavailable, we see no reason to delay implementation of retroactivity

V. Conclusion

Defenders believe that a vote in favor of full retroactivity is the fairest and most reasonable decision that squares with the duties of the Commission to ensure that sentences are sufficient, but not greater than necessary; to avoid unwarranted disparity; and to relieve prison overcrowding. The notion that the doctrine of finality should weigh against retroactivity is misplaced. Congress expressly gave the Commission the statutory authority to specify the circumstances under which prison terms may be reduced when the Commission reduces the terms of imprisonment recommended under the guidelines. 28 U.S.C. § 994(u). As discussed in the written testimony of Sarah Gannett,[65] the purposes of the amendment, the magnitude of the change in the guideline made by the amendment, and the relative ease of determining an amended guideline range all weigh in favor of retroactivity.

The Department's proposed carve-outs are contrary to the core purposes of the amendment, which was to let guideline factors other than drug quantity play a greater role in determining sentence length and to reduce prison crowding. To carve out exclusions from retroactivity that would have a disproportionate impact on incarcerated African-Americans without bearing a meaningful relationship to public safety is unjustifiable. To keep any person incarcerated for a longer period of time than necessary undermines public confidence in the justice system.

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[63] Jody Klein-Saffran, *Electronic Monitoring vs. Halfway Houses: A Study of Federal Offenders* (1995), http://www.fed.bop.gov/resources/research_projects/published_reports/gen_program_eval/orepralternatives.pdf.

[64] William Bales, et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring* (May 2010), https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf.

[65] Statement of Sarah Gannett, Assistant Federal Defender for the Eastern District of Pennsylvania, Before the U.S. Sentencing Comm'n, Washington, D.C. (June 10, 2014).

History supports that federal judges, together with the helping hands of U.S. Probation, the U.S. Attorney, and Federal Public and Community Defenders, are equipped to implement full retroactivity of the drug quantity guidelines, efficiently, fairly, and safely. That many of these players – judges, probation and Defenders – have indicated not only that it should be – but that it can be – done without carve outs that serve no good purpose, should give the Commission confidence in a decision to make these amendments fully retroactive.

Defenders strongly encourage the Commission to vote in favor of full retroactivity of the amendment.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures
cc (w/encl.): Hon. Patti B. Saris, Chair
Hon. Ricardo H. Hinojosa, Vice Chair
Hon. Ketanji Brown Jackson, Vice Chair
Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel Barkow, Commissioner
Hon. William H. Pryor, Jr., Commissioner
Isaac Fulwood, Jr., Commissioner Ex Officio
Jonathan J. Wroblewski, Commissioner Ex Officio
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

Addendum

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
vs.	*	CRIMINAL NO. MJG-00-0432
SOLOMON JONES	*	
DATE OF PREVIOUS JUDGMENT: 06/05/2007	*	Thomas Sarachan, Esquire DEFENDANT'S ATTORNEY

* * * * * * * * *

MEMORANDUM AND ORDER RE: SENTENCE REDUCTION
PURSUANT TO 18 U.S.C. § 3582(c)(2)

The Court has before it the Status Report [Document 280] deemed to constitute a Crack Motion for Reduced Sentence Under 18 U.S.C. § 3582(c)(2) filed by Defendant Solomon Jones based on a Guideline sentencing range that has subsequently been lowered by Amendment 750 and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u).

The Government agreed that Defendant Jones is eligible for a sentence reduction, but contends that the Court should not exercise its discretion to reduce the sentence.

Defendant Jones' original sentence was determined based on Offense Level 36, Criminal History Category IV. The Court imposed a sentence of 262 months (the low end of the Guideline range of 262-327 months) with credit for time served since May 18, 2001. The Court provided that its federal sentence was to be concurrent with a state sentence of 25 years imposed on

May 23, 2002.[1] The 2007 Supplemental Report to the Bureau of Prisons states that the then current estimate of the release date from state custody was January 27, 2020, and the maximum expiration date was June 9, 2025.

The Government bases its opposition upon the serious nature of Defendant Jones' offense. However, Defendant Jones has been incarcerated for more than 12 years and appears to face at least six additional years in state custody. Accordingly, by the time that a reduction of the instant sentence would have any practical effect, Defendant Jones will have been incarcerated more than 18 years and possibly as long as 23 years.

Defendant Jones appears to have conducted himself in prison in a manner to warrant reasonable confidence in his being ready to return to society at the completion of his 18 year or longer term of incarceration. The Court does not find it appropriate to deny Defendant Jones the benefit of the Amendment.

If the present Guidelines had been in effect on the original sentencing date, the Court would have sentenced Defendant Jones within the range for Offense Level 32, Criminal History Category IV (162 – 210 months). The Court does not find it appropriate to vary from its prior decision to sentence Defendant Jones at the low end of the applicable guideline

[1] The sentence was also concurrent with the then outstanding balance of a 21-month sentence imposed in MJG-02-0080.

range, 162 months.

Accordingly:

1. The Crack Motion for Reduced Sentence Under 18 U.S.C. § 3582(c)(2) [Document 280] filed by Defendant Solomon Jones is GRANTED.

2. The Defendant's previously imposed sentence of imprisonment (as reflected in the last Judgment issued) of 262 months is hereby reduced to 162 months.

3. All other provisions of the last Judgment issued herein remain in effect subject to possible modification of conditions of supervised release.

4. An Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) shall be issued herewith.

SO ORDERED, on Wednesday, May 22, 2013.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

Criminal No. [redacted]

v. *

[redacted] *

Prisoner ID # [redacted]

*

* * * * * * *

O R D E R

The above-named defendant apparently being indigent, and possibly being eligible for a reduction of his/her sentence under 18 U.S.C. §3582(c)(2) and the retroactive application of Amendment No. 706 to the United States Sentencing Guidelines related to cocaine base ('crack"), it is this 20 day of Oct, 2008, hereby ordered that:

1. The Federal Public Defender for the District of Maryland is appointed to PRELIMINARILY REVIEW whether the defendant may be entitled to relief under the above provisions and to provide a status report within 30 days; and

2. The Clerk shall send a copy of this order to the Federal Public Defender, the United States Attorney, the United States Probation Office, and the defendant.

James K. Bredar

JAMES K. BREDAR
United States Magistrate Judge

cc: United States Attorney's Office
Office of the Federal Public Defender
United States Probation Services Office
Defendant

THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND
NORTHERN DIVISION
TOWER II, SUITE 1100
100 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201-2705
TEL: (410) 962-3962
FAX: (410) 962-0872

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U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2008 FEB 26 P 12:47
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AT BALTIMORE
BY _____ DEPUTY

JAMES WYDA
FEDERAL PUBLIC DEFENDER

DENISE C. BARRETT
ASSISTANT FEDERAL PUBLIC DEFENDER

Via Hand-Delivery

URGENT - Crack Reduction - Release Date March 3, 2008

February 26, 2008

Honorable William M. Nickerson
District Judge
United States District Court
for the District of Maryland
101 West Lombard Street
Chambers 3C
Baltimore, Maryland 21201

Re: *United States v.* [redacted]
Dkt No.: [redacted]

Dear Judge Nickerson:

Pending before your Honor is a pro se motion filed by [redacted] seeking a reduction in his sentence under 18 U.S.C. § 3582 and the new crack guidelines. The U.S. Probation Office has submitted a memorandum to the Court indicating that Mr. [redacted] "**is eligible to seek a reduced sentence** based upon retroactive application of the crack cocaine amendment **if it can be established that the exact amount of cocaine base attributed to the defendant is less than 4.5 kilograms.**" The report notes that the sentencing transcript will have to be consulted to determine the exact amount of cocaine based attributed to Mr. [redacted].

Attached is a copy of the sentencing transcript. At pages 61 to 62, it shows that the Court held Mr. [redacted] responsible for **4.383 grams**. That amount makes Mr. [redacted] eligible for a sentencing reduction. His guideline range would come down from an offense level 38, criminal history I (235 to 293 months) to offense level 36, CH II (188 to 235 months).

The Court originally sentenced Mr. [redacted] to the low end of the guideline, 235 months. If the Court reduces his sentence under 18 U.S.C. § 3582 and again sentences at the low end, the sentence would be 188 months.

Mr. [redacted] **estimated date of release is June 14, 2009**. A reduction as little as 16 months would make Mr. [redacted] **eligible for release on March 3, 2008**.

Should the government object to Mr. [redacted] motion for a reduction, then I request that the Court schedule an emergency hearing before March 3, 2008.

Thank you for your attention to this matter.

Very truly yours,

Denise C. Barrett
Assistant Federal Public Defender

DCB/kdw

cc: [redacted]
Barbara S. Sale, AUSA
Court File

OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND
SOUTHERN DIVISION
6411 IVY LANE, SUITE 710
GREENBELT, MARYLAND 20770
TEL: (301) 344-0600
FAX: (301) 344-0019

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DISTRICT OF MARYLAND

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CLERK'S OFFICE
AT BALTIMORE

BY _____ DEPUTY

JAMES WYDA
FEDERAL PUBLIC DEFENDER

SAPNA MIRCHANDANI
STAFF ATTORNEY

April 11, 2008

The Honorable Marvin J. Garbis
United States District Judge
U.S. Courthouse, Chambers 5C
101 West Lombard Street
Baltimore, MD 21201

Re: **Crack Reduction - Status Report**
United States v. [redacted], Case No. [redacted]

Dear Judge Garbis:

Please accept and docket this letter as a status report in the above-captioned case. The U.S. Probation Office has reviewed [redacted] case and determined that he is not eligible to seek a reduced sentence under 18 U.S.C. § 3582 and Amendment 706 to the U.S. Sentencing Guidelines because "[t]he original term of imprisonment that was imposed constituted a non-guideline sentence" under *United States v. Booker* and, therefore, "a further reduction generally would not be appropriate." Although this office agrees that Mr. [redacted] is not eligible for a sentence reduction under these provisions, it disagrees with the Probation Office's reasoning. In Mr. [redacted] case, the Probation Office calculated his advisory guideline range to be 168 to 210 months. The Court imposed a sentence of 120 months – the minimum term of imprisonment required by statute. Because this Court cannot impose a sentence lower than 120 months, Mr. [redacted] is not eligible to seek a further reduction under § 3582 and Amendment 706.[1]

Please let me know if I can provide any further assistance to the Court.

Sincerely,

Smirchand

Sapna Mirchandani

cc: Barbara Sale, Assistant U.S. Attorney
Estelle Santana, U.S. Probation Officer
[redacted]

---

[1] Counsel disagrees with the Probation Office's determination that a person who receives a below-guideline sentence is not eligible to seek a sentence reduction under § 3582. Section 1B1.10 of the U.S. Sentencing Guidelines expressly states that if a persons's original sentence was below the guideline range, the court should impose a "comparably less" sentence under the amended range. However, this issue is moot in Mr. [redacted] case in light of the mandatory minimum sentence.

U.S. Probation and Pretrial Services

MEMORANDUM

DATE: September 28, 2012

TO: Sapna Mirchandani, AFPD
Paresh Patel, AFPD
Barbara Sale, AUSA

FROM: Reginald D. Morrison
Supervisory U.S. Probation Officer

SUBJECT:
U.S. v. [redacted]
Dkt No: [redacted]
Consideration for Sentence Reduction Based on Crack Cocaine Amendment 750

Count 1: PWID 50 Gr. Or More of Cocaine Base; 21USC:841
Penalty: NLT 10 yrs, NMT Life; NLT 5 yrs. TSR

X - Eligible for Reduction

Determination of Guideline range:

	Original Sentence 5-10-2012)	Previously Amended (706)	New Amendment (750)
Total Offense Level	34(- 1) =33	NA	30(- 1) =29
Criminal History Category	VI V		VI V
Guideline Range Departure Range	262 - 327 mos. 210 - 262 mos.		168 - 210 mos. 140 - 175 mos.
Sentence	216 mos.		
Current BOP Release Date	1-17-2025		
TSR			

Additional Information:

U.S. Department of Justice

United States Attorney
District of Maryland

Rod J. Rosenstein
United States Attorney

Barbara S. Sale
Chief, Criminal Division

36 South Charles Street
Fourth Floor
Baltimore, Maryland 21201

DIRECT: 410-209-4902
MAIN: 410-209-4800
FAX: 410-962-3124
TTY/TDD: 410-962-4462
Barbara.Sale@usdoj.gov

September 26, 2012

The Hon. William D. Quarles
United States District Judge
United States District Court
101 W. Lombard Street
Baltimore, MD 21201

Re: *United States v.* [redacted],
Crim. No. [redacted]

Dear Judge Quarles:

The United States opposes a further sentence reduction for Mr. [redacted]. Although this Court found at sentencing that the Career Offender designation overstated his criminal history, his record includes numerous violent and handgun offenses, and at the time of this offense he was awaiting trial on an unrelated armed home invasion. He was in possession of two handguns at the time of his arrest on these charges, and according to Mr. Romano, the AUSA who prosecuted him initially, he has a tattoo of a gun and the words "Harm City."

Despite the protestations he made to the officer completing his presentence report about wanting to be "different" when he is released (PSR ¶12), Mr. [redacted] SENTRY report, a copy of which is attached, reflects poor institutional adjustment and includes instances of fighting, substance abuse, telephone abuse and possession of a homemade weapon, none of which augur a successful transition to life on the outside. For these reasons of public safety, the United States respectfully urges this Court not to exercise its discretion under 18 U.S.C. § 3582(c)(2).

Very truly yours,

Rod J. Rosenstein
United States Attorney

By:____/s/_____
Barbara S. Sale
Assistant United States Attorney
Chief, Criminal Division

Encl.
cc: Paresh Patel, Esq.
Randy Canal, Leon Epps, Sharon Stewart, United States Probation

OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND
SOUTHERN DIVISION
6411 IVY LANE, SUITE 710
GREENBELT, MARYLAND 20770
TEL: (301) 344-0600
FAX: (301) 344-0019

JAMES WYDA
FEDERAL PUBLIC DEFENDER

THOMAS SARACHAN
STAFF ATTORNEY

April 15, 2013

The Honorable Marvin J. Garbis
United States District Court for the District of Maryland
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: *United States v.* [redacted], Crim. Case No. [redacted]

Dear Judge Garbis:

Please accept this letter as a reply to the government's letter of January 17, 2013 opposing a sentence reduction for [redacted]. Mr. [redacted] has been using his lengthy prison term to work toward rehabilitation. His efforts make him deserving of a reduction in his federal sentence.

Mr. [redacted] received his GED shortly after his incarceration began. (Ex. 1.) Since then he has completed numerous programs designed to help him re-integrate into society. Through these courses he has learned valuable professional skills such as job-seeking and the fundamentals of computer literacy. (Ex. 2-4.) He has also progressed through nine of the 11 modules in the FDIC's Money Smart program, a "financial education curriculum designed to help low- and moderate-income individuals outside the financial mainstream enhance their financial skills and create positive banking relationships." FEDERAL DEPOSIT INSURANCE CORPORATION, *Money Smart—A Financial Education Program: Financial Education.....A Corporate Commitment* (last updated Mar. 15, 2012) <http://www.fdic.gov/consumers/consumer/moneysmart/index.html>; FEDERAL DEPOSIT INSURANCE CORPORATION, *Money Smart—A Financial Education Program: Computer-Based Instruction* (last updated Apr. 19, 2012) <http://www.fdic.gov/consumers/consumer/moneysmart/mscbi/mscbi.html>. (Ex. 5-13.) In addition, Mr. [redacted] is seeking to improve his employability by pursuing entry into the sheet metal vocational shop.

Perhaps most importantly, Mr. [redacted] has been involved in programs which will help him interact with others in a positive fashion. (Ex. 14-16.) One social worker noted that Mr. [redacted] "was the leader and spokesperson many times in his small group" sessions. (Ex. 16.) By

participating in these activities Mr. [redacted] has demonstrated an intent to change and has made significant progress toward that goal.

Mr. [redacted] Supplemental Report to the Bureau of Prisons (attached with Mr. [redacted] original motion) estimated that he would not be released from state custody until early 2020. (Supp. Rpt. to the Bur. of Prisons, at 1.) Yet, he has not been disheartened by the substantial length of his sentence. Instead he has applied himself, and continues to apply himself, to the task of rehabilitation. It can fairly be said that he is taking advantage of the opportunity his extended period away from society offers to put his life on a better track.

The government quotes from a sentencing memorandum to argue that Mr. [redacted] actions warrant denying him a reduction in his sentence. (Gov't. Letter Br. of Jan. 17, 2013, at 1-2.) However, the state of Maryland imposed its own lengthy sentence—25 years—for the violence to which the government refers. (Supp. Rpt. to the Bur. of Prisons, at ¶ 17, 18.) Mr. [redacted] is receiving a serious punishment for that crime, and the instant motion will not reduce that punishment.

The government also argues that the "community needs and deserves to be protected from [redacted]." (Gov't. Letter Br. of Jan. 17, 2013, at 2.) Mr. [redacted] offense took place 13 years ago. (Supp. Rpt. to the Bur. of Prisons, at ¶ 17, 19.) Over those intervening years Mr. [redacted] has worked hard to make fundamental changes in his life. The need to protect society is very much attenuated at this stage—if it still exists at all—and will certainly be entirely dissipated by the time of his release.

Mr. [redacted] committed his offenses when he was barely into adulthood. (Id. at ¶ 17.) Even if the instant motion is granted, he will be a middle-aged man upon release from Maryland's custody. That lengthy period of imprisonment will satisfy the retributive needs of the law. So too will the law's rehabilitative purpose be accomplished: Mr. [redacted] continues to put great effort into preparing for his re-entry into society. As the goals of incarceration can be accomplished through a 168-month sentence, Mr. [redacted] respectfully requests that his motion be granted.

Thank you for your consideration of this matter.

Sincerely,

/s/

Thomas Sarachan

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Docket** [redacted]
	)	**The Honorable Gerald Bruce Lee**
[redacted],	)	
	)	
Defendant.	)	

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

COMES NOW the Defendant, [redacted], 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 150 months to 132 months. The government does not oppose this motion.

PROCEDURAL BACKGROUND

On August 21, 2008, Mr. [redacted] pleaded guilty, in accordance with the terms of a plea agreement, to a Criminal Information charging him with (1) 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, and (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of Title 18 U.S.C. §924(c). On December 18, 2008, the Court imposed a sentence of 150 months of imprisonment, comprised of 90 months for the narcotics charge and 60 months (consecutive) for the weapons charge, and a sentence reduction of 61 months.[1] Pursuant to the recent changes to the crack guideline, Mr. [redacted] now requests that the Court reduce his sentence to 132 months.

[1] This sentence reflected consideration of the government's § 5K motion. *See* chart *infra*.

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. [redacted] 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. [redacted] sentence.

A. The Court Has the Authority under 18 U.S.C. § 3582(c) to Reduce Mr. [redacted] 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. [redacted] sentence. Therefore, the Court has authority pursuant to 18 U.S.C. § 3582(c) to reduce Mr. [redacted] 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. [redacted] 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: 1.5kg (*see* PSR Worksheet A)		
	Sentencing	**Amendment 750**
Date:	December 18, 2008	
Base Offense Level:	36	34
Downward Adjustment:	-3	-3
Adjusted Offense Level:	33	31
Criminal History Category:	Category II	Category II
Guideline Range:	151-188 months (+60)	121-151 (+60)
Sentence Imposed:	90 + 60 = 150 months	72 + 60 = 132 months *Suggested sentence*

On December 18, 2008, the Court imposed a total sentence of 150 months, comprised of 90 months on Count I (a 61-month reduction from the low-end of the guideline range, i.e. 151 months) [2] plus 60 months consecutive on Count II. Because the advisory guideline range applicable to Mr. [redacted] has been lowered, U.S.S.G. § 1B1.10 provides that he is eligible for a reduction in his term of imprisonment pursuant to 18 U.S.C. § 3582(c). Specifically, Mr. [redacted] amended guideline range is 121-151 months. Application of § 1B1.10(b)(2)(B) results in a proportionately reduced total sentence of 132 months, comprised of 72 months on Count I (a proportionate reduction from the low-end of the amended guideline range, i.e. 121 months) plus 60 months consecutive on Count II. A sentence of 132 months amounts to an 18-month reduction.

A reduction to Mr. [redacted] 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

[2] *See* Sentencing Minutes (Docket No. 12) (noting the Court's consideration of a §5K motion).

not retroactive or does not lower the defendant's sentence—do not apply to Mr. [redacted]. As noted above, Amendment 750 has been made retroactive and would lower Mr. [redacted] sentence. Second, while §1B1.10(b)(2)(A) prohibits sentence reductions below the amended advisory guideline range, Mr. [redacted] reduction falls within the exception carved out by § 1B1.10(b)(2)(B), as noted above. 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 132 months is consistent with these considerations.

Based upon the foregoing, Mr. [redacted] 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 132 months for the following reasons.

C. The Court Should Reduce the Defendant's Sentence to 132 months.

The Court should sentence Mr. [redacted] to 132 months because he poses no threat to public safety and because of his post-sentencing rehabilitation efforts. Mr. [redacted] behavior in prison reflects a determination to turn his life around.

Prior to his arrest, Mr. [redacted] work history was irregular and spotty and his future earning potential was uncertain because of his lack of experience and education. He also had a history of drug and alcohol use which began at the age of eighteen. Since his incarceration, however, Mr. [redacted] has exhibited a marked increase in maturity. He successfully completed a faith-based substance abuse program as well as a guided bible study course. That course, administered by the Crossroad Bible Institute, is aimed at both spiritual and personal development in preparation for reentry into society. Mr. [redacted] has also completed a twenty-hour parenting course. With regard

to future employment, Mr. [redacted] successfully completed the course necessary to obtain his Commercial Driver's License in February of this year. Mr. [redacted] dedicates his free time to healthy social activities and has shown talent in sports ranging from bowling to basketball, winning or finishing near the top of several intramural tournaments. *See* Appendix A.

In addition to improving himself both academically and physically while incarcerated, he has served as a spiritual resource and support system for fellow inmates. His impact on these individuals is clear from the letters they have submitted for the Court's consideration. *See* Appendix B (four character letters). Those who have been acquainted with Mr. [redacted] during his incarceration praise his role in his church as well as consistently friendly demeanor.

Mr. [redacted] 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.

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

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

For these reasons, the Defendant respectfully requests that the Court enter the proposed Order attached hereto and reduce his sentence to 132 months.

Respectfully submitted,

[redacted]

By Counsel
Michael S. Nachmanoff
Federal Public Defender

/s/

Gul Raza Gharbieh, Esquire
Attorney for Defendant
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UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

United States of America
v.

[redacted]
Defendant.

Case No.: [redacted]
USM No.: [redacted]

Date of Original Judgment: December 18, 2008
Previous Judgment:
(Use Date of Last Amended Judgment if Applicable)

Gul Gharbieh
Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 150 months **is reduced to 132 months.**

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level:	33	Amended Offense Level:	31
Criminal History Category:	II	Criminal History Category:	II
Previous Guideline Range:	151-188 months	Amended Guideline Range:	121-151 months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

☐ The reduced sentence is within the amended guideline range.
☑ Pursuant to USSG § 1B1.10(b)(2)(B), the reduced sentence is comparably less than the amended guideline range.
☐ Other (explain):

III. ADDITIONAL COMMENTS

Except as provided above, all provisions of the judgment dated December 18, 2008 shall remain in effect.

IT IS SO ORDERED.

Order Date:

Hon. Gerald Bruce Lee
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No:** [redacted]

[redacted]**.,**

Defendant.
_____/

UNOPPOSED MOTION TO DISMISS
AMENDMENT 750 PROCEEDINGS WITHOUT PREJUDICE

Defendant [redacted] by and through the undersigned attorney, respectfully requests that this Honorable Court dismiss the instant Amendment 750 proceedings without prejudice, based on the following:

1. On November 10, 2011, this Court entered a *sua sponte* order, Doc. 160, directing the parties to file a response to Probation's memorandum.

2. The supplemental report/assessment regarding the application of Amendment 750, prepared by the United States Probation Office (Probation's memorandum), states that, pursuant to 18 U.S.C. § 3582(c)(2), Mr. [redacted] is ineligible for a sentence reduction because his base offense level and guideline range are not lowered under Amendment 750.

3. Mr. [redacted] does not dispute the factual background set forth in Probation's memorandum concerning his conviction and sentence.

4. Given the current state of the law and the facts of this case, Mr. [redacted] requests that the current proceedings be dismissed without prejudice.

5. Counsel for the United States does not oppose this motion.

Wherefore, Defendant [redacted] respectfully requests that this Honorable Court dismiss without prejudice the instant Amendment 750 proceedings.

Respectfully submitted,

Donna Lee Elm
Federal Defender

/s/ *Rosemary Cakmis*
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Counsel for Defendant

Certificate of Service

I hereby certify that on January 25, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Assistant United States Attorney Patricia Barksdale.

/s/ *Rosemary Cakmis*
Rosemary Cakmis
Assistant Federal Defender